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Standing Committee on Industry, Science & Technology

Re: Fair Dealing and Education in Statutory Review of the Copyright Act

May 11, 2018

Dear members of the Standing Committee on Industry, Science & Technology,

As a university professor who researches copyright (see McCutcheon 2015), I am writing in order to submit a brief for your consideration in the process of the statutory review of Canada's Copyright Act. This brief focuses on fair dealing and education, about which I wish to make six concise, evidence-based points:

- 1) Over a decade's worth of Supreme Court rulings has firmly and consistently enshrined fair dealing as a users' right in copyright law (Geist 2012). Should your review be considering restricting or withdrawing fair dealing, please understand that it would not be good public policy to amend the copyright act in a way that would reverse provisions based on the clear and consistent jurisprudence of Canada's highest court. The copyright act's current fair dealing provisions represent fair and balanced intellectual property policy.
- 2) Claims that Canadian and educational publishers' profits are suffering because of fair dealing are specious, misleading, and not evidence-based. One too-oft-cited source for such claims is a 2015 PricewaterhouseCoopers report: commissioned by Access Copyright, it has been thoroughly critiqued and debunked for its inaccuracies and lack of evidence (Nair 2015). If educational publishers' profits have diminished in recent years, it is not due to fair dealing, but instead to global education market and technology trends (see Geist 2017). If Canadian publishers' profits have diminished, it is not due to fair dealing—the Association of Canadian Publishers' March 2017 report Digital Trends and Initiatives in Education does not mention copyright as a significant issue (Nair 2018, Geist 2018). Moreover, that's a big "if": Statistics Canada evidence on Canadian publishing between 2014 and 2016 shows that Canadian book sales actually increased (Nair 2018).



- 3) In the name of authors, lobbyists against fair dealing antagonize and vilify educators (Doctorow 2011, Nair 2017b). However, many educators are authors themselves. And authors and educators alike both need fair dealing (MacLaren 2017, McCutcheon 2013, Nair 2017a). I belong to both groups. Studying literature has led me to write it, and fair dealing is crucial to my creative writing. One genre of poetry I write is the cento: a poem made of lines from other poems or works. Without fair dealing, licensing fees to excerpt even single lines from extant published works, especially works of poetry or song lyrics, could cost hundreds or thousands of dollars (Orr 2011). Creative writers and authors need fair dealing no less than educators do.
- 4) Far from “pirating” works, educators actively promote authors’ interests. Teachers order not just textbooks but also novels, nonfiction, plays, and poetry books, in large quantities, for students to purchase. And university libraries spend millions of dollars each year on books, journal database subscriptions, and other resources. As the Canadian Association of Research Libraries asserts, the fact is that “post-secondary institutions continue to be among the biggest supporters of Canadian authors” (CARL-ABRC 2017). And as Nick Mount documents in *Arrival: The Story of CanLit* (2017), Canadian writing and publishing are presently flourishing (292-3).
- 5) Fair dealing is closely, constitutively connected to—and reinforces—Canadians’ Charter-guaranteed freedom of expression. As law scholar Bitá Amani argues, it is “a legal imperative that [Charter] section 2(b) rights be given priority when in conflict with copyright law ... we must acknowledge and embrace Charter compliance as a check on copyright's public reach” (2014, 50-51). Summarizing her argument, she writes: “Whether copied in substantial or insubstantial part, expression that creates and conveys meaning constitutes a legitimate exercise of freedom of expression” (52). Therefore, any prospective change to fair dealing must be understood as a change—and a risk—to Canadians’ free speech rights (Reynolds 2016).
- 6) Canadian postsecondary students have benefitted enormously from educational fair dealing. As the Canadian Alliance of Student Association attests, fair dealing both affords students greater access to more educational resources—and helps to make education more affordable (Boyd 2018).

All these points are supported by case law and evidence-based studies, most of which are freely available online (see References, below, for links). Thank you for considering this submission to your committee’s review process.

Sincerely,

Mark A. McCutcheon, Ph.D.



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