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VIA EMAIL

Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Committee Members:

Re: Statutory Review of the *Copyright Act*

I want to thank the Committee for its invitation to address it as part of this important hearing.

My brief submission to the Committee is attached, but I first wanted to give the Committee some idea of my experience and viewpoint on the topics being discussed at this hearing.

I have been practicing law in Ontario since 1984, have been a Certified Specialist in Civil Litigation since 1994 and a Certified Specialist in Intellectual Property (Copyright) since 2005. I have at one time or another represented just about every type of copyright participant, including artists, authors, composers, photographers, music, film and TV performers, film and television producers and directors, radio and television broadcasters, motion picture theatres, live theatres, record labels, video game producers, Internet service providers, telecommunication companies, book and magazine publishers, educational software publishers, software developers, software users, sports teams and athletes, industry associations, many types of users and distributors of copyright works, and many others. In addition to litigating copyright issues at all levels of Canadian courts, including the Supreme Court of Canada, I have been involved in various Copyright Board hearings since 1992 and have represented a wide range of clients before the Board on tariffs relating to communications to the public of music, reproductions of musical recordings, retransmission of distant television signals, live performances of music in various venues, and applications for licences for the use of works by unlocatable copyright owners. I was the author of the copyright section of "The Cyberspace is not a 'No Law Land'", the landmark 1997 study commissioned by Industry Canada on liability on the Internet, and have given scores of presentations and speeches on copyright issues over the years.

To put it simply, I've been around, copyright-wise.

I hope my thoughts on some of the issues before you are of some interest. I have not consulted with any of my clients, either past or present, concerning the content of my submission, and I do not pretend to represent any other individual, company or group.

I have reviewed the submissions that have to date been made to the Committee by others. I have chosen to make comments concerning some discrete issues which have been raised and which I find particularly interesting.

The one issue I have not commented on is the important dispute regarding educational fair dealing, about which the Committee has received a wide range of viewpoints and much data. I do not feel that I can add much useful to the mountain of material the Committee has already received on this issue, so I will leave it to others.

The only general comment I would make is that all sides in the dispute over educational fair dealing (as well those commenting on many other issues before the Committee) seem to rely on the concept of "balance" in copyright, a concept that I heartily agree with and that has been repeatedly promoted by the Supreme Court of Canada. However, like art, copyright balance is truly in the eye of the beholder. My only comment is that the side of the balance question which is often directly opposite to the interests of copyright creators and owners is the interest of the public, and the public interest in copyright issues is all too often is rather diffuse and difficult to identify, rationalize and value. I urge the Committee to always remember the interests of the public in considering how copyright balance should be created and maintained.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Mark Hayes', with a stylized flourish at the end.

Mark Hayes

November 2, 2018

To: Standing Committee on Industry, Science and Technology

From: Mark S. Hayes, Hayes eLaw LLP

Re: Statutory Review of the *Copyright Act*

Dear Committee Members:

The following are my brief comments on some of the issues which the Committee will be considering, some of which are fairly high profile, and others more obscure (but nevertheless important). I would be pleased to answer any questions the committee may have about these or other issues during my appearance on November 7, 2018.

Copyright Board and Tariff Enforcement

As Ministers Bain and Rodriguez have said in their recent letter to the Committee, “certain stakeholders recommended that the government clarify when Board-set rates must be paid and provide collective management organizations stronger tools for their enforcement.” While I understand that this issue has been raised in connection with the hotly contested educational tariffs (about which I am not commenting), I would like to highlight two issues surrounding tariff and royalty enforcement.

First, as a general matter, it is important to note that the role of the Copyright Board and its predecessor bodies has always been that of a rate setter, not an enforcement arm. The Board is not equipped to try to enforce its tariffs or approved agreements – that is the role of the courts, and this is confirmed by the current Act and proposed new ss. 73 and 73.1.

Second, I recommend that the Committee review the punitive provisions of s. 38.1(4) of the Act, which are proposed to be clarified in proposed new ss. 38.1(4) and (4.1). These provisions are intended to provide an incentive to users to pay the royalties due under an approved tariff by ensuring that users will have to pay more if they avoid payment until a collective is forced to take legal action against them.

