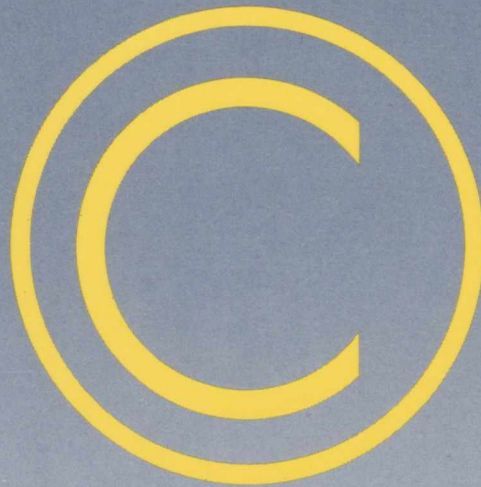


# A CHARTER OF RIGHTS FOR CREATORS



CANADA  
HOUSE OF COMMONS

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**REPORT OF THE SUB-COMMITTEE  
ON THE REVISION OF COPYRIGHT**

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**STANDING COMMITTEE  
ON COMMUNICATIONS AND CULTURE**

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GABRIEL FONTAINE, M.P.  
CHAIRMAN

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OCTOBER 1985

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HOUSE OF COMMONS

CHAMBRE DES COMMUNES

Issue No. 27

Fascicule n° 27

From Thursday, June 27, 1985  
to Tuesday, September 24, 1985

De jeudi 27 juin 1985  
au mardi 24 septembre 1985

Chairman Gabriel Fontaine

Président Gabriel Fontaine

*Minutes of Proceedings and Evidence of the  
Sub-committee of the Standing Committee on  
Communications and Culture on*

*Procès-verbaux et témoignages  
du Sous-comité du Comité permanent des  
communications et de la culture sur*

The Revision of  
Copyright

La révision du droit

**A CHARTER OF RIGHTS  
FOR CREATORS**

RESPECTING:

CONCERNANT:

From September to October  
Revision of the Canadian  
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De Septembre à Octobre  
Révision de la Loi canadienne sur le  
droit d'auteur

INCLUDING:

Y COMPRIS:

The FIRST and SECOND REPORTS  
to the House

Les PREMIER et DEUXIEME RAPPORTS  
à la Chambre

First Session of the  
Thirty-Ninth Parliament, 1984-85

Première session de la  
 Trente-neuvième législature, 1984-1985

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FOR CREATORS

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First Session of the  
Thirty-third Parliament, 1984-85

Première session de la  
trente-troisième législature, 1984-1985

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## SECOND REPORT OF THE SUB-COMMITTEE TO THE HOUSE

Thursday, October 10, 1985

The Sub-committee of the Standing Committee on Communications and Culture on the Revision of Copyright has the honour to present its

### SECOND REPORT

According to its Order of Reference dated Thursday, January 24, 1985, your Sub-committee was formed on Thursday, February 7, 1985 to consider all aspects of the Revision of Copyright. According to its Orders of Reference dated Friday, May 10, 1985 and Wednesday, September 25, 1985, your Sub-committee has the honour to present its Second Report which reads as follows:

(Text enclosed)

Your Sub-committee has adopted this report, including 137 recommendations and requests the Government to study whether it is advisable to enforce the said recommendations and, in accordance with item 70 (16) of the Standing Orders, requests the Government to table a global answer to this report.

A copy of the Minutes of Proceedings and Evidence relating to the Sub-committee on the Revision of Copyright (*Issues 1 to 26, and 27 including the Second Report*) is tabled.

Respectfully submitted,

**GABRIEL FONTAINE**  
Chairman

## ACKNOWLEDGEMENTS

From the very beginning of its deliberations in February 1985 and throughout the different report-writing stages, the Sub-Committee has received the co-operation and support of a great many people. We wish to thank each and everyone who contributed to the Sub-Committee's work.

First, the members of the Sub-Committee wish to extend their gratitude to all the individuals who appeared as witnesses (*see Appendix C*) as well as those who, while they did not testify, submitted written briefs. Their contribution proved invaluable to us.

The Sub-Committee also wishes to express its appreciation to the central staff for their excellent work and commitment and for the long hours devoted to this study. In particular, we wish to thank the Clerk of the Sub-Committee, Richard Dupuis, who ably scheduled the activities and managed the administrative, financial and logistical aspects of the Sub-Committee's work. We also appreciate the contribution of Francine-Michelle Therrien, Secretary to the Clerk, assisted by Jean Beauchamp, who has worked faithfully for the Sub-Committee since the beginning of its mandate.

The Sub-Committee owes a special debt of gratitude to its advisers for their dedication and great expertise. We thank Claude Brunet from Montreal, Claude Forget from Montreal, Wanda Noel from Ottawa, and Claude Rhéault from Quebec City. We also appreciate the valuable contribution made by Monique Hébert, Terrence Thomas and Margaret Young from the Research Branch of the Library of Parliament.

The Sub-Committee also wishes to acknowledge the contribution of Lucie Daniel and Karen Kluz who, with great skill and patience, typed and re-typed the text of the Report. We also thank Jacqueline Filotas, assisted by Martin Rochon, for her excellent work on the French version of the Report. The Sub-Committee thanks its interpreters for their marvellous work at the public hearings.

Finally, the Sub-Committee would like to thank the staff of the Committees and Private Legislation Branch, the Translation Bureau of the Secretary of State and the other services of the House of Commons for their administrative and technical assistance.



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## PREFACE

This Report recommends a Charter of Rights for Creators.

Canada's *Copyright Act*<sup>1</sup> has existed for more than 60 years. It is imperative that we revise this antiquated copyright law which speaks of "mechanical contrivance," and "perforated rolls" as used in player pianos and, in its French version, refers to "radiophonie" to describe the technology of radio and television. When the Act was drafted, computers, photocopiers, satellites, cable television and video cassette recorders were unknown.

Advances in technology are now so rapid that the revision process must not only cope with the problems caused by developments since 1924; a new law must also keep an eye to the quickening pace of the use and exploitation of intellectual property to the end of the twentieth century, and beyond. The constantly changing technology has drastically altered the relationship between creators and the users of their works in today's society.

Copyright affects everybody. It gives basic protection to individual creators who work with their minds and their imaginations. Of course copyright does not stand alone as a policy tool to develop and encourage Canadian culture. Copyright is only one element of cultural policy. Even with a new copyright law it will still be necessary to use other policy tools to enhance the status of creators.

Copyright is also big business. Almost 500,000 Canadians are directly employed in major commercial industries such as broadcasting, book publishing, journalism, film and television production, music publishing, sound recording, and advertising. All these industries depend on the law of copyright to protect the works that are the basis of their commercial existence.

<sup>1</sup> R.S.C. 1970, c. C-30.



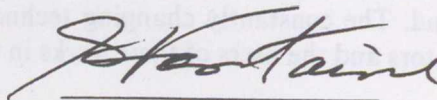
It was against this background — recognizing the cultural and economic importance of copyright — that an all-party Sub-Committee of the House of Commons Standing Committee on Communications and Culture spent 10 months examining copyright revision. The Sub-Committee received over 300 written briefs, and heard from 111 witnesses at public hearings in Ottawa, Toronto and Montreal. Poets, artists, librarians, lawyers, publishers, the handicapped, musicians, dancers, cable operators, broadcasters and computer companies were among those who appeared at the hearings. Their views on copyright varied widely.

A recurring theme, however, both at the hearings and later during the Sub-Committee's exhaustive weighing of the various positions, was the obligation of any new *Copyright Act* to support the rights of the creator. The Sub-Committee thinks that because of the special contribution creators make to Canadian society, they must be fairly rewarded for the constantly increasing number and variety of uses of their work. Indeed, this is the first of the 137 recommendations of the Sub-Committee:

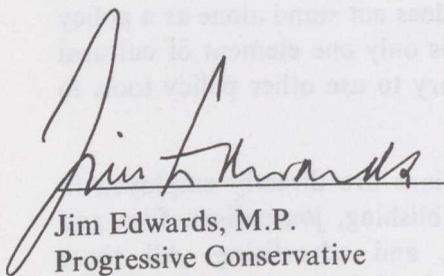
**The *Copyright Act* should be expanded to include new property rights which reflect modern forms of creative activity and the various ways of communicating the fruits of that activity.**

In its work, the Sub-Committee has been spurred on by many groups and individuals to be bold and innovative in the development of a Canadian copyright system which would provide strong support to creative activities and to this country's cultural evolution. The Sub-Committee welcomed that challenge. The *Copyright Act* has the potential — given extensive revision — of becoming a Charter of Rights for Creators.

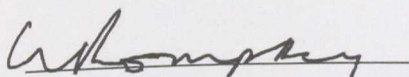
This Report is the result of the deliberations of five Members of Parliament who comprised the Sub-Committee, ably assisted by other Members with an interest in copyright. The Sub-Committee wishes to thank Robert Pennock (Progressive Conservative, Etobicoke North, Ontario) in particular for his interest and active participation. The Sub-Committee also wishes to thank the staff of the Sub-Committee who provided outstanding expert advice.



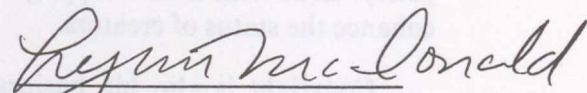
Gabriel Fontaine, M.P.  
Chairman  
Progressive Conservative  
Lévis (Quebec)



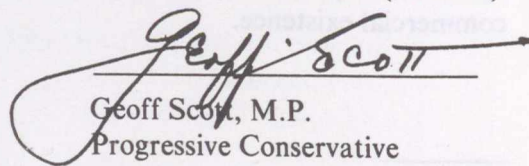
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Broadview-Greenwood (Ontario)



Geoff Scott, M.P.  
Progressive Conservative  
Hamilton-Wentworth (Ontario)

## BACKGROUND AND PHILOSOPHY

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### A. SUB-COMMITTEE ON THE REVISION OF COPYRIGHT

There have been increasing demands over the years from the arts community to revise the *Copyright Act*. Revision has proceeded slowly and concern over this lack of progress has resulted in a great deal of interaction between the government and the arts community on how the law should be revised. The arts community has made a substantial contribution to the revision process and was instrumental in bringing copyright revision to the stage where it could be considered by Parliament.

Copyright has been cited as one of the immediate concerns of the present government. The November 8, 1984 economic statement issued by the Honourable Michael H. Wilson, Minister of Finance, included a discussion of copyright under the heading "Economic Regulation and Intervention":<sup>1</sup>

Canada's *Copyright Act*, unchanged since 1921, has been overtaken by new technologies. This has created ambiguities and uncertainties and has, in some cases, left Canadian copyright owners with less protection or compensation than would be available to them in other countries which have more modern copyright laws. Impacts are particularly significant for the vitality of our cultural and computer services industries. This is a real obstacle to economic growth, particularly in an economy which is increasingly service-oriented, with a growing role for the creation, transmission and processing of information, and in which automation may be a powerful source of productivity gains.

A broad-based update of Canadian copyright legislation is needed to create an appropriate and balanced copyright environment. Much preparatory work has already been done and extensive consultation will continue.

---

<sup>1</sup> *A New Direction for Canada: An Agenda for Economic Renewal*, Canada, Department of Finance, 1984, 56.



In keeping with the importance of copyright, the present government referred all matters of copyright revision to the Standing Committee on Communications and Culture on January 24, 1985. The Committee then formed the all-party Sub-Committee, composed of five members of Parliament, and empowered it to study all aspects of copyright, including the proposals contained in the previous government's white paper on copyright revision.

## B. HISTORY OF REVISION

Although the Sub-Committee examining copyright revision was formed only in early 1985, the discussion of revision has been taking place for over 30 years. In 1954 a Royal Commission on Patents, Copyright, Trade Marks and Industrial Design was created.<sup>1</sup> The Ilsley Commission, which reported on copyright in 1957, was appointed to assess whether federal legislation relating to intellectual property afforded reasonable incentives to creative effort while at the same time not limiting public access to the results of creative effort. The notion of striking a balance between the rights of creators and the needs of users recurs throughout the discussion of the revision of copyright.

The Ilsley Commission was heavily influenced by developments in the United Kingdom — the Gregory Report of 1951 and the resulting *Copyright Act* in 1956. The Commission delayed its Report in order to study the United Kingdom Act and the debate surrounding it. During the period of the Ilsley Commission deliberations, several nations undertook revisions to their copyright law, and two major nations — the United Kingdom as mentioned above, and France a year later, in 1957 — introduced new legislation. Other nations had lengthy lags between formal studies of copyright and revised legislation. In Canada, the recommendations of the Ilsley Commission were never acted upon, although the Report influenced subsequent discussion of the subject.

In the mid-sixties the federal government asked the Economic Council of Canada to report on a number of issues, including patents, trade marks, copyright and registered industrial designs. The *Report on Intellectual and Industrial Property* was issued in January 1971.<sup>2</sup> The Council was of the view that intellectual property should be included in any general discussion of economic policy. The economic aspects of copyright were highlighted, with consumers' interests an important focus of the debate. Two members of the Council, representing labour interests, did not concur completely and felt the Report should have been more pro-creator. The economic approach also led to concerns about the balance of payments implications of copyright, concerns that recur to this date.

When the Economic Council Report was published, the Minister of Consumer and Corporate Affairs announced the formation of a group to review the Report and make recommendations for new copyright legislation. The result was the study *Copyright in Canada — Proposals for Revision of the Law*.<sup>3</sup> This study, expressing the personal views of

<sup>1</sup> Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright*, Queen's Printer, Ottawa, 1957.

<sup>2</sup> Economic Council of Canada, *Report on Intellectual and Industrial Property*, Ottawa, 1971.

<sup>3</sup> A.A. Keyes and C. Brunet, *Copyright in Canada — Proposals for Revision of the Law*, Queen's Printer, 1977.



its authors, A.A. Keyes and C. Brunet, made creators' rights its central preoccupation. Although it was unabashedly pro-creator and emphasized the legal, rather than economic, aspects of copyright, the study took into account the Council's concerns about the international economic results of any change in copyright.

Following this study, the Department of Consumer and Corporate Affairs commissioned a number of independent studies on various aspects of copyright. Between 1980 and 1983, the department published 14 studies on selected issues.

Building on the research of three decades, the previous government through the Ministers of Communications and Consumer and Corporate Affairs issued, in May 1984, *From Gutenberg to Telidon — A White Paper on Copyright*.<sup>1</sup> Following the change of government, *From Gutenberg to Telidon* was referred to as a document which did not necessarily embody government policy. The general thrust of *From Gutenberg to Telidon* found favour with the Sub-Committee.<sup>2</sup> The Sub-Committee agrees with its assertions that the *Copyright Act* is seriously outdated, that copyright must continue to be regarded as private property, that revisions must respond to technological change and that new rights and subject matters are now essential.

### C. A CHARTER OF RIGHTS FOR CREATORS

In addition to the specific recommendations to be found later in this Report, the Sub-Committee wishes to express in more general terms the approach behind its efforts to modernize and improve the Canadian *Copyright Act*. The need to modernize is easily understood; the present Act was adopted before the onset of a period of extremely rapid technological change. The importance of updating such an ancient piece of legislation is obvious. One should say, however, that the 1924 Act, inadequate as it is today, has proved surprisingly adaptable to an evolving environment, considering that so few of the new media for creation and communication were known or in use at the time the Act was adopted. Before moving on, it is appropriate to pay homage to our legislators of a bygone era and to the flexibility and ingenuity of our legal system.

Yet, the task before this Sub-Committee is not one of mere updating. There is a need to give a new emphasis to the contribution of creators to our national life. Sixty years ago what might have seemed, to a country barely emerging from colonial status, as wishful thinking is now a widely-acknowledged reality. Canadian writers, composers, musicians, film-makers, artists, performers and creative workers of all description exist in numbers and in a quality such that the *creation* of a Canadian culture need no longer be a focus for policy: the issues are now to give it adequate recognition, to maintain its vitality and to expand its appreciation both in this country and abroad.

<sup>1</sup> The Department of Communications and the Department of Consumer and Corporate Affairs, Supply and Services Canada, 1984.

<sup>2</sup> Despite the fact that *From Gutenberg to Telidon* discusses over 100 issues to be decided in the revision process, a significant number of them are non-contentious, either because they are technical or because a consensus for change has emerged in the many previous reports and studies. Thus, where this Report does not explicitly deal with an issue raised in *From Gutenberg to Telidon* it may be assumed that the Sub-Committee is not opposed to its proposals.



It is with these purposes in mind that the Sub-Committee set about its task of revising the copyright law. In the process it has been guided by the following objectives:

1. Give more emphasis and reward to creative activity;
2. Clarify and extend moral rights;
3. Make the application of copyright principles as general as possible;
4. Avoid improper extensions of copyright protection;
5. Recognize the major importance of cultural enterprises.

Each of these general objectives will be examined in turn.

#### 1. Give More Emphasis and Reward to Creative Activity

Many groups that appeared before the Sub-Committee stressed the following: what Canada does in the revision of copyright will show how much value it attaches to the contribution of creators to the national life. The *Copyright Act* is seen as a very significant symbol of the country's scale of values and as a signal to creators of their social merit or worth.

A similar concern seemed to inspire the Minister of Communications when he appeared before the Sub-Committee. He said (translation):<sup>1</sup>

Copyright revision is one of my highest priorities as Minister responsible for Communications and Cultural Affairs ... We must therefore create in Canada a climate where culture can thrive.

The process of revising the *Copyright Act* undoubtedly gives rise to high expectations — so much so that one is tempted to issue a word of caution. Canada's culture cannot rest on this one pillar of public policy; other ingredients are needed because the *Copyright Act*, albeit of major importance, can only provide an indirect stimulus. Copyright contributes to the environment in which creative activity takes place, but everyone recognizes that it cannot generate that activity.

This being said, the Sub-Committee agrees with those for whom the adoption of a substantially revised *Copyright Act* is seen as an occasion to make a statement of our pride in the achievement of Canadian authors and performers and in the coming of age of this country as a place where cultural pursuits and creative activity are fully recognized.

Naturally, many witnesses before the Sub-Committee were not concerned with a merely symbolic statement about the rightful place of creators in Canadian society. The Sub-Committee shares with those witnesses the conviction that such symbols have meaning only if they are reflected in the income-earning potential of individual authors, composers, performers, and the many other creative individuals working in Canada.

---

<sup>1</sup> *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, 1:20.



Creation is not, generally speaking, sufficiently economically rewarding, even granting the difficulty of defining what would be "sufficient." Creators readily engage in most forms of creative activity; there are very few formal barriers. Given the large number of individuals who are actively involved in creative activity, there will be few who can make a living out of it and fewer still who can derive a large income.

Copyright cannot remedy this situation but it can help. Copyright revision can remove what may be arbitrary or unnecessary restrictions which keep creators from fully benefitting from the use of their works.

There is an important characteristic of copyright as an income-generating mechanism: it rewards popular success rather than just effort. In this sense copyright provides a very democratic reward system because its outcome is the result of a cumulative process of choices — and of the expression of preferences — by thousands, even millions, of individuals. The copyright system constitutes a running poll about which works and which performers are of interest. Neither the *Copyright Act* nor the courts that interpret it can impose standards of taste.

From an economic perspective, the copyright system helps reinforce and sustain those who develop and nurture the cultural goods that the nation approves of and enjoys. These cultural goods are as varied as the tastes present in the communities making up the nation. No single person or group is the arbiter of taste. Copyright is the non-bureaucratic, non-technocratic tool of cultural policy. It does not stand alone — but it is indispensable to any cultural policy that is based on diversity, freedom of expression and the creation of works which express our culture.

Creative activity in Canada takes place under a "mixed system." There exist a number of official cultural programs that allocate funds on the basis of criteria not related to those that would trigger copyright payments. This Sub-Committee would like to reinforce the copyright element of this mixed system, the element which is characterized by relative freedom and diversity.

A note of caution: optimism must be tempered with realism. The *Copyright Act* remained essentially unchanged during a 60-year period coinciding with the fastest evolution in all the techniques related to creative expression. The unrevised law did not prevent a remarkable flowering of Canadian creativity. It is sometimes claimed that a revised *Copyright Act* will usher in a new era of Canadian cultural production. The Sub-Committee would certainly hope that this optimistic prediction comes true but realism invites moderation.

Nevertheless, realism does not dampen the commitment to write a new Charter of Rights for Creators. The question is not whether it should be done, but how? A piece of legislation is not, after all, a vehicle for sweeping philosophical statements but must provide predictable answers to concrete problems. Hopes have been voiced before the Sub-Committee the implications of which would be to sweep away existing formulations considered too restricted and specific, replacing them with radical general statements of intent.

At the risk of disappointing those who are unfamiliar — and impatient — with the legal drafting style, one has to recognize that legislation is an area where manner of expression



must be distinguished from content. The content that the Sub-Committee recommends should be included in the revised legislation contains very important substantive changes. For instance, many new rights ought to be given recognition for the first time in Canada: retransmission rights, performers' rights in their performances, broadcasting rights in sound recordings, rental rights, exhibition rights, as well as rights in computer programs, in translations, and in published editions.

The challenge in most of these instances is to expand the field of application of copyright principles without sacrificing established rules and precedents any more than necessary. The advantage of jurisprudential continuity resides in the savings that will accrue to creators in not having to go to court to test, at their own expense, the meaning of untried provisions.

## RECOMMENDATION

- 1. The *Copyright Act* should be expanded to include new property rights which reflect modern forms of creative activity and the various ways of communicating the fruits of that activity.**

### 2. Clarify and Extend Moral Rights

There is more at stake in the exploitation of a work than economic reward. Creative works are very much the expression of the personality of their authors. There is an identification between authors and their works.<sup>1</sup> The Sub-Committee agrees with the many witnesses who stated that creators cannot be fully protected unless their moral rights are recognized and enhanced.

First and foremost, the Sub-Committee would like to state that, in its view, moral rights should have as much importance as economic rights. This, unfortunately, does not appear to be the case under the present Act which identifies moral rights as being "independent from copyright," as if they were not part of copyright itself.<sup>2</sup> Worse, the French version of the Act does not even refer to them as rights, but as mere options<sup>3</sup> and privileges.<sup>4</sup> The Sub-Committee disagrees strongly with this treatment of such an integral part of copyright and accordingly recommends that the new Act fully recognize that moral rights are as important as economic rights. Consequently, all remedies for infringement of an economic right should also be available for infringement of a moral right.

Another consequence of the language used in the present Act is that moral rights appear to be protected only during the life of the author rather than the usual term of life of the author plus 50 years. If moral rights are to be recognized as being as important as economic rights, the term of protection should be the same.

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<sup>1</sup> In French the word for "authorship" is "paternité."

<sup>2</sup> *Copyright Act*, section 12(7).

<sup>3</sup> "faculté"

<sup>4</sup> "privilège"



Mere clarification of the status of moral rights under the present law is not sufficient. The Sub-Committee agrees with the numerous witnesses who urged that moral rights be expanded. Recommendations are therefore made for additional moral rights.

One such new moral right arises from the realities of our consumer society. We live in an advertising age. No one would dispute that advertisers must obtain a person's consent before using that person to endorse a product. Individuals cannot be forced to publicly endorse products, services, causes or institutions against their will. But such a situation might occur indirectly where the individual is an author and a work is used without the author's consent as part of an advertisement, even though a publisher or collective has licensed the use. The traditional rights of reproduction or radio communication may not be sufficient to control such uses as they may be owned by third parties who have no particular interest in protecting the personality of the author.

For example, a publisher might grant a licence for the reproduction of an artistic or literary work as part of an advertisement for a pizzeria or a new automobile. A performing right society may have granted blanket licences for the radio communication of all musical works in its repertoire and a licenced broadcaster can use a certain musical work as background to a commercial or other promotion. If the promotion is pre-recorded, the consent of the copyright owner is necessary. But under current law, if it is carried live, no authorization is required.

The Sub-Committee believes that such uses go beyond the normal economic exploitation of creative works and that authors alone should have the right to decide whether they wish, even indirectly through the use of their works, to endorse a particular product, service, cause or institution. It is therefore recommended that a new moral right be introduced to allow authors themselves to authorize such uses of their works.

Witnesses before the Sub-Committee also supported the recommendation in *From Gutenberg to Telidon* that unauthorized modification of the original of an artistic work should be an infringement of the moral right of integrity, even in the absence of evidence of prejudice to the artist's honour or reputation.<sup>1</sup> The Sub-Committee agrees that this recommendation should be adopted, together with its limitations relating to physical relocation, alteration of the structure containing the work and legitimate restoration and preservation activities.

The Sub-Committee wishes to make clear, however, that respect for works of the mind and their creators should not take the form of paternalism. Creation is, after all, one of the most self-assertive pursuits that can be imagined, precisely because it is a process fraught with considerable risk. Artists and other creators will always have to go through a struggle in which many fail and where there cannot be any guarantee of success.

Freedom is vital to the creative environment. Concerns expressed that hard-pressed and non-established creators may be tempted to give away too much control over their works are well meant, but lead to undesirable constraints. All copyright rights — economic as well as moral — should be assignable or waivable. It is through negotiations about rights that

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<sup>1</sup> Pages 26-27.



creators derive benefit from their works. What is important is that these rights be divisible and separable; each creative work gives rise to a bundle of rights and no more need be — or should be — assigned than is required for the purposes at hand. Associations of creators have — more than the legislation — an important educational and advisory role to play for their members in this regard.

## RECOMMENDATIONS

2. **The revised law should recognize moral rights as an integral part of copyright.**
3. **All remedies for infringement of an economic right should be available for infringement of a moral right.**
4. **The term of protection for moral rights should be the same as the term of protection for economic rights.**
5. **The new Act should provide a moral right to authorize the use of any protected work in association with products, services, causes or institutions.**
6. **The revised Act should provide a moral right to prevent any modification of the original of an artistic work, including an element of a limited edition thereof, even in the absence of evidence of prejudice to the author's honour or reputation.**
7. **The right should be limited in order to permit the physical relocation of the work, the alteration of a structure containing the work, and legitimate restoration and preservation activities.**
8. **Unimpeded negotiations concerning the use and assignment of rights should be preferred whenever possible over compulsory arrangements, prohibitions and other predetermined outcomes.**

### 3. Make the Application of Copyright Principles as General as Possible

It is perhaps natural for those who exercise legislative authority to wish to assume for themselves a status somewhat above the law. The temptation ought to be resisted; the *Copyright Act* should apply to the Crown, and governments in Canada should be required to comply with it. The point is more one of form than of substance because no Canadian government has been using protected works without authorization or payment. That compliance, however, has been voluntary because, unless specifically provided for, a statutory obligation does not apply to the Crown. Because the revision of the *Copyright Act* constitutes an occasion to make a statement about the importance of works of the mind and intellectual property rights, it would seem entirely appropriate to make explicit that the same obligations apply to government as apply to everyone else.



Earlier in the revision process it had been suggested that the government should be able to make unrestricted use of protected works in case of national emergency. The Sub-Committee is not convinced that there is any need to provide for national emergencies in the *Copyright Act*. Should such an occasion unfortunately arise, one can assume that extraordinary powers extending to many areas far beyond the *Copyright Act* would be needed. Intellectual property rights should not be selected for particular treatment: the same requirements, procedures and principles of fair compensation should apply to them as apply to other property rights.

## RECOMMENDATION

- 9. The Crown in the right of Canada and in the right of every province should be subject to the provisions of the *Copyright Act*. Any exception to the above rule should be included in statutes dealing with emergency powers rather than in the *Copyright Act*.**

In assessing the scope of the application of the copyright system, one must also take a critical look at the other limitations to, and exceptions from, copyright principles. *From Gutenberg to Telidon* suggested substituting a "fair use" rule for the existing "fair dealing" provision of the Act.<sup>1</sup> The fair dealing provision already constitutes an important limitation to copyright by providing that some unauthorized use of intellectual property is permissible as long as it is "fair" and it is done for the purpose of "private study, research, criticism, review or newspaper summary."<sup>2</sup> Substituting a fair use criterion would expand this defence to permit any use whatsoever as long as it did not inflict economic damage on the copyright owner. It is the view of the Sub-Committee that fair use implies that rights in intellectual property are definitely second class rights, very different from rights in physical property.

The Sub-Committee rejects this proposition and takes the opportunity to assert that "ownership is ownership is ownership." The copyright owner owns the intellectual works in the same sense as a landowner owns land. Infringement of copyright is analogous to trespass and the owner in real estate does not have to prove damages before asserting his rights against a trespasser; that does not mean to say that there are no differences at all between ownership in works of the mind and ownership in physical objects, as we shall presently see. However, those differences that do exist are adequately reflected in the fair dealing concept.

The Sub-Committee has taken a hard, critical look at the exceptions under the Act for the benefit of religious organisations, education, agricultural fairs and so on. While the Sub-Committee does not agree with the request of some groups to do away with all exceptions, the number and scope of exceptions have been revised and narrowed. A number of affected groups implied in their testimony that mere inconvenience or cost was reason enough to deny copyright protection. The Sub-Committee disagrees. A strong public purpose must justify any exception from copyright liability; a desire to save money or time is not such a strong public purpose. Quite the contrary: the stronger the purpose, the greater should be the willingness to spend money towards its realization.

<sup>1</sup> Pages 39-40.

<sup>2</sup> *Copyright Act*, section 17(2)(a).



The Sub-Committee's approach to exceptions will be explained in the various sections of the Report dealing with specific issues, but the recommendations with respect to the educational use of protected works, ephemeral recordings, agricultural fairs and others may be seen as instances of a more rigorous approach to exceptions.

#### 4. Avoid Improper Extensions of Copyright Protection

Copyright is essential to creative activity and the country's cultural life. One principle of copyright is that creators must be the owners of the rights to the works they generate, ownership being necessary as an inducement and reward for production. An inappropriate application of this principle can result in an improper extension of copyright protection. The Sub-Committee will first address this issue with regard to Crown copyright.

The processes whereby laws and regulations are enacted or judicial decisions rendered have no need to be stimulated or supported by rights of ownership in the resulting "works." These documents are instruments of government in the widest sense of the word and there is even something repugnant in the notion that they could be "owned" by anyone, including the state. They are truly the common property of the entire nation. Copyright in these works implies a possibility, if not an intent, to restrict access or use. That is not only inappropriate but totally contrary to the purposes these works are intended to serve. Consequently, the Sub-Committee recommends that copyright should be removed from these documents.

Such a course of action would make it unnecessary to determine where copyright in such documents — and in particular judicial decisions — now lies thus sidestepping a highly technical legal argument about the status of judges and the application of the royal prerogative. The *Copyright Act* does not constitute an appropriate instrument to determine or plan how judicial reporting should be done, to decide whether foreign-owned firms should be permitted to edit statutes, regulatory instruments or judicial decisions, nor to facilitate the financing of related activities, whatever their merits. Civil and criminal remedies exist for cases in which misrepresentation, omissions or errors in the reproduction of these documents cause damage or amount to fraudulent use.

### RECOMMENDATION

#### **10. Statutes, regulations and judicial decisions of courts and tribunals at all levels of jurisdiction should be in the public domain.**

In the United States the tradition of open government extends even further: the federal government is not permitted by law to hold copyright in the publications — studies, reports, transcripts of hearings and so on — that it produces. That rule does not extend to state governments.

This law allows private publishers in the United States to appropriate, for instance, tax information or guides published by the Internal Revenue Service. These publishers are able to add value to that basic information by providing an extra dimension such as explanatory information, convenience of purchase or superior presentation and they sometimes charge for



the resulting product four or five times what the government charges for the basic information alone. Since this in no way diminishes the availability of the low-price official edition, the American approach provides more variety and convenience to users. The Sub-Committee likes that approach and favours its adoption in Canada.

In order to implement it, however, a few subordinate issues have to be looked at. First, there arises the question of accuracy. That question does not constitute a material concern (over and above civil and criminal remedies already mentioned) except for a rather narrow range of government documents. For instance, in the United States, the Bureau of Standards holds copyright on standards and tolerances. Strictly speaking a moral right to integrity in certain works would suffice to give government the power to obtain injunctions to stop the distribution of factually incorrect material.

