The Software and Hardware Implications of Bill C-61's Ammendments to the Copyright Act

Joseph Potvin[1]

DRAFT / 3 July 2008

Bill C-61 was tabled in Parliament on 12 June 2008 to ammend the Copyright Act. The methods implemented in the Bill would, if passed by Parliament, have pivotal impacts on the basic legal and competitive business environment for the software and hardware sectors generally. To date, primary attention in government, media and public discussion has been directed to the Bill's objectives and potential outcomes in relation to music, movies, and performances, as well as in relation to changing the SIM cards in cell phones. The impacts upon other sectors have not been widely considered. The purpose of this present brief is to outline the general implications of Bill C-61 for producers and users of software and hardware.

1. Bill C-61 Is Primarily About Who Controls the Operation of Computer Programs on Hardware

Section 31 of Bill C-61 would "ammend" the original 163-word Section 41 of the Copyright Act with an entirely new 4,311-word Section 41 entitled "Technological Measures and Rights Management Information". This "ammendment" alone makes up about a third of the legal text in Bill C-61, and many of the other sections include references back to it. In the context of this bill, it is important to understand that the phrases "technological measures", "digital technologies" and "technology, device or component" include, or indeed almost entirely refer to, methods implemented in computer programming code. A computer program is defined in the current Copyright Act as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result”. Such a program may be stored on re-programmable or fixed media (i.e. as “software” or “firmware”). It is instructive to read Bill C-61 with the three phrases "technological measure", "digital technology" and "technology, device or component", replaced with the simpler phrase "computer program". Doing this reveals no fewer than 94 references to computer programs in Bill C-61, and it illustrates more clearly how the ammendments would affect the legal environment of the computer programming industry, and the wide diversity of hardware industries that depend in any way upon it.

2. Every Computer Program Is Also, Itself, a "Literary Work" Affected by Bill C-61

In Canada's existing Copyright Act (1985; 1997) a computer program is a “literary work” / “oeuvre litteraire”, of a type that occurs as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result”. This treatment of a computer program in the Act does not change under Bill C-61. The Act correctly reflects the international "Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)" (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Article 10 (1) http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). The TRIPS agreement also states that “computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)”. This means that an expression in the "C++" programming language such as:

```
#include <iostream>
```

1 Joseph Potvin has worked nationally and internationally as an economist for 20 years, ten of these most recently with information technology organizations in the public and private sectors. The views expressed in this paper are his own.

```
int main()
{
   std::cout << "Hello, world!\n";
}
```

...or in the "Ruby" programming language:

```
for i in 1..1
   puts "Hello World!"
end
```

...have the same essential characteristics, in terms of information management and intellectual rights, as the English expression in pre-formatted text:

```
Print: “Hello World!”
```

3. Bill C-61 Erodes Competition, Private Property Rights, and Privacy

What private citizens have a right to do with their private property, if that property depends in any way on a computer program, is affected by Bill C-61. The bill would take away your right, for example, to take your car to anyone but officially-sanctioned mechanics for diagnosis or repair, if the independent garage you go to would need to circumvent any type of computer program lock put in place around a component computer program by the original equipment manufacturer precisely to restrict competition from other suppliers and from independent garages. Well, we pretty much have that problem now, anyways, don't we! See: http://www.righttorepair.ca/ What Bill C-61 does is enshrine such anti-competitive practices into law. This fundamentally changes the legal environment, since at present it is perfectly legal, in this example of a car, for any mechanic to take apart and modify any of the car's components in order to proceed with any diagnosis, repair or modification, even if this requires circumventing a lock attached to the product so that he can gain access to its internal operations. Bill C-61's exclusive delegation of power to original equipment manufactures would strengthen anti-competitive practices, particularly in market segments with one or a small number of dominant vendors. A good overview of this issue is provided by Bruce Perens, former executive of Hewlett-Packard: "Is DRM Just a Consumer Rights Issue?" http://technocrat.net/d/2006/6/6/4149

Enforcement of the rules described in Bill C-61 would require intrusive questions about what people do with their private property, and thus would raise the fundamental issue of privacy itself. If there is any lingering doubt about whether there has been sufficient consultation on how this Bill would affect the privacy rights of Canadians and others while inside Canadian jurisdication, please consider the view of the Privacy Commissioner of Canada, who said on his blog on 23 June 2008: "The privacy commissioners of Canada, Ontario and British Columbia have also said they have privacy concerns over digital rights management - the media companies use to monitor and control access to copyrighted material."
http://blog.youthprivacy.ca/index.php/2008/06/23/have-you-been-following-the-copyright-debate/ For Minister Prentice's clarification of the issues, please listen to this interview with him on CBC's program "Search Engine": http://hughmcguire.net/2008/06/19/copyright-on-cbcs-search-engine-meeting/

4. The Ammendments of Bill C-61 Will be Used To Protect Copyright Violators

Bill C-61's blanket prohibitions against circumvention of computer program locks or encryption have the unintended consequence of making copyright and contract compliance checks themselves illegal, if the

violators merely use these methods to protect their code from examination. When any type of shield is implemented, even if it is trivial to circumvent, the Bill C-61 ammendments would prevent legitimate copyright holders from legally examining source and binary computer program code distributed by suspected violators. Copyright and contract infringers can therefore use these protections to conceal violations. If violations cannot be discovered legally, then enforcement is impractical. The only legal way left to discover violations would be for legitimate copyright holders, if they can afford it, to initiate expensive litigation "fishing expeditions" based on nothing more than suspicions. Such a scenario clearly plays to the advantage of the powerful over the weak, and has nothing to do with who is violating copyright, versus who is justly defending copyright. Bill C-61 would simply place all the legal rights and remedies with parties who have cause to restrict access to works, and it would provide essentially no rights or remedies to parties who have cause to defend access to works. That's to say, C-61 is based fundamentally upon an a-priori assumption about who is the “good guy”, and who is the “bad guy”.

Consider an example. Suppose an employee or contractor of a small Canadian firm helps to write restricted source code, and the copyright title for that computer program vests with the firm. Then let's say the person quits the firm, and goes to work for another company that also produces restricted source code. At the new company, he copies in 1,000 lines of source code from the first company's computer program. In such a scenario, the Bill C-61 ammendments would leave no legal means to the first company to use reverse-engineering and lock-circumvention tools to independently assess whether or not such a copyright violation has taken place. It is not sufficient for the first company to notice a familiar function in the second company's computer program, since the courts have clarified that copyright is meant to protect only the expression of ideas, never ideas in themselves. Federal Court Justice Thorson commented in a landmark "Moreau v. St. Vincent" decision:

> “It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.”
>
> Justice Thorson P. in Moreau v. St. Vincent,[1950] Ex. C.R. 198, at p. 203.

That is to say, the only avenue that enables the first company to detect violations of its copyright is to examine the source code, but it is precisely this right that Bill C-61 would revoke. Bill C-61 would introduce a major new legal barrier against practical copyright protection, because it removes a legitimate copyright holder's right to the very first step of "looking at" a suspected violator's work if they can.

