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Standing Committee on Industry,
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Comité permanent de l'industrie,
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indu@parl.gc.ca

Fostering Digital Innovation Through an Open-Ended Fair Dealing Regime:
The Case of "Text and Data Mining"
Brief - Statutory Review of the Copyright Act

Dear Chair and Committee members,

This brief recommends the adoption of an open-ended fair dealing regime in the *Copyright Act*. In its present form, fair dealing only covers certain specific purposes and thus does not offer predictable guidance for the new uses of copyrighted content resulting from recent technological advancements. For instance, it is not clear whether text and data mining processes, which depend on the analysis by computers of large volumes of data subjected to copyright, is included in the realm of the Canadian fair dealing. Text and data mining is at the heart of the machine learning, a technology that Canada seeks to encourage in its artificial intelligence (AI) innovation policy.[1] Hence, this brief suggests that to establish itself as both a leader in technological innovation and a welcoming market for research in AI, Canada must demonstrate clearer support for the new uses of copyrighted works in its *Copyright Act*. More importantly, this brief proposes that opening fair dealing provisions beyond few defined categories is in line with Canadian copyright policy. This amendment is far less radical than it first appears.

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Luke Maynard, J.D. Candidate 2019, University of Toronto
Pierre-Luc Racine, LL.M., University of Toronto
John Sime, J.D. Candidate 2019, University of Toronto

[1] Canada, Department of Finance, *Budget 2017: Building a Strong Middle Class*, (Ottawa: Government of Canada Publications, 2017) at 103-4; Canada, Department of Finance, *Budget 2018: Equality & Growth, A Strong Middle Class*, (Ottawa: Government of Canada Publications, 2018) at 85, 92.

1. Background: The Case of Text and Data Mining

In past decades, digital technologies and new tools, such as text and data mining, emerged as important vectors of innovation. However, their interaction with the *Copyright Act*'s fair dealing provisions makes many new uses a risky business. They do not easily fall in one of the specific categories (research, private study, education, parody, satire, criticism, review, and news reporting) provided in the *Copyright Act*.[2] For instance, it is unclear whether copies of protected works produced through text and data mining can raise copyright liability. During this process, numerous copies are created by sophisticated software algorithms for the discovering of new connections within the dataset.[3] Although machines reproduce and analyze data without human intervention, the authorization of copyright holders to use their works for this purpose of text and data mining may still be required.[4] Under these potential copyright restrictions, researchers could be forced to rely on low-risk, public domain works which are more biased, less current, and more poorly suited to their research.[5] Most works that have entered the public domain have done so through the passage of time; they do not reflect current information or contemporary values and can lead to results that are obsolete.[6]

Therefore, in order to be future-proofed against the demands of innovation, the *Copyright Act* must provide a clearer framework for developers and their machines to analyze copyrighted works. A more predictable, transparent inclusion of new uses would account technological advancements without negating the requirement of lawful access to the copyrighted information in the first place. Whether through the purchase of information or partnership with libraries and archives, users would still have to secure a legitimate access to copyrighted works before conducting their fair dealing activities, usually to the benefit or enrichment of the copyright holder. In sum, enshrining new uses into the fair dealing provisions strikes a balance between users and copyright holders while preventing the "double-dipping" by which innovators who have paid once for access to information may be unfairly obligated to pay a second time.

2. Interpretation of the Current Fair Dealing Regime

As abovementioned, the current Canadian fair dealing is, on a plain reading of the statute, a closed and categorical regime. An assessment of the fairness of the dealing only proceeds once it has been established that the purpose of the dealing slots into one of these statutory categories.[7] Nonetheless, the Supreme Court, in *CCH v Law Society of Upper Canada*, established that the

[2] *Copyright Act*, RSC 1985, c C-42, ss 29, 29.1, 29.2 [*Canadian Copyright Act*].
[3] Ralf Mikut & Markus Reischl, "Data Mining Tools" (2011) 1:5 WIREs Data Mining and Knowledge Discovery 431 at 431; David J Hand, "Principles of Data Mining" (2007) 30: 70 Drug Safety 621 at 621.
[4] Benjamin LW Sobel, "Artificial Intelligence's Fair Use Crisis" Colum JL & Arts [forthcoming] at 58, online: SSRN <https://ssrn.com/abstract=3032076>.
[5] Amanda Levendowski, "How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem" Wash L Rev [forthcoming] at 27, online: SSRN <https://ssrn.com/abstract=3024938>.
[6] *Ibid* at 30-31.
[7] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 26, [2012] 2 SCR 326 [*Bell*].

