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CANADA

STATUTORY REVIEW OF THE COPYRIGHT ACT

Report of the Standing Committee on Industry, Science
and Technology

Dan Ruimy, Chair

JUNE 2019
42nd PARLIAMENT, 1st SESSION

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**Dan Ruimy
Chair**

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

To assist the reader:

A list of abbreviations used in this report is available on page xv

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THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

has the honour to present its

SIXTEENTH REPORT

Pursuant to the Order of Reference of Wednesday, December 13, 2017, the Committee has reviewed the *Copyright Act* and has agreed to report the following:

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CHAIR'S FOREWORD

In December 2017, the House of Commons entrusted its Standing Committee on Industry, Science and Technology with the statutory review of the *Copyright Act*. The importance of this Act is unquestionable: as the Honourable Navdeep Bains and the Honourable Mélanie Joly said in their [letter](#) to the Committee, while “often underappreciated, the *Copyright Act* impacts Canadians every day, shaping what we see and hear, and enhancing our systems for the creation and use of content.” The Ministers also emphasized that, given the wide range of industries and activities it affects, the Act and its application are notoriously complex. It was clear to the members of the Committee that reviewing the Act would be no easy task.

To manage the complexity of the task at hand, the Committee elected to conduct, as its members called it, a “living and grounded” review of the Act. The review would thus progress from the ground up, allowing witnesses to set its agenda by raising the issues that concerned them while remaining flexible enough to accommodate evolving interests and concerns. The Committee began by hearing witnesses representing specific industries and sectors of activity, moved gradually to witnesses involved in multiple industries and sectors of activities, such as interest groups and Indigenous witnesses, and concluded the review with academics and legal experts who could speak broadly about the Act and comment previous testimony. For over a year, the review was this Committee’s main endeavour.

As Chair, my main concern was to make sure that the review would be informed by as many different perspectives as possible. Committee members were encouraged to ask all manner of questions to better understand the impact copyright law has on Canada’s modern economy and Canadian creators, even though such questions often led to difficult discussions. We did not presume what the outcome of this lengthy and complex undertaking would bring, only that the Committee would give anyone the opportunity to present oral or written evidence. I am honoured to have witnessed such an important and thoughtful conversation.

This report is the culmination of hundreds of oral and written testimonies, to which the Committee responds with observations and recommendations. I thank all the members who sat on the Committee during its public hearings and contributed to its deliberations, as well as the dedicated individuals who tirelessly supported their work. Most of all, I am grateful to all who took the time and the resources to provide testimony on such an important matter.

LIST OF ABBREVIATIONS

ABPBC	Association of Book Publishers of British Columbia
ACAD	Alberta College of Art and Design
ACP	Association of Canadian Publishers
ACTRA	Alliance of Canadian Cinema, Television and Radio Artists
ADAC	Art Dealers Association of Canada
ADISQ	Association québécoise de l'industrie du disque, du spectacle et de la vidéo
AI	Artificial intelligence
ALAC	Artists and Lawyers for the Advancement of Creativity
AMBP	Association of Manitoba Book Publishers
AMII	Alberta Machine Intelligence Institute
ANEL	Association nationale des éditeurs de livres
ANSUT	Association of Nova Scotia University Teachers
AQED	Association québécoise pour l'éducation à domicile
AQPM	Association québécoise de la production médiatique
ARIN	American Registry for Internet Numbers
ARR	Artist's resale right
ARRQ	Association des réalisateurs et réalisatrices du Québec
BAnQ	Bibliothèque et Archives nationales du Québec
BCBC	Business Coalition for Balanced Copyright
BCLA	British Columbia Library Association
CAA	Canadian Authors Association

CAB	Canadian Association of Broadcasters
CACN	Canadian Anti-Counterfeiting Network
CALJ	Canadian Association of Learned Journals
CALL	Canadian Association of Law Libraries
CAPIC	Canadian Association of Professional Image Creators
CARFAC	Canadian Artists' Representation
CARL	Canadian Association of Research Libraries
CASA	Canadian Alliance of Student Associations
CAUL	Council of Atlantic University Libraries
CAUT	Canadian Association of University Teachers
CBA	Canadian Bar Association
CBC	Canadian Broadcasting Corporation
CCA	Canadian Council of Archives
CaCC	Canadian Chamber of Commerce
CrCC	Creative Commons Canada
CCD	Council of Canadians with Disabilities
CCI	Canadian Copyright Institute
CCM	Coalition for Culture and Media
CCP	Cultural Capital Project
CDPA	<i>Copyright, Designs and Patents Act 1988 (UK)</i>
CFLA	Canadian Federation of Library Associations
CFM	Canadian Federation of Musicians
CFS	Canadian Federation of Students
CHPC	House of Commons Standing Committee on Canadian Heritage