5. Bill C60 Implemented the WIPO Treaty; Bill C-61 Goes Beyond WIPO

The previous attempt to ammend the Copyright Act was Bill C-60 put forward by the Liberal Government on June 22, 2005. Bill C60 mirrored the language of the World Intellectual Property Organization (WIPO) Copyright Treaty by prohibiting circumvention of computer program locks and encryuption when the purpose is to violate copyright, but it permitted circumvention for law-abiding purposes. The new Bill C-61 introduced by the Conservative Government, however, makes circumvention of a computer program lock a violation regardless of the ownership of the work it applies to, and whether or not the activity one is carrying out would otherwise be lawful and ethical. This is equivalent to making the independent locksmith trade illegal, on the grounds that lock-picking is sometimes carried out as part of a crime. In this sense, the Liberal Government's Bill C60 was "better" -- however it was also problematic because under Bill C60 the definition of "circumention service" was left so broad that it could apply to any generic computer program that might be used for good or evil. This I refer to as the "butterknife problem": Should society outlaw the butterknife because it can be just as easily used to murder someone, as to butter one's bread?

Annex 1

BILL C-61 ADAPTED SO THAT THE PHRASE "COMPUTER PROGRAM*" [2] IS SUBSTITUTED FOR THE FOLLOWING PHRASES:

- **"TECHNOLOGICAL MEASURES**
- **"DIGITAL TECHNOLOGIES"**
- **"TECHNOLOGY, DEVICE OR COMPONENT"**

Session, Thirty-ninth Parliament,
56-57 Elizabeth II, 2007-2008
HOUSE OF COMMONS OF CANADA

BILL C-61
An Act to amend the Copyright Act
First reading, June 12, 2008
THE MINISTER OF INDUSTRY 90443

Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas such norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996;

Whereas such norms are not wholly reflected in the Copyright Act;

Whereas the exclusive rights in the Copyright Act provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on these rights exist to further enhance users' access to copyright works or other subject-matter;

Whereas the Government of Canada is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of a computer program*, in a manner that promotes culture and innovation, competition and investment in the Canadian economy;

And whereas Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of a computer program* for research and education;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

---

2 The text appearing here as Annex 1 is the full text of Bill C-61 but with the phrase "computer program" substituted in place of "technological measure", "digital technologies" and "technology, device or component". In each case this substituion is done, an asterisk follows: computer program*. All of the 18 original instances of this phrase appear in the text without the asterisk.

COPYRIGHT ACT

1. (1) The definitions “moral rights” and “treaty country” in section 2 of the Copyright Act are replaced by the following:

“moral rights” means the rights described in subsections 14.1(1) and 17.1(1);

“treaty country” means a Berne Convention country, UCC country, WCT country or WTO Member;

(2) Section 2 of the Act is amended by adding the following in alphabetical order:

“WCT country” means a country that is a party to the WIPO Copyright Treaty, adopted in Geneva on December 20, 1996;

“WPPT country” means a country that is a party to the WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996;

2. Subsection 3(1) of the Act is amended by striking out the word “and” at the end of paragraph (h), by adding the word “and” at the end of paragraph (i) and by adding the following after paragraph (i):

(j) in the case of a work that can be put into circulation as a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as the ownership of that tangible object has never previously been transferred with the authorization of the author in or outside Canada,

3. Subsections 5(1.01) to (1.03) of the Act are replaced by the following:

(1.01) For the purposes of subsection (1), a country that becomes a Berne Convention country, a WCT country or a WTO Member after the date of the making or publication of a work is deemed to have been a Berne Convention country, a WCT country or a WTO Member, as the case may be, at that date, subject to subsection (1.02) and sections 33 to 33.2.

(1.02) Subsection (1.01) does not confer copyright protection in Canada on a work whose term of copyright protection in the country referred to in that subsection had expired before that country became a Berne Convention country, a WCT country or a WTO Member, as the case may be.

(1.03) Subsections (1.01) and (1.02) apply, and are deemed to have applied, regardless of whether the country in question became a Berne Convention country, a WCT country or a WTO Member before or after the coming into force of those subsections.

4. Section 10 of the Act is repealed.

5. Subsection 13(2) of the Act is repealed.

6. The headings before section 15 of the Act are replaced by the following:

PART II

COPYRIGHT IN PERFORMERS’ PERFORMANCES, SOUND RECORDINGS AND COMMUNICATION SIGNALS AND MORAL RIGHTS IN PERFORMERS’ PERFORMANCES

Performers’ Rights

Copyright

7. (1) Section 15 of the Act is amended by adding the following after subsection (1):

(1.1) Subject to subsections (2.1) and (2.2), a performer’s copyright in the performer’s performance also consists of the sole right to do the following acts in relation to the performer’s performance or any substantial part of it and to authorize any of those acts:

(a) if it is not fixed,

(i) to communicate it to the public by telecommunication,

(ii) to perform it in public, if it is communicated to the public by telecommunication otherwise than by communication signal, and

(iii) to fix it in any material form;

(b) if it is fixed in a sound recording, to reproduce that fixation;

(c) to rent out a sound recording of it;

(d) to communicate to the public by telecommunication a sound recording of it in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public; and

(e) to sell, or otherwise transfer ownership of, every sound recording of it that can be put into circulation as a tangible object and whose ownership has never previously been transferred with the authorization of the performer in or outside Canada.

(2) Subsection 15(3) of the Act is replaced by the following:

(2.1) Subsection (1.1) applies in the following cases:

(a) if the performer's performance takes place in Canada;

(b) if the performer's performance is fixed in

(i) a sound recording whose maker, at the time of its first fixation,

(A) was a Canadian citizen or permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act, in the case of a natural person, or

(B) had its headquarters in Canada, in the case of a corporation, or

(ii) a sound recording whose first publication in a quantity sufficient to satisfy the reasonable demands of the public occurred in Canada; or

(c) if the performer's performance is transmitted at the time of its performance by a communication signal broadcast from Canada by a broadcaster that has its headquarters in Canada.

(2.2) Subsection (1.1) also applies in the following cases:

(a) if the performer's performance takes place in a WPPT country;

(b) if the performer's performance is fixed in

(i) a sound recording whose maker, at the time of its first fixation,

(A) was a citizen or permanent resident of a WPPT country, in the case of a natural person, or

(B) had its headquarters in a WPPT country, in the case of a corporation, or

(ii) a sound recording whose first publication in a quantity sufficient to satisfy the reasonable demands of the public occurred in a WPPT country; or

(c) if the performer's performance is transmitted at the time of its performance by a communication signal broadcast from a WPPT country by a broadcaster that has its headquarters in that country.

(3) The first publication of a sound recording in Canada, a Rome Convention country or a WPPT country is deemed to have occurred in that country, despite an earlier publication elsewhere, if the earlier publication took place no more than 30 days previously.

8. The Act is amended by adding the following after section 17:

Moral Rights

17.1 (1) In the cases referred to in subsections 15(2.1) and (2.2), a performer of a live aural performance or a performance fixed in a sound recording has, subject to subsection 28.2(1), the right to the integrity of the performance, and — in connection with an act mentioned in subsection 15(1.1) or one for which the performer has a right to remuneration under subsection 19(1) — the right, when it is reasonable in the circumstances, to be associated with the performance as its performer by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a performer's performance does not by itself constitute a waiver of any moral rights.

(4) If a waiver of any moral right is made in favour of an owner or a licensee of a copyright, it may be invoked by any person authorized by the owner or licensee to use the performer's performance, unless there is an indication to the contrary in the waiver.

17.2 (1) Subsection 17.1(1) applies only in respect of a performer's performance that occurs after the coming into force of that subsection. The moral rights subsist for the same term as the copyright in that performer's performance.

(2) The moral rights in respect of a performer's performance pass, on the performer's death, to

(a) the person to whom those rights are specifically bequeathed;

(b) if there is not a specific bequest of those moral rights and the performer dies testate in respect of the copyright in the performer's performance, the person to whom that copyright is bequeathed; or

(c) if there is not a person as described in paragraph (a) or (b), the person entitled to any other property in respect of which the performer dies intestate.