Second, under a legal regime where all government works would be in the public domain some exceptions must be made. Where works are not documents needed for policy debate and evaluation such as films and audio-visual works produced by the Canadian Broadcasting Corporation or the National Film Board copyright protection should apply.

Third, the Sub-Committee is uncertain about the desirability of government statistics having copyright protection. While there is little doubt that national income and other widely used statistics are already, in effect, in the public domain, statistical production in this age of information is tending to become more and more custom-made and, because of that, will increasingly tend to be made available on a cost-recovery basis to particular users. The Sub-Committee makes no judgment on whether or not this development is appropriate, but if it continues it needs to be supported by copyright.

Fourth, the provinces should be consulted with respect to the removal of copyright in provincial public documents. The Sub-Committee thinks that identical rules ought to apply to federal and provincial documents and, while copyright is an exclusive federal matter, it would be preferable to have the support of the provinces before enacting changes that directly affect them.

## **RECOMMENDATIONS**

### **11. There should be no copyright in government works except as follows:**

- (a) a moral right of integrity to ensure the accuracy of works in the nature of standards should be provided;**
- (b) works produced by a Crown agency, such as the Canadian Broadcasting Corporation or the National Film Board, the purpose of which is to entertain rather than to assist in policy debate and evaluation, should be protected; and**
- (c) custom-made statistics and statistical works in restricted circulation should be protected if it is found desirable to continue the practice of making these works available to particular users on a cost-recovery basis.**



- 12. Provincial public documents should have the same copyright status as federal ones and consultations should take place between the two levels of government on this issue.**

Not all documents relating to public policy evaluation and debate are produced by government. The Sub-Committee had direct experience — because of its public consultations preceding this Report — of the uncertain status under the *Copyright Act* of documents submitted to Parliament from private sources. Because the purpose of these submissions is to stimulate public debate and influence policy, the Sub-Committee believes that they should be considered public documents as soon as they are received by the clerk of the House or one of its committees. The same rule should apply to submissions made to all public inquiries.

## **RECOMMENDATION**

- 13. Written submissions sent to Parliament, Legislatures or to public bodies of inquiry should be in the public domain from the time of their receipt.**

The *Copyright Act* affords a very long term of protection as compared with industrial designs or patents and creates a tempting alternative for those who seek ways to limit competition. The fact that copyright does not require registration is an added attraction.

Manufactured articles, whether or not they are made by incorporating an “industrial design” or a “patent,” are nearly always made from drawings and plans. These drawings and plans, if they are “original” in the sense given to this word by the Act, are automatically protected by copyright. It is quite clear, and entirely reasonable, that anyone who would copy such drawings and plans would infringe the copyright of their owners. What is less clear is whether someone who copies the manufactured articles themselves without having access to the drawings and plans is infringing copyright in the drawings and plans. One should bear in mind that copyright does not protect ideas as such but only the expression of the ideas.

Copyright legislation was never intended to prevent competition in goods but only to prevent the unauthorized copying of written, drawn, visual or auditory expressions of ideas. However, cases decided under foreign and Canadian laws are emerging where copyright is given an unreasonable extension which enables commercial interests to use copyright to inhibit industrial competition and international trade.

The Sub-Committee is seriously concerned with this unwarranted extension of copyright principles outside the field of intellectual property. It may not be enough for Canada to put this matter right. The Canadian government should express its concern to its trading partners and seek a multilateral solution to this question. Failing that, it may eventually be necessary to deny copyright protection in the drawings and plans themselves from which industrial articles have been made once these articles have been put on the market. A



recommendation is therefore made later in this Report that the respective scope of application of copyright and industrial design legislation be clarified.<sup>1</sup>

## 5. Recognize the Major Importance of Cultural Enterprises

The twentieth century has seen the emergence of new media of cultural expression: records, films, broadcasts, computers. As opposed to the more traditional vehicles of creative expression such as writing, drama or art, the new media often require more equipment and a large and diversified creative team. Creation is no longer only a craft but also an industry.

Creation has always been a high-risk activity and it remains so today. The traditional writer, composer or artist was not only a creator but also an independent entrepreneur. The emergence of the new media of artistic expression has provoked a distinction between these two roles: some creators have acquired the status of salaried employees and the risk-taking entrepreneurial function has been taken over by an organization.

This change does not just involve new forms of economic organization but reaches into the creative process itself. For example, in a sound recording the creative aspects include the choice of works, the contribution of musicians and performers, the work of sound mixers and so on. Here the contribution of each team member is distinct but not separable from the final product; the outcome is greater than the sum of its parts.

The Sub-Committee believes that cultural enterprises constitute full-fledged participants in the creative process. They are entitled to the same full range of rights as are individual creators. Copyright law already makes plain that the "person" mainly responsible for the creation of a protected work can be a corporate entity. As such it will hold copyright in the work. Several witnesses stressed that corporate entities should also have moral rights in the same way as individual creators. The Sub-Committee agrees with this view.

## RECOMMENDATION

### **14. The revised law should recognize that corporate and co-operative entities can hold and exercise full rights, including moral rights.**

Modern corporate creation gives rise to the issue of first ownership of rights in works produced in the course of employment. People who are hired for their creative talents and skills typically work for cultural enterprises. By working for a salary individual creators shift to the organization the risk inherent in creative activity. The organization becomes responsible for the work being created and being created in a specific way.

The Sub-Committee notes that very few salaried creators have complained about the existing law which vests first ownership in the employer. Those who have expressed concern are mostly independent creators who either assign their rights to publishers or who are not

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<sup>1</sup> Pages 26-27.



employees but are commissioned to produce works. Creators in this latter group do have the first ownership in the works that they produce under commission. The current law contains an exception to this rule for certain types of commissioned works: engravings, photographs and portraits. *From Gutenberg to Telidon* proposed that this exception be eliminated and the Sub-Committee agrees.<sup>1</sup> The differing treatment for commissioned works and works made in the course of employment is consistent with the distinction drawn above between independent creators and members of a creative team: the works of the former are separable from the work of any other creator, while members of a creative team are in effect co-authors of a joint work.

The Sub-Committee believes that this distinction, common in our law, between a “contract for services” and a “contract of service” is appropriate in the law of copyright and should continue. At the same time, witnesses drew to the attention of the Sub-Committee the fact that in some circumstances, especially in the newspaper and broadcasting fields, independent free-lancers are treated as employees. The Sub-Committee feels that the revised law should define the word “employee” so as to eliminate confusion wherever possible.

The Sub-Committee believes that employers should own first copyright in creative works produced by their employees. Such an approach best facilitates the efficient marketing of cultural products because it creates a presumption that a firm assigning rights in a work can validly do so. If employees held first copyright, the validity of the assignment might be open to debate and litigation. This confusion would not be dispelled even if the Act granted employers an automatic licence to use a work in the “normal course” of business, since that expression itself is open to interpretation.

It must be remembered that the Sub-Committee is proposing an arrangement that can be set aside — in any case — by an agreement to the contrary. If employees were to have first copyright, such agreements to the contrary would no doubt be necessary for the vast majority of employees, including office workers who could own copyright in the correspondence and memos of their firm. Such massive documentation and significant costs seem unnecessary and burdensome and would largely confirm the arrangements of the existing law in any case — hardly a worthwhile achievement.

## RECOMMENDATIONS

- 15. First ownership of copyright should be vested in an employer in the case of works created by employees in the course of employment subject, as now, to any agreement to the contrary.**
- 16. The revised law should clarify the meaning of “employee.”**
- 17. The copyright in commissioned engravings, photographs and portraits should vest in the author.**

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<sup>1</sup> Page 31.



WORKS PROTECTED BY COPYRIGHT

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A. WRITING AND PUBLISHING

1. Subject Matter

(a) Published Editions

The publishing industry, with strong support from the writing community, advocated protection of published editions. They argued that protection, as a matter of principle, is only equitable now that modern technology permits the appropriation of the efforts of a publisher by simple copying without the copier having to expend any of the time, money or creative input invested in the edition by the original publisher. The Sub-Committee agrees that an appropriation of this kind offends basic notions of fairness and provides no economic incentive to publish new editions.

Once the principle is accepted, the question arises as to what editions should come within this new category. *From Gutenberg to Telidon* discusses published editions only in terms of works in the public domain.<sup>1</sup> Witnesses before the Sub-Committee took a wider view, arguing that all editions should be protected regardless of whether the work contained in the edition is still protected by copyright or has fallen into the public domain.

Copying of formats, type settings, and layouts can occur with respect to protected as well as public domain works. This can happen, for example, where the rights to a particular work are held by different people. Two examples of this were provided to the Sub-Committee by the Association of Canadian Publishers. In the first case a foreign copyright holder copied the format of a Canadian publisher holding Canadian copyright in a work. In the second, the rights had reverted to an author because of a contractual provision. When the author assigned his rights to another publisher, the new publisher appropriated the existing format. The original publisher under existing law has no remedy.

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<sup>1</sup> Pages 12-13.



In addition to these practical examples there is also a theoretical reason why copyright in editions should extend to both protected and public domain works. One can draw a parallel between the creative activity engaged in by a book publisher as compared to that of a sound recording producer. The former produces a copy of a literary work while the latter produces a recording of a musical work. There is no good reason why one should be protected and not the other. There is no distinction made in copyright protection between a recording of a musical work in the public domain and one still protected by copyright. In both cases the sound recording is protected. Similarly, no distinction should be drawn between the copyright subsisting in an edition of a public domain work and an edition of a work protected by copyright.

Adopting this view would follow the practice of protection of editions in other Commonwealth countries. The United Kingdom and Australia do not distinguish between editions of protected and public domain works. Protection is accorded to editions of dramatic, musical and artistic works and is based on reciprocity. This means that protection is extended to foreign editions if their country of origin offers protection in a similar manner. Such legislation should be enacted in Canada.

As to the length of protection for editions, submissions to the Sub-Committee were not uniform. Although any choice is arbitrary, the Sub-Committee is of the view that a period of 25 years beginning from the date of publication is appropriate. That is the term provided in the United Kingdom and Australia. For reasons of international uniformity, a similar term of protection in Canada is desirable.

Finally, protection for an edition should not extend independently to the type-face used in the work. Type-faces are proper subject matter for industrial design legislation. Protection of the edition should extend to reproduction of the edition or a substantial part thereof.

## RECOMMENDATION

**18. In view of the originality involved in their preparation, editions of literary, dramatic, musical and artistic works should be protected against unauthorized reproduction for 25 years from publication. Protection should be extended on a reciprocal basis to those countries with similar protection.**

### (b) Translations

In their submissions to the Sub-Committee translators pointed out that the present Act does not include translations within the present categories of protected subject matter. They requested that translations be explicitly recognized as literary works.

Existing jurisprudence clearly establishes that translations are protected as literary works, with protection being subservient to the owner of the copyright in the underlying work.<sup>1</sup> The Sub-Committee fully accepts the principle and the merit of protecting translations. Translation of literary works from one language into another requires the very kind of skill and effort which a copyright statute is intended to protect.

<sup>1</sup> *Byrne v. Staust Company*, [1914] 1 K.B. 622.



## RECOMMENDATION

- 19. Translations should be expressly included in the revised law as proper subject matter of copyright protection, without prejudice to the rights of the owner of the copyright in the underlying work.**

### (c) Blank Forms

*From Gutenberg to Telidon* made the proposal to exclude blank forms from copyright protection. This was the only instance of a recommended express exclusion from protection, apparently an attempt to reverse a recent Federal Court decision.<sup>1</sup> Although *From Gutenberg to Telidon* stated that the great majority of the industry in Canada was in favour of denying copyright protection to this type of material,<sup>2</sup> a contrary view was expressed to the Sub-Committee.

The Sub-Committee is of the view that special criteria should not be applied to any one particular category of work.<sup>3</sup> The court decision referred to applied the originality criterion to the facts of a particular case and reached the conclusion that the accounting system in question involved considerable skill and ingenuity and was therefore original and protected. Other accounting systems might not be original, as testimony before the Sub-Committee revealed, and our courts are accustomed to making that determination.

A blanket legislative exclusion such as that proposed in *From Gutenberg to Telidon* is ill-advised. No doubt there will be cases where originality is absent and no protection will exist. An inflexible statutory provision excluding blank forms in all cases, however, is not justified and should not be enacted.

## RECOMMENDATION

- 20. Blank forms should not be specifically excluded from protection, but should be subject to the same criteria as other works.**

### (d) Category of Protection

Literary works should continue to be one of the traditional categories of works protected under the revised copyright law. Although there is no need to change the name of the category, it does require some alteration in its composition. Maps, charts and plans are more properly regarded as artistic works. Literary works should mean something which is written.

<sup>1</sup> *Bulman Group Ltd. v. "One Write" Accounting Systems Ltd.* (1982), 62 C.P.R. (2d) 149.

<sup>2</sup> Page 14.

<sup>3</sup> There are three criteria that apply to all copyright subject matter: fixation, creation by a qualified person, and originality.



Protection should continue for literary works regardless of the method of fixation. Fixation of a literary work in any form, be it through a computer, or on a more traditional material support such as paper, should meet the fixation requirement as a criterion for protection under the revised law.

## RECOMMENDATION

### 21. Maps, charts and plans should be treated as artistic works.

The final matter to be addressed is whether computer programs should be protected as literary works or should be placed in a separate, new category.<sup>1</sup> The appropriate category of protection for computer programs, as well as other related issues, is discussed in the section of this Report on computer programs.<sup>2</sup>

#### 2. Rights

##### (a) The Right to Prohibit Importation

A great many submissions filed by the writing and publishing segment of the creative community stressed the importance of protection against the importation of competing foreign editions. Some witnesses ranked this as an issue second only to the problems created by reprography. Because the main debate on the importation question was in respect of books, it is appropriate to address the question of importation protection in the writing and publishing part of this Report.

Witnesses repeatedly stated that territorial divisibility is a fundamental and necessary part of international copyright. The present copyright law provides importation protection for all works. *From Gutenberg to Telidon* proposed to remove this importation protection for some works but not for others.<sup>3</sup> Included in the non-protected category would be artistic works and computer programs. For those works not benefitting from importation protection the so-called doctrine of exhaustion would apply.

The doctrine of exhaustion derives its name from the fact that the right of a copyright owner is said to be "exhausted" after it is exercised. For example, under the doctrine of exhaustion, once a copyright owner puts a book on the market he or she has used up the right to control territorial distribution of the book: the right is said to be "exhausted." Purchasers of the book are then free to do what they wish with it, including importing it into another country.

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<sup>1</sup> The courts have treated computer programs as literary works. See *I.B.M. Corp. v. Spiraes Computers Inc.* (1984), 2 C.I.P.R. 56 (F.C.T.D.); *La Société d'Informatique R.D.G. Inc. v. Dynabec Ltée et autres*, [1984] C.S., 1189.

<sup>2</sup> See page 44.

<sup>3</sup> Page 25.



The first issue to be addressed is the proposal to provide importation protection to some works but not others. The rationale in *From Gutenberg to Telidon* appears to be that those works that should benefit from importation protection are “cultural” works: books, records, musical works contained in sound recordings and cinematographic works. This categorization does not accord with the stated rationale. For example, artistic works — missing from the protected list — are as “cultural” as books or records.

The publishing industry in Canada publishes not only “books” which would be protected under the proposal, but also computer programs which would not be. Electronic publishing does not trade in “books.” Similarly, a musical work contained in a sound recording would receive import protection but the same musical work in sheet music form would not. The Sub-Committee is of the view that the distinction drawn in the proposal is not soundly based and should be discarded.

The next question is whether *any* of the works protected by copyright should receive importation protection. On this issue two observations should be made. First, the present law, which provides importation protection to all works, represents the international norm both in the Commonwealth and in our own North American market.

For Canada to remove unilaterally its importation barriers would mean that foreign editions, licenced only for foreign markets, could freely compete in the Canadian marketplace while Canadian editions would be excluded from foreign markets by means of the importation prohibitions contained in the copyright laws of those foreign countries.

The second observation concerns the purpose of Canadian cultural policy. The Canadian Conference of the Arts (CCA) presented some pointed testimony on this issue. Although given with respect to the publishing industry, it is equally applicable to the producers of other works. The testimony focused on the question of why Canadian consumers should be required to buy more expensive Canadian editions of copyright works when cheaper foreign versions could be imported.

The answer came as a surprising acknowledgement that importation protection in the *Copyright Act* is a particular type of government protection for certain industries. The CCA stated it would be quite willing to agree to the removal of importation protection if the footwear or clothing industries were able to survive the removal of their protection from foreign competition: “... let someone else be the laboratory experiment and not us.”<sup>1</sup>

Based upon this country’s past and continuing attempts to encourage and develop a unique Canadian cultural identity, as expressed by Canadian cultural industries, and the fact that other jurisdictions maintain similar protection for the same reasons, the Sub-Committee is of the view that the importation protection of the present law should be maintained for all copyright works.

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<sup>1</sup> *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, 4:46. Testimony of Mr. Brian Anthony.



## RECOMMENDATION

### **22. Importation protection should be maintained for all copyright subject matter.**

#### (b) Public Lending

Most groups of authors and publishers, supported by the library community, favoured the principle that authors should be compensated for the public lending of their books by libraries. When a book is loaned by a library the author does not receive any royalties. However, if the book had been purchased by a library patron, a royalty would have been paid. In short, a public lending right is a method of compensating authors for royalties foregone because of lost sales due to library lending.

The Sub-Committee agrees with the writers, publishers and librarians who have argued for some form of compensation for public use. But like these groups, the Sub-Committee prefers to have this right implemented outside the *Copyright Act* to minimize, where possible, the outflow of payments to foreign authors. Two such schemes have been suggested, one by the Canada Council, the other by the Federal Cultural Policy Review Committee, both of which would benefit Canadian writers.

Copyright is not always the most appropriate tool to achieve a particular goal. The objective sought in connection with a public lending right is to benefit Canadian authors for the lending of their works by public libraries. Copyright is not the best means of accomplishing this objective because a copyright solution entails payments to foreign as well as Canadian authors.

## RECOMMENDATION

### **23. A mechanism should be developed to compensate authors for the public lending of their works by libraries. The scheme should be independent of copyright law.**

#### (c) Reproduction

The Sub-Committee fully supports the principle that no limitations should be placed upon the right of reproduction. The Sub-Committee also endorses the formation of collective organizations of authors and publishers to license reproduction by libraries, schools and other users.

Some witnesses argued that the revised law should provide a special "reprographic right" — intended to cover reproduction specifically by photocopying — which could be



assigned to a collective to administer. The Sub-Committee, however, thinks that a specific reprographic reproduction right is not necessary. Reproduction can take many forms, each of which comprises part of the right of reproduction. There is no greater need to have a specific right to reproduce by means of photocopying than there is by means of a typewriter or by hand copying. Greater protection is offered if the Act provides a broadly-defined right of reproduction which owners can then subdivide in order to exercise it as they wish. By contract, the owners of the right could limit reproduction to "reprographic reproduction" if that is what is desired.

## RECOMMENDATION

### **24. A specific right of reprographic reproduction should not be introduced.**

#### 3. Limitations

##### (a) Reproduction by Libraries

Limitations to copyright can take various forms. When the law contains an outright exception, a copyright owner receives no compensation for the use of a work and a user need obtain no authorization. It is common knowledge that a significant amount of photocopying takes place in libraries and it has been suggested that an exception for library photocopying should be introduced. The Sub-Committee has sympathy with the difficulties experienced by libraries in this area, but does not feel that such an exception is appropriate. Instead, the Sub-Committee considers that reproduction by libraries should be the subject of blanket licences issued by collectives following negotiation. The library community by and large accepts this approach as only fair and the Sub-Committee applauds its responsible and reasonable attitude on this issue.

But writers and publishers must act. The Sub-Committee strongly encourages them to take the initiative in forming the appropriate collective. The library community cannot tolerate indefinitely a law which is respected more in its breach than in its observance. In this context the Sub-Committee also suggests that the government provide whatever assistance it can in the formation of a collective to authorize reprographic reproduction.

One related matter of concern to the Sub-Committee is the reproduction of scholarly articles and journals. Scholars respond to a different set of motivations than do other authors. Publication, rather than profit, is the primary objective of most scholars, and copyright protection is not an important consideration. Yet copyright infringement is common with these works.

The Sub-Committee considered two approaches. The first was to provide an exception so that the widest possible use could be made of this material. The second was to trust that the collective negotiation of reproduction rights would adequately reflect the non-commercial nature of scholarly publishing and the importance of these works to higher



education. The Sub-Committee has adopted the second approach as the one most consistent with its view of copyright as a species of property. The Sub-Committee, however, is also of the view that the unique nature of scholarly works should be reflected in the licencing fees charged by collectives for the reproduction of these works.

## RECOMMENDATION

### 25. No exception should be provided for reproduction by libraries.

#### (b) Compulsory Licences

Another kind of limitation on a copyright owner's rights is the compulsory licence. This permits the use of a work without the permission of its owner but with payment of a fee which is either fixed in the copyright statute or set by a designated authority. In essence, a compulsory licence removes from a creator a central and fundamental element of copyright protection: the right to permit and control the use made of a work. The compulsory licence removes any possibility of refusal and substitutes a mere right to compensation.

As stated above, the Sub-Committee views copyright as a property right. The concept of property carries with it the notion that property should not be expropriated unless there is a strong public policy reason to do so. This test has been applied by the Sub-Committee in making the recommendations which follow.

#### (i) The Translation Compulsory Licence

This licence, proposed in *From Gutenberg to Telidon*, would permit the making of a translation of a literary work seven years after publication provided certain conditions are met: a translation is not available in a national language or all translations are out of print; and the copyright owner cannot be found or will not agree.<sup>1</sup> This licence could only apply to those countries who are members of the *Universal Copyright Convention* of 1952, but not of the *Berne Convention*.<sup>2</sup>

In effect, the enactment of this licence would render English language United States publications available to French translators and works first published in other languages in the United States available to Canadians for translation into either English or French. The licence would also apply to the works originating in other *Universal Copyright Convention* countries, notably the Soviet Union.

The Sub-Committee has not been persuaded that there is a sufficient public policy reason to justify the introduction of this licence. If assured access is required to make translations then it is also required with respect to other works and rights in general. No case has been established which demonstrates the need for this licence. Witnesses representing

<sup>1</sup> Pages 38-39.

<sup>2</sup> *The Berne Convention for the Protection of Literary and Artistic Works*, Rome Text, 1928.



translators did not argue that it was needed and no mischief requiring legislative intervention in the free market process has been proven. Finally, the requirement that the licence cannot be obtained until seven years following publication eliminates any advantage of quick availability of the works translated under the licence. The Sub-Committee has concluded that a compulsory licence for the making of translations should not be enacted.

## RECOMMENDATION

### **26. The revised law should not provide for a compulsory licence to translate literary works.**

#### (ii) The Reproduction, Public Performance and Printing Compulsory Licences

*From Gutenberg to Telidon* recommended the abolition of these three compulsory licences.<sup>1</sup> As a group they have been little used, if at all, and there are no strong public policy reasons why any of them should be retained.

## RECOMMENDATION

### **27. The reproduction, public performance and printing compulsory licences should not be retained in the revised law.**

#### (iii) The Unlocatable Copyright Owner

Users of copyright material — especially librarians, sound recording producers and archivists — often have difficulties when a copyright owner cannot be identified or located. They want to abide by the law and obtain the appropriate authorization, and negotiate a fee for use, but are unable to do so.

*From Gutenberg to Telidon* proposed the introduction of a licence, issued by the Copyright Appeal Board and subject to various safeguards, as a solution to the practical problem of the missing copyright owner.<sup>2</sup> It would not be so much a matter of removing the right of authorization as of putting the Copyright Appeal Board, according to the proposal, in the place of the copyright owner in negotiating a royalty. It should be stressed here that the Copyright Appeal Board should require a high standard of inquiry on the part of the applicant before such a licence should issue.

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<sup>1</sup> Pages 36-37. *Copyright Act*, sections 7, 13, 14-16.

<sup>2</sup> Pages 37-38.

## RECOMMENDATION

28. Provision should be made in the revised law for the Copyright Appeal Board to issue non-exclusive licences where a copyright owner cannot be located.

## B. THE VISUAL ARTS

### 1. Subject Matter

#### (a) Artistic Works

Under the present Act, one of the four categories of protected subject matter is "artistic works" which includes "works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs."<sup>1</sup> During the public hearings, the artistic community stated strongly that the phrase "artistic work" has become a catch-all phrase for any work that is not literary, dramatic or musical. Witnesses suggested to the Sub-Committee that a more appropriate phrase would be "works of the visual arts and other artistic works."

Although it is unclear to the Sub-Committee what distinction might be drawn between "works of the visual arts" and "other artistic works," it is hoped that the drafters of the new Act will be able to reflect contemporary concepts used by the artistic community. The present categories of protected subject matter, as traditional as they may be, are not founded on any specific legal requirement; there are no prohibitions against revising these categories in order to meet the artistic community's concerns.

Similarly, the present definition of "engravings" appears out-dated and should be revised. If a definition of "engraving" is retained, it should embrace all the techniques associated with these works.

## RECOMMENDATION

29. Consideration should be given to a new designation of "artistic works" in general and to "engravings" in particular.

Elsewhere in this Report,<sup>2</sup> the Sub-Committee recommends that the modification of the original of an artistic work without the consent of its author should be an infringement of the creator's moral rights, irrespective of whether his or her reputation or honour has been affected by such modification. Witnesses pointed out to the Sub-Committee that certain

<sup>1</sup> *Copyright Act*, section 2.

<sup>2</sup> See page 7.



works, although reproduced in many copies, are properly considered originals. Such works are generally numbered and signed individually by their creator, in accordance with well-known and verifiable standards of the artistic community. The Sub-Committee agrees that these multiple works should also be treated as originals.

## RECOMMENDATION

### **30. The original of an artistic work should include separately identifiable reproductions of that work in a limited edition.**

#### (b) Choreography

Choreographic works presently come within the category of dramatic works. Because of this association, it would appear that works of choreography must develop a plot or, at least, a sequence of action. Yet it is clear to the Sub-Committee that some choreographic works are simply visually aesthetic patterns with neither plot nor sequence. An attractive definition of choreographic works embodying this view was suggested to the Sub-Committee:

A choreographic work is an arrangement or an organized thought in time and space which uses human bodies as design units.<sup>1</sup>

This definition would also appear to cover such works as pantomimes or even the contemporary phenomenon of "works of performance," neither of which need develop a dramatic plot or sequence. Accordingly, it would seem more appropriate either to include these works within the category of the visual arts, rather than within dramatic works, or to establish a new category altogether.

As has been said earlier there is no particular reason to limit protected subject matter to the traditional categories of literary, dramatic, musical and artistic works. Because choreographic works may or may not incorporate literary, artistic, dramatic and musical works, there is strong justification to regroup all such works within an entirely separate category of protected subject matter which could perhaps be labelled "choreographic works."

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<sup>1</sup> *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, 15:87. Testimony of Ms. Elise Orenstein for the Canadian Association of Professional Dance Organizations.

## RECOMMENDATION

31. "Works of choreography," "works of performance" and "pantomimes" should be placed in a separate category of protected subject matter. Such works should not need to develop a dramatic plot or sequence in order to be protected.

### (c) Industrial Design

Possibly one of the most difficult issues in revising the *Copyright Act* is the interface between that Act and the *Industrial Design Act*.<sup>1</sup> Section 46(1) of the *Copyright Act* provides in part that the Act "does not apply to designs capable of being registered under the *Industrial Design Act*." Recent Canadian jurisprudence, however, following closely on British decisions, has severely limited the ambit of application of the *Industrial Design Act*.<sup>2</sup> The net result of this jurisprudence may be to protect by copyright the majority of utilitarian objects which experts had, until now, assumed were protected by industrial design rather than by copyright. Most objects based on a working drawing would now appear to be three-dimensional reproductions of these working drawings and, as such, would enjoy copyright protection. China patterns, mechanical pumps, boat hulls and gear wheels may have become "artistic works" protected by copyright.

Canadian commentators on the revision of the *Copyright Act*, while noting the potential problem of utilitarian objects being protected by copyright, have assumed that studies were being carried out which would analyze the problem of the interface between the two Acts and propose solutions. These studies, however, have yet to be reflected in any legislative change.

The *Industrial Design Act* is even older than the *Copyright Act* and this Subcommittee is convinced that it is even more outdated. The problems raised by the court decisions mentioned above can be solved only by a complete revision of the *Industrial Design Act*. Such revision, however, will undoubtedly be a long and difficult process, necessitating complex studies, as evidenced by work of a similar nature undertaken in the United Kingdom.<sup>3</sup>

Undue delay in revising design legislation could result in transforming the *Copyright Act* into umbrella legislation for the protection of works never envisaged nor warranting copyright protection. Given the jurisprudence referred to above, it is reasonable to fear that this result would have enormous repercussions on all intellectual property laws, possibly even rendering everything except copyright law obsolete.

<sup>1</sup> R.S.C. 1970, c. I-8.

<sup>2</sup> *Royal Doulton Tableware Ltd. v. Cassidy's Ltd.* (1984), 1 C.P.R. (3d) 214; *Bayliner Marine Corporation v. Doral Boats Ltd.*, F.C.T.D., unreported, June 24, 1985, Walsh J. (Court File No. T-1274-84).

<sup>3</sup> Christine Fellner, *The Future of Legal Protection for Industrial Design*, A Report Commissioned by the Common Law Institute of Intellectual Property and the Intellectual Property Unit, Queen Mary College, London, 1985, 220 p.



The urgency is such that the Sub-Committee is of the strong view that provisional stop-gap measures should be taken in revising the *Copyright Act*, even before the revision of the *Industrial Design Act*. In their joint testimony before the Sub-Committee, the Patent and Trademark Institute of Canada and the Canadian Bar Association suggested a specific modification of the present section 46 of the *Copyright Act* in order to clarify the relationship between the two Acts. It is probable that the language proposed for the revision would have to be somewhat modified. However, the principles of the proposal should be retained and, indeed, put into effect immediately.

## RECOMMENDATIONS

32. Work on the revision of the *Industrial Design Act* should be accelerated.
33. Pending revision of the *Industrial Design Act*, section 46 of the *Copyright Act* should be immediately amended to eliminate the availability of copyright to protect industrial articles incorporating functional designs.

### 2. Rights

Creators of artistic works have long maintained that, in comparison with creators of other types of works, they are short-changed by the present *Copyright Act*. Artistic works do not easily lend themselves to translation, performance in public or conversion into other forms. Other types of works benefit from copyright protection with respect to such uses and their authors share in these exploitations of their creations. Creators of artistic works, who rightfully consider themselves as deserving as creators of other works, have for a long time tried to devise ways to restore some balance between the protection afforded to them and that afforded to their colleagues in other fields. Invariably, they conclude that this balance could be restored only by recognizing the unique uses made of an artistic work and by providing exclusive rights to these under the *Copyright Act*.

#### (a) Exhibition

The Sub-Committee sees an analogy between the right to exhibit an artistic work in public and the right to perform other types of works in public. It bears noting that, in its French version, the present *Copyright Act* uses two different words interchangeably when it addresses the "right to perform in public": one is "exécuter" which is properly "to perform"; the other is "représenter" which appears to cast a wider net and could possibly have been meant to embrace all forms of public presentations. Perhaps the original intent of the 1924 legislator has merely gone unnoticed.

The Sub-Committee recommends that the English version of the Act be harmonized with the possible interpretation of the French version. Limits should be established in order to avoid the exercise of the right with respect to reproductions of artistic works and, in particular, to those reproductions which are mere ornamentations on industrial articles, for example, pictures on chocolate boxes or record jackets.



The Sub-Committee notes with pleasure that a consensus has emerged in the artistic community on the recognition of this new right. In their appearance before the Sub-Committee, witnesses representing gallery curators did not oppose the right, although they expressed concern that some creators might prohibit the exhibition of their works in conjunction with those of certain other artists. Curators, naturally, are worried that their educational function, which leads them to organize exhibitions juxtaposing the works of many artists, might be impeded by uncooperative creators. The Sub-Committee believes, however, that the benefits artists would derive from the exhibition of their works would constitute a natural safeguard against the eccentric exercise of the exhibition right.