CIC	Colleges and Institutes Canada
CIMA	Canadian Independent Music Association
CIPPIC	Canadian Internet Policy and Public Interest Clinic
CMA	Copyright Modernization Act
CMRRA	Canadian Musical Reproduction Rights Agency
CMEC	Council of Ministers of Education, Canada
CMePA	Canadian Media Producers Association
CMuPA	Canadian Music Publishers Association
CNIB	Canadian National Institute for the Blind
CNOC	Canadian Network Operators Consortium
CPC	Canadian Publishers Council
CPCC	Canadian Private Copying Collective
CPHSS	Canadian Publishers Hosted Software Solutions
CPSLDBC	Council of Post-Secondary Library Directors of British Columbia
CRKN	Canadian Research Knowledge Network
CRTC	Canadian Radio-television and Telecommunications Commission
CSBA	Canadian School Boards Association
CSC	Campus Stores Canada
CSCAIP	Canadian Society of Children’s Authors, Illustrators and Performers
CTA	Consumer Technology Association
CTF	Canadian Teachers’ Federation
CULC	Canadian Urban Libraries Council
CUSMA	Canadian–United States–Mexico Agreement
CVA	Copyright Visual Arts

DCH	Department of Canadian Heritage
DFA	Dalhousie Faculty Association
DGC	Directors Guild of Canada
ECUAD	Emily Carr University of Art and Design
FCM	Federation of Canadian Municipalities
FNC	Fédération nationale des communications
GMMQ	Gilde des musiciens et musiciennes du Québec
HAC	Hotel Association of Canada
HAP	House of Anansi Press/Groundwoor Books
IATSE	International Alliance of Theatrical Stage Employees
ICMI	Indigenous Culture and Media Innovations
ICSAC	International Confederation of Societies of Authors and Composers
IFLAI	International Federation of Library Associations and Institutions
IFRRO	International Federation of Reproduction Rights Organisations
INDU	House of Commons Standing Committee on Industry, Science and Technology
IPIC	Intellectual Property Institute of Canada
IPU	International Publishers Association
ISED	Department of Innovation, Science and Economic Development
ISP(s)	Internet service provider(s)
LMAs	Libraries, archives and museums
MMF	Manitoba Metis Federation Inc.
MPAC	Motion Picture Association-Canada
MRFHG	Maple Ridge Family History Group

MRU	Mount Royal University
MTAC	Movie Theatre Association of Canada
NCCRA	National Campus and Community Radio Association
NCTR	National Centre for Truth and Reconciliation
NMC	News Media Canada
OBPO	Ontario Book Publishers Organization
OMM	ole Media Management
OSP(s)	Online service provider(s)
OTW	Organization for Transformative Works
PGC	Playwrights Guild of Canada
PIAC	Public Interest Advocacy Centre
PMPA	Professional Music Publishers Association
PPC	Professional Photographers of Canada
PWAC	Professional Writers Association of Canada
QLA	Quebec Library Association
RAAVQ	Regroupement des artistes en arts visuels du Québec
RSU	Ryerson Students' Union
SACD	Société des auteurs et compositeurs dramatiques
SAIT	Southern Alberta Institute of Technology
SARTEC	Société des auteurs de radio, télévision et cinéma
SCAM	Société civile des auteurs multimedia
SCC	Supreme Court of Canada
SCGC	Screen Composers Guild of Canada
SFU	Simon Fraser University

SNE	Syndicat national de l'édition
SOCAN	Society of Composers, Authors and Music Publishers of Canada
SODRAC	Society for Reproduction Rights of Authors, Composers and Publishers in Canada
SPACQ	Société professionnelle des auteurs et des compositeurs du Québec
TPM(s)	Technology protection measure(s)
TSM	Third Side Music Inc.
UBC	University of British Columbia
UCRIU	Undergraduates of Canadian Research-Intensive Universities
UEQ	Union Étudiante du Québec
UNB	University of New Brunswick
UNEQ	Union des écrivaines et des écrivains du Québec
UK	United Kingdom
US	United States
WAC	Winnipeg Arts Council
WGC	Writers Guild of Canada
WSD	Winnipeg School Division No 1
WUC	Writers' Union of Canada

SUMMARY

Section 92 of the *Copyright Act* (the Act) provides that the Act must be reviewed every five years by a parliamentary committee. On 13 December 2017, the House of Commons designated its Standing Committee on Industry, Science and Technology (the Committee) to conduct the review. The Committee held 52 meetings, heard 263 witnesses, collected 192 briefs, and received more than 6,000 emails and other correspondence.

