May 22, 2018

To: Standing Committee on Industry, Science and Technology

Re: Review of the *Copyright Act*

Thank you for this opportunity to contribute to the examination, and potential revision, of the *Copyright Act*. This subject has occupied my attention for nearly fourteen years, through life as a graduate student, teacher, researcher, administrator, and parent.

Copyright is a seemingly straight-forward provision; a measure within law that allows a copyright owner to monetize intellectual effort, by controlling (among other things) the right of reproduction. This control is not absolute; it is limited in time by expiry and in space by some rights of use (those statutory exceptions defined in the *Copyright Act*). Taken together, rights of control and rights of use form the system of copyright and might foster future creativity.

An impediment to fruitful operation of the system is the misunderstanding that authors lie at the heart of the system. Whereas the system was only designed to bring some stability among feuding 18th century publishers. Nevertheless, for over three centuries, control via copyright expanded in depth and breadth, always through the plea that authors were living in poverty. One may rightly ask: if authors are still in dire straits after 308 years of copyright expansion, is copyright their real problem and can it provide a meaningful solution?

The rhetoric escalates with every revision of the *Copyright Act;* copyright is deemed essential to the very existence of Canadian culture.[1] But copyright is a blunt instrument; it cannot distinguish between literary superstars and novice writers, between fostering a homegrown operation and an international publishing conglomerate, and, between writing for an audience and writing for financial gain. Revision of the Act must be carefully handled, with the commercial trade imbalance kept uppermost in mind.

On the following pages are my recommendations for action the Federal Government could undertake, with (and without) change to the *Copyright Act*. Four themes are addressed:

- Preserving Canadian content.
- Deterring copyright abuse.
- Fostering Canadian creativity, exceptions and other means.
- The system of copyright, in support of reconciliation.

Regards,

Meera Nair, Ph.D.
Edmonton, AB

[1] Meera Nair, "wrapping copyright in the maple leaf," *Fair Duty*, 24 April 2016 <https://fairduty.wordpress.com/2016/04/24/wrapping-copyright-in-the-maple-leaf/>.

I. Preserving Canadian Content

While debate often focuses on ensuring the continued creation of Canadian content, little attention is paid to content well on its way to being lost. This loss occurs through the limitations of both the academic market and Crown Copyright. In both situations, taxpayers contributed generously to the content created.

(a) Facilitate recovery and distribution of out-of-print academic press books

Volumes of scholarship about Canada are produced in our universities but are not easily available to all Canadian readers. For instance, consider these two books issued by University of Toronto Press: (i) *The Man from Halifax: Sir John Thompson, Prime Minister* (1985) by the eminent historian P. B. Waite; and (ii) *Essays on the Constitution: Aspects of Canadian law and politics* (1977) by poet-constitutional scholar F. R. Scott. Both books are rich in their contribution towards understanding our past; neither book is easily discoverable or available. That Canadian taxpayers liberally supported the creation of such works (through development of universities, hiring of the professoriate, research grants for those professors, and contributions to the presses themselves) makes this doubly unjust. Books such as these ought to be updated to a digital form and stored in publicly accessible repositories, like those operated by individual universities.

(b) Abandon Crown Copyright

This archaic practice not only denies Canadian taxpayers access to, and use of, taxpayer-funded content, but also limits the capacity of professional librarians and archivists to maintain this important record of Canadian history. In 2017, Amanda Wakaruk petitioned Parliament to address this matter; her petition was widely supported but the government refused to act. I hope this Committee will review Wakaruk's response to the government and act accordingly.[2]

Recommendation 1: That the Federal Government institute a system of grants, applicable to the creation of openly-licensed e-books, of existing print content which is neither actively published nor available in public libraries. The grant may be enjoyed by the publisher, or any third party who wishes to take on the project, with the consent of the copyright-owner.

Recommendation 2: That Section 12 of the *Copyright Act*, "Crown Copyright," be removed and language inserted to make plain that all content produced by the Federal Government is deemed public domain at the moment of creation.