An exhibition right would have to be extended to all nationals of foreign countries that have adhered to the two international conventions on copyright to which Canada is a party. Although no specific figures are available on the possible outflow of royalties that would result, it is possible that most artistic works exhibited in Canada are those of foreign artists. On the other hand, there is no risk of forcing the art market out of the country should the exhibition right be granted. This risk is very real should *droit de suite*, discussed below, be introduced.

## RECOMMENDATION

- 34. The revised law should recognize a right to exhibit the original of an artistic work in public. This right should also extend to artistic works which are part of a limited edition.**

(b) *Droit de suite*

*From Gutenberg to Telidon* recommended against the introduction of *droit de suite* in Canadian copyright law. Nevertheless, it invited further debate and public comment on the principle and on how such a right might be exercised.<sup>1</sup> Perhaps the reason for the invitation is the fact that relatively few jurisdictions have granted this right, and some of them only rather recently. Despite the emotional debate surrounding this issue, there is still a considerable lack of factual information in Canada on the consequences of introducing *droit de suite*, as well as on its practical implementation.

For example, it has been suggested by opponents of *droit de suite* that the introduction of this right results in the displacement of the art market to neighbouring jurisdictions where no such right exists. The information that the Sub-Committee has received does not allow it to conclude whether this is true or false. The question therefore remains open and the Sub-Committee, for that reason alone, could not presently recommend the introduction of *droit de suite* at the risk of causing the art market to move outside of Canada, a consequence that would undoubtedly be very detrimental to the art community as a whole and to Canadian creators in particular.

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<sup>1</sup> Page 22.



As well, because of Canada's obligations under the two international conventions on copyright, the introduction of *droit de suite* in this country would benefit all foreign creators who are nationals of countries that are members of these conventions, whereas most of these countries would extend no corresponding benefit to Canadian authors or, for that matter, to their own nationals.

## RECOMMENDATION

- 35. *Droit de suite* should not be introduced at this time in the new Act. Ongoing study should be undertaken to evaluate fully the implications of the right.**

### 3. Ownership

One specific problem was raised during the Sub-Committee's deliberations which should be discussed in connection with the visual arts. The problem has to do with ownership of copyright in photographs. The present Act provides that copyright in a photograph is owned by the person who owns the negative from which the photograph was derived.<sup>1</sup> For the sake of consistency in the ownership provisions, however, it was suggested in *From Gutenberg to Telidon* that the owner of the copyright in a photograph should be the author of that photograph, that is, the person who "composed" the photograph.<sup>2</sup> In most cases this will be the photographer. The Sub-Committee agrees with that suggestion.

In its submission to the Sub-Committee, the Photo Marketing Association, representing Canadian companies which develop negatives and print photographs, expressed its concern that photofinishers obtain most of their business through "drop-off points." They are therefore almost never in a position to ascertain whether the person authorizing them to make prints is in fact the person who "composed" the photograph. Photofinishers are, however, reasonably certain that most of their customers are the owners of the negative from which they, the photofinishers, develop photographs. Under the existing law, they feel fairly confident that they are not infringing copyright because they can rely on an implied licence granted to them by the owner of the negative, who is by law the owner of the copyright. The Association testified that, in its opinion, this security would no longer exist should the ownership of copyright in photographs be vested in the photographer instead of in the owner of the negative.

Various solutions to this problem were proposed to the Sub-Committee. One was to maintain the *status quo* so that ownership of copyright in photographs would remain with the owner of the negative; another was to make innocence a complete defence to copyright liability for photofinishers; a third was to favour the introduction of "marking" of photographs so that only marked photographs would enjoy copyright protection with respect to reproduction by photofinishers.

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<sup>1</sup> Copyright Act, section 9.

<sup>2</sup> Page 29.



Each proposed solution has its problems. Marking would go against Canada's obligations under the Berne Convention, which provides that the subsistence of copyright cannot be made subject to any formalities.<sup>1</sup> Innocence as a defence would represent a major departure because it has never been available as a complete defence for direct infringers, such as those engaged in reproduction activities. The *status quo* would be inconsistent with the principle that the author should be the first owner of the copyright in a work.

The Sub-Committee cannot recommend any of those proposed solutions. In fact, the Sub-Committee does not think that photofinishers would be exposed to more liability under the proposed ownership provisions than they are under the present Act. To be exact, what photofinishers collect at their drop-off points are not negatives but undeveloped film. They cannot, therefore, claim that they receive an implicit authorization from the owner of the negative. Yet it appears that they have had no legal difficulties in the past. The Sub-Committee thinks that there is no greater possibility of a photofinisher infringing copyright under the proposed modification than under the present Act. In all probability, the current practice of relying on implied licences will continue, the only change being in the person giving the implied licence.

In any event, the Sub-Committee notes that forms are routinely used to transmit the undeveloped films to photofinishers. These forms are, in effect, a contract between the depositor and the photofinisher. It would not seem difficult to add to these forms a statement authorizing photofinishers to make the required reproductions and holding them harmless from copyright liability.

In short, given the possibility of a practical solution that respects normal copyright concepts, the Sub-Committee does not propose that the revised law should contain a specific exception for the benefit of photofinishers.

## RECOMMENDATION

36. **Ownership of copyright in a photograph should vest in the person who composed the photograph.**
37. **There should be no specific exception from copyright liability for the benefit of photofinishers.**

## C. MUSICAL WORKS

### 1. Subject Matter

Of the numerous works covered by the *Copyright Act*, only one — a musical work — is specifically defined. All the others are described by way of examples, a method of legal drafting which gives scope for flexibility if circumstances change. Because musical works are

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<sup>1</sup> *The Berne Convention for the Protection of Literary and Artistic Works*, Rome Text, 1928, Article 4(2).



presently defined as combinations of melody and harmony, or either of them, which have been "printed, reduced to writing, or otherwise graphically produced or reproduced,"<sup>1</sup> much contemporary music may not be protected by copyright because it is never written down.

It is time for the law to apply the criterion of fixation as flexibly to musical works as it does to other works. It is irrelevant that a musical work is fixed by recording as opposed to written notation. A law revised in this manner would be consistent in treating, insofar as possible, all subject matter in the same manner.

## RECOMMENDATION

### **38. The category of musical work should be defined in an illustrative manner.**

#### 2. Rights

The Sub-Committee thinks that full economic and moral rights should be provided to the composers of musical works. It further suggests that the new moral right of endorsement should be provided, as suggested above in recommendation 5. This new moral right will provide authors with the right to control the use of their works in association with products, services, causes or institutions. For example, music is often used in live television and radio commercials. Such endorsement could be objectionable to a composer who might not want to be associated, albeit indirectly, with what is being advertised. A composer, and indeed all copyright owners, should be provided with the moral right to control endorsements because this kind of use is more properly a matter concerning the personality of the author rather than an economic use of the work.

## RECOMMENDATION

### **39. The full range of economic and moral rights should apply to musical works, including the new moral right of endorsement.**

#### 3. Limitations

The approach of the Sub-Committee with respect to limitations to rights has been mentioned throughout this Report: copyright is the recognition of the property rights of creators and the concept of property carries with it the notion that limitations on property rights should not be permitted unless strong public policy reasons have been demonstrated. With respect to musical works five specific limitations will be discussed.

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<sup>1</sup> *Copyright Act*, section 2.



(a) Fairs and Exhibitions

There has been a great deal of judicial consideration of the exception in section 17(2)(g) of the *Copyright Act* which appears to exempt fairs and exhibitions from an obligation to pay royalties for public performances. These decisions have rendered the exception of no practical application by holding that if there is any payment made to the promoters or musicians at such a fair then the exception concerning payment to composers cannot apply.<sup>1</sup> Because most promoters and musicians do not participate in these fairs unless they are paid, the exception is now virtually meaningless.

The Canadian Association of Exhibitions requested that the revised law contain an exception which would remove any obligation to pay performing rights royalties for the incidental use of music where the fair patron need not pay an additional fee for the hearing of music. The arguments advanced in support of this request have been examined in light of the principles adopted by the Sub-Committee. The question to be asked is whether the function performed by fairs and exhibitions represents a sufficient public policy reason to justify limiting composers' rights. The Ilsley Commission thought so:

The promotion of the best agricultural methods and practices is so important a public interest in this country that those holding fairs and exhibitions ... should be exempt.<sup>2</sup>

The Sub-Committee agrees that exhibitions and fairs play an important educational role. The performance of music at these fairs and exhibitions, however, does not play any part in educating the public about agricultural methods and practices. Music is not related to the teaching function. The Sub-Committee has therefore concluded that an exception is not justified. The Sub-Committee would like to quote a former Member of the House of Commons:

Nevertheless I do not think it fair by legislation to make an exemption of authors and of composers by compelling them to give anything to anybody. By legislation we are assuming the right to do the charitable work which belongs properly to the individuals whose property is concerned in the matter. It would be a fine gesture if composers would give their music free to the churches; it would be a fine gesture if they would give music free to the fairs throughout the country. However, for this Parliament to legislate a gift from the hands of composers and authors to anybody whatsoever is a questionable procedure.<sup>3</sup>

## RECOMMENDATION

### **40. The revised law should not contain an exception for fairs and exhibitions from the payment of royalties for the public performance of music.**

<sup>1</sup> *CAPAC v. Western Fair Association*, [1951] S.C.R. 596.

<sup>2</sup> Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright*, Queen's Printer, Ottawa, 1957, 62.

<sup>3</sup> Canada, House of Commons, *Debates*, June 8, 1931, p. 2404. Speech by Mr. William Irvine (Wetaskiwin).



## (b) Religious Services and Charitable Objects

The present law provides an exception from the payment of royalties for public performance of music when the performance is “in furtherance of a religious, educational or charitable object.”<sup>1</sup> This provision does not actually provide an outright exception but rather excuses payment for the use of music. It is probable that the owner of the copyright could obtain an injunction to prevent public performance.

The main justification for the enactment of this exception, at least as far as it applies to religious services, appears to be a reaction against the effrontery of any law which would make it illegal to sing a hymn during the practice of one’s religion unless proper authorization had been obtained. “Educational and charitable objects” were apparently considered to be analogous to religious objects.

The Sub-Committee considers that the present exception should be narrowed with respect to religious uses and repealed with respect to charitable uses. By definition charity is voluntary. Legislation should not force charitable actions on the part of any member of society even though the objects themselves are commendable ones. With respect to religious services, however, a limited exception should be provided for the performance of music during a religious service. Canadians would be offended by a law which could make it illegal to sing or perform music while attending a religious service.

## RECOMMENDATION

### **41. The revised Act should provide an exception from copyright liability for the public performance of a musical work during a religious service.**

## (c) Compulsory Licence for Mechanical Reproduction

In Canada, a record producer can record any literary, dramatic or musical work as long as its author has permitted the work to be recorded once before. All the producer needs to do is pay a royalty of two cents, as specified in the *Copyright Act*.<sup>2</sup> This licencing system is not used in all countries, but has been part of Canadian law since the early days of the recording industry.

The compulsory licence was enacted originally as a compromise between the two parties most affected. On the one hand, composers and their publishers wanted to be able to negotiate freely the right to record their musical works. On the other hand, members of the fledgling recording industry feared that music publishers would exercise their exclusive rights in such a way that the growth of smaller companies would be thwarted. They feared that the result would be an industry dominated by a few large recording companies. The Sub-Committee notes that monopolies are now subject to competition legislation.

<sup>1</sup> *Copyright Act*, section 17(3). Educational exceptions are discussed separately at pages 70-71.

<sup>2</sup> Section 19.



It is time to reassess whether the compulsory licence for mechanical reproduction is justified. Merely because it has existed for many years does not of itself warrant its retention in the revised law. Canada is not alone in questioning the necessity for the compulsory licence for sound recordings. For example, the recently published discussion paper on copyright in the United Kingdom has called into question the utility of the licence.<sup>1</sup> Many European countries have never had the licence and yet have profitable sound recording industries.

In its approach to this issue, as with the other exceptions to copyright that it has considered, the Sub-Committee returns to its basic philosophy: copyright law is a matter of the property rights of creators and any derogation from those rights must be for strong public policy reasons.

There is no question that the compulsory licence constitutes such a derogation. It takes away a copyright owner's right to control who will record a work and under what circumstances. It takes away the right to negotiate the most favourable terms possible. In effect, the compulsory licence forces a seller to sell to a buyer, and arbitrarily sets the price of the product.

Are there good public policy reasons to justify this intrusion in the marketplace? The Sub-Committee thinks not. It may be argued that the diversity produced by the present system is in the public interest. Under the current law, if record producers perceive that there is a market demand for ten different versions of a musical work, ten will be made. Proponents of the compulsory licence argue that if it is abolished and copyright holders are given exclusive rights, only one recording would be licensed by the publisher.

The answer to that concern undoubtedly lies in the economics of the music publishing industry. It makes plain business sense for a publisher to want to have a composition recorded as many times as possible in order to maximize returns. In all probability, should the compulsory licence be abolished, ten versions of a work will continue to be made but under a non-exclusive licence system. The Sub-Committee thinks, therefore, that the diversity of musical works fostered by the present system would not be jeopardized should the compulsory licence be abolished.

Would monopolies detrimental to the public interest develop in the absence of the compulsory licence? Music is used by a number of industries which have not had the benefit of compulsory access. For example, music is an integral part of the motion picture industry, to which the compulsory licence is not applicable. There has been no indication of a monopoly developing there.

Again, the marketplace will check abuses of power should the compulsory licence be abolished. Record producers and music publishers are of necessity interdependent. They are willing buyers and willing sellers, each dependent on the continuous flow of new music in order to prosper. For publishers to restrict this flow would be in neither's best interest.

The Sub-Committee concludes that there are no public policy reasons that require retention of this licence. A system which treats publishers and composers of musical works

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<sup>1</sup> *Reform of the Law Relating to Copyrights, Designs and Performers' Protection*, London, 1982.



differently from other creators should be changed. Book publishers do not have compulsory access to the successful works of other publishers. Writers are not paid a fixed statutory royalty for their work. Yet these conditions are imposed on the creators of musical works by the present system.

For all these reasons, the Sub-Committee thinks that compulsory access to music for the purpose of making a recording should not be part of the revised copyright law. Composers of musical works should have the same exclusive rights to control the use of their works as are provided to the creators of other works.

## RECOMMENDATION

### **42. The revised law should not retain the compulsory licence for the making of sound recordings.**

#### (d) "Receiving Sets and Gramophones"

The present law contains an exception from copyright liability for public performances by means of jukeboxes and radio and television sets even when a direct charge is made to the public for the performance.<sup>1</sup> All previous studies have recommended that this exception should be abolished. The Sub-Committee agrees that the operators of jukeboxes and discotheques should not benefit from an exception at the expense of the Canadian creative community.

It is not realistic, however, to formulate a law which states that *all* performances of musical works should attract copyright liability. The right to perform is not an unrestricted right under the present law — it is the right to perform *in public*.

There are a number of significant uses of copyright works which, although they have a public aspect, are essentially private. Examples of essentially private uses that occur incidentally in public are sunbathers listening to a radio on a public beach or taxi drivers playing music in their cabs. Still other examples are the owners or managers of small stores or barbershops who operate radios, television sets, cassette players or other similar devices. The fact that the public enters these small establishments does not change the essentially private nature of the use. It should be noted that performances of music which are used as an element to attract clientele and which form part of the marketing strategy of a business are not considered by the Sub-Committee to be private uses.

Clearly it would be an improper extension of copyright law if these essentially private uses were, even in theory, considered copyright infringements. *From Gutenberg to Telidon* addressed this issue, but only in the context of the retail store, and suggested eight possible solutions.<sup>2</sup> As noted, however, the Sub-Committee sees a wider dimension to the question.

<sup>1</sup> *Copyright Act*, section 50(7). The extension to jukeboxes is by judicial interpretation: *Vigneux et al. v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348; [1945] A.C. 108.

<sup>2</sup> Pages 47-48.



Limiting the size and number of speakers that could be used in a store, or the number of employees that could be present on the retail premises in order for the exception to operate, overlooks the underlying rationale for this exception: these uses are essentially private. The Sub-Committee therefore recommends that when radios, television sets or playback devices are used for essentially private purposes, there should be no copyright liability.

## RECOMMENDATIONS

43. The revised law should not contain a general exception for the public performance of copyright works by means of jukeboxes, radios, television sets and playback machines.
44. The revised law should contain an exception from copyright liability for performances of protected works by means of radios, television sets and playback machines that incidentally take place in public.

## D. AUDIO-VISUAL WORKS

### 1. Subject Matter

Film was in its infancy when the present *Copyright Act* was passed. The Act provides protection to "cinematographic works," defined as including "any works produced by any process analogous to cinematography."<sup>1</sup> They are classified either as a species of dramatic or artistic works. Given this technical definition, it is unclear whether the category embraces videotapes, video cassettes or video discs. To ensure protection for all these works, *From Gutenberg to Telidon* recommended the creation of a separate category of protected works, apparently to be identified as "cinematographic works."<sup>2</sup>

The suggestion to create a distinct category for these works has met with general approval. However, witnesses invariably expressed disagreement with the proposed title — "cinematographic works." The Sub-Committee agrees that, if the new Act is to avoid terminology rooted in specific technologies, the generic term "audio-visual works" would be more appropriate for this new category of protected subject matter. This new category should embrace any work in which an image appears to be in motion, whether there is sound accompaniment or not, and whatever the material support of the work might be.

## RECOMMENDATIONS

45. The new Act should provide for a distinct category of protected subject matter to be called "audio-visual works."

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<sup>1</sup> *Copyright Act*, section 2.

<sup>2</sup> Page 10.



- 46. Audio-visual works should be defined to include any work in which an image appears to be in motion, with or without sound, on any material support.**

A particular problem arises with respect to video games. In these games the audio-visual work which is displayed on the screen is fixed in a computer program but is the result of player interaction with that program. Moreover, it is readily possible to arrive at an identical audio-visual work by means of a program completely different from the original one. Unless the audio-visual work displayed is protected quite apart from the computer program, these audio-visual games would be afforded no useful protection. Any programmer could create a virtually identical game by devising a different program. This is undesirable.

## RECOMMENDATION

- 47. Audio-visual works should be defined to include pre-programmed works where the movement of the picture may be the result of a player's interaction with a computer program.**

### 2. Rights

Audio-visual works should enjoy the general regime of protection, both economic and moral, afforded to the traditional categories of literary, dramatic, musical and artistic works.

One of the basic economic rights is the right to perform in public. In commenting on that right, *From Gutenberg to Telidon* stated that the phrase "in public" has been frequently dealt with by the courts and that, consequently, there would be no need to define it in the new Act.<sup>1</sup> It has been brought to the attention of the Sub-Committee that the court decisions on this point may not be as clear as *From Gutenberg to Telidon* suggests. For example, it is possible that, under the jurisprudence, groups of unrelated individuals would not constitute a "public" solely because they happen to share living quarters because of their work, education, vacation or detention. These and similar situations should be clarified in any new Act.

## RECOMMENDATION

- 48. The new Act should define the phrase "in public" as regards the right to perform in public so as to include situations where individuals share living quarters by reason of their work, education, vacation or detention.**

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<sup>1</sup> Page 18.



Further to the definition of "in public," it has also been suggested to the Sub-Committee that a multiplicity of private performances effected at different locations or times should amount to a public performance. At first glance, it seems fair that performances by means of video jukeboxes or performances in a hotel room by means of playback equipment, should be considered public performances even though they might be viewed by only one person at a time.

However, broadening the definition of public performance by adopting the suggested proposal could also have the effect of making public those performances received in the home from a broadcast or by cable. This would indirectly introduce a retransmission right. The Sub-Committee prefers to discuss retransmission rights directly.<sup>1</sup> In any event, the rental of video cassettes in hotels would be covered by the Sub-Committee's recommendation to introduce a rental right. To be consistent with the recommendation to eliminate the jukebox exception found in the present Act, it appears logical to provide that performances by means of video jukeboxes should also attract copyright liability for public performances.

## RECOMMENDATION

- 49. "Performance in public" should be defined to include those performances effected by means of a video jukebox even where such performances can be viewed only by one person at any given time.**

With respect specifically to films, the Sub-Committee has been advised that the definition of publication under the present Act does not take into account film distribution methods. The law states that publication "means the issue of copies of the work to the public."<sup>2</sup> In the normal course of theatrical motion picture distribution, however, a copy of a film is never sold. Use of a copy is made available only for a limited period and, furthermore, only to a limited segment of the public. Technically, therefore, distribution of a film in this manner may not be an infringement of the right to publish even where such distribution is not authorized.<sup>3</sup> More importantly, a film lawfully distributed in this manner and seen by millions would remain technically "unpublished."

Although the problem is more apparent with respect to films, analogous situations can arise with all categories of protected material. In our communications age, works can be made widely available without copies of them ever being issued to the public. This fact is increasingly recognized at the international level where the traditional definition of publication involving issue of copies is being replaced by the concept of making the work available by whatever means. This trend should be followed in Canada.

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<sup>1</sup> See pages 77-83.

<sup>2</sup> *Copyright Act*, section 3(2).

<sup>3</sup> Admittedly this possibility verges on the academic as the public presentation of the film would itself constitute a copyright infringement if it too were unauthorized (see *Copyright Act*, section 3(1)(e)).



## RECOMMENDATION

50. The new Act, in defining "publication," should take into account the various methods of making a work available to the public other than by issuance of copies of that work.

### 3. Term

With respect to the term of protection for audio-visual works, it is desirable to be consistent with the proposed provisions for sound recordings which, like audio-visual works, are created largely by corporate entities and for which it is therefore difficult to base term of protection on the life of an individual author. The term of protection for audio-visual works should be for a period of 50 years after the date of publication or a period of 75 years after the date of fixation, whichever period terminates first.

## RECOMMENDATION

51. Audio-visual works should be protected for the shorter of 50 years following publication or 75 years following fixation.

## E. COMPUTERS

If there is one area of creative activity where technological development has overtaken the 1924 *Copyright Act* it is in the vast domain of the computer. Computers have become a factor as a support for creative works, as an instrument in the creative process itself and as an occasion for an entirely new type of work: the computer program. Some are even of the opinion that, if not the computer itself, at least the microchip, should be regarded as a truly creative work and perhaps made into a new category of work protected by copyright.

### 1. The Computer as a Support

The computer has taught us to translate all kinds of information into a digital form — not only numbers, but also words, musical notes, sounds and images. Anything can be expressed in the binary code. Information in such a form can be stored on various recording devices, reproduced, electronically transmitted, and transformed in various ways. This technological leap is as important as the Gutenberg printing revolution because it opens up even wider possibilities, only some of which are now known and fewer still currently exploited. The computer age has placed copyright principles themselves in a radically new environment with unpredictable consequences. One of the biggest challenges facing the Sub-Committee is to apply the principles of intellectual property to this new environment. For a new *Copyright Act* not to address these questions would be to guarantee a slow erosion of the very concept of intellectual property.

The first issue to consider is the use of pre-existing works in computers. A new right, a right to input these works into a computer, should be recognized. This right would cut across



all categories of protected works because any work can, at least in principle, be put into a computer. Such a right would only be infringed by the unauthorized introduction of a work into the memory of a computer system. Once in the memory of such a system, almost limitless possibilities exist to use, consult, reproduce, copy, transmit, or display the work in question. The owner of the right to input this work would be aware of these possibilities, and hence could negotiate compensation.

The Sub-Committee considered whether rights other than the right to input should be recognized. In particular, many witnesses argued that copyright owners should also be provided with an exclusive right to display their works on a computer terminal. On the whole, the Sub-Committee thinks that the right to input goes very far in meeting the concerns of copyright owners. With a right to input, copyright owners will be in a position to negotiate payments for further uses, including the display, of their works.

Indeed, there would appear to be only three problems that could not be solved other than by the recognition of a separate right to display the protected work. These problems involve use of a work through the unauthorized access to a computer or the lawful access to a foreign system in which works have been input without proper authorization, and the unauthorized reproduction of a video game where the reproduction is achieved without copying the program. This last situation was the one which was most often referred to by witnesses as justification for providing a right to display.

In the section of this Report dealing with audio-visual works, the Sub-Committee has recommended that video games be recognized as audio-visual works fixed on a program. If the program were copied without authorization, the copyright in that program would be infringed. If the audio-visual work itself were unlawfully copied by means of a program substantially different from the original one, there would still be copyright infringement, although it would be an infringement of the audio-visual work rather than an infringement of the program. Given this recommendation and its practical result, it is unnecessary to introduce a right of display to correct the problem of video game piracy.

With respect to unauthorized use of copyright material through unauthorized access to a computer, it is true that, absent a right of display, the copyright owner may be without recourse if no copy of the work is made. However, it should be apparent that if such break-ins do take place, it is the operators of the system who are first threatened and who would take action. They would also be the first to know about the break-in and the only ones with easy access to information about its occurrence. The copyright owner may always sue a negligent computer system operator for damages. As far as the break-in itself is concerned, it is an indictable offence under the *Criminal Code*.<sup>1</sup> Again, there is no need for the introduction of a new right to display.

There remains the situation of a systems operator in another country using protected works without authorization for exploitation in Canada through telecommunication links. A mere right to input would be of little use to stop such a practice because the input occurs outside of Canada. What occurs in Canada may be nothing more than a display. Although this situation is by no means far-fetched given present and emerging technology, it remains

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<sup>1</sup> *Criminal Code*, R.S.C. 1970, c. C-34 section 301.2 as added by the *Criminal Law Amendment Act, 1985*, section 46, Bill C-18, to be proclaimed Dec. 2, 1985.



extreme. The Sub-Committee has not been convinced that such an exceptional possibility warrants the introduction of a new right to display.

## RECOMMENDATIONS

- 52. A new right to input any protected work into a computer should be provided in the revised law.**
- 53. There should be no right of display in the revised law.**

### 2. The Computer As a Creative Tool

The computer is used not only as a support for the recording and reproduction of protected works but also as an instrument in the creative process itself. People use computers to create works: writers can write literary works directly on the key-board of their machines, artists can use the computer to create visual compositions and composers can compose by computer. These works will, when complete, only exist in the computer memory. The works are not entered into the computer as completed works but during the process of creation itself.

The jurisprudential requirement of fixation is what appears to create a problem in connection with such works. *From Gutenberg to Telidon* did not suggest a precise definition of "fixation." It did however recognize that the present interpretation is out of date and that the definition should be extended to include any means of fixation.<sup>1</sup> Many of the witnesses appearing before the Sub-Committee agreed that fixation needed to be defined in accordance with developing technology. Most witnesses were in favour of an explicit definition which accommodated all forms of material media, even those that do not exist at present. Some were more precise and recommended the inclusion of all means capable of capturing works, a suggestion borrowed from the definition found in the American copyright law of 1976.

The Sub-Committee thinks that the new Act should specify what is to be a fixation. However, great care must be taken to ensure that the fixation be in a form which has a certain degree of permanence. The Sub-Committee recommends that volatile media, in which a work is not generally in a stable state, be rejected as a method of fixation. For example, the mere presence of a work in the central memory of a computer which would be lost if the power were turned off would not suffice.

## RECOMMENDATION

- 54. Fixation should be defined as all means capable of capturing a work, including capture in computer media, but excluding capture in a medium as volatile as a computer's main storage or display screen.**

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<sup>1</sup> Page 11.



At this point the Sub-Committee wishes to comment on a frequent confusion that became evident during the hearings as to the purpose served by the fixation requirement. To be protected, a work needs to be fixed in a permanent way on some material support. However, several witnesses seemed to imply that an infringing use of a work had itself to be fixed. This is a misunderstanding. Actually copying a protected work results in a fixation but producing a fixed copy of a protected work is only one of the possible ways in which such a work can be infringed. Consider, for instance, unauthorized performances in public or unauthorized transmission. Neither, in itself, is fixed. The problem of video displays of protected works may be the source of this confusion because displays are transitory in nature. If a display right were provided, evidence of infringement would be difficult to obtain. But that does not mean that an infringement would not have taken place.

This clarification being made, one issue remains with respect to infringements by means of reproduction. As was said above, in these cases, a copy is being made. In the context of computer technology, the question is to determine what constitutes a copy. In legal terms, the *Copyright Act* grants to authors the exclusive right to "reproduce the work in any material form"; the question becomes one of determining what is meant by "material form." For example, must a copy of a work in a computer's main storage be considered as a reproduction in material form?

In *From Gutenberg to Telidon*, disks and magnetic tapes are mentioned as material forms on which any unauthorized reproduction of a work should constitute an infringement of copyright.<sup>1</sup> All witnesses who addressed the subject said they agreed that there is a need for an explicit definition of material form in a computer context. Several witnesses said they would like that notion to be extended to other forms, even to any form that may be perceived by a human being with or without the aid of a machine.

Under the present law, a work is considered to exist only from the moment it has a certain degree of permanence. The Sub-Committee is of the view that a similar principle must be applied to the meaning of "material form."

## RECOMMENDATION

**55. With respect to the right of reproduction, a material form should be one that has a certain degree of permanence.**

A more difficult issue is raised where the creator uses a computer program to create a work. Possible works are varied, ranging from literary works using a word processor to computer-aided graphics and computer-aided designs.<sup>2</sup> A perfect example of such a computer-aided work is the internationally acclaimed Canadian film *Vol de Rêve* created by the Ecole des Hautes Etudes Commerciales. Who should own the copyright in computer-aided works such as these?

<sup>1</sup> Page 11.

<sup>2</sup> Works produced with the aid of a computer would be assigned their appropriate categories for the purposes of copyright protection. Thus computer graphics and designs would be audio-visual or artistic works. Musical works would be placed in that category, and so on.



There is general agreement that ownership of the copyright in any protected work should be vested in the individual or entity principally responsible for the making of the work. This general principle must be applied with care in determining the ownership of works created with the assistance of a computer program. The person or entity principally responsible for the making of these works could be the creator of the original program, or the creator who used the program to create a new work.

The argument for vesting copyright ownership in the creator of the original program would be that the program itself contains all the multiple variables that could possibly be found in any work produced with its assistance. Because the ultimate work is only the result of an individual's interaction with the program, copyright should vest with the owner of that program.

This argument, however, must be rejected because it confuses the creation of a work with the creator's materials. Just as canvas and paints serve as the traditional artist's raw materials, the computer program provides the raw material which the creator uses to produce a distinctive work. Just because the potential form of the work may be bounded by the limits of the variables of the program does not preclude an original, creative work from being produced.

Naturally, for such a work to be protected by copyright the usual requirement of originality must be satisfied. The resulting work must be substantially different from the applications program which was used for its creation. How different is different enough to justify protection is a matter to be decided in each case. The intellectual effort made by the user of the program must yield a result that is not solely the result of the design program.

This approach to ownership, however, is not appropriate in assessing who should own the copyright in video games. At first glance, there seem to be similarities between video games and works produced with the aid of a computer. Both involve the interaction of an individual with a computer program, and in both cases the program contains all the possible variables of the work. It will be remembered that the Sub-Committee has recommended that video games should be treated as audio-visual works. Does that mean that the copyright in video games should vest in the player, in the same manner as it should vest in the creator of the computer-aided design?

Clearly the answer is that it should not. In video games, the result obtained by the player, who interacts with the program, follows directly from what is written in the computer program. Even though the interaction requires a certain intellectual effort on the player's part, the results are entirely predictable because the player in fact supplies only certain directions to guide a predetermined process.

## RECOMMENDATION

- 56. Where a work created with the assistance of a computer is original the copyright in that work should be owned by the person responsible for its making and not by the owner of the copyright in the original program.**



The question of ownership of copyright also arises in connection with information storage and retrieval systems. To the extent that the compilations contained in these data banks are "original" in the copyright sense, they are protected as literary works in the same manner as a compilation which is not computerized. Data in a computer, however, may be built up from elements from many sources who contribute information from time to time as it is collected. It may be impossible even to identify the various human authors. For this reason the principle of vesting copyright ownership with the individual or entity primarily responsible for the arrangements undertaken for making the computer-created work should be followed here also.

