Athabasca University

athabascau.ca

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House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Attention: Mr. Dan Ruimy, Chair, Standing Committee on Industry, Science and Technology

Dear Sir:

Re: Submissions by Athabasca University – Statutory Review of Canada's *Copyright Act*

On behalf of The Board of Governors of Athabasca University ("**AU**"), I wish to thank the Standing Committee on Industry, Science and Technology (the "**Committee**") for the opportunity to make submissions further to the Committee's statutory review of the *Copyright Act*, R.S.C., 1985, c. C-42) (the "**Act**").

AU's submissions (stated as four recommendations) are provided below.

Known as ***Canada's Open University***, AU is dedicated to the removal of barriers that restrict access to, and student success in, university-level study. AU's mission is to promote equality of educational opportunity for adult learners regardless of geographical location. At present, AU serves over 40,000 students worldwide, employs over 1000 faculty and staff members and offers over 850 university-level courses.[1]

EXECUTIVE SUMMARY

AU's Submissions with respect to Canada's Copyright Act

1. Preserve Section 29 of the Act as currently drafted;:

2. Preserve Section 6 of the Act as currently drafted;

3. Preserve Section 38.1(b) of the Act as currently drafted; and

4. Recognize Indigenous Copyright to Further Goals of Truth and Reconciliation

[1] http://www.athabascau.ca/aboutau/

AU SUBMISSIONS

Recommendation #1:

Preserve Section 29 of the Act as currently drafted: "Fair Dealing for research, private study, education, parody or satire does not infringe copyright."

Athabasca University, as a content owner and user, relies on both the protections and the exceptions provided under the Act. The fair dealing exception provided by the Act offers an appropriate balance between the rights of content creators/owners and content users. This balance must be preserved.

Over the past two decades, the Supreme Court of Canada has consistently held that the fair dealing is a content user's right. It is imperative that the Committee's statutory review process not undermine settled jurisprudence in Canada and thereby disrupt the careful balance of rights as articulated by the Supreme Court of Canada.

It is well understood that in *CCH Canadian Ltd. v. Law Society of Upper Canada*[2], the justices of the Supreme Court of Canada unanimously confirmed the fair dealing exception as a content user's right which must not be interpreted restrictively. . The Court held as follows:

> "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. To maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[3]

Further to this, the unanimous court provided an analytic framework, commonly referred to as the 'six-factor test', to help users determine the fairness of the dealing.[4]

The Supreme Court of Canada's 'pentology' of rulings on copyright released in 2012 further confirmed that the law in Canada recognizes the fair dealing exception as a user's right. These important rulings provided further clarity regarding the application of the six-factor test to determine the practical application of 'fairness' under the fair dealing exception.

It is no coincidence that Parliament's Bill C-11, the *Copyright Modernization Act*, also came into force in 2012by amending the Act to include, among other things, "education" as an allowable fair dealing purpose.

The Supreme Court of Canada's jurisprudence on the fair dealing exception has since become the foundation of the *Fair Dealing Policy* at AU. AU's *Fair Dealing Policy* is an operational policy that provides guidelines for the application of the fair dealing exception by students, faculty and staff so as to promote compliance with Canada's legal regime. In brief, the *Fair Dealing Policy* provides a reasonable framework within which AU stakeholders may calibrate their actions with respect to fair dealing with content.[5]

Further to the adoption of AU's *Fair Dealing Policy* in 2013, AU continues to maintain a Copyright Office, which seeks transactional licenses for all dealings that do not meet the six-factor test threshold of fairness. AU's academic research library continues to spend almost a million of dollars per year in

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2 2004 SCC 13
3 CCH, at para 48
4 CCH, at paras 53-59
5 http://ous.athabascau.ca/policy/academic/fair_dealing_policy.pdf

licensing fees for access to scholarly journals and texts, and the AU continues to purchase significant numbers of textbooks every year for students.

AU is committed to the use and development of Open Educational Resources in our courses. Fair Dealing as an exception in the Act is intertwined in University Operations and policy but is certainly not a replacement for AU's considerable spending on commercial content.

Recommendation #2:

Preserve Section 6 of the Act: "The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year."[6]

In Canada, the term of copyright protection lasts fifty years after the death of the author (Murray and Trosow, 2013). After the copyright term expires, a work is no longer copyright protected; it enters the *public domain*. The public domain consists of the total corpus of works whose copyright terms have expired.

Public domain works may be freely reproduced, repurposed, or transformed by anyone, for any purpose, without payment to or permission from the rights holder. As Carys Craig (2014) notes, Canadian jurisprudence envisions the public domain as "a vibrant cultural space that facilitates exchange and transformation, inspiration, and innovation, and thereby serves the public interest" (67).

The public interest in the public domain concerns nothing less than freedom of expression itself: Craig argues that the public domain should be treated as a "human entitlement equivalent in nature, purpose, and importance to the freedom of speech" (2014, 77). The importance of the public domain to freedom of speech is better recognized in US "fair use" jurisprudence; as Michael Birnhack (2006) says, "The public domain represents our free speech concerns within the realm of copyright law" (63); this domain lets "new ideas form when old ideas interact" (85).

Many international studies show that the public costs of long copyright terms outweigh their private benefits (Rossini and Welinder, 2012). Long copyright terms have been criticized by intellectual property law experts as effective monopolies in perpetuity for the typically corporate rights holders that profit most from them (e.g., Disney, which has repeatedly succeeded in lobbying the US government to lengthen copyright term). Other critics point out that for the vast majority of rights holders, there is no economic incentive in such long copyright terms; and that for the public, there is demonstrable harm to the public good and education in how long copyright terms impoverish the public domain. Keeping works under restrictive copyright licences for so long after their economic benefits have been exhausted results in them ceasing to be of value to new creation, education and innovation.

