



CFTPA

*Representing television, film
and interactive production in Canada*

ACPFT

*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

September 13, 2009

The Honourable James Moore
Minister of Canadian Heritage and Official Languages

The Honourable Tony Clement
Minister of Industry

Ottawa, Ontario, Canada

Dear Ministers Moore and Clement:

Re: Copyright Consultations by Heritage Canada and Industry Canada

Please find attached the Canadian Film and Television Production Association's written submission in respect of the above-named consultation.

Yours very truly,

[Original Signed by Norm Bolen]

Norm Bolen
President and CEO



CFTPA

*Representing television, film
and interactive production in Canada*

ACPFT

*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

Written Submission of the
Canadian Film and Television
Production Association

With respect to:

**Copyright Consultations by
Heritage Canada and Industry Canada**

September 13, 2009

INTRODUCTION

1. The Canadian Film and Television Production Association (the “CFTPA” or the “Association”) welcomes the opportunity to provide this written submission in response to the copyright reform consultation process launched by Heritage Minister James Moore and Industry Minister Tony Clement on July 20, 2009.
2. The CFTPA represents the interests of almost 400 companies engaged in the production and distribution of English-language television programs, feature films, and interactive media productions in all regions of Canada. Our member companies are significant employers of Canadian creative talent, and assume the financial and creative risks of developing original content for Canadian and international audiences.
3. As entrepreneurs, independent film, television and interactive media producers operate small- and medium-size business located in communities across the country. The independent production sector is a key contributor to Canada’s creative economy, leading the production of more than \$2.3 billion in production activity, the creation of about 58,000 jobs, and the generation of \$231 million in exports every year.
4. Independent producers provide Canadians with a Canadian perspective on our country, our world and our place in it. Through the content we produce across a multiplicity of distribution platforms, we help foster Canadian cultural choices and reflect the rich diversity of this country.
5. As the creative and business force behind quality Canadian content, Canada’s independent producers further the government’s industrial, innovation and cultural policy objectives. We develop the projects, structure the financing, hire the creative talent and crews to help turn stories into programs, control the exploitation of the rights, and deliver the finished product. Independent producers create high-quality programming in the financially risky genres of drama, comedy, documentary, children’s and youth, and variety and performance programming.
6. Independent producers are also among Canada’s leading digital entrepreneurs, having consistently been at the forefront of exploiting the unique potential of the Internet to deliver Canadian programming to audiences on new platforms and in new ways.
7. In a number of cases, independent producers have collaborated with broadcasters to extend the reach of existing successful Canadian television series on the Internet. In other cases, independent producers have used the Internet as the primary distribution platform for their content, either through self-distribution or by entering into revenue sharing arrangements with Internet content aggregators and distributors, such as Joost (www.joost.com), Babelgum (www.babelgum.com), and Sling (www.sling.com).
8. Critically acclaimed multi-platform programs like the award-winning regenesistv.com from Xenophile Media and Shaftesbury Films, the cutting-edge new media components of *Degrassi: The Next Generation* from Epitome Pictures, and Stage 3 Media’s *Sanctuary*, the break-out online Sci Fi drama turned internationally distributed television series, are visible proof of the creative talent and skilled entrepreneurship of Canadian independent producers.

9. As one of the key drivers and innovators in Canadian content creation, Canada's independent production sector has a critical role to play in strengthening Canadian identity and sovereignty in the Internet age and in furthering the establishment of a vital and vibrant digital content marketplace. In order to fully fulfil that role, independent producers require a modernized *Copyright Act* that fosters an environment that enables them to make the significant – and risky – investments necessary for the creation of compelling Canadian content that is distributed across multiple digital distribution platforms for the enjoyment of both Canadians and audiences around the world.