## RECOMMENDATION

### **57. Ownership in compilations produced by computer data storage and retrieval systems should be vested in the individual or entity primarily responsible for the arrangements undertaken for making the compilation.**

#### 3. Computer Programs

*From Gutenberg to Telidon* raised the possibility of treating human-readable and machine-readable programs differently,<sup>1</sup> a distinction that was almost unanimously rejected by witnesses at the hearings. Jurisprudence has already established that both kinds of computer programs are protected by copyright.<sup>2</sup> The Sub-Committee agrees that any distinction is unwarranted. Needless to say, the protection accorded to computer programs should not extend to the language used to write those programs. No "language" can in itself be a proper subject matter for copyright.

Some witnesses suggested that a separate category of protected works for computer programs should be established. Others suggested that they should continue to be treated as literary works. Judicial treatment of computer programs as literary works can be understood as necessary in light of the antiquated copyright law which did not contemplate this kind of work. Courts were forced to reason by analogy. The revision process, however, is an opportunity to re-examine the categories of copyright subject matter. For example, earlier in this Report the Sub-Committee has recommended that new categories be created for sound recordings, audio-visual works and published editions. To be consistent, a separate new category should also be established for computer programs.

*From Gutenberg to Telidon* suggested that some rights, such as a rental right and the right to prohibit importation, should not be granted with respect to computer programs.<sup>3</sup> Witnesses disagreed with this proposal. The Sub-Committee sees no merit in singling out computer programs for less favourable treatment than other works and recommends the full regime of protection. In addition, some witnesses believed that there was a need to make sure that the right to transform a program from one format or language to another should be

<sup>1</sup> Pages 80-85.

<sup>2</sup> *I.B.M. Corp. v. Spirales Computers Inc.* (1984), 2 C.I.P.R. 56 (Fed. T.D.); *La Société d'Informatique R.D.G. Inc. v. Dynabec et autres*, [1984] C.S. 1189.

<sup>3</sup> Page 82.



recognized. The Sub-Committee thinks that these rights are already present in the right to translate, to adapt or to convert.

The absolute nature of the right of reproduction raises a difficulty in relation to computer programs for which the making of a back-up copy is recommended practice. This practice could be dealt with in the contract of sale accompanying each program if it were not for the fact that there may be several intermediaries between the copyright owner and the ultimate user. The need to make back-up copies is a legitimate one. Given the nature of the technology, works that sometimes have an enormous economic value may be easily destroyed through a failure in the system, an error in operation or through poor programming. It would appear necessary, therefore, to provide an exception to the right of reproduction to allow explicitly for the making of a back-up copy.

An intriguing possibility has been brought to the Sub-Committee's attention. Software systems generally comprise a large number of computer programs whose combined use enables a computer to carry out a set of complex tasks. In a modular construct, each program may consist of a set of subprograms. The current trend in data processing is to develop increasingly complex software systems, using various construction blocks consisting of programs and their subprograms, and adding new components. To cut costs, many businesses prefer to acquire basic software and to adapt it to their needs, rather than to develop a program from scratch. In so doing, they use a substantial portion of that program in preparing another that is in some instances very different from the original.

It was alleged that the computer program industry accepts this practice as normal and healthy and has no wish to see it unduly curbed. Usual rules that prohibit the unauthorized use of a "substantial part" of a protected work run counter to this alleged norm and, it was said, might unduly slow down innovation. The Sub-Committee is not in a position to determine the validity of this view and consequently recommends that the government examine the question of introducing an exception to permit the reproduction of a substantial part of a pre-existing program as a non-substantial part of another program.

The appropriate term of protection for computer programs is controversial. Some have argued that life of the author plus 50 years, the usual term of protection, is excessively long and not in keeping with the pace of innovation in this field. This is not a proper focus of concern. The term of protection for numerous other works continues long after they have stopped being used. The Sub-Committee thinks that computer programs should be treated no differently than other works.

Considering the proposed scheme of protection and the unclear status of computer programs internationally, the Sub-Committee thinks it would be preferable to apply the principle of reciprocity with regard to the rights of foreign nationals so as to encourage their countries to recognize a protection system similar to Canada's.

## RECOMMENDATIONS

- 58. Computer programs should be protected by the revised law as a separate category of subject matter with the full regime of protection on the basis of reciprocity.**



59. The Act should provide an exception to the right of reproduction to permit the making of a back-up copy.
60. The term of protection for computer programs should be the life of the author plus 50 years.
61. The government should study the possibility of providing an exception to permit the reproduction of a substantial part of a pre-existing program as a non-substantial part of another program.

#### 4. Semi-conductor Chips

Computers were originally developed without semi-conductor chips. With the miniaturization of circuits and the development of semi-conductor chips, computers have become fast, reliable, inexpensive and, consequently, in ever-expanding use. The revolution brought about by the chip has changed the traditional role of the computer: everyone is now familiar with talking dolls, electronic toys, fully automatic cameras, fuel-injection systems, automatic and programmable household appliances and fuel-saving thermostats.

Behind the manufacture of any chip there is an extremely elaborate three-dimensional design. The first step in the production of a chip is the making of "masks" that are in the nature of photographic templates and are used in a way somewhat reminiscent of a photographic process to etch or deposit microscopic circuits and components on a silicon chip. A different mask is needed to produce each layer making up the chip. The issue to be decided by the Sub-Committee is the copyright status of the "mask works" resulting from the layering of several masks and the resulting chip.

On one view, both the masks and the resulting chips are utilitarian objects and as such should not be protected by copyright. The discussion elsewhere in this Report on the problem of the interface between the *Copyright Act* and the *Industrial Design Act* makes clear that there are legal difficulties in this area.<sup>1</sup> However, even if changes were made to the *Industrial Design Act*, computer chips would probably still not be eligible for protection under it, not being the type of ornamental designs covered by the Act.

Another view argues that chips are proper subject matter for copyright because they meet the tests of originality and fixation. Witnesses informed the Sub-Committee that the function of a particular chip does not necessarily determine the design to be used in its fabrication. Asked to design a chip to serve a given function, two designers will each go about it differently. There is room for inventiveness and ingenuity, even when the designing is itself a computer-aided process. For this reason, many chip designs pass the test of originality necessary for copyright protection.

Nevertheless, the fact remains that chips remain fundamentally utilitarian objects. The fact that chips may not even have programs embodied on them merely emphasizes their status as utilitarian objects. When they contain no programs, they function as blank tapes.

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<sup>1</sup> See pages 26-27.



On this analogy, it is as inappropriate to protect the chip through copyright as it would be to protect blank audio or video cassettes used to record music or television programs.

In its discussion of the *Copyright Act* and the *Industrial Design Act*, the Sub-Committee recommended that copyright protection should not be extended to utilitarian objects. From the preceding discussion regarding computer chips, it seems clear that the *Copyright Act* is not conceptually appropriate as a basis for chip protection. As noted already, however, the *Industrial Design Act* is equally unhelpful.

Yet, the Sub-Committee is convinced that legal protection from some source is essential. The design of chips, including the making of masks, involves considerable investment and much skill. However, once a chip has been made from a given design, people familiar with the process can easily and inexpensively infer the mask and the design from which that chip was made. If the mask itself is not protected by copyright, pirated versions of the chip can be made without any infringement. The Sub-Committee was told that such pirated versions of a new chip can be competing with the original one in a matter of a few weeks.

There is some chip design and manufacturing activity in Canada. Because American legislation to protect computer chips extends protection to foreigners only on a reciprocal basis, it is imperative that a Canadian law be enacted in order to enable the Canadian computer industry to benefit from the American regime of protection.

What form should that law take? It has already been pointed out that neither the *Copyright Act* nor the *Industrial Design Act* is suitable. The Sub-Committee concludes, therefore, that a separate Act, specifically to protect computer chips, is in order. The United States enacted this kind of *sui generis* legislation in November 1984.<sup>1</sup> The protection afforded by Canada should be on a reciprocal basis, as it is in the United States. The reciprocal approach has been followed throughout this Report wherever new rights not universally recognized have been recommended.

What should the proposed *sui generis* legislation protect? It would appear that what needs to be protected is not the individual mask from which the semi-conductor chip is made but rather the three-dimensional pattern of circuits and components that results from the vertical layering of several masks. The individual mask represents only a particular technology used at present to produce this three-dimensional pattern and the individual chip is the physical embodiment of this three-dimensional pattern but it is distinct from the pattern itself and does not require protection.

## RECOMMENDATIONS

62. Mask works fixed in semi-conductor chips should be protected by new legislation outside the *Copyright Act*.
63. The mask works to be protected are a series of related images that represent the three-dimensional pattern of circuits and components fixed in a semi-conductor chip.

<sup>1</sup> *Semiconductor Chip Protection Act of 1984*, P.L. 98-620 (17 U.S. Code, 901 *et seq.*).







## NEIGHBOURING RIGHTS

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### A. SOUND RECORDINGS

#### 1. Category of Protection

The present law assimilates sound recordings to musical, literary or dramatic works. This categorization is outdated. It is time to protect sound recordings as a separate category of subject matter. In addition, the law should specify that the protection of a sound recording is totally independent of what is recorded. It is irrelevant whether what is recorded is a work which is protected by copyright or is in the public domain. For example, bird sounds do not constitute subject matter protected by copyright because such sounds are not works. But a sound recording of the same bird sounds would be protected as falling within the new category of copyright subject matter suggested in this recommendation.

### RECOMMENDATION

**64. A sound recording should be protected as a separate category of copyright subject matter.**

#### 2. Rights

The most controversial of the rights that could attach to sound recordings are public renting, performing and transmission rights.

The subject of a renting right is discussed later as a general issue because it is a right applicable to all copyright subject matter. Performing and transmission rights are already provided to other works; this section of the Report is therefore the appropriate place to discuss these rights in relation to sound recordings.



Under the present law performing, transmission and retransmission rights are granted to composers and lyricists, but not to performers nor to producers of sound recordings. Should the owners of the copyright in a sound recording be provided with rights similar to those provided to at least two of the four creative participants in recorded music, the composer and the lyricist?<sup>1</sup> Performing, transmission and retransmission rights would entitle the owner of the copyright in a sound recording to remuneration for these uses of a recording in addition to the payment received for its purchase.

In 1971 the *Copyright Act* was amended to restrict the copyright in a sound recording to a reproduction right only, in order to prevent the exercise of public performance and transmission rights. Although these rights had existed prior to the 1971 amendment, they had never been exercised. It was the attempt in 1968 to exercise them for the first time that gave rise to Parliamentary consideration of this issue. The apparent reason for the decision to take away the rights was that their exercise would increase the outflow of copyright royalties from Canada. At that time 90% of the records manufactured in Canada were made from foreign masters, a percentage that has not changed substantially.

The Sub-Committee thinks that the full regime of rights should be reinstated. The production of a sound recording is just as creative as other activities protected under the copyright law. The production of a film is a good example. Witnesses from the sound recording industry referred to a number of different creative aspects of their work: choosing the work to be recorded, selecting performers, and mixing the sounds to produce the final result — a sound recording. Commercial use of the results of this creative activity should not be permitted without appropriate compensation.

Recognizing performing, transmission and retransmission rights in sound recordings would be consistent with the scope of protection provided to other derived works. For example, audio-visual works and sound recordings fix sounds, images or a combination of the two on a material support. It is inconsistent to provide audio-visual works with performing, transmission and retransmission rights but to deny them to sound recordings.

The question arises: who should benefit from these new rights? Two options are open. The rights could be granted to the nationals of all Convention countries whether or not those countries provide this kind of protection or they could be provided, on the basis of reciprocity, only to nationals of those countries which provide similar rights to Canadians. The United Kingdom and Australia are examples of countries which provide reciprocal rights. At the present time, the United States does not extend public performance or transmission rights to sound recordings.

The Sub-Committee fully supports the reciprocal approach and considers that such protection should be adopted in Canada. The Sub-Committee sees no merit in extending rights on a unilateral basis. Attaching the condition of reciprocity to the provision of performing, transmission and retransmission rights minimizes the problem of the outflow of copyright royalties, thereby overcoming the main objection that led to their deletion in 1971 and, in the Sub-Committee's view, fully justifies their reinstatement.

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<sup>1</sup> The fourth creative participant, the performer, is discussed in the next section.



The main opposition to the grant of these new rights has come from the broadcasting industry. The central argument advanced is that the air play of a sound recording already indirectly compensates record producers in that it is free advertising which, in turn, increases record sales. However, even if it is true that the broadcast of a sound recording promotes its sale, thereby benefitting the producer, the extent of that benefit has proved very difficult to quantify. A rather detailed and thorough American study suggests that while air play may be valuable in some cases, its overall impact is not as significant as has been argued.<sup>1</sup> Should this right be granted, the amount of the benefit derived by record producers from air play by broadcasters would be a matter to be taken into account by the Copyright Appeal Board in setting the quantum of the tariff. It should not affect the recognition of the right.

In any event, the argument by the broadcasting industry regarding free advertising confuses purpose and result. The purpose for which broadcasters use sound recordings is to attract and maintain their audiences. It is this use that should be paid for regardless of the incidental beneficial effects of airplay on sales. The granting of rights must ultimately be considered in terms of principle. The use of someone's creativity without authorization and payment, in this case a sound recording, is contrary to the fundamental principles adopted by the Sub-Committee.

The final issue to be addressed concerning these new rights in a sound recording is their practical implementation. The Sub-Committee has already suggested that the quantum of the royalty should be a matter to be determined by the Copyright Appeal Board on the basis of evidence adduced. It is envisaged that these rights would be collectively exercised by their owners in the same manner as composers and lyricists presently exercise their performing and transmission rights. Indeed, it is difficult to envisage any other practical way such rights could be exercised.

## RECOMMENDATION

- 65. The revised law should provide the full regime of copyright protection to sound recordings. Public performance, transmission and retransmission rights should be extended only to nationals of those foreign countries which provide similar protection to Canadians.**

### 3. Ownership

*From Gutenberg to Telidon* recommended that the author of a sound recording should be the person principally responsible for the arrangements undertaken for its making.<sup>2</sup> This would be a major change from the present law, which vests copyright in the owner of the original plate. The proposal has received widespread support and the Sub-Committee endorses it.

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<sup>1</sup> *Performance Rights in Sound Recordings*, Sub-Committee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Ninety-fifth Congress, Second Session, June 1978, 164.

<sup>2</sup> Page 30.



## RECOMMENDATION

- 66. The owner of the copyright in a sound recording should be the individual or entity principally responsible for the arrangements undertaken for its making.**

### 4. Limitations

In the section of this Report on musical works the Sub-Committee examined a number of exceptions in the current law relating to the public performance right. The Sub-Committee recommended that the exception for jukeboxes be eliminated, that radio and television sets and playback machines be excepted only for essentially private uses, and that the religious and charitable objects exception should be narrowed in the case of the former and eliminated for the latter. The Sub-Committee considers that the same exceptions should apply to sound recordings as to musical works.

## RECOMMENDATIONS

- 67. The performance of a sound recording during a religious service should not constitute an infringement of copyright.**
- 68. The revised law should not contain an exception for the public performance of sound recordings by means of jukeboxes, radios, television sets and playback machines.**
- 69. The revised law should contain an exception from copyright liability for uses of sound recordings that incidentally take place in public.**

### 5. Term

*From Gutenberg to Telidon* recommended that the term of protection for sound recordings should be 50 years from publication or 75 years from creation.<sup>1</sup> It is not clear whether the term of protection would be the greater or lesser of the two proposed terms. Nor is "creation" a precise point of departure. Submissions to the Sub-Committee indicated that some works are created over a number of years. Because of this the Sub-Committee is persuaded that fixation should be substituted for creation as a point of departure in calculating the term of protection.

## RECOMMENDATION

- 70. Sound recordings should be protected for the shorter of 50 years following publication or 75 years following fixation.**

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<sup>1</sup> Page 56.



## 6. Remedies

The Sub-Committee deplores the widespread practice of record piracy described by witnesses at the public hearings. Although the subject of remedies will be dealt with as a matter of general application and importance to all copyright owners later in this Report, the Sub-Committee is fully aware of, and wishes to emphasize, the grave consequences of piracy for the recording industry, as well as the urgent need for practical and efficient remedies to combat this problem. The provision of new rights will not assist the industry to any great extent unless those rights, together with existing rights, can be effectively enforced.

### B. PERFORMERS' PERFORMANCES

#### 1. Subject Matter

The Sub-Committee has already recommended that new rights should be provided to the producer of a sound recording. The only unprotected creative element remaining, then, would be the performer. Of course, the use of a performer's recorded performance on a sound recording is not the only use which can be made of the performance of a performer. Performers' unions such as the Alliance of Canadian Cinema, Television and Radio Artists and the Union des Artistes, in their submissions to the Sub-Committee, addressed the various uses of performers' performances and requested statutory protection for them all.

For reasons stated below, the Sub-Committee recommends that the performances of performers should be protected. The Sub-Committee is aware that this is controversial. Opposition to the protection of performers came primarily from two sources. The first was composers, music publishers and the performing rights societies. Opposition from this quarter appears to be based upon the fear that payments to other creators might reduce those made to composers for performing rights. It is not the intention of the Sub-Committee, as a result of its recommendation to protect performers, that royalty payments should merely be divided differently. Rather, such payments should be increased. This has, in fact, been the experience at the international level.<sup>1</sup> The Copyright Appeal Board under the revised law should operate on the assumption that the protection of new subject matter should entail new sources of royalty payments.

Nevertheless, if it should happen that the grant of rights to performers results in a mere re-apportionment of royalties, the Sub-Committee notes that it is also open to composers to argue for the redistribution of royalties with respect to other uses. The composers' share of mechanical reproduction royalties is a good example of a change in the copyright law which should increase composers' remuneration.

The Sub-Committee insists, however, that revision of the law should not be viewed as an exercise in which one creative group is put in the position of opposing protection to another creative group in order to safeguard its own interests. Rather, copyright revision should be

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<sup>1</sup> S.M. Stewart, *International Copyright and Neighbouring Rights*, Butterworths, London, 1983, 179.



an exercise in providing statutory protection to *all* creative activity, consistent with certain principles. One group should not be preferred over another. Each creator is important and entitled to protection.

Another source of opposition to the protection of performers' performances came from the broadcasting industry. It was argued, as it was with respect to the performing right in sound recordings, that the exposure that performers derive from broadcasts increases their popularity and provides them with free advertising. This reasoning was considered in connection with the performing right in sound recordings and, as discussed there, the Sub-Committee concludes that this argument does not address the issue of the provision of the right itself but only the quantum of the royalty generated by the right.

In some cases re-use fees by broadcasters are already established and agreed to by contract and no reference to the Copyright Appeal Board will be required. Where there is no contract, as is the case with respect to the transmission of authorized recorded performances, the amount of benefit derived by a performer from air-play can be established by the Board based upon evidence presented. It remains open to the broadcasting industry to establish before the Board that the free advertising provided to record producers and performers is such that only minimal tariffs should be set.

Another argument advanced by the opponents of protection of performers' performances was that protection already exists by means of contract. A performer, it is argued, can control re-use of performances by private contractual arrangements between the performer and the producer of the performance. Assignment by the producer to a third party can also be controlled by a contractual obligation requiring the third party to undertake the residual obligations to the performer set out in the original agreement. However, performers' representatives have testified that these so-called "Assumption Agreements" are ineffective because performers often find themselves dealing with a judgement-proof corporate shell as a result of the current practice of forming a new corporation for the production of each work.

The truth is that contractual obligations are effective in many cases but not in all. A contract is of no use in the case of unauthorized recording. Performers seek protection against those who have recorded and used a performance without their authorization. To meet their concern, *From Gutenberg to Telidon* recommended that a criminal offence be created where the unauthorized recording is used for commercial gain.<sup>1</sup>

Performers agreed with this recommendation but suggested that any unauthorized recording and subsequent use should be a criminal offence even where no motive of commercial gain is involved. The Sub-Committee rejects this approach because it does not wish to brand as a criminal an individual who records a performance. This should not be a criminal matter.

Criminal offences, or summary remedies as they are called in the present law, must be applied in the same way to all copyright subject matter. Performers' performances should not be isolated for special treatment. The Sub-Committee's recommendations concerning criminal offences are discussed later.<sup>2</sup>

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<sup>1</sup> Page 12.

<sup>2</sup> See pages 97-98.



*From Gutenberg to Telidon* seems to have recommended the creation of a criminal offence to meet the problem of unauthorized recording because copyright protection for performances was rejected. As the Sub-Committee is recommending that performers' performances form a new category of copyright subject matter, it is not necessary to have two solutions to the same problem. A civil right of action should be provided instead of the criminal offence suggested in *From Gutenberg to Telidon*.

Apart from unauthorized recordings of performances, there exist several situations where a performer cannot make contractual arrangements with the actual user of the performance and where, therefore, the performer is left without any protection. The most common example is where a radio station transmits a sound recording containing an authorized performance. The performer is not paid because there is no contract. There can be no contract as there is no statutory right to authorize the broadcast of a performance. In other words, there is nothing to negotiate.

Another example of re-use of a performance lawfully recorded exists where the recording is acquired by a third party without a corresponding obligation to respect the provisions of the original contract concerning residuals. Finally, re-use without compensation to the performer occurs in the situation where a performance is recorded in one medium and is subsequently adapted to another medium.<sup>1</sup>

These examples illustrate that performers are not able to negotiate with users the terms of re-use of all of their performances. Accordingly, the Sub-Committee is of the view that performers' rights cannot be adequately protected solely by means of contract.

As a matter of principle, all creators should be protected against unauthorized uses of their intellectual property. A performer is just as much a creator as is the producer of a sound recording or a film. It is inequitable to protect some creative works and not others, based on artificial distinctions that betray value judgements as to the creative merits of certain works. No good reasons have been advanced to deny protection to performers in their own creative contribution.

Consistent with the approach taken to the protection of other creative works such as published editions and sound recordings, rights should attach to the performance of any work whether or not it is in the public domain. The performance should be protected irrespective of what is performed. As with the provision of a performing right in sound recordings and rights in published editions, the protection of performers' performances should be provided to nationals of other countries on a reciprocal basis.

## RECOMMENDATIONS

### **71. The performances of performers should be a new category of subject matter with the necessary regime of protection.**

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<sup>1</sup> This situation was considered in the *Economic Council Report*, pages 159 and 160. At least one member was of the view that payment should be made to both the performer and the prime producer.



**72. The protection of performers' performances should be extended to nationals of those foreign countries which provide similar protection to Canadians.**

2. Ownership

Performers should be the first owners of copyright in their performances, subject to any agreement to the contrary, and subject to any other rules in the Act concerning works created during the course of employment. This recommendation in turn raises the issue of who is a performer. Some guidance in answering this question can be found in the model law for the protection of performers proposed by the World Intellectual Property Organization. It defines as performers those who put the stamp of their personality on their performance. The Sub-Committee envisages a wide group of performers: actors, singers, musicians, conductors and dancers would all benefit from the new rights.

The question has been raised as to whether performers should be given the right to veto some re-uses of the authorized recordings of their performances. This question can only arise with respect to re-uses that were not foreseen or provided for in the contract that permitted the original recording. Should a performer be able to prohibit an unforeseen re-use? The question would be particularly relevant where the performance involved the contribution of numerous performers, some of whom might agree to the re-use while others might not. Some jurisdictions have solved this problem by granting only a right of remuneration for the use, not a veto power. Others have concluded that in actual fact this is not a problem in that performers are not likely to forbid the re-use of their performances because that would be contrary to their economic interests. The Sub-Committee is not in a position to evaluate the relative merits of these approaches and recommends further study.

**RECOMMENDATION**

**73. Performers should be the first owners of the copyright in their performances.**

3. Limitations

Some commentators have raised the issue of whether protecting performers' performances would mean that nobody could parody, satirize or imitate a performer. As stated before, the Sub-Committee has recommended that the necessary regime of rights should be provided for performers. At a minimum, this would include protection for recorded, fixed performances and the right to authorize transmission. The mannerisms, expressions, movements and style of a performer would not in themselves be subject matter for copyright and could therefore be used in parodies, impressions or satire. For this reason, the Sub-Committee thinks that it is not necessary to provide a specific limitation on performers' protection to permit parody, imitation or satire.



#### 4. Term

There is no internationally-accepted norm for the term of protection for performers' performances. In introducing this new category of protected subject matter, the prudent course would seem to be to follow the provisions of the Rome Convention on neighbouring rights.<sup>1</sup> Article 14 of that Convention provides for a minimum term of 20 years from the recording of the performance.

### RECOMMENDATION

**74. Performers' performances should be protected for a term of at least 20 years from the time of fixation of the performance.**

### C. BROADCASTS

#### 1. Subject Matter

Under the present Act, broadcasters<sup>2</sup> enjoy copyright protection for their own productions which fall under the traditional categories of protected subject matter, namely, literary, dramatic, musical or artistic works, including cinematographic works and sound recordings. *From Gutenberg to Telidon* proposed to broaden substantially the meaning of fixation.<sup>3</sup> This would provide broadcasters with rights in previously unprotected material such as live broadcasts of sports events or of news and public affairs programs. The recommendation would also, by clarifying the status of works first fixed on videotape, allow for certainty of protection of in-house productions which are not in a cinematographic medium. Broadcasters would therefore own copyright, with certainty, in many more works than is presently the case. The Sub-Committee endorses this recommendation.

Broadcasters, however, argue that their signals should be protected as such, independently of the copyright material that might be embodied in these signals. If a sound recording is protected independently of the musical work it contains, or if an edition should be protected separately from the literary work it conveys, it is difficult to see why a broadcast should not also be protected under the revised law, quite apart from the works embodied in the broadcast. The Sub-Committee recognizes that there is surely as much creative input in arranging a broadcast, or a "broadcast day" as it is referred to by broadcasters, as there is in other compilations, a street directory, for example. Compilations in the nature of a broadcast should therefore be protected.

<sup>1</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 1961.

<sup>2</sup> "Broadcaster" in this section refers to all program originators regardless of the technology employed, including cable.

<sup>3</sup> Page 6.



## RECOMMENDATION

### 75. Broadcasts should be protected under the revised Act.

#### 2. Rights

Given the nature of broadcasts, a number of the rights traditionally provided by a copyright law would be of no use and would only give rise to interpretation difficulties. For example, it is impossible to imagine how a broadcast could be translated or converted into a novel. Accordingly, the Sub-Committee sees utility in providing the following rights: a right of reproduction, a right of transmission, a right to authorize each of these and a right of retransmission.

The right of reproduction needs no explanation. It is obvious that a recording can be made of a broadcast. Such a recording should be authorized by the broadcaster.

The right of transmission will, at first, appear redundant: regulations made under the *Broadcasting Act* already prohibit the simultaneous re-broadcast of a broadcast.<sup>1</sup> The Sub-Committee, however, believes that regulations adopted for reasons of broadcasting policy are not the proper place to determine intellectual property rights. The right to transmit a broadcast should therefore be provided in the new *Copyright Act*.

Finally, broadcasters should be provided with a right of retransmission in their broadcasts. This, of course, will be the most significant right in a broadcast. Consistent with the international philosophy underlying this neighbouring right for broadcasters, the right should be limited to a right of remuneration.

In keeping with the Sub-Committee's other recommendations concerning neighbouring rights and published editions, rights in broadcasts should be provided to foreigners on a reciprocal basis.

## RECOMMENDATIONS

### 76. The rights attaching to broadcasts should be:

- (a) a right of reproduction;
- (b) a right of transmission;
- (c) a right to authorize each of the above; and
- (d) a right of retransmission.

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<sup>1</sup> *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, section 15; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c. 380, section 23; *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, section 22.



**77. The rights should be provided to foreign broadcasters on the basis of reciprocity.**

**3. Term**

The Rome Convention provides that broadcasts must be protected at least until the end of a period of 20 years computed from the year in which the fixation was made or the (unfixed) broadcast took place.<sup>1</sup> It is a basis of this Sub-Committee's recommendations that works, to be protected, must be fixed. Accordingly, there is no need to envisage a different point of departure for the period of protection of unfixed broadcasts. On the other hand, it would appear that most countries which provide protection to broadcasts grant a term of protection that is longer than the Rome Convention minimum requirement.

In introducing new neighbouring rights into Canadian law, the Sub-Committee finds merit in recommending terms of protection comparable to international standards. Accordingly, the Sub-Committee recommends that broadcasts be protected for a period of 25 years from the fixation of the broadcast. This would have the added benefit of being consistent with the recommended term of protection for performers' performances, another neighbouring right that is not provided for in the present Act.

**RECOMMENDATION**

**78. Broadcasts should be protected for a period of 25 years from the date of their fixation.**

**4. Limitations Benefitting Broadcasters**

In addition to obtaining rights in their broadcasts and confirmation that the works they produce are protected, broadcasters should benefit from certain exceptions to copyright liability, designed to meet the particular needs of the broadcasting industry.

**(a) Incidental Use in a Broadcast**

In the majority of cases where broadcasters make incidental use of literary, dramatic or musical works, it is safe to assume that the use is of a non-substantial part of the work. Otherwise, the use would not be incidental, but planned in the production of the broadcast. This is particularly so with respect to literary or dramatic works. Even under the present law, it is doubtful that the unauthorized broadcast of a non-substantial part of a work would constitute an infringement of copyright. Furthermore, in those rare instances where broadcasters would perhaps incidentally use a substantial part of a protected work (which could be more likely to happen with respect to musical works), that use is probably authorized by blanket licence arrangements.

<sup>1</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 1961, Article 14.



However, an incidental use of an artistic work in a television broadcast almost always entails a broadcast of the whole artistic work or, at the very least, a substantial part of it. These uses are as unavoidable as they are incidental. Broadcasters should be freed from the risk of copyright infringement by incidental inclusions of artistic works in their broadcasts.

*From Gutenberg to Telidon* suggested that this problem could be solved by a new, broader definition of "fair use."<sup>1</sup> The Sub-Committee disagrees with this suggestion and recommends later in this Report that the present fair dealing provision, with certain modifications made necessary by the emergence of new communications technologies, be retained.<sup>2</sup> The incidental use of artistic works in a broadcast would not be covered by this more traditional concept of fair dealing. Accordingly a specific exception is necessary.

## RECOMMENDATION

### **79. It should not be a copyright infringement to use incidentally an artistic work without authorization in a broadcast.**

#### (b) Ephemeral Recordings

Most copyright laws, even in those jurisdictions which are most protective of authors, provide exceptions to copyright liability to permit broadcasters to make ephemeral recordings. The Canadian Act recognizes no such exception. Canadian copyright owners, while preferring to retain the present system which is undoubtedly to their advantage, realize that the *Copyright Act* is out of step with foreign copyright laws and therefore reluctantly agree that a limited exception should be introduced.

From the submissions received by the Sub-Committee, and from the presentations made during the public hearings, it is apparent that much confusion surrounds the concept of ephemeral recordings. There appear to be three different notions of what an ephemeral recording is.

First, it is current practice in the broadcast industry, both for radio and television, to pre-record many programs. Few programs are broadcast live. These pre-recordings can be made months, even years in advance. Most broadcasters would label these pre-recordings "ephemeral" and would suggest that they must be kept for very long periods.

Secondly, once a program has been broadcast for the first time, a recording of it may be needed in order to allow the program to be shown elsewhere on the same network or by affiliated stations situated in different time zones. For example, a program broadcast at 6 p.m. in the Maritimes could be simultaneously recorded in order to be broadcast in British Columbia at 6 p.m. as well.

<sup>1</sup> Page 51.

<sup>2</sup> See pages 63-66.



Thirdly, broadcasters and certain archival interests, who all state that they have no intention of re-broadcasting the program, claim that programs should be recorded to be kept in archives for internal reference and research.

These three types of recordings are all interchangeably said to be "ephemeral recordings." To these three situations the Sub-Committee would add a fourth: those recordings made by virtue of the specific requirements of the Canadian Radio-Television and Telecommunications Commission. The CRTC requires broadcasters to maintain a sound recording of their complete broadcasts for a period of 30 days.

Of these four situations, the Sub-Committee is prepared to recognize a need for an ephemeral recording exception only with respect to broadcasting in different time zones and with respect to CRTC requirements. With respect to the pre-recording of programs, the Sub-Committee can find no justification in derogating from the creator's basic right of reproduction. Such pre-recordings can and should be authorized contractually.

