

Lights, Camera, ... Harmonize:

Photography Issues in Copyright Reform

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harmonize / 'hɑrmə,naɪz / v. ... (4) *make or form a pleasing or consistent whole.* (5) *coordinate or make consistent.*¹

A. INTRODUCTION

“Harmony,” “consistency,” and “equality” are powerful words in law and legal policy. Framing objectives using these terms can be an effective way of justifying legal change and limiting options for debate. This issue has arisen in the context of proposed amendments to the *Copyright Act*² under Bill C-60³ in the area of photographic works — the government’s seemingly unassailable objective is “to harmonize the treatment of photographers

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1 *Canadian Oxford Dictionary*, s.v. “harmonize.”

2 *Copyright Act*, R.S. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42>> [the Act].

3 **Bill C-60**, *An Act to amend the Copyright Act*, <www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html> [Bill C-60].

with other creators in terms of authorship and copyright ownership.”⁴ This certainly appears to be a laudable and straightforward proposition. However, to borrow a phrase from the Honourable Senator Kirby, Chair of the Senate committee⁵ that studied the photography issues in late 2004, “there is nothing in life that is as simple, when you get into it, as it looks on the surface.”⁶

This chapter attempts to dig beneath the surface by providing an exploration and analysis of photography issues in Bill C-60. This chapter suggests that, with the blinders of “harmonization” in place, the proposed amendments fail to adequately address important issues of balance and consumer protection, particularly in relation to ownership of commissioned photographs.

Part B of this chapter provides a basic framework for analysis by reviewing the sections at issue and outlining the proposed amendments. Part C sketches the balance and consumer protection issues that arise in respect of the authorship and term proposals. Part D discusses what is arguably the most controversial and challenging aspect of the amendments: consumer protection issues in relation to ownership of commissioned works. Finally, in light of the issues identified, Part E critiques the proposed amendments and suggests alternative ways to address the interests of photographers, the public and individual consumers.

B. FRAMEWORK FOR ANALYSIS

The Act gives unique treatment to photographic works in three main areas: authorship, term of protection, and ownership. The former two areas are intertwined and can be dealt with together. However, the third area arises under a narrow provision of the Act relating to first ownership of copyright in *commissioned* works and is addressed independently below.

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- 4 Canada, Industry Canada and Canadian Heritage, *Government Statement on Proposals for Copyright Reform* (24 March 2005), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html>> [Government Statement]. See also, Canada, Industry Canada, “Frequently Asked Questions” (24 March 2005), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01143e.html>> [FAQ].
 - 5 Standing Senate Committee on Social Affairs, Science and Technology (the “Senate Committee”).
 - 6 Canada, Standing Senate Committee on Social Affairs, Science, and Technology, *Minutes of Proceedings* (3 November 2004), <www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/soci-e/pdf/o3issue.pdf> at 12 [*Senate Hearing November 3*].

The following sections describe the current operation of the Act and outline the proposed amendments.

1) Authorship and Term of Protection of Photographs

Section 10 of the Act contains special rules regarding authorship and term of protection for photographs. This section is easiest to understand when considered in reverse order.

Subsection 10(2) deems the author of a photograph to be the person that owned the initial negative, and if no negative existed, the initial photograph. As a result of this deeming provision, corporations can be authors of photographs. This subsection is a departure from the normal rule that the author of a work is the person who created it.

Prior to 1999, subsection 10(2) did not cause any difficulty with respect to the term of protection for photographs. Until that time, all photographs, regardless of authorship, were protected for a period of fifty years from the end of the calendar year in which the initial negative was made, or if there was no negative, the making of the initial photograph. The term of protection for photographs was not calculated by reference to the life of the author, which in many cases made it easier to determine when copyright had expired.

In 1999, the Act was amended⁷ to provide a term of protection for photographs that was consistent with other works — life of the author plus fifty years from the end of the calendar year of their death.⁸ However, the deemed authorship provisions were not removed from the Act at that time. Instead, the new term of protection only applied where the author of a photograph was a natural person (or where that person was the majority shareholder of a corporation that owned the initial negative or photograph). In all other cases where the owner of the initial negative or photograph was a corporation, and hence the “author” by virtue of subsection 10(2), the term of protection remained at the pre-1999 level — fifty years from the end of the calendar year of the making of the negative. The reason for this distinction was to avoid perpetual copyright protection — after all, some corporations might “live” forever.

These changes resulted in the current version of section 10 which reads as follows:

7 *An Act to Amend the Copyright Act*, S.C. 1997, c. 24, <www.parl.gc.ca/bills/government/C-32/C-32_3/12472bE.html>, s. 7.

8 *Copyright Act*, above note 2, s. 6.

Term of Copyright

Term of copyright in photographs

10. (1) Where the owner referred to in subsection (2) is a corporation, the term for which copyright subsists in a photograph shall be the remainder of the year of the making of the initial negative or plate from which the photograph was derived or, if there is no negative or plate, of the initial photograph, plus a period of fifty years.

Where author majority shareholder

(1.1) Where the owner is a corporation, the majority of the voting shares of which are owned by a natural person who would have qualified as the author of the photograph except for subsection (2), the term of copyright is the term set out in section 6.

Author of photograph

(2) The person who

- (a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or
- (b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate,

is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this Act to be ordinarily resident in a treaty country if it has established a place of business therein.

Article 7(4) of the *Berne Convention*⁹ requires a twenty-five year minimum term of protection for photographs but otherwise allows contracting countries the freedom to determine the term. However, Article 9 of the *World Intellectual Property Organization Copyright Treaty (WCT)*¹⁰ provides that contracting parties shall not apply Article 7(4) of the *Berne Convention*. The upshot of the *WCT* requirement is that contracting parties must provide the standard term of protection for photographs — life of the author plus fifty years from the end of the calendar year of their death.

9 *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act of 2 July 1971 as amended 28 September 1979) (with Annex), [1998] Can. T.S. No. 18, <www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>.

10 *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No. 226 (entered into force 6 March 2002), <www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> [WCT].

In light of the *WCT* requirement, the government adopted the recommendation of the Standing Committee on Canadian Heritage (the “Heritage Committee”) that all photographs be protected for the life of the author plus fifty years.¹¹ This amendment involves the repeal of subsection 10(1) which sets out a different term of protection for certain corporate-authored photographs. However, the repeal of that subsection would be problematic in light of the deemed-author provisions of subsection 10(2). In other words, because corporate authors might never “die,” calculating the term of protection by reference to their “life” could result in perpetual copyright protection.