(3) Subsection (2) applies, with any modifications that the circumstances require, on the death of any person who holds moral rights.

9. Subsections 18(2) and (3) of the Act are replaced by the following:

(1.1) Subject to subsections (2.1) and (2.2), a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it and to authorize any of those acts:

(a) to communicate it to the public by telecommunication in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public; and

(b) to sell or otherwise transfer ownership of it, in the case of a sound recording made by the sound recording maker that can be put into circulation as a tangible object and whose ownership has never previously been transferred with the authorization of the sound recording maker in or outside Canada.

(2) Subsection (1) applies only if

(a) at the time of the first fixation or, if that first fixation was extended over a considerable period, during any substantial part of that period, the maker of the sound recording

(i) was a Canadian citizen or permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act,

(ii) was a citizen or permanent resident of a Berne Convention country, a Rome Convention country, a

WPPT country or a country that is a WTO Member, or

(iii) had its headquarters in one of those countries, in the case of a corporation; or

(b) the first publication of the sound recording in a quantity sufficient to satisfy the reasonable demands of the public occurred in any country referred to in paragraph (a).

(2.1) Subsection (1.1) applies in the following cases:

(a) if at the time of the first fixation or, if that first fixation was extended over a considerable period, during any substantial part of that period, the maker of the sound recording

(i) was a Canadian citizen or permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act, or

(ii) had its headquarters in Canada, in the case of a corporation; or

(b) if the first publication of the sound recording in a quantity sufficient to satisfy the reasonable demands of the public occurred in Canada.

(2.2) Subsection (1.1) also applies in the following cases:

(a) if at the time of the first fixation or, if that first fixation was extended over a considerable period, during any substantial part of that period, the maker of the sound recording

(i) was a citizen or permanent resident of a WPPT country, or

(ii) had its headquarters in a WPPT country, in the case of a corporation; or

(b) if the first publication of the sound recording in a quantity sufficient to satisfy the reasonable demands of the public occurred in a WPPT country.

(3) The first publication of a sound recording in Canada, a Berne Convention country, a Rome Convention country, a WPPT country or a country that is a WTO Member is deemed to have occurred in that country, despite an earlier publication elsewhere, if the earlier publication took place no more than 30 days previously.

10. Subsection 19(1) of the Act is replaced by the following:

19. (1) If a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for a communication in the circumstances referred to in paragraph 15(1.1)(d) or 18(1.1)(a) and any retransmission.

11. (1) The portion of subsection 22(1) of the Act before paragraph (a) is replaced by the following:

22. (1) If the Minister is of the opinion that a country grants or has undertaken to grant

(2) The portion of subsection 22(2) of the Act before paragraph (a) is replaced by the following:

(2) If the Minister is of the opinion that a country neither grants nor has undertaken to grant

12. Subsections 23(1) to (3) of the Act are replaced by the following:

23. (1) Subject to this Act, copyright in a performer's performance subsists until the end of 50 years after the end of the calendar year in which the performance occurs. However,

(a) if the performance is fixed in a sound recording before the copyright expires, the copyright continues until the end of 50 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs; and

(b) if a sound recording in which the performance is fixed is published before the copyright expires, the

copyright continues until the earlier of the end of 50 years after the end of the calendar year in which the first publication of the sound recording occurs and the end of 99 years after the end of the calendar year in which the performance occurs.

(1.1) Subject to this Act, copyright in a sound recording subsists until the end of 50 years after the end of the calendar year in which the first fixation of the sound recording occurs. However, if the sound recording is published before the copyright expires, the copyright continues until the end of 50 years after the end of the calendar year in which the first publication of the sound recording occurs.

(1.2) Subject to this Act, copyright in a communication signal subsists until the end of 50 years after the end of the calendar year in which the communication signal is broadcast.

(2) The rights to remuneration conferred on performers and makers by section 19 have the same terms, respectively, as those provided by subsections (1) and (1.1).

(3) Subsections (1) to (2) apply whether the fixation, performance or broadcast occurred before or after the coming into force of this section.

13. The heading “INFRINGEMENT OF COPYRIGHT AND MORAL RIGHTS AND EXCEPTIONS TO INFRINGEMENT” before section 27 of the Act is replaced by the following:

INFRINGEMENT OF COPYRIGHT AND OTHER RIGHTS, AND EXCEPTIONS

14. Section 27 of the Act is amended by adding the following after subsection (2):

(2.1) It is an infringement of copyright for any person to do any of the following acts with respect to anything that the person knows or should have known is a lesson, as defined in subsection 30.01(1), or a fixation of one:

(a) to sell it or to rent it out;

(b) to distribute it to an extent that the owner of the copyright in the work or other subject-matter that is included in the lesson is prejudicially affected;

(c) by way of trade, to distribute it, expose or offer it for sale or rental or exhibit it in public;

(d) to possess it for the purpose of doing anything referred to in any of paragraphs (a) to (c);

(e) to communicate it by telecommunication to any person other than a person referred to in paragraph 30.01(3)(a); or

(f) to circumvent or contravene any measure taken in conformity with paragraph 30.01(5)(b), (c) or (d).

15. Section 28.1 of the Act is replaced by the following:

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer’s performance is, in the absence of the author’s or performer’s consent, an infringement of those rights.

16. The portion of subsection 28.2(1) of the Act before paragraph (a) is replaced by the following:

28.2 (1) The author’s or performer’s right to the integrity of a work or performer’s performance is infringed only if the work or the performance is, to the prejudice of its author’s or performer’s honour or reputation,

17. The Act is amended by adding the following after section 29.2:

Reproduction onto Another Medium or Device

29.21 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter that is a photograph or is contained in a book, newspaper, periodical or videocassette, or any substantial part of such a work or other subject-matter, onto another medium or device, if the following conditions are met:

(a) the copy of the work or other subject-matter of which the reproduction is made is not an infringing copy;

(b) the individual legally obtained the photograph, book, newspaper, periodical or videocassette, otherwise than by borrowing it or renting it, and owns the medium or device on which it is reproduced;

(c) the individual, in order to make the reproduction, did not circumvent a computer program or cause one to be circumvented, within the meanings of the definitions “circumvent” and "computer program*” in section 41;

(d) the individual

(i) reproduces the work or other subject-matter no more than once for each device that the individual owns, whether the reproduction is made directly onto the device or is made onto a medium that is to be used with the device, and

(ii) prints no more than one copy of the work, if the work is in digital form;

(e) the individual does not give the reproduction away; and

(f) the reproduction is used only for private purposes.

(2) If the individual has downloaded the work or other subject-matter from the Internet and is bound by a contract that governs the extent to which the individual may reproduce the work or other subject-matter, the contract prevails over subsection (1) to the extent of any inconsistency between them.

(3) Subsection (1) does not apply if the individual gives away, rents or sells the photograph, book, newspaper, periodical or videocassette without first destroying all reproductions of the work or other subject-matter that the individual has made under that subsection.

(4) Subsection (1) does not apply if the reproduction is made for the purpose of doing any of the following in relation to the work or other subject-matter:

(a) selling or renting out, or by way of trade exposing or offering for sale or rental;

(b) distributing, whether or not for the purpose of trade;

(c) communicating to the public by telecommunication; or

(d) performing, or causing to be performed, in public.

