Brief to the Standing Committee on Industry, Science and Technology in Furtherance of the Statutory Review of the *Copyright Act*

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ABOUT MOUNT ROYAL UNIVERSITY

Mount Royal University is a non-profit post-secondary institution located in Calgary, Alberta. Founded as Mount Royal College in 1910 and established as Mount Royal University in 2009, it creates applied and pure research and prepares students for careers, graduate and professional schools, and life-long learning.

CONTACT

Alana Gaulin, LLB
Copyright Advisor, Mount Royal University

I. INTRODUCTION

Canadian copyright law has always contained user rights. Our *Copyright Act* was based upon the 1710 British *Statute of Anne*, which had the following title:

> *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*

The *Statute* offered 14 years of protection, turning private law into a grant of public law. It provided writers limited economic rights to encourage the creation of literary works for the public good through the "Encouragement of Learning." The short copyright term – renewable once – was intended to build a body of works for use in the public domain. It provided writers economic incentives to create more works, which was why protection was not extended past a creator's lifetime.

Since these modest beginnings, both ownership and use of copyrighted works have been linked to freedom of expression and basic human rights (Vaver, 2013, p. 671). Freedom of expression is impacted in that user rights allow for self-expression through the performance, adaptation, and use of works (Reynolds, 2017). Human rights are impacted through access to information and thus the ability to participate in society.

There are also cultural ramifications, as access to expressions of culture expose students to their own heritage and those of others (Samuelson, 2017, p. 33). Culture is a participatory process, and every individual is both user and creator as most 'new' works are based on old ones, making access a vital part of producing educated, culturally grounded citizens.

II. A HISTORY OF COPYRIGHT

As noted above, the *Statute of Anne*, upon which Canadian copyright law was founded, had at its core a purpose of encouraging learning by incentivizing the creation of works. It was a 'bare bones' document, often necessitating judicial interpretation. Thus, the courts have always played a central role in the interpretation and application of copyright law, which allows the law to adapt to social and technological changes (Patry, 2017, p. 89).

In the late eighteenth and early nineteenth centuries, English judges rendered decisions based on the *Statute's* premise of encouraging learning. Canada embraced this educational premise in its own laws (Patry, 2017, p. 89 and Elkin-Koren, 2017, p. 145). However, following these early decisions, in the twentieth century, courts began to shift away from public policy goals, focusing on the protection of private economic rights (Craig, 2017, p. 11). Copyright law only reverted back to its public policy foundations in the latter half of the twentieth century.

A. International Conventions

Prior to Canada enacting its own *Act*, it became a signatory to the 1886 *Berne Convention for the Protection of Literary and Artistic Works*. Article 10 states:

> *(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between*

> *them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.*

Berne is the oldest, most adopted international copyright convention. It has always contained provisions for the use of copyrighted works for education and research, and requires signatory countries to maintain them in their own legislation (Billah et al, 2018, p. 424).

Although not all international conventions contain specific educational provisions, they do all have broad use provisions. An example is the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),* an international agreement between members of the World Trade Organization (WTO) (Billah et al, 2018, p. 425). TRIPS contains minimum standards for member countries.

Article 7 requires intellectual property protection to contribute to innovation and dissemination "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Thus, Canada has international obligations to uphold user rights in its copyright legislation.

B. The Creation of the Canadian *Copyright Act*

First passed in 1921, the *Copyright Act* was closely modelled on the *Statute of Anne*. It always included fair dealing for the purpose of private study and research. The *Act* remained largely unchanged until the late twentieth century, when parliament codified explicit exceptions for nonprofit educational institutions.

C. 2002-2012, The Supreme Court of Canada (SCC) Adopts a "Balanced Approach"

The SCC's move to strengthen user rights first appeared in 2002, with their decision in *Théberge*. The SCC asserted that copyright protection is not primarily a benefit for creators, but rather a balance intended to promote the public interest by encouraging creation and dissemination of works while maintaining creators' economic rights, which are "limited" (*Théberge v. Galerie d'Art*, 2002, para. 31).

Further, the Court stated that, "Excessive control by holders of copyrights … may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing" (*Théberge v. Galerie d'Art*, 2002, para. 32).

In 2004, the SCC further endorsed this position by stating, "user rights are not just loopholes" and "research must be given a large and liberal interpretation in order to ensure that user rights are not unduly constrained" (*CCH Canadian Ltd. v. Law Society of Upper Canad*a, 2004, paras. 48 and 51).

With the release of five copyright cases in 2012 – often referred to as the 'Pentatology' – the SCC affirmed fair dealing as a user right on which educational institutions should rely. It was because of these landmark decisions that many educational institutions began to rely on fair dealing later that year.