The Committee consulted a broad range of stakeholders to ensure all perspectives were duly considered. These stakeholders included, among others, creators, educational institutions, industry representatives, teachers, students, interest groups, broadcasters, online service providers, Internet service providers, collective societies, lawyers, and academics. The Committee also dedicated a portion of the review to Indigenous groups and individuals, which could become standard practice when formulating copyright policy. The Committee gathered evidence in a systematic manner that allowed witnesses to bring forth the issues that mattered to them. This report cites every single person who provided oral testimony or submitted a brief to the Committee, and thus recognizes that the complexity of copyright policy requires every issue to be carefully weighed.

The fruit of over ten meetings of deliberations, this Committee's report covers a broad range of topics. They include the protection of traditional and cultural expressions, term extension, computer-generated works, artist's resale rights, fair dealing, safe harbour provisions, perceptual disability provisions, online piracy, proceedings before the Copyright Board of Canada, and the statutory review process itself. After reporting on a few legal developments of the last seven years, the report addresses these topics in turn under six sections: Statutory Review, Indigenous Matters, Rights, Exceptions, Enforcement, and the Collective Administration of Rights.

The report makes 36 recommendations. They include recommendations aiming at reducing the opaqueness of Canadian copyright law, notably by gathering authoritative information on its impact on Canadian creators and creative industries, increasing the transparency of the collective administration of rights, and simplifying the Act. The Committee recommends improving the bargaining power of Canadian creators by granting them a termination right while mitigating the impact of such a right on the commercial exploitation of copyright. It also proposes to sensibly update enforcement mechanisms, starting with statutory damages for rights-holders and collective societies. The recommendations address site-blocking proposals and their potential impact on the form and function of Internet, and assert that online service providers such as Google and Facebook must fully comply with the Act to the benefit of both rights-holders and

users. The report also proposes to move forward to protect traditional and cultural expressions, vitally informed by the testimony of Indigenous witnesses.

Readers will find in the report many “Committee observations.” While these observations do not amount to recommendations, they constitute a genuine effort to respond and engage with stakeholders who have taken the time and expended resources to partake in the review, rather than leaving them to speculate on the Committee’s motives. The Committee hopes these observations will help stakeholders learn from and reflect on this exercise. This report will not end the debate around copyright law, but it will hopefully help moving it forward.

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That the Government of Canada introduce legislation to repeal section 92 of the *Copyright Act* in order to remove the requirement to conduct a five-year review of this Act. 24

Recommendation 2

That the Government of Canada simplify the wording and the structure of the *Copyright Act*. 25

Recommendation 3

That the Government of Canada establish a Research Chair on Remuneration and Business Models for Creators and Creative Industries in the Digital Economy as well as a Research Chair on the Economics of Copyright..... 25

Recommendation 4

That the Government of Canada mandate Statistics Canada to develop consistent indicators and authoritative data on the economic impacts of copyright legislation in Canada, notably to determine its effects on the remuneration of Canadian creators and the revenues of Canadian creative industries. 25

Recommendation 5

That the Government of Canada consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context of Reconciliation, and that this consultation address the following matters, among others:

- **The recognition and effective protection of traditional arts and cultural expressions in Canadian law, within and beyond copyright legislation;**

- The participation of Indigenous groups in the development of national and international intellectual property law;
- The development of institutional, regulatory, and technological means to protect traditional arts and cultural expressions, including but not limited to:
 - Creating an Indigenous Art Registry;
 - Establishing an organization dedicated to protecting and advocating for the interests of Indigenous creators; and
 - Granting Indigenous peoples the authority to manage traditional arts and cultural expressions, notably through the insertion of a non-derogation clause in the *Copyright Act*..... 30

