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September 7, 2001

Government of Canada
c/o Intellectual Property Policy Directorate
Industry Canada
235 Queen Street
5th Floor West
Ottawa, Ontario
K1A 0H5

Re: A *Framework for Copyright Reform* and *Consultation Paper on Digital Copyright Issues*

Dear Sir/ Madame:

The CMEC Copyright Consortium has been actively examining the issues of copyright in a digital environment and its implications for education for a number of years. We welcome this opportunity to respond to the June 22, 2001, *A Framework for Copyright Reform* and *Consultation Paper on Digital Copyright Issues* issued by the Intellectual Property Policy Directorate, Industry Canada and the Copyright Policy Branch, Department of Canadian Heritage. The public was invited to submit its comments by September 15, 2001. The comments of the Council of Ministers of Education, Canada (CMEC) Copyright Consortium are enclosed.

The CMEC Copyright Consortium comprises the ministers of education in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, and Nunavut. At the time of writing, Ontario was in the process of reviewing the enclosed comments and had not yet communicated its approval.

Yours truly,

Elvy Robichaud
Minister of Education, New Brunswick
Chair, CMEC Copyright Consortium

Enc.

c.c. Members of the CMEC Copyright Consortium

COMMENTS ON:

A Framework for Copyright Reform
and the *Consultation Paper on Digital Copyright Issues*

From the
COPYRIGHT CONSORTIUM OF THE
COUNCIL OF MINISTERS OF EDUCATION, CANADA (CMEC)
on behalf of the Ministers of Education in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, and Nunavut.

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September 2001

Comments on *A Framework for Copyright Reform*

Need for Balance

Virtually all those involved in copyright reform in Canada agree that the process must be "balanced." Opinion, however, is divided on what balance means in the process of reforming the copyright law. The CMEC Copyright Consortium believes that balance must exist at each and every stage of the process. A balance achieved over time and a series of revision bills do not together constitute a balanced approach to copyright reform. For example, reform dealing with digital issues must address all digital issues. Balance cannot be achieved by dealing with some digital issues in one bill and others in another bill at another time. The issues are inter-connected and inter-related. To achieve balance, issues related to a single topic must be dealt with together. For example, all digital issues must be dealt with in a single reform package. How can balance be achieved if Parliament is legislating on issues that are profoundly and directly affected by other issues which are not even mentioned in the legislation being considered? For the purposes of digital reform, balanced legislation will not be achieved unless Parliament considers all of the issues related to digital copyright in one legislative package. This means addressing the interests of both copyright owners and users in one legislative package. Addressing digital rights issues without addressing digital exceptions in the same bill cannot result in balanced legislation and is therefore not an acceptable approach to copyright reform.

The government has proposed dealing with five "important Internet issues" as the "first steps" in reform: the right of making available; technological protection measures; rights management information; Internet service provider liability; and the application of the compulsory retransmission licence to the Internet. It is agreed that these are "important Internet issues." However, failure to address other equally "important Internet issues" at the same time would result in imbalanced legislation. Parliament cannot create a balanced law when it does not have the issues to be balanced before it.

The "first steps" do not address two equally important Internet issues: the educational use of the Internet exception and the interface of copyright and contract law. The failure to address these important Internet issues in a bill dealing with digital copyright issues will result in unbalanced legislation. As currently proposed, the bill would address the rights aspects of digital copyright reform and leave the interests of users of the Internet to a separate and future bill. As copyright legislation is a Parliamentary decision on the appropriate balance between copyright owners and users, it is essential that parliamentarians consider all aspects of an issue during its deliberations. This cannot be accomplished with two bills several months or years apart.

What History Teaches Us

The history of copyright law revision in Canada teaches us that separating related subjects in copyright law revision into different legislative packages has undesirable consequences.
In 1988, when Phase I of copyright law revision was being considered, libraries, archives, museums, and educational institutions argued that it was unwise to enact amendments to the *Copyright Act* that addressed the creation of new rights and their administration without also dealing with limitations and exceptions to those rights. Educational institutions were assured that legislation dealing with exceptions to balance the Phase I legislation would be forthcoming within a few months. Legislation dealing with exceptions was tabled eight years later. In the

ensuing eight years, the balance between rights owners and users was profoundly and irrevocably changed as a result of the changes made in the law in 1988.

If the issues addressed in the *Consultation Paper on Digital Copyright Issues* are indeed the issues to be dealt with in the next copyright reform bill, history will repeat itself. The "exceptions" side of the equation will once again be left for a later time and the reform package will not be balanced.

