

Noises Heard: Canada's Recent Online Copyright Consultation Process

Teachings and Cautions

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Abstract

This short comment analyses the results of the Government of Canada's recent on-line public consultation on its planned reform of copyright laws, held from July 20th, 2009 to September 15th, 2009. Defects in the Consultation process are striking. While the results of our study revealed a sharp gender, age and Anglophone bias in the submissions, of particular concern is the apparent lack of verification of identity, uniqueness, age (voting or otherwise) or citizenship of those making the submissions. For instance, 70% of the total submissions were "form letters" originating from a single little-known group of modchip distributors – the Canadian Coalition for Electronic Rights (CCER) – that had its form letter extensively circulated internationally on BitTorrent-related sites. As a result, it appears that many of the submissions were not even made by Canadians. Our study raises serious issues regarding the design and results of the public consultations, and of the need to ensure that future online consultations are better designed to properly represent the views and interests of the Canadian body politic. The government of Canada is urged to make available its own analysis of the submissions, as well as the nature and results of its verification process, if any.

Introduction

The reform of copyright law is a slow process in Canada. The long interlude between Canada's signing of the World Intellectual Property Organisation Copyright Treaty and the World Intellectual Property Organisation Performances and Phonograms Treaty ("**WIPO Treaties**") and the passage of ratifying legislation has been filled with studies, suggestions, consultations and the occasional *contretemps*. Continual attempts to resolve differences have most recently resulted in still further public consultation, which this short comment is about. Its focus is the most recent public consultation ("**Consultation**") which concluded on September 15, 2009, held by and on behalf of Industry Canada ("**Industry Canada**") and Heritage Canada ("**Heritage**"; (Industry and Heritage together, the "**Departments**").²

Taxonomy and Statistical Assessment³

From the perspective of developing a robust public policy forum in the digital age, a review of the Submissions is both surprising and disappointing.⁴ One has to wonder not

¹ The opinions in this article are mine alone, and not those of any entity of which I am a part or which I represent. As a practising technology lawyer I represent organisations with varied interests in intellectual property laws and in regulation (or not) of the Internet. Among them are creators, and those who represent their interests. I number artists and authors among my friends. To finally and fully expose any apparent potential for bias, my own interests, to the extent that I am also a photographer and writer, are those of the creative community. Needless, I hope, to say, I endeavor to put my responsibilities as a lawyer before any other interest or agenda.

² All of the written submissions made to that consultative process ("**Submissions**") are available online at <http://copyright.econsultation.ca/topics-sujets/show-montreal/29>. That website supplied the data for this analysis.

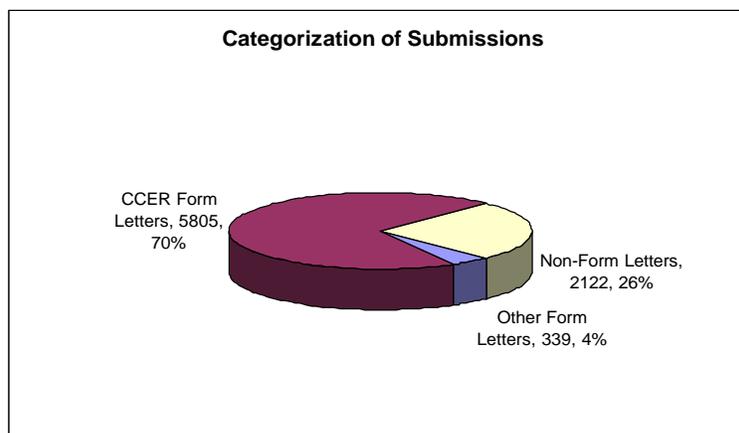
³ While we have tried to make our review as rigorous as we can, the necessarily subjective aspects of the evaluation and categorization of them ensure that, in spite of our best efforts, there is a degree of subjectiveness.

⁴ My colleague Blake Chapman was of great assistance in the review and categorization of Submissions.

only what weight is to be given to them, but in many cases, who has made them and what message is to be taken from them. The Consultation is transparent to the extent that all Submissions are on the website. But this transparency has significant limits: very little identifying information is provided about the individuals who made Submissions. The majority of the Submissions came from a single IP address (through the CCER letter writing “Wizard”) and many of the Submissions were sent with non-verifiable, incomplete, suspect or anonymous identification. These included Submissions in which: no names were used; only first names were used (there were, for example, sixty-eight “Chris” and seventy-two “John” who made Submissions); and, suspect names, such as - “D Man”, “El Qwazo”, “pr0f1t”, “Cereal”, and “Eagle” - were used. Given the ability to submit anonymously or under false identification, it is highly probable that there are multiple Submissions from the same persons.