The Urgent Need for Reform

10. When Bill C-61 was tabled in June, 2008, the CFTPA was one of the first organizations to congratulate the Government for moving forward with copyright reform. In our view, the simple tabling of the bill provided all stakeholders with an opportunity to assess a concrete legislative proposal and to generate some forward momentum for copyright reform.
11. While Bill C-61 died on the order paper with the dissolution of Parliament and the calling of the fall election, the CFTPA nevertheless agreed with the Government's stated four objectives in tabling the bill, namely:
 - The rights of those who hold copyright must be balanced with the needs of users to access copyright works;
 - The *Copyright Act* must provide clear, predictable and fair rules to allow Canadians to derive benefits from their creations;
 - The *Copyright Act* should foster innovation in an effort to attract investment and high-paying jobs to Canada; and
 - Canada must ensure that its copyright framework for the Internet is in line with international standards.¹
12. As an association representing a wide and diverse membership of copyright holders and users (with virtually all producers falling into both categories to varying degrees), the CFTPA recognizes that copyright reform involves an exceptionally delicate balancing act.
13. We understand that there are necessary trade-offs that can and must be made between enhancing protection and increasing accessibility; between incentivising the creation of new works while facilitating the dissemination of those works to the public; and between meeting our international obligations while crafting copyright legislation that is uniquely reflective of Canadian values, priorities and interests. Achieving such a balance makes for a rather daunting and unenviable undertaking for any government.
14. It is also, however, an urgent necessity. Leaving aside Canada's longstanding failure to adopt the minimum amendments necessary to bring the *Copyright Act* in conformity with the requirements of the *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty*, the simple fact remains that both creators and users are hampered by having to rely on an analog *Copyright Act* in a digital age. Indeed, if there is one clear area of consensus

¹ Government of Canada, *Copyright Reform Process – Reforming the Copyright Act – Background*, http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01151.html.

across the spectrum of copyright stakeholders, it is that the *status quo* is no longer an option.

15. The CFTPA therefore entirely agrees with the Government's statement on its *Copyright Consultation* website that:

Digital technology has evolved dramatically, changing the way Canadians work, live and engage locally and globally. The emergence of the Internet has blurred the line between creators, users, producers, and distributors of copyrighted works.

Canadian copyright law needs to be updated to give Canadian creators and consumers the tools they need to engage with confidence in the digital marketplace. These updates will also help foster creativity, innovation and economic growth.²

16. The Association has attempted to craft its copyright reform proposals below in a manner that would give "Canadian creators and consumers the tools they need to engage with confidence in the digital marketplace" and that reflects the four principles that framed the government's drafting of Bill C-61. In certain cases, our proposals were only arrived at after considerable debate and compromise.
17. The Association has also limited its comments and recommendations to those issues which we regard as requiring urgent and immediate action and which reflect the scope of previous government copyright reform efforts. First we make recommendations with respect to certain issues that must be addressed for the purposes of ratifying the WIPO treaties. These are followed by recommendations intended to address ambiguities, anomalies or omissions in the *Copyright Act* that have inadvertently disadvantaged independent producers and which require immediate action.
18. Should the copyright bill that is ultimately tabled with Parliament be more comprehensive and wide-ranging than anticipated (a development that we would welcome), the CFTPA will provide additional comments as the bill makes its way through the legislative process.

ISSUES RELATED TO RATIFICATION OF THE WIPO TREATIES

Clarifying the Liability of Internet Service Providers

19. The CFTPA fully supports the principle that Internet Service Providers (ISPs) should not find themselves exposed to liability for infringement where they are facilitating connectivity and communication between users or when they engage in caching for network efficiency or host websites for subscribers.
20. At the same time, the CFTPA is of the respectful view that the proposed provisions in Bill C-61 that were intended to achieve this aim may have had the unintentional and inadvertent consequence of shielding from liability – and thereby legitimizing – websites, services and their operators whose business model is predicated on massive unauthorized copying and distribution of copyrighted works.

² "Copyright and You", Copyright Consultation Website, <http://copyright.econsultation.ca/topics-sujets/show-montret/6>.

