September 13, 2009

VIA Email (***info@copyrightconsultation.gc.ca***)

The Honourable Tony Clement, P.C., M.P.
Minister of Industry
5th Floor, West Tower, C.D. Howe Bldg.
235 Queen St.
Ottawa, Ontario K1A 0H5

- and -

The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage, and
Official Languages
15 Eddy St.
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Dear Ministers:

Re: Copyright and Privacy

We are a group of Canada’s leading public-interest oriented organizations and academic privacy and security experts concerned with how changes to Canada’s copyright laws will implicate privacy, security, and freedom of expression in Canada.

This is not the first time that Canada’s privacy community has spoken out on this issue. Each past government attempt at amending the *Copyright Act* has raised serious concerns for us, and we have articulated these concerns in past letters and in greater detail in a Background Paper on the subject.[1] We enclose a copy of that Background Paper for your review. The Federal Privacy Commissioner, as well as the Information and Privacy Commissioners of Alberta, British Columbia, and Ontario have expressed similar concerns in relation to past incarnations of copyright bills.[2] Together, this body of communications represents a remarkable consensus

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[1] See our background paper on the issue: Intellectual Privacy, *Background Paper: Critical Privacy Issues in Canadian Copyright Reform*, [“Background Paper”] May 17, 2006, available online at: <http://www.cippic.ca/uploads/copyright-law-reform/Backgrouner-Copyright_and_Privacy.pdf>. We further refer you to: Canada’s Privacy Community, *Open Letter Re: Copyright Reform and Canada’s Privacy Community*, May 17, 2006, available online at: <http://www.cippic.ca/uploads/copyright-law-reform/Open_Letter-Copyright_and_Privacy-17May06.pdf>, Open letter; Canada’s Privacy Community, *Open Letter Re: Copyright Reform and Canada’s Privacy Community*, January 21, 2008, available online at: <http://www.cippic.ca/uploads/copyright-law-reform/Open_Letter-Copyright_and_Privacy-21Jan08-Final.pdf>.

[2] For example, see Office of the Privacy Commissioner, *Letter to CIPPIC Re: Privacy and DRM*, November 24, 2004, available online at: <http://www.cippic.ca/uploads/copyright-law-reform/LF_Privacy_Commissioner_re_copyright_and_DRM_&_TPM_-_Nove_24_04.pdf>, Information and Privacy Commissioner of Ontario, “Privacy and Digital Rights Management (DRM): An Oxymoron?” (October 2002), < http://www.ipc.on.ca/images/Resources/up-1drm.pdf >; Information and Privacy Commisioner of British Columbia, “*Letter to Jennifer Stoddart Re:Digital Rgiths Management – OIPC File No. 23366*, November 29, 2004, available online at: < http://www.cippic.ca/uploads/copyright-law-reform/lf_bc_privacy_commissioner_re_privacy_commissioner_of_canada_and_copyright.pdf>. These Privacy Commissioners,

among Canadian privacy experts as to the potential hazards posed by certain copyright proposals. Today, we write again to ensure that these concerns are not ignored in the current policy debate.

We wish to address three areas of proposed copyright revision:

1. Overbroad extension of Digital Rights Management ("DRM") anti-circumvention protections;
2. Increased mandate for ISPs and other Internet intermediaries in enforcing copyright; and
3. Transfer of copyright ownership from subjects of photographs to photographers.

We will address each issue in turn and conclude with recommendations for accommodating each concern.

1. Overbroad extension of DRM anti-circumvention protections

We share a concern that the application of new digital technologies to subject matter governed by copyright is placing a great deal of personal information within reach of copyright interests. There has been great pressure for content distributors to extend technological control over private uses of content to ever-greater extents, especially in the online context. Left unchecked, such technologies allow copyright holders to access, track and control personal information in new and intrusive ways, all in the name of protection of copyright and the pursuit of "new business models".[3]

These technologies in and of themselves threaten privacy – a fundamental right. As noted by Justice LeBel, copyright enforcement technologies of this nature:

> tend to reveal core biographical information about a person. Privacy interests of individuals will be directly implicated where owners of copyrighted works or their collective societies attempt to retrieve data from Internet Service Providers about an end user's downloading of copyrighted works. We should therefore be chary of adopting a test that may encourage such monitoring.[4]

DRMs also create security vulnerabilities in host computers that expose users to even greater invasions of privacy and potential harms. Sony BMG's "rootkit" DRM is one example of an invasive DRM that has received much negative attention, but this example is by no means atypical.[5] Indeed, many DRMs communicate unidentified information to third parties while

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as well as the Information and Privacy Commissioner of Alberta, all followed up on these concerns with letters to government sent during the course of the 2006 copyright reform process, in letters dated May 17, 2006.