29.22 (1) It is not an infringement of copyright for an individual to reproduce onto a medium or device a musical work embodied in a sound recording, a performer’s performance of a musical work embodied in a sound recording, or a sound recording in which a musical work or a performer’s performance of a musical work is embodied, or any substantial part of such a work or other subject-matter, if the following conditions are met:

(a) the sound recording is not an infringing copy;

(b) the individual legally obtained the sound recording, otherwise than by borrowing it or renting it, and owns the medium or device on which it is reproduced;

(c) the individual, in order to make the reproduction, did not circumvent a computer program or cause one to be circumvented, within the meanings of the definitions “circumvent” and "computer program*” in section 41;

(d) the individual reproduces the sound recording no more than once for each device that the individual owns, whether the reproduction is made directly onto the device or is made onto a medium that is to be used with the device;

(e) the individual does not give the reproduction away; and

(f) the reproduction is used only for private purposes.

(2) If the individual has downloaded the sound recording from the Internet and is bound by a contract that governs the extent to which the individual may reproduce the sound recording, the contract prevails over subsection (1) to the extent of any inconsistency between them.

(3) Subsection (1) does not apply if the reproduction is made onto a medium that is governed by Part VIII.

(4) Subsection (1) does not apply if the individual gives away, rents or sells the sound recording without first destroying all reproductions of it that the individual has made under that subsection.

(5) Subsection (1) does not apply if the reproduction is made for the purpose of doing any of the following in relation to the musical work, performer's performance or sound recording:

(a) selling or renting out, or by way of trade exposing or offering for sale or rental;

(b) distributing, whether or not for the purpose of trade;

(c) communicating to the public by telecommunication; or

(d) performing, or causing to be performed, in public.

Fixing Signals and Recording Programs for Later Listening or Viewing

29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or watching it later, if the following conditions are met:

(a) the individual receives the program legally;

(b) the individual, in order to record the program, did not illegally circumvent a computer program* or cause one to be illegally circumvented, within the meanings of the definitions "circumvent" and "computer program*" in section 41;

(c) the individual makes no more than one recording of the program;

(d) the individual keeps the recording no longer than necessary in order to listen to or watch the program at a more convenient time;

(e) the individual does not give the recording away; and

(f) the recording is used only for private purposes.

(2) If the individual receives the program under a video-on-demand service and is bound by a contract that governs the extent to which the individual may record it, the contract prevails over subsection (1) to the extent of any inconsistency between them.

(3) Subsection (1) does not apply to the recording of a program that is communicated over the Internet, unless it is communicated simultaneously via radio or television.

(4) Subsection (1) does not apply if the program is recorded for the purpose of doing any of the following in relation to the program:

(a) selling or renting out, or by way of trade exposing or offering for sale or rental;

(b) distributing, whether or not for the purpose of trade;

(c) communicating to the public by telecommunication; or

(d) performing, or causing to be performed, in public.

(5) Nothing in subsection (1) authorizes the recording of programs under a network personal video recorder service.

(6) The following definitions apply in this section.

“broadcast” has the same meaning as in the definition “broadcasting” in subsection 2(1) of the Broadcasting Act.

“network personal video recorder service” means a service that allows a person to store recordings of programs in a service provider’s networked facility in order to access them at any time.

“video-on-demand service” means a service that allows a person to receive programs at times of his or her choosing.

18. The Act is amended by adding the following after section 30:

30.01 (1) For the purposes of this section, “lesson” means a lesson, test or examination, or part of one, in which, or during the course of which, an act is done in respect of a work or other subject-matter by an educational institution or a person acting under its authority that would otherwise be an infringement of copyright but is permitted under any of sections 29.4 to 29.6 and subsection 29.7(3).

(2) This section does not apply so as to permit any act referred to in paragraph (3)(a), (b) or (c) with respect to a work or other subject-matter whose use in the lesson constitutes an infringement of copyright or for whose use in the lesson the consent of the copyright owner is required.

(3) Subject to subsection (5), it is not an infringement of copyright for an educational institution or a person acting under its authority

(a) to communicate a lesson to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course of which the lesson forms a part or of other persons acting under the authority of the educational institution;

(b) to make a fixation of the lesson for the purpose of the act referred to in paragraph (a); or

(c) to do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) and (b).

(4) For the purposes of sections 29.4 to 29.6 and subsection 29.7(3), a student who is enrolled in a course of which the lesson forms a part is deemed to be a person on the premises of the educational institution when the student participates in or receives the lesson by means of communication by telecommunication under paragraph (3)(a).

(5) The educational institution and any person acting under its authority, except a student, shall

(a) destroy any fixation of the lesson within 30 days after the day on which the students who are enrolled in the course have received their final course evaluations;

(b) take measures that can reasonably be expected to limit the communication by telecommunication of the lesson to the persons referred to in paragraph (3)(a);

(c) take, in relation to the communication by telecommunication of the lesson in digital form, measures that can reasonably be expected to prevent the students from fixing or reproducing the lesson, or communicating it other than as they may do under this section; and

(d) take, in relation to a communication by telecommunication in digital form, any measure prescribed by regulation that is applicable in the circumstances.

30.02 (1) Subject to subsections (3) to (5), it is not an infringement of copyright for an educational institution that has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society's repertoire for an educational or training purpose

(a) to make a digital reproduction — of the same general nature and extent as the reprographic reproduction authorized under the licence — of a paper form of any of those works;

(b) to communicate the digital reproduction by telecommunication for an educational or training purpose to persons acting under the authority of the institution; or

(c) to do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) and (b).

(2) Subject to subsections (3) to (5), it is not an infringement of copyright for a person acting under the authority of the educational institution to whom the work has been communicated under paragraph (1)(b) to print one copy of the work.

(3) An educational institution that makes a digital reproduction of a work under paragraph (1)(a) shall

(a) pay to the collective society, with respect to all the persons to whom the digital reproduction is communicated by the institution under paragraph (1)(b), the royalties that would be payable if one reprographic reproduction were distributed by the institution to each of those persons, and comply with the licence terms and conditions applicable to a reprographic reproduction to the extent that they are reasonably applicable to a digital reproduction;

(b) take measures to prevent the digital reproduction from being communicated by telecommunication to any persons who are not acting under the authority of the institution;

(c) take measures to prevent a person to whom the work has been communicated under paragraph (1)(b) from printing more than one copy, and to prevent any other reproduction or communication of the digital reproduction; and

(d) take any measure prescribed by regulation that is applicable in the circumstances.

(4) An educational institution may not make a digital reproduction of a work under paragraph (1)(a) if

(a) the institution has entered into a digital reproduction agreement respecting the work with a collective society under which the institution may make a digital reproduction of the work, may communicate the digital reproduction by telecommunication to persons acting under the authority of the institution and may permit those persons to print at least one copy of the work;

(b) there is a tariff certified under section 70.15 that is applicable to the digital reproduction of the work, to the communication of the digital reproduction by telecommunication to persons acting under the authority of the institution and to the printing by those persons of at least one copy of the work; or

(c) the institution has been informed by the collective society that is authorized to enter into reprographic agreements with respect to the work that the owner of the copyright in the work has informed it, under subsection (5), that the owner refuses to authorize the collective society to enter into a digital reproduction agreement with respect to the work.

(5) If the owner of the copyright in a work informs the collective society that is authorized to enter into reprographic agreements with respect to the work that the owner refuses to authorize it to enter into digital reproduction agreements with respect to the work, the collective society shall inform the educational institutions with which it has entered into reprographic reproduction agreements with respect to the work that they are not permitted to make digital reproductions under subsection (1).