Questions arise, however, with respect to recordings made simultaneously with the broadcast of a live event. Such simultaneous recordings could be made for two purposes. They could be made in order to meet the fixation requirement for copyright protection of the live event *per se*. But in that instance, the recording would need to have a certain permanence and could hardly be called "ephemeral." Insofar as such a recording would include pre-existing works protected by copyright, it is envisaged that it be subject to the same requirements governing pre-recordings. Owners of copyright in the pre-existing works forming part of the live event should authorize the making of that simultaneous recording.

However, simultaneous recordings of live events incorporating protected works could be made for the sole purpose of broadcasting the live event in a different time zone. The exception proposed above with respect to ephemeral recordings should apply in those instances and broadcasters should then be exempted from seeking authorizations from owners of the copyright in the protected works forming part of the live event.

With respect to recordings for archival purposes, the Sub-Committee is of the opinion that relying on an exception designed for the making of "ephemeral" recordings is, on the face of it, contradictory. What would be kept in a broadcaster's archives would be a permanent recording. Such permanent recording must be made with the consent of the copyright owner. No exception should permit the building of a collection of copyright material by unauthorized reproduction. However, broadcasters who perform an archival function should benefit from the same exceptions as other archives. Those exceptions are discussed later in this Report.<sup>1</sup>

Another issue is the question of how long true ephemeral recordings should be kept. Obviously, with respect to those recordings made pursuant to CRTC regulations the period of conservation should be that which is in the regulations. For recordings made for broadcasting in different time zones, the Sub-Committee has concluded that the period should be eight days.

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<sup>1</sup> See pages 68-70.



The Sub-Committee arrived at this conclusion by simple mathematical reasoning. There are six time zones in Canada. Accordingly, it would appear that programs recorded via network feed in different time zones as they are being broadcast at their point of origin need only be kept a maximum of six hours in order to be broadcast in each time zone at the same local time as they were originally broadcast. This, however, does not take into account the duration of the program itself nor the fact that ephemeral recordings cannot always be made at the intended place of a time-delayed broadcast. Ephemeral recordings are often "bicycled" across the country. Moreover, programs are not only exchanged from east to west but also from west to east. It could therefore conceivably happen that a program titled, for example, "Sunday Evening" originating in British Columbia and broadcast there at that time could not be shown until the following Sunday in the Maritimes. Counting from Sunday to Sunday, and including both the point of departure and the last day, gives eight days.

## **RECOMMENDATION**

### **80. Exceptions should be provided for the making of ephemeral recordings by broadcasters:**

- (a) pursuant to CRTC regulations, or**
- (b) in order to permit the broadcast of the program in a different time zone provided that the recording is erased after eight days.**

### **(c) Identification of Works Broadcast**

One of the moral rights of an author is the right to claim authorship. The Sub-Committee has recommended recognition of protected works, such as sound recordings and performers' performances, to which attach moral rights, including the right to claim authorship. As a result, broadcasters could find themselves in the situation of devoting the better part of air time to the identification of the various authors in the numerous works broadcast. This result is unwarranted. It is therefore recommended that broadcasters be specifically exempted from the otherwise generally applicable requirement to identify the authors of works being broadcast where such identification is not incorporated in the work itself, for example, as credits at the beginning or end of an audio-visual work.

## **RECOMMENDATION:**

- ### **81. A broadcaster should not be required to identify the authors of works broadcast except where the identification is incorporated in the work itself.**



## PART IV

### GENERAL ISSUES

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The five issues discussed in this Part are grouped together because each is a matter of general application which could not be appropriately discussed in connection with any one particular theme. For example, fair dealing and certain other exceptions apply to all works protected by copyright and could not be discussed in connection with each theme without a great deal of repetition. The same is also the case with respect to renting and retransmission rights, which apply to all works protected by copyright.

#### A. FAIR DEALING

The first matter to be discussed is what "fair dealing" should be called. *From Gutenberg to Telidon* suggested that the term "fair use" found in the American copyright law should be substituted for the term fair dealing used in our present law, as well as in the copyright laws of other Commonwealth countries.<sup>1</sup> The Sub-Committee has concluded that the concept of fair dealing should be retained. The American concept of fair use is vastly different from the concept of fair dealing. As the Sub-Committee rejects the American concept, it also rejects the name.

The proposals in *From Gutenberg to Telidon* would represent a substantial departure from the concept of fair dealing in the present law. In order to assess this departure it is necessary to examine the nature of fair dealing as it presently exists. The present law provides that it is not an infringement of copyright to deal fairly with any work provided the dealing is for one of five enumerated purposes: private study, research, criticism, review, or newspaper summary.

Fair dealing is not an exception under which a user obtains an advance statutory authorization to do the things which are exclusively the right of the copyright owner. Rather,

<sup>1</sup> Pages 39-40.



it is a defence which can be raised in an action for infringement. It must first be determined that an infringement has taken place. For example, with respect to the right of reproduction, it must be found that more than a substantial part of a work has been copied. After it has been determined that an infringement has taken place, it can then be decided whether a defence of fair dealing will excuse the infringement. The defence will succeed only if the dealing was fair and was for one of the five enumerated purposes.

This scheme of inquiry in connection with fair dealing has worked well. There has been very little litigation in Canada on this issue. Indeed, there has not been a great deal of litigation in any of the Commonwealth countries which have a similar provision. This alone is a good reason not to alter drastically the existing fair dealing provision. Submissions to the Sub-Committee attributed the success of the existing fair dealing scheme to the sequential tests used in applying the provision: infringement must first be established and then the dealing must be fair and for one of the enumerated purposes.

The Sub-Committee is of the view that this scheme should be retained. It settles many potential lawsuits at an early stage. The wider approach in the United States has given rise to much litigation there, and has caused the issue to be raised as a matter of course in all copyright actions. It has created rather than curtailed the uncertainty surrounding the concept.

There are some other matters with respect to the existing scheme which require comment. One concerns reproduction by schools and libraries. This matter was referred to by the Economic Council of Canada in its 1971 Report in the following terms:

[A]n unreasonable burden is being thrown on the consciences and amateur legal expertise of such people as librarians and copying-machine operators...<sup>1</sup>

These people have a great deal of difficulty in applying the concept of fair dealing to their particular copying practices with any degree of certainty. In the end, the Economic Council questioned whether fair dealing could provide the answer. The Sub-Committee does not think it can. The concept of fair dealing and the problem of reprography are separate issues requiring separate solutions. The certainty sought by libraries and schools, in the Sub-Committee's opinion, lies in the formation of collectives and the negotiation of blanket licences.

Some submissions to the Sub-Committee requested that fair dealing be "defined" so as to provide certainty. The Sub-Committee is of the view that it is not possible to define fair dealing without sacrificing essential flexibility. To be effective, any fair dealing provision must be flexible. It must be left to the discretion of the courts to mould and shape according to technological developments and existing practices. Fair dealing must be used in accordance with its name, that is, as a method of determining what is fair and what is not fair on the facts of a particular case.

*From Gutenberg to Telidon* suggested that the Act should contain a prioritized list of factors to be applied by the courts in each case.<sup>2</sup> These were apparently to be exhaustive. The

<sup>1</sup> Page 133.

<sup>2</sup> Page 39.



Sub-Committee does not agree with either the prioritization of factors or their mandatory nature. That factors might be listed in the provision is not objectionable. However, the flexibility so essential to fair dealing would be destroyed by the fact that they would be mandatory and exhaustive.

With respect to the enumerated purposes of the present law, the Sub-Committee is of the view that, with some changes, they should be retained. Many submissions suggested that fair dealing for research purposes should be a defence only where the research is private. The Sub-Committee agrees that commercial research organizations should not benefit from the fair dealing defence. In addition, the purpose of "newspaper summary" is outdated and should be expanded to include all methods of news reporting.

Retaining the enumerated purposes is essential to the fair dealing scheme envisaged by the Sub-Committee. Whatever certainty is possible with respect to fair dealing is derived from the enumeration of these purposes. If the activity in question is not for one of the purposes then it is not fair dealing. Nothing can be more certain than that.

Finally, *From Gutenberg to Telidon* recommended that its fair use concept should "apply to all copyright subject matter that has generally been made available to the public, regardless of whether such material has been published in the traditional sense."<sup>1</sup> It is possible that under this recommendation the fair dealing defence could apply to unpublished works. The Sub-Committee cannot endorse the application of a defence to the infringement of unpublished works. Publication has been, and should continue to be, the exclusive right of the copyright owner.

In any event, the Sub-Committee has recommended elsewhere in this Report that the meaning of "publication" be expanded to include the various ways in which a work can be made available to the public other than by the issuance of copies.<sup>2</sup> This recommendation would considerably expand the concept of publication and would result in bringing more works within the ambit of the fair dealing defence. The Sub-Committee fully endorses this development which would appear to meet some of the objectives of the suggestion in *From Gutenberg to Telidon*. However, the revised law should make clear that there can be no fair dealing with an unpublished work. A member of the public cannot deal fairly with a work that is unavailable to the public.

## RECOMMENDATIONS

- 82. The present fair dealing provisions should not be replaced by the substantially wider "fair use" concept.**
- 83. The nature of fair dealing as a defence to an action for infringement should not be changed.**

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<sup>1</sup> Page 40.

<sup>2</sup> Pages 38-39.



84. The purposes for which fair dealing can be a defence should be retained but should be revised to indicate that research must be private to qualify and to indicate that all media of news reporting are covered.
85. Factors to be considered by the court may be listed but should be illustrative only and not prioritized.
86. Fair dealing should not apply to unpublished works.

## B. REQUESTS FOR SPECIAL CONSIDERATION

During the public hearings held by the Sub-Committee one of the themes was *Requests for Special Consideration* under which were grouped requests for exceptions for the handicapped and for archival institutions. Another theme was devoted to *Uses of Protected Works in Educational Institutions*. These limitations on the rights of creators will be discussed in this part.

### (1) Handicapped

Whether or not an exception should be provided to permit the production of special media materials for the perceptually handicapped is addressed as a "general issue" because such an exception would affect not only the reproduction and recording of literary and dramatic works but also the captioning of audio-visual works. Furthermore, it is entirely conceivable that technology could develop new ways to make other categories of copyright material accessible to the handicapped.

Submissions to the Sub-Committee focused on requests for, and arguments against, a limitation for the benefit of the *visually* handicapped. The issue, however, is broader. Access to copyright material by individuals with an *auditory* handicap can also be provided through the captioning and subsequent broadcasting of audio-visual material. Under the present law, just as producing a braille version or a talking book without permission infringes copyright so too does the captioning or broadcasting of a captioned audio-visual work. If an exception is to be provided it should apply to all forms of special media materials and should not isolate some for special treatment.

The principles stated in the introduction to this Report are difficult to apply to the issue of whether an exception should be provided for the benefit of the handicapped. The Sub-Committee is not dealing with a request for special consideration for the benefit of a commercial interest group. Rather, the Sub-Committee must attempt to apply these principles to a disadvantaged group in our society. In the final result the Sub-Committee has decided that, in at least some respects, this is an instance where there are strong reasons for limiting the rights of creators.

The issue, however, is not entirely as one-sided as at first it may appear. The creative community argued strongly that it is fundamentally inequitable to require one disadvantaged group to support another. Creators are an economically disadvantaged group. Accordingly, they see a law which would compel them to donate their work to the handicapped, another disadvantaged group, as unjust. Creators argue that, to be consistent, tape and recording



machine manufacturers, and indeed grocery stores who sell food to the handicapped, should also be required by law to forego their right to payment. On this issue the creative community has persuaded the Sub-Committee that no exception from the copyright owner's basic right of remuneration should be recommended.

Submissions from the handicapped, however, were persuasive with respect to another issue. Many witnesses spoke of the immense practical difficulties experienced in obtaining permissions from copyright owners to produce special media materials. These difficulties exist in two areas. The first consists of delays of weeks and months in obtaining the necessary permissions for handicapped people who need access immediately. A wait of weeks or months is of little help to a student whose examination has been written before the student has access to the material needed to write it.

Delays sometimes turn into refusals. Permissions are occasionally subject to such stringent conditions as to amount to a refusal in reality. This leads to the second kind of practical difficulty being experienced. That is the cost of permissions. In most cases the testimony revealed that nominal royalties are requested by copyright owners. In some cases, however, the cost is prohibitive. This situation can be rectified.

These practical problems can be cured by a provision in the revised law which does not require the producer of special media materials to obtain the permission of the copyright owner. This will eliminate the problem of delay in obtaining permissions. The Sub-Committee is of the view that the Copyright Appeal Board should be vested with the authority to establish tariffs in advance for the production of special media materials. These tariffs could be set according to criteria established by the Board.

The setting of general tariffs in advance for an established period would avoid delays in the production of special media materials that result from unknown copyright costs. The Board should not make its decisions on a case by case basis as it could take several weeks to obtain information about the fee, thereby delaying production. Payment in accordance with the established tariffs should be made directly by producers to the appropriate copyright owners.

This solution represents the best possible compromise. It is not a case of right versus wrong, but of two rights in basic conflict with each other. The Sub-Committee cannot recommend that creators be compelled by law to donate their property to the handicapped when no other group in society is required to do so. At the same time the Sub-Committee cannot condone the long delays being experienced by the handicapped in obtaining permission to produce special media materials under the present law.

The Sub-Committee is aware that the producers of special media materials are either publicly funded institutions or are charitable organizations funded at least in part by the public purse. The Sub-Committee wishes to take this opportunity to encourage those responsible for establishing the grants to these organizations to consider the recommendations of this Sub-Committee in establishing the quantum of the grant.



## RECOMMENDATION

- 87. The revised law should permit the production of special media materials without the authorization of the copyright owner but with payment to be made in accordance with tariffs established by the Copyright Appeal Board.**

### (2) Archives

The matter of preservation of historical records posed an interesting and perplexing problem for the Sub-Committee. A great number of archival works are protected by copyright and it is important that the principles of copyright law be respected by archives, as by everyone else. It is highly desirable from a public policy perspective that documents and other materials be preserved for future generations. If these records are not systematically preserved they could be lost forever. Not only printed material is involved. Our society has entered an electronic era where audio-visual material has replaced the printed word as the prime means of communication.

Donors are free to deposit in an archival institution copies of works which they own, even if they do not own the copyright in them. What an archival institution can do with a protected work once it has become part of its collection is affected by the *Copyright Act*, quite apart from any restrictive provisions contained in the deposit agreement. For example, performance in public of copyright works is prohibited but not performance in private. Thus, a film on deposit could be consulted by an archival researcher only if the consultation remained a private performance.

The Sub-Committee heard testimony reflecting the concerns of copyright owners who feared that broad archival exceptions would lead to unauthorized uses of their works prior to the expiration of the copyright subsisting in them. Yet, it would be an irreplaceable loss if archival works were not preserved and available for use. Indeed, creators themselves often use archives in their research. The Sub-Committee is therefore of the view that an archival exception should be provided in the revised law, subject to appropriate safeguards for the interests of creators.

Much of the concern which has been expressed by archivists stems from the problems caused by the perpetual protection of certain unpublished works provided by the present law. Over the long history of copyright law revision in this country, archival institutions have advocated a fixed term of protection for unpublished works. Such a term would make a large volume of unpublished works that were previously protected available to archivists. The Sub-Committee agrees that a definite term of protection for unpublished works is desirable. *From Gutenberg to Telidon* recommended that the term should be the normal term of protection, life of the author plus 50 years,<sup>1</sup> and the Sub-Committee endorses that suggestion. Where the term of protection cannot be based on the life of an author, it should be a term of 75 years from the date of fixation of the work.

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<sup>1</sup> Page 57.



It is important to realize that contracts of deposit will continue to override any statutory term of protection provided in the *Copyright Act*. For example, a donor to an archival institution can stipulate that the contents of the deposit should not be made available to the public for whatever period of time the donor wishes to specify. The term specified by the donor can be shorter or longer than the term of copyright protection. This ensures the donor's privacy and does not discourage archival deposits.

Having decided to recommend an archival exception for the reasons just outlined, the Sub-Committee has designed a two-part exception. The first part would permit reproduction where the archival institution already legitimately has the work in its collection. Four conditions should attach to the exception. First, only one copy could be made under the exception. Second, the copy could only be made to preserve the work, which would include both making a copy to be used in lieu of the original in order to preserve it, and also making another copy where the first one is no longer usable. Third, the work must not be available through the normal channels of trade. This is intended to protect copyright owners from the making of copies where a copy can easily be purchased on the retail market. Finally, and perhaps most importantly, any work reproduced under this exception must already be legitimately in the archival collection. This exception is not intended to permit archives to create collections of works which they might not otherwise be able to acquire. Acquisition is strictly a matter of negotiation between the owner and the archival institution.

The beneficiaries of this exception are intended to be institutions which perform archival functions and which are open to the public. Such institutions could include libraries, museums, or even private corporations as long as such a corporation provides public access to its collection.

The exception should be limited to reproduction under the conditions previously outlined and should not permit publication by archival institutions. The Sub-Committee views publication as a matter strictly within the prerogative of the copyright owner. In view of the greatly reduced term of protection proposed for unpublished works, the vast majority of works will be available for publication within a relatively short time after the death of their authors.

The second part of the exception addresses the need of individual archival researchers to have access to archival collections. To facilitate this access the Sub-Committee recommends that an exception be provided which would permit an archival institution to make a copy of a work for another archival institution where the latter has received a request for a copy of a work from a researcher.

Finally the Sub-Committee wishes to comment on the subject of oral histories. Witnesses before the Sub-Committee requested that the interviewer responsible for such histories hold copyright in them. This result could be achieved by means of other recommendations in this Report. When they are recorded, oral histories will be protected as sound recordings, the copyright in which is to be owned by the person principally responsible for making the arrangements to produce the recording. In many instances, that person could be the interviewer.



## RECOMMENDATIONS

**88. The revised law should provide an exception to permit an archival institution to make a copy of a work which is not otherwise available and which is already in its collection, for the purpose of preserving the archival copy of that work.**

**89. An exception should be provided to permit an archival institution to make a copy of a work for another archival institution where the latter has received a request for a copy of a work from an individual researcher for the purpose of private research. The making and issuance of copies under this exception should not constitute publication.**

### (3) Education

A wide range of participants in the Canadian educational system made submissions to the Sub-Committee. Their views differed as widely as their respective roles in the educational system. Some requested far-ranging exceptions on the ground that education must take precedence over creators' interests. Others expressed a desire to compensate creators for educational uses of their works and urgently requested that mechanisms be developed to enable them to do so.

The range of possible exceptions for educational institutions is wide. Educators utilize a broad range of works protected by copyright and deal with these works in a great variety of ways. It is conceivable that an educational institution, in an academic year, could use most of the different kinds of works protected by copyright. In doing so, it could infringe many of the rights associated with them such as reproduction, public performance, radio communication, adaptation, translation and so on. Before the Sub-Committee discusses the particular rights involved it wishes to set out the principles it has applied to the numerous individual questions.

The Sub-Committee has already stated that copyright is the legal recognition of the property rights of creators in their works, and that property carries with it the notion that the rights attaching to it should not be limited unless there is a demonstrated public policy reason to do so. Applying these principles leads the Sub-Committee to the conclusion that the needs of education should not override the rights of creators. If the needs of education justified limitations to rights, then teachers and caretakers should not be paid. Nor should the utilities, such as water or hydro, used by schools be paid for. If our legal system were to require creators to forego payment for the benefit of education, then all the other participants in the system should also be required, by law, to forego payment.

On the broader level the Sub-Committee views the collective exercise of copyright and the issuance of blanket licences as an answer to the needs of educators. The answer is not to provide access without payment, but to recommend the only practical method of licencing and payment available. That method is the formation of collectives and the issuance of blanket licences. That such a system is practical and workable has already been demonstrated in the province of Quebec where two collectives have been formed to exercise reproduction rights in literary works and audio-visual materials, both of which are extensively reproduced in educational institutions.



For these reasons the Sub-Committee is opposed to educational exceptions for off-air taping, for the reproduction of literary works, and for the use of copyright material by educational broadcasters. Limited exceptions to permit the public performance of a work by teachers and students in the normal course of teaching activities should be provided; so should a narrow exception to permit transmission and retransmission by the same people under the same conditions and within the confines of a single educational institution. Beyond this, educational broadcasters will continue to be required to obtain copyright permission to transmit material protected by copyright. Finally, *From Gutenberg to Telidon* suggested an exception to permit reproduction as part of questions to be asked, or answered, in an examination.<sup>1</sup> The Sub-Committee agrees with this suggestion. All of these are narrow exceptions which were proposed in *From Gutenberg to Telidon*, and to which very little opposition has been raised.

## RECOMMENDATIONS

**90. The revised law should provide an exception to permit teachers and students, in the normal course of teaching activities to:**

- (a) perform a work in public;**
- (b) transmit and retransmit a work within the confines of a single educational institution.**

**91. An exception should be provided to allow for the reproduction of a work as part of questions to be asked, or answered, in an examination.**

## C. RENTING RIGHT

The possibility of providing a new right to control the public renting of works is most appropriately discussed in connection with audio-visual works because an extensive rental market presently exists in Canada only for this kind of work, primarily for movies on video cassettes. A market this limited is most probably only a temporary phenomenon. A rapidly expanding rental market for sound recordings already exists in other countries, most notably in Japan. With the growing popularity of the new and more expensive compact discs, this rental market could soon develop in Canada. It is also realistic to imagine that rentals could be used in the computer software industry. Accordingly, although the provision of rental rights will be discussed with respect to audio-visual works, the discussion is equally applicable to other works protected by copyright.

Witnesses before the Sub-Committee argued that rentals cannot be controlled by copyright owners through contracts. There is a problem in maintaining privity of contract between the copyright owner and the establishment which actually rents to the public. In addition, it is alleged that the so-called "first sale doctrine" prevents a copyright owner from controlling the use of a material support containing a work after the support has been sold. A

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<sup>1</sup> Page 43.



book, a record or a video cassette can therefore be rented without any compensation to, or even any authorization from, the owner of the copyright in the work being rented. Copyright owners have objected to this and have asked the Sub-Committee to recommend that a rental right be provided in the revised law.

Under the present law the owner of the copyright in an audio-visual work is provided with the rights which, until recently, permitted an owner to control distribution. For example, the provision of a public performance right permits the negotiation of distribution contracts for films. Similarly, the right of radio communication permits the negotiation of contracts which permit the owner to control distribution in that medium.

A new way to distribute audio-visual works has developed with video cassettes. This has led to the phenomenal growth of video rental outlets over the past few years. This growth has been documented in a recent Quebec study<sup>1</sup> which has found that revenues from video rentals are now slightly higher than revenues from movie attendance. This growth has occurred very rapidly. The number of video cassette recorders per household increased 131% between 1983 and 1984. To service this market the number of video clubs increased 400% in this same period. The study also found numerous correlations between the increase in sales of video cassette recorders and the growth of rental outlets on the one hand and the dramatic decrease in attendance at cinemas on the other.

The renting of a work protected by copyright deprives the owner of the copyright of royalties in two ways. First, the copyright owner receives no royalties from the renting of the work. Second, a rental can displace a sale which would, if the sale had taken place, have entitled the copyright owner to a royalty. Once a rental establishment has purchased an audio-visual cassette, the copyright owner receives no further royalties from the viewing of that work no matter how many times it is subsequently rented. Copyright owners claim that the other participants in this system — the owner of the rental establishment and the consumer — benefit from the system. They ask that they be provided with the rights necessary so that they may also benefit from this new method of distributing their works.

Other copyright owners have found themselves in a more fortunate position when technology changed. A good example can be found with respect to the owner of the copyright in a literary work. In anticipation that a library will photocopy a journal, the owners of copyright in this kind of material have developed a two-tiered pricing system whereby a higher subscription rate is paid by libraries. An individual subscriber pays a much lower rate. The owner of the copyright in the journal can enforce a two-tiered pricing system because there is a right of reproduction that would be infringed if the library supplied its patrons with photocopies made from the lower-priced copy.

Owners of copyright in other types of works do not have the necessary rights to develop such a system. In particular, the provision of a rental right in the revised law would provide owners of copyright in audio-visual works with the rights necessary to enable them to control both the sale and the rental of their works. This protection would place them in the same position they were in before the development of video cassette player technology, that is, with

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<sup>1</sup> Michel Houle, *Le Parc d'établissements et l'exploitation cinématographiques au Québec, 1974 — 1985*, study commissioned by Société Générale du Cinéma, July 1985.



the right to authorize the viewing of their works regardless of the way in which that viewing takes place. It makes little difference whether one views an audio-visual work by going to a theatre, seeing it on television or by renting it to view on a video cassette player. It would be illogical for the law to require a royalty to be paid to the copyright owner for all but one method of viewing the work. Provision of a renting right would also anticipate the development of rental markets for other categories of works as well.

Submissions made to the Sub-Committee suggest that, at least with respect to audio-visual works, a two-tiered pricing system similar to that just described for journals in libraries, would be developed. A renting right would thus provide other copyright owners with protection similar to that which already exists for some literary works.

The Sub-Committee is of the view that protection should be as consistent as possible. Accordingly, the Sub-Committee recommends that the new rental right should apply to all categories of works. If the works are not rented, then the right will simply not be exercised. Absent comprehensive treatment, if the renting of some category of copyright work, not foreseen at this time, were to become a reality, the owners of the copyright in those works would find themselves in the position of not having the legal protection necessary to participate in the fruits of their labour.

## RECOMMENDATION

- 92. A new renting right attaching to all categories of protected subject matter should be provided in the revised law.**

## D. HOME COPYING

New technology has made it possible to reproduce at home works protected by copyright. At the present time both sound recordings and audio-visual works can easily be copied at home for less than the purchase price in a retail store.

It appears to be generally accepted that the present fair dealing provision was never intended to deal with the large scale copying of works protected by copyright. It also seems to be generally accepted that fair dealing should not, and probably cannot, be redesigned in the new law to deal with modern reproduction technology. The Sub-Committee has already recommended that fair dealing is not the way to solve the problems caused by the reproduction of literary works by photocopiers and other similar reprographic devices. The Sub-Committee is of the view that the concept of fair dealing cannot be redesigned to encompass copying by audio and video recorders either.

The issue of home copying can only be resolved in one of two ways. Either copyright owners should be compensated for this activity in return for permitting home copiers to reproduce their works, or an outright exception for home copying should be provided.

Any other solution appears unworkable. The traditional right of authorization cannot be exercised effectively for home copying. Copyright owners cannot possibly know what taping



is being done in the millions of households across the country. The only practical solution is either an outright exception or some compensatory mechanism in exchange for explicit permission to copy.

Home copying has become a real threat to the traditional revenue sources of copyright owners in sound recordings and audio-visual works, as well as the various works protected by copyright contained in these works. Royalties are lost because the home copier does not purchase a copy from a retail store. Home copying thus results in no payment being made to any of the creative elements involved in the original production: composers, lyricists, performers, script writers, producers and distributors of protected works.

Witnesses before the Sub-Committee sought compensation for these lost sales. Because home copying is no longer the isolated activity of a few music or film buffs, its cumulative effect is too damaging to copyright owners to justify an exception from copyright liability without compensation. Home copying is growing in magnitude and the damage in sales lost by creators, performers and producers is growing proportionately.

The number of homes owning audio recording devices and video cassette recorders has increased tremendously over the past few years and will continue to do so. The Sub-Committee was not able to quantify with any exactness the amount of home copying being done. The extent to which copyright owners are being harmed by the home taping phenomenon is hotly disputed. However, it is clear to the Sub-Committee that whatever the amount of damage being done, home copying is a reproduction of a work protected by copyright for which creators receive no compensation. The Sub-Committee is of the view that payment should be made.

Submissions to the Sub-Committee by the affected copyright owners indicate that they would be amenable to a provision whereby, in return for the enactment of an exception permitting home copying, they would be compensated by a royalty paid when blank tape and recording equipment is purchased.

Other countries have enacted legislation to compensate owners of copyright for home copying or are in the process of doing so. Austria, the Federal Republic of Germany, Hungary, Norway, Sweden, the Congo, Finland, Iceland, Turkey and France all have compensation schemes in place. In addition, Denmark, Italy, the Netherlands, Switzerland, the United States and the United Kingdom are presently considering the imposition of similar schemes. In Canada, the province of Quebec in 1983 introduced a tax of \$2.00 on certain blank tapes sold to compensate copyright owners for royalties lost due to home copying.

Having decided that a compensation scheme should be provided, there remains the very practical question of what kind of scheme should be devised. Although this is primarily a matter of detail which is outside the immediate mandate of the Sub-Committee, there are several issues which will be addressed.

First, should the compensation scheme be a royalty in recognition of payment for use of intellectual property, or a tax collected by the government to be used for the general benefit of copyright owners? A royalty would be the recognition of a property right pursuant to the *Copyright Act* and would accrue to the copyright owner. A tax, on the other hand, is



collected by the government for more general purposes. The Sub-Committee is of the view that the compensation scheme should more properly be considered a royalty which provides copyright owners with the right to payment for the reproduction of a work. This system follows more closely the philosophy of the law the Sub-Committee recommends and is one which reflects payment for use of a work where possible.

Who should be the beneficiaries of these royalties? The Sub-Committee thinks that all those copyright owners whose works are copied should be entitled to participate in the regime. This would include composers, lyricists, performers and record producers with respect to audio works and a similar grouping with respect to audio-visual works.

The benefit of this compensation system should be extended to foreigners on the same basis as protection is extended to the underlying works. For example, the protection provided to performers' performances, as well as to sound recordings with respect to certain rights, is to be provided to foreigners on the basis of reciprocity. That same method should also be applied to participation in the compensation scheme for home copying. Where the foreign work is protected on the basis of national treatment, as for example with respect to literary, dramatic, musical, and cinematographic works, then the benefit of the compensation system for home copying should also be provided on the basis of national treatment.

The decision to recommend a royalty rather than a tax was a difficult one. The choice of a royalty system will cause an outflow of royalties from Canada which will not be matched by an inflow of royalties from similar systems in other countries. The problem is alleviated somewhat by the Sub-Committee's recommendation to protect foreign sound recordings and performers on the basis of reciprocity. However, copyright protection for literary, musical and audio-visual works cannot be based on reciprocity and the Sub-Committee is aware that the outflow problem remains with respect to those works.

The Sub-Committee does not recommend the extension of the right to participate in the compensation system to the owners of copyright either in computer programs or in broadcasts. With respect to broadcasts, it is extremely unlikely that anyone would copy in the home an entire broadcast day. That would be necessary before the reproduction right of the broadcaster would be infringed. The Sub-Committee does not think that such an unlikely event justifies the inclusion of broadcasters in the compensation system.

Computer programs, on the other hand, are increasingly reproduced at home. Although there is no difference in principle between the home reproduction of a computer program and the home reproduction of a sound recording or audio-visual work, there is a vast difference in the amount of reproduction being done. Copying of computer programs has not yet, and may never, reach the proportions being experienced by the sound recording and film industries. Indeed, the computer program industry itself did not request compensation for home copying. Therefore, the Sub-Committee has concluded that the owners of copyright in computer programs should not be one of the beneficiaries of the compensation system.

The third matter concerns the issue of what the royalty should be based on: the recording equipment, the blank tape or both? The answer to this question could easily be overtaken by rapidly developing technology. For example, it is conceivable that future recording devices might not use blank tape, thereby making a tape royalty obsolete. The work could be stored in a computer memory with no independent material support at all. The



Sub-Committee does not wish to endorse solutions which would be rooted in any one particular technology. The Sub-Committee therefore proposes that the royalty should be based upon both the material support used to store the work and on the machine used to make the reproduction. This system best accommodates the principle of liability for reproduction of a work, and takes into account developing technology.

It would be possible to avoid paying royalties by recording something on a material support, just so that the support would not be blank. The intention, however, would still be to distribute a support which would be used for home copying. By erasing what had been recorded, the purchaser then would have what was truly sought, namely a blank material support. Careful drafting of the relevant provisions of the Act will be required to prevent the possibility of circumventing the compensation system in this way.