[3] See Ian Kerr, " If Left to Their Own Devices…How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy", in M. Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 167-210; Ian Kerr, & Alex Cameron., "Scoping anonymity in cases of compelled disclosure of identity: Lessons from *BMG v. Doe*", in D. Matheson, ed., *Contours of Privacy* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2009) 3-30. See also D. Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing", in M. Geist, Ed., *In the Public Interest: The Future of Canadian Copyright Law*, (Toronto: Irwin Law Inc., 2005)

[4] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers,*["SOCAN"] [2004] 2 S.C.R. 427 (S.C.C.) per LeBel, J., at para. 155.

[5] Similar problems have arisen with the use of DRM on DVDs. See *e.g.* Heise Online, "DVD Copy Protection Creates Security Risk" (14 February 2006), online: <http://www.heise.de/english/newsticker/news/69608>.

content is being accessed, often unbeknownst to users, or meaninglessly communicated in unread End User License Agreements.[6]

Among the most consistent copyright revision proposals proposed by others has been for the creation of "anti-circumvention" laws – legal protection for the technological protection of content. Anti-circumvention laws are problematic from a privacy perspective. Individuals should not face hefty statutory damages for bypassing DRMs for non-infringing purposes such as privacy protection or addressing security concerns. While we acknowledge that some anti-circumvention protection might be unavoidable given international obligations and industry pressure, privacy concerns demand that the approach taken should limit anti-circumvention laws so as to allow for circumvention not aimed at copyright infringement. This includes dealings for purposes that do not infringe copyright law, and circumvention for the explicit purpose of protecting one's privacy.

Further, while current federal data protection legislation places some obligations on organizations to obtain users' knowledge and consent over how their information shall be used, those laws have gaps in coverage and are often, unhappily, honoured more in the breach. It is foreseeable that copyright distributors will abuse the legitimacy granted by proposed copyright changes for their DRMs in order to collect personal information for marketing and other purposes unrelated to copyright protection. This is especially problematic given how difficult it is for the average individual, or even the average privacy advocate, to assess precisely what information is being gathered by DRMs and for what purpose.[7] For these reasons, we suggest that any DRM circumvention protections be accompanied by strict penalties for misuse of such DRMs for illegitimate or undisclosed purposes. We note that the government's Bill C-27 contains one possible means of addressing this issue,[8] but remain concerned that anti-circumvention laws will be put in place before the accompanying safeguards in Bill C-27 come into effect. We also note that there have been calls to diminish the efficacy of provisions aimed at protecting against the types of problems mentioned above, and are concerned that the final product may not effectively address the privacy concerns raised by anti-circumvention laws.[9]

2. Increased mandate for ISPs and other Internet intermediaries in enforcing copyright

Another significant concern involves the greater copyright enforcement role some have envisioned for ISPs and other Internet intermediaries such as blog hosting sites. Any provisions requiring ISPs to monitor the activity of their consumers for infringing content, or even to develop the capacity for doing so, would be an egregious invasion of privacy. The impact of such a requirement would be great, as Canadians will not know when and to what extent their

[6] Canadian Internet Policy and Public Interest Clinic, *Digital Rights Management Technologies & Consumer Privacy*, September 2007, available online at: <http://www.cippic.ca/uploads/CIPPIC_Report_DRM_and_Privacy.pdf>.
[7] Heise, *supra* note 5, CIPPIC, *supra* note 6.
[8] Bill C-27: *Electronic Commerce Protection Act*, available online at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3832885&file=4>, at s. 8.
[9] The Sony rootkit had such vulnerabilities, for example, and the exposure of these led the U.S. Department of Homeland Security to issue a warning against installing any software from audio CDs altogether: U.S. Computer Emergency Readiness Team, "First 4 Internet XCP (Sony DRM) Vulnerabilities" (15 November 2005), online: <http://www.us-cert.gov/current/archive/2005/12/13/archive.html> ["Do not install software from sources that you do not expect to contain software, such as an audio CD."].