However, in practice this provision is also being used by collectives as a threat to force users to accept questionable demands for royalties using aggressive and often questionable interpretations of the Act and relevant tariffs. One example was a dispute several years ago between radio stations and collectives over the interpretation of the Regulations defining the term “advertising revenues.” Radio stations had for some years paid royalties which they thought to be owing based on their reading of the Regulations. Some of the collectives eventually challenged that interpretation and threatened to sue for 10 times difference between what the stations had paid and what the collectives claimed was owing. This forced the broadcasters to apply to the Federal Court for an interpretation of the Regulations. In my view, these types of threats are an abuse of this section of the Act. I would recommend that proposed s. 38.1(4) be amended as follows:

“38.1 (4) A collective society or copyright owner who has authorized a collective society to act on their behalf may make an election under this section with respect to an act set out in subsection

(4.1) only if applicable royalties are set out in an approved tariff or fixed under subsection 71(2) and the defendant has not paid them and has not raised a legitimate dispute concerning the amount payable or the application of the tariff to the defendant. If they make the election, the collective society or copyright owner may only recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in respect of such acts in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.”

Charitable Exemption

SOCAN has argued in its submission to the Committee that the charitable exemption in s. 32.2(3) of the Act should be amended so that it could only be relied upon if the charity did not pay any of the performers or make any profit from the performance. I have represented several of the organizations which claim the charitable exemption and I can attest that SOCAN’s description of the issue is misleading and its proposed “solution” is unworkable. What’s more, numerous organizations have challenged SOCAN to cooperate in presenting a test case to the courts to settle this issue, but SOCAN has refused to do so.

SOCAN argues that charities claim the benefit of the exemption “by taking the position that they have obtained charitable status from the Canadian Revenue Agency pursuant to the *Income Tax Act*.” I am not aware of any charitable presenting organizations that take this position. Instead, as SOCAN is well aware, most presenting organizations claim the exemption on the basis that their charitable charter requires them to present musical performances – it is in fact an integral part of what they do as charities. Further, although performers and other staff at these events may be paid, the entirety of the net proceeds of the performances in question is used for the charity’s charitable purposes – and this is monitored by the Canada Revenue Agency.

The change proposed by SOCAN would eviscerate the extensive musical programs presented by charitable organizations such as symphonies and church and school programs, as well as established musical and educational programs such as those presented by many jazz, folk and other festivals across the country and by institutions like the Royal Conservatory of Music in Toronto.

Reversion of Copyright

My colleague Bob Tarantino has argued before the Committee that the reversion right set out in s. 14 of the Act should be repealed. With great respect I have to disagree.

Mr. Tarantino argues that the continuation of the reversion right creates uncertainty since it occurs 25 years after the death of the author of a work, and it is impossible to know when that occurs. In fact, any uncertainty that exists is a function of the “life of the author plus” rule of copyright term duration which has existed in most copyright systems around the world for many years and is one of the bedrock concepts of the Berne Convention. Eliminating the reversion right will not change this uncertainty.

Mr. Tarantino also argues that the uncertainty caused by the s. 14 reversion right inhibits the licensing of copyright works in Canada. In fact, s. 203 of the US Copyright Act has an even more generous reversion right (the rights revert to the author 35 years after the grant of right) and no-one could argue that there is not a robust licensing market in the United States.

The reversion right was created to provide some return to the family of the authors of the very small number of works that still have commercial value 25 years after the death of the author, value that the author and his or her heirs may not have been able to realize during the author's lifetime due to unequitable licensing arrangements made before the author's commercial value was realized. There is no compelling reason to change that provision.