To address these interrelated issues of term and authorship, the government has proposed the repeal of section 10 in its entirety.¹² Thus, although repealing the deemed authorship provision in subsection 10(2) is not required by the *WCT*, it is both necessary and sufficient to address the *WCT* requirement regarding term of protection, at least so long as the subsection permits corporations to be “authors” — it is necessary because the term amendment could not be implemented without addressing the potentially indefinite “life” of corporations and it is sufficient because repealing the deemed authorship provisions in subsection 10(2) renders subsection 10(1) and 10(1.1) moot and automatically results in a term of protection of life (of a natural person) plus fifty years for all photographs.

2) Ownership of Copyright in Commissioned Photographs

Section 13 of the Act addresses ownership of copyright. Subsection 13(1) sets out the general rule that the author of a work is the first owner of copyright. However, subsections 13(2) and 13(3) carve out two important exceptions to the general rule.

Dealing first with subsection 13(3), this subsection applies to all works and provides that, subject to an agreement to the contrary, first owner-

11 Canada, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform*, (May 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf> at 8 [*Interim Report*]. This report was adopted by a subsequent re-constituted Heritage Committee in fall 2004. See Standing Committee on Canadian Heritage, “Second Report” (November 2004), <www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8974&SourceId=89793>.

12 Bill C-60, above note 3, s. 5.

ship of copyright in works made in the course of employment rests with the employer, not with the author:

Work made in the course of employment

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

Subsection 13(3) merely establishes a default position which can be modified by agreement. This subsection is not affected by Bill C-60 but provides a useful frame of reference for thinking about the main target of the amendments — subsection 13(2).¹³

Subsection 13(2) addresses first ownership of copyright in a very narrow category of works — engravings, photographs, and portraits — and only applies when such works are commissioned and paid for. Further, like 13(3), subsection 13(2) merely establishes a default copyright ownership position which can be modified by an agreement to the contrary. The current provision reads as follows:

Engraving, photograph or portrait

(2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, and the consideration was paid, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

Except for a minor amendment in 1997,¹⁴ subsection 13(2) has operated unchanged as part of the Act for more than eighty years; it has been

13 Although s. 13(3) is not amended under Bill C-60, newspaper groups told the Senate Committee that the section discriminates against them because it gives photographers and other contributors to newspapers the right to restrain uses of their works. See *Senate Hearing November 3*, above note 6 at 8.

14 *An Act to Amend the Copyright Act*, above note 7, s. 10(1).

part of Canada's copyright law since the Act first came into force in 1924.¹⁵ However, although the subsection has never been substantially modified or repealed, it has been the object of intense debate for decades. Some commentators have called for its repeal¹⁶ while others have suggested that the rule be retained¹⁷ or even extended to all commissioned works.¹⁸

Photographers' groups have expressed the view that section 13(2) should be repealed because it unfairly discriminates against them *vis-à-vis* other creators.¹⁹ Others have asserted that the subsection protects the important interests of individual consumers who commission photographs and portraits.²⁰ These tensions are present in the current debate regarding the future of subsection 13(2) and are reflected to a degree in the government's announcement regarding proposed changes to the Act:

First ownership of copyright in commissioned photographs would now rest with the photographer, but an individual that commissions

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- 15 *Copyright Act*, S.C. 1921, c. 24, s. 11(1)(a). See generally Harry Chartrand, *The Compleat Canadian Copyright Act: Current, Past & Proposed Provisions of the Act 1921 to 1997* (Saskatoon: Compiler Press, 1997) at 66. See also the *Imperial Copyright Act*, (1911) 1 & 2 Geo. 5, c.46, s. 5(1)(a).
- 16 See for example Barry Torno, "Ownership of Copyright in Canada" (Ottawa: Consumer and Corporate Affairs Canada, 1981) at 50–57. See also Consumer and Corporate Affairs Canada, "From Gutenberg to Telidon: A White Paper on Copyright" (Ottawa: Supply and Services Canada, 1984).
- 17 See for example *The Royal Commission on Patents, Copyright, Trade Marks and Industrial Design: Report on Copyright*, Ottawa, 1957 at 46–49 [*Ilsley Commission*].
- 18 See for example A.A. Keyes & C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (April 1977) at 71. The *Copyright Act of 1868*, 31 Vic. C.54, s. 15 provided that copyright in *all* works made to order or sold was transferred to the purchaser.
- 19 This view was the basis of the Canadian Photographers' Coalition's submissions to the Heritage Committee and the Senate Committee. See for example Canada, Standing Committee on Canadian Heritage, *Evidence* (21 April 2004), <www.parl.gc.ca/infocomdoc/37/3/HERI/Meetings/Evidence/HERIEVo8-E.HTM#Int-891448> [*Heritage Hearing*]. This view was also the basis of proposed legislation aimed at repealing s. 13(2) in the Senate. See for example Bill S-9, *An Act to amend the Copyright Act*, First Reading 7 October 2004, <www.parl.gc.ca/38/1/parlbus/chambus/senate/bills/public/S-9/S-9_1/S-9_cover-E.htm>. Bill S-9 was reintroduced from two earlier sessions where it had been introduced as Bill S-20 and Bill S-16.
- 20 See *Ilsley Commission*, above note 17. See also *Heritage Hearing*, *ibid*. During public hearings before the Heritage Committee and the Senate Committee, the author testified on behalf of the Canadian Internet Policy and Public Interest Clinic (CIPPIC) regarding the consumer protection issues raised by the proposed repeal of s. 13(2).

a photograph for personal or domestic purposes would, subject to an agreement to the contrary, be able to make personal and non-commercial uses of that photograph.²¹

In Bill C-60, subsection 13(2) is repealed²² and a new paragraph is added to subsection 32.2(1) of the Act to state that it is not an infringement of copyright:

(f) for an individual to use for private or noncommercial purposes a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration unless the individual and the owner of copyright in the photograph or portrait have agreed otherwise.

As mentioned at the outset, the government's objective with this amendment is to harmonize the treatment of photographers with other creators.

C. BALANCE AND CONSUMER ISSUES REGARDING AUTHORSHIP AND TERM OF PROTECTION

The proposed authorship and term of protection amendments raise general questions of balance in the Act. The Canadian Press, for example, argued that repealing subsection 10(2) would, as an unintended consequence, grant staff photographers at newspapers a veto right regarding the use of their photographs, thereby restricting the ability of the copyright owner (their employer) and the public to use the photographs.²³ Despite these possible concerns, however (but subject to the consumer issue mentioned in the next section), it is difficult to conceive of reasons why authorship of photographs should be different than other works and why corporations should be granted authorship status merely because they own the film or photographs. Indeed, from the perspective of photographers, the authorship change is important because it would grant them moral rights as authors of photographs in all cases. The bigger question of balance arises in the amendment to the term of protection.