(6) The owner of the copyright in a work who, in respect of the work, has authorized a collective society to enter into a reprographic reproduction agreement with an educational institution is deemed to have

authorized the society to enter into a digital reproduction agreement with the institution — subject to the same restrictions as a reprographic reproduction agreement — unless the owner has refused to give this authorization under subsection (5) or has authorized another collective society to enter into a digital reproduction agreement with respect to the work.

(7) In proceedings against an educational institution for making a digital reproduction of a paper form of a work, or for communicating such a reproduction by telecommunication for an educational or training purpose to persons acting under the authority of the institution, the owner of the copyright in the work may not recover an amount more than

(a) in the case where there is a digital reproduction licence that meets the conditions described in paragraph (4)(a) in respect of the work — or, if none exists in respect of the work, in respect of a work of the same category — the amount of royalties that would be payable under that licence in respect of those acts or, if there is more than one applicable licence, the greatest amount of royalties payable under any of those licences; and

(b) in the case where there is no licence described in paragraph (a) but there is a reprographic reproduction licence in respect of the work — or, if none exists in respect of the work, in respect of a work of the same category — the amount of royalties that would be payable under that licence in respect of those acts or, if there is more than one applicable licence, the greatest amount of royalties payable under any of those licences.

(8) The owner of the copyright in a work may not recover any damages against a person acting under the authority of the educational institution who, in respect of a digital reproduction of the work that is communicated to the person by telecommunication, prints one copy of the work if, at the time of the printing, it was reasonable for the person to believe that the communication was made in accordance with paragraph (1)(b).

30.03 (1) If an educational institution has paid royalties to a collective society for the digital reproduction of a work under paragraph 30.02(3)(a) and afterwards the institution enters into a digital reproduction agreement described in paragraph 30.02(4)(a) with any collective society,

(a) in the case where the institution would — under that digital reproduction agreement — pay a greater amount of royalties for the digital reproduction of that work than what was payable under paragraph 30.02(3)(a), the institution shall pay to the collective society to which it paid royalties under that paragraph the difference between

(i) the amount of royalties that the institution would have had to pay for the digital reproduction of that work if the agreement had been entered into on the day on which the institution first made a digital reproduction under paragraph 30.02(1)(a), and

(ii) the amount of royalties that the institution paid to the society under paragraph 30.02(3)(a) for the digital reproduction of that work from the day on which that paragraph comes into force until the day on which they enter into the digital reproduction agreement; and

(b) in the case where the institution would — under that digital reproduction agreement — pay a lesser amount of royalties for the digital reproduction of that work than what was payable under paragraph 30.02(3)(a), the collective society to which the institution paid royalties under that paragraph shall pay to the institution the difference between

(i) the amount of royalties that the institution paid to the society under paragraph 30.02(3)(a) for the digital reproduction of that work from the day on which that paragraph comes into force until the day on which they enter into the digital reproduction agreement, and

(ii) the amount of royalties that the institution would have had to pay for the digital reproduction of that work if the agreement had been entered into on the day on which the institution first made a digital

reproduction under paragraph 30.02(1)(a).

(2) If an educational institution has paid royalties to a collective society for the digital reproduction of a work under paragraph 30.02(3)(a) and afterwards a tariff applies to the digital reproduction of that work under paragraph 30.02(4)(b),

(a) in the case where the institution would — under the tariff — pay a greater amount of royalties for the digital reproduction of that work than what was payable under paragraph 30.02(3)(a), the institution shall pay to the collective society to which it paid royalties under that paragraph the difference between

(i) the amount of royalties that the institution would have had to pay for the digital reproduction of that work if the tariff had been certified on the day on which the institution first made a digital reproduction under paragraph 30.02(1)(a), and

(ii) the amount of royalties that the institution paid to the society under paragraph 30.02(3)(a) for the digital reproduction of that work from the day on which that paragraph comes into force until the day on which the tariff is certified; and

(b) in the case where the institution would — under the tariff — pay a lesser amount of royalties for the digital reproduction of that work than what was payable under paragraph 30.02(3)(a), the collective society to which the institution paid royalties under that paragraph shall pay to the institution the difference between

(i) the amount of royalties that the institution paid to the society under paragraph 30.02(3)(a) for the digital reproduction of that work from the day on which that paragraph comes into force until the day on which the tariff is certified, and

(ii) the amount of royalties that the institution would have had to pay for the digital reproduction of that work if the tariff had been certified on the day on which the institution first made a digital reproduction under paragraph 30.02(1)(a).

30.04 (1) Subject to subsections (2) to (5), it is not an infringement of copyright for an educational institution, or a person acting under the authority of one, to do any of the following acts for educational or training purposes in respect of a work or other subject-matter that is available through the Internet:

(a) reproduce it;

(b) communicate it to the public by telecommunication, if that public primarily consists of students of the educational institution or other persons acting under its authority;

(c) perform it in public, if that public primarily consists of students of the educational institution or other persons acting under its authority; or

(d) do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) to (c).

(2) Subsection (1) does not apply unless the educational institution or person acting under its authority, in doing any of the acts described in that subsection in respect of the work or other subject-matter, mentions the following:

(a) the source; and

(b) if given in the source, the name of

(i) the author, in the case of a work,

(ii) the performer, in the case of a performer's performance,

(iii) the maker, in the case of a sound recording, and

(iv) the broadcaster, in the case of a communication signal.

(3) Subsection (1) does not apply if the work or other subject-matter — or the Internet site where it is posted — is protected by a computer program* that restricts access to the work or other subject-matter or to the Internet site.

(4) Subsection (1) does not permit a person to do any act described in that subsection in respect of a work or other subject-matter if

(a) that work or other subject-matter — or the Internet site where it is posted — is protected by a computer program* that restricts the doing of that act; or

(b) a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work or other subject-matter is posted or on the work or other subject-matter itself.

(5) Subsection (1) does not apply if the educational institution or person acting under its authority knows or should have known that the work or other subject-matter was made available through the Internet without the consent of the copyright owner.

(6) The Governor in Council may make regulations for the purposes of paragraph (4)(b) prescribing what constitutes a clearly visible notice.

19. Paragraph 30.1(1)(c) of the Act is replaced by the following:

(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable;

20. (1) Subsection 30.2(5) of the Act is replaced by the following:

(5) A library, archive or museum, or a person acting under the authority of one, may do, on behalf of a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of one of its own patrons.

(5.01) A library, archive or museum, or a person acting under the authority of one, may, under subsection (5), make a copy of printed matter in digital form and provide it to a person who has requested it through another library, archive or museum if the providing library, archive or museum or person takes measures to prevent the person who has requested it from

(a) making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;

(b) communicating the digital copy to any other person; and

(c) using the digital copy for more than five business days.

(2) Subsection 30.2(6) of the Act is amended by striking out the word “and” at the end of paragraph (c), by adding the word “and’’ at the end of paragraph (d) and by adding the following after paragraph (d):

(e) prescribing the manner and form in which the measures referred to in subsection (5.01) are to be taken.

21. The Act is amended by adding the following after section 31:

Network Services

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

(2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

(3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter,

(a) does not modify it;

(b) ensures that any directions related to its caching that are established by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and

(c) does not interfere with the lawful use of technology to obtain data on its use.

(4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

(5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

22. Subsection 32.2(1) of the Act is amended by striking out the word “or” at the end of paragraph (d), by adding the word “or” at the end of paragraph (e) and by adding the following after paragraph (e):

(f) for an individual to use for private or non-commercial purposes a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.

