October 22 2018

Standing Committee on Industry,
Science and Technology
Comité permanent de l'industrie,
des sciences et de la technologie
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Brief - Statutory Review of the *Copyright Act*
submitted by Myra Tawfik on behalf of
Canadian intellectual property law scholars

Dear Chair and Committee members,

We are submitting this brief in the context of the statutory review of the *Copyright Act*, R.S.C., 1985, c. C-42. This brief provides specific recommendations and is submitted concurrently to another brief by Pascale Chapdelaine (on behalf of Canadian intellectual property law scholars) that addresses general issues and principles that the Committee should consider as part of the statutory review and that makes four recommendations that relate to copyright user rights. The recommendations reflect the opinion of the signatories to these briefs and are informed by years of study and teaching of Canadian and international intellectual property law. Links to the bios of each signatory are attached to this brief.

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.

In light of the introductory guiding principles submitted in the concurrent brief by Pascale Chapdelaine (on behalf of Canadian intellectual property law scholars), this brief makes six additional recommendations that relate to:

--Initiating a process of consultation with Indigenous peoples
--Open access for scientific publications
--Works created by artificial intelligence
--Text and data mining
--Remedies for copyright owners
--Remedies for copyright users

1. Initiating a Process of Consultation with Indigenous Peoples

We salute the Committee's announcement that it will consult with Canada's Indigenous communities. This important step is overdue, and may lead to suitable recognition and protection of Indigenous traditional cultural expressions, particularly those that are not protected by the *Act*. We would urge the Committee to recognize Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*, specifically article 31 aimed at moving forward

with concrete action and to engage in comprehensive consultations with Canada's Indigenous communities to ensure that the rights and interests of Indigenous peoples are fully and properly addressed at national and international levels.

2. Open Access to Scientific Publications

In support of a national Open Access policy, the *Act* should include a provision according to which the author of a scientific publication that is the result of research activities partly financed by public funds, has the right to make that work available to the public after a reasonable period of time following its first publication, provided that the source of the first publication is clearly stated. A similar provision exists in several jurisdictions, including France, Germany, Italy and the Netherlands.

Timely and cost efficient access to scientific research contributes to increasing society's general economic and social welfare. In a world in which public funding for university research is shrinking and the price of scientific journals is increasing, providing the widest possible access to researchers to high quality peer-reviewed scientific material at low cost is difficult to attain. The implementation of this Open Access provision, which complements and supports the open access and open data policies of Canada's research funding agencies, is a key element toward this goal.

3. Works Created by Artificial Intelligence

The increasing sophistication of artificial intelligence raises important copyright questions. The most significant relate to authorship and ownership of works created by AI, which implicate the test for originality for computer-generated or computer-aided works. We recommend that the *status quo* be maintained in this regard: works created exclusively by artificial intelligence or fully computer-generated should not be eligible for copyright protection. To the extent that a physical person exercises sufficient skill and judgment in the way that they use software or other technologies to produce an original work, the usual copyright principles would apply to vest copyright with that individual (or first owner of copyright). However, where the output does not result from the exercise of skill and judgment on the part of the individual, a work produced by the technology itself should be afforded no copyright protection.

4. Text and Data Mining

Another major disruptive use of technology that has copyright implications relates to text and data mining. The UK has made provision for researchers to reproduce copyright material for text and data analysis as an exception to copyright infringement. While we are of the view that such activities would fall for the greater part under the purview of fair dealing (or a fair-use style provision as proposed in the concurrent brief by Pascale Chapdelaine et al., which could add text and data mining as one additional illustrative purpose), Canada should consider the best way to safeguard the practice of text and data mining. This could include enacting a specific exception to copyright infringement similar to the UK and that could extend beyond non-commercial uses. The lack of an explicit text and data mining exception could significantly undermine Canada's

position as a leader in AI and other innovations by creating uncertainty around the legality, cost and repercussions of activities essential to such innovations. Text and data mining are non-expressive uses that permit vital research without producing copies that reach consumers or substitutes in the market for the original. Limiting TDM frustrates the immense potential of generation of knowledge, business opportunities, and citizen participation, and cannot be justified as a matter of copyright policy.

5. Remedies for Copyright Owners

We recommend against the introduction of additional remedies for copyright owners such as an administrative body that would facilitate orders of site blocking and site de-indexing, in response to the identification of infringing works as was proposed by the Fair Play Canada coalition and recently rejected by the CRTC, or otherwise. This proposal created a public outcry for good reason. Third party mandatory injunctions should remain exceptional and need to meet well-established checks and balances recognized in a long tradition of remedies law. Such injunctions would be inefficient, providing short term gains to copyright owners that would be outweighed by unintended and disproportionate collateral effects including stifling freedom of expression. Copyright infringement generally would not justify such exceptional need to resort to third party mandatory injunctions.

We recommend maintaining the current notice and notice regime and applaud the fact that Canada retained its ability to do so in the USMCA. The US-style "notice and take-down" regime has given rise to serious criticism regarding the broad additional powers that it confers *de facto* to copyright owners. Transplanting this procedure would run the risk of eroding the fragile equilibrium between owners' rights, users' rights, and the public interest that is progressively being established in Canada.

We recommend restricting copyright owners' ability to claim statutory damages only with respect to works that are registered at the time of the alleged infringement. Such limitation currently exists in the U.S. While statutory damages offer obvious advantages to copyright owners, e.g. relieving the evidentiary burden on the copyright owner and possibly deterring infringement, statutory damages may also have the unintended effect of over-deterring law-abiding citizens from pursuing productive and socially beneficial activities in grey zones where copyright infringement is uncertain. The risk of being liable to pay excessive statutory damages creates a serious chill on socially desirable activities. Limiting statutory damages to publicly registered works is a more measured approach to copyright owners' remedies.

6. Remedies for Copyright Users

While the *Act* confers a broad range of remedies to copyright owners against infringement of copyright and moral rights, and the circumvention of TPMS, it provides no remedies for users who are improperly restrained in making legitimate uses of copyright works. Explicitly providing general common law and equitable remedies to users facing such limitations, coupled with an administrative procedure facilitating legitimate access to copyright works (e.g. to exercise fair dealing or for interoperability purposes on a work protected by TPMs) would be the

natural next step toward solidifying copyright user rights. Similar administrative procedures mediating between copyright owners and users deprived of legitimate access to their works currently exist in, e.g., France and the UK.

The introduction of new administrative oversight could extend to copyright owners' business practices and increasing use of algorithms and AI as copyright self-enforcement mechanisms. Such technologies are, or can be used to filter user-generated content before it is uploaded to a platform, preventing the upload of copyright material; to locate copyright material on a platform; or to remove and/or prevent the re-upload of copyright material. Administrative oversight could ensure that non-infringing material is not inappropriately removed, and that freedom of expression is protected. The oversight could include 1) transparency and reporting requirements about the use of such technologies and instances of pre-upload filtering or takedowns, 2) auditing of such technologies' use by large platforms, and 3) proactive disclosure of private agreements between large platforms and copyright owners regarding the use of such technologies.

To sum up, we recommend that:

- A process of consultation with Indigenous peoples be initiated;
- A provision allowing open access to publicly funded scientific publications be introduced;
- The *status quo* be maintained with respect to authorship and ownership of works created by artificial intelligence;
- Canada consider the best way to safeguard the practice of text and data mining;
- The current notice and notice regime be maintained, that statutory damages be restricted, and that copyright owners' remedies not be expanded any further;
- Explicit reference to copyright user remedies be made and specific administrative procedures and oversight to safeguard legitimate uses of copyright works be established.

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