Of the total 8,266 Submissions, 5,388, or 65.18%, are formally classified on the Website as “form letters”. That is to say, they are based on a common text and messaging template made available to third parties online by a single, interested proponent to effect a specific policy outcome. As high as the number of officially designated form letters was in the Consultation process, the number reported by the Departments was, in fact, much too low. Our analysis finds that many of the so-called “individual” or “unique” Submissions are actually form letters, and many others are slightly amended form letters. While there is some degree of controversy over the number of form letters which were modified by their senders, our research has found that there were a significant number of other Submissions that were in fact form letters but were not categorized as such. In total, there appear to be over 6,100 form letter Submissions. While modified form letters are arguably a step above merely rote form letters, they manifest most of their significant failings and fall far below the standards set by substantive individual submissions.

The number of Submissions which were classified by the Departments as “individual” or “non-form letter” is 2,878, or 34.82% of the total number of Submissions. In fact, the number of Submissions that are classified “non-form letter”, but that contain all or part of the CCER form letter, is at least 756. Fully 26.27% of the so-called “individual” Submissions contain all or part of the CCER form letter. When we add that number to the total form letter Submissions, *we find that one form letter, from the CCER, accounts for 5,805, or 70.23%, of all Submissions.*



Who are the “Canadian Coalition for Electronic Rights”?

The CCER⁵ is an advocacy and lobbying organization for sellers and distributors of "mod chips", "flash carts" and other circumvention devices and services. Many of the CCER member companies are in the business of "modding" video game consoles and handhelds to circumvent the copy protection built into them, enabling them to play pirated video games. CCER and its member companies fiercely oppose anti-circumvention legislation as it would affect their business (which is the whole point of anti-circumvention legislation). Indeed, effective anti-circumvention legislation could affect their liberty (jail) and pocketbooks (fines). An essential part of copyright reform would make it clear that their activities would benefit from no loophole—copyright reform is intended to curtail their activities as a matter of public policy. That is why the world, Canada included, negotiated the WIPO Copyright Treaty.

To ensure a high volume of Submissions, the CCER arranged for online forums of “modders” and BitTorrent (peer-to-peer file sharing communications protocol) information sites to encourage their readers to submit the form letter. The majority of the readership of these forums is, of course, non-Canadian. For instance, according to Alexa, a web information aggregator, only 5% of gbatemp.net and TorrentFreak users are from Canada.

Mod chip sellers like the CCER’s members and BitTorrent sites have a synergistic relationship, as BitTorrent sites deliver the pirated video games while mod chips allow them to be played. Accordingly, well known BitTorrent sites such as isoHunt and BTJunkie directed their users to make a Submission using the CCER’s form letter. TorrentFreak, a European site run by “Ernesto” which caters to the international BitTorrent community, also encouraged its readers to take advantage of CCER’s “quick and easy to use” letter wizard. A TorrentFreak post by “Corrupt Plague” (surely someone with our best interests at heart) reads:

“I have done my part and sent a letter, now you do yours. And BTW, Am I the only non-Canadian doing this?”⁶

Similarly, another TorrentFreak poster stated in regards to the CCER form letter:

“Letter sent! Do the same everyone! Just use the wizard linked in the article. If your (*sic*) not from Canada, just Google some address there or something :P Most bittorrent sites are hosted in Canada, so this is epic loose for everyone! “(all *sic*)”⁷

Professor Michael Geist, a well-known and influential technology law professor at the University of Ottawa, also endorsed the CCER wizard tool in his guest blog on TorrentFreak, adding to its momentum.⁸

⁵ The CCER website contains no street address, no telephone contact number and no listing of the Directors, Officers or employees. It is also unclear who wrote the CCER form letter. It seems to have been written by a sophisticated copyright lawyer – perhaps discreetly acting as a lobbyist for the CCER - and not a modchip marketer *per se*.