enumerated categories "must not be interpreted restrictively."[8] Subsequent Supreme Court decisions confirmed this jurisprudential trend in employing loose definitions of these categories. In *Alberta v Access Copyright,* Justice Abella characterized the distribution of copyrighted material to students as "research and private study" under s. 29 since teachers, in performing an instructive role, "are there to facilitate the students' research and private study."[9] In *SOCAN v Bell,* "research" was held to include private music previews for the purposes of determining whether or not to purchase the entire song.[10] In both cases, the Court rejected strict readings to find fair dealing that was analogous to one of the categories provided in the statute. In fact, there has been no reported Canadian decision in which fair dealing of copyrighted material has failed merely because the purpose of the use did not fit into one of the statutory categories.[11]

Therefore, this suggests that, in Canada, rigidly enumerated fair dealing categories may be largely vestigial.[12] Canadian fair dealing may be closer to open-ended regimes, such as the one in the United States, than it first appears. In the United States, fair use provisions contain categories, but they are merely illustrative, "provid[ing] only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses."[13] Nevertheless, there has been some judicial resistance to the idea that the categories are irrelevant. In *Alberta,* which was decided by a bare majority of 5-4, Justice Rothstein offered a strong dissent against the inclusion of classroom instruction in the definition of private study.[14] In any case, because of the relative rarity of Canadian copyright decisions, with so few high court decisions on record, it is premature to declare the categories' irrelevance. Faced with new and unfamiliar computer-assisted uses that do not explicitly fit into the established fair dealing categories, it is possible that courts will refuse to stretch the enumerated categories far enough to accommodate new uses.[15] However, one thing is certain: opening Canadian fair dealing provisions would not be a profound change to the current regime.

3. Recommendation: The Adoption of an Open-Ended Fair Dealing Regime

Therefore, to reflect Canada's ambitions in research and innovation and confirm the obsolescence of a strict categorical approach, we recommend the adoption of an open-ended fair

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[8] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 48, [2004] 1 SCR 339 [*CCH*].
[9] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright),* 2012 SCC 37 at para 23, [2012] 2 SCR 345 [*Alberta*].
[10] *Ibid* at paras 21-22.
[11] Ariel Katz, "Fair Use 2.0: The Rebirth of Fair Dealing in Canada" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 93 at 96.
[12] Michael Geist, "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use Hand" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 157 at 159.
[13] *Campbell v Acuff-Rose Music Inc*, 510 U.S. 569 at 577 (1994).
[14] *Alberta*, *supra* note 9 at para 47.
[15] Michael Geist, "Why copyright law poses a barrier to Canadian AI ambitions", *The Globe and Mail* (17 May 2017), online: <https://www.theglobeandmail.com/report-on-business/rob-commentary/why-copyright-law-poses-a-barrier-to-canadian-ai-ambitions/article35019241>.

dealing regime.[16] We consider that merely adding new categories, such as text and data mining, in the scope of fair dealing is less suitable since its effects would be limited to targeted measures. On the contrary, an open-ended provision would prospectively cover future uses of copyrighted works that technological developments will require.

(i) Benefits of an Open-Ended Regime

Empirical studies have shown that an open and flexible fair dealing regime provides economic benefits to the information sector.[17] It increases "firm revenues in information industries, including software and computer systems design".[18] Moreover, industries reliant on fair dealing provisions, which would include AI and data mining companies, tend to have higher incomes and perform better in countries where the copyright regime is open-ended.[19] An open fair use environment is also positively correlated with the increase of scholarly output both quality and quantity.[20] By every conceivable metric, a non-categorical approach to fair use provides great incentives to researchers or companies to base their operations in countries offering such provisions.

For instance, most of the jurisdictions that have already adopted open-ended fair dealing provisions, which includes the United States, Israel, Taiwan, Singapore, Malaysia, and the Philippines, are leaders in the high-technology sector.[21] All of these countries (with the exception of the Philippines) outperform Canada in innovation, which is ranked twenty-third according to the Global Competitiveness Index, with the United States and Israel being second and third respectively.[22] Hence, by explicitly opening up the fair dealing categories, Canada would signal to investors, researchers, and analysts that Canada is at least as open as these other jurisdictions and able to compete with them in the global marketplace. Otherwise, as Michael Geist warns, "our legal framework will continue to trail behind those of other countries that have reduced the risks associated with using datasets in […] activities [such as text and data mining]".[23]