Recommendation 6

That, in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work. 38

Recommendation 7

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion..... 38

Recommendation 8

That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration. 39

Recommendation 9

That the Government of Canada consult with provincial and territorial governments, Indigenous groups, and other stakeholders to explore the costs and benefits of implementing a national artist’s resale right, and report on the matter to the House of Commons Standing Committee on Industry, Science and Technology within three years..... 43

Recommendation 10

That the Government of Canada consider amending the *Copyright Act* to remove the words “created after June 7, 1988,” from section 3(1)(g) of this Act, with no retroactive effect and providing stakeholders with a significant transitional period..... 43

Recommendation 11

That the Government of Canada improve Crown copyright management policies and practices by adopting open licences in line with the open government and data governance agenda, with respect to any work prepared and published:

- **By or under the direction or control of a Canadian government; and**
- **In the public interest and for the purpose of public use, education, research, or information.**

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that no Canadian government or person authorized by a Canadian government infringe copyright when committing an act, either:

- **Under statutory authority; or**
- **For the purpose of national security, public safety, or public health.**

In the context of Crown copyright and acts done under statutory authority or for the purpose of national security, public safety, or public health, that the Government of Canada consider implementing measures to compensate rights-holders for acts done by a Canadian government or a person authorized by a Canadian government that would otherwise infringe copyright, when appropriate.

That the Crown exercise copyright protections that are reasonable in the public interest. 46

Recommendation 12

That the Government of Canada maintain the definition of “sound recording” under section 2 of the *Copyright Act*. 48

Recommendation 13

That the Government of Canada update the rules governing first ownership of cinematographic works in light of the digital age and in consideration of maintaining competitiveness in a global market. 50

Recommendation 14

That the Government of Canada consider amending the *Copyright Act* or introducing other legislation to provide clarity around the ownership of a computer-generated work. 51

Recommendation 15

That the House of Commons Standing Committee on Canadian Heritage consider conducting a study to investigate the remuneration of journalists, the revenues of news publishers, the licences granted to online service providers and copyright infringement on their platforms, the availability and use of online services, and competition and innovation in online markets, building on their previous work on Canada’s media landscape. 53

Recommendation 16

That the Government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada. 65

Recommendation 17

That the House of Commons Standing Committee on Industry, Science and Technology resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments. 65

Recommendation 18

That the Government of Canada introduce legislation amending section 29 of the *Copyright Act* to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one..... 69

Recommendation 19

That the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes. 72

Recommendation 20

That the Government of Canada review section 29.21 of the *Copyright Act* to ensure that the creator of non-commercial user-generated content is not held liable for unintended copyright infringement..... 74

Recommendation 21

That the Government of Canada monitor the implementation, in other jurisdictions, of extended collective licensing as well as legislation making safe harbour exceptions available to online service providers conditional to measures taken against copyright infringement on their platforms. 83

Recommendation 22

That the Government of Canada assert that the content management systems employed by online service providers subject to safe harbour exceptions must reflect the rights of rights-holders and users alike..... 83

Recommendation 23

That the Government of Canada introduce legislation to amend the *Copyright Act* to facilitate the use of a work or other subject-matter for the purpose of informational analysis. 87

Recommendation 24

That the Government of Canada work with industry and relevant stakeholders to explore ways to support the production of works published in formats specially designed for persons with a perceptual disability, and to measure, on a yearly basis, the availability of works published in such formats. 89

Recommendation 25

That the Government of Canada make regulations to require notices sent under the notice-and-notice regime be in a prescribed machine-readable format..... 92

Recommendation 26

That the Government of Canada examine ways to keep IPv6 address ownership information up-to-date in a publicly accessible format similar in form and function to American Registry for Internet Numbers’ IPv4 “WHOIS” service. 92

Recommendation 27

Following the review of the *Telecommunications Act*, that the Government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law. 98

Recommendation 28

That the Government of Canada introduce legislation amending the *Copyright Act* to increase upper and lower limits of statutory damages provided under sections 38.1(1), 38.1(2) and 38.1(3) of this Act to account for inflation, based on the years when they were originally set. 101

Recommendation 29

That the Government of Canada introduce legislation amending the *Copyright Act* to clarify that users can negotiate with a collective society as a group and to allow users to jointly apply to the Copyright Board of Canada, when the Board deems it appropriate. 106

Recommendation 30

That the Government of Canada report to the House of Commons Standing Committee on Industry, Science and Technology within three years on the effectiveness of the reform of the Copyright Board of Canada, including measures introduced and amended by the *Budget Implementation Act, 2018, No. 2*. 107

Recommendation 31

That the Government of Canada introduce legislation amending section 72(2) of the *Copyright Act* to ensure that the radio royalty exemption only applies to small, independent broadcasters.