Another historical lesson is available from the *Digital Millennium Copyright Act* in the United States. When this legislation was first introduced, it contained only amendments that were necessary to bring the United States copyright law into conformity with the obligation of the two WIPO treaties, a "minimalist" approach. This approach did not survive passage through either the House of Representatives or the Senate. In both Houses, major amendments were made to provide a "balance." The amendments included sections on distance education, digital preservation for libraries and archives, provisions to increase the protection of privacy on the Internet, to foster encryption research, to affirm the principle of "fair use" in the digital environment, and to limit the liability of Internet service providers for copyright violations occurring over their networks. The amendments were made because of opposition from educational institutions, libraries, archives, and researchers (among others) to the proposed minimalist approach. A repeat of the acrimonious and divisive experience in the United States can be avoided in Canada by introducing a balanced bill.

"Important Internet Issues" Not Addressed

History could repeat itself if the process outlined by the federal government in *A Framework for Copyright Reform in Canada* were implemented. The CMEC Copyright Consortium agrees that the issues identified as important in the consultation paper are important. However, other equally important issues must be addressed if balance is to be achieved. Taking advantage of the means at hand to avoid the time-consuming and acrimonious process of amending legislation once it is tabled — and to avoid a repetition of the situation that developed in the United States — would support dealing with all the "important Internet issues" in the first copyright reform bill. This means addressing the "important Internet issues" already in the two consultation papers and adding two additional issues to provide balance: the educational use of the Internet exception and the interface between copyright and contract law.

Educational Use of the Internet

The use of the Internet by educators is as "important" an issue as rights management, technological protection, or the creation of a making available right. Canada is committed to positioning itself as a world leader in the knowledge economy. To achieve this objective it is essential that students and teachers be able to harness the full potential of digital technology to learn and to teach. This cannot be done under the current law without technically and chronically infringing upon the rights of copyright owners. The copyright law must be reformed to deal not only with the rights of those whose material is communicated over the Internet, but also to deal with access by students and teachers who use the Internet to teach and to learn. To table a bill dealing with one but not the other is to table unbalanced legislation — a course of action that the CMEC Copyright Consortium strongly opposes.

The CMEC Copyright Consortium believes that the *Copyright Act* needs to be amended to permit an educational institution or a person acting under its authority, including a student, to do the following acts in relation to all or part of a work or other subject-matter that has been made publicly available on a communication network, provided the act takes place where a student is participating in a program of learning under the authority of an educational institution, is done for educational or training purposes, and is not for profit, and provided that the source is mentioned, and, if given in the source, the name of the author, performer, maker or broadcaster:

1. use a computer for reproduction, including making multiple reproductions for use in the course for instruction
2. perform in public before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution, or any person who is directly responsible for setting curriculum for the educational institution, and
3. communicate to the public by telecommunication to or from a place where a person is participating in a program of learning under the authority of an educational institution

The term "publicly available" should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption, or similar techniques intended to limit access or distribution.

The exception should not apply if the educational institution or a person acting under its authority knows that the work or other subject-matter has been made available to the public on a communication network without the consent of the copyright owner.

The purpose of the exception for educational use of the Internet is to permit students and teachers to make effective use of the Internet as part of a program of learning. This includes copying certain material from the Internet, performing music or a play on line for students, incorporating text or images in assignments, and exchanging materials with teachers or other students electronically.

The recommended exception is not open-ended. To be entitled to use the exception, a student or teacher would need to be participating in a program of learning under the authority of an educational institution. The scope of the exception is also limited by the condition that the material must have been made "publicly available" on a communications network, by or with the authority of the copyright owner, without restrictions on access to it.

These conditions of entitlement to the exception are very important. The challenge is to devise an exception that permits students and teachers to use digital technologies to their fullest potential as an educational tool, while at the same time ensuring that the rights of the copyright owner to exploit his or her works in the marketplace are not impeded. It would be inappropriate for the exception to cover uses for which educational institutions currently pay. Examples include subscription databases, licensed software, purchased CD-ROMs, on-line courses and curriculum resources that include copyright materials.

However, use of material made freely available on the Internet should be covered by an exception for educational use. Students and teachers routinely copy material from the Internet for class work and assignments. In fact, teachers encourage this practice and the material, once copied, is communicated by e-mail, on a regular basis, between students and teachers.

The argument for a new exception covering educational use of the Internet is based on the following considerations:

- a negative financial impact on copyright owners resulting from this exception is unlikely since it would only apply to material that is put on the Internet without any expectation of payment
- even if the assumption regarding expectation of payment is incorrect, there is little likelihood that collectives will make available blanket licences for items accessible on the Internet
- in the absence of blanket licences, obtaining copyright clearance for real-time classroom use of the Internet by students and teachers is not practical or possible within any acceptable time limits; if a student wants to include an image or text from the Internet in a class assignment, there is no time to obtain permission, even if the copyright owner can be identified and contacted, since copyright owners of digital works can come from all over the world
- the recommended exception would not be available if the copyright owner has taken steps to prevent access to the material by using passwords, encryption, or other technological protection measures; it would only apply to material placed on the Internet with unrestricted access
- the federal government invests millions of dollars in projects designed to develop Internet skills among Canadian students, while current policy, as reflected in the copyright law, makes much of what students do under these federally funded projects illegal

