

Norms for copyright reform: my submission to the INDU Committee, Barry Sookman,
December 10, 2018

I am a Senior Partner in the technology law group of [McCarthy Tétrault](#). I have represented members of the creative industries, intermediaries and users. I also teach intellectual property law at Osgoode Hall Law School and have published books including on copyright and Internet law.¹ I have both a practical and theoretical understanding of copyright. This submission, like my appearance, is on my own behalf and not on behalf of any clients.

A key reason copyright law exists is to create a framework encouraging creators to develop and make available works and to ensure they are paid appropriately for their creative efforts. This rationale for copyright is not only good economics, it also comports with generally accepted norms and values.

You have had submissions opposing reasonable framework laws that would support a vibrant creative community and functioning markets for creative products. For example, some have advocated for the continuation or expansion of broad exceptions and free uses of works and have opposed internationally accepted and proven remedies to combat online piracy.

These submissions, when stripped to their core, raise important questions of economics and values. Should authors have basic rights to authorize and be paid when their works are used and exploited by others? Should authors be forced to subsidize uses by large organizations who pay for other products, but think it is fair not to pay for copyright materials? What norms justify opposing reasonable remedies against online theft?

In my opinion many of the arguments opposing reasonable copyright frameworks are based on “copyright exceptionalism”; namely on arguments advanced in copyright policy discourse to erode effective copyright rights and remedies which offend commonly held norms and values and would be categorically rejected in other policy contexts.²

In this submission, I intend to focus on decoding for you certain norm based appeals and misleading arguments made to you to oppose reasonable framework laws required by creators.

Fair dealing

You have heard appeals for exceptions to copyright relying on the norm of “fairness”. However, a “fair dealing” is a “free dealing” and a free dealing should be understood for what it is - and free is not necessarily fair. Nor is it “fair market value”.

Whether something is fair as a matter of law cannot be dispositive of whether it is actually fair or in the public interest. Courts in Canada have developed a unique expansive framework for determining what is a fair dealing. The framework arguably allows for more uncompensated copying and financial prejudice to rights holders than in any other country’s fair dealing or fair use framework, despite the fact that the allowable purposes in Canada are not open ended as in the U.S..

Unlike in the UK³ fair dealing for research purposes can be for a commercial purpose. Copying by a person for others knowing that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose would infringe copyright in the U.K, though it may not in Canada. Further, unlike in other Commonwealth countries significant copying can go uncompensated if the copier can

show that it had a practice or system that is fair and, notwithstanding that the *Berne Three Step Test* prohibits exceptions that “conflict with a normal exploitation” of the work, a use can be considered “fair” even if it has an adverse effect on the market for the work.⁴

Canada’s courts’ tectonic shift away from encouraging payment for uses of copyright materials through the expansion of fair dealing was compounded with the addition of education as a new allowable purpose in 2012. It was also exacerbated by the 2012 amendment to statutory damages which removed copying for non-commercial purposes from the higher range of statutory damages and the failure to harmonize statutory damages to all collectives both of which reduced the risks associated with non-payment of certified tariffs, especially in the educational sector.

You should reject the submission that the addition of “such as” to fair dealing is no big deal and only adds “flexibility” to the Act. The appeal to the “flexibility” norm reflects a judgment that compulsory free dealings should be expanded to uses not expressly permitted or even imagined by Parliament and that users who pay for all other products should be able to discriminate against - and not pay - copyright holders when they consume their products. This was rejected in 2012 after being opposed by the creative sector.⁵

The argument that Canada’s adoption of fair use would *just* align Canada’s fair dealing with U.S. fair use fails to recognize the prejudice to rights holders. The proposal does not take into account that fair use is the most troublesome doctrine in U.S. copyright law.⁶ It is fraught with uncertainty and is, and would be, leveraged by large platforms like Google which have aggressively litigated rather than licensed works from creators.⁷ Adopting open ended purposes also doesn’t take into account that the framework for assessing fairness in Canada is much more prejudicial to copyright holders in this country.⁸

Balance in copyright

You have heard appeals for exceptions to copyright to maintain a “balance”. When rights holders, for example, hear copyright exceptionalists like Michael Geist talk about “balance” they know it is usually a call to hollow out an exclusive right, or to oppose a right or new remedy, or to argue for a broad new exception or weaker remedies, or for uncompensated uses of copyright materials.⁹ But, the concept of balance does not provide any useful guidance for copyright reform any more than balance provides any useful or principled basis for reforms to tax or other laws. You should be mindful of norm based appeals premised on balance where not supported by principled justifications.

Supreme Court decisions on copyright refer to balance. But, some mythical balance, in itself, is not what the Court is speaking about. Rather, the Court teaches that the complementary goals of copyright are to encourage the creation and dissemination of works and to provide “a just reward for the creator”.¹⁰ The civil law tradition of “droit d’auteur” also recognizes the natural rights of ownership of authors to the fruits of their creative labours that enables them to determine the conditions under which their works are exploited by others.¹¹ These are the purposes of copyright that this Committee should focus on.