[2] Amanda Wakaruk, "Fix Crown Copyright," *University of Alberta*, <https://sites.google.com/a/ualberta.ca/wakaruk/fixcrowncopyright>.

II. Deterring Copyright Abuse

Individual Canadians unfamiliar with the system of copyright may be forgiven for expecting more than the system delivers, but professional operators have no such excuse.

(a) Notice-and-notice

A practice followed informally within Canada's ISP community entered into law via the amendments of 2012; ISPs, when notified by copyright-owners of suspected illicit behavior by subscribers, must forward the notification to the subscriber. Regrettably, the former Government did not implement any safeguards against abuse of this statutory requirement, to the consequence that many Canadians have received demands for settlement for their alleged misconduct. The present government is well aware of this abuse of the *Copyright Act*;[3] corrective action need not have waited but since the Review is underway, correction is now imperative.

(b) Extortion by threat of lawsuit

The *Copyright Act* offers a means to settle legitimate grievances between affected parties. Unfortunately, the Act can also be invoked as a means of extortion. This is not a hypothetical musing; it has occurred in Canada, with taxpayers bearing the brunt of the abuse. Briefly, a news outlet published inaccurate accounts of government operations, used Access to Information requests to determine who had read those articles, and then pressed the department for a site license far in excess of the actual use of the articles. When this dispute was heard in a Federal Court, the judge cleared the government of any wrongdoing and declared that the sharing of those legitimately obtained articles among a limited number of affected readers was fair dealing.[4] But the fact that this tactic was previously deployed against other departments and Crown corporations—with success—is disturbing.[5]

Recommendation 3: That the *Copyright Act* be amended to include explicit language prohibiting the inclusion of settlement offers or demands in ISP-conveyed notices.

Recommendation 4: That the *Copyright Act* be amended to include explicit language that willful abuse of the Act is an offense, with full damages to be awarded.

---

[3] Michael Geist, "…internal docs raise abuse and fraud concerns," *Michael Geist*, <http://www.michaelgeist.ca/2017/09/government-failed-act-copyright-notice-notice-internal-docs-raise-abuse-fraud-concerns/>.

[4] "Any reporter with the barest understanding of copyright law could not have reasonably concluded that the Department's limited use of the subject news articles represented a copyright infringement;" *Blacklock's Reporter v. Attorney General*, 2016 FC 1400 <http://canlii.ca/t/gx32x>.

[5] Meera Nair, "Blacklock's Reporter—the stories within the story" *Fair Duty*, <https://fairduty.wordpress.com/2016/11/15/blacklocks-reporter-the-stories-within-the-story/>.

III. Fostering Canadian creativity

Through a historical accident of vocabulary—rooting control under the word *copy*—what entered into law as a trade mechanism, now targets individual unauthorized use. Exceptions are the vital means to shelter some unauthorized uses of protected works; uses that foster creative individuals and educated communities. However, unauthorized use is not well understood by writers and/or copyright-owners.[6]

(a) Continuing creativity

Canada's writers and publishers are a success story, at home and abroad.[7] But can the next generation replicate this success? Writers have the opportunity to find their own audience;[8] a lack of publisher no longer limits awareness of Canadian talent.[9] Whereas creative activity is limited by the atmosphere surrounding copyright—mandarins in education, government, and industry, instruct our youth to be creative and innovative, and in the next breath offer stern warnings against copying anything. That the first action relies on the second, escapes notice.

To the extent that Canadians are undertaking the first steps of creativity through lawful activity,[10] they face added challenge by digital locks that remove even the pretense of balance in the system of copyright.[11]

(b) Fair dealing in educational institutions

This Committee has heard of declining incomes for Canadian writers and publishers; please consider the role of competition with respect to educational materials—that open access textbooks, content directly licensed from publishers, and publicly available web-

[6] A survey carried out by Eli Maclaren (Dept. of English, McGill University) offers insight to this challenge, through both qualitative and quantitative analyses; "Copyright and Poetry in twenty-first-century Canada: Poets' incomes and fair dealing," *Canadian Literature* 233 (Summer 2017) 10-27.