Since this exception applies only to material made publicly available without expectation of payment for use, the exception does not violate the provisions of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. When an author makes a work publicly available on line, without seeking compensation or restricting access, there is no economic exploitation envisaged. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

An issue arising in connection with the definition of "publicly available" is how to address the situation where a work has been communicated without the consent of the copyright owner. A teacher or student using the exception will not know whether a work has been communicated with or without "the consent of the copyright owner." Yet a requirement that the work be communicated with the copyright owner's consent is a reasonable safeguard in the exception from the copyright owner's point of view. It is recommended that the teacher or student be required to know that the work or other subject-matter was communicated without the copyright owner's consent before she or he loses the benefit of the exception for educational use of the

Internet. Liability for unauthorized use on a website should be placed on the creator of the website. This issue is more fully discussed in the section of these comments under the heading "Hosting" which can be found in the discussion related to Proposal 4.4, Liability of Network Intermediaries, such as Internet Service Providers, in relation to Copyright.

Standard Form Contracts

The interface between copyright law and contract law is also as "important" as the issues addressed in the *Consultation Paper on Digital Copyright Issues.* The *Copyright Act* is a carefully crafted balance established by Parliament. The balance permits creators to enjoy the benefits of their work and permits users to access those works. The use of standard form contracts has the ability to upset this carefully crafted balance. Current use of click-wrap and Web-wrap agreements are voiding exceptions and imposing restrictions on uses permitted under the copyright law.

When a person or institution buys a digital product, the purchaser is usually obliged to enter into a contract with the digital product vendor. This type of contract, called a "standard form agreement," is drafted entirely by the vendor without consultation or negotiation with the purchaser. Examples are a "shrink-wrap licence" in retail transactions and a "click-wrap licence" or "Web-wrap licence" in on-line transactions. By breaking open the cellophane packaging or clicking the mouse after loading the program, the purchaser may be required to agree to a contract prohibiting copying or lending. The increasing use of standard form agreements to govern the use of digital products is creating a growing number of conflicts between the
prohibitions embedded in contracts and uses permitted by copyright law.

The lending of CD-ROMs by Canadian libraries is illustrative of this problem. The Canadian *Copyright Act* provides copyright owners with a bundle of exclusive legal rights allowing them to control specified uses of their works. One of these rights is the right to "rent" a computer program. Since many CD-ROMs contain computer programs, for the purposes of the *Act*, many CD-ROMs are protected as computer programs. However, the rental right was drafted so that the copyright owner's right to rent was balanced by a library's right to lend. The rental right in the *Copyright Act* does not apply if the activity does not involve a financial "gain," which makes it inapplicable to library lending activities. The public policy balance was established so that lending would be free of the copyright owner's control. Vendors are using standard form contracts to establish a lending right when the legislature has denied them this right in the copyright law.

This raises the question of what can be done to ensure that the normal activities of educational institutions, libraries, archives, and museums, which are permitted by the *Copyright Act*, will not be undermined by the imposition of contractual obligations over which an institution has no effective control. A legislated solution is recommended, using the United Kingdom's *Copyright Act* for guidance.

The United Kingdom's *Copyright Act* addresses a similar, but not identical, issue to the one flagged above. Section 36(4) of the U.K. *Copyright Act* provides:

> 36(4) The terms of a licence granted to an educational establishment authorizing the reprographic copying for the purpose of instruction of passages from published literary,

dramatic or musical works are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

This section has the legal effect of rendering licence terms ineffective insofar as they purport to override statutory provisions in the copyright law, thus preserving the balance in the U.K. copyright law. Section 36(4) is therefore proposed as a model for legislation providing that standard form contracts are of no effect as far as they purport to restrict activities permitted under the copyright law.

Issues to Add to Annex of the Framework Document

A Framework for Copyright Reform lists in Section 5 and describes in the Annex, a number of issues that must be considered. The CMEC Copyright Consortium proposes to add to the list of issues: the meaning of "publication" and an amendment to Section 30.1 (management and maintenance of collections).

Publication

The term "publication" has significant import in the *Copyright Act*. For example, whether or not a work or other subject-matter is protected by copyright in Canada is, in certain cases, dependent on where the work was first published, the term of protection is, in certain cases, dependent on the date of first publication, and certain exceptions apply only to published works.

With the advent of the Internet and the World Wide Web, "electronic publishing" has emerged as an alternative to conventional means of making copies of a work available to the public. For all intents and purposes, works made available to the public via the Internet, the World Wide Web, or similar means of communication are "published" works.

The status of such works under the *Copyright Act*, however, is problematic because the term "publication" is defined so as to specifically exclude "communication to the public by telecommunication" as a mode of "publication." As a consequence, works "published" via the Internet technically remain "unpublished" works, unless they are also "published" through conventional means of printing and distributing copies.

