

I wish to encourage the Copyright review committee to strengthen fair dealing in light of the restrictive measures that were agreed to in NAFTA 2.0 that gave even stronger rights to “owners” and corporations rather than creators and users. Copyright needs to be re-balanced in favor of users’ rights. I encourage the committee to adopt a fair use focus, including “such as” rather than a restrictive list of exceptions. I encourage a less restrictive UGC exception – drop requirement 4. Keep notice and notice where it is – it’s working. Finally, reach out to indigenous groups to craft provisions for uniquely indigenous works.

What happens when the formal cultural economy is at odds with the informal cultural economy? Canada has an opportunity to become a leader in the increasingly global, digital environment and a champion of cultural innovation. At a time when the knowledge economy and innovation are seen as the way forward both nationally and internationally, it is more important than ever to make sure that access to information remains a protected right and is not stifled by protectionism itself. There are better ways to encourage and support Canadian culture than by a more restrictive copyright regime. Copyright must consider both its private and public mandates.

Fair dealing and the notice and notice provisions of the *Copyright Act* are two elements that set Canada apart. US fair use,¹ which is more flexible because it contains the phrase “such as,” is more often the subject of litigation than Canada’s fair dealing is because of US corporations and collection societies, resulting in a chilling effect on users’ rights. In Canada, the SCC (Supreme Court of Canada) has maintained a balance between users’ and owners’

¹ 17 U.S. Code § 107.

rights. The notice and notice system differs from the US system of notice and takedown² (see the Digital Millennium Copyright Act - 1998). In the US system, when an ISP provider is notified that material uploaded to their site is infringing, in order to avoid liability, the ISP provider must immediately take the material down. In order for the person who uploaded the allegedly infringing material to have it re-uploaded, he or she must engage in a costly battle to prove the material is non-infringing. In Canada, ISPs are responsible for notifying the uploader that his or her material has been identified as infringing. The uploader can choose to leave the material up or take it down, and the onus and cost of taking the matter further lies with the accuser.

Copyright policy should balance economic incentives with creative opportunity and innovation. The SCC stated in *Théberge* that “[t]he *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”³ When purely economic interests are the primary or sole drivers in directing control over cultural works, culture itself is threatened. The monetary benefits are one side of the equation. On the public side is promoting and preserving culture, *Canadian* culture, and ensuring that an educated public is able to participate knowledgeably in our democracy. Bitá Amani points out that “liberal access to knowledge as a public good will have proportionately greater gains for the granting society and government policies should, accordingly, promote laws, networks or systems that can efficiently distribute knowledge and remain impervious to external

² 17 U.S. Code § 512.

³ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, 2002 SCC 34 at para 30.

(corporate) pressure for its containment through the conferral of intellectual property rights.”⁴ Expressive speech and freedom of speech are important elements of users’ rights and should not be impinged by property rights.

The danger to global culture is increased when a single culture is able to dominate both policy and regulation. The United States wields such power. William Landes and Richard Posner, leading American economists and Intellectual Property authorities, are referring to art dealers and connoisseurs when they point out how they make money: “they buy from owners who do not realize the full value of their art.”⁵ As the largest and one of the only exporters of Intellectual Property, the United States is able to exert an undue influence on, control over and access to cultural materials, and they do so fully cognizant of the value of those materials. Encouraging Canadian cultural production and nurturing Canadian cultural heritage is a multi-faceted endeavor.

The SCC has stated its position on users’ rights: “The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”⁶ Users’ rights are only mentioned in the *Copyright Act* in the 2012 User-Generated Content (UGC) exception: “It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or

⁴ Bita Amani, *What's Wrong With Intellectual Property Rights?: And the Public Interest in Privatizing Our Common Genetic Heritage* (May 2007). <SSRN: <https://ssrn.com/abstract=991584> or <http://dx.doi.org/10.2139/ssrn.991584>> at 4.

⁵ William Landes and Richard Posner. *The Economic Structure of Intellectual Property Law*. Cambridge, MA: Harvard University Press, 2003 at 27.

⁶ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 at para 48. See *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 SCR 326, 2012 SCC 36 at para 11.

otherwise made available to the public, in the creation of a new work....”⁷ The concept of creation and innovation following from what has come before is not a new idea. Under today’s restrictive copyright regimes, Shakespeare would have found himself frequently in Court for copyright infringement as plays such as *Romeo and Juliet* and *Othello* relied heavily on his source material. In fact, the other provisions of fair dealing, “research, private study, education,”⁸ are also in place to facilitate learning a craft.

The UGC provision supports the burgeoning digital creative platforms on which users can hone their craft or simply create for enjoyment. When so much attention is placed on the economic interests of Copyright holders, the social benefits of creation and access to information can be forgotten or silenced. The economic truth is that those with little financial clout will have the most need to access information and to use materials for free or at a very affordable rate. Creators just starting out fall into this category as do students. Those with the financial clout to have the loudest voices, to have access to the legal system, and to influence policy on both a national and international level are most often owners of entire libraries of copyrighted material. Collection societies like Access Copyright and the Society of Composer, Authors, and Music Publishers of Canada (SOCAN) fall into this category. Artists who rely on these institutions have little input into the lobbying and legal pursuits of the entities. Those artists rarely have the time or expertise to critically examine whether copyright is actually benefitting them or lining the pockets of those funneling royalties to them. I would point the committee to Bryan Adam’s recent submission.