That the Government of Canada make regulations to define “community systems” under section 72(6) of the *Copyright Act* in order to identify broadcasters to which section 72(3) of this Act applies. 109

Recommendation 32

That the Government of Canada evaluate the forms of statutory damages available under the *Copyright Act* to a collective society or a rights-holder who has authorized a collective society to act on their behalf where applicable royalties are set by the Copyright Board of Canada and the defendant has not paid them. 114

Recommendation 33

That the Government of Canada study the private copying regimes in place in other countries with a view to identifying the digital environment, the distribution of royalties flowing from the private copying levy, and the impact on consumers on which a private copying levy applies, including the impact of the private copying regime on the retail prices of the different types of digital device to which they apply. 117

Recommendation 34

That the Government of Canada evaluate the constitutional feasibility of establishing minimal standards in private agreements relating to a transfer of a right provided by the *Copyright Act*. 119

Recommendation 35

That the Copyright Board of Canada review whether provisions of the *Copyright Act* empower the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and report to the House of Commons Standing Committee on Industry, Science and Technology within two years..... 120

Recommendation 36

Given the important role of collective societies in the copyright framework and in the collective administration of rights, that the Government of Canada consider the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations and the disclosure of their repertoire. 120



STATUTORY REVIEW OF THE *COPYRIGHT ACT*

INTRODUCTION

The Committee heard a total of 263 witnesses and received 192 briefs.

Section 92 of the *Copyright Act* (the Act) provides that the Act must be reviewed every five years by a designated or established parliamentary committee. On 13 December 2017, the House of Commons designated the Standing Committee on Industry, Science and Technology (the Committee) to review the Act. The statutory review consisted of

52 meetings, which took place between 13 February 2018 and 16 May 2019. The Committee heard a total of 263 witnesses and received 192 briefs.

This report presents 36 recommendations, most of which are directed to the Government of Canada (the Government). Pursuant to section 109 of the *Standing Orders of the House of Commons*, upon the tabling of the report in the House of Commons and at the request of the Committee, the Government will have 120 days to respond in writing to the Committee on the recommendations therein.

In this report, the phrase “copyrighted content” refers to works and other subject-matters protected under the Act. The “use” of copyrighted content refers to any use of copyrighted content that would fall under the rights of a rights-holder under the Act, such as, in the case of a work, the rights enumerated under section 3 of the Act.



LEGAL DEVELOPMENTS, 2012–2017

LEGISLATION

This review of the Act is the first conducted since the adoption of the *Copyright Modernization Act* (CMA) in 2012.¹ This section provides a brief review of the contents of the CMA. It also provides a summary of other amendments to the Act made since 2012, as well as some of the notable case law. While this Committee was tasked with conducting a statutory review, it was conscious of the diverse sources of copyright law, including international agreements, decisions of the Copyright Board of Canada, and case law. As such, it was careful to look beyond the Act where necessary.

The CMA received Royal Assent on 29 June 2012. The CMA marked the first major amendments to the Act since 1997 and was the product of a lengthy policy-making process that spanned multiple sessions of Parliament. The CMA made several significant changes to the Act, including the introduction of section 92, the provision requiring this statutory review. Other additions of note include:

- a) An explicit reference to education as an acceptable purpose for the application of fair dealing at section 29;
- b) The notice-and-notice regime at sections 41.25 and 41.26, which provides a method for rights-holders who suspect that an IP address has been used to infringe their copyright to alert the user associated with that address;
- c) The backup copy exception at section 29.24, which allows users to make a “backup” version of a work they either own or have a licence to use;
- d) An amendment to the “ephemeral copies exception” at section 30.9. Previously, this section permitted the creation of temporary copies of a recording for broadcasting purposes, but only if the right to do so was not otherwise available under a licence from a collective society. Under the new Act, the exception applies regardless of any available licence;
- e) A requirement at section 38.1 that, in assessing the quantum of statutory damages available to a rights-holder upon a finding of infringement, a court

1 S.C. 2012, c. 20.

must consider whether the infringement was commercial or non-commercial;

- f) The technological protection measures (TPMs) regime at sections 41 to 41.22, which prohibits the circumvention of TPMs used to restrict access to and use of copyrighted content;
- g) The non-commercial user-generated content exception at section 29.21, which allows users to create new works out of pre-existing works as long as the new works are non-commercial and do not adversely affect rights-holders; and
- h) A “safe harbour,” at section 41.27, that limits the liability of providers of digital “information location tools” for infringements that may have occurred using those tools.