Amendments are required to make it clear that communicating a work on the Internet is effectively the same as publishing the work and that, for the purposes of the *Act*, such works have the same status as "published" works.

The notion of electronic publishing is also relevant to fair dealing. If, as it is sometimes argued, fair dealing applies only to published works, it is important to establish whether "electronic publications" are, for the purposes of fair dealing, "published" works. If they are not, and as a result are deemed to fall outside the scope of fair dealing, fair dealing will in practice become an increasingly meaningless concept as more and more works are made available exclusively in an electronic format.

Management and Maintenance of Collections — Section 30.1 Amendment
Section 30.1 (management and maintenance of collections) of the *Copyright Act* needs to be amended to permit the making of a copy in an alternative format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.

The exception that permits a library, archives or museum to make a copy of a work under certain circumstances, for the purpose of maintaining or managing its permanent collection, includes a provision relating to technological obsolescence.

The provision, however, is problematic, in that, as it is written, it would appear to apply only ***after*** the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain works in their collections that are in digital formats, libraries, archives and museums will have to migrate those works to new formats and to new technological environments while the technology that enables them to "access" and "read" the original digital format is still available. Once the technology becomes unavailable, migrating the work may in fact be impossible.

Comments on the *Consultation Paper on Digital Copyright Issues*

4.1 Making Available

No comment at this time.

4.2 Legal Protection of Technological Protection Measures

There are several legislative options available to the Government of Canada with respect to providing copyright owners with legal protection against circumvention of technological protection measures. These include:

- providing that circumvention for specified purposes is permitted
- providing that any circumvention is prohibited
- providing that circumvention for non-infringing purposes is permitted

Of these three options, the CMEC Copyright Consortium believes that the first**,** circumvention of technological protection measures for specified purposes, is the best option. This option provides the best balance because it enables a purpose-by-purpose analysis. It also provides greater flexibility. The second option, a prohibition against any circumvention whatsoever**,** is too draconian a solution and would result in possible invasions of privacy, would restrict research and development in new technology, and would upset the public policy balance between copyright owners and users. However, the third option, permitting circumvention for any non-infringing purpose**,** is too broad (non-infringing refers to activities permitted by exceptions in the *Act).*

Permitting circumvention for specified purposes permits analysis of when circumvention will be permitted on a purpose-by-purpose basis. From the perspective of educators, the specified purposes should include circumvention for:

- the protection of the privacy of the user of the technology and of the material available via that technology
- the purpose of reproducing a computer program to make interoperable products, to correct errors, and for security testing
- activities covered by the exceptions for educational institutions in sections 29.4 (reproduction for instruction), 29.5 (performances), 29.6 (news commentary), 29.7 (reproduction of broadcasts), and 30 (literary collections)
- activities covered by the exceptions for libraries in sections 30.1 (management and maintenance of collections) and 30.21 (copying works depositied in archive)
- fair dealing in sections 29 (research and private study), 29.1 (criticism or review), and 29.2 (news reporting)
- reproduction in an alternate format for persons with a perceptual disability in section 32 (reproduction in alternate format)

This approach has been adopted in two other countries. In Japan, as noted in the consultation paper, there are exclusions from the prohibitions against alteration and removal (for instance, where certain recording or transmission technologies are involved), and where these acts are necessary to lawfully use the copyrighted material. In Australia, the enforcement provisions regarding technological protection measures allow for the operation of some existing exceptions to the exclusive rights of copyright owners. These limited exceptions are referred to as "permitted purposes." The permitted purposes in the Australian law are the reproduction of computer programs to make interoperable products, to correct errors, and for security testing, activities covered by libraries and archives exceptions, the use of copyright material for the Crown, and activities covered by the statutory licences for educational institutions and institutions assisting persons with a disability.

Responses to questions in section 4.2

Question 1: Given the rapid evolution of technology and the limited information currently available regarding the impact of technological measures on control over and access to copyright protected material, what factors suggest legislative intervention at this time?
Answer: Legislative intervention is necessary to maintain the carefully crafted public policy balance between owners and users in the *Copyright Act*. While copyright owners have a legitimate need to employ technology to protect their interests, the unrestricted use of technological protection measures has the potential to prevent access to copyright materials even when the copyright law says access is permitted. To preserve the balance that Parliament has defined in the *Copyright Act*, it is necessary to set out rules on how technology may be employed.

Question 2: Technological devices can be used both for copyrighted and non-copyrighted material. Given this, what factors should be considered determinative in deciding whether circumvention and/or related activities (such as the manufacture or distribution of circumvention devices) ought to be dealt with in the context of the *Copyright Act*, as opposed to other legislation?
Answer: If devices are illegal, it will be impossible to access copyright material for purposes permitted under the *Copyright Act*. Therefore outlawing circumvention devices is not an available option if some circumvention is to be permitted. It is submitted, in response to question 4 below, that circumvention should be permitted for specified purposes. Outlawing devices is incompatible with this option.