The Sub-Committee thinks it useful to give an indication of the range of royalty payments and the methods of calculation used in other countries. In some countries, a calculation based on a percentage of the retail selling price is used. In Turkey it is 5%, in Hungary 8% and in the United Kingdom it has been proposed that the maximum level be set by legislation at 10% for audio tapes and 5% for video tapes. Other countries have adopted a system based on a set amount per unit of playing time: in Austria 25¢ per hour, in France 56¢, in Finland 60¢ and in West Germany a surprisingly low 7¢ per hour.<sup>1</sup> In some cases, a flat fee per unit sold is used; for example, in Quebec a charge of \$2.00 per designated tape has been levied.

The royalties payable on the purchase of machines may also be calculated on a percentage basis: 4% in Iceland and 10% to 25% as proposed in the United States. Other countries use a flat fee: in West Germany, \$1.05 on audio recorders and \$7.56 on video recorders.

The amount of the actual royalty to apply in Canada is a matter which must ultimately be determined by the Copyright Appeal Board, but the Sub-Committee found this information helpful as to the high and low figures used elsewhere. It is hoped that the Copyright Appeal Board will have the same response.

The system of collection and distribution used with respect to the performing rights in music could be adapted to home copying. The beneficiaries of this royalty system for home copying would be able to exercise their rights by forming collectives. These beneficiaries would not be compelled to form collectives but it would be next to impossible for anyone to exercise individually the home copying aspects of a reproduction right. The collectives would file tariffs with the Copyright Appeal Board which would be vested with the authority to set tariffs. Importers and manufacturers of the material support would then pay the collectives directly according to the tariffs set by the Board.

## RECOMMENDATIONS

- 93. Home copying should be permitted under the revised law subject to the payment of compensation in the form of a royalty on the material support and on the machine used to reproduce the work.**

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<sup>1</sup> Expressed in Canadian currency.



94. The mechanism for establishing the amount of royalties should be the filing of tariffs for approval by the Copyright Appeal Board.
95. Payment should be made by the manufacturers or importers directly to the collectives.
96. Where works are protected on a reciprocal basis the owners of copyright in those works should participate in the compensation system on a reciprocal basis.

## E. RETRANSMISSION

### 1. Retransmission is More Than Signal Enhancement

Retransmission by cable and satellite brings signals from a multitude of sources to very large audiences that could not otherwise receive them. This situation is a world apart from the early days of cable television when the enhancement of local signals was the principal purpose of retransmission systems.

As a result of a trial decision rendered in 1954 by the Federal Court,<sup>1</sup> cable retransmission systems are not required to pay royalties to the copyright owners of works retransmitted. This decision has never been challenged. Cable retransmission systems make no payment to broadcasters either.

Many witnesses urged the Sub-Committee to recommend the granting of a retransmission right. Opposed were the cable operators, four provincial governments and Canadian Satellite Communications Inc. (CANCOM). This latter organization provides satellite retransmission services for the benefit of isolated, mostly northern, communities. Concerns over the potential impact of a retransmission right on such communities inspired the reservations expressed by the four provinces. Their concerns will be addressed below.

The Sub-Committee shares these concerns and has others as well. Of the many and varied issues addressed in the revision process the retransmission question generated the most vigorous and lengthy debate amongst the members of the Sub-Committee. The majority of the members have recommended the provision of a retransmission right, but in doing so experienced a great deal of difficulty.

The main difficulty which the Sub-Committee faced in coming to its decision was the clash of firmly-held copyright principles with the financial consequences of their application. Copyright principles clearly dictate the provision of a retransmission right. The provision of the right, however, entails an outflow of copyright royalties to foreign countries. Canada is already a net importer of copyright material. This results in more money going out of Canada in copyright royalties than comes in. The provision of a retransmission right is particularly germane to the outflow problem because Canada imports a great many foreign, and particularly American, television programs.

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<sup>1</sup> *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382.



In wrestling with the outflow problem, the Sub-Committee considered the option of granting a retransmission right to Canadians only. This option was first proposed in 1977.<sup>1</sup> The Sub-Committee has rejected this approach because it is only equitable to compensate all those who own the copyright in the programs Canadians watch, regardless of where they are produced.

Despite the dilemma created by the outflow problem, the Sub-Committee is convinced that the new Act should provide a retransmission right. Everyone recognizes that retransmission adds economic value to the original broadcast. Consumers are prepared to pay for the service, even for local signals available off-the-air. Advertisers, as is evident from a study commissioned by the broadcasters themselves,<sup>2</sup> also take into account the expanded audiences resulting from retransmission. Owners of copyright material used in retransmission should also share in the gains that accrue from this use of their works. As is recommended with respect to home copying, the benefit of a retransmission right should be extended to foreigners on the same basis as protection is extended to the underlying works being retransmitted.

## RECOMMENDATIONS

**97. A retransmission right should be provided in the revised law.**

**98. Where works are protected on a reciprocal basis, the owners of copyright should benefit from a retransmission right on a reciprocal basis.**

### 2. Impact of Retransmission Payments

Cable operators argued that demand for cable services is very sensitive to price. As a consequence, they stated that if they had to pay a royalty on each signal, they would be forced to remove some signals from the typical menu of signals now offered in order to keep subscription costs down. Evidence before the Sub-Committee, however, varied greatly as to the impact of royalty payments on the monthly fees for subscribers. In any event, rates will be established by the Copyright Appeal Board which in all probability will not set prohibitively high tariffs. Consequently, the Sub-Committee finds it hard to imagine a massive impact on cable's penetration rate or the shedding of many signals as a result of a retransmission right.

Nevertheless, should the government consider the impact of this new liability overly burdensome for cable operators, consideration could be given to a reduction of the 7% tax that cable companies pay to the Broadcast Program Development Fund, approximately \$35 million in 1983. Some have argued that this tax is in lieu of copyright payments but in fact it is not directly related to the actual use of protected works by cable operators.

<sup>1</sup> A.A. Keyes and C. Brunet, *Copyright in Canada — Proposals for Revision of the Law*, Queen's Printer, 1977, 130-143.

<sup>2</sup> R. Quinn, and K. Watson, *Impact of CATV on TV Advertising Revenues, 1972-1981*, June 1984.



In a negotiated system of copyright payments for retransmission, the scale of the payments would have to reflect the economic realities of retransmission services. Many signals are local signals available off-the-air without the aid of cable. This even applies to American networks' signals for a majority of cable users in this country. In such a context, excessive demands by copyright owners would be self-defeating because many households could cancel their cable service and pick up the signals free of charge.

Another mechanism already in operation would further restrict the economic impact of the recognition of a retransmission right. Under regulations of the Canadian Radio-Television and Telecommunications Commission, cable operators who retransmit a signal from a distant station must, under certain conditions, substitute a local signal for a distant one.<sup>1</sup> They must do this when the local station has purchased the right to broadcast a given program that is simultaneously broadcast on a distant station also carried by cable. If viewers were equally free to watch either the distant program (with its own advertising) or the local program, the value to the local advertiser would be severely undercut. Hence, the local signal is substituted for the distant one. This means that with regard to such "substituted" signals no retransmission of a distant signal takes place. Retransmission of a local signal should attract lower copyright royalties.

Finally, in order to assess these financial implications the Sub-Committee commissioned a study of the probable consequences of what it was considering.<sup>2</sup> The resulting estimates show that these consequences, although not insignificant, are quite manageable both in terms of their impact on cable operators and on the Canadian balance of payments.

### 3. Retransmission Right as an Extended Broadcast Right?

At the present time, discussion of a retransmission right is implicitly predicated on the notion that the original broadcast is made over Hertzian waves and that the "retransmission" is made over some other medium, in most instances, coaxial cable. The introduction of a retransmission right is very much linked with the concept of a different technological medium being used by someone else.

Over the long term, the assumption that different technological media are involved may not be helpful. Technology may evolve in unpredictable ways and the essence of a retransmission right bears no necessary relationship to a particular state of technology. Indeed, why should not the transmission right be redefined to cover both the originating broadcast and any retransmission over any kind of medium, be it Hertzian waves, coaxial cable or anything else. This could eliminate the need to have a separate retransmission right. Neither *From Gutenberg to Telidon* nor the submissions made to the Sub-Committee dealt with this option. The Sub-Committee therefore suggests that the government should examine the question.

<sup>1</sup> *Cable Television Regulations*, C.R.C. 1978, c. 374, section 19.

<sup>2</sup> *Probable Cost of a Retransmission Right: Adaptation of the American System to Canada*, Secor, September 1985.



## RECOMMENDATION

- 99. The government should examine the desirability of bringing all broadcasting and retransmission activities under an expanded definition of a transmission right.**

### 4. Common Carriers

The Sub-Committee thinks that the existence of a retransmission right should not be dependent on a single technology. For this reason a very wide definition of what constitutes retransmission is necessary. Any retransmission, by whatever means, of signals primarily intended for individual consumers should attract a royalty.

On the other hand, retransmission destined solely to serve as an intermediary between the signal source and a retransmitter whose services are offered to the general public should be exempted in order to avoid unnecessary layering of copyright liability. For example, a telephone company operating a microwave relay system should not be expected to obtain a licence to convey broadcast signals to another broadcaster or to a cable operator. In other words, the "wholesale stage" may be ignored provided the "retail stage" in the retransmission of signals is fully accountable. This would justify ignoring the intervention of telephone and satellite companies in the overall retransmission chain.

## RECOMMENDATIONS

- 100. The right of retransmission should be defined in general terms and should not depend on current technology.**

- 101. Common carriers should be exempted from copyright liability.**

### 5. Implementation of a Retransmission Right

The Sub-Committee expects that the new retransmission right will be collectively exercised. Copyright owners would form collectives in order to file tariffs with the Copyright Appeal Board. Disputes would be resolved by the Board. However, no authorization by copyright owners should be necessary for retransmitters to pick up a signal off-the-air and retransmit it.

Although the Sub-Committee does not in general favour compulsory licencing, it sees no other possibility in this case. Providing exclusive rights to copyright owners to authorize retransmission would enable them to prohibit the retransmission of signals the CRTC requires the system to carry. It would also give copyright owners the legal right to stop all retransmission activities by refusing authorization altogether. Copyright owners should not be permitted to stop retransmission because this activity is too important to Canada's communications system.



Moreover, the transactions costs for small retransmission systems of obtaining licences through negotiation with copyright owners could be prohibitive. In many cases, negotiation would simply be impossible given that broadcasters often do not have the rights to the underlying material. These rights would have to be separately negotiated with a very large number of owners.

## RECOMMENDATION

**102. The right of retransmission to be provided in the revised law should be limited by a compulsory licence, with tariffs to be established by the Copyright Appeal Board.**

The Sub-Committee thinks that the revised law should establish criteria to be used by the Copyright Appeal Board in setting the tariffs for retransmission. To this end, the Sub-Committee believes that an evaluation of retransmission should be done to determine the sum total of retransmission activity in Canada, instead of the retransmission activity of any one cable system. Based on this evaluation, individual systems would pay a sum that would not depend on the number or composition of their signals.

This would have two consequences, both of which the Sub-Committee sees as desirable. It would encourage the maintenance of a wide scope for individual choice among cable channels by providing no incentive to eliminate channels because of cost considerations. The ability of cable to serve minority audiences constitutes a feature of retransmission technology that is worth preserving.

It would also contribute to uniform charges by cable systems in different parts of the country. In the absence of such an approach, regional "discrimination" would arise from the fact that a broadcaster's signal has a different economic value when carried by cable into a distant market.

Any valuation formula should recognize that difference. However, American signals can only be considered "local signals" in certain parts of the country. Although a very high percentage of the total Canadian population lives in these parts, many other Canadians simply cannot pick up radio and television signals originating in the United States off-the-air. Consequently, for them, these signals are not local but distant ones. They would end up paying significantly more for the same programs merely because of where they live. The Sub-Committee thinks that this should be avoided.

## RECOMMENDATIONS

**103. The Copyright Appeal Board should determine the total economic value of all retransmission activities in Canada.**



- 104. The Board should set a tariff based on that evaluation and whatever other criteria that the Board deems relevant but should not consider the number and composition of the signals carried by an individual retransmission system.**

A major consideration in evaluating the economic value of retransmission activities is the definition of what constitutes a local market for the originating broadcaster. There is no doubt that the originating broadcaster is the person who should bear responsibility for compensating copyright owners for use of protected works in that broadcaster's own market. However, retransmission in any other market adds economic value.

The question of what constitutes the local market has been approached up until now by reference to topographical or technical considerations. The broadcaster's market has been assumed to be coextensive with the audience that the broadcaster can reach over the air given the transmission power of its station and the area's topography. That is known as the "contour." This definition of a market is an arbitrary one.

The Sub-Committee believes that the definition of a local market is basically a question of fact to be determined in each case. The definition depends on the audience towards which the originating broadcaster aims its programs. The originating broadcaster always has a very precise idea of the market being targetted. The target market guides the programming and the marketing strategies of the commercial broadcaster, certainly, but non-profit stations also operate upon a similar premise. This target audience consists of whatever households can be reached that are considered by broadcasters as worthwhile targets. The facts of each particular situation help define that audience, not any simple technologically-defined "contour." In other words, a target audience is not necessarily the "local market" as ordinarily defined, but this local market plus some further markets reached through cable systems.

The question whether a distant audience is part of the target audience is a question of fact that the behaviour of the broadcaster itself can help decide. For example, if a broadcaster aims its programming and solicits advertisements or other revenue in a distant market then it can be presumed to be part of the target market. The broadcaster's success in effectively reaching the target audience is less significant than its efforts in doing so. The actions of the broadcaster are the determining factor. Outside this target audience, the question of a retransmission right properly arises. Additional economic value should be recognized wherever a protected work is retransmitted to any audience other than the one originally intended.

## **RECOMMENDATIONS**

- 105. In assessing the economic value of retransmission activities, the Copyright Appeal Board should assign a lower value to the retransmission of local signals.**
- 106. Local signals should be defined as those reaching the broadcaster's target market by whatever means.**



**107. The target market of the broadcaster should be determined by reference to such factors as the content of the programming involved, the marketing activity of the broadcaster, and the origin of the broadcaster's advertising revenues.**

**108. Retransmission systems should be considered within the scope of a broadcaster's target market irrespective of the broadcaster's success in deriving income from it, as long as the broadcaster's own behaviour demonstrates an intent to benefit from it financially.**

## 6. Small and Isolated Communities

Canada is one of the largest countries in the world but most of its territory is very sparsely populated. Living in small and isolated communities imposes a variety of hardships, not the least of which is a feeling of isolation. Modern communication technologies have made an immense contribution to the lessening of this isolation and nothing should jeopardize the maintenance and enhancement of that contribution.

The cost of providing cable services to small and isolated communities is very high even with modern technology. Although the cost is coming down all the time, monthly fees remain relatively substantial. This hinders the high penetration rate which is essential to make the service possible at all.

Even the most vocal advocates of a retransmission right recognized the unique status of small and isolated communities. Some volunteered that a licence should be available for a nominal amount. An alternative would be to provide an exception in the revised Act, but that would require a precise definition of which communities are to be considered "small and isolated" for this purpose. The Sub-Committee received no submission or testimony that could help it formulate such a definition and is therefore reluctant to go beyond the general principle.

From its examination of the financial implications of a retransmission right, the Sub-Committee believes that a tariff of the same order of magnitude as that found in the United States for small cable systems could satisfy the need for special treatment for small and isolated communities.<sup>1</sup>

## RECOMMENDATION

**109. Small cable systems serving small and isolated communities should be shielded from any material impact arising from the introduction of a retransmission right.**

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<sup>1</sup> In the United States, cable systems with as few as 500 subscribers pay 1¢ per month per subscriber.







## IMPLEMENTATION OF THE COPYRIGHT LAW

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### A. COLLECTIVES

This Report has already concluded that the formation of collective societies of copyright owners is the best solution to the problems created by modern reproduction technology such as photocopiers and video cassette recorders. Collective societies of copyright owners have also been suggested as an answer to the problems of authorizing multiple uses of works protected by copyright by many different users. This is the system presently used with respect to the performing rights in musical works where it has worked well. The performing rights societies provide a working model to the Sub-Committee for application in similar situations.

The collective exercise of copyright has several advantages. For users it permits quick and easy access to a large volume of copyright material. For creators it permits the exercise of rights which cannot be effectively administered individually. For example, a composer cannot monitor the use of every musical work on radio and television all across the country. However, the same monitoring done on behalf of several thousand composers at the same time is an effective way to monitor and enforce what otherwise would be unenforceable rights. The same principles can also be applied to photocopying in schools and libraries, to the taping of broadcasts by schools, and to other multiple uses.

The Sub-Committee views a collective as a group of copyright owners who form an association to exercise on their behalf a particular aspect of copyright, for example the right to reproduce by photocopying. One association, therefore, represents a large number of copyright owners. These societies obtain from their members assignments of the rights to be administered. They negotiate with users on behalf of all their members. A blanket licence is then negotiated which sets out royalty rates and the conditions under which the licence operates.

In return for complying with the conditions of the licence and the payment of the appropriate royalties, the purchaser of the blanket licence is at liberty to do what would



otherwise be prohibited under the *Copyright Act*. From the users' point of view, lengthy searches to determine who owns the copyright are completely avoided. Drawn out negotiations to determine royalty payments for each individual use are also avoided. The societies monitor the use made of the works in their repertoires, collect and distribute royalties, and commence copyright infringement suits where necessary. This approach ensures remuneration for creators and at the same time also ensures that the public has quick access to protected works.

There is a danger that the unregulated collective exercise of rights could lead to abusive practices. If the only practical access is through a collective then there is a potential that a collective, because of its dominant position, could occupy too strong a bargaining position *vis-à-vis* users. This problem was foreseen by those who devised the existing copyright law. It was solved by creating a regulatory body, the Copyright Appeal Board, vested with the authority to set rates after hearing the interested parties. It became impossible for collective societies to abuse their dominant position because all royalties were subject to regulatory approval. The Sub-Committee endorses this mechanism. The system of regulatory approval of rates should be maintained in the revised law. The exact scope of that regulatory authority will be discussed in the next section.

The matter of the regulation of collectives raises a related issue concerning competition policy. Any combination of individuals who together control access to, and use of, a particular good or service are within the ambit of competition legislation because of the potential for anti-competitive behavior. It was expected that users would express concern in this regard to the Sub-Committee. They did not. In fact, quite the opposite view was expressed. Users consistently stated that the number of collectives should be kept to a minimum (the ideal situation being described as one super-collective) so that users would need to go to only one place to obtain a licence. Users do not want to have to search the repertoires of two or more societies to determine where they must obtain the necessary licence. Users, for obvious reasons, prefer the simplicity of one collective administering one particular right, trusting the Copyright Appeal Board to ensure reasonable rates.

The simplicity and efficiency of one collective from a user's perspective is appreciated. However, from the perspective of competition policy, it may be that two collectives competing with each other is more desirable. The Sub-Committee has examined both sides of this question and is of the view that the Copyright Appeal Board provides effective protection to the public by controlling the royalty rates charged by copyright owners to users.

The then Director of Investigation and Research under the *Combines Investigation Act* testified that to the extent that specific activities of the societies are effectively regulated by the Copyright Appeal Board, they would be shielded from the *Combines Investigation Act*,<sup>1</sup> under the "regulated conduct" exemption. This exemption, which is jurisprudential, encompasses activities subject to effective regulation under validly enacted federal and provincial legislation. As the Sub-Committee recommends that collectives come under the jurisdiction of the Copyright Appeal Board it is expected that they would benefit from this exemption. The degree of regulatory power which the Sub-Committee recommends be vested in the Board is discussed in the next section.

<sup>1</sup> R.S.C. 1970, c. C-23.



Some critics have suggested that one problem with collective societies is that copyright owners cannot be compelled to join. Canada's obligations under the Berne Convention provide that the enjoyment and exercise of rights are not subject to the performance of formalities.<sup>1</sup> Quite apart from this international commitment, the Sub-Committee is firmly opposed to any proposal which would compel creators to exercise their rights in any particular way. Copyright is a bundle of private property rights. The owners of that property can exercise their rights individually or collectively. The choice is theirs.

The Sub-Committee is of the view that compelling someone to join a collective is not necessary in any event. The only practical way to administer some rights is collectively. The performing rights in music provide an excellent example. No composer has ever been forced to join a performing rights society. Yet the collective exercise of this right has worked well for decades. The reason is a practical one. If a composer wants to be compensated for the use of music he must join one of the two existing societies so that the thousands of uses of music across the country can be monitored as a basis for payment. An individual composer could attempt this monitoring and collecting, but the attempt would be unsuccessful. The payment for each use is so small that the cost of collecting would be greater than the payment. For this reason the Sub-Committee does not foresee any real problem with individual creators refusing to participate in the system, thereby exposing users to multiple infringement actions.

The final matter to be discussed in connection with collectives is whether they should be prohibited from receiving assignments of exclusive rights from their members. In their submissions to the Sub-Committee, broadcasting interests, motion picture theatre exhibitors and concert promoters requested that users should be permitted to negotiate directly with composers of music. This would avoid use of the tariff system established by the Copyright Appeal Board. It should be remembered that the present performing rights societies operate on the basis of assignment of exclusive rights.

The Sub-Committee wishes to make two comments on this issue. The first concerns the need to regulate licencing from the creator's perspective and the second from the user's perspective. The Sub-Committee has some reticence in having any private group, in this case a collective, vested with powers over its own members which are too sweeping. Collectives are important to their members. They represent their main source of income in many cases. An individual member's bargaining position is not strong. A member of a collective, regardless of how democratic that collective may be, cannot force a majority decision that would be in that member's favour. Each individual member must accept the decision of the collective. The Sub-Committee notes that there was no actual evidence presented to it documenting any abuses, although it is mentioned as a possibility in *From Gutenberg to Telidon*.<sup>2</sup>

In the final result, the Sub-Committee's concerns in this respect were not strong enough to support a recommendation prohibiting exclusive licencing. It is not the function of a copyright law to protect creators from themselves. Creators are responsible individuals who know what they are doing when they sign a contract. If a creator assigns exclusive rights to a collective it should be presumed that that is what was intended. To presume otherwise would be to adopt a paternalistic attitude contrary to the thrust of this Sub-Committee's recommendations.

<sup>1</sup> *The Berne Convention for the Protection of Literary and Artistic Works*, Rome Text, 1928, Article 4(2).

<sup>2</sup> Page 62.



The second comment relates to the concern expressed by some users with respect to exclusive licencing. The Sub-Committee foresees the demise of the collective exercise of copyright if users are permitted to circumvent the tariff system and bargain with the essentially weaker individual creator, rather than pay an approved tariff. It is recalled that the Copyright Appeal Board had its origins in the claim of licencees that the rates set by an unregulated society were exorbitant. The Sub-Committee is of the view that the greater good would be served by continuing to permit creators to assign their rights, exclusively if they so choose, to a collective for administration.

A creator should not be compelled to assign rights to a collective. Similarly, a creator should not be prohibited from assigning exclusive rights to a collective merely because some users foresee possibly lower royalty rates as a result of direct negotiation. Freedom of contract is an essential element of the copyright system and should remain so.

## RECOMMENDATIONS

- 110. The collective exercise of copyright should be encouraged.**
- 111. The Copyright Appeal Board should be vested with the authority to regulate all collectives.**
- 112. Membership in collectives should continue to be voluntary.**
- 113. Creators should continue to be allowed to grant exclusive licences to collectives.**

## B. COPYRIGHT APPEAL BOARD

The Copyright Appeal Board came into being pursuant to amendments to the *Copyright Act* resulting from recommendations made by a Royal Commission headed by Mr. Justice Parker in 1935.<sup>1</sup> The objective sought was to introduce a measure of balance between the one performing rights society in existence at the time and users of music who were to pay royalties to that collective. As one witness observed, history has shown that the Board has functioned remarkably well for 50 years in its important role as a rate-fixing tribunal, with probably the least impact on the public purse of any such tribunal.<sup>2</sup> The Board is presently formed of three part-time members and is limited to approving the rate schedules of the two existing performing rights societies. This original Canadian concept has since been followed in a number of countries, namely the United Kingdom, Australia and the United States.

If the expected trend to form collectives for the administration of copyright occurs, the role of the Board will become even more critical in balancing the interests of users and

<sup>1</sup> *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society Limited, and Similar Societies*, Canada, King's Printer, 1935.

<sup>2</sup> Brief submitted by the Board of Trade of Metropolitan Toronto, 4.



creators. It is therefore not surprising that numerous briefs received by the Sub-Committee addressed that issue. As might have been expected, briefs submitted by copyright owners generally favoured a Board that would be little more than a rubber-stamping operation, whereas briefs submitted by users of copyright material argued in favour of strong interventionist powers for the new Board. Even though some of the users have been encouraged by comments from certain authors who expressed frustration with the operation of their own collectives, the Sub-Committee believes that the appropriate role for the new Board lies somewhere between these two extreme positions.

Accordingly, the Sub-Committee recommends that the new Board not be granted authority to intervene in the administration of collectives, but at the same time, that the Board's jurisdiction be somewhat broadened. The recommendations made, given the nature of the issue, are numerous and technical. For the sake of convenience, they may be regrouped under four general categories: jurisdiction, procedure, appeals and composition.

One issue stands alone: the name to be given to the regulatory body. The Board is presently known as the Copyright Appeal Board. It has been brought to the attention of the Sub-Committee that this appellation might be confusing in that the Board in no way reviews the decisions of a lower authority. At best, it plays the role of an arbiter in cases where copyright owners and users have not succeeded in negotiating tariffs. It is only in that limited sense that one could think of an "appeal" being filed to the Board. The Sub-Committee agrees that the present name of the Board gives the misleading impression that the Board is a higher judicial authority. Accordingly, it is recommended that the Board be known simply as the Copyright Board.

## RECOMMENDATION

### **114. The Copyright Appeal Board should be re-named the Copyright Board.**

#### **1. Jurisdiction**

As noted above, the Sub-Committee received a number of submissions favouring increased powers for the Board and, in particular, supporting the jurisdiction of the Board to intervene in the administration of collectives. Such intervention could take many forms, one of which could be a process of certification of collectives. If this suggestion were followed, the Board would certify that a collective could operate if the Board were satisfied that the collective met certain requirements with respect to its ownership, its corporate structure and the composition of its board of directors.

The Board could also possibly conduct inquiries into the electoral processes within collectives, the mechanisms for distribution of royalties and the surveys on which the distribution is made. Finally, it was suggested that the Board could impose standard agreements between the collectives and their members.

The Sub-Committee is of the opinion that all of these suggestions would represent an unwarranted intrusion into the private affairs of corporations. It is believed that normal



corporate legislation contains all the necessary safeguards to ensure that collectives conduct their business in an honest and accountable way. As well, many of the proposals referred to above are obviously designed to shift to a regulatory body the responsibility of creators who are members of collectives. There is something patronizing in the suggestion that authors are not responsible enough to take the necessary means to ensure that their own collectives operate in their best interests. Consequently, the Sub-Committee makes no recommendation to grant the Board the authority to intervene in the administration of collectives.

Admittedly, not all of the preceding suggestions reflect the concerns of authors who are members of collectives. Many of these proposals are in fact made by user groups who seek additional information from collectives, on the assumption that such information would be useful to demonstrate that the tariffs suggested by collectives are too high. The Sub-Committee believes that this area of concern can best be dealt with by expanding the Board's authority with respect to procedure at its hearings.

Another jurisdictional issue is whether the Board should be empowered to hear evidence on *all* tariffs proposed by collectives or whether it should be limited to hearing *disputes* over proposed tariffs. Given that the Board is to regulate all collectives, it is felt that it would have little time to hear anything but disputes. In addition, it is difficult to justify that the Board could, of its own accord, modify the terms of a privately negotiated agreement between a collective and a user group. If the Board's role is to ensure a measure of balance between creator and user interests, it would seem counter-productive for the Board to modify an agreement developed by the parties themselves. It is therefore recommended that the Board be limited to hearing evidence only where a proposed tariff is in dispute.

The question also arises whether the Board should be limited to setting rates or whether it should be granted jurisdiction over the conditions of licences issued by collectives. It is settled law that where a tariff is based on a percentage of a user's revenues it is normal that the collective require, as a condition of its licence, that the user account for its revenues.<sup>1</sup>

Those who have submitted to the Sub-Committee that the Board should be granted authority over the conditions of licences issued by collectives suggested "standard" conditions that should be imposed by the Board. These conditions would amount to vesting the Board with authority to regulate and control the exercise of private property rights by their owners. Such a suggestion is contrary to the basic principles of property ownership. The Sub-Committee has already stated that the Board should have no specific authority to intervene in the administration of collectives. Accordingly, it is recommended that the Board's jurisdiction should be limited to setting rates. Of course, the Board should also have the required jurisdiction to give effect to the recommendations made by the Sub-Committee with respect to the unlocatable copyright owner, the handicapped and retransmission.

## RECOMMENDATIONS

### **115. The Board should not be granted powers to intervene in the administration of collectives.**

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<sup>1</sup> *Maple Leaf Broadcasting Co., v. CAPAC*, [1954] S.C.R. 624.



**116. The Board's jurisdiction should be limited to hearing evidence only where a proposed tariff is in dispute.**

**117. The Board's jurisdiction should be limited to setting rates.**

## 2. Procedural Matters

If the revised law results in the Board having jurisdiction over all existing and new collectives, it will be necessary to provide that the Board's procedures are structured so as to ensure that both collectives and user groups can effectively present their case. User groups, in particular, have expressed concern that collectives are better equipped than they are when it comes to arguing before the Board. Collectives have structures which allow them to prepare for such hearings on an ongoing basis, whereas user groups cannot, by their very nature, devote as much time to the hearing process. In addition, the information which would be useful for users in arguing their case before the Board is often found solely in the hands of collectives and is accessible to users only with great difficulty. The Board itself, in its submission to the Sub-Committee, has expressed concerns on this issue.

It therefore seems only proper that the Board should be granted the usual powers of a court of record so that it can issue subpoenas and require the production of documents which would be necessary for an equitable hearing. It is envisaged that the Board could, for example, require disclosure by collectives of rules and by-laws concerning the distribution of royalties and even, possibly, a general form of accounting by collectives of the royalties they have distributed. Concerning this last suggestion, it is to be noted that both performing rights societies already publish, on a yearly basis, such a general accounting of their revenues and distributions. Conversely, in certain instances, the Board may feel justified in requiring users to disclose information on their uses of works protected by copyright.

In order to simplify the hearing process, it also seems logical to recommend that, although the Board should remain under the responsibility of a Minister, dealings with the Board should be with the Board directly and not through the responsible Minister as the present law requires.

Finally, under the present Act, experience has shown that the rates are seldom approved before their proposed effective date, which is currently the first of January of each year. As the Board itself has suggested:

The result is an unnecessary legal vacuum that could easily be filled if the new Act were to stipulate that rates in effect on December 31 continue to apply in the new year until such time as the Board approves the new rates, which will be retroactive to January 1.<sup>1</sup>

Of course, there is no necessity to have all rates of all collectives come into effect on January 1st, particularly should new collectives be formed in the middle of a calendar year. The new Act should reflect that possibility. However, the Sub-Committee is not prepared to recommend that rates should be retroactive.

<sup>1</sup> Brief submitted by the Copyright Appeal Board, 7.



## RECOMMENDATIONS

- 118. The Board should be granted the usual powers of a court of record, including the authority to issue subpoenas and require the production of documents.**
- 119. Dealings with the Board should be with the Board directly, and not through the responsible Minister.**
- 120. Previously approved rates should remain in effect until such time as the Board has approved new rates.**

### 3. Appeals

It has been recommended above that the Board's procedures should be changed to ensure that both parties have an equal opportunity to present their case effectively. In order to ensure that these rules are indeed followed, it appears necessary to allow parties to appeal the Board's decision. Such an appeal should be to the Federal Court.

Predictably, user groups have argued that appeals from the Board's decisions should be allowed with respect to all matters, whether they be of law or of fact. If a court were given such comprehensive powers of review, it would be in the position of substituting its view of the merits of the case for that of the Board. The Sub-Committee thinks that the appellate court neither is nor should be in a position to review the case on its merits. Its review should be confined to a consideration of the applicable law and the adequacy of the procedures used to arrive at the decision.