⁷ *Copyright Act* RSC, 1985 c. C-42 at sec. 29.21(1).

⁸ *Ibid.*, at sec 29.

Copyright owners maximize profits by locking up rights. Even Landes and Posner recommend that the optimal term would be 20 to 25 years.⁹ In 2013, Maria A Pallante, then Register for the US Copyright Office suggested that 70 years was too long and proposed that after 50 years the burden of copyright should shift from the user to the owner, with the owner being required to license the work “to assert their continued interest in exploiting their work.”¹⁰ Michael Geist concurs, suggesting that “Canada could conceivably treat the term beyond [50 years]... as a supplementary regime that falls outside of the Berne Standard.”¹¹ The increasing term of copyright can trace its roots directly to Mickey Mouse. Every time the infamous mouse’s term has neared the end of its copyright life, there has been another copyright term extension.¹²

In a Human Rights Council report, Farida Shaheed, the Special Rapporteur for cultural rights, proposed “expanding copyright exceptions and limitations to empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works.”¹³ A publisher may own the copyright in a work that they do not deem financially worth keeping in print. If the work is therefore allowed to languish it may be lost. If the work enters the public domain, it allows another publisher to print the text less expensively without having to license the work

⁹ *Supra* note 5 at 70.

¹⁰ Maria A Pallante. “The Next Great Copyright Act” 37 Colum JL & Arts (Spring 2013) at 23.

¹¹ Michael Geist. “The Trouble with the TPP’s Copyright Rules.” In *What’s the Big Deal? Understanding the Trans-Pacific Partnership*. Ottawa: Canadian Centre for Policy Alternatives, (July 2016). <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/07/Trouble_with_TPPs_Copyright_Rules.pdf> at 9.

¹² Steve Schlackman. “How Mickey Mouse Keeps Changing Copyright Law.” *Artrepreneur*. (18 October 2017). <<https://mag.orangenius.com/how-mickey-mouse-keeps-changing-copyright-law/>>.

¹³ *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*. <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/249/51/PDF/G1424951.pdf?OpenElement>>.

and may even be able to add value through new editorial material and commentary to the work. The more access new creators have to older works with which to educate themselves, the more innovation can take place. Copyright maximalists, like Access Copyright, an entity that exists solely to collect and distribute royalties, continue to push for longer duration. While collections societies perform a valuable function for creators, they have a vested interest in maintaining a system when there is too much tangible evidence that suggests longer terms do not mean greater economic gain or benefit for the creators themselves.¹⁴ Sean Flynn et al assert that

“These views are supported by numerous academic studies finding no public benefit, but great public cost, from extending copyright terms to the current U.S. levels.”¹⁵

Part of what makes Canada unique is its commitment to multi-culturalism. Within Canada, indigenous voices face particular problems. The *Copyright Act* is failing these communities. The consultation points out that “Inuit and Indigenous northern knowledge is primarily oral, passed on through generations; knowledge keepers now require their knowledge to be documented or risk losing it through attrition.”¹⁶ In order for Copyright to attach, the work to be fixed in a tangible medium. There are further divergences between Copyright law and Indigenous culture: “Copyright reform is necessary to help protect/support northern artistic commodities and the artists and creators who live there. However, there are specific

¹⁴ Jodie Griffen, “The Economic Impact of Copyright,” *Public Knowledge* (nd).
<<https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf>>.

¹⁵ Sean Flynn, et al. “Public Interest Analysis of the US TPP Proposal for an IP Chapter.” *PIJIP Research Paper Series* (6 December 2011).

<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1023&context=research>>.

¹⁶ Ipsos Public Affairs. “Canadian Culture in a Digital World: Consultation Report” (21 February 2017).
<http://www.canadiancontentconsultations.ca/system/documents/attachments/82eb44ca377ab94e80535ee617d129c8841dab18/000/005/629/original/PCH-DigiCanCon-Consultation_Report-EN.pdf>. at 42.

challenges around in [sic] communities with shared oral culture – who has the ‘right’ to share these stories?”¹⁷ Canada’s *Copyright Act* needs to allow for special provisions to be sensitive to culturally different attitudes to the basic theories of Copyright. The balance turns once again to culture versus economics.

Another issue is the rules around distribution of copyrighted works that place great financial restrictions on publicly oriented content providers such as libraries and schools.

Students are the innovation and economic leaders of the future; their access to knowledge and training is an important foundation for them to take a place on the global stage. Publishers repeatedly overlook the books that have been assigned as texts in addition to the books that have been purchased by libraries and most importantly, perhaps, the licensing agreements that libraries have purchased. Fair dealing may be the most important tenant to educate both the public and creators on Canadian culture and how to produce it, to say nothing about the ability of educational and research provisions helping both creators and users to understand the law and their rights.

¹⁷ *Ibid.*