21. In this regard, the CFTPA respectfully submits that the “notice and notice” regime that would have been enshrined by Bill C-61 would not have gone far enough to begin stemming – let alone reversing – the flood of unauthorized copyrighted material on the Internet that is being generated by these websites and services. While “notice and notice” is arguably helpful in deterring such activity by individual Canadians who may not have been aware that they were infringing copyright, it has little or no impact on professional business operators who financially profit from being a source of “one stop shopping” for the downloading of unauthorized copyright works. Any number of infringement notices will not stop operators of illegal streaming, leeching, or hosting sites from continuing their lucrative operations.
22. The Association accordingly strongly recommends that the Government consider enacting a “notice and take down” regime that balances interests in a careful manner. Such a regime must immunize ISPs from liability where they are acting as faithful intermediaries that facilitate communication with the rest of the Internet by transmitting to and from the end-user the content that that end-user has requested or provided. However, this same regime must also provide rights holders with an efficient and effective mechanism for the removal of infringing content that is made available, reproduced or communicated through the provision of network services, hosting and caching and/or through the use of an information location tool.
23. A “notice and takedown” model that respects the two considerations set out above is an essential feature of the copyright regimes of our major trading partners, including the European Union, Australia and the United States. Only this model can provide rights holders with the tools they need to ensure the rapid removal of valuable commercial content from sites that would engage in wide-scale online copyright infringement.
24. The CFTPA notes that one of the stated reasons for declining to implement a “notice and takedown” regime as part of Bill C-61 was a concern that such a regime could result in the “takedown” of material without sufficient due process. The Association shares this concern. Absent adequate safeguards, there is the potential for such a regime to be used for anti-competitive purposes or as a means of inhibiting free speech. Simply put, a “notice and takedown” regime should be used as a shield against mass copyright infringement and not as a sword to achieve non-copyright related ends.
25. We therefore consider it critical that a procedural framework be adopted that would, among other things (a) require that the rights holder alleging infringement certify in its notice that it has a good-faith belief that the material at issue is, in fact, infringing and (b) provide the recipient of such a notice with a process by which it, in turn, could serve a counter-notice certifying its good-faith belief that the material at issue is not infringing. The serving of such a counter-notice should have the effect of reversing the requirement that the ISP disable access to or remove the allegedly infringing material, while at the same time leaving the option to the rights holder to pursue all rights and remedies available to it – including, we would propose, enhanced rights and remedies resulting from strengthened secondary infringement provisions in the *Copyright Act*.
26. The CFTPA submits that any new legislation must provide clarity in the laws related to secondary liability (i.e. contributory liability and secondary infringement). Rights holders need to be able to obtain effective remedies against those who intentionally induce, encourage or materially contribute to the high levels of copyright infringement that take place online. The number and size of illegitimate file sharing services operating in Canada has

risen dramatically in recent years due, at least in part, to the lack of clarity surrounding the availability and application of the secondary liability doctrine in Canada. Around the world, illegal sites and services, and their operators, have been successfully prosecuted using the doctrine of secondary liability, giving relief to rights holders and providing the opportunity for legitimate services to grow. Strong, clear laws are needed to ensure that illegitimate operations that contribute to the mass infringement of copyright works online are held accountable for their actions.

27. Finally, the CFTPA would strongly recommend that the Government consider including a provision in the *Copyright Act* that would require ISPs to adopt an effective policy to deal with repeat copyright infringers. The Association notes that a number of jurisdictions, including the United Kingdom, France, Australia and New Zealand have either implemented or are in the process of implementing legislative reforms aimed at reducing repeated infringement by individual subscribers. While we do not necessarily believe that a “one size fits all” solution should be prescribed by law, we are of the view that ISPs should be required to develop clear criteria or benchmarks that will enable them – and, if necessary, the courts – to measure the effectiveness of the adopted policy.

The Role of Peer-to-Peer File Sharing in Copyright Infringement

28. The CFTPA submits that it is almost a truism to state that the success of new business models for audiovisual content on the Internet depends on it remaining an open-access platform that is an effective vehicle for the distribution of authorized content. Typically, Peer to Peer (P2P) file sharing has been, and remains, one of the primary vehicles for the distribution of unauthorized audiovisual content. It therefore could be argued that content providers, including Canadian independent producers, would benefit from measures that would have the effect of targeting P2P applications.
29. The CFTPA notes, however, that P2P file sharing is also being used for the distribution of authorized content on the Internet. Likely the most well-known such example is the CBC’s attempted distribution of its *Next Great Prime Minister* program using Bit Torrent. In addition, a number of independent producers are also using Bit Torrent and similar P2P applications as the primary means for distributing original digital content to their audiences.
30. Two such examples are Rocket Ace Moving Pictures’ *Dead-End Days*³ and *Cerealized*⁴ – two weekly web serials that have garnered considerable cachet and acclaim. Both *Dead-End Days* (a 2003 serialized zombie comedy) and *Cerealized* (a 2005 serialized sitcom) were, during their runs, the most popular domestic episodic Internet video series in Canada. *Cerealized* was also the first ongoing web serial to ever be nominated for a Canadian Comedy Award. Both series extensively used Bit Torrent technology to distribute new episodes at launch to reduce bandwidth costs for their producers – costs which otherwise would have been prohibitively expensive.
31. The Association therefore considers that amendments to the *Copyright Act* aimed at reducing the proliferation of unauthorized copyrighted material on the Internet must be fashioned in a manner that deters infringing behaviour without either choking off legitimate forms of content distribution and/or targeting specific applications or protocols.