In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (2012), the SCC stated that, "Teachers have no ulterior motive when providing copies to students, and that "the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying" (para. 34).

Thus, the SCC declared that one should not assess 'fairness' based on the total copying done by institutions, as only the end-user's (each student's) use is relevant. It is therefore inappropriate to assess fair dealing based on the total number of works or pages copied by institutions. This premise was also recently supported by the Federal Court of Appeal in *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, (2018) (at para. 142).

Through the Pentatology, the SCC dismissed concepts of 'exceptions' and 'defences,' instead embracing user rights. They emphasized user rights as balancing protection and access, underscoring the *Act*'s public interest objectives (Vaver, 2013, p. 669).

These cases, along with the changing digital sourcing landscape, were the stimulus for educational institutions to move away from an unnecessary blanket licensing scheme in 2012 that, in many cases, resulted in double payments for use of the same resources.

D. Bill C-11 – *The Copyright Modernization Act*

The *Copyright Act* was amended in June, 2012 through Bill C-11, which added "education" to fair dealing purposes. It did not expand fair dealing, but simply emphasized the right of educational institutions to facilitate access to limited portions of works for their students. Bill C-11 also added new user rights that have proven key to educational users, such as the "Non-commercial User-generated Content" provision in s. 29.21 and the "Work Available Through the Internet" provision in s. 30.04.

However, Bill C-11 simply reflected ongoing shifts in public policy supporting user rights as emphasized by the SCC. It showed Parliament's recognition of Canada's international obligations and the needs of its citizens at the start of the twenty-first century.

E. Fair Dealing Today

Although educational institutions source most works used through electronic licensing, other payment schemes, and as free Open Education Resources, fair dealing still plays a small, but important role in day-to-day activities. This is because it allows for real-time access to small portions of works that supplement other resources and facilitate education and research in today's fast-paced, information savvy society.

Furthermore, in *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, (2018), the Court reiterated the much overlooked fact that, in order to even activate a fair dealing analysis, a 'substantial part' of a work must be copied (para. 128). Many of the excerpts of works reproduced for educational uses are below that threshold and

therefore require neither a license nor a fair dealing analysis under section 3(1) of the *Copyright Act*. However, as a community of both users and creators, Mount Royal University respects the limitations of user rights and encourages payments to copyright owners where appropriate.

It is also important to recognize that the Fair Dealing Guidelines (FDGs) adopted by many institutions are based on decisions from the SCC and the Copyright Board. From an international perspective, Canada's fair dealing practices are consistent with many jurisdictions, and in some cases are much more restrictive. For example, the United States' fair use provisions are far broader than Canadian fair dealing.

Moreover, the FDGs are just that; they are tools designed to assist in determining fair amounts, but they do not replace the SCC's full six factor analysis. For example, the Guidelines allow for the use of one chapter from a book. However, Mount Royal University would never condone unpaid use of a book containing only a few chapters, as it would be patently unfair. As well, like most educational institutions, Mount Royal has a copyright office with a mandate to educate and assist its community in upholding copyright law.

III. CONCLUSIONS

Copyright law has always supported the creation of works by affording creators limited private economic rights balanced against public usage. Users and creators play complimentary roles in creating, disseminating, transforming, interpreting, and expressing literary, dramatic, musical and artistic works. Users are not 'parasites,' but active participants in a cycle that is integral to cultural, artistic, social, and democratic processes. Fair dealing is not a 'wrongful' practice that can be excused in exceptional circumstances; it is a central part of copyright law's underlying goals (Elkin-Koren, 2017, para. 134).

If copyright owners are allowed absolute control over all uses of works, the public domain will be unable to thrive and to incorporate and adapt new works, debilitating the interests of society. User rights are not an encroachment on owners' rights, but a means to foster new generations of creators and their works.

IV. RECOMMENDATIONS

1. **Preserve Fair Dealing and all Other User Rights:** Leave all user rights in place.
2. **Retain the Current Copyright Term:** Do not extend protection from fifty to seventy years, as this would lock up the public's ability to access, use, adapt and participate in education, research, politics, and culture.
3. **Eliminate Contractual Overrides:** Amend the *Copyright Act* so that users are not forced to forego their rights through contractual overrides.
4. **Recognize Aboriginal Copyright:** Acknowledge the unique nature of Indigenous culture and adopt provisions that support Aboriginal copyright.

5. **Allow Circumvention of Digital Locks for Non-Infringing Purposes:** Remove the restriction on overriding technological protection measures which prevent otherwise legal uses of works.
6. **Abolish Crown Copyright:** Canadian taxpayers fund, but do not have access to many works created by governmental bodies. It is necessary to the democratic process that the public has access to government information by abolishing Crown copyright.

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