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Standing Committee on Industry,
Science and Technology
Comité permanent de l'industrie,
des sciences et de la technologie
indu@parl.gc.ca

Brief - Statutory Review of the *Copyright Act*
submitted by Pascale Chapdelaine, on behalf of
Canadian intellectual property law scholars

Dear Chair and Committee members,

This brief provides specific recommendations for amendments to the *Act* and addresses general issues and principles that the Committee should consider as part of the statutory review. A brief by Myra Tawfik (on behalf of Canadian intellectual property law scholars) filed concurrently to this brief makes six additional recommendations. The recommendations reflect the opinion of the signatories to the briefs and are informed by years of study and teaching of Canadian and international intellectual property law.

The signatories would welcome the opportunity to appear separately before the Committee to explain and expand upon particular aspects of this brief and/or other copyright reform proposals not addressed herein.

1. Introduction: Guiding Principles

Canadian copyright law is the result of legislative and judicial deliberations that have provided a robust set of rules and principles that conform to Canada's international obligations while being specific to our context and place. We invite the Committee to adopt three guiding principles as it contemplates amendments to the *Act*.

Firstly, the current *Act* and the jurisprudence that informs it are reflective of a copyright system that seeks to balance the rights and interests of both copyright users and copyright owners. A copyright system that is too attentive to the exclusive rights of copyright owners without taking into account the impact of new technologies, the interests of users accessing these works, and the public interest (e.g., access to knowledge, education, creativity and innovation, personal property rights in the copy of a work, privacy interests, and respect for fundamental rights) lacks credibility and ultimately legitimacy. From its inception, one of copyright law's predominant concerns was to ensure the public's access to creative works. Its primary policy purpose has never been exclusively about rewarding creators for the act of creating or exclusively about providing industry with a return on its investment.

The Canadian copyright system is being noticed worldwide for its unique and creative approach to balancing competing interests. (e.g., introducing an exception to copyright infringement for non-commercial user-generated content), and policy-makers should be proud of this recognition. It is with this in mind that the Committee should build from the existing body of copyright law, and should view with extreme caution any external sources of pressure regarding issues relating to user rights such as fair dealing, or copyright term extension, or changes to our current "notice and notice" system for copyright infringement, among other aspects of our law that have been identified as 'problematic' in international trade negotiations.

It is understood that new obligations undertaken by Canada under the new USMCA may limit the range of policy options available to the Committee in certain respects such as, e.g., term extension. We urge the Committee to identify and make use of flexibilities built into Canada's international agreements to minimize the impact of such external pressures and to prioritize Canadian interests and domestic policy goals to the extent possible. Where concessions have been made, counter-balancing policy solutions should be considered. In particular, the extension of copyright's term to seventy years after the death of the author imposes significant costs on Canada by diminishing the public domain without conferring corresponding benefits. This should be resisted or the consequences minimized by any means available.

Secondly, copyright law needs to move away from a tendency of exceptionalism and be integrated as much as possible with underlying general bodies of Canadian private and public law. This may seem obvious, but recent developments, especially the introduction of anti-circumvention measures in Canadian copyright law, have obscured this important consideration. The legislative reform process ought to review and ensure copyright law's compliance and consistency with other bodies of Canadian law. First and foremost, the *Act* must comply with the *Canadian Charter of Rights and Freedoms,* and the restrictions it imposes on freedom of expression must therefore be demonstrably justifiable. Also, copyright law needs to be, as much as possible, consistent with the law of (personal) property, contracts, remedies, competition law, etc. For instance, the Committee should resist calls to import copyright reform proposals from other jurisdictions (such as the creation of additional rights for newspaper publishers being debated in the European Union), without careful consideration as to whether and the extent to which these proposals comply and are consistent with Canadian law, including Charter-protected rights to freedom of expression and of the press.

Thirdly, the Committee should bear in mind the principle of technological neutrality as affirmed by the Supreme Court of Canada such that any further modernization of the legislation operates independently of any specific technology or anticipated future technologies, and seeks to maintain copyright's balance through guiding principles that operate consistently across technologies and over time.

In light of these guiding principles, we will address four areas of concern that pertain to users' rights.

2. Exceptions to Copyright Infringement – "Users' Rights"

The jurisprudential developments of the Supreme Court of Canada in recent years and the introduction of new exceptions to copyright infringement in 2012, have contributed to the development of a copyright regime that is attentive to the rights of users and the public domain, as well as to authors' and owners' rights.

There has been much discussion concerning the recent addition of the purpose of "education" within fair dealing and the effects thereof. Data provided by multiple post-secondary institutions during this review illustrate that expenditure of educational content is increasing, particularly with respect to licensed digital resources. Furthermore, the use of open educational resources is also increasing. At the same time, Canadian publishing continues to do well, despite challenges for the publishing sector world-wide.

Bringing "education" into the ambit of fair dealing simply acknowledged that that some unauthorized uses pertaining to teaching and learning are legitimate, and should not be subjected to licensing and payment, provided that they meet the requirements of fairness as set out by case law.