Question 3: If the government were to adopt provisions relating to technological measures, in which respects should such provisions be subject to exceptions of other limitations?
Answer: In addition to being able to circumvent technological protection measures for purposes permitted under the *Copyright Act*, circumvention for the protection of privacy, ensuring interoperability, and the other issues discussed in response to question 4 should be permitted.

Question 4: Are there non-copyright issues, e.g., privacy, that need to be taken into account when addressing technological measures?
Answer: Yes. The following non-copyright issues need to be taken into account when addressing technological measures.

Privacy
Most personal computers have "cookie" files stored on their drives, often without the computer user even knowing. Under Canadian law, anyone may take measures to protect their privacy. Users can install software that automatically blocks the placing of a "cookie" file on a hard drive or that notifies the user that a "cookie" file is present so that it can be deleted. It would be possible to wrap "cookie" files in some form of technological measure. If all acts that circumvent technological measures are made illegal, the public would then have lost the right to use self-help methods to protect its privacy. Copyright reform must ensure that unintended restrictions on computer users' privacy rights are not put in place.

Making Legal Activities Illegal
Circumvention for lawful uses of copyright material must remain legal. In other words, some "circumvention" of technological measures should not be illegal. Digital technology can easily and inexpensively be used to apply technological measures to copyright works. If this obligation prohibits "circumvention" of a technological protection measure for any purpose, it would be illegal for educational institutions to use copyright material in a variety of circumstances that are legal today. For example, making a single copy of a periodical article for research and private study could become unlawful.

Limiting Reverse Engineering
In the digital world, reverse engineering involves taking apart or "decompiling" software programs to identify the digital codes. Engineers, scientists, and others engage in reverse engineering of software to ensure that digital products are "interoperable." The lawfulness of

this practice has been generally accepted. Prohibiting circumvention of technological measures should not impede legal activities such as reverse engineering.

Hindering Encryption Research
Closely related to reverse engineering is testing lawfully acquired encryption programs for weaknesses or to create stronger encryption systems. Engineers should be able to circumvent an encryption device to test its effectiveness. This is necessary to encourage the development of encryption systems, that are in themselves essential to the growth of electronic commerce.

Monitoring Use of the Internet
Software programs are available to monitor on-line activities. A common application is to monitor on-line activities of students for inappropriate use. The software is used by parents, employers, libraries, educational institutions, and others to identify sites visited and to block access to some sites. It should not be illegal to use software to monitor undesirable Internet use in educational institutions. But it could be illegal if monitoring software circumvents a technological protection measure used to block access to the information. Copyright reform must ensure that the use of software programs to monitor on-line activities remains a legal activity.

4.3 Legal Protection of Rights Management Information

The CMEC Copyright Consortium agrees that rights owners should have effective remedies against removal or alteration of rights management information. The issue is not whether the protection should be provided, but in what form.

What constitutes rights management information is a difficult issue. Industry practices are evolving and there are some indications that one simple identification code may be all that is needed to serve the same purpose as a number of pieces of rights information. Such a development would render the WCT and WPPT definition of rights management information obsolete. There is the additional problem of some information included in the WCT and WPPT as "rights management information" changing during the lifetime of the copyright. For example, the copyright owner may change many times over the lifetime of a copyright. Because of the evolving nature of this issue, flexibility is needed. It is proposed that Option B as outlined in the *Consultation Paper* be adopted and that the definition of "rights management information" be left to regulations, so that the definition can change more easily to accommodate evolving industry practice.

Option B is also preferable because it proposes a definition of rights management information that excludes terms and conditions of use. A term and condition of use that is valid in one country may be invalid in another. Because of the international nature of electronic distribution of copyright material, terms and conditions of use should not be considered to be "rights management information."

A number of additional considerations related to this issue were mentioned above in connection with technological protection measures. These include privacy protection, making legal activities illegal, limiting reverse engineering, hindering encryption research, and monitoring use of the Internet.

Responses to questions in section 4.3

Question 1: What information should be protected under the *Copyright Act*? Given that information may cease to be accurate over time, should information relating to, for example, the owner of copyright and to terms and conditions of use be protected?
Answer: Option B as outlined in the *Consultation Paper* should be adopted. The definition of "rights management information" should be left to regulations, so that the definition can change more easily to accommodate evolving industry practice. Option B is preferred because it proposes a definition of rights management information that excludes terms and conditions of use. A term and condition of use that is valid in one country may be invalid in another. Because of the international nature of electronic distribution of copyright material, terms and conditions of use should not be considered to be "rights management information."