21 Government Statement, above note 4.

22 Bill C-60, above note 3, s. 6. The repeal of s. 13(2) does not affect copyright ownership of any photograph commissioned prior to the repeal. See Bill C-60, above note 3, s. 35.

23 *Senate Hearing November 3*, above note 6 at 13–14. The Canadian Press claimed that repealing ss. 10(2) would cause ss. 13(3) to kick in for staff photographers. Although the newspaper gets copyright in both cases, ss. 13(3) gives authors a right of restraint.

The proposed amendment regarding term of protection for photographs is an example of a long history of copyright amendments that increase copyright holders' rights without any increase in the rights of individual consumers or the public at large.²⁴ In the photography context specifically, the term of protection for photographs has gone from a flat fifty-year rule, to life plus fifty years for photographs authored by natural persons, and now to a proposed life plus fifty-year rule for all photographs. Some suggest that this increased protection will stimulate the publishing industry in Canada.²⁵ On the other hand, the term extension raises questions about balance and the public interest because it will be more difficult to determine when copyright expires in many photographs²⁶ and because a vast number of existing photographs²⁷ and all future ones will be protected by copyright for a much longer period, thereby reducing the public domain. Corporations who were deemed authors of photographs whose copyright is still in effect at the time Bill C-60 comes into force will, in many cases, be granted a substantial term-extension in their photographs — rather than fifty years from the making of the photograph, the Bill states that

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- 24 Over almost the past two decades, a series of additions and amendments were made to the Act that evidence this trend, including in the areas of moral rights, secondary infringement, musical works, performances, cinematographic works, rental rights for computer programs and sound recordings, neighbouring rights, performers rights, statutory damages, and a private copying regime. See for example *An Act to Amend the Copyright Act and other acts in consequence thereof*, R.S.C. 1988, c. C-15; *Intellectual Law Improvement Act*, R.S.C. 1993, c. 15; *An Act to amend the Copyright Act*, R.S.C. 1993, c. 23; *An Act to Amend the Copyright Act*, R.S.C. 1997, c. 24.
- 25 Marcel Boyer, "Assessing the Economic Impact of Copyright Reform on Authors, Makers, Photographers and Publishers in Canada in Reference to Two New Copyright-Related Treaties: *WIPO Copyright Treaty (WCT)*, *WIPO Performances and Phonograms Treaty (WPPT)*" (30 April 2003; revised 6 June 2003), <<http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/ipo1134e.html>>.
- 26 Archivists raised this point during hearings before the Heritage Committee: "Without the information about who took the photograph, it is impossible to locate the copyright owner. It is, therefore, impossible to get permission or to give permission to our researchers to use the photograph. If a researcher cannot get permission to use the photo, it sits in copyright limbo and valuable historical research becomes impossible." See *Heritage Hearing*, above note 19. The Heritage Committee concluded that the archivists' concerns had been addressed by the amendments to the Act made in the *Library and Archives of Canada Act*, [2004, c. 11], which came into force in May 2004.
- 27 It should be noted that Bill C-60 does not revive copyright protection in any photograph in which copyright is expired at the time of coming into force of Bill C-60. See Bill C-60, above note 3, s. 34(1).

such photographs will now be protected for the life of the *photographer* plus fifty years.²⁸

In addition to a general question of balance, the repeal of section 10 would have unintended consequences for consumers. The proposed amendment does not account for the fact that people often hand their camera to strangers and ask them to take a picture of, for example, the person and their spouse or family. The repeal of section 10 would mean that the stranger, not the consumer, would own copyright in the resulting photographs in such circumstances. Although this vesting of copyright probably would not cause frequent problems in practice, Bill C-60's repeal of section 10 obviously produces a perverse result in such situations and defies individuals' basic and reasonable expectations.

D. CONSUMER PROTECTION ISSUES REGARDING COMMISSIONED WORKS

... [in repealing section 10 and subsection 13(2) of the *Copyright Act*, Bill S-9] has been written so broadly that it sweeps in consumers which — trust me — it was not intended to do, but nevertheless does.

— Honourable Senator Kirby, 2004²⁹

As mentioned above, proposals to repeal subsection 13(2) have been an ongoing matter of controversy for decades. This controversy recently became particularly heated between May 2003 and the government's March 2005 announcement. During that period, subsection 13(2) was the subject of proposed legislation introduced three different times in the Senate, as well as ardent debate at numerous hearings before the Heritage Committee and the Senate Committee.³⁰ Groups representing photographers, newspapers, archivists, and the public interest presented submissions on a variety of issues.³¹

28 Bill C-60, above note 3, s. 34(2). Subsection 34(3) provides that where s. 10 had deemed an individual to be the author of a photograph, the term of protection will continue to be the author and the term of protection will be their life plus fifty years.

29 *Senate Hearing November 3*, above note 6 at 19.

30 Bill S-20, the first bill in the Senate aimed at the repeal of ss. 10 & 13(2), received first reading on 15 May 2003.

31 The following groups attended at the hearings: Canadian Photographers' Coalition, Canadian Press, Canadian Newspaper Association, CIPPIC, and the Bureau of Canadian Archivists.

In the end, although the Heritage Committee recommended that subsection 13(2) be repealed outright,³² the Senate Committee expressed clear concern about the unintended consequences for consumers — the Honourable Senator Keon referred to such consequences as the “Achilles’ heel” of the proposal to repeal the subsection.³³ In general terms, the consumer protection issues that arise in connection with subsection 13(2) can be broken into three related categories: expectations and fairness, rights of restraint, and affirmative rights to use.

1) Expectations and Fairness

Basic expectations and fairness are the starting points for considering the repeal of subsection 13(2) for personal or domestic situations. Personal or domestic situations include (but are not limited to) commissioned photographs of weddings and other special occasions, as well as photographs and portraits of families, couples, maternity, children, babies, and pets.³⁴ If anyone other than the commissioner is getting rights to use photographs in such situations, wishes to exercise such rights, or wishes to deny the commissioner the ability to use or restrain uses of such photographs, then the commissioner expects to be asked about it, particularly since the commissioner is the impetus for the creation of the photographs and the one who ordered and paid for them. Subsection 13(2) currently ensures that they are asked and fairness dictates that the onus should be on the photographer, not the consumer, to ask.