[7] Nick Mount (Dept. of English, University of Toronto) is an expert on the subject of CanLit and has quite literally written the book on CanLit's history and ongoing success; *Arrival: The Story of CanLit*, (Toronto: House of Anansi Press, 2017). See also Meera Nair, "good news," *Fair Duty* <https://fairduty.wordpress.com/2018/04/23/good-news-2/>.

[8] Canada's Instagram poet Rupi Kaur comes to mind; her own self-promotion led to a publisher and then 77 weeks on the *New York Times'* best-seller list; Tariro Mzezewa, *New York Times*, <https://www.nytimes.com/2017/10/05/fashion/rupi-kaur-poetry-the-sun-and-her-flowers.html>. Similarly, 2011 Canada Reads' winner Terry Fallis began his successful journey via his own podcasts; Shannon Rupp, *The Tyee*, <https://thetyee.ca/Books/2010/10/20/TerryFallisSatirist/>.

[9] Arguably, the 19th century lack of a Canadian publishing industry did not hinder Canadian writers, they merely went elsewhere to hone their talent; Nick Mount, *When Canadian Literature Moved to New York*, (Toronto: University of Toronto Press, 2006).

[10] The jewel in the Canadian crown may be S29.21, known as the mash-up exception. **This is Canada's competitive edge**; "Imitation and mastery of form or skills must come before major creativity," Oliver Sacks, "The Creative Self" in *The River of Consciousness* (2017) 137. See also Meera Nair, "integrity," *Fair Duty*, <https://fairduty.wordpress.com/2017/05/24/integrity/>.

[11] During the previous copyright amendment process, MP Marc Garneau obtained confirmation—digital locks "trump fair dealing;" Meera Nair, "preparation," *Fair Duty*, <https://fairduty.wordpress.com/2016/06/13/preparation/>.

based materials, may be supplanting previous resources. Furthermore, please consider the lessening interest in explicitly Canadian works by schools and universities.[12]

(c) Supporting Canadians
The firms that predominantly benefit by copyright tend to be large, international conglomerates.[13] To support Canadians, a non-copyright solution is needed.[14]

Recommendation 5: That the *Copyright Act* be amended to allow the use, manufacture or importation of devices capable of overcoming a TPM, if the intended use of the underlying content is lawful.

Recommendation 6: That S.29, fair dealing, of the *Copyright Act* remain as currently stated.

Recommendation 7: That in order to increase revenues of Canadian writers, the Public Lending Right be expanded to include K-12 libraries and K-12 class sets of assigned Canadian literature.

IV. Copyright and Reconciliation

This Committee expressed interest in seeking solutions to challenges faced by Indigenous communities with respect to their intellectual property; namely that the *Copyright Act* does not provide adequate protection. Copyright's structure is predicated on the assumption of individual creativity, by known authors, with protection curtailed by a set duration. By another unfortunate choice in vocabulary, the framework is imbued with misconceptions that intellectual property should be treated as landed property, with its concomitant framework of rigid boundaries.

Whereas the universal act of creativity and characteristics of intellectual property are more aligned with Indigenous perspectives of creativity and property—where creativity is community based, and property is not owned, but belonged to.[15] If Canadians could recognize these commonalities, that all intellectual property is cultural property,[16] it might be easier to find solutions for Indigenous challenges.

Recommendation 8: I offer that recognizing indigenous traditions that we **implicitly already follow**, supports the objectives of the Truth and Reconciliation Commission, particularly the recurring call for better integration of indigenous law into Canadian life.[17]

---

[12] Mount presents data concerning this educational disinterest in Canadian literature (292).
[13] That copyright is ill-suited to serve creators and small publishers is a theme explored by economist Ruth Towse (papers available at ssrn.com).
[14] Mount details how vital direct, and indirect, government support was to Canadian publishing and writing.
[15] Brian Noble, "Owning as Belonging/Owning as Property …" in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law* (Vancouver: UBC Press, 2008) 465.
[16] This research was first presented at *Copyright User Rights and Access to Justice Symposium,* Faculty of Law—University of Windsor, May 2017.
[17] *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), <www.trc.ca>.