⁶ Corrupt Plague’s posting is at: <http://torrentfreak.com/prevent-canada-from-becoming-a-copyright-pollce-state-090812/#comment-587442>. (Posted on 9 Aug 12, 2009)

⁷ See Torrent Freak posting at: <http://torrentfreak.com/prevent-canada-from-becoming-a-copyright-pollce-state-090812/#comment-587444>. (Posted on 10 Aug 13, 2009)

⁸ See Professor Geist’s posting at: <http://torrentfreak.com/canadians-caught-as-copyright-consultation-nears-conclusion-090908/>

In terms of the linkage between the European TorrentFreak site and the CCER, one has to look no further than the CCER's own website posting from August 13:

TorrentFreak has posted an article entitled: *Prevent Canada from Becoming a Copyright Police State*. In this article, Ernesto [the TorrentFreak administrator] details how the old guard of corporate interests and lobby groups are threatening to direct copyright legislation in such a way to protect their antiquated and outmoded business models. Well, TorrentFreak appears to have struck an especially sensitive chord amongst Canadians as the CCER has seen a tremendous boost in its Letter Writing Wizard Submissions. Less than 24 hours ago @copyrightcanada tweeted "We've received over 1000 formal Submissions!" Since this tweet went out CCER has received more than 1300 Submissions to the official consultations on copyright via our letter writing wizard, *more than doubling the number of Submissions to the Government consultations on copyright thus far.*⁹(Emphasis added)

This coincidence of international promotion and a big spike in Submissions ineluctably draws one to the conclusion that the Submissions are not only dubiously sourced, but non-Canadian and likely in response to "Ernesto's" manipulative diatribe on TorrentFreak.

The problem with the CCER Submissions is not only that many likely come from non-Canadians, but also that it is impossible to tell – because the Submissions are all sent through a single CCER IP address – how many are duplicate Submissions. To submit multiple form letters was nearly as simple as clicking "send" multiple times. Twenty letters could come from one home computer; or, from Venezuela, Spain, or Japan. It is unclear, for instance, how many of the CCER form letter Submissions were duplicate Submissions using bogus names since they all were sent from the same IP address and the Departments did not publicly acknowledge utilizing any methods of sender verification.

Assessment of Submissions

A. Form Letters

Form letters are useful to some degree, but they are hardly the outpourings of hearts and minds filled by circumspect contemplation of the minutiae of copyright law. The thought and effort required to send a form letter is minimal. A form letter can be sent from a position of complete ignorance so long as it seems to further some vague objective for the sender, such as the desire for free stuff, or to feed a sense of belonging to a community. It simply cannot be argued that form letters should be given equal weight and space with original, thoughtful Submissions. To do so would be to fail to make the most basic qualitative distinction amongst evidence at hand, and qualitative distinctions are far more important in areas of policy than mere quantity.

It is ironic that so many people opted to make themselves heard about original works, with an appropriated "cut and paste" form letter. This is especially ironic when the overwhelming majority of form letters originated with an association of modchip distributors and were publicised internationally by sites which generate traffic from the

⁹ CCER Website, August 13th, 2009 at: <http://www.ccer.ca/>

unauthorized distribution of works protected by copyright. While an element of the burlesque is a nice touch in public consultations which, after all, tend to be a little dry, it does not do much for the integrity of the process that burlesque is, in this case, proportionally the whole game, and the thoughtful Submissions just the half time show.

In any event, since we have all these CCER form letters, how are they to be interpreted? Even if every one of their senders sent only one, was actually Canadian, and actually understood and meant with their whole-heart every pre-packaged word (assumptions which are wholly unlikely), the over-arching concern is still that the Submissions were made on behalf of a shadowy organization, the members of which may be criminals¹⁰, or on the verge of criminalisation. This being so, does it not mean that, for public policy purposes, all of the CCER form letter Submissions mean the opposite of what they say? In other words, if clandestine modchip manufacturers want one thing, should Canada not want the opposite? Is that not the whole point of progressive legislative reform?

For the TorrentFreak and “modder” crowds, piracy havens like Canada have great utility.¹¹ Should the opinions of those who want to exploit Canada for disreputable and illicit trans-border commerce really influence Canada’s copyright policy? One might argue that they should be dismissed entirely given the virtual certainty that many of them are not even Canadian. But if one did want to see the debate influenced by the meaning of these Submissions, then the meaning is this: if the interests of foreigners are to make Canada “a no law land”¹² in order to protect their illicit interests, should Canada not do the opposite? While I am resolutely of the belief that intellectual property policy is not, and should not be, nation-specific, I also believe that we must implement policy that is made in Canada and in the interests of Canadians. We must not let our public consultations be abused by shadowy organizations working with foreign purveyors of pirated material. The incentives of non-Canadians to direct Canadian public policy against the interests of Canadians are too strong to ignore.