Consumers have a number of expectations when they commission photographs. They expect to be able to use their photographs and to be able to restrain others from doing so; those expectations are addressed in more detail in sections 2 and 3 of this Part. As a result of those expectations, consumers also expect that they will be asked and that their agreement will be required before anything different transpires. This final expectation is protected by subsection 13(2) because it dictates that, for example, couples who hire and pay for a wedding photographer automatically own copyright in their photographs. What this default copyright allocation really ensures is that, unless they are asked and agree otherwise, the couple has affirmative rights to use their photos and to restrain any

32 The Heritage Committee also recommended that s. 10 be repealed outright.

33 *Senate Hearing November 3*, above note 6 at 12 and 19.

34 The market for pet portraiture appears to be enormous, with thousands of photographers and portrait artists advertising the service online.

other person from doing the same in a way that would infringe their copyright.

Importantly, subsection 13(2) does not prevent photographers from obtaining copyright and it does not dictate to consumers what their expectations must be regarding copyright ownership. The subsection merely imposes a default rule which is subject to an agreement to the contrary. The rule ensures that consumer expectations are protected if the parties do not raise and reach an agreement regarding a different allocation of rights. In other words, subsection 13(2) places the onus on the photographer, rather than everyday consumers, to raise the issue of copyright.

As a matter of basic fairness to consumers, subsection 13(2) establishes an important default position because everyday consumers would otherwise have to take positive steps to negotiate copyright in photographs that they commission. The onus would be on the consumer to raise the issue of rights. In addition to according with common sense consumer expectations, there are a number of additional factors that suggest the onus should rest with the photographer, not the consumer. For example, consumers cannot be assumed to be sophisticated about issues of copyright law, they are typically one-time purchasers without resources, adequate information, or bargaining power, and they are likely to conflate ownership of the tangible goods with ownership of copyright because in both situations they order and pay for something. On the other hand, photographers are in the business of copyright and have access to information and resources through professional associations.³⁵ Photographers are the party with the knowledge, experience, and bargaining power to raise copyright — it is fairest to place the onus on them to do so in the consumer context.

In contrast to the examples discussed above, there are many non-consumer examples where the default in subsection 13(2) appears to be unfair to photographers *vis-à-vis* other creators. For example, a newspaper might ask a freelance photographer in a remote location to take photographs for a breaking story. In the absence of a contract, the newspaper would automatically own copyright in the photographs under subsection 13(2). From the perspective of the newspaper, this is a good default. Going one step further, the Canadian Newspaper Association suggested to the Heritage Committee that subsection 13(2) protects the broader public interest:

35 See for example Canadian Association of Photographers and Illustrators in Communications, <www.capic.org>.

... removing subsection 13(2) from the Copyright Act will have the unintended consequence of affecting the quality of news gathering and dissemination in this country, which does not serve anyone's interests, particularly the public interest, and the public interest should trump the commercial interest.³⁶

Newspapers' concerns were expressed primarily in relation to situations where they must send a photographer on a rush assignment without a contract in place. However, photographers challenged this claim and asserted that it does not describe how newspapers typically operate.³⁷ With respect to these commercial situations, photographers also pointed out that subsection 13(2) puts them in a disadvantaged bargaining position regarding copyright ownership in circumstances where they are already the weaker party to the negotiation:

For me, negotiating with a major corporation like CanWest can be very difficult when CanWest has 10 lawyers to deal with contracts. I would rather see the opposite situation — I would like the rights to belong to me and have CanWest offer me a contract and say they're ready to pay for whatever copyright they want.³⁸

In any event of these disagreements between photographers and newspapers, the rationale for retaining subsection 13(2) for commercially-commissioned works appears to be limited at best because newspapers are typically sophisticated business entities and, as recognized by the Heritage Committee, they are in a position to safeguard their interests through the use of contracts.³⁹

In conclusion, an outright repeal of subsection 13(2) does not reflect consumer's basic expectations or fairness because it shifts the onus to the weaker party, the consumer, to raise the issue of copyrights. At the same time, because the rationale for the rule in the consumer situation does not apply in commercial settings, there is good reason to consider repeal of the section for the latter cases. The difficulty lies in crafting a rule which addresses these different objectives. Before turning to the adequacy of Bill C-60 and possible alternatives, the next two sections consider the impor-

36 *Heritage Hearing*, above note 19.

37 *Ibid.* ("I don't think that's how you do business ... [y]ou never call a guy who you've never known, never heard about, and send him to a place the next minute without negotiating anything.")

38 *Ibid.*

39 *Interim Report*, above note 11 at 7.

tance of subsection 13(2) in relation to consumers' rights to use and to restrain use of their commissioned photographs.

2) Affirmative Rights to Use

When consumers hire and pay for a photographer to take photographs, they expect that they, not the photographer, have the affirmative and exclusive right to use the photographs. Automatically vesting copyright ownership with the commissioner in these circumstances accords with consumers' expectation that they have the right to, for example, make or send copies of their photographs to family and friends.

One could argue that vesting copyright ownership in consumers goes too far because it permits consumers to *commercially* exploit photographs that were originally commissioned for personal purposes, without compensation to the photographer beyond the initial commissioning. These cases are likely infrequent because consumers will likely have little opportunity or incentive to commercialize their personal photographs and because they would be somewhat limited in doing so by reason of photographers' moral rights. Photographers have not raised this as a practical concern under the current subsection.

On the other hand, if consumers are not provided rights to use their photographs, either through copyright ownership or as proposed in Bill C-60, then additional affirmative-rights problems would arise for consumers in connection with vesting copyright with the photographer. For example, if a consumer wished to use a commissioned photograph decades after it was taken (i.e., they wished to exercise an affirmative right), they would have to track down the photographer to obtain permission from them or from the party to whom the photographer had sold or licensed their rights. The problems here are obvious. No cultural or economic purpose is served by forcing John Smith, aged eighty-two, to trace copyright ownership and to clear copyright in order to use a school picture taken of him seventy-five years earlier.