The term length set by the first modern copyright law, Britain's Statute of Anne, in 1710, was for fourteen years after the publication date, renewable once if the author outlived its expiry. The term-lengthening trend that has continued since roughly the mid-19th century is based on effective lobbying, not on economic evidence. Australian government studies in 2000 and in 2010 consistently argue against copyright extension as a cost to any jurisdiction that imports more IP than it exports (Rimmer, 2017; Weatherall, 2015). A 2006 report for the UK government concludes that Britain's copyright term of life-plus-seventy-years "far exceeds the incentives required to invest in new works" (Gowers, 2006, 50). A 2011 report for the UK government cited economic evidence and the government's own 2010 study to conclude that copyright term extensions are "economically detrimental" (Hargreaves, 2011,

[6] Copyright Act (R.S.C., 1985, c. C-42) Sec 6

19). A 2011 study by the Canadian government (Canada, Innovation, Science and Economic Development) concludes that "extending the term simply does not create an additional incentive for new creativity" (Geist, 2016, ¶4; see also Pollock, 2007). By way of contrast, a US Report on the fair use economy reveals the substantial positive impact that fair use has on the economy (CCIA, 2017).

On the basis of these arguments and evidence, then, AU argues that the present copyright term length is more than sufficient, and that no term extension should be contemplated by the government.

Recommendation #3:

Preserve Section 38.1(b) Statutory Damages "in a sum of not less than $100 and not more than $5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes."[7]

Removal or modification of the statutory damages, and/or the good faith provision, could significantly impact Universities in Canada by increasing exposure to unpredictable actual damages with no mitigation based good faith.

Recommendation #4:

Recognize Indigenous Copyright.

It is important to ensure that the Copyright Act appropriately recognizes Indigenous Copyright with respect to traditional knowledge and traditional cultural expression to more effectively support the goals of the Truth and Reconciliation Commission.

Athabasca University agrees with the recommendation of S a'ke'j Henderson to include a non-derogation clause to ensure Copyright does not infringe on Aboriginal or treaty rights:

> "The Copyright Act should be amended to be consistent with the constitutional rights of Aboriginal peoples. As a first step, the Act should be amended to protect and promote the TK and TCEs of Aboriginal peoples with a non-derogation clause… to protect the TK and cultural expressions of the Aboriginal peoples or to prevent their misappropriation by others…. Canada should begin consultations with the Aboriginal peoples about how they want to protect and promote their traditional knowledge and traditional cultural expressions. They may choose to protect them by Aboriginal law or by cooperating in the establishment of protective legislation that gives intellectual property-style protection to traditional knowledge and traditional cultural expressions." (Sa'ke'j Henderson, JD, IPC, FRS, Research Fellow Submission, 2018)

Thank you for the opportunity to comment on the Copyright Act Review.

Respectfully submitted,

Dr. Matthew Prineas, PhD
Provost and Vice President Academic

[7] Copyright Act (R.S.C., 1985, c. C-42) Sec 38.1(b)

Additional References

Birnhack, M. (2006). More or better? Shaping the public domain. In L. Guibault, & P. B. Hugenholtz (Eds.), The Future of the public domain (pp. 59-86). Amsterdam: Kluwer Law.

Computing and Communications Industry Association. (2017). Fair use in the U.S. economy: Economic contribution of industries relying on fair use (CCIA). Retrieved from https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf

Craig, C. J. (2014). The Canadian public domain: what, where, and to what end? In R. Coombe et al (Ed.), Dynamic Fair Dealing: Creating Canadian Culture Online. (pp. 65-81). Toronto: University of Toronto Press.

Geist, M. (January 6, 2016). The Trouble with the TPP, Day 3: Copyright Term Extension. Retrieved from http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-3-copyright-term-extension/

Gowers, A. (2006). Gowers Review of Intellectual Property. Norwich, U.K.: HMSO. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

Hargreaves, I. (2011). Digital opportunity: a review of intellectual property and growth: an independent report. Intellectual Property Office. Retrieved from https://orca.cf.ac.uk/30988/1/1_Hargreaves_Digital%20Opportunity.pdf

Hunter, A. (2015). TPP's Copyright Term Extension Isn't Made for Artists—It's Made By and For Big Content Companies. Retrieved from https://www.eff.org/deeplinks/2015/08/tpps-copyright-term-extension-isnt-made-artists-its-made-and-big-content-companies

Murray, L. J., & Trosow, S. E. (2013). Canadian copyright: A citizen's guide Between the Lines.

Pollock, R. (2007). Forever minus a day? Some theory and empirics of optimal copyright. Cambridge University. Retrieved from http://rufuspollock.org/papers/optimal_copyright.pdf

Rimmer, M. (2007). Digital copyright and the consumer revolution: hands off my iPod Edward Elgar Publishing.

Rossini, C., & Welinder, Y. (2012). All Nations Lose with TPP's Expansion of Copyright Terms. August 8, 2012. Retrieved from: https://www.Eff.org/deeplinks/2012/08/all-Nations-Lose-Tpps-Expansion-Copyright-Terms

Weatherall, K. G. (2015). Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015–Part 2–Copyright. Retrieved from https://works.bepress.com/kimweatherall/32/