B. Individual Submissions: A Small, Passionate, and (often) Poorly Informed Cohort

Once the CCER form letter is taken out of the equation, the most striking result is how few Canadians actually made substantive individual Submissions. In total, less than two thousand individuals actually took the time to make a substantive, non-form letter submission. While copyright policy has sometimes been portrayed as a national flashpoint for Canadians, the response was, at best, tepid. To put the response in context, more New Brunswick residents, with population of less than 800,000, took the time to march on the provincial legislature to protest the sale of NB Power, than did Canadians take the time to make non-form letter Submissions from their home computers.¹³

This is, however, not particularly surprising to observers of the disconnect between online “click activism” and actual political mobilization. As a partner at Nanos Research recently observed to *The Globe and Mail*:

¹⁰ The RCMP is of the position that modifying a console and computer is considered an illegal act under Section 342.1 of the Criminal Code and is punishable by imprisonment for up to ten years. See: <http://www.rcmp-grc.gc.ca/qc/nouv-news/com-rel/2010/04/100401a-eng.htm>

¹¹ See, for example, see Barrie McKenna, “The (legal) music fades out for Canadians” *The Globe and Mail*, October 20th, 2009, in terms of Canada as an online piracy haven.

¹² Reflecting the phraseology in: Racicot *et al.*, “The Cyberspace Is Not A “No Law Land”: A Study of the Issues of Liability for Content Circulating on the Internet” (Industry Canada: February, 1997).

¹³ See Damira Davletyarova, “Thousands protest: NB Power Not for Sale”, *The New Brunswick Beacon*, March 21, 2010.

[Joining Online Social Networking Groups] shouldn't be confused with the political intentions of the broader population and whether a government should change or modify its policy just because of something that's on the Internet. ... Because it's probably easier to mobilize a Facebook group than to call your local riding association and get people to show up and do something.¹⁴

Similarly, the CBC noted that one should be somewhat skeptical of the click activism surrounding the copyright debate:

[Michael] Geist's [Facebook] group stands as one of the most successful examples of "Facebook activism" – tapping into the ready-made structure of online social networks to make joining a group as quick as a click of a button. [But analyst Mark Goldberg notes that while these] "petitions have been popularized, I'm not sure they have been legitimized. They may have made their sponsors feel good about themselves, but I am not sure they've led to many changes." ... [*This Hour Has 22 Minutes* had an online poll to change Stockwell Day's name to "Doris Day" which], attracted more than one million people and garnered international attention. *This Hour Has 22 Minutes'* poll [however] had little quality control to determine whether people were who they said they were, but that was ultimately the point: tying anything to a petition, particularly one done online, was asking for abuse of the system.¹⁵

As observers of the long-standing Canadian copyright debate have noted, while click-button movements have generated large Facebook and form letter numbers on copyright reform, attempts to organize protesters to take to the streets or the legislative lawns have failed to generate more than a few dozen people, at most.

Nevertheless, the issue of the small number of substantive Submissions is overshadowed by how many of the Submissions, on all sides of the debate, were so poorly informed. I have been studying and teaching copyright law and policy a long time. It is complex, difficult and often counterintuitive. While there were many individual Submissions that were thoughtful, engaging and earnest, the fact that a huge number of them based their opinions on simplifications, errors and second hand hyperbole, makes them of little practical utility.

Looking at the individual or non-form letter Submissions, we see a wide range of "types", to the extent they can be classified as such. Irrespective of their particular viewpoint, a large number of the Submissions contain strong opinions but simply get the law wrong or misunderstand the issues. For example, while a number of Submissions are either "for" or "against" technological protection measures (TPMs), few of the Submissions appear to understand TPMs or comprehend that they are different from digital rights management (DRM) systems. Although some of the individual Submissions are thoughtful and measured, many are to varying degrees, confused, irrelevant or intemperate, such as:

American new copyright is the biggest land-grab in history. property, by def, is absolute. not a interest which expires as soon as the tech changes. ... altering the defination [sic] of property to the point where the economy is locked solid

¹⁴ Michael Valpy, "Facebook forums shouldn't sway government, pollsters told", *The Globe and Mail*, February 18th, 2010.