³ See www.deadenddays.com.

⁴ See www.cerealized.com.

Technical Protection Measures

The Need for TPMs

32. The CFTPA notes that there has been considerable debate regarding the issue of whether, and/or to what extent, the *Copyright Act* should permit the circumvention of technical protection measures (TPMs) and for what purposes.
33. While the Association recognizes that there are legitimate concerns surrounding the appropriate ambit of any proposed TPM provisions, the fact remains that TPMs are an essential tool used by creators to develop both new vehicles for content distribution and the new business models that underpin them. The need for TPMs arises from the special character of some intellectual property, such as audiovisual content, which in digital form can be replicated on a mass scale and distributed around the world in a matter of seconds.
34. The Association takes issue with the argument that it is the aim or the intention of rights holders to use TPMs to “lock up” or to otherwise prevent access to their content by consumers. Such an approach would certainly be disastrous for Canadian independent producers, whose long-term viability depends on creating compelling content that is available at a variety of price points (including “free” content in certain cases) and in a manner that is as convenient and accessible as possible for consumers. TPMs that unduly frustrate consumers or defeat their reasonable expectations as to how they should use the content that they have paid for would inevitably lead the audiovisual industry down the same path of decline as the music industry. Independent producers have absolutely no intention of heading down that path.
35. The CFTPA also entirely rejects the claim that according reasonable legislative protections to TPMs would only benefit large, deep-pocketed corporations. The Association would point out that the vast majority of its members are small and medium-sized Canadian businesses – businesses that take enormous investment risks to produce expensive Canadian content with high production values for Canadian and global audiences. To deny independent producers the ability to control the dissemination of their content in a manner that affords them at least the possibility of recouping their investment is to effectively outsource the production of high-budget, high-production value digital content to other jurisdictions – most notably the United States. It would also greatly reduce the diversity of Canadian content offerings in the digital marketplace.
36. As the Government underscored in its introduction of the TPM-related provisions in Bill C-61:

With regard to [Technical Measures] in particular, it is critical to note that these technologies are used at the discretion of rights holders. They can choose not to use them if they feel they can more effectively market their products in another fashion. The law is designed to ensure that rights holders have a choice. Consumers have a similar choice in that they can avoid products and services that employ [Technical Measures] if they disagree with their use. Rights holders can then choose to adjust their business practices accordingly, as we see happening now.⁵

⁵ *Supra* at note 1.

37. Contrary to the assertions of some copyright commentators, the issue is not whether content creators need to adapt to the dictates of the digital age – certainly Canadian independent producers must continually adapt to the relentlessly evolving demands of broadcasters, distributors and consumers, or risk going out of business. Rather, the issue is whether the *Copyright Act* can be modernized to provide a legislative toolkit that facilitates the development of viable business models for the creation and distribution of high quality Canadian content across all digital platforms. The CFTPA submits that one essential tool in that toolkit is legal protection for TPMs.

Bill C-61 – Striking the Right Balance

38. In the Association's view, the TPM provisions proposed in Bill C-61 reflected a balanced approach that would have enabled content creators to create new digital markets for their products, while at the same time permitting circumvention where the purpose of the circumvention was clearly in the public interest.

39. The CFTPA fully supports the inclusion of the TPM exceptions and limitations that were provided in section 31 of Bill C-61, namely those in relation to:

- Law enforcement;
- Program interoperability;
- Encryption research;
- Privacy verification;
- Security assessment;
- Perceptual disability; and
- Broadcasting

40. The CFTPA notes that Bill C-61 did not shut the door to the inclusion of additional TPM exceptions and limitations; it also would have authorized the Governor in Council to introduce additional exceptions and limitations by regulation if it considered that a TPM (or class of TPM) would have the effect of unduly restricting competition in the aftermarket sector in which the TPM was used. Bill C-61 further provided that the Governor in Council could enact additional exceptions following due consideration of a list of factors that are broadly similar to the fair dealing criteria enumerated by the Supreme Court of Canada in *CCH Ltd. vs. Law Society of Upper Canada* ("CCH"). The Association submits that incorporating these provisions in any new copyright bill would provide the government with ample flexibility to ensure that TPMs are not used in a manner that is anti-competitive or that is otherwise contrary to the public interest.