A related consequence is that consumers' personal commissioned photographs can be effectively held hostage in terms of fees for exercising affirmative rights. Honourable Senator Trenholme Counsell was alert to this problem during a Senate Committee hearing and asked the Canadian Photographers' Coalition (CPC) "What if that fee suddenly became \$2500?"⁴⁰

40 Canada, Standing Senate Committee of Social Affairs, Science and Technology, *Minutes of Proceedings* (28 October 2004), <www.parl.gc.ca/38/1/parlbus/

The CPC's response was that the Senator could go to another photographer for \$75 to redo the photograph.⁴¹ Of course, that response ignores the fact that nobody can go elsewhere to redo their wedding, a twenty-five-year-old school picture, a pregnancy, or a birth. The consumer is forever at the mercy of the photographer in many cases; they must first find the photographer or assignee or licensee of the copyright and then pay the fee demanded in order to make use of the very photographs that they were the impetus for and that they commissioned and paid for.

3) Rights of Restraint

The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer ...

— *Pollard v. Photographic Co.*, 1888⁴²

If subsection 13(2) is repealed, photographers will own copyright in commissioned photographs by default and thus, to the extent permitted by copyright, automatically control how such works are used. This can mean that for up to 120 years or more, the photographer and her heirs would have the copyright-based right to use and commercialize consumer-commissioned photographs, as well as the right to sell or license them to total strangers. Subject to the application of privacy law, which is addressed below, the photographer would be able to do all of this without needing to ask permission and without needing to compensate the consumer.

Vesting ownership of copyright in commissioned photographs in the consumer is important for two reasons in connection with rights of restraint. First, independent of privacy-based interests, consumers have a highly personal interest in having the broadest possible ability to restrain the uses of such photographs. In 1957, the *Royal Commission on Patents, Copyright, Trade Marks and Industrial Design* studied subsection 13(2) and concluded that this was the main reason why the section should not be repealed:

commbus/senate/Com-e/soci-e/o2evb-e.htm?Language=E&Parl=38&Ses=18&comm_id=47> [*Senate Hearing October 28*].

41 *Ibid.*

42 *Pollard v. Photographic Co.* (1888) 40 Ch. Div. 345.

The main reason why the first owner of the copyright should be the person commissioning is that *that person is likely to have a highly personal interest in permitting or refusing to permit reproduction. And this applies not only to photographic portraits but to other photographs which he commissions* A balance must be struck between these conflicting considerations, and we have concluded that the considerations in favor of vesting the copyright in the person commissioning are more weighty.⁴³

Copyright ownership ensures that consumers have a broad ability to restrain uses of their commissioned photographs in accordance with their wishes, whatever those wishes might be. In the modern context, this right of restraint is particularly important to the extent that privacy laws do not provide consumers with the kind or scope of restraint-rights that they expect to have over photographs that they commission.

A second reason for vesting copyright in consumers is that vesting copyright in photographers may aggravate the number and nature of incidents where consumers need to invoke a right of restraint. During hearings before the Senate Committee, the CPC admitted that, even with privacy legislation in place, it is receiving “more and more” calls complaining about what photographers are doing with photographs.⁴⁴ If that is the situation now, then providing copyright ownership to photographers by default may aggravate the problem, while at the same time reducing consumers’ rights to restrain uses.

The usual retort offered to the criticisms identified above is that automatically granting photographers copyright ownership does not pose a threat to consumer interests because privacy law will adequately protect consumers by restraining what the photographer can do with commissioned photographs.⁴⁵ This is the conclusion that the Heritage Committee reached when it recommended that subsection 13(2) be repealed outright.⁴⁶

Framing the restraint-rights issue as merely a privacy issue in this way is unduly limiting from the consumer perspective and does not reflect the true nature of consumer interests in their commissioned photographs. The consumer interest at issue is broadly an issue of the ownership, use, and control of copyrighted photographic works. Although privacy rights may arise in some situations, the basic issue is one of copyright ownership, not

43 *Ilsley Commission*, above note 17 at 46–49 [emphasis added].

44 *Senate Hearing October 28*, above note 40.

45 *Ibid.*

46 *Interim Report*, above note 11 at 7.

privacy. Even to the extent that privacy is relevant at all, it provides only a very limited scope of restraint-rights for consumers.

First, under the *Personal Information Protection and Electronic Documents Act*,⁴⁷ only commercial uses would be actionable, leaving the photographer free to use commissioned photos (ordered and paid for by an ordinary consumer) in *any* non-commercial way. Second, journalistic, artistic, and literary purposes are expressly excluded from the ambit of *PIPEDA* under paragraph 4(2)(c), leaving the photographer free to, for example, display consumer-commissioned photographs at an art exhibit or for any other artistic purpose. This might include display in magazines, on websites, or in books or other media. It is notable that this broad exception in *PIPEDA* would permit commercial uses of consumers' photographs by the photographer and anyone else, provided that the use is artistic. Third, only photographs in which the consumer is identifiable would be potentially covered by privacy laws. This means that body shots, pet portraits, and photographs of homes or other subject matter receive no protection whatsoever. Fourth, privacy rights are lost on death, leaving no right for families to use or control use of photographs commissioned by their deceased relatives. Finally, it is important to note that to the extent provinces enact "substantially similar" legislation to *PIPEDA*, protection for consumers may vary by province.

Outside of *PIPEDA*, consumers might find rights of restraint at common law or in the provincial legislation. In Quebec, privacy is alive and well under the *Quebec Charter of Human Rights and Freedoms*⁴⁸ and the *Quebec Civil Code*, particularly in the wake of the *Aubry* case.⁴⁹ However, other provinces do not have equivalent protections. In certain very limited circumstances, a consumer may have a claim in tort for misappropriation of personality,⁵⁰ defamation, or breach of confidence.

Finally, British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan have created statutory privacy torts that may provide a cause of action to consumers in certain circumstances.⁵¹ In terms of cover-

47 *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 <<http://laws.justice.gc.ca/en/P-8.6/>> [*PIPEDA*].

48 *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 <www.cdudj.qc.ca/en/commun/docs/charter.pdf>.

49 *Aubry v. Éditions Vice-Versa Inc.* 1998 SCC 31, <www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol1/html/1998scr1_0591.html> [1998] 1 S.C.R. 59.

50 See for example *Joseph v. Daniels* (1986), 11 C.P.R. (3d) 544 and *Athans v. Can. Adventure Camps Ltd.* (1977), 80 D.L.R. (3d) 583 (Ont. High Court).