¹⁵ Paul Jay, "The Rise of Facebook Activitism", *CBC News*, September 9, 2008.

under lawsuits? All of them want money or the system falls under it's own weight. (of lawsuits) for the love of god, do something sensible, not political.¹⁶

...

I am very against this bill... and i will spend alot of my time and energy fighting bills like this one and bill c-6. if you pass garbage like this instead of doing something about or economy and us being treated like the USA's cheep hooker then u have failed us more then any one knows.¹⁷

...

I am sick and tired of how Canada is becoming a policed state, much like the Americans. I do not claim to know the solution but Bill C-61 is wrong. I feel less and less free everyday, please do not let us be shackled like the Americans.¹⁸

Lay voices must be heard; but our elected representatives – and the bureaucratic experts who serve them - must judiciously draw heavily on the informed, not the uninformed. In this regard, the paucity of the individual Submissions – in both quantity and quality - in large part reflect the Government’s lack of guidance to the Consultation participants. With little guidance or substantive background information, many of the participants were left floundering, making incorrect assumptions addressing issues that were not part of the Consultation process. Further, many other Submissions dealt only with very narrow issues, such as those from the Archivists of Canada, Canadian National Institute for the Blind, the Vancouver Archives, and others.

It was suggested in a number of the Submissions that freer access to copyright-protected works would enhance economic opportunity. Nonetheless, the trend is absolutely clear from the Submissions that those who try to make a full-time living from arts and creative content, as opposed to those who are passive consumers, do not agree. We sampled twenty-five percent of the substantive individual Submissions, and of the professional authors, musicians, filmmakers, performers, photographers and designers, more than 90% were in favour of robust copyright protection as a means to secure their livelihood and protect their artistic integrity. Most of the Submissions by professional creators clearly fall under the “help save my job” and “protect me from theft” category and not “help save my ability to take from others without permission”. While these professional authors and creators do not appear to be especially informed about the intricacies of copyright law, they clearly are concerned that they have legally enforceable rights to stem the tide of online piracy.

Another category of unique Submissions is those of persons for whom the issues are important and who have the knowledge and resources to address the issues. The Departments should ensure that a qualitative, and not quantitative, evaluation process results in these Submissions rising to the top of the pile and being accorded far greater weight than others. For example, the Submission by the Alliance of Canadian Cinema, Television and Radio Artists (“**ACTRA**”), is very detailed and very useful and discusses such topics as the different rights in each media (including moral and economic rights), TPM’s, the WIPO Treaties, legal liability, and fair dealing. Moreover, it does so on behalf of its many tens of thousands of members. Such Submissions as these deserve more attention because of the time, thoughtfulness and expertise that they reflect. Similarly detailed Submissions come also from individual users such as that from Ms. Bev Katz

¹⁶ Copyright Consultation Submission by Packrat.

¹⁷ Copyright Consultation Submission of Jordan MacIssac.

¹⁸ Copyright Consultation Submission of Homer in Calgary.

Rosenbaum, and Mr. Asim “Awesome”Awan. Similarly thoughtful proposals come from people like Professor Ian Kerr, Barry Sookman, Noah Stewart, The Archivists and Librarians Association of Canada, and Professor Myra Tawfik.

The Lack of Representativeness: The Paucity of Francophones and Women

It is to the credit of the Departments that they have engaged in such wide and open-ended Consultations on copyright reform. Nonetheless, there are danger signs that so undermine the integrity of the Consultation process that any significant reliance on it should be carefully questioned. This is certainly the case with respect to the doubts about the CCER form letter Submissions described above. But another important aspect is to what extent the Submissions truly represent the Canadian body politic.

There is no reason, I think, why the demographics of persons making Submissions should stray very dramatically from Canada's. Yet, there were only 174 French Submissions, a mere 2.33% of Submissions made (while approximately 21% of the Canadian population speaks French at home). Moreover, the great majority, more than 91%, of the Canadian population that speaks French at home resides in Québec. The interests of Québécois, and French Canadians generally, were dramatically underrepresented in the Consultation process. Given the vigour and fruitfulness of French culture in Canada, and the importance of content creators there, compensation for this underrepresentation is clearly a concern for any findings resulting from the Consultation.