Further amendments were made to the Act in 2016, with the passage of [*An Act to amend the Copyright Act \(access to copyrighted works or other subject-matter for persons with perceptual disabilities\)*](#).² Those amendments implemented a series of obligations Canada had assented to as a signatory to the World Intellectual Property Organization’s [*Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*](#). The changes allowed a person with a “perceptual disability,”³ or those operating at their request or to their benefit, to engage in activities that would otherwise amount to either copyright infringement or circumvention of a TPM, so long as those activities were aimed at providing access to the work at issue in an alternate format.

NOTABLE DECISIONS

On 12 July 2012, the Supreme Court of Canada (SCC) released a series of five decisions concerning interpretations of the Act (often referred to as the “Copyright Pentalogy”). While these decisions interpreted the Act as it existed prior to the 2012 amendments, they are nonetheless relevant to this review in at least two ways. First, in [*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*](#), the SCC endorsed, without fully explaining, the concept of “technological neutrality” as a

2 S.C. 2016, c. C-42.

3 *Copyright Act*, R.S.C. 1985, c. C-42, s. 2.



principle for interpreting the Act. Many witnesses who appeared before the Committee advocated for changes to the Act based on this principle.⁴

Second, in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*,⁵ the SCC concluded that teachers could rely on the fair dealing exception when reproducing works for their students since these students were engaging in “private study.” The SCC reached this conclusion without relying on an explicit fair dealing exception for “education”—which, as noted above, has since been added to the Act.

Three years after the Pentalogy, in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,⁶ the SCC revisited the concept of “technological neutrality.” At issue was a decision from the Copyright Board (the Board) that found that “broadcast-incidental copies,” or reproductions of a work that are made for technical or legal reasons during the broadcasting process, required separate compensation under the Act. The Canadian Broadcasting Corporation (CBC) argued that this assessment was inconsistent with the principle of technological neutrality. The majority of the SCC ultimately found that technological neutrality can not override the language of the Act, which did require the CBC to pay. However, that majority also stated that the Board should have considered technological neutrality in determining the value of those copies and sent it back for redetermination.

While these decisions [of the Supreme Court of Canada] interpreted the Act as it existed prior to the 2012 amendments, they are nonetheless relevant to this review in at least two ways.

Another court case relevant to this review relates to a September 2011 decision by York University to “opt out” of its relationship with Access Copyright, a copyright collective that administers reproduction rights associated with a number of literary and artistic works. As a result, York University would no longer pay Access Copyright according to a tariff established by the Board to make copies of materials for its students. Instead, it would rely on subscriptions to online databases, engagement with Access Copyright on a case-by-case basis, and exceptions, like fair dealing, contained within the Act.

4 2012 SCC 34.

5 2012 SCC 37.

6 2015 SCC 57.

On 8 April 2013, Access Copyright sued York, seeking to enforce the tariff. York counterclaimed, arguing that its activities fell within fair dealing and that the tariff was not mandatory. Ultimately, the Federal Court sided with Access Copyright, concluding in *Canadian Copyright Licensing Agency v. York University* that York was bound by the Board’s decision and that its fair dealing policies were not in compliance with the Act.⁷ The *York* case, which is currently under appeal, is only one piece of a larger ongoing legal battle between Access Copyright and many stakeholders from the Canadian education sector.