While progress has been made toward greater recognition of user rights, much remains to be done. In our rapidly changing technological environment, the lines between authors and users are often indistinct; so-called users now interact with works in ways that are creative, transformative and productive. More generally, users' interactions with copyright works contribute as much as authors' original creations do to the pursuit of copyright's purpose as interpreted by the Supreme Court, namely "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." [1] Copyright law must do more to ensure that creators' rights are not strengthened to such an extent that the social and economic benefits of these interactions are lost.

(i) Substitute Fair Dealing Provisions with Fair-use Style Provisions

Parliament should clarify that the principle of fair dealing, now codified in ss 29-29.2, remains a cornerstone of the *Act* by ensuring its flexibility and applicability to a wide range of purposes, subject to a criterion of fairness. This could be done by adding "such as" before the listed purposes to clarify that they are merely illustrative, while embedding a judicially developed flexible test, as set out in *CCH Canadian Ltd v Law Society of Upper Canada*,[2] that would continue to guide a contextual assessment of the fairness of an unauthorized use with a view to the rights and interests of users, copyright owners, and the public.

Broadening the applicability of fair dealing to potentially any purpose (subject to the test of fairness) would be consistent with a noticeable trend worldwide,[3] and would not be as drastic a change as some might suggest. The Supreme Court requires a large and liberal interpretation of

[1] See *Théberge* v *Gallerie d'art du petit Champlain Inc.*, 2002 SCC 34 at para 30.
[2] 2004 SCC 13.
[3] See Peter K. Yu, "Customizing Fair Use Transplants" 7 Laws 2018 9, online: http://www.mdpi.com/2075-471X/7/1/9, detailing the several jurisdictions that have adopted a fair use regime.

the stated purposes for which a user may be allowed to deal fairly with a work. At the same time, a fair use–style provision, while allowing the judiciary to take into account the purpose of the use, has the benefit of not being limited at the outset by a closed list of purposes stated in the statute. Maintaining a list of acceptable purposes is likely to require amendments in the future (as was done with the addition of the parody, satire and education purposes in the last major copyright reform in 2012), and may exclude certain unforeseen uses that are otherwise fair and consistent with copyright's purposes. A fair-use style provision would ensure greater flexibility as new technologies, methods of creation and dissemination of copyright works arise.

(ii) No Contracting out of User Rights

The *Act* should specifically state that copyright owners cannot "contract out" of exceptions to copyright infringement. That is, contract terms setting aside exceptions to copyright infringement would be non-enforceable. This would be the natural evolution toward solidifying user rights. Recently the UK has introduced provisions that specifically state that copyright owners cannot contract out of certain exceptions to copyright infringement. A similar provision should be introduced with respect to non-negotiated standard form agreements. For negotiated agreements, a rebuttable presumption should apply that contract clauses setting aside the application of exceptions to copyright infringement are not enforceable. This would leave room for exceptional cases where contracting out of exceptions to copyright infringement may be required to fulfill other important goals of copyright law.

(iii) Technological Protection Measures (TPMs) not to Override User Rights

The *Act*'s TPM anti-circumvention measures deprive users of their rights by making it an infringement to circumvent access control TPMs even to perform legitimate acts. In other words, anti-circumvention measures apply regardless of copyright infringement. The Committee should make recommendations that invite Parliament to use all flexibilities, including the grandfathering effect of the USMCA,[4] to ensure that TPM protections do not override the application of exceptions to copyright infringement. Circumvention for non-infringing purposes should be lawful.

"Code is law" and anti-circumvention measures are *de facto* stronger obstacles to the legitimate exercise of exceptions to copyright infringement than contract terms that override user rights. Allowing the use of TPMs to essentially eviscerate the application of exceptions to copyright infringement seriously undermines the concept of "user rights" as it has progressively evolved in Canada.

The *Act* should oblige copyright owners to facilitate the legitimate exercise of exceptions to copyright infringement in the architecture of their TPMs, and users should have proper remedies when copyright owners fail in their obligations (see concurrent brief submitted by Myra Tawfik et al.: "Remedies for copyright users").

[4] Footnote 64 provides that limitations, exceptions and regulations in respect of TPM protections that are in place prior to the coming into force of the USMCA can be maintained provided that protections meet the requirements of Art. 20.H.11.1.

(iv) Application of Exceptions to Copyright Infringement to Moral Rights

As recognized by the Supreme Court, "an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity."[5] The fair dealing provisions in the *Act* should be amended to clarify that fair dealing "does not infringe copyright or moral rights." The non-commercial user-generated content exception in section 29.21 should similarly be amended to confirm its availability as a defence to both moral rights and copyright infringement. The same reasoning applies to other limits and exceptions in the *Act* that are designed to permit downstream creative uses without the chilling risk of liability for moral rights infringement, including, e.g., the exception for "incidental use" in section 30.7 and other permitted acts in section 32.2.

To sum up, we recommend that:

- Canada adopt fair-use style provisions;
- Contract clauses overriding user rights be made non-enforceable;
- Circumvention of TPMs for non-infringing purposes be allowed;
- Exceptions to copyright infringement be applied to moral rights.

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[5] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para. 21.