Similar underrepresentation is found in the gender bias of Submissions. Submissions made by females counted 1,083; by males, 5,982.¹⁹ Statistics Canada tells us that the digital divide between the sexes is now statistically insignificant. Thus, males and females have equal access to making Submissions through the Internet, and an equal interest and investment in issues facing our digital world. Why has the government been able to do so little to improve the rate of response from females in Canada? How has the process of consultation become so appallingly gender-biased? I certainly do not mean to say that there is any intentional bias by the Departments. Indeed, very capable women guide much of their policy-making. Nonetheless, whatever the cause, this is a serious problem.

How can the online Consultation process have been so dramatically biased towards English-speaking males? Given that so many of them were form letter driven by the CCER and by TorrentFreak, and since the users of such sites and of the Internet are so disproportionately young, it must be said that the rate of Submissions is not just disproportionately English speaking males – it is young, even teenaged, males, who may well not be Canadian, but are simply benefitting from the *Pax Britannica* of the English language to make their Submissions.²⁰ Given the over-representation of this group amongst precisely the population of Internet users whose usage patterns governments around the world are trying to change, must we not be on guard against the system being gamed in an attempt to preserve digital anarchy and continued flow of free stuff?

¹⁹ The Submissions made by genderless persons (i.e. unions or corporations), or persons who are anonymous or to whose names we were insufficiently cosmopolitan as to be able to attribute gender, were 1,201 or 14.53%. Presumably, these unknown Submissions would divide proportionately much as the balance of the Submissions did, being weighted very heavily towards males.

²⁰ Certainly the grammar of a number of the submissions indicates that English is not their first, or even second, language. Obviously, simply having to click on a form letter would mask a Submitter's lack of knowledge of the English language.

The Consultation and its Lessons: Conclusion

If the aim of the Consultation was to canvass public opinion and discern trends, it failed. To the extent that any trend can be discerned from the Submissions, it is undermined by its sources and the great extent to which the Submissions are not at all representative of Canadian demographics. Most troubling, the Consultation was systematically abused by a clandestine group of mod-chip manufacturers, foreign websites administrators and international BitTorrent users, principally through the CCER and “TorrentFreak”. As one gadfly blogger noted in his CCER submission from the United States, ‘Ministers, you have been gamed’.²¹

In her recent article in *The Wall Street Journal*, Evgeny Morozov highlights that policy-makers must be cognizant that online social networks can do either good or harm, it all depends which groups are using them. Warning against “techno-utopianism”, Ms. Morozov underscores that, “not all social capital created by the Internet is bound to produce ‘social goods’; ‘social bads’ are inevitable as well”.²² Clearly the Consultation process showed that international online social networks can damage, rather than enhance, Canadian participative democracy, if online public consultations are not properly designed and implemented. The Obama White House supports the use of social networks and online fora—but expressly states that they “should not be used as the basis for policy or planning.”²³ Canada needs also to take a discerning look at how to best integrate these forms of communication into the policy process.

The Consultation on copyright reform did, however, provide guidance on how to properly conduct online public consultations in the future. For prospective consultations, the Departments need to focus with much greater care in at least three areas. First, ensure that the consultations are not gamed by non-Canadians and shadowy organizations involved in quasi-illicit activities. Second, it is critical that demographic data be considered when designing both the communications plan for the consultation and the means by which a person is to respond. The fact that there were so few female and Francophone Submissions is particularly troubling. Third, participants need to be informed of the legal and factual context in which they are making their Submissions. Despite their small number, many of the substantive individual Submissions were thoughtful, passionate and well written. Unfortunately, the vast majority of them based their comments on misinformation, gross simplifications or fear mongering. As a result, much of the practical utility of their participation was lost.

The next step the Departments must take is to openly publish the results of their own analyses of the Submissions, acknowledge the limitations of the Consultation, and to prepare legislation from a much more informed perspective. The Departments are custodians of the long-term interests of Canadians in their artistic, innovative and cultural endeavors. To fulfill their duty of stewardship, a system of intellectual property rights must be based on a fair, informed and representative consultation process. Unfortunately, none of these three criteria were met in the online Consultation associated with copyright reform.