23. The Act is amended by adding the following after section 32.5:

32.6 Despite sections 27, 28.1 and 28.2, if a person has, before the day on which subsection 15(1.1), 17.1(1) or 18(1.1) applies in respect of a particular performers’ performance or sound recording, incurred an expenditure or a liability in connection with, or in preparation for, the doing of an act that would, if done after that day, have infringed rights under that subsection, any right or interest of that person that arises from, or in connection with, the doing of that act and that is subsisting and valuable on that day is not, for two years after the day on which this section comes into force, prejudiced or diminished by reason only of the subsequent application of that subsection in respect of the performers’ performance or sound recording.

24. Subsection 33(1) of the Act is replaced by the following:

33. (1) Despite subsections 27(1), (2) and (4) and sections 27.1, 28.1 and 28.2, if a person has, before the later of January 1, 1996 and the day on which a country becomes a treaty country other than a WCT country, incurred an expenditure or liability in connection with, or in preparation for, the doing of an act that, if that country had been such a treaty country, would have infringed copyright in a work or moral rights in respect of a work, any right or interest of that person that arises from, or in connection with, the doing of that act and that is subsisting and valuable on the later of those days is not, except as provided by an order of the Board made under subsection 78(3), prejudiced or diminished by reason only of that country having become such a treaty country.

25. The Act is amended by adding the following after section 33:

33.1 (1) Despite subsections 27(1), (2) and (4) and sections 27.1, 28.1 and 28.2, if a person has, before

the later of the day on which this section comes into force and the day on which a country that is a treaty country but not a WCT country becomes a WCT country, incurred an expenditure or liability in connection with, or in preparation for, the doing of an act that, if that country had been a WCT country, would have infringed a right under paragraph 3(1)(j), any right or interest of that person that arises from, or in connection with, the doing of that act and that is subsisting and valuable on the later of those days is not, except as provided by an order of the Board made under subsection 78(3), prejudiced or diminished by reason only of that country having become a WCT country.

(2) Despite subsection (1), a person's right or interest that is protected by that subsection terminates as against the copyright owner if and when the owner pays the person any compensation that is agreed to between the parties or, failing agreement, that is determined by the Board in accordance with section 78.

33.2 (1) Despite subsections 27(1), (2) and (4) and sections 27.1, 28.1 and 28.2, if a person has, before the later of the day on which this section comes into force and the day on which a country that is not a treaty country becomes a WCT country, incurred an expenditure or a liability in connection with, or in preparation for, the doing of an act that, if that country had been a WCT country, would have infringed copyright in a work or moral rights in respect of a work, any right or interest of that person that arises from, or in connection with, the doing of that act and that is subsisting and valuable on the later of those days is not, except as provided by an order of the Board made under subsection 78(3), prejudiced or diminished by reason only of that country having become a WCT country.

(2) Despite subsection (1), a person's right or interest that is protected by that subsection terminates as against the copyright owner if and when that owner pays the person any compensation that is agreed to between the parties or, failing agreement, that is determined by the Board in accordance with section 78.

26. The Act is amended by adding the following before section 34:

Copyright Infringement

27. Subsection 34(2) of the Act is replaced by the following:

(2) In any proceedings for an infringement of moral rights, the court may grant to the holder of those rights all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

28. The portion of subsection 34.1(1) of the Act before paragraph (a) is replaced by the following:

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

29. Sections 36 and 37 of the Act are repealed.

30. (1) Subsection 38.1(2) of the Act is replaced by the following:

(1.1) If a copyright owner has made an election under subsection (1), a defendant who is an individual is liable for statutory damages of $500 in respect of all the defendant's infringements that were done for the defendant's private purposes and that are involved in the proceedings.

(1.2) However, the copyright owner may not recover statutory damages from a defendant referred to in subsection (1.1) in respect of the defendant's infringements that

(a) were done for the defendant's private purposes before the institution of the proceedings in which the election was made; and

(b) are not involved in those proceedings.

(1.3) If a copyright owner has made an election under subsection (1) in respect of a defendant referred to in subsection (1.1), no other copyright owner may elect statutory damages in respect of that defendant for

the defendant's infringements that were done for the defendant's private purposes before the institution of the proceedings in which the election was made.

(1.4) Subsections (1.1) to (1.3) do not apply with respect to infringements that were made possible because the defendant circumvented or caused to be circumvented a computer program* that protected the work or other subject-matter, within the meanings of the definitions "circumvent" and "computer program*" in section 41.

(2) If subsection (1.1) does not apply and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of an award under subsection (1) to less than $500, but not less than $200.

(2) The portion of subsection 38.1(5) of the Act before paragraph (a) is replaced by the following:

(5) In exercising its discretion under subsections (1) and (2) to (4), the court shall consider all relevant factors, including

(3) Subsection 38.1(6) of the Act is amended by striking out the word "or" at the end of paragraph (b), by adding the word "or" at the end of paragraph (c) and by adding the following after paragraph (c):

(d) an educational institution that is sued in the circumstances referred to in subsection 30.02(7) or a person acting under its authority who is sued in the circumstances referred to in subsection 30.02(8).

31. Section 41 of the Act is replaced by the following:

Computer programs* and Rights Management Information

41. The following definitions apply in this section and in sections 41.1 to 41.2.

"circumvent" means,

(a) in respect of a computer program* within the meaning of paragraph (a) of the definition of "computer program*", to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the computer program*, unless done with the authority of the copyright owner; and

(b) in respect of a computer program* within the meaning of paragraph (b) of the definition of "computer program*", to avoid, bypass, remove, deactivate or impair the computer program*.

"a computer program*" means any effective a computer program* that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

41.1 (1) No person shall

(a) circumvent a computer program* within the meaning of paragraph (a) of the definition "computer program*" in section 41;

(b) offer services to the public or provide services if

(i) the services are offered or provided primarily for the purposes of circumventing a computer program*,

(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a computer program*, or

(iii) the person markets those services as being for the purposes of circumventing a computer program* or acts in concert with another person in order to market those services as being for those purposes; or

(c) manufacture, import, provide — including by selling or renting — offer for sale or rental or distribute any computer program* if

(i) the computer program* is designed or produced primarily for the purposes of circumventing a computer program*,

(ii) the uses or purposes of the computer program* are not commercially significant other than when it is used for the purposes of circumventing a computer program, or

(iii) the person markets the computer program* as being for the purposes of circumventing a computer program* or acts in concert with another person in order to market the computer program* as being for those purposes.

(2) The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which paragraph (1)(a) has been contravened is, subject to this Act and any regulations made under section 41.2, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened that paragraph.

(3) The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which paragraph (1)(a) has been contravened may not elect under section 38.1 to recover statutory damages from an individual who contravened that paragraph only for his or her own private purposes.

(4) Every owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which a computer program* has been or could be circumvented as a result of the contravention of paragraph (1)(b) or (c) is, subject to this Act and any regulations made under section 41.2, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened paragraph (1)(b) or (c).

41.11 (1) Paragraph 41.1(1)(a) does not apply if a computer program* is circumvented for the purposes of an investigation related to the enforcement of any Act of Parliament or any Act of the legislature of a province, or for the purposes of activities related to the protection of national security.

(2) Paragraph 41.1(1)(b) does not apply if the services are provided by or for the persons responsible for carrying out such an investigation or such activities.

(3) Paragraph 41.1(1)(c) does not apply if the computer program* is manufactured, imported or provided by the persons responsible for carrying out such an investigation or such activities, or is manufactured, imported, provided or offered for sale or rental as a service provided to those persons.