41. The Association further submits that the TPM-related provisions provided in Bill C-61 also substantially improved upon those contemplated in Bill C-60 in two important respects.

42. First, whereas Bill C-61 would have prohibited the circumvention of TPMs, Bill C-60 only would have authorized a rights holder to sue a person who circumvented a TPM, and then only if the rights holder could prove that the person who had circumvented the TPM knew, or ought to have known, that such circumvention was an infringement copyright. The imposition of this procedural double hurdle on rights holders would have effectively eviscerated the purpose of having a TPM anti-circumvention provision in the first place, and would have offered a threshold of protection to rights holders that was substantially below

that of virtually any other industrialized country, in that it would not have provided “effective legal protection” for these devices, as required by the WIPO Treaties.

43. Second, Bill C-61 also would have made it illegal to provide, market or import tools designed to enable circumvention of TPMs. Bill C-60, in contrast, did not include any comparable provisions. This is not a minor omission. Acting on their own, most individuals lack the technical expertise or means to circumvent TPMs. Conversely, where anti-circumvention tools and services are widely available, it becomes relatively easy for individuals who wish to circumvent TPMs for infringing purposes to do so.
44. The Association submits that once it is accepted that according legal protection to TPMs (subject to appropriate limitations and exceptions) is an important element of copyright reform, it is only logical to ensure that such protection is not undermined by also prohibiting products and services that are intended to be used for the purposes of circumventing TPMs.

ADDITIONAL ISSUES REQUIRING URGENT ACTION

Authorship of Film and Television Products

45. Perhaps the most glaring and longstanding omission of the current *Copyright Act* is the fact that it does not specify which person is the “author” of an audiovisual work. This omission has had significant negative implications for independent producers, given that rights ownership and exploitation have always constituted the foundation of the business model for independent production. As noted entertainment lawyer Stephen Fraser explained in a paper on this issue:

Uncertainty over who owns the copyright in a film [or television production] affects its economic value. While the film stock, tape, or other media on which a film is stored are important, these media are the only means by which the film is delivered. Copyright is what creates the economic value in the film. Put simply, copyright is what allows the production company to stop others from copying the film. It is this economic value that banks lend against, and what broadcasters and exhibitors licence to bring the film to their audiences.

As there is no clear answer in Canadian copyright law to the question of copyright ownership in a film, producers must take a series of important steps to ensure that their ownership is clear. Anyone who could be considered the “author” of any part of the film, from the obvious (writers, directors, designers) to the not so obvious (extras, set painters), must sign a contract with the production company. If the transfer of the copyright is not in writing, or if there is nothing in writing showing that use of the copyrighted element was “cleared”, the producer places the whole production at risk. No bank will lend money against the creation of a film unless there is a clear showing that the production company seeking the loan owns or will own, the copyright in the film.⁶

46. Rights licensing and exploitation are the currency of a robust digital distribution marketplace.

⁶ Stephen Fraser, *Who Owns the Copyright in a Canadian Film? Answer: it depends (and that’s the problem)*, available online at http://www.fraser-elaw.com/pdf/fraser_article_1.pdf.

As content distribution platforms have multiplied, the importance of having clear, transparent and fair terms for the licensing of the related rights has increased exponentially.

