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Bill C-61 Locks Out User Rights

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Cases, Legislation and Proposed Legislation Considered:

Bill C-61, An Act to Amend the Copyright Act,
WIPO Copyright Treaty;
Performances and Phonograms Treaty;
Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34 ;
CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13.

Bill C-61, *An Act to Amend the Copyright Act*, tabled in the House of Commons by Alberta MP Jim Prentice on June 12th, 2008, contains proposed amendments to the *Copyright Act* designed to allow Canada to implement and ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty ("Internet Treaties"). The centerpiece of the Bill is s. 41, which generally prohibits the circumvention of technological measures; that is, apart from a few narrow exceptions, it prohibits the unlocking of digital locks on content such as software, digitized music, digitized books and other protected subject matter, even for the purpose of exercising user rights recognized in the *Copyright Act*, such as fair dealing, and for some rights explicitly recognized in Bill C-61 (e.g. for time shifting or device shifting). Bill C-61 goes further still, generally prohibiting unlocking services and dealing in keys to allow the unlocking of digital locks on content. Unfortunately, such provisions are at odds with the idea that owners' rights in protected subject matter should be balanced with users' rights in that subject matter.

The idea that copyright owners' interests in works and other subject matter must be balanced with users' interests in the same matter is a commonplace. The Supreme Court of Canada said in *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 that "the *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and … [preventing] someone other than the creator from appropriating whatever benefits may be generated…." In *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13*, the Supreme Court of Canada characterized the interests of both owners and users as rights. The Internet Treaties recognize the need to maintain a balance between the rights of authors, performers and producers of sound recordings and the larger public interest. The Canadian Government in its *Reforming the Copyright Act Backgrounder* says that its approach "truly balances the interests of Canadians who use digital technology and those who create content." In fact, however, the Government abdicates its balancing role in Bill C-61 for the reasons that follow.

The balance that exists in copyright law is provided in the form of legally enforceable *written rules* that give rights to owners but also limit those rights in favour of users. Copyright owners believe, however, that in a digital environment legally enforceable written rules are not enough: digital locks are needed to protect digital content against infringing uses. But locks can be unlocked, so copyright owners also demand legal rules that prohibit users from unlocking the locks. The fundamental problem with the prohibition against unlocking digital locks, however, is that those locks can be used by copyright owners to restrict the exercise of users' rights with respect to the locked content. Thus, unless digital locks prevent only infringing activity, or users are permitted to unlock locks on digital content in order to exercise their rights, the balance of interests that is reflected in the written rules can be upset by the copyright owners, *whatever* the balance is in the written rules.

Given that digital locks are not smart enough to prevent only infringing activity, the only way that the exercise of users' rights can be guaranteed is to provide for a general unlocking right for users. Although Bill C-61 provides a few limited unlocking rights, such as in police investigations, it does not provide for a general right to unlock digital locks in order to exercise a user right, nor does it generally allow unlocking services or dealing in keys in order to facilitate the exercise of user rights. Of course, these omissions reflect the worry of copyright owners that keys would be used to facilitate infringement of copyright rather than merely the exercise of a user right. Yet, the correlative concern exists for users with respect to the impact of a general prohibition against unlocking locks on their rights. In short, given a general prohibition against unlocking digital content, without the existence of a corresponding general right to unlock locks for the purposes of exercising user rights, Bill C-61 would allow copyright owners to lock in broad owners' rights and lock out all but a few users' rights.