41.12 (1) Paragraph 41.1(1)(a) does not apply to a person who owns a computer program or a copy of it, or has a licence to use the program or copy, and who circumvents a computer program* that protects that program or copy for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable.

(2) Paragraph 41.1(1)(b) does not apply to a person who offers services to the public or provides services for the purposes of circumventing a computer program* if the person does so for the purpose of making the computer program and any other computer program interoperable.

(3) Paragraph 41.1(1)(c) does not apply to a person who manufactures, imports or provides a computer program* for the purposes of circumventing another computer program* if the person does so for the purpose of making the computer program and any other computer program interoperable and

(a) uses that computer program* only for that purpose; or

(b) provides that computer program* to another person only for that purpose.

(4) A person referred to in subsection (1) may communicate the information obtained under that subsection to another person for the purposes of allowing that person to make the computer program and any other computer program interoperable.

(5) A person to whom the computer program* referred to in subsection (3) is provided or to whom the information referred to in subsection (4) is communicated may use it only for the purpose of making the computer program and any other computer program interoperable.

(6) However, a person is not entitled to benefit from the exceptions under subsections (1) to (3) or (5) if, for the purposes of making the computer program and any other computer program interoperable, the person does an act that constitutes an infringement of copyright.

(7) Furthermore, a person is not entitled to benefit from the exception under subsection (4) if, for the purposes of making the computer program and any other computer program interoperable, the person does an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.

41.13 (1) Paragraph 41.1(1)(a) does not apply to a person who, for the purposes of encryption research, circumvents a computer program* by means of decryption if

(a) it would not be practical to carry out the research without circumventing the computer program*;

(b) the person has lawfully obtained the work, the performer's performance fixed in a sound recording or the sound recording that is protected by the computer program*; and

(c) the person has informed the owner of the copyright in the work, the performer's performance fixed in a sound recording or the sound recording who has applied the computer program*.

(2) However, a person acting in the circumstances referred to in subsection (1) is not entitled to benefit from the exception under that subsection if the person does an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.

(3) Paragraph 41.1(1)(c) does not apply to a person referred to in subsection (1) who manufactures a computer program* for the purposes of circumventing another computer program* that is subject to paragraph 41.1(1)(a) if the person does so for the purpose of encryption research and

(a) uses that a computer program* only for that purpose; or

(b) provides that a computer program* only for that purpose to another person who is collaborating with the person.

41.14 (1) Paragraph 41.1(1)(a) does not apply to a person who circumvents a computer program if

(a) the work, performer's performance fixed in a sound recording or sound recording that is protected by the computer program* is not accompanied by a notice indicating that its use will permit a third party to collect and communicate personal information relating to the user or, in the case where it is accompanied by such a notice, the user is not provided with the option to prevent the collection and communication of personal information without the user's use of it being restricted; and

(b) the only purpose of circumventing the computer program* is to verify whether it permits the collection or communication of personal information and, if it does, to prevent it.

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers services to the public or provides services, or manufactures, imports or provides a computer program*, for the purposes of circumventing a computer program* in accordance with subsection (1), to the extent that the services, a computer

program* do not unduly impair the computer program*.

41.15 (1) Paragraph 41.1(1)(a) does not apply to a person who circumvents a computer program that is subject to that paragraph for the sole purpose of, with the consent of the owner or administrator of a computer, computer system or computer network, assessing the vulnerability of the computer, system or network or correcting any security flaws.

(2) Paragraph 41.1(1)(b) does not apply if the services are provided to a person described in subsection (1).

(3) Paragraph 41.1(1)(c) does not apply if the computer program* is manufactured or imported by a person described in subsection (1), or is manufactured, imported, provided — including by selling or renting — offered for sale or rental or distributed as a service provided to that person.

(4) A person acting in the circumstances referred to in subsection (1) is not entitled to benefit from the exception under that subsection if the person does an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.

41.16 (1) Paragraph 41.1(1)(a) does not apply to

(a) a person with a perceptual disability who circumvents a computer program* for the sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to that person;

(b) a person who circumvents a computer program* at the request of a person with a perceptual disability for the sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with the perceptual disability; or

(c) a non-profit organization acting for the benefit of a person with a perceptual disability that circumvents a computer program* for the sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to that person.

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers or provides services to persons or organizations referred to in subsection (1), or manufactures, imports or provides a computer program*, for the purposes of enabling those persons or organizations to circumvent a computer program* in accordance with that subsection, to the extent that the services, a computer program* do not unduly impair the computer program*.

41.17 Paragraph 41.1(1)(a) does not apply to a broadcasting undertaking that circumvents a computer program* for the sole purpose of making an ephemeral reproduction of a work, a performer's performance fixed in a sound recording or a sound recording in accordance with section 30.9, unless the owner of the copyright in the work, the performer's performance fixed in a sound recording or the sound recording that is protected by the computer program* makes available the necessary means to enable the making of such a reproduction in a timely manner in light of the broadcasting undertaking's business requirements.

41.18 A court may reduce or remit the amount of damages it awards in the circumstances described in subsection 41.1(1) if the defendant satisfies the court that the defendant was not aware, and had no reasonable grounds to believe, that the defendant's acts constituted a contravention of that subsection.

41.19 If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.

41.2 (1) The Governor in Council may make regulations excluding from the application of section 41.1 any computer program* that protects a work, a performer's performance fixed in a sound recording or a sound recording, or classes of them, or any class of such a computer program*, if the Governor in Council

considers that the application of that section to the computer program* or class of a computer program* would unduly restrict competition in the aftermarket sector in which the computer program* is used.

(2) The Governor in Council may make regulations

(a) prescribing additional circumstances in which paragraph 41.1(1)(a) does not apply, after taking into consideration the following factors:

(i) whether not being permitted to circumvent a computer program* that is subject to that paragraph could adversely affect the use a person may make of a work, a performer's performance fixed in a sound recording or a sound recording when that use is authorized,

(ii) whether the work, the performer's performance fixed in a sound recording or the sound recording is commercially available,

(iii) whether not being permitted to circumvent a computer program* that is subject to that paragraph could adversely affect criticism, review, news reporting, commentary, teaching, scholarship or research that could be made or done in respect of the work, the performer's performance fixed in a sound recording or the sound recording,

(iv) whether being permitted to circumvent a computer program* that is subject to that paragraph could adversely affect the market for the work, the performer's performance fixed in a sound recording or the sound recording or its market value,

(v) whether the work, the performer's performance fixed in a sound recording or the sound recording is commercially available in a medium and in a quality that is appropriate for non-profit archival, preservation or educational uses, and

(vi) any other relevant factor; and

(b) requiring the owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording that is protected by a computer program* to provide access to the work, performer's performance fixed in a sound recording or sound recording to persons who are entitled to the benefit of any of the limitations on the application of paragraph 41.1(1)(a) prescribed under paragraph (a). The regulations may prescribe the manner in which, and the time within which, access is to be provided, as well as any conditions that the owner of the copyright is to comply with.

41.21 (1) No person shall knowingly remove or alter any rights management information in electronic form without the consent of the owner of the copyright in the work, the performer's performance or the sound recording, if the person knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner's copyright or adversely affect the owner's right to remuneration under section 19.

(2) The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording is, subject to this Act, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against a person who contravenes subsection (1).