47. It is therefore critical that the *Copyright Act* be amended to specify that the producer is the “author” of an audiovisual work. This single amendment would remove potential barriers to rights exploitation, reduce transaction costs and simplify the mechanics of Canadian content creation and distribution.
48. The Association has long maintained that the producer is clearly entitled to be recognized as the “author” of an audiovisual work. The producer is the person (whether an individual or a production company) who takes on the overall risk of creating the work, of assembling the creative team to realize the project, of securing the financing and of overseeing the completion and distribution of the work.
49. Successive governments at both the federal and provincial levels have developed and implemented programs, policies and support measures for the production of Canadian programming based on the bedrock principle that the producer is the first copyright owner of a film, television or new media work.
50. Public and private funding sources (whether in the form of equity investment, grants or loans) recognize the key creative role of the producer function. The Canadian Television Fund⁷ and Telefilm Canada’s programs in support of television and film development production, distribution, marketing, aboriginal projects and international treaty co-productions are all contingent on the producer having copyright in the work. The federal, provincial and territorial tax credit regimes and the retransmission royalty collectives are also all based on the same premise.
51. The CFTPA notes that United States copyright legislation clearly and unequivocally states that the producer is the author and first owner of copyright in audiovisual works. Recognizing any person other than the producer as the author of an audiovisual work could therefore create a needless trade irritant with Canada’s largest trading partner.
52. This is of particular concern in light of the fact that in 2007/2008, foreign location shooting in Canada accounted for \$1.8 billion in production volume, creating an estimated 44,500 direct and indirect full time jobs.⁸ Canadian content production also strongly benefits from sales to the US market. These transactions are based on fundamental assumptions about producer ownership of copyright.
53. If Canada were to amend the *Copyright Act* in a way that differed from or undermined this fundamental premise, it would create a serious anomaly in the North American environment. A move to introduce new beneficiaries into the copyright structure could be seen as hostile to US production interests and inconsistent with how Canadian productions are financed.
54. The CFTPA notes that an analogous situation applies in the case of sound recordings. Under the *Copyright Act*, the “maker” of a sound recording – the person who undertakes to

⁷ Soon to become the Canada Media Fund.

⁸ *09 Profile: An Economic Report on the Canadian Film and Television Production Industry*, produced by the CFTPA and the Association des producteurs de films et de télévision du Québec (APFTQ), in conjunction with the Department of Canadian Heritage pages 77-79.

make the necessary arrangements for the first fixation of sounds (i.e. the record company) – is the first owner of copyright. The existing legislation already contains a parallel definition of maker in relation to a cinematographic work. It would be logical to extend this principle to the person who undertakes the arrangements necessary for the first fixation of an audiovisual work. This person is the producer.

55. The notion that other parties should share in the right of first ownership to an audiovisual work, whether by virtue of technology-facilitated access or those having a moral underlying interest as a creative participant in the production process, would be extremely problematic. Such an expansion would result in a vast number of changes to other government legislation, regulations and policy as administered by such departments and agencies as the Department of Finance, the Canadian Radio-television and Telecommunications Commission, the Canadian Audio-Visual Certification Office at the Department of Canadian Heritage, Telefilm Canada, the Canadian Television Fund and the National Film Board of Canada.
56. The CFTPA would underscore, however, that explicitly recognizing the producer as the first owner of copyright in an audiovisual work does not disenfranchise other players. Copyright is a resilient concept and can be the source of negotiated agreements to share benefits between the various stakeholders who participate in the creation of a film, video or new media content. In fact, copyright serves as the foundation of all labour agreements between the Association and the creative guilds and unions, while also acting as the basis for the contracts that are negotiated in relation to the commercial exploitation of the production.
57. We would also note that if it is determined that it would be appropriate to grant additional underlying rights, such as moral rights, to performers through amendments to the *Copyright Act* (and as was contemplated in Bill C-61), it becomes all the more important to also clarify producers' first right of ownership in audiovisual works.

Fair Dealing

58. The CFTPA notes that the issue of whether copyright reform should include making modifications to, or undertaking a wholesale replacement of, the fair dealing provision as currently provided in section 29 of the *Copyright Act* is a source of considerable debate among its members.
59. On the one hand, documentary producers generally regard the current provision as overly restrictive in its ambit and ambiguous in its meaning, resulting in ever-increasing clearance costs for the use of copyrighted materials in documentary films. Comedy and animation producers, for their part, must grapple with the jurisprudential uncertainty surrounding whether parody falls within one of the enumerated fair dealing defences currently provided in the *Copyright Act*. This uncertainty, and the attendant fear of liability for copyright infringement, can create a "chilling effect" on the exercise of free speech, including political speech.
60. Producers in other genres, on the other hand, tend to be wary of proposals that would significantly expand the ambit of fair dealing as a defence for copyright infringement, fearing that this will result in the widespread and undue exploitation of their works by others. Those producers who work across multiple genres find themselves particularly torn, leaning in favour of one side or the other depending on the project concerned.