activity is being watched. We further question the legitimacy of using ISPs for surveillance with respect to copyright infringement, and our Supreme Court has likewise stated that this is not a role carriers such as ISPs should undertake.[10]

Even milder notice-based proposed amendments to copyright laws should be carefully adjusted to meet privacy concerns. While we concede that copyright holders should not be prevented from gaining identities of infringers in cases of actual infringement, safeguards must be put in place to prevent erosion of online anonymity on an arbitrary basis.[11] Our courts have repeatedly stated that, while privacy rights should not extend so far as to shield individuals from intellectual property liability, great care must be taken to ensure that the anonymity of the Internet is not shattered at the mere mention of copyright infringement.[12] While there are currently safeguards in place preventing such unwarranted disclosures by ISPs, it seems these protections may not cover other Internet intermediaries such as blog hosting sites or social networking sites.[13] Third parties must be prevented from identifying anonymous users before the prima facie legitimacy of copyright infringement claims have been substantiated in court.

Forcing ISPs to retain personal information of users for excessive periods of time is equally a disproportional response to allegations of copyright infringement. There should be reasonable limits placed on any retention requirements placed on ISPs for identification information of accused infringers.[14]

3. Transfer of copyright ownership from subjects of photographs to photographers

Finally, proposals to change the default rules of ownership of copyright in consumer-commissioned photographs is an unnecessary copyright grab that raises serious privacy concerns. Ownership of copyright in consumer-commissioned photographs would allow photographers to use such photos without permission from or approval of the consumer. While data protection laws may prevent commercial uses of personal information in such photos, they offer no protection for artistic and non-commercial uses of the images contained therein. And there is no need to deprive individual consumers of the privacy protections offered by current copyright laws in this sphere. After all, professional photographers, not consumers who are often ignorant of the intricacies of copyright law, are best placed to bargain for copyright if they desire it. The proposed amendments are aimed at alleviating problems emerging in commercial photography, and there are various alternative solutions available that would address these concerns without impacting on individual rights in consumer-commissioned photographs.[15]

Recommendations

[10] *SOCAN, supra* note 4.

[11] *Warman v. Wilkins-Fournier*, [2009] O.J. No. 1305 (Ont. S.C.) – currently, there are NO safeguards in place when the information is sought from a party as opposed to a third party.

[12] *BMG Canada v. John Doe,* [2005] 4 F.C.R. 81 (F.C.A.), *Irwin Toy Ltd. v. Doe*, [2000] O.J. No. 3318 (Ont. S.C.).

[13] *Warman*, *supra* note 11.

[14] See Background Paper, *supra* note 1, where we noted that the 90 day retention period found in Bill C-60 was unreasonably long.

[15] See Canada Standing Senate Committee on Social Affairs, Science and Technology, *Minutes of Proceedings*, (November 3, 2004), where the Committee Chair noted that such reforms where "not intended" to apply to consumer-commissioned photographs.

We ask that the privacy concerns raised here and expressed in greater detail in our background paper be addressed in the copyright policy formation process. The Privacy Commissioner of Canada has in the past offered to consult with government on copyright policy. We ask that you do so at this stage as well. In addition, we make the following broad recommendations and suggestions:

- Limit the scope and reach of anti-circumvention laws so as to allow for circumvention not aimed at copyright infringement, including circumvention for the purpose of advancing security research.
- DRM circumvention protections should be accompanied by strict penalties for misuse of such DRMs for illegitimate or undisclosed purposes.
- Amendments should be put in place preventing Internet intermediaries from disclosing the identities of alleged copyright infringers in response to accusations that have not been substantiated in court.
- Any retention requirements placed on ISPs should be limited to a reasonable period of time.
- Any change in the ownership rules for commissioned photographs should only apply to commercial photographs, not to consumer-commissioned photographs.

The steps outlined above should allow for a balanced copyright bill that nonetheless respects Canadians' privacy rights. We look forward to working with you in achieving such a bill.

Sincerely,

Canada's Privacy Community

(list of signatories attached)

Encl.

Canada’s Privacy Community

BC Civil Liberties Association

BC Freedom of Information and Privacy Association

Canadian Federation of Students

CIPPIC, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

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