[16] *Budget 2017*, *supra* note 1 at 82, 103-4; *Budget 2018*, *supra* note 1 at 85, 92 (It stated that the government's goal was to "make Canada a beacon that attracts the very best researchers from across the globe." at 85).
[17] Sean Flynn & Mike Palmedo, "The User Rights Database: Measuring the Impact of Copyright Balance" (2017) at 14, online: SSRN <https://ssrn.com/abstract=3082371>.
[18] *Ibid*.
[19] *Ibid* at 17.
[20] *Ibid*.
[21] Geist, *supra* note 12 at 157-164.
[22] World Economic Forum, "12th Pillar: Innovation", online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/#series=GCI.C.12.>
[23] Michael Geist, "What's Next, After the 2012 Overhaul?", *Policy Options* (12 June 2017), online: <http://policyoptions.irpp.org/magazines/june-2017/whats-next-after-the-2012-copyright-overhaul>.

(ii) Concerns about an Open-Ended Regime

Nonetheless, concerns still arise from the adoption of an open-ended regime. Some have pointed out that abandoning a fair dealing closed-categories system is against the "three-part test" under Article 13 of TRIPS.[24] They contend that Canada would not comply with this test, which states that member countries must "confine limitations or exceptions to exclusive rights to *certain special cases* which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder [emphasis ours]".[25] Nevertheless, as Hugenholtz and Okediji make clear, "certain special cases" only implies that the right should be construed and restricted to certain uses – not that limitations are specifically defined in classes of conduct.[26] This test is thus readily fulfilled by the remainder of the *CCH* analysis of fair dealing, which exempts copyright liability to those that deal fairly with copyrighted content following a six-step evaluation.[27]

Moreover, others have suggested that a non-categorical approach to fair dealing would lack clarity. For instance, the United Kingdom rejected the establishment of an open fair dealing system to keep the purported certainty offered by closed categories, the result of which avoids "an American style proliferation of high cost litigation."[28] However, as supported by Matthew Sag, "fair use is not nearly so incoherent or unpredictable as is conventionally assumed"[29] since "standards are not necessarily more unpredictable than rules."[30] In this sense, a closed-ended regime whose enumerated borders do not transparently map onto emerging technologies is far more unpredictable, in the long run, than an open-category regime whose governing principles operate according to a greater standard of certainty.

(iii) Effects on Creators and Copyright Holders

It is important to reiterate that the adoption of an open-ended fair dealing provision is a far less a radical change than it may appear on the surface. As Michael Geist points out, "the breadth of fair dealing purposes is now so wide […] that future Canadian fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes test together with a far more

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[24] International Intellectual Property Alliance, "2018 Special 301 Report on Copyright Protection and Enforcement" at vi, online: IIPA <https://iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf>.
[25] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, art. 13 (entered into force 1 January 1995) [TRIPS].
[26] P. Bernt Hugenholtz & Ruth L Okediji, "Conceiving an International Instrument on Limitations and Exceptions to Copyright" (2008) Amsterdam Law School Legal Studies Research Paper No 2012-43 at 22, online: SSRN <https://ssrn.com/abstract=2017629>.
[27] *CCH*, *supra* note 8 at para 53.
[28] Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property Growth" *UK Intellectual Property Office* (2011) at 44, online: UK Government <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf>.
[29] Matthew Sag, "Predicting Fair Use" (2012) 73 Ohio St LJ at 86.
[30] *Ibid*.

rigorous analysis".[31] Moreover, any extra protection that creators may feel from the limited categories is largely illusory. Even under a plan that abandons the categorical approach, truly unfair dealing will remain illegal. An open-ended provision will enable to proceed directly to a *real* assessment of fairness rather than an arbitrary sorting exercise that may unnecessarily exclude activity, like text and data mining, that does not neatly enter any of the existing categories.

Therefore, the creative community will not be significantly harmed by an open-ended fair dealing regime. "[T]here is a significant *positive* relationship between openness and revenues."[32] In many ways, the creative industry benefits from more open user's rights. Filmmakers that know about fair use make better-produced documentaries than those that do not.[33] User-generated art that remixes previously available content in interesting or profound new ways is allowed to flourish rather than being subject to the same categorical blocks that hinder AI development.[34] Opening the fair dealing categories will thus not affect creativity. Instead, it will actually help to foster it.

In sum, we recommend that:

- Canada adopts an open-ended fair dealing regime based on the United States fair use model.

[31] Geist, *supra* note 12 at 159.
[32] Flynn & Palmedo, *supra* note 17 at 21.
[33] Flynn & Palmedo *supra* note 17 at 7-8.
[34] Samuel Trosow, "Copyright as a Barrier to Creativity: The Case of User-Generated Content" in B. Courtney Doagoo et al, eds, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law, 2014) 521 at 530.