An online public consultation on a highly technical and complex area of law might provide some degree of useful context, but by and large it can accomplish little that will

²¹ Chris Castle, “Canadians Slimed as Copyright Consultation Concludes”, September 21, 2009, at <http://www.musictechpolicy.com/2009/09/canadians-slimed-as-copyright.html>.

²² Evgeny Morozov, “The Digital Dictatorship”, *The Wall Street Journal*, February 20, 2010.

²³ White House to Federal Agencies: Beware Social Media Ratings and Polls http://www.readwriteweb.com/archives/white_house_to_federal_agencies_beware_social_media_ratings_and_polls.php

be of direct application. Much more useful is to solicit the opinions of the members of the communities that are truly informed. In Canada, that is certainly a large enough population to yield a great many useful submissions. Ministers Moore and Clement are strong ministers and they need the support of the best and most rigorous processes. In fact, Minister Clement has recently called for further consultation on Canada's digital economy strategy. Let's be sure that our next consultation is more fruitful.

To date, the limited analysis of the Copyright Consultations has simply been quantitative, principally consisting of adding up form letters. While Professor Michael Geist, for example, has found that the "overwhelming majority" of the Submissions "rejected Bill C-61", he fails to mention the fact that 95% of these submissions came from the CCER Form Letter.²⁴ Indeed, when one takes the CCER Form Letter out of the equation, only 333 individual Canadians made substantive Submissions against Bill C-61.²⁵ Obviously, the weight of a few hundred individual submissions is dwarfed by the many Canadian organizations – representing hundreds of thousands of Canadians – that supported Bill C-61 when it was tabled.²⁶ What is most striking from Professor Geist's analysis is that – once the CCER Form Letter is taken out of the equation – there are only a few hundred substantive submissions on any given topic.²⁷ For example, the epicenter of Canadian copyright reform and the Consultation process is Canada ratifying the WIPO Internet Treaties, and yet, according to Professor Geist's analysis, only 206 Canadians either supported or opposed the WIPO Internet Treaties in their Submissions.²⁸ Perhaps even more interestingly, of the 206 Canadians that did make submissions on the WIPO Internet Treaties, 90% supported Canada's long overdue implementation.

What Professor Geist's terse²⁹ analysis does not consider, however, is the lack of transparency and accountability in the Consultation process. Professor Geist and I are united in our position that the public policy process must be open and representative in order to be legitimate. In this regard, the Departments – if they have not done so already - need to answer a number of questions: How were the CCER (and the international BitTorrent community) able to dominate the process, accounting for 70% of the Submissions? Is the CCER involved, either directly or indirectly, in any other Canadian Copyright reform lobbying or activities to undermine the will of Canadians? Why did so few Canadians make substantive submissions on copyright reform and, in particular, why were Francophones and women so grossly underrepresented in the Consultation process? Unfortunately, given that the Consultations are over, the answers to these questions cannot save last summer's Consultation process, but my hope is that the answers we find may help to remedy public copyright consultations in the future.

²⁴ Professor Geist's analysis of the Consultation can be found on his April 9, 2010 posting, "The Final Copyright Consultation Numbers: No Repeat of Bill C-61" on his website: <http://www.michaelgeist.ca/>

²⁵ Professor Geist finds that 6138 submissions "rejected" Bill C-61, yet we know that there were 5805 CCER form letters, which means that only 333 Canadians made individual substantive submissions rejecting Bill C-61.

²⁶ See, e.g., the fact that the Canadian Chamber of Commerce, which represents over 175,000 businesses in Canada, supported Bill C-61. Canadian Chamber of Commerce, "Canadian Chamber Welcomes Government Action to Protect Intellectual Property", June 18, 2008. Also see the joint press release of ACTRA, AFM Canada, CIRPA, CMPA, CRIA, MIAC, MMF, and RMAC, which supported the introduction of Bill C-61 ("Canadian Creator and Music Industry Groups Applaud Introduction of Copyright Bill", June 18, 2008). These groups represent over 36,000 Canadian creators and creative enterprises

²⁷ We have not independently verified Professor Geist's analysis in any way.

²⁸ Professor Geist finds that there were 187 "Submissions in favour of implementing WIPO" and 19 "Submissions opposed to implementing WIPO".

²⁹ Aside from his chart, Professor Geist's final analysis of the Consultation process is only three sentences long. I suspect this means that his additional analysis will follow, but that he took the opportunity to make the data quickly available, which of course is helpful.