61. The Association does not pretend that there is a compromise that can fully satisfy all constituencies in this debate, including within its own membership. However, it is nevertheless of the view that the *Copyright Act* can be amended in a manner that provides greater stability and certainty for documentary, comedy and animation producers, while at the same time not leaving the door wide open for massive copyright infringement under the guise of fair dealing.
62. The CFTPA would accordingly propose to amend the fair dealing provision such that:
- (a) parody is explicitly included as one of the enumerated fair dealing defences to copyright infringement; and
 - (b) the six non-exclusive criteria enumerated by the Supreme Court of Canada in *CCH* are added to the provision, with these criteria to be used as an interpretive tool by the court for the purpose of assisting it in determining whether a particular dealing in a work is fair.
63. The Association submits that adding parody as one of the enumerated fair dealing defences to copyright infringement is necessary to ensure that Canadian independent producers are not at a creative competitive disadvantage to their counterparts in other jurisdictions, notably the United States. It would also have the effect of bringing an end to the continuing legal uncertainty as to whether parody is already implicitly covered by the provision.
64. By expanding fair dealing to accommodate artistic and political freedom of expression within the existing statutory framework, our proposal allows parody to be an available form of expression while preserving fair dealing as a principle of Canadian law. We would note in this regard recently adopted federal legislation which expressly authorizes the use of an Olympic or Paralympic mark for the purpose of parody.⁹ The Association regards this as a positive step forward, and that the next logical step is to see this principle explicitly reflected in the *Copyright Act*.
65. In a similar vein, the CFTPA considers that including the six-non exclusive criteria identified by the Supreme Court of Canada in *CCH* would bring both greater clarity and consistency to judicial determinations of the ambit of the fair dealing provision as applied to particular cases of alleged infringement. Those six criteria are as follows:
- The purpose of the dealing;
 - The character of the dealing;
 - The amount of the dealing;
 - Alternatives to the dealing;
 - The nature of the work; and
 - The effect of the dealing on the work.¹⁰
66. The Association recognizes that its proposed amendments to the fair dealing provision of the *Copyright Act* will be criticized by some for going too far and by others for not going far enough. The CFTPA accepts both criticisms as valid but nevertheless remains of the view that an incremental approach that brings greater clarity and certainty to this important area of copyright law is ultimately of benefit to all parties.

⁹ Namely the *Olympic and Paralympic Marks Act*, S.C. 2007, c. 25 at section 3(5).

¹⁰ *CCH*, para. 53.

CONCLUSION

67. The CFTPA considers it undeniable that the time has long since passed to modernize the *Copyright Act*. Indeed, few would argue with the rationale the Government provides for deciding to make another attempt at copyright reform:

It has been more than 10 years since the last major reform of this important legislation. During that time, new technologies have fostered new ways to create and use copyright material, as well as new distribution models and consumer products. Updates are needed to ensure that Canada's copyright laws are modern and so that Canada can regain its place as a leader in the global digital economy.¹¹

68. The CFTPA, like the Government, regards the retrofitting of Canada's copyright legislation for the digital age as not only an obligation but as an opportunity: an opportunity to create a legal framework that fosters investment and innovation in the high-value, high-skilled industries of the future; an opportunity to ensure that Canadians have access to a full range of Canadian content on the platforms and devices of their choice; and an opportunity to regain leadership in the global digital marketplace.
69. In order to seize this opportunity, all stakeholders must be careful not to treat copyright reform as a zero-sum game. Too often, previous reform efforts have been hijacked by hysterical prognostications of doom or by a refusal to accept compromise where compromise is unquestionably required.
70. We have been encouraged by the fact that, over the course of this summer's copyright town halls and roundtables, participants have been generally respectful towards those with differing or opposing points of view. Maintaining this spirit of openness will be of critical importance once a new proposed bill is tabled with Parliament.
71. The CFTPA is fully prepared to work with the Government, parliamentarians and all other stakeholders to reach workable solutions to the difficult issues that can and must be resolved in order for copyright reform to move forward. We thank the Government for providing the Association, other stakeholders and all Canadians with an opportunity to share our views in advance of the tabling of its new proposed legislation.
72. All of which is respectfully submitted.

¹¹ Frequently Asked Questions, Copyright Consultation Website, <http://copyright.econsultation.ca/topics-sujets/show-montre/11>.