In *Nintendo of America Inc. v. King*,⁸ the Federal Court was asked, for the first time, to interpret and apply the new provisions of the Act on TPMs. At issue was the sale of “Game Copiers,” items that allowed owners of game consoles to download and play unauthorized copies of Nintendo games. The Federal Court ultimately provided a large and liberal interpretation of the “digital lock” provisions: so long as a component is effective in controlling access to or controlling use of the work, it is a TPM under the Act. Moreover, the Court determined that even the physical configuration of a work could be a TPM—in this case, the shape of a Nintendo game cartridge, which, in corresponding to the shape of a slot on a Nintendo game console, “operate[s] much like a lock and key.”⁹

On 14 September 2018, the SCC released its decision in *Rogers Communications Inc. v. Voltage Pictures, LLC*.¹⁰ At issue: whether the notice-and-notice regime obliges Internet service providers (ISPs) to keep the identities of customers who have received a notice of alleged infringement from a rights-holder so that the rights-holder, with a court order, could then obtain them for free. The Court found that ISPs are entitled to compensation for their compliance with such an order. While it may seem like a narrow decision, the practical effect could have been significant. Had the Court found otherwise, Voltage and other rights-holders would have been able to use the notice-and-notice regime to freely acquire the identities of thousands of users, thereby steeply reducing the costs of litigation.

*Keatley Surveying Ltd. v. Teranet Inc.*¹¹ involved a long-running dispute between professional surveyors and Teranet, which manages the Province of Ontario’s electronic land registry system (ELRS). Surveyors prepare survey plans, recognized as works under the Act, which are then registered in the ELRS and made available to the public for a

7 2017 FC 669 (CanLII).

8 2017 FC 246 (CanLII).

9 *Ibid.*, para. 86.

10 2018 SCC 38.

11 2016 ONSC 1717 (CanLII).



prescribed fee under Ontario's [Registry Act](#) and [Land Titles Act](#). Surveyors launched a class action against Teranet before the Superior Court of Justice, claiming that Teranet infringed their copyright given that no portion of the collected fees were distributed back to the authors of the survey plans. The Superior Court dismissed the action of the surveyors, a decision later [confirmed](#) by the Court of Appeal for Ontario.¹² While the survey plans had not been prepared by the Government of Ontario, both courts found that they had been published under its direction or control, which there transferred copyright ownership to the Crown.

The SCC granted leave to appeal the case and took it under consideration after having [heard](#), on 29 March 2019, arguments on the proper interpretation of section 12 of the Act from the parties and a number of interveners, the latter of which included the attorney generals of Canada, Ontario, Saskatchewan and British Columbia.

12 2017 ONCA 748 (CanLII).

STATUTORY REVIEW

APPROACH, EVIDENCE AND CAMPAIGNS

Given the complexity of the endeavour, the Committee adopted a systematic approach to conducting the statutory review of the Act. The review was divided into three phases:

- a) During the first phase, the Committee heard from witnesses representing stakeholders associated with specific industry sectors, such as publishing, the music industry or the provision of telecommunications services;
- b) During the second phase, the Committee heard from interest groups and other stakeholders involved in multiple sectors of activities, such as online service providers (OSPs)—i.e., entities providing a commercial communication service online, such as a search engine or a social media platform; and
- c) In the third phase, the Committee supplemented its preliminary findings with submissions from legal experts, namely academics, professional associations and practicing lawyers.

Over the course of the review, in addition to written and oral testimony, the Committee and its members received over 6,000 emails.

To hear from a wide range of stakeholders, the Committee also held meetings in Halifax, Montreal, Toronto, Winnipeg, and Vancouver from 7 to 11 May 2018 to hear the perspectives of Canadians working in all sectors of activities.

Over the course of the review, in addition to written and oral testimony, the Committee and its members received over 6,000 emails. These emails mainly originated from two online campaigns: *Let's Talk Copyright*, organized by OpenMedia, and *I Value Canadian Stories*, organized by a coalition of associations operating in multiple creative industries. The Committee also received almost one hundred postal cards from the Songwriters Association of Canada (SAC). Every single one of these contributions was reviewed and is part of the record of the statutory review.



THE CONTRIBUTION OF THE HOUSE OF COMMONS STANDING COMMITTEE ON CANADIAN HERITAGE

At the beginning of the review, the Committee invited the House of Commons Standing Committee on Canadian Heritage (CHPC) to contribute to the statutory review, requesting that it

conduct a study, in the context of copyright, on remuneration models for artists and creative industries, including rights management and the challenges and opportunities of new access points for creative content such as streaming and emerging platforms.

That [CHPC] call upon the expertise of a broad range of stakeholders impacted by copyright to ensure a holistic understanding of the issues at play.

That [CHPC] provide [the Committee] with a summary of testimony and recommendations related to the items mentioned above for the parliamentary review of the Copyright Act.

CHPC presented in the House of Commons a report entitled *Shifting Paradigms* on 15 May 2019. The Committee thanks its colleagues for their contribution and looks forward to consulting their report.