These copyright goals are often presented by copyright exceptionalists as a zero sum game – implying if rights holders obtain incremental rights invariably there is a net loss for users and that some “rebalancing” or “recalibrating” of other rights or exceptions are thereby required. This view overlooks that the goals of copyright – encouraging creation and dissemination of works

and obtaining a just reward for creators -- complement one another and that incremental rights including legal protection of TPMs (where Canada has one of the most flexible regimes for creating new exceptions)¹² and copyright term extension¹³ benefit users as well as creators.

Exceptions and the value gap

You have heard that exceptions are needed to promote access to works. Creators fully support a framework that promotes broad access. But, “free access” as a guiding norm is not consistent with encouraging new investment by our creators or paying them properly.

Broad exceptions also result in value gaps¹⁴ where creators cannot negotiate market prices and are not adequately compensated, or compensated at all.¹⁵

You have heard that exceptions are needed to promote “innovation”. The appeal to the innovation norm is frequently a demand for unlicensed uses of works where everyone, except creators, profit. There is quite a difference between innovation where creators are paid and innovation where innovators that find new ways to steal content such as providers of fully loaded Kodi boxes and pirate streaming services.¹⁶

Creators embrace innovation, they just want what other property owners want: a right to license and to be paid.¹⁷ Copyright doesn’t inhibit innovation. To the extent it provides rights and effective remedies against infringements, it creates the markets which enables innovation.¹⁸

Copyright exceptionalism

Opponents of creator rights often justify online piracy arguing it is fundamentally a business model issue and that creators should, in effect, make content available at prices that compete with those that steal and distribute their content or simply rely on being “first to market” . This “business model” claim defies basic economics.¹⁹

Another argument against providing creators the rights and remedies they need is that they are successful despite piracy, not being paid for uses, or are earning revenues from other sources.

The “they are doing just fine” argument is really a normative judgment that creators should not have a copyright framework law that will enable them to achieve their full potential – what they could produce and earn but for piracy or uses not paid for.

The “they are making money in other ways” argument is another normative judgment that creators should not be paid for valuable uses of their works such as when they innovate to bring a new product offering to market - even if the new revenues do not recoup lost revenues from the older ones.

Bottom line, the “business model”, “they are doing just fine” and “they are making money in other ways” smoke and mirrors arguments are premised on the normative judgment that it is justifiable to acquire and consume a product or service for free. These are arguments made by Michael Geist, for example, who opposed the FairPlay website blocking proposal and in his recent series attacking Access copyright. These exceptionalist arguments would be categorically rejected outside of the copyright context.²⁰

Site blocking

You are told that laws that would help tackle online piracy such as site blocking should be rejected.

There are over 40 countries that have court or administrative website blocking regimes. This is not some experiment as one witness told you. These remedies assist in supporting functioning marketplaces that are otherwise undermined by unauthorized pirate services. Numerous studies and courts worldwide have found website blocking effective in countering piracy and promoting use of legitimate websites and to be fully consistent with freedom of expression values.²¹

We can learn from international experience. Countries like the UK which have over a decade of experience with court-ordered website blocking are now studying expanding their remedies to allow administrative blocking.²² Australia which also has experience with these orders just updated its site blocking law to include search engine de-indexing. An Australia Senate Committee concluded that “in light of the significant role that these providers may play in both the infringement and enforcement of copyright .. the measure is appropriate.”²³

You are told that laws that would help tackle online piracy such as site blocking amount to “censorship” or infringement of freedoms of speech. Courts around the world including in Canada have confirmed that copyright protection is fully consistent with, and in fact, promotes freedom of expression.²⁴ The resort to these emotionally charged principles to, in effect, defend online pirates and online theft, should be seen for what they are.

Closing

When people leave no stone unturned arguing against creators having a framework law that enables them to control the uses of their works and to be paid a fair market value for such uses - including by opposing reasonable rights and remedies against blatant online theft - you should question why. Arguments about copyright are about both economics and values. Yet, copyright exceptionalism is pervasive in advocating against effective rights and remedies for creators. You should analyze submissions made to you in this light.

In preparing your report, I urge you to question what moral compass and values underlie arguments that oppose reasonable rights and remedies for creators and whether these values comport with norms this Committee is prepared to accept for copyright or would accept in other situations. I urge this Committee to reject copyright exceptionalism as a guiding norm for copyright reform.

¹ My biography online: <https://www.mccarthy.ca/en/people/barry-sookman>.

² Elsewhere the kind of suspension of common sense and rational economic thinking in connection with special immunities for online providers has been referred to as “internet exceptionalism”, but these types of arguments and marked departures from norms and values held outside of copyright specifically to attack creator rights may also be referred to as “copyright exceptionalism” since the advocates of these views tend to be very focused on the erosion of copyright rights.

³ S.29, *Copyright, Designs and Patents Act 1988*

⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012]

2 SCR 283; *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58.

⁵ Barry Sookman and Dan Glover, “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” Osgoode Hall Review and Policy, Number 2 Volume 2, Number 2 (November 2009) Online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1024&context=ohrlp>.