Question 2: Certain terms and conditions may not be legally valid in Canada if they are contrary to public policy. In light of this, what limitations should there be on the protection of such information? Is a provision required that specifies that the protection of such information does not imply its legal validity in Canada?
Answer: Yes. It will be important for both users and copyright holders to understand clearly that there is no implication of legal validity. The danger in not doing so is that there will be confusion on the part of users as to what has legal validity and what does not, the end result of which could be a continuation of the current environment in which it is unclear which activities are legal and which are not in a digital environment.
For example, many teachers and students currently use copyright information found on the Internet to assist them in adhering to copyright law. The problem is that sometimes the information they are using is from other countries, such as the United States. US law differs from Canadian law, and teachers and students are misled as to what the applicable law actually is. The result is confusion as to which acts are infringing and which are not.

Question 3: Given the fact that some technologies serve a dual purpose, i.e., reflect rights management information and protect a work against infringement, how should provisions concerning rights management information take into account provisions regarding technological measures?
Answer: Many of the same issues arise with respect to technological protection measures and rights management information. Amendments with respect to one matter must be consistent with amendments regarding the other. This will involve policy development as well as a technical assessment of the legal drafting. It is not possible to effectively assess the inter-relationship until a draft text of the amendments is available for review.
Question 4: If the *Act* were amended to protect rights management information, does the fact that some technologies may be used both to set out rights management information and to protect a work against infringement mean that duplicate or overlapping sanctions could result in some cases?
Answer: This is possible. It depends on how the relevant sections are drafted.
Question 5 Are there non-copyright issues, e.g. privacy, that need to be taken into account when addressing rights management information?
Answer: Yes. These include privacy protection, making legal activities illegal, limiting reverse engineering, hindering encryption research, and monitoring use of the Internet.

4.4 Liability of Network Intermediaries, such as Internet Service Providers, in Relation to Copyright

The CMEC Copyright Consortium has a number of recommendations on the liability of network intermediaries.

Institutional Exception from Liability
The CMEC Copyright Consortium believes that section 30.3 (machines installed in educational institutions, libraries, archives and museums) of the *Copyright Act* should be amended to exempt an educational institution, library, archive, or museum from liability for infringement of copyright where:

1. a copy of a work or other subject-matter is made using a computer or similar device.
2. the computer or similar device is installed by or with the approval of the educational institution, library, archive, or museum, on its premises, for use by students, instructors, or staff at the educational institution, or by persons using the library, archive, or museum.
3. the educational institution, library, archive, or museum makes reasonable efforts to inform students, instructors, staff, and patrons about copyright law and warns them against copyright infringement.

Section 30.3 (machines installed in educational institutions, libraries, archives and museums) of the *Copyright Act* provides educational institutions, libraries, archives, and museums with an exemption from liability, under certain conditions, for any infringements committed by persons using self-serve photocopiers in their institutions. Because this exemption applies only to reprographic reproduction, and because some of the conditions attached to the exemption could not apply to reproduction of on-line works and other subject-matter — such as the requirement for licensing, since no collective represents all the rights holders in the digital world — a new technology-neutral exemption is required to cover the use of computers and similar devices furnished by institutions for students, staff, teachers, and patrons.

Hosting
The CMEC Copyright Consortium believes that the *Copyright Act* should be amended to permit a service provider to store a work or other subject-matter whose content is provided by, and stored at the request of, a recipient of the service as long as:
1. the service provider does not have knowledge that the activity is infringing.
2. the service provider is not aware of facts or circumstances from which infringing activity is apparent.
3. the service provider, upon obtaining knowledge or awareness that the activity is alleged to be infringing, investigates the activity, and if it determines that the activity may be an infringement, acts expeditiously to remove or disable access to the information.

A service provider should be under no obligation to monitor content provided by, and stored at the request of, a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity.

Defining "service provider"
The term "service provider" should be defined in the *Copyright Act*. Many educational institutions, libraries, archives, and museums now provide Internet services to their respective teachers, students, and patrons. A clear definition of the term "service provider" is required in the *Copyright Act* to ensure that these institutions qualify for the purposes of any exemption aimed at insulating service providers from the activities of the users of their Internet services.

A recommended model for a definition of "service provider" is the United States' *Digital Millennium Copyright Act*, which defines the term as follows:

> "service provider" means
> (a) an entity offering the transmission, routing, or providing of connections for digital on-line communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material sent or received.
> (b) a provider of on-line services or network access, or the operator of facilities therefore, and includes an entity described in (a).

One of the key functions of service providers is to host content, such as the Web pages of subscribers, over which the service provider exercises no control. It is impossible, in practice, to monitor or screen the activities of users of network services. On that basis, service providers need legal protection similar to that already given under the law to "common carriers" such as telephone companies for infringements committed by their patrons. This view is consistent with the Agreed Statements Concerning the WIPO Copyright Treaty, which states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication, as well as with the December 1999 decision of the Copyright Board of Canada on Tariff 22, in which the Board concluded that a service provider should be able to benefit from the common carrier exemption as long as it merely provides facilities and its activities fall short of communicating or authorizing the communication of a work or other subject-matter.