CONCURRENT DEVELOPMENTS

A challenging aspect of conducting a wide-ranging review of such a crucial piece of legislation is that the ways in which the Act is interpreted and applied may shift significantly during the review. Indeed, several developments on both the domestic and international levels occurred during this statutory review. The most significant of those are described briefly below.

FairPlay Canada

On 29 January 2018, a coalition of broadcasters, telecommunications companies, and unions and organizations within the Canadian cultural industry, including a number of stakeholders who testified before the Committee during this review, filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC) requesting the creation of an “Independent Piracy Review Agency.” This agency would identify websites or online services that are “blatantly, overwhelmingly, or structurally engaged in copyright piracy” and then require ISPs to block access to those sites or services.

The coalition argued that online piracy has a significant financial impact on the Canadian entertainment industry, hindering new investment and growth, and that Canada’s copyright regime struggles to adequately respond to this growing problem. In response, those opposed to the idea raised concerns around freedom of expression, net neutrality, market competitiveness, and a lack of jurisdiction on the part of the CRTC to deal with copyright issues.

On 2 October 2018, the CRTC issued its [ruling](#) on the application. It denied FairPlay’s proposal, concluding that the enforcement of the Act was not within its mandate as defined by the [Telecommunications Act](#). The CRTC noted, however, that this Committee’s statutory review was ongoing, concluding that “[t]here are also other avenues to further examine the means of minimizing or addressing the impact of copyright piracy, including the parliamentary review of the *Copyright Act*.”¹³ The Committee did review the relevant provisions of the Act, as seen under the “Enforcement” section of the present report.

Canada–United States–Mexico Agreement

On 30 November 2018, Canada, the United States, and Mexico signed an agreement (CUSMA) on free trade. Chapter 20 of that agreement, “Intellectual Property Rights,” contained several clauses that would commit Canada to harmonizing aspects of its copyright law with those of Mexico and the United States. In many respects, the terms of the CUSMA appear to affirm pre-existing elements of Canada’s copyright regime, including anti-circumvention rules, safe-harbour provisions for ISPs and OSPs, and notice-and-notice. One major change, however, is that Canada would need to extend the general term of copyright protection from 50 to 70 years after the death of the author of the work.

European Union Copyright Directive

On 15 April 2019, the Council of the European Union approved a [Directive of the European Parliament and of the Council on copyright in the digital single market](#) (the Directive), which seeks to harmonize digital copyright policy across the European Union (EU). The proposal attracted significant attention from across the cultural industries.

Two elements of the Directive have been particularly controversial and were frequently raised by witnesses in this review. Article 15 of the Directive would provide press publishers with a right to remuneration by “information society service providers” for

13 Canadian Radio-television and Telecommunications Decision [CRTC], [Telecom Decision CRTC 2018-384](#), Ottawa, 2 October 2018, para. 73.



the digital use of their publications. Critics suggested that it would amount to a “link tax” that content aggregators, search engines, and other online platforms would have to pay to provide hyperlinks to press publications. However, Article 15 stresses that the right “shall not apply to acts of hyperlinking.”

Article 17 of the Directive would make “online content sharing service providers” liable for the communication to the public, through their platforms, of works or other subject-matter without the authorization of their rights-holders, unless they can show that they have:

- (a) made best efforts to obtain an authorization and
- (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information, and in any event
- (c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightsholders, to disable access to, or to remove from, their websites the notified works and other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Article 17(8) also specifies that the “application of this Article shall not lead to any general monitoring obligation.” Article 17(7) of the Directive would also allow the unauthorized upload of parts of works and other subject-matter for the purposes of quotation, criticism, review, caricature, parody, and “pastiche”—i.e., a work imitating the style of another work.

Critics of the provision argue that it would saddle OSPs with massive liability and encourage them to err on the side of caution and take down uploaded content—whether or not it actually infringes copyright. Its opponents have also warned that, given that only the biggest OSPs would be able to afford complying with its requirements, Article 17 could severely reduce competition in online markets.

Bill C-86

On 29 October 2018, [Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures](#) (Bill C-86) was introduced in the House of Commons. Along with a package of amendments to other aspects of Canada’s intellectual property regime, two sub-divisions of Bill C-86 contained substantial amendments to the Act. It received Royal Assent on 13 December 2018.

In particular, Bill C-86 amended provisions of the Act governing proceedings before the