⁶ Barry Sookman “Fair use for Australia?”, August 23, 2012, online: <http://www.barrysookman.com/2012/08/23/fair-use-for-australia/>.

⁷ *Authors Guild v. Google, Inc.*, 804 F. 3d 202 (2nd.Cir.2015); Barry Sookman “The Google Book project: is it fair use?” January 5, 2014 online: <http://www.barrysookman.com/2014/01/05/the-google-book-project-is-it-fair-use/>. *Oracle America, Inc. v. GOOGLE LLC*, 886 F. 3d 1179 (Fed.Cir.2018).

⁸ See, Dan Glover “A Response to Professor Michael Geist’s Clearing Up the Copyright Confusion” January 9, 2011, online: <http://www.barrysookman.com/2011/01/09/a-response-to-professor-michael-geist%E2%80%99s-clearing-up-the-copyright-confusion/>.

⁹ Barry Sookman “Canadian government response to copyright and digital policy issues” April 24, 2018 online: <http://www.barrysookman.com/2018/04/24/canadian-government-response-to-copyright-and-digital-policy-issues/>.

¹⁰ *Cinar Corporation v. Robinson*, [2013] 3 SCR 1168, 2013 SCC 73; *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII); *SOCAN v. Bell Canada*, 2012 SCC 36; *Entertainment Software Association v. SOCAN* 2012 SCC 34; *Rogers Communications Inc. v. SOCAN* [2012] 2 S.C.R. 283. See also in the U.S. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) Per Ginsburg J “[t]he economic philosophy behind the [Copyright] [C]ause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.’ ... Rewarding authors for their creative labor and ‘promot[ing] ... Progress’ are thus complementary...”

¹¹ *Théberge* per Gonthier (in dissent 4:5).

¹² Barry Sookman “An FAQ on TPMs, Copyright and Bill C-32”, December 10, 2010 online: <http://www.barrysookman.com/2010/12/14/an-faq-on-tpms-copyright-and-bill-c-32/>.

¹³ Barry Sookman “Term extension and respect for artists: a reply to Michael Geist” April 23, 2015 online: <http://www.barrysookman.com/2015/04/23/term-extension-and-respect-for-artists-a-reply-to-michael-geist/>; Barry Sookman “Economic effects of term extension for sound recordings” April 30, 2015 online: <http://www.barrysookman.com/2015/04/30/economic-effects-of-term-extension-for-sound-recordings/>.

¹⁴ Music Canada, “The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach”, online: <https://musiccanada.com/resources/research/the-value-gap-report/>.

¹⁵ George Barker, “More Unfair Claims About Fair Use in Australia”, May 24, 2018 online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184614; George Barker, “Claims to Expand Copyright Exceptions Driven by ‘Bad Science’”, June 14, 2016, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795498.

¹⁶ Barry Sookman “Why crackdown on pirate set-top boxes is good for innovation: a reply to Michael Geist”, June 29, 2016, online: <http://www.barrysookman.com/2016/06/29/why-crackdown-on-pirate-set-top-boxes-is-good-for-innovation-a-reply-to-michael-geist/>.

¹⁷ Barry Sookman “Law and Innovation: Is Intellectual Property a Path to Progress”, April 13, 2014, online: <http://www.barrysookman.com/2014/04/13/law-and-innovation-is-intellectual-property-a-path-to-progress/>.

¹⁸ George Barker, *ibid.*

¹⁹ Barry sookman, “Why the CRTC should endorse FairPlay’s website-blocking plan: a reply to Michael Geist” February 18, 2018, online: <http://www.barrysookman.com/2018/02/12/why-the-crtc-should-endorse-fairplays-website-blocking-plan-a-reply-to-michael-geist/>.

²⁰ See Barry sookman, “Why the CRTC should endorse FairPlay’s website-blocking plan; also the recent series on fair use in education by Michael Geist, online: www.michaelgeist.ca.

²¹ Barry Sookman “Fact checking Michael Geist’s criticisms of the FairPlay site blocking proposal” online: <http://www.barrysookman.com/2018/03/29/fact-checking-michael-geists-criticisms-of-the-fairplay-site-blocking-proposal/>.

²² Intellectual Property Office, “UK Government response to the call for views regarding illicit IPTV streaming devices”, 2018 online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750177/Gov-Response-call-for-views-Illicit-IPTV.pdf.

²³ “Copyright Amendment (Online Infringement) Bill 2018, November 2018, online: <file:///Users/barrysookman/Downloads/report.pdf>; Fiona Phillips , “Copyright Amendment (Online Infringement) Act 2018 extends Australia’s site blocking regime to Google”, November, 28, 2018, online: <http://fionaphillipslaw.com.au/copyright-amendment-online-infringement-act-2018-extends-australias-site-blocking-regime-to-google/>.

²⁴ Barry Sookman Fact checking Michael Geist