In addition, in light of the impossibility in practice of monitoring or screening the activities of users of network services, educational institutions, libraries, archives, and museums acting as service providers should have no obligation to monitor what they transmit or to seek facts or circumstances indicating illegal activity. The CMEC Copyright Consortium's recommendation in this regard is based on Article 15(1) of the European Union's Directive on Electronic Commerce. The European Union's approach is preferred over that of the United States. However, there should not be a provision relating to temporary surveillance activities, as is proposed in Article 15(2) of the European Union's Directive on Electronic Commerce.

Temporary Copying
The CMEC Copyright Consortium believes that there should be no liability for the making of temporary copies in the course of the technical process of communicating a work or other subject-matter on a communications network, including the Internet. Under the *Copyright Act*, a copyright owner in a work or other subject-matter is provided with the exclusive right to reproduce that work or subject-matter or a substantial part thereof. Temporary reproductions are often made in the course of the technical process of communicating a work or other subject-

matter on a communications network, including the Internet. These temporary reproductions might be considered an infringement of copyright.

Exceptions permitting the making of a temporary copy for the following three purposes are recommended:

1. transmitting
2. browsing
3. caching

1. *Temporary Copy Exception: To Transmit, Route, and Provide Connections or Access*

The CMEC Copyright Consortium recommends that the *Copyright Act* be amended to permit a service provider to make a transient copy of material provided by the recipient of the service in order to transmit, route, or provide network connections, or to provide access to a communications network, without infringing copyright, on condition that the service provider does not:

(a) initiate the service.
(b) select the receiver of the transmission.
(c) select or modify the information contained in the transmission.

This exception would permit the automatic, intermediate, and transient storage of the information transmitted. The information could not be stored for a time longer than is reasonably necessary in order to effect the transmission.

The proposed exception is similar in nature to Article 12, the "mere conduit" exception, in the European Union's Directive on Electronic Commerce. The purpose of the mere conduit exception is to permit the making of transient copies as part of the technical process of operating an on-line communications system, without infringing copyright.

2. *Temporary Copy Exception: Browsing*

The CMEC Copyright Consortium recommends that the *Copyright Act* be amended to permit the making of temporary copies in the course of browsing a work or other subject-matter in a digital format.

The term "browsing" should be defined to mean the making of a temporary copy of a work on a video screen, television monitor, or similar device, or the performance of the audio portion of a work on a speaker or similar device by a user. The definition should exclude the making of a permanent reproduction of the work in any material form.

The proposed exception would permit browsing or simple viewing or playing of a protected work or other subject-matter, or any portion thereof, that is made publicly available without the requirement to obtain the explicit authorization of the copyright owner to reproduce the work.

Making temporary reproductions in the course of browsing a work in a digital format is necessary in order to view it on a computer screen or to listen to the audio portion of the work. The recommended browsing exception would exclude from the scope of the existing reproduction right temporary copies made in the course of browsing. In technical terms, the

exception would permit the operation of the technical processes that are integral to digital access and playback.

In its report to the Information Highway Advisory Council (IHAC), the Copyright Subcommittee of IHAC concluded that the act of browsing a work in a digital environment should be considered an act of reproduction and as such, should require authorization by the copyright owner. In its final report, IHAC supported the notion that copyright owners should be able to determine whether and when browsing should be permitted, and recommended that the *Copyright Act* be amended to provide clarification of what constitutes "browsing" and what works are "publicly available."

The proposed amendment is based on the assumption that, in making a work or portion of a work or other subject-matter publicly available, the copyright owner is giving implicit authorization for browsing. The proposed exception for temporary copying for purposes of browsing simply clarifies the right of the user to browse what the copyright owner has made publicly available, without obtaining explicit authorization to reproduce it.

3. Temporary Copy Exception: Automatic Caching

The CMEC Copyright Consortium believes that the *Copyright Act* should be amended to permit a service provider to make a temporary copy of a work or other subject-matter through an automatic and technical process for the purpose of making more efficient its onward transmission to a recipient of a service, at the request of the recipient. The service provider:

(a) must not modify the material
(b) must comply with the conditions on access as specified in the material
(c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself
(d) must not interfere with the technology commonly used to obtain data on the use of the material, and
(e) must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:
    (i) The material has been removed from the communications network at the initial source of the transmission.
    (ii) Access to the material or to the communications network has been denied.
    (iii) A competent authority has ordered removal or barring of the material.

A cache is a mechanism for temporarily storing a copy of on-line materials so that, for example, when a person wishes to return to a Web page that has been viewed recently, the person's Internet browser can retrieve a copy of the document from the cache of the person's computer or similar device rather than from the server where the document originated. Common types of caches on a computer are "cache memory," a type of random access memory that can be read more quickly than normal RAM, and a "disk cache," which is usually a part of the hard disk of a computer. In addition, the design of networks can create temporary cached copies of works or other subject-matter on their networks, using an automatic and technical process, for the purpose of making such materials available in an efficient manner to the users of their networks. All of these types of caches are of a limited size, so that they are emptied out automatically as new

copies enter the cache and replace older cached copies. In addition, caches are usually programmed to delete temporary copies after a fixed period of time (e.g., once a week).