## RECOMMENDATION

- 121. The Board's decisions should be subject to appeal to the Federal Court on matters of law.**

### 4. Composition of the Board

Under the present Act, the Board is composed of three members appointed by the Governor in Council. The chairperson is required to have held high judicial office.

Given that the present Board's jurisdiction is limited to the two performing rights societies whereas under the revised law the Board would have jurisdiction over all collectives, it is likely that the new Board would require more members on a permanent basis. On the other hand, the requirements of efficiency dictate that the number of members be kept to a minimum. Accordingly, it is recommended that the new Board be composed of five permanent members. Consistent with the earlier recommendation that the new Act provide procedural safeguards to ensure that parties may participate fully, and in view of the fact that the Board approves tariffs, the Board should have members with legal, financial or copyright expertise.



The Sub-Committee agrees with the proposal made in *From Gutenberg to Telidon* that members should be appointed for a fixed term subject to renewal and should be removable only for cause.<sup>1</sup> Appointments should be staggered to ensure continuity of membership.

To fulfill its mandate, the Board should have authority to employ its own staff and have the possibility of retaining outside professional assistance, not only for matters in question before it, but also on any matter that can assist the Board in the performance of its duties. This last recommendation, however, should be the subject of cautious drafting in the new Act in order to avoid the undesired result of allowing the Board to engage in policy-making activities. Finally, the Board should be an independent body reporting to Parliament through the responsible Minister.

## RECOMMENDATIONS

- 122. The Board should be composed of five permanent members, appointed for a fixed renewable term by the Governor in Council.**
- 123. Members should be removable only for cause.**
- 124. Members of the Board should have legal, financial or copyright expertise.**
- 125. The Board should be supported by its own staff and outside professional assistance as required.**
- 126. The Board should be an independent body reporting to Parliament through the responsible Minister.**

## C. REGISTRATION

The Berne Convention provides that countries which adhere to it may not impose formalities in order for copyright to exist or be exercised. Accordingly, Canada has no formalities in its copyright law. If a work is proper subject matter for copyright in Canada, the copyright in the work exists from the moment of creation.

However, in order to facilitate evidence of the existence and ownership of copyright, Canada has adopted a voluntary system of registration. Essentially, the author or other copyright owner, using a simple form supplied by the Registrar of Copyrights, declares ownership of copyright in a work identified merely by its title and category of copyright protection. Contrary to practice in the United States where a registration system also exists, a deposit of the work is not required and there is no examination of the claim to copyright by the Registrar.

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<sup>1</sup> Page 64.



Registration of copyright brings two important benefits to the copyright owner. Section 36(2) of the *Copyright Act* provides that: "A certificate of registration of copyright in a work is evidence that copyright subsists in the work and that the person registered is the owner of such copyright." These presumptions have been held to supercede other presumptions of ownership found in other sections of the Act.<sup>1</sup>

Over the past decade, commentators have argued for the abolition of this voluntary registration system. They have done so principally for two reasons. First, it is felt that any registration system, albeit voluntary, is contrary to the spirit, if not the letter, of the Berne Convention. Secondly, the registration process itself is so automatic that it renders worthless whatever information may be contained on the certificate of registration. *From Gutenberg to Telidon* sided with these views and recommended the abolition of the registration system. The presumptions deriving from the registration were to be replaced with a presumption of copyright ownership vested in the plaintiff, where there is litigation.<sup>2</sup>

Twenty-four submissions received by the Sub-Committee addressed the issue of whether the registration system should be maintained. Of these, ten argued that it should, four were indecisive and eleven agreed with *From Gutenberg to Telidon* and recommended abolition. It is noteworthy, however, that virtually all the abolitionists expressed doubts about the value of the suggested new presumptions designed to replace those derived from registration under the present system. Indeed, it is clear that the present presumptions are seen as providing important benefits to copyright owners in that they constitute the most fundamental element of an efficient regime of remedies in the event of copyright infringement.

Undoubtedly, given the nature of intellectual property and the numerous successive assignments that are possible with respect to copyright material, presumptions as to the subsistence and ownership of copyright will always be necessary in any *Copyright Act*. By way of example, performing rights societies control the performing rights in literally millions of individual musical works created throughout the world. In practice, foreign authors who own the original copyright in these works assign the copyright to their publishers and domestic copyright collectives. These foreign collectives, in turn, assign the Canadian copyright to the Canadian collective.

Under the existing rules of evidence, that Canadian collective, in order to establish a claim to copyright, would have to demonstrate a full chain of title from the original author to the collective. That chain of title would be established by filing each and every successive assignment. Each filing would have to be made, in a Canadian court, by a party to that assignment. Therefore, merely to establish the claim of a Canadian collective in one work, it is possible that dozens of individuals would have to be brought before the tribunal, even if most of them were from foreign countries. Admittedly, it is normal to require that plaintiffs prove their claims. However, insofar as presumptions are rebuttable by contrary evidence, the initial burden of proof to be met by copyright owners should not be so high as to discourage any attempt to redress a copyright infringement.

There is also a very real difficulty with the new presumptions proposed in *From Gutenberg to Telidon* in the absence of a registration system. These presumptions would

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<sup>1</sup> *Circle Film Enterprises Inc. v. C.B.C.*, [1959] S.C.R. 602.

<sup>2</sup> Pages 73-74.



benefit the *plaintiff* in an action founded in copyright. As one witness put it to the Sub-Committee, this suggestion carries the potential to increase the number of nuisance suits by those who might make false claims to achieve quick settlements.<sup>1</sup>

In the end, the Sub-Committee agrees with another witness, the Patent and Trademark Institute of Canada and the Canadian Bar Association which stated that:

... we have not been able to find a proposal that seemed to be free of real difficulties, and particularly if tested against the system we have, which seems to be a workable system.<sup>2</sup>

Accordingly, the Sub-Committee is of the view that a copyright registration system should be maintained in Canada. That system, of course, should be voluntary, and should not be a condition of the existence or exercise of copyright in order to comply with Canada's obligations under the Berne Convention.

Registration fees should be set at a level sufficiently high to recover the costs of administering the system, at the expense of those who consider that they need the benefit of the presumptions flowing from registration. As well, in order to attempt to ensure the validity of the information filed with the Registrar, application forms for registration should require statements, perhaps by affidavit, as to how the applicant derived title and as to the nature and identification of the work.

Finally, in maintaining a registration system, the provisions of the present Act dealing with the registration of copyright in periodicals and other works consisting of multiple parts should be clarified. At present, it is unclear whether one certificate of registration covers all issues of the same periodical and all successive volumes of the same work or merely all the parts of a single issue or volume.

## RECOMMENDATIONS

- 127. A voluntary system of copyright registration should be maintained.**
- 128. In an application for copyright registration, more information, supported by an affidavit, should be provided to the Registrar as to the identification and nature of the work and as to how the applicant derived title.**
- 129. Fees for registration should be set at a level which will ensure that the system is administered on a cost recovery basis.**
- 130. Requirements for registration of a work consisting of multiple parts should be clarified.**

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<sup>1</sup> Brief from the Canadian Film and Television Association, 10

<sup>2</sup> *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, 26:17.



131. The legal effect of a certificate of registration should be to establish two rebuttable presumptions: that copyright subsists in the work and that the person named as owner on the certificate of registration is the owner of the copyright in the work.

#### D. INFRINGEMENT AND REMEDIES

There has been virtually unanimous agreement with the statements made in *From Gutenberg to Telidon* concerning the objectives of the infringement and remedy provisions of the Act: "The major objectives of a copyright enforcement policy are to secure compliance with the law and to provide for restitution if the copyright owner's interests have been damaged."<sup>1</sup> However, there also has been virtually unanimous disagreement with the recommendations made to achieve this objective.

Clearly, what is needed is a system which a copyright owner can use to obtain redress for infringement quickly, at a reasonable cost, and with some degree of certainty that the cost of enforcement will not exceed the damages awarded for the infringement. It is also clear to the Sub-Committee that additional analytical research is required with respect to both the definition of infringement and the kinds of remedies which should be available when an infringement occurs.

There has been nearly unanimous disagreement expressed to the Sub-Committee with what has been proposed in *From Gutenberg to Telidon*. Most submissions received by the Sub-Committee, however, did not propose alternatives beyond statements about the desired objectives of the system. On the basis of the evidence presented to the Sub-Committee several areas of inquiry have emerged, each of which requires thorough examination and study of a nature which is beyond the mandate of this Sub-Committee.

One area of inquiry concerns the definition of what should constitute infringement of copyright. The present definition of infringement should be reviewed to determine whether additional activities should constitute an infringement. It has been suggested that the enforcement of copyright would be improved if the definition of infringement were revised to include additional ways of dealing in and with infringing copies. This suggestion should be analysed.

Another important area of inquiry concerns remedies. With respect to civil remedies the Sub-Committee is of the view that the present system requires revision, but it is not convinced that it should be discarded. Consideration should be given to retaining the existing system of the remedy provisions in the *Copyright Act* which, in general, appear to be regarded as satisfactory.

Many submissions to the Sub-Committee advocated the introduction of a new form of remedy in the revised law which has been referred to as statutory damages. This suggestion is completely in keeping not only with the Sub-Committee's intention to devise a Charter of

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<sup>1</sup> Page 67.



Rights for Creators, but also with its commitment to make the Charter enforceable. The Sub-Committee agrees with the many witnesses who viewed the introduction of a statutory damage system as an answer to many of the practical problems involved in the enforcement of the *Copyright Act*. Accordingly, the Sub-Committee recommends that a system of statutory damages be implemented in the revised Act. Implementation of such a system will require practical adjustments to the existing remedy provisions. The Sub-Committee therefore recommends that the responsible department undertake the required analysis to determine what adjustments are necessary.

The current *Copyright Act* provides yet another kind of remedy to the copyright owner. As discussed previously in this Report, copyright owners may presently invoke the assistance of the customs apparatus by notifying customs that certain works protected by copyright must be listed on Schedule C of the Customs Tariff.<sup>1</sup> The result is that the listed works cannot be imported. The main opposition to the retention of this administrative remedy has come from the customs enforcement sector of the government which claims that the function of inspecting shipments of works protected by copyright cannot be done because of high volume and scarce resources. Many submissions to the Sub-Committee have disagreed, arguing that the system is used effectively in other countries and that it is essential to effective import protection.

It is easier to stop a shipment at the border than to trace many copies which are quickly dispersed once they are in the country. Copyright owners have also argued that new computer technology can assist customs in controlling imports. The Sub-Committee is persuaded by these arguments. Certainly part of the problem is the commitment to provide customs with the sufficient resources to fulfill its role under the Customs Tariff. The Sub-Committee urges that the necessary resources be provided. This administrative remedy should be retained in the revised law.

The Sub-Committee, however, suggests that the present system requires some modification to make it more efficient. First, those who list a work on Schedule C should be obliged to provide customs with information on the probable entry of a prohibited shipment, the date of its arrival if known, the kind of work involved and how to identify the infringing copies. Copyright owners should bear some of the responsibility for this method of enforcing their rights. The system, insofar as possible, should also be made self-supporting. Finally, consideration should also be given to a requirement to renew the listing of a work, perhaps annually, to prevent cluttering the system with works no longer commercially available and therefore unlikely to be imported.

The present law also contains criminal offences. These impose fines, imprisonment and in certain instances the now outlawed practice of "hard labour." Theft is a very serious matter. Piracy costs copyright owners millions of dollars every year. Accordingly, copyright owners need the full force of the criminal law to protect their intellectual property.

Present penalties, however, give no indication of the serious economic harm that may be caused by violators of the law. Maximum fines of \$200.00 (the present limit in respect of one transaction) are sadly outdated. By way of contrast, we can look to another federal statute

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<sup>1</sup> *Copyright Act*, sections 27 and 28.



which also deals with serious economic harm, the *Combines Investigation Act*. Section 32 of that Act prohibits conspiracies, combinations and agreements to restrain competition unduly and carries a maximum fine of one million dollars.

Proposals of the former government would have increased the existing fine under the *Combines Investigation Act* from one to two million dollars to emphasize the harm caused by the prohibited activities. A discussion paper released by the present government this year raised the possibility that the fines might be increased to five million dollars in order to give a signal to the courts that the crime is a serious one.<sup>1</sup> The Sub-Committee is firmly convinced that a similar signal needs to be sent for copyright offences. The Sub-Committee recommends a maximum fine of one million dollars.

Finally, it has been suggested to the Sub-Committee that in revising the remedy provisions it should be remembered that Canada is a country with two legal systems. There are concepts in each of the two systems which are valuable enforcement tools in the hands of copyright owners. For example, the civil law procedure with respect to seizure before judgment has proved to be very effective in enforcing copyright. Similarly in the common law jurisdictions, proceedings seeking Anton Pillar orders and Mareva injunctions have proven to be very effective. Unfortunately, these valuable copyright enforcement tools are available in one or the other of Canada's two legal systems, but not both. These tools cannot be transposed from one legal system to another unless it is done legislatively, by specific provisions in the revised copyright law. The Sub-Committee recommends that the suggestion to make these procedures available in both legal systems be carefully examined.

## RECOMMENDATIONS

132. The definition of what constitutes copyright infringement should be reviewed.
133. The existing system of civil remedies should be used as the basis for revision.
134. A system of statutory damages should be introduced.
135. The protection afforded by Schedule C of the Customs Tariff should be retained.
136. The criminal offences under the existing Act should be retained and the monetary penalties increased to one million dollars.
137. Study should be made of the feasibility of extending pre-judgment procedures presently available only in one or the other of Canada's legal systems, to both systems.

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<sup>1</sup> *Reform of Competition Policy in Canada: A Consultation Paper*, Consumer and Corporate Affairs Canada, March 1985, 18.



## APPENDIX A

### DISSENTING OPINION

Lynn McDonald, M.P.

I have signed the Report of the Sub-Committee on the Revision of Copyright because I am in agreement with the great majority of the recommendations. A new *Copyright Act* based on these recommendations would considerably improve the lot of creators. Yet I do have serious reservations or objections where I believe the recommendations are contrary to the Report's laudable intention of proposing a Charter of Rights for Creators.

Underlying these contested recommendations is a general shift in understanding as to what copyright is intended to do, whom it should serve. The old model of copyright was the individual, and often impoverished, poet, playwright, author, composer or painter. The new model is the cultural enterprise, including large and highly profitable corporations whose employees do creative work. Certainly the new corporations have to be accepted as copyright owners, as well as individuals. Yet I can, and must, question, to what extent their desires and powerful lobbies should influence the design of a new *Copyright Act*. It is telling that a new right to the broadcast day is defended on the grounds that there is as much creativity in making up a broadcast day as in compiling a city directory. But should the street directory be the model for copyright?

The practical result of such a shift in conceptualization will be costly to the large number of ill-paid individual artists, who are looking to greater copyright protection as a means of improving their incomes. A new right in broadcasts for example, will mean further splitting of the royalty pie; composers, authors and so forth, will now have to compete also with the broadcasting corporations.

#### *Employers' Rights*

The shift in focus from the individual creator to the corporation is first apparent in the recommendation for maintaining employers' rights (recommendation 15), in spite of a large number of representations of the creative community to the contrary, (including the Canadian Conference of the Arts, Canadian Association of University Teachers, Union des Artistes, L'Association des Créateurs et Créatrices du Québec, Canadian Authors Association, the League of Canadian Poets and the National Film Board).

To justify the majority's recommendations the whole purpose of copyright is realigned, from reward for creative work to reward for risk taking. Since the employee receives a salary, the argument goes, and the employer undertakes the risk, copyright should be given to the employer. I disagree, and urge that the understanding of copyright as a reward for *creative work* be retained. I support the recommendations of the many arts organizations that first ownership of copyright, subject to an agreement to the contrary, be vested in the creator/employee, with an exclusive licence to the employer to use the work in the normal course of business. I do not believe this will cause any hardship to the "cultural enterprise."



Indeed, and as noted in briefs, employers already are highly advantaged in negotiations with their employees.

### *Broadcasting*

The question of recognition of a new right in the broadcast day is more complex, but also reflects the new preference for corporations in copyright protection. Such a new broadcasting right would mean a new, and probably unnecessary, layering of rights in copyright. It was not recommended by the CBC, and has only recently emerged as a demand of the private broadcasting industry. The claim is highly problematic for the real creative work within broadcasting is already the subject of copyright, by composers, lyricists, performers, producers and other artists.

The broadcaster's contribution, apart from these creative aspects, is largely one of hardware, putting the signal onto the air. That the creativity entailed in organizing a "broadcast day" is similar to that required of a playwright, composer or producer is not advanced, for obvious reasons, and the street directory analogy shows just how weak the rationale is. The practical result, however, is serious: broadcasting corporations competing with composers, writers and so forth for scarce royalty dollars.

### *International Obligations and Outflow*

The requirement in international copyright law for non-citizens to be treated equally with citizens poses particular problems for Canada. Since so much of our cultural activity is imported, the recognition of new rights in copyright means an increasing outflow of dollars, mainly to the United States. For example, we recommend the provision of new rental and exhibition rights which will cause an outflow of dollars. To avoid these outflows the Report recommends that payment for public use of library books be left *out* of copyright. And, where possible, we recommend that new rights be granted only on a reciprocal basis, in effect hoping that the United States will not grant similar rights. New rights, but requiring reciprocity, are recommended in broadcasting, performers' rights, sound recordings, published editions and computer programs.

*No estimates have been made as to the probable costs, or outflow of funds, from the recognition of these new rights*, although for all of them, the majority of funds, up to 90% in some categories, would leave the country. I believe that estimates should be made and considered before implementation of any costly items.

Copyright is a means to an end, not the end itself. For a Parliament seeking a thriving Canadian culture, copyright is one important means, to be used with others, such as the funding of the Canada Council, the CBC, the National Film Board and other agencies and tax policies. When cultural dollars are as limited as they are, and in a year of \$100 million in arts cutbacks, one must question any recommendations that will result in an outflow of funds from the country. Arts organizations want more copyright *and* increased funding for the arts. If they can't have both, which do they want? Are they prepared to take another \$100 million cut in arts funding in Canada to pay for the outflow?



## *Home Copying*

It is with this concern for loss of funds for the arts in Canada that I oppose the recommendation of *royalties* on blank tapes and cassettes, video cassette recorders and so forth for home copying. Instead I would advocate a *tax* on such materials, to be directed to copyright owners through collectives, or to new production, such as through Telefilm, or through some special new program, or some combination of the above. To the consumer, the result is the same, a slight increase in cost. To the Canadian cultural community the result of the tax choice would mean increased opportunities for creative work, and more rewards for it.

## *Retransmission*

The outflow of funds, overwhelmingly to the United States, is the reason also for my reservations on recognition of a retransmission right. The logic for some form of compensation for retransmission I believe to be persuasive; my concern is with how to insure that there is not a serious drain of resources to the United States. The Report's suggestion to end the distinction between transmission and retransmission I think only muddies the waters, to evade facing certain embarrassing consequences of recognition of a retransmission right. One such result would be that cable subscribers in Windsor, for example, would have to pay a royalty for retransmission for the American channels their Detroit neighbours get, on cable, for free. American cable subscribers pay royalties only for distant signals, a distinction the Report is attempting to obliterate, at some cost in logical argument. The method for calculating royalties becomes extraordinarily convoluted, entailing imputations of intention on the part of advertisers and broadcasters. On the receiver end, I take strong exception to the treatment of the reception of American broadcasting as a *right* for all Canadians, requiring special measures to insure equal access regardless of where Canadians live.

The question as to how much recognition of a new retransmission right would cost is hotly disputed. The American broadcasting corporations, which are pressing in no uncertain terms for such a right, all refuse to put a price tag on it. Canadian cable estimates run between \$34 million and \$82 million per year, which one of the Sub-Committee's experts considers exaggerations. His estimates, using the American system, but with some further qualifications, are as low as \$11 million per year but are as yet unverified by any other source. The same study also reports the Belgium experience which, if applied to Canada, would cost \$53 million per year. Note that even the lowest and unverified estimate would entail an outflow of funds twice the Canada Council's cut this year. The higher amounts would enable doubling the Canada Council's budget or buy a noticeable increase in quality in Canadian television programs.

The Report recommends that, if the additional charges to cable subscribers for these royalties would be too high, the cable tax, which proceeds go to Telefilm Canada, should be reduced. This, I believe, reveals a mistaken sense of priorities. Instead, I would recommend increasing that tax, and directing the proceeds to collectives of copyright owners, or to Telefilm for further production. Another option to be considered is that recommended in the Keyes-Brunet report of 1977, to grant a retransmission right only to Canadian broadcasters. Probably neither of these proposals will please the major players at the "Shamrock Summit" (or ABC, NBC, CBS or the Hollywood majors) but either, I believe, would better serve the interests of Canadians than the recognition of a retransmission right that would cause a major outflow of funds.







## APPENDIX B

### RECOMMENDATIONS

#### A CHARTER OF RIGHTS FOR CREATORS

1. The *Copyright Act* should be expanded to include new property rights which reflect modern forms of creative activity and the various ways of communicating the fruits of that activity. (page 6)
2. The revised law should recognize moral rights as an integral part of copyright. (page 8)
3. All remedies for infringement of an economic right should be available for infringement of a moral right. (page 8)
4. The term of protection for moral rights should be the same as the term of protection for economic rights. (page 8)
5. The new Act should provide a moral right to authorize the use of any protected work in association with products, services, causes or institutions. (page 8)
6. The revised Act should provide a moral right to prevent any modification of the original of an artistic work, including an element of a limited edition thereof, even in the absence of evidence of prejudice to the author's honour or reputation. (page 8)
7. The right should be limited in order to permit the physical relocation of the work, the alteration of a structure containing the work, and legitimate restoration and preservation activities. (page 8)
8. Unimpeded negotiations concerning the use and assignment of rights should be preferred whenever possible over compulsory arrangements, prohibitions and other predetermined outcomes. (page 8)
9. The Crown in the right of Canada and in the right of every province should be subject to the provisions of the *Copyright Act*. Any exception to the above rule should be included in statutes dealing with emergency powers rather than in the *Copyright Act*. (page 9)
10. Statutes, regulations and judicial decisions of courts and tribunals at all levels of jurisdiction should be in the public domain. (page 10)
11. There should be no copyright in government works except as follows:
  - (a) a moral right of integrity to ensure the accuracy of works in the nature of standards should be provided;
  - (b) works produced by a Crown agency, such as the Canadian Broadcasting Corporation or the National Film Board, the purpose of which is to entertain rather than to assist in policy debate and evaluation, should be protected; and



- (c) custom-made statistics and statistical works in restricted circulation should be protected if it is found desirable to continue the practice of making these works available to particular users on a cost-recovery basis. (page 11)
12. Provincial public documents should have the same copyright status as federal ones and consultations should take place between the two levels of government on this issue. (page 12)
13. Written submissions sent to Parliament, Legislatures or to public bodies of inquiry should be in the public domain from the time of their receipt. (page 12)
14. The revised law should recognize that corporate and co-operative entities can hold and exercise full rights, including moral rights. (page 13)
15. First ownership of copyright should be vested in an employer in the case of works created by employees in the course of employment subject, as now, to any agreement to the contrary. (page 14)
16. The revised law should clarify the meaning of "employee." (page 14)
17. The copyright in commissioned engravings, photographs and portraits should vest in the author. (page 14)

## **WRITING AND PUBLISHING**

18. In view of the originality involved in their preparation, editions of literary, dramatic, musical and artistic works should be protected against unauthorized reproduction for 25 years from publication. Protection should be extended on a reciprocal basis to those countries with similar protection. (page 16)
19. Translations should be expressly included in the revised law as proper subject matter of copyright protection, without prejudice to the rights of the owner of the copyright in the underlying work. (page 17)
20. Blank forms should not be specifically excluded from protection, but should be subject to the same criteria as other works. (page 17)
21. Maps, charts and plans should be treated as artistic works. (page 18)
22. Importation protection should be maintained for all copyright subject matter. (page 20)
23. A mechanism should be developed to compensate authors for the public lending of their works by libraries. The scheme should be independent of copyright law. (page 20)
24. A specific right of reprographic reproduction should not be introduced. (page 21)
25. No exception should be provided for reproduction by libraries. (page 22)
26. The revised law should not provide for a compulsory licence to translate literary works. (page 23)
27. The reproduction, public performance and printing compulsory licences should not be retained in the revised law. (page 23)
28. Provision should be made in the revised law for the Copyright Appeal Board to issue non-exclusive licences where a copyright owner cannot be located. (page 24)



## THE VISUAL ARTS

29. Consideration should be given to a new designation of "artistic works" in general and to "engravings" in particular. (page 24)
30. The original of an artistic work should include separately identifiable reproductions of that work in a limited edition. (page 25)
31. "Works of choreography," "works of performance" and "pantomimes" should be placed in a separate category of protected subject matter. Such works should not need to develop a dramatic plot or sequence in order to be protected. (page 26)
32. Work on the revision of the *Industrial Design Act* should be accelerated. (page 27)
33. Pending revision of the *Industrial Design Act*, section 46 of the *Copyright Act* should be immediately amended to eliminate the availability of copyright to protect industrial articles incorporating functional designs. (page 27)
34. The revised law should recognize a right to exhibit the original of an artistic work in public. This right should also extend to artistic works which are part of a limited edition. (page 28)
35. *Droit de suite* should not be introduced at this time in the new Act. Ongoing study should be undertaken to evaluate fully the implications of the right. (page 29)
36. Ownership of copyright in a photograph should vest in the person who composed the photograph. (page 30)
37. There should be no specific exception from copyright liability for the benefit of photofinishers. (page 30)

## MUSICAL WORKS

38. The category of musical work should be defined in an illustrative manner. (page 31)
39. The full range of economic and moral rights should apply to musical works, including the new moral right of endorsement. (page 31)
40. The revised law should not contain an exception for fairs and exhibitions from the payment of royalties for the public performance of music. (page 32)
41. The revised Act should provide an exception from copyright liability for the public performance of a musical work during a religious service. (page 33)
42. The revised law should not retain the compulsory licence for the making of sound recordings. (page 35)
43. The revised law should not contain a general exception for the public performance of copyright works by means of jukeboxes, radios, television sets and playback machines. (page 36)
44. The revised law should contain an exception from copyright liability for performances of protected works by means of radios, television sets and playback machines that incidentally take place in public. (page 36)



## AUDIO-VISUAL WORKS

45. The new Act should provide for a distinct category of protected subject matter to be called "audio-visual works." (page 36)
46. Audio-visual works should be defined to include any work in which an image appears to be in motion, with or without sound, on any material support. (page 37)
47. Audio-visual works should be defined to include pre-programmed works where the movement of the picture may be the result of a player's interaction with a computer program. (page 37)
48. The new Act should define the phrase "in public" as regards the right to perform in public so as to include situations where individuals share living quarters by reason of their work, education, vacation or detention. (page 37)
49. "Performance in public" should be defined to include those performances effected by means of a video jukebox even where such performances can be viewed only by one person at any given time. (page 38)
50. The new Act, in defining "publication," should take into account the various methods of making a work available to the public other than by issuance of copies of that work. (page 39)
51. Audio-visual works should be protected for the shorter of 50 years following publication or 75 years following fixation. (page 39)

## COMPUTERS

52. A new right to input any protected work into a computer should be provided in the revised law. (page 41)
53. There should be no right of display in the revised law. (page 41)
54. Fixation should be defined as all means capable of capturing a work, including capture in computer media, but excluding capture in a medium as volatile as a computer's main storage or display screen. (page 41)
55. With respect to the right of reproduction, a material form should be one that has a certain degree of permanence. (page 42)
56. Where a work created with the assistance of a computer is original the copyright in that work should be owned by the person responsible for its making and not by the owner of the copyright in the original program. (page 43)
57. Ownership in compilations produced by computer data storage and retrieval systems should be vested in the individual or entity primarily responsible for the arrangements undertaken for making the compilation. (page 44)
58. Computer programs should be protected by the revised law as a separate category of subject matter with the full regime of protection on the basis of reciprocity. (page 45)
59. The Act should provide an exception to the right of reproduction to permit the making of a back-up copy. (page 46)



60. The term of protection for computer programs should be the life of the author plus 50 years. (page 46)
61. The government should study the possibility of providing an exception to permit the reproduction of a substantial part of a pre-existing program as a non-substantial part of another program. (page 46)
62. Mask works fixed in semi-conductor chips should be protected by new legislation outside the *Copyright Act*. (page 47)
63. The mask works to be protected are a series of related images that represent the three-dimensional pattern of circuits and components fixed in a semi-conductor chip. (page 47)

### **SOUND RECORDINGS**

64. A sound recording should be protected as a separate category of copyright subject matter. (page 49)
65. The revised law should provide the full regime of copyright protection to sound recordings. Public performance, transmission and retransmission rights should be extended only to nationals of those foreign countries which provide similar protection to Canadians. (page 51)
66. The owner of the copyright in a sound recording should be the individual or entity principally responsible for the arrangements undertaken for its making. (page 52)
67. The performance of a sound recording during a religious service should not constitute an infringement of copyright. (page 52)
68. The revised law should not contain an exception for the public performance of sound recordings by means of jukeboxes, radios, television sets and playback machines. (page 52)
69. The revised law should contain an exception from copyright liability for uses of sound recordings that incidentally take place in public. (page 52)
70. Sound recordings should be protected for the shorter of 50 years following publication or 75 years following fixation. (page 52)

### **PERFORMERS' PERFORMANCES**

71. The performances of performers should be a new category of subject matter with the necessary regime of protection. (page 55)
72. The protection of performers' performances should be extended to nationals of those foreign countries which provide similar protection to Canadians. (page 56)
73. Performers should be the first owners of the copyright in their performances. (page 56)
74. Performers' performances should be protected for a term of at least 20 years from the time of fixation of the performance. (page 57)



## **C. BROADCASTS**

75. Broadcasts should be protected under the revised Act. (page 58)
76. The rights attaching to broadcasts should be
  - (a) a right of reproduction;
  - (b) a right of transmission;
  - (c) a right to authorize each of the above; and
  - (d) a right of retransmission. (page 58)
77. The rights should be provided to foreign broadcasters on the basis of reciprocity. (page 59)
78. Broadcasts should be protected for a period of 25 years from the date of their fixation. (page 59)
79. It should not be a copyright infringement to use incidentally an artistic work without authorization in a broadcast. (page 60)
80. Exceptions should be provided for the making of ephemeral recordings by broadcasters:
  - (a) pursuant to CRTC regulations, or
  - (b) in order to permit the broadcast of the program in a different time zone provided that the recording is erased after eight days. (page 62)
81. A broadcaster should not be required to identify the authors of works broadcast except where the identification is incorporated in the work itself. (page 62)

## **FAIR DEALING**

82. The present fair dealing provisions should not be replaced by the substantially wider "fair use" concept. (page 65)
83. The nature of fair dealing as a defence to an action for infringement should not be changed. (page 65)
84. The purposes for which fair dealing can be a defence should be retained but should be revised to indicate that research must be private to qualify and to indicate that all media of news reporting are covered. (page 66)
85. Factors to be considered by the court may be listed but should be illustrative only and not prioritized. (page 66)
86. Fair dealing should not apply to unpublished works. (page 66)

## **REQUESTS FOR SPECIAL CONSIDERATION**

87. The revised law should permit the production of special media materials without the authorization of the copyright owner but with payment to be made in accordance with tariffs established by the Copyright Appeal Board. (page 68)



88. The revised law should provide an exception to permit an archival institution to make a copy of a work which is not otherwise available and which is already in its collection, for the purpose of preserving the archival copy of that work. (page 70)
89. An exception should be provided to permit an archival institution to make a copy of a work for another archival institution where the latter has received a request for a copy of a work from an individual researcher for the purpose of private research. The making and issuance of copies under this exception should not constitute publication. (page 70)
90. The revised law should provide an exception to permit teachers and students, in the normal course of teaching activities to:
  - (a) perform a work in public;
  - (b) transmit and retransmit a work within the confines of a single educational institution. (page 71)
91. An exception should be provided to allow for the reproduction of a work as part of questions to be asked, or answered, in an examination. (page 71)