51 *Privacy Act*, R.S.B.C. 1996, c. 373, <www.qp.gov.bc.ca/statreg/stat/P/96373_01.htm>, s. 1 [*BC Privacy Act*]; *The Privacy Act*, R.S.S. 1978, c.P-24 <www.qp.gov>.

age, this represents only four provinces — Ontario does not have such a tort — and, even in the four provinces where they exist, these torts are very limited in their application and focus only on commercial uses. In British Columbia, for example, it is a tort under the *Privacy Act* to use the image of another but only where the use is “... for the purpose of advertising or promoting the sale of, or other trading in, property or services....”⁵² The British Columbia legislation also contains other requirements which severely limit its application of the provision, including in essence a requirement that the plaintiff be famous.

In conclusion, privacy laws will undoubtedly restrict the ability of photographers to use and disclose photographs that contain personal information, but only in a very limited set of circumstances. Photographs that do not contain personal information would not be covered, and even when photographs do contain highly sensitive personal information, there are a wide variety of circumstances — notably non-commercial and artistic uses — in which their use would not violate privacy laws. This would leave photographers with the unrestricted ability in copyright to use consumers’ commissioned photographs. Subsection 13(2) covers these substantial gaps and does much more, ensuring that consumers have the rights they expect and need to restrain uses of photographs that they commission and pay for.

E. CRITIQUING THE PROPOSED AMENDMENTS AND COMPOSING ALTERNATIVES

1) General Problems

Before turning to a number of specific critiques of the photography proposals in Bill C-60, it is important to note two fundamental problems that underlie the photography issues: the definition of the government’s objective and the importance of balance in the Act.

As mentioned above, the government’s objective in the photography amendments is “harmonization.”⁵³ If accepted, this objective has the effect of narrowly framing thinking about photography issues. It suggests

sk.ca/documents/English/Statutes/Statutes/P24.pdf>; *The Privacy Act*, C.C.S.M. c. P125, <<http://web2.gov.mb.ca/laws/statutes/ccsm/f175e.php>>, s. 2(1); *Privacy Act*, R.S.N.L. 1990, c.P-22, <www.hoa.gov.nl.ca/hoa/statutes/p22.htm>, s. 3(1).

52 *BC Privacy Act*, *ibid.*, s. 3.

53 See Government Statement, above note 4.

that anyone who opposes Bill C-60 must be in favor of “disaccord” in the Act, as well as “discrimination” against photographers. In the sections that follow, this chapter endeavours to seek solutions that consider “harmonization” as one factor to consider in defining the right balance regarding the treatment of consumer-commissioned photographs under the Act. However, it is important to question the legitimacy of “harmonization” as an objective in itself. This objective has gone relatively unchallenged in the photography debate thus far.

“Harmonization,” for its own sake, is a solution without a problem. The Act does not work an injustice merely because default ownership of copyright is vested in the writer in the case of commissioned books, while a different rule applies for consumer-commissioned photographs.⁵⁴ If anything, the issue of equity and the balance of rights in the case of consumer-commissioned photographs is an issue between the photographer and the consumer, not between the photographer and other creators. Throughout the recent debate regarding Bill C-60, no concrete mischief or market distortion has been articulated or substantiated regarding the operation of subsection 13(2) in the present market for consumer-commissioned photographs. On the contrary, as articulated in this chapter, there are a number of reasons why the subsection would cause more harm, imbalance, and unintended consequences if it were *not* part of the Act.

Related to the definition of the government’s objective is the issue of whether Bill C-60’s photography provisions are consistent with the underlying purpose of copyright law, as clarified in recent decisions of the Supreme Court of Canada. In *Théberge v. Galerie d’Art du Petit Champlain Inc.*,⁵⁵ Justice Binnie stated (for the majority of the court) that “the proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”⁵⁶

54 Though not obvious, one might argue that there are legal theory or policy reasons why copyright law must be consistent across its treatment of all works, as opposed to having different rules for different classes of work. Although this issue is beyond the scope of this chapter, it should be acknowledged that this chapter implicitly accepts the possibility of different works being treated differently under the Act, as well as the possibility that balance in copyright can be considered in the context of particular works and as part of a greater copyright whole. In fact, as suggested in Part B above, the photography amendments are in any event merely one example of a broader trend of increased rights for rights-holders and decreased rights for the individuals and the public.

55 [2002] 2 S.C.R. 336, <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html>.

56 *Ibid.* at para. 31.

Justice Binnie also sounded a warning for copyright law that too strongly favors rights holders: “excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”⁵⁷ This articulation of the underlying purpose of copyright law and the need for balance was expressly affirmed by a unanimous Supreme Court of Canada two years later in *Law Society of Upper Canada v. CCH Canadian*.⁵⁸ As alluded to above and discussed further below, there are a number of reasons why Bill C-60 veers away from the Supreme Court of Canada’s expression of the purpose of copyright and appears to be imbalanced in its approach to photography issues.

2) Section 10

Although *WCT* compliance is undoubtedly a catalyst for government action regarding section 10, the essential objective behind the repeal of the section appears to be the harmonization of how photographers and other authors are treated under the Act in terms of authorship and term of protection. The term extension proposal raises fundamental questions of balance and the public domain. Although these issues are arguably part of a broader problem of balance which needs to be addressed on a global level in the *Act*, a broader fair dealing right or broader rights for libraries and archives might help address these issues regarding photographs by ensuring that public rights are increased when copyright holders’ rights are increased. Such counter-measures would certainly be consistent with the Supreme Court of Canada’s view of the purpose of copyright.

Another troubling problem with the repeal of section 10 is the unintended copyright consequence for the person who hands their camera to a stranger and asks them to take a family picture at Niagara Falls. Vesting copyright with the stranger in these situations is unacceptable, even if it is unlikely to cause significant problems in practice. Two main alternative approaches could be adopted to address this problem.

57 *Ibid.* at para. 32.

58 [2004] 1 S.C.R. 339, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html> (“As mentioned, in *Théberge*, above, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” at para. 23).

Under the first approach, the individual who owns the negatives or the photographs in such circumstances could be deemed to be the author of the photograph. This would essentially involve retaining subsection 10(2), but only for “personal” situations and only where the person who owns the negatives is a natural person. If either of those two requirements is not met, then the default rule regarding authorship would apply and the photographer would be the author of the work. This approach is balanced and would accomplish each of the key objectives: (1) it protects consumers and properly provides them with copyright and moral rights in relation to their photographs in the identified category of cases where it matters, (2) it allows Canada to meet the WCT requirement regarding term of protection because only natural persons could be authors, and (3) it harmonizes the treatment of photographers with other creators under the Act because the stranger at Niagara Falls is not truly a “photographer” for the purpose of measuring whether photographers are treated on equal footing with other authors under the Act. As an aside, if subsection 10(2) were retained as suggested here, it should also be amended to account for digital photography. Digital means of photography would have to be added to the notion of “negatives” in the subsection.

The second approach could address the “Niagara Falls” case at the ownership level by vesting first ownership of copyright in the consumer, not the stranger. Under this approach, the author would be the photographer and first ownership of copyright would vest in the consumer. This would harmonize treatment of photographers for the same reasons as under the first approach, permit the term extension amendment to be made, and provide consumers with copyright in their photographs. That said, there are at least two reasons why this approach is less desirable than the first approach outlined above: first, the term of protection would be based on the life of a stranger, leaving great doubt about how long copyright would subsist in the photographs, and second, the stranger would have moral rights that could (in theory) restrain the consumer’s ability to use their photographs.

3) Subsection 13(2)

a) Shortcomings of Bill C-60

The proposed repeal of subsection 13(2) raises a number of consumer protection issues, despite the fact that Bill C-60 states that certain consumer uses of commissioned photographs are not an infringement of copyright. When considered in isolation, the issue of consumers’ expectations regarding their affirmative rights is partially addressed by Bill C-60. Because the proposal permits consumers to make non-commercial use of the photo-

graphs that they commission, consumers' expectations are respected. Indeed, because consumers would be limited by photographers' moral rights even if the consumer owned copyright, there may not be an enormous difference between copyright ownership and the affirmative rights provided under Bill C-60. This conclusion is only applicable when the issue of affirmative rights is considered in isolation.

Even when affirmative rights are considered in isolation, however, it is important to note that the exception-based approach adopted by Bill C-60 may have adverse consequences for consumers. Rather than framing certain consumer activities as affirmative rights, Bill C-60 carves them out as exceptions and states that those acts are not infringements of copyright. This approach could have a chilling effect on consumer activities because consumers may be unwilling (and unable) to defend against allegations of infringement made by photographers, or parties to whom photographers have assigned or licensed copyright in consumer-commissioned photographs. In other words, consumers may be unwilling make use of their photographs because doing so requires them to wager that a court might find them to fall within the exception to infringement carved out in Bill C-60. Consumers may also find that they are unable to make certain uses because the chilling effect may extend to service providers — photo printing labs may increasingly refuse to copy photographs for consumers.⁵⁹

Beyond affirmative rights, Bill C-60 fails to address basic consumer expectations, fairness and rights of restraint. The next paragraphs consider these shortcomings and the next section discusses alternative ways to address them.

Bill C-60 addresses the issue of onus and fairness in only a limited way. By providing a form of use-rights to consumers, it does not impose an onus on consumers to raise the issue of copyright, at least in respect of many uses that they would likely wish to make of personal photos that they commission — the proposal provides them with those rights by default. That said, consumers might nevertheless expect that when they hire and pay for a photographer, they have full copyright in the resulting photographs. If so, then Bill C-60 effectively imposes an onus on the consumer to raise the issue of rights insofar as the rights they expect are something more than what the Bill provides.

The other aspect of onus relates to use of the photographs by the photographer. Because Bill C-60 vests copyright ownership in the photogra-

59 There is increasing anecdotal evidence that photo labs are already refusing to copy consumers' photographs. See for example Dan Bell, "Copyrights cause photo labs to refuse printing for customers" (17 June 2005), <www.cdfreaks.com/news/11961>.

pher, it undermines consumers' expectation that they will be asked for permission when a photographer wishes to use their photographs. To the extent that this expectation is not reflected in privacy law, the repeal of subsection 13(2) unfairly shifts the onus from photographer to consumer to raise the issue of rights-allocation.

Bill C-60's effect of shifting the onus away from the photographer is also unfair to consumers because it leaves little incentive for the photographer to raise the issue of copyright with consumers at all. Take the example of commissioned photographs of a pet. The consumer in this situation might have paid a great deal of money for the photographs, they probably assume that they have copyright in the resulting photographs, and they probably do not know that they need to raise the issue of copyright. In this example, the photographer may have no incentive to raise the rights issue or to present a contract to the consumer. Absent an agreement, the photographer would have copyright and moral rights in the photographs for their life plus fifty years. This means that (subject only to possible privacy or related restraints) the photographer has the right to commercialize the photographs without the knowledge or permission of the consumer who ordered and paid for them, and without any obligation to remunerate the consumer for any profits made. The same holds true for all artistic uses of consumers' photographs which are not covered by privacy legislation.

Finally, Bill C-60 does nothing to address the issue of consumers' ability to restrain uses of photographs that they commission. The rights provided to consumers under Bill C-60 are not exclusive rights in the nature of copyright — these cannot form the basis of a right of restraint. More importantly, with copyright vesting in the photographer by default, the Bill does not respect consumers' highly personal interest in controlling how their commissioned photographs are used, whether by reason of privacy or otherwise. At the same time that Bill C-60 takes away this right from consumers, it could also contribute to increased incidents of photographers making unauthorized use of commissioned photographs.

In effect, Bill C-60 relies entirely on privacy laws to provide consumers with rights of restraint.⁶⁰ As discussed above, there are numerous reasons why this reliance is misplaced. First, privacy laws are a confusing patchwork that do not offer uniform rights of restraint across Canada. Second, privacy laws do not apply in many important circumstances where con-

60 FAQ, above note 4 ("Existing protections of personal information and privacy legislation at the federal and provincial levels will continue to apply, regardless of the ownership of copyright in commissioned photographs").

sumers would expect that they have the ability to restrain use, including situations where no personal information is involved, where the use is non-commercial, or where the purpose is artistic.

Those who support the repeal of subsection 13(2) also sometimes suggest that privacy interests cannot justify its retention in the Act because copyright law is not intended to provide privacy protection.⁶¹ This is misguided in two substantial respects. First, subsection 13(2) protects much broader consumer interests than mere privacy interests — this is a copyright issue which belongs in the Act. For example, even though England's *Copyright, Designs and Patents Act, 1988* makes photographers the first owners of copyright in commissioned works, the legislation provides consumers with copyright-based rights of restraint:

- (1) A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have—
 - (a) copies of the work issued to the public,
 - (b) the work exhibited or shown in public, or
 - (c) the work broadcast or included in a cable programme service;
- ...

These rights of restraint are reflective of copyright interests rather than mere privacy interests.⁶³ For example, these copyright-based rights of restraint do not require that the commissioner appear in the photographs or films, suggesting that the interests protected are more than privacy interests. New Zealand goes one step further by not only providing commissioners with first ownership of copyright in a variety of works by default, but also setting out specific rights of restraint for consumers who commission photographs and films (in addition to the general rights of restraint that they might enjoy as copyright holders).⁶⁴ The rights of restraint provided by default in subsection 13(2) are more than mere privacy-based interests; this fact is made clear by the numerous examples of where privacy does not provide consumers a right of restraint, but where any reasonable person would conclude that a right of restraint should exist.

61 See for example *From Gutenberg to Telidon*, above note 16.

62 *Copyright, Designs and Patents Act 1988*, Ch. 48, <www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm>, s. 85.

63 See also *Ilsley Commission*, above note 17.

64 *Copyright Act, 1994*, No.143, <www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes>, s. 105 [*New Zealand Copyright Act*].

Second, even if subsection 13(2) does overlap with privacy to a great extent, it does not follow that copyright should not protect such interests. Subsection 13(3) is a useful parallel to help understand this point. In this section, Parliament decided in its wisdom to vest initial ownership of copyright in employers by default. This subsection protects the (primarily economic) interests of employers. The point is that ownership of copyright in a work is a matter for the Act to address and to allocate on whatever basis is appropriate and balanced in the circumstances. Subsection 13(3) sets out a default position that protects the interests of employers while subsection 13(2) allocates a default position that protects the interests of consumers. In each case, the interests of the party requesting and paying for the work are protected. The *Ilseley Commission* picked up on this parallel between commissioned works and subsection 13(3):

One reason for leaving copyright in commissioned works with the person commissioning is that to leave it with the person commissioned makes (we think) too sharp a distinction between the case where there is a contract of service and the case where there is a contract for services. Many cases would be on the border line.⁶⁵

b) Developing a balanced solution for commissioned works

The shortcomings of Bill C-60 could be largely addressed by adopting the model currently used in Australia. For all photographs commissioned for private or domestic purposes, Australia vests copyright with the commissioner but allows the photographer to restrain uses not contemplated at the time of commissioning:

the [commissioner] is the owner of any copyright subsisting in the work by virtue of this Part, but, if at the time the agreement was made that person made known, expressly or by implication, to the author of the work the purpose for which the work was required, the author is entitled to restrain the doing, otherwise than for that purpose, of any act comprised in the copyright in the work.⁶⁶

This ensures that photographers can prevent consumers from unfairly exploiting and profiting from commissioned works. The Australian default rule puts the onus on the photographer; if the photographer does not raise

⁶⁵ *Ilseley Commission*, above note 17 at 48.

⁶⁶ *Copyright Act 1968* (Cth.), <<http://aide.austlii.edu.au/TestbedSwiki/49.html>>, s. 35.

the issue of restraining the consumer's use, or if the consumer's purpose is not obvious, then the consumer is permitted to make full copyright use of their commissioned photographs. This solution appears to respect each of the consumer issues and expectations identified in this chapter, while at the same time placing the onus properly on the photographer to raise the issue of copyright, or at least to ensure the consumer is specific about what uses he intends to make of his photograph. The one undesirable aspect of the Australian model is the use of the phrase "or by implication." Given that photographers can be expected to be savvy about copyright, it would be preferable to encourage them to raise copyright issues explicitly and to present consumers with concrete agreements, rather than relying on vague ideas about what can or cannot be implied into certain commissions.

In order to further ensure that consumer interests are protected irrespective of copyright ownership and any standard form contract that photographers might present to consumers, Canada could add to the modified-Australian model described above the kind of inalienable copyright-based rights of restraint contained in the English and New Zealand legislation.

Photographers might protest that the solution proposed here discriminates against them, even if only in a very narrow category of cases. One response to this might be that the different treatment is justified in the circumstances of such cases given the unique nature of photographs and the need to balance rights in the Act. However, the other alternative would be to treat all creators just as photographers would be treated under such a rule — i.e., extend the rule to the private or domestic commissioning of more than just photographic works. This issue was raised by the Minister of Canadian Heritage who suggested that Canadian Heritage was considering whether to extend the rule regarding commissioned works to include commissioned films and videos — e.g., wedding videos.⁶⁷

Although the application of the default rule in subsection 13(2) seems to take on particular significance in the context of photographs and videos, which can be highly personal, the rationale for vesting default copyright in the consumer may not be limited to these types of works. New Zealand provides a precedent in this regard, providing first ownership of copyright to consumers in respect of commissioned photographs, computer programs, paintings, drawings, diagrams, maps, charts, plans, en-

67 Canada, Canadian Heritage, *Status Report on Copyright Reform* (24 March 2004), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01134e.html>>.

gravings, models, sculptures, films and sound recordings.⁶⁸ Canada might consider whether the rule for personal and domestic commissioned works should be extended to all categories of works, or to a specific list of works as in New Zealand. Under this approach, all creators are treated more or less equally and the default rule favours consumers where appropriate. Ironically, given the government's intention to "modernize" the Act,⁶⁹ this model would bring Canada somewhat closer to the English *Copyright Act of 1868* which provided that copyright in all works made to order belonged to the commissioner.⁷⁰

F. CONCLUSION

Having come to the end of this chapter, the wisdom in the Honourable Senator Kirby's words is clear: "there is nothing in life that is as simple, when you get into it, as it looks on the surface."⁷¹ This chapter has reviewed a number of important reasons why consumers who commission works ought to retain first ownership of copyright by default and why their interests, and the public interest, need to be accounted for in the proposed authorship and term extension amendments in Bill C-60. Consumer expectations and fairness, affirmative rights, and rights of restraint all militate strongly in favor of retaining subsection 13(2) for photographs commissioned for personal and domestic purposes. The same rationale may justify extending the application of the rule to other works as well. The adequacy of Bill C-60's "harmonization" amendments has been analyzed and criticized and a number of possible alternative solutions have been proposed. The alternative solutions proposed here strive to treat all creators and works in the same manner, but only as one factor to consider in determining the proper copyright balance. It is hoped that this chapter will help frame debate around the photography issues in copyright reform more broadly than through the government's narrow lens of "harmonization."

68 *New Zealand Copyright Act*, above note 64, s. 21.

69 Canada, Industry Canada, "Government to Modernize Copyright Legislation" (22 June 2001), <www.ic.gc.ca/cmb/Welcomeic.nsf/o/85256a220056c2a485256a710062b454?OpenDocument>.

70 *Copyright Act of 1868*, above note 18.

71 *Senate Hearing November 3*, above note 6 at 12.