(3) The copyright owner referred to in subsection (2) has the same remedies against a person who, without the owner's consent, knowingly does any of the following acts with respect to any material form of the work, the performer's performance fixed in a sound recording or the sound recording and knows or should have known that the rights management information has been removed or altered in a way that would give rise to a remedy under that subsection:

(a) sells it or rents it out;

(b) distributes it to an extent that the copyright owner is prejudicially affected;

(c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public;

(d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or

(e) communicates it to the public by telecommunication.

(4) In this section, “rights management information” means information that

(a) is attached to or embodied in a copy of a work, a performer’s performance fixed in a sound recording, or a sound recording, or appears in connection with its communication to the public by telecommunication; and

(b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or the holder of any rights in the work, the performance or the sound recording, or concerns the terms or conditions of the work’s, performance’s or sound recording’s use.

General Provisions

41.22 (1) Subject to this section, the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of that right, title and interest, is entitled to the remedies provided by this Act.

(2) If proceedings under subsection (1) are taken by a person other than the copyright owner, the copyright owner shall be made a party to those proceedings, except

(a) in the case of proceedings taken under section 44.1, 44.2 or 44.4;

(b) in the case of interlocutory proceedings, unless the court is of the opinion that the interests of justice require the copyright owner to be a party; and

(c) in any other case in which the court is of the opinion that the interests of justice do not require the copyright owner to be a party.

(3) A copyright owner who is made a party to proceedings under subsection (2) is not liable for any costs unless the copyright owner takes part in the proceedings.

(4) If a copyright owner is made a party to proceedings under subsection (2), the court, in awarding damages or profits, shall, subject to any agreement between the person who took the proceedings and the copyright owner, apportion the damages or profits referred to in subsection 35(1) between them as the court considers appropriate.

41.23 The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under sections 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

41.24 (1) Subject to subsection (2), a court may not award a remedy provided by this Part unless

(a) the proceedings for the infringement or the act giving rise to a remedy are commenced within three years after it occurred, in the case where the plaintiff knew, or could reasonably have been expected to know, of the infringement or act at the time it occurred; or

(b) the proceedings for the infringement or the act giving rise to a remedy are commenced within three years after the time when the plaintiff first knew of it or could reasonably have been expected to know of it, in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the infringement or act at the time it occurred.

(2) The court shall apply the limitation or prescription period set out in paragraph (1)(a) or (b) only in respect of a party who pleads a limitation period.

Provisions Respecting Providers of Network Services or Information Location Tools

41.25 (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides

(a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

(b) the digital memory referred to in subsection 31.1(4) that is used for the electronic location to which the claim of infringement relates; or

(c) an information location tool as defined in subsection 41.27(3).

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;

(b) identify the work or other subject-matter to which the claimed infringement relates;

(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.

41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) without delay forward the notice electronically to the person that the electronic location identified by the location data specified in the notice belongs to and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than $5,000 and not more than $10,000.

(4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

41.27 (1) In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled, against a provider of an information location tool who makes a reproduction of the work or other subject-matter or communicates that reproduction to the public by telecommunication,

to any remedy other than an injunction.

(2) Subsection (1) applies only if the provider, in respect of the work or other subject-matter,

(a) makes and caches the reproduction in an automated manner for the purpose of providing the information location tool;

(b) communicates that reproduction to the public by telecommunication for the purpose of providing the information that has been located by the information location tool;

(c) does not modify the reproduction;

(d) complies with any conditions relating to the making or caching of reproductions of the work or other subject-matter, or to the communication of the reproduction to the public by telecommunication, that were established by whoever made the work or other subject-matter available through the Internet or another digital network and that lend themselves to automated reading and execution;

(e) does not interfere with the lawful use of technology to obtain data on the use of the work or other subject-matter; and

(f) has not received a notice of claimed infringement relating to the work or other subject-matter that complies with subsection 41.25(2).

(3) In this section, “information location tool” means any tool that makes it possible to locate information that is available through the Internet or another digital network.

32. Section 42 of the Act is amended by adding the following after subsection (3):

(3.1) Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, is guilty of an offence who knowingly and for commercial purposes contravenes section 41.1 and is liable

(a) on conviction on indictment, to a fine not exceeding $1,000,000 or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

33. Subsection 58(1) of the Act is replaced by the following:

58. (1) Any assignment of a copyright, or any licence granting an interest in a copyright, may be executed, subscribed or acknowledged at any place in a treaty country, a Rome Convention country or a WPPT country by the assignor, licensor or secured or hypothecary debtor, before any notary public, commissioner or other official, or the judge of any court, who is authorized by law to administer oaths or certify documents in that place and who also subscribes their signature and affixes to, or impresses on, the assignment or licence their official seal or the seal of the court of which they are a judge.

34. Paragraphs 62(1)(a) and (b) of the Act are replaced by the following:

(a) for the purposes of paragraph 30.01(5)(d), respecting measures, which may vary according to circumstances specified in the regulations;

(b) for the purposes of paragraph 30.02(3)(d), respecting measures, which may vary according to circumstances specified in the regulations;

(c) prescribing the form of a notice of claimed infringement referred to in subsection 41.25(2) and prescribing information to be contained in it;

(d) prescribing anything that by this Act is to be prescribed by regulation; and

(e) generally for carrying out the purposes and provisions of this Act.

35. Subsection 67.1(4) of the Act is replaced by the following:

(4) If a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

(a) the infringement of the rights, referred to in section 3, to perform a work in public or to communicate it to the public by telecommunication;

(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or

(c) the recovery of royalties referred to in section 19.

36. Subsection 68.2(2) of the Act is replaced by the following:

(2) No proceedings may be brought against a person who has paid or offered to pay the royalties specified in an approved tariff for

(a) the infringement of the right to perform in public or the right to communicate to the public by telecommunication, referred to in section 3;

(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or

(c) the recovery of royalties referred to in section 19.

37. Subsection 78(1) of the Act is replaced by the following:

78. (1) Subject to subsection (2), for the purposes of subsections 32.4(2), 32.5(2), 33(2), 33.1(2) and 33.2(2), the Board may, on application by any of the parties referred to in one of those provisions, determine the amount of the compensation referred to in that provision that the Board considers reasonable, having regard to all the circumstances, including any judgment of a court in an action between the parties for the enforcement of a right mentioned in subsection 32.4(3) or 32.5(3).

TRANSITIONAL PROVISIONS

38. (1) The repeal of section 10 of the Copyright Act by section 4 does not have the effect of reviving copyright in any photograph in which, on the coming into force of that section 4, copyright had expired.

(2) In any case in which, immediately before the coming into force of section 4, a corporation is deemed, by virtue of subsection 10(2) of the Copyright Act as it read before the coming into force of that section 4, to be the author of a photograph in which copyright subsists at that time, the copyright in that photograph continues to subsist for the term determined in accordance with sections 6, 6.1, 6.2, 9, 11.1 or 12 of the Copyright Act as if its author were the individual who would have been considered the author of the photograph apart from that subsection 10(2).

(3) In any case in which an individual is deemed to be the author of a photograph by virtue of subsection 10(2) of the Copyright Act as it read before the coming into force of section 4, the individual continues, after the coming into force of that section 4, to be the author of that photograph for the purposes of the Copyright Act.

39. Subsection 13(2) of the Copyright Act, as it read immediately before the coming into force of section 5, continues to apply with respect to any engraving, photograph or portrait the plate or original of which was commissioned before the coming into force of that section 5.

40. Subsections 23(1) to (2) of the Copyright Act, as enacted by section 12, do not have the effect of reviving the copyright, or a right to remuneration, in any performer's performance or sound recording in which the copyright or the right to remuneration had expired on the coming into force of those subsections.

COMING INTO FORCE

41. The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council.