The purposes of the proposed exceptions are:
1. to ensure that temporary copies that are made and stored in the cache of person's computer or similar device do not infringe copyright.
2. to ensure that a service provider can make temporary cached copies on a network, through an automatic and technical process, for use by network patrons without infringing copyright.

4. Temporary Copy Exception: Intentional Caching

The CMEC Copyright Consortium believes that the *Copyright Act* should be amended to permit a service provider to intentionally store a temporary copy of a publicly available work or other subject-matter for the purpose of making more efficient its onward transmission to a recipient of a service, at the request of the recipient. The service provider:

(a) must not modify the material.
(b) must comply with the conditions on access as specified in the material.
(c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself.
(d) must not interfere with the technology commonly used to obtain data on the use of the material.
(e) must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:
    (i) the material has been removed from the communications network at the initial source of the transmission.
    (ii) access to the material or to the communications network has been denied.
    (iii) a competent authority has ordered removal or barring of the material.

Intentional caching can be used by many types of service providers, but it is particularly important for service providers whose networks have limited bandwidth, thereby requiring careful management to avoid the creation of network "bottlenecks." For example, some educational institutions deliberately download and store copies of frequently used materials onto their local and wide area networks. When a student or teacher tries to access these materials, the system diverts them to the cached copy rather than to the Internet. The purposes of intentional caching by educational institutions include reducing telecommunications costs, increasing access speeds for students and teachers to the stored materials, and providing schools with some control over what students may access using school computers.

The purpose of the intentional caching exception is to permit a service provider to choose when to make a temporary copy of a work on a communications network in order to store it for use by network users, without infringing copyright. Intentional caching makes use of the Internet, as well as local and wide area networks, more efficient and less expensive.

The use of caching, whether intentional or automatic, confers no benefit to either service providers or to end-users deriving from the content of the cached works themselves. The only benefits derive from technical efficiencies and, with regard to intentional caching, the ability to control access to certain content.

Since the proposed intentional caching exception applies only to material that has been made publicly available without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

Both the European Union and the United States have caching exceptions in their laws. In both jurisdictions, a number of obligations must be met by service providers before the caching exception is available. It is recommended that Canadian service providers be subject to similar obligations.

Responses to questions in section 4.4

Question 1: Do the current provisions of the *Copyright Act* already adequately address ISP concerns?
Answer: No, the current provisions should be amended to provide an institutional exception from liability similar to the current exception for self-service reprography machines, to permit service providers to host, and to permit the making of temporary copies for the purposes of transmitting, browsing and caching.

Question 2: Some ISPs and rights holders have entered into agreements for dealing with infringing material. In what respects is this approach sufficient or insufficient?
Answer: Individual arrangements are insufficient. What is required is legal certainty that can only be provided by a legislated solution. Amendments to the *Act* (as noted in the above recommendations in connection with section 4.4 of the *Consultation Paper on Digital Copyright Issues*) above would clearly define ISP liability.

Question 3: What other intermediary functions that have not been discussed in this section, but that are nonetheless being carried out by ISPs, ought to be considered when developing a policy regarding ISP liability?
Answer: No comment at this time.

Question 4: To the extent that a notice and take-down system is being contemplated, how would such a system affect the framework in Canada for the collective management of copyright? What alternative proposals should be considered? Under what conditions would a compulsory licensing system be appropriate?
Answer: Regarding the notice and take-down system, the recommendations dealing with temporary copying exceptions provide that a service provider must comply with the following five requirements:

(a) must not modify the material
(b) must comply with the conditions on access as specified in the material
(c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself

(d) must not interfere with the technology commonly used to obtain data on the use of the material, and
(e) must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:
    (i) The material has been removed from the communications network at the initial source of the transmission.
    (ii) Access to the material or to the communications network has been denied.
    (iii) A competent authority has ordered removal or barring of the material.

Regarding the conditions under which a compulsory licence system would be appropriate, a compulsory licensing system would be unfair and unworkable for copyright owners because it would remove the ability to control exploitation. A compulsory licence system could pose a hardship for many ISPs, including those in the education sector that act as an ISP solely for the benefit of their sector and the functioning of their network. An assessment of whether or not a hardship would result would require a detailed proposal for review and consideration. As a practical matter, a licensing system in regard to ISPs could also have a detrimental effect on Canada's ability to compete fairly in the global marketplace.

Question 5: To the extent that issues surrounding the scope and application of the reproduction right are being examined in relation to Internet-based communications, are there reasons why this examination should be restricted to the question of ISP liability?
Answer: No comment at this time.