## **RENTING RIGHT**

92. A new renting right attaching to all categories of protected subject matter should be provided in the revised law. (page 73)

## **HOME COPYING**

93. Home copying should be permitted under the revised law subject to the payment of compensation in the form of a royalty on the material support and on the machine used to reproduce the work. (page 76)
94. The mechanism for establishing the amount of royalties should be the filing of tariffs for approval by the Copyright Appeal Board. (page 77)
95. Payment should be made by the manufacturers or importers directly to the collectives. (page 95)
96. Where works are protected on a reciprocal basis, the owners of copyright in those works should participate in the compensation system on a reciprocal basis. (page 77)

## **RETRANSMISSION**

97. A retransmission right should be provided in the revised law. (page 78)
98. Where works are protected on a reciprocal basis, the owners of copyright should benefit from a retransmission right on a reciprocal basis. (page 78)
99. The government should examine the desirability of bringing all broadcasting and retransmission activities under an expanded definition of a transmission right. (page 80)



100. The right of retransmission should be defined in general terms and should not depend on current technology. (page 80)
101. Common carriers should be exempted from copyright liability. (page 80)
102. The right of retransmission to be provided in the revised law should be limited by a compulsory licence, with tariffs to be established by the Copyright Appeal Board. (page 81)
103. The Copyright Appeal Board should determine the total economic value of all retransmission activities in Canada. (page 81)
104. The Board should set a tariff based on that evaluation and whatever other criteria that the Board deems relevant but should not consider the number and composition of the signals carried by an individual retransmission system. (page 82)
105. In assessing the economic value of retransmission activities, the Copyright Appeal Board should assign a lower value to the retransmission of local signals. (page 82)
106. Local signals should be defined as those reaching the broadcaster's target market by whatever means. (page 82)
107. The target market of the broadcaster should be determined by reference to such factors as the content of the programming involved, the marketing activity of the broadcaster, and the origin of the broadcaster's advertising revenues. (page 83)
108. Retransmission systems should be considered within the scope of a broadcaster's target market irrespective of the broadcaster's success in deriving income from it, as long as the broadcaster's own behaviour demonstrates an intent to benefit from it financially. (page 83)
109. Small cable systems serving small and isolated communities should be shielded from any material impact arising from the introduction of a retransmission right. (page 83)

#### **COLLECTIVES**

110. The collective exercise of copyright should be encouraged. (page 88)
111. The Copyright Appeal Board should be vested with the authority to regulate all collectives. (page 88)
112. Membership in collectives should continue to be voluntary. (page 88)
113. Creators should continue to be allowed to grant exclusive licences to collectives. (page 88)

#### **COPYRIGHT APPEAL BOARD**

114. The Copyright Appeal Board should be re-named the Copyright Board. (page 89)
115. The Board should not be granted powers to intervene in the administration of collectives. (page 90)



116. The Board's jurisdiction should be limited to hearing evidence only where a proposed tariff is in dispute. (page 91)
117. The Board's jurisdiction should be limited to setting rates. (page 91)
118. The Board should be granted the usual powers of a court of record, including the authority to issue subpoenas and require the production of documents. (page 92)
119. Dealings with the Board should be with the Board directly, and not through the responsible Minister. (page 92)
120. Previously approved rates should remain in effect until such time as the Board has approved new rates. (page 92)
121. The Board's decisions should be subject to appeal to the Federal Court on matters of law. (page 92)
122. The Board should be composed of five permanent members, appointed for a fixed renewable term by the Governor in Council. (page 93)
123. Members should be removable only for cause. (page 93)
124. Members of the Board should have legal, financial or copyright expertise. (page 93)
125. The Board should be supported by its own staff and outside professional assistance as required. (page 93)
126. The Board should be an independent body reporting to Parliament through the responsible Minister. (page 93)

## **REGISTRATION**

127. A voluntary system of copyright registration should be maintained. (page 95)
128. In an application for copyright registration, more information, supported by an affidavit, should be provided to the Registrar as to the identification and nature of the work and as to how the applicant derived title. (page 95)
129. Fees for registration should be set at a level which will ensure that the system is administered on a cost recovery basis. (page 95)
130. Requirements for registration of a work consisting of multiple parts should be clarified. (page 95)
131. The legal effect of a certificate of registration should be to establish two rebuttable presumptions: that copyright subsists in the work and that the person named as owner on the certificate of registration is the owner of the copyright in the work. (page 96)

## **INFRINGEMENT AND REMEDIES**

132. The definition of what constitutes copyright infringement should be reviewed. (page 98)
133. The existing system of civil remedies should be used as the basis for revision. (page 98)



- 134. A system of statutory damages should be introduced. (page 98)
- 135. The protection afforded by Schedule C of the Customs Tariff should be retained. (page 98)
- 136. The criminal offences under the existing Act should be retained and the monetary penalties increased to one million dollars. (page 98)
- 137. Study should be made of the feasibility of extending pre-judgment procedures presently available only in one or the other of Canada's legal systems, to both systems. (page 98)

REGISTRATION

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- 127. Fees for registration should be set at a level which will ensure that the system is administered on a cost recovery basis. (page 97)
- 126. Requirements for registration of a work consisting of multiple parts should be clarified. (page 97)
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INFRINGEMENT AND REMEDIES

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## APPENDIX C

### LIST OF WITNESSES

#### I

During hearings held between May 9 and June 27, 1985, a large number of groups and individuals appeared before the Sub-Committee, including the Honourable Marcel Masse, Minister of Communications, and the Honourable Michel Côté, Minister of Consumer and Corporate Affairs. The majority of the meetings were held in Toronto and Montreal using the following thematic approach:

#### *Toronto*

Theme 1	<i>Protection of Literary Works</i>	June 10
Theme 2	<i>Requests for Special Consideration</i>	June 11
Theme 3	<i>Uses of Protected Works in Educational Institutions</i>	June 12
Theme 4	<i>Vesting of Copyright Ownership</i>	June 13
Theme 5	<i>The Visual Arts</i>	June 14

#### *Montréal*

Theme 6	<i>Protection of Computer Programs and Data Bases</i>	June 17
Theme 7	<i>The Music Industry</i>	June 18-19
Theme 8	<i>Film, Broadcasting and Retransmission</i>	June 20-21



WITNESSES	ISSUE <sup>1</sup>	DATE
<b>Access Network:</b> Linda Sherwood, Manager, Corporate Affairs.	23	June 20, 1985
<b>Alaska Broadcasters Association:</b> A.G. Hiebert, Chief Executive Officer; Leon T. Knauer, Counsel.	23	June 20, 1985
<b>Alliance of Canadian Cinema, Television and Radio Artists (ACTRA):</b> Bruce MacLeod, National President; Lyn Jackson, Vice-President, Performers; Paul Siren, General Secretary; Laurence Arnold, Counsel; Jack Gray, Chairman, Copyright Writers.	21	June 19, 1985
<b>Apple Computer Inc.:</b> Bill Holtzman, Manager.	17	June 17, 1985
<b>"Association des archivistes du Québec Inc.":</b> Marcel Caya, President.	10	June 11, 1985
<b>"Association des réalisateurs de Radio-Canada":</b> Gaston Dagenais, Director; Gaston Imbeault, Director.	22	June 20, 1985
<b>"Association des réalisateurs et réalisatrices de films du Québec":</b> Richard Boutet, Vice-President.	23	June 20, 1985
<b>"Association du disque et du spectacle québécois (L'ADISQ)":</b> André Noreau, Coordinator; Michel Sabourin, Member; Lyse George, Member.	20	June 19, 1985
<b>Association for the Study of Canadian Radio and Television:</b> Marie Leclair, President; Richard Wright, Vice-President; Howard R. Fink, Chairman.	10	June 11, 1985

<sup>1</sup> The number of the issue refers to the printing of the Minutes of Proceedings and Evidence.



WITNESSES	ISSUE	DATE
<b>"Association littéraire et artistique internationale":</b> Nelson Landry, Vice-President.	5	May 29, 1985
<b>Association of Canadian Advertisers Incorporated:</b> Dan Presley, Manager, Advertising & Publicity; Rolf James.	14	June 13, 1985
<b>Association of Canadian Archivists:</b> Corrado A. Santoro, Chairman.	9	June 11, 1985
<b>Association of Canadian Publishers:</b> John Irwin, Chairman Copyright Committee; Phyllis Yaffe, Executive Director; Peter Grant, Counsel; Grace Westcott, Counsel.	7	June 10, 1985
<b>Association of Universities and Colleges of Canada:</b> W.A. MacKay, President; Pierre Yves Boucher, Associate Executive Director.	11	June 12, 1985
<b>Athabaska University:</b> Neil Henry, Vice-President; David Yates, Copyright Officer.	12	June 12, 1985
<b>Butterworth &amp; Co. (Canada) Ltd.:</b> Lebby Hines, Executive Director; Ronald G. Atkey, P.C., Q.C., Counsel.	13	June 13, 1985
<b>Canada Law Book Inc.:</b> Walter Cowing, President; John J. Robinette, Q.C., Counsel.	13	June 13, 1985
<b>Canadian Artists' Representation (National):</b> E. Jane Condon, National Director; Ricardo Gomez, National Representative; Pamela Medjuck, Counsel.	15	June 14, 1985
<b>Canadian Artists' Representation (Ontario):</b> Mark Burnham, Chairman, Copyright Committee; Hamish Buchanan, Interim Executive Director.	15	June 14, 1985
<b>Canadian Association of Broadcasters:</b> Michel Arpin, Chairman of the Board; David Bond, President;	22	June 20, 1985



- D. Anthony Scapillati, Counsel;  
C. David MacDonald, Q.C., Counsel.
- Canadian Association of Exhibitions:** 18 June 18, 1985  
Jack Sirrs, President;  
Elwood F. Hart, General Manager.
- Canadian Association of News and Public Affairs Monitors:** 14 June 13, 1985  
Lise Chartier, President;  
David E. Clarke, Counsel.
- Canadian Association of Professional Dance Organizations:** 15 June 14, 1985  
Gordon Pearson, Director;  
William Poole, Administrative Director;  
Elise Orenstein, Counsel;  
Miram Adams, Dancers Canada Association.
- Canadian Association of University Teachers:** 21 June 19, 1985  
Allen Sharp, Vice-President;  
Donald Savage, Executive Secretary.
- Canadian Authors Association:** 7 June 10, 1985  
Frank Kerner, Past President.
- Canadian Bar Association and Patent and Trademark  
Institute of Canada** 26 June 27, 1985  
Richard R. Hahn, Chairman;  
Ross Gray, Q.C., Member;  
Bernard Mayer, Q.C., Member;  
C. David Macdonald, Member;  
William L. Hayhurst, Member;  
John C. Singlehurst, Member.  
Colleen E.R. Spring, Member;  
Casey August, Member;  
Barry D. Torno, Member;  
Susan Brown, Member.
- Canadian Book Publishers' Council:** 7 June 10, 1985  
Jacqueline C. Husion, Executive Director;  
Michael I. Pitman, Chairman, Copyright Committee.
- Canadian Broadcasting Corporation:** 22 June 20, 1985  
William Armstrong, Executive Vice-President;  
Donald Lytle, Director, Corporate Program Services;  
Jacques Alleyn, Q.C., General Counsel.



WITNESSES	ISSUE	DATE
<b>Canadian Business Equipment Manufacturers' Association (CBEMA):</b> John Reid, Chairman; Casey August, Manager, IBM Canada Ltd.; George Fisk, Counsel.	17	June 17, 1985
<b>Canadian Cable Television Association:</b> Michael Hind-Smith, President; Philip Lind, Senior Vice-President, Rogers Cable Systems Inc.; Susan E. Cornell, Vice-President, Public Affairs; Gilles Desjardins, Vice-President, "Groupe Vidéotron"; Bruce McDonald, Counsel.	25	June 21, 1985
<b>Canadian Community Newspaper Association:</b> Ralph Hennigar, Past President.	14	June 13, 1985
<b>Canadian Conference of the Arts:</b> Brian Anthony, National Director; Curtis Barlow, President; Claudette Fortier, Vice-President; Pat Durr, Member of the CCA Board of Governors; Paul Siren, Member of the CCA Board of Governors.	4	May 23, 1985
<b>Canadian Copyright Institute:</b> Michael Pitman, Former President; John Wilson, Executive Secretary; Mark Burnham, Ottawa Representative.	2	May 16, 1985 May 21, 1985
<b>Canadian Crafts Council:</b> Peter Weinrich, Executive Director.	15	June 14, 1985
<b>Canadian Daily Newspaper Publishers Association:</b> John E. Foy, President; Murray Burt, Chairman, Copyright Committee; Brian Edmonds, Counsel.	14	June 13, 1985
<b>Canadian Football League:</b> Douglas Mitchell, Commissioner; Peter Grant, Counsel.	23	June 20, 1985
<b>Canadian Independent Record Production Association (CIRPA):</b>	20	June 19, 1985



## WITNESSES

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Vic Wilson, President; Brian Chater, Director.		
<b>Canadian Law Information Council:</b> Louis Bertrand, President; David Barry, Past Chairman.	13	June 13, 1985
<b>Canadian Library Association:</b> Cathy Zuraw, Librarian; Françoise Hébert, Librarian.	9	June 11, 1985
<b>Canadian Manufacturers Association:</b> R.A. Eckersley, Chairman of the Committee; Philip T. Erickson, Member of the Committee.	13	June 13, 1985
<b>Canadian Motion Picture Distributors Association:</b> N. Alterman, Vice-President; Millard S. Roth, Executive Director; H.B. Mayer, Q.C., Counsel.	25	June 21, 1985
<b>Canadian Music Publishers Association:</b> Brian Chater, President; John Bird, Head, Copyright Committee; Paul M. Berry, Secretary.	20	June 19, 1985
<b>Canadian Musical Reproduction Rights Agency Limited:</b> Mark Altman, President; Al Mair, Past President; Paul M. Berry, Secretary.	20	June 19, 1985
<b>Canadian Recording Industry Association (CRIA):</b> Peter Erdmann, Chairman; Barry Torno, Counsel.	20	June 19, 1985
<b>Canadian Satellite Communications Inc.:</b> Pierre L. Morissette, President; Chris Johnston, Secretary and Counsel.	24	June 21, 1985
<b>Canadian Society of Copyright Consumers (CSCS):</b> Stanley G. Simpson, C.A., Managing Secretary; C. David McDonald, Q.C., Counsel.	3	May 22, 1985
<b>Canadian Teachers' Federation:</b> Brian Shortall, President; Russell Mosher, Deputy Secretary General.	11	June 12, 1985



WITNESSES	ISSUE	DATE
<b>Canadian Translators and Interpreters Council:</b> Michel Limbos, Vice-President; Jean-Paul Partensky, Chairman of the Copyright working group; Maryan Hebb, Counsel.	8	June 10, 1985
<b>Carswell Company Limited:</b> Alan Turnbull, President; Ronald G. Atkey, P.C., Q.C., Counsel.	13	June 13, 1985
<b>CCH Canadian Limited:</b> James Grace, Vice-President and Managing Editor; Ronald G. Atkey, P.C., Q.C., Counsel.	13	June 13, 1985
<b>Charles Crane Memorial Library:</b> Paul E. Thiele, Librarian and Head.	9	June 11, 1985
<b>Columbia Broadcasting Systems (CBS):</b> Ross Gray, Q.C., Counsel: Harry R. Olsson, General Attorney.	23 24	June 20, 1985 June 21, 1985
<b>Composers, Authors, and Publishers Association of Canada Ltd. (CAPAC):</b> Marc Fournier, President; John V. Mills, Q.C., General Manager.	19	June 18, 1985
<b>Concert Production International:</b> Norman Perry, Vice-President.	18	June 18, 1985
<b>«Conférence des Associations des créateurs et créatrices du Québec»:</b> Jean-Yves Collette, Secretary; Marcel Dubé, Counsel; Claudette Fortier, SARDEQ; Jacqueline Lemay, SPACQ.	4	May 23, 1985
<b>«Conseil de la Science et de la technologie»:</b> Maurice L'Abbé, President; Raymond Trudeau, Member of the Council; Francisco Arena, Research Officer.	16	June 17, 1985
<b>Consumer and Corporate Affairs Canada:</b> Lawson A.W. Hunter, Director, Investigation and Research, Combines Investigation Act.	19	June 18, 1985



WITNESSES	ISSUE	DATE
<b>«Corporation des bibliothécaires professionnels du Québec»:</b> Alain Perrier, Member of the Board; Gisèle Lagueux, Member.	10	June 11, 1985
<b>CTV Television Network Ltd.:</b> David Basskin, Director, Business Affairs; John Hylton, Q.C., Counsel.	23	June 20, 1985
<b>Educational Media Producers and Distributors Association of Canada:</b> John Fisher, Director.	11	June 12, 1985
<b>First Choice Communications Corporation:</b> Paul Gratton, Program Director; Peter Grant, Counsel.	22	June 20, 1985
<b>GDT Softworks Inc.:</b> Gary W. McIntosh, President.	17	June 17, 1985
<b>Global Communications Limited:</b> Seymour Epstein, Chairman, Executive Committee Board of Directors.	23	June 20, 1985
<b>Goulet, Theresa:</b> Graduate Student, University of Calgary.	24	June 21, 1985
<b>Graphic Arts Industries Association:</b> Willy Cooper, President; Douglas Scott, Chairman of the Board.	8	June 10, 1985
<b>House of Semiconductors Ltd.:</b> Robert MacFarlane, Counsel.	16	June 17, 1985
<b>Information Industry Association (U.S.A.):</b> David Peyton, Director.	16	June 17, 1985
<b>Institute of Canadian Advertising:</b> Keith B. McKerracher, President.	14	June 13, 1985
<b>International Association for the Protection of Industrial Property:</b> G.A. Macklin, Q.C., Counsel.	16	June 17, 1985



WITNESSES	ISSUE	DATE
<b>Kane, Don:</b> Artist.	15	June 14, 1985
<b>Law Society of Upper Canada:</b> John Hylton, Q.C., Counsel; Gordon Henderson, Q.C., Counsel.	13	June 13, 1985
<b>League of Canadian Poets and Writers' Union of Canada:</b> John Wilson, Executive Secretary; Maryan Hebb, Counsel; Elizabeth Woods, Member.	7	June 10, 1985
<b>"Les photographes professionnels du Québec inc.":</b> Marc Renaud, President; André Amyot, Vice-President.	15	June 14, 1985
<b>Literary Translators' Association:</b> David Homel, President; Patricia Claxton, Chairman, Copyright Committee.	8	June 10, 1985
<b>Mackintosh Computer Ltd.:</b> Robert MacFarlane, Counsel.	16	June 17, 1985
<b>Maclean Hunter Limited:</b> Harvey Botting, Assistant Vice-President.	14	June 13, 1985
<b>"Magnétothèque":</b> André Hamel, President.	9	June 11, 1985
<b>Microcom Computer:</b> Robert MacFarlane, Counsel	16	June 17, 1985
<b>Motion Picture Theatre Associations of Canada:</b> Tom Fermanian, President; Larry Pilon, Second Vice-President; Dave MacDonald, Counsel; Curly S. Posen, Executive Secretary.	18	June 18, 1985
<b>National Association of Broadcasters:</b> Michel D. Berg, Senior Associate and Counsel.	24	June 21, 1985
<b>National Broadcasting Systems:</b> Molly Pauker, Assistant General Attorney; Ross Gray, Q.C., Counsel.	23	June 20, 1985



WITNESSES	ISSUE	DATE
<b>National Film Board of Canada:</b> Joan Pennefather, Director General of Planning; Guy Gauthier, Chief of Staff Relations; David Balcon, Consultant.	22	June 20, 1985
<b>Norfield/Safeguard/Systems/McBee:</b> George N. Gorloff, President, McBee Technographics Inc.	8	June 10, 1985
<b>Northern Telecom Limited:</b> Philip T. Erickson, Vice-Chairman.	17	June 17, 1985
<b>Ontario Library Association:</b> Bernard Katz, Chairman, Copyright Action Committee; Larry Moore, Executive Director.	9	June 11, 1985
<b>Pacific Instructional Media Association:</b> Gary Karlsen, President; Mike Reddington, Director; Ron Harper, Director.	11	June 12, 1985
<b>Patent and Trademark Institute of Canada and Canadian Bar Association:</b> Richard R. Hahn, Chairman; Ross Gray, Q.C., Member; Bernard Mayer, Q.C., Member; C. David Macdonald, Member; William L. Hayhurst, Member; John C. Singlehurst, Member. Colleen E.R. Spring, Member; Casey August, Member; Barry D. Torno, Member; Susan Brown, Member.	26	June 27, 1985
<b>Public Broadcasting Services (PBS):</b> Eric H. Smith, Counsel.	24	June 21, 1985
<b>Performing Rights Organization of Canada Ltd. (PRO CAN):</b> Jan V. Matejcek, President and General Manager; Claude Lafontaine, Director, Quebec Division; Craig Parks, Counsel.	18	June 18, 1985
<b>Periodical Writers Association of Canada (PWAC):</b> Michael Fay, Chairman; Peter von Stackelberg, Member; Marilyn Kay, Member.	7	June 10, 1985



WITNESSES	ISSUE	DATE
<b>Philips Information Systems Ltd.:</b> Michel Racicot, Vice-Chairman; Louis Dumontier, Director.	17	June 17, 1985
<b>Photo Marketing Association:</b> Donald Spring, Executive Director; George E. Fisk, Counsel.	15	June 14, 1985
<b>Professional Art Dealers Association of Canada Inc.:</b> Jean-Pierre Valentin, Past President; Edith Yeomans, Executive Director.	15	June 14, 1985
<b>Professional Photographers of Canada:</b> Peter J. Lown, Professor.	15	June 14, 1985
<b>“Regroupement des journalistes du Québec”:</b> Georges Pierre Corbeil, Journalist; Danielle Debbas, Journalist.	14	June 13, 1985
<b>RepcO Electronics Co. Ltd.:</b> Robert MacFarlane, Counsel.	16	June 17, 1985
<b>Retail Council of Canada:</b> Alasdair J. McKichan, President; James H. Farrell, Vice-President and General Manager.	13	June 13, 1985
<b>Samarajiwa Rohan:</b> Graduate Student, Simon Fraser University.	17	June 17, 1985
<b>Shulman, Irving:</b> Robert MacFarlane, Counsel.	16	June 17, 1985
<b>«Société canadienne française de protection du droit d'auteur (SCFPDA)»:</b> Pierre Tisseyre, President.	8	June 10, 1985
<b>«Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) Inc.»:</b> François Cousineau, President; Zénaïde Lussier, Director; Jacques Dupont, Treasurer.	21	June 19, 1985



## WITNESSES

ISSUE DATE

**«Société pour l'avancement des droits en audio-visuel (SADA)»:**

Jean-Guy Jacques, President.

12 June 12, 1985

**«Société professionnelle des auteurs et des compositeurs du Québec (SPACQ)»:**Jacqueline Lemay, Director;  
Lise Aubut, Author.

21 June 19, 1985

**«Union des Artistes»:**

Serge Demers, General Director.

21 June 19, 1985

**«Union des écrivains du Québec (UNEQ)»:**

Michel Gay, General Secretary.

12 June 12, 1985

**University of Guelph:**Janet Wardlaw, Acting Academic Vice-President;  
Bernard Katz, Head, Humanities & Social Science  
Division.

12 June 12, 1985

**University of Waterloo:**J.W. Graham, Dean of Computing and Communications;  
J. Peter Sprung, Associate Director.

16 June 17, 1985

**Vancouver ad hoc Committee on Computer Related Legal Problems:**Garry Little, Counsel;  
David Austin, Counsel.

16 June 17, 1985

**Vanier College:**

Beverly Chandler, Coordinator, Media Resources.

12 June 12, 1985

**Video One Canada Ltd.:**

Dalton McArthur, President.

22 June 20, 1985

**«VIS-ART Inc.»:**Pamela Medjuck, Counsel;  
Hélène Gauthier, Artist.

15 June 14, 1985



## APPENDIX D

### STAFF OF THE SUB-COMMITTEE

#### *Committees and Private Legislation Directorate*

Richard Dupuis, Clerk of the Sub-Committee  
Francine-Michelle Therrien, Senior Secretary  
Jean Beauchamp, Administrative Assistant  
Lucie Daniel, Secretary and Word Processing Unit  
Karen Kluz, Secretary and Word Processing Unit

#### *Office Services*

Carole Roussel, Supervisor

#### *Committee Reporting Services*

Jeannine Desjardins  
Lizette Hogan

#### *Messenger Services*

Jeannine Little  
Robert Beaudoin  
Claude Beaudry

#### *From the Interpretation Directorate of the Department of the Secretary of State*

Scott Macdonnell  
Hélène Lemieux  
Sandra Fairman  
Marc Gourdeau  
Gérard Gallienne  
Bénédicte Brueder

#### *From the Parliamentary Translation Directorate, Committee documents of the Secretary of State*

Christiane Delon  
Jacqueline Filotas  
Martin Rochon

#### *From the Canadian Government Printing Office*

Bruce Broadfoot  
Terry Denovan







## APPENDIX E

### ORDERS OF REFERENCE, THE FIRST REPORT OF THE STANDING COMMITTEE THE FIRST REPORT OF THE SUB-COMMITTEE TO THE HOUSE AND MINUTES OF PROCEEDINGS

#### ORDERS OF REFERENCE FROM THE HOUSE

Thursday, January 24, 1985

*ORDERED*,—That the Standing Committee on Communications and Culture be empowered to study all aspects of copyright revision;

That the document entitled: "*From Gutenberg to Telidon, A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*", tabled earlier this day, be referred to the Committee and that the Committee examine and report upon the proposals contained therein;

That the Committee be empowered to retain expert staff; and

That the Committee report its findings and recommendations no later than May 24, 1985.

*ATTEST*

MICHAEL B. KIRBY

for the Clerk of the House of Commons

Friday, May 10, 1985

*ORDERED*,—That the Sub-committee on the Revision of Copyright of the Standing Committee on Communications and Culture:

- i) be authorized to retain professional and support staff;
- ii) be authorized to adjourn or travel from place to place inside Canada;
- iii) be authorized to report directly to the House; and
- iv) that the deadline for presentation of the Final Report be extended from May 24, 1985 to September 30, 1985.

*ATTEST*

MICHAEL B. KIRBY

for the Clerk of the House of Commons



Wednesday, September 25, 1985

*ORDERED*,—That the deadline for presenting its report to the House, of the Sub-committee of the Standing Committee on Communications and Culture on the Revision of Copyright, be extended from Monday, September 30 to October 15, 1985.

*ATTEST*

MICHAEL B. KIRBY

for the Clerk of the House of Commons

## ORDER OF REFERENCE FROM THE STANDING COMMITTEE

Thursday, February 7, 1985

*ORDERED*,—i) That a Sub-committee composed of five (5) members including three (3) members of the Progressive Party, one (1) from the Liberal Party and (1) from the New Democratic Party, be constituted in order to consider the Order of Reference of Thursday, January 24, 1985 relating to the Revision of the Canadian Copyright Act, which is as follows:

That the Sub-committee be empowered to study all aspects of copyright revision;

That the document entitled: "*From Gutenberg to Telidon, A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*", tabled earlier this day, be referred to the Sub-committee and that the Sub-committee examine and report upon the proposals contained therein;

That the Sub-committee be empowered to retain expert staff; and

That the Sub-committee report its findings and recommendations no later than May 24, 1985.

ii) That the Sub-committee be empowered to send for persons and records, to sit while the House is sitting, to sit during periods when the House stands adjourned, to print from day to day such papers and evidence as may be ordered by it and to authorize the Chairman to hold meetings to receive and authorize the printing of evidence when a quorum is not present.

*ATTEST*

RICHARD DUPUIS

Clerk of the Committee



# FIRST REPORT OF THE SUB-COMMITTEE TO THE STANDING COMMITTEE

Tuesday, April 23, 1985

Adopted on Thursday, April 18, 1985 and presented to the Standing Committee on Tuesday, April 23, 1985 and adopted.

The Sub-committee on the Revision of Copyright has the honour to present its

## FIRST REPORT

In accordance with the Order of Reference of Tuesday, February 12, 1985, your Sub-committee has commenced consideration of the said Order of Reference relating to Revision of Copyright and has agreed to make the following recommendations:

- i) That the committee request the House to empower the Sub-committee to retain professional and support staff;
- ii) That the Committee request the House to empower the Sub-committee to adjourn or travel from place to place inside Canada;
- iii) That the Committee request the House to empower the Sub-committee to report directly to the House;
- iv) That the Committee request the House to extend the deadline for presentation of the Final Report from May 24, 1985 to September 30, 1985.

Respectfully submitted,

**GABRIEL FONTAINE**  
Chairman



# FIRST REPORT OF THE SUB-COMMITTEE TO THE HOUSE

Wednesday, September 25, 1985

The Sub-committee of the Standing Committee on Communications and Culture on the Revision of Copyright has the honour to present its

## FIRST REPORT

According to its Order of Reference of Friday, May 10, 1985, your Sub-committee met on Monday, September 9, 1985 and has agreed to make the following recommendation:

That the deadline for submitting its Report to the House be extended from Monday, September 30 to October 15, 1985.

A Copy of the relevant Minutes of Proceedings and Evidence of the Sub-committee on the Revision of Copyright (*Issue No. 27*) is tabled.

Respectfully submitted,

**GABRIEL FONTAINE**  
Chairman



## MINUTES OF PROCEEDINGS

THURSDAY, June 27, 1985  
(35)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 3:40 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 4:45 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

MONDAY, July 8, 1985  
(36)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 9:10 o'clock a.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 12:50 o'clock p.m., the Sub-committee adjourned until 2:20 o'clock p.m.



AFTERNOON SITTING

(37)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 14:23 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 6:00 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

TUESDAY, August 6, 1985  
(38)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 9:05 o'clock a.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Claude Rheault, Consultant; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 12:55 o'clock p.m., the Sub-committee adjourned until 2:30 o'clock p.m.



AFTERNOON SITTING  
(39)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 2:38 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Claude Rheault, Consultant; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 5:15 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

WEDNESDAY, August 7, 1985  
(40)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 9:08 o'clock a.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 1:03 o'clock p.m., the Sub-committee adjourned until 2:30 o'clock p.m.



AFTERNOON SITTING  
(41)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 2:37 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 4:40 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

MONDAY, September 9, 1985  
(42)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 9:10 o'clock a.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald, Bill Rompkey and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 12:00 o'clock p.m., the Sub-committee adjourned until 3:30 o'clock p.m.



The Sub-committee on the Revision of Copyright met this day, *in camera*, at 3:35 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Forget, Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 4:30 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

MONDAY, September 23, 1985

(44)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 9:40 o'clock a.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald, Bill Rompkey and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 11:50 o'clock p.m., the Sub-committee adjourned until 2:30 o'clock p.m.



AFTERNOON SITTING

(45)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 3:35 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Jim Edwards, Gabriel Fontaine, Lynn McDonald, Bill Rompkey and Geoff Scott.

*Other member present:* Bob Pennock.

*In attendance:* Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 5:20 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

TUESDAY, September 24, 1985

(46)

The Sub-committee on the Revision of Copyright met this day, *in camera*, at 3:45 o'clock p.m., Gabriel Fontaine, Chairman, presiding.

*Members of the Sub-committee present:* Gabriel Fontaine, Lynn McDonald, Bill Rompkey and Geoff Scott.

*In attendance:* Claude Brunet and Wanda Noel, Counsels to the Sub-committee; Monique Hébert, Terry Thomas and Margaret Young, Research Officers from the Library of Parliament.

The Sub-committee resumed consideration of its Order of Reference dated, Thursday, February 7, 1985, relating to the Revision of Copyright. (*See Minutes of Proceedings and Evidence dated Tuesday, February 12, 1985, Issue No. 1(1)*).

The Sub-committee resumed consideration of its Draft Report.

At 5:15 o'clock p.m., the Sub-committee adjourned to the call of the Chair.

RICHARD DUPUIS

Clerk of the Sub-Committee