Definition of "Sound Recording"

Some of the copyright collectives have asked that the definition of "sound recording" in the Act be changed so that musical scores of audiovisual works are included. This issue was debated many years ago when sound recordings were added to the Act, and I represented Canadian broadcasters who, with others, took this issue all the way to the Supreme Court and were successful at every level. Audiovisual works are excluded from the definition of "sound recordings" since the inclusion of musical works and other sounds in audiovisual works are negotiated when the work is created, and, as both legislators and the courts have repeatedly found, copyright owners are fully remunerated at the "front end" through these agreements. I would respectfully adopt the submissions made to this Committee by the Movie Theatre Association of Canada.

Authorship of Audiovisual Works

The Directors Guild and the Writers Guild have both suggested that the current uncertainty surrounding the identity of the authors of works involving many creative contributors (in particular motion pictures and television shows) should be resolved by deeming that the director and screenwriter of an audiovisual work are the authors of the work. In my view, this proposal creates more issues than it solves.

There is no doubt that there is uncertainty in Canada concerning the authorship of motion pictures and television shows. Canada does not have "work for hire" provisions like those in the US, which allow the producer of a collaborative work like a movie to be the author. While most of the short term issues regarding authorship of audiovisual works are dealt with by extensive licensing arrangements whereby all of the creative contributors to an audiovisual work assign their copyrights to the producer and waive all moral rights, the identity of the original authors is a long term issue as a result of the term of copyright being dependent on the life of the author and the reversion right being available 25 years after the author's death. In recent years, for example, there has been considerable uncertainty whether some older motion pictures which have entered the public domain in the US and other jurisdictions are still under copyright in Canada since it is difficult to determine who was the author of the movie and when they died.

While the proposal by the Directors Guild and the Writers Guild would remove some of this uncertainty, it is far from clear whether it is the correct solution for several reasons:

- In addition to the director and the screenwriter, there are others involved in the creation of a movie or TV show who can reasonably claim a share of authorship, including the cinematographer and the score composer (both are deemed to be authors for some purposes by some European copyright statutes).

- Since the trend in many TV shows is to have different writers and directors for each episode, the proposed rule would mean that each episode of a TV series would have a different term of copyright protection, possibly making future licensing and syndication more difficult.
- While directors and screenwriters have fairly well-defined roles in productions of mainstream movies and TV shows, the roles played by individuals in the creation of smaller independent audiovisual works may not fit neatly into these categories or have the same titles. Similar concerns would apply to other types of audiovisual works such as video games and interactive media, which do not typically have a “director” or “screenwriter.”
- Lastly, and perhaps most importantly, because any such change would make the Canadian authorship rules for audiovisual works markedly different from the “work for hire” rules in the US, the potential impact on the production of film and TV works in Canada would have to be carefully studied before any such change is considered.

AI and “Machine learning Exemption”

Microsoft Canada, BSA and Element AI have proposed a specific exemption for “machine learning” by artificial intelligence programs, such that the incidental reproductions necessary to allow such AI programs to “read” copyright material and learn from them would not attract copyright liability. In their oral testimony, Element AI and the BSA seemed to suggest that this should be done by way of a new fair dealing exemption for machine learning.

While I agree that this concept should be studied in more detail, my view is that the concern about machine learning is a subset of a much larger issue relating to “incidental copying,” which is a feature of digital networks generally. These issues were intended to be dealt with, at least in part, by the introduction of the s. 30.71 exception for “Temporary Reproductions for Technological Processes”. Unfortunately, in 2016, the Copyright Board, in a decision involving temporary reproductions made by broadcasters which had to change the format of sound recordings in order to allow such sound recordings to be broadcast, gave an extremely narrow interpretation to s. 30.71 which severely limited the section’s usefulness for many applications, including AI machine learning.

My suggestion would be that, rather than creating a new fair dealing exemption for machine learning, s. 30.71 should be amended to make it clear that:

- Technological processes can involve human intervention;
- Technological processes are not limited to automatic processes or those that are instantaneous;
- Machine learning is a technological process;
- A technological process can be for the purpose of format changes to facilitate accessing or using data or content; and
- The “infringement of copyright” referred to in s. 30.71(b) does not refer to the making of reproductions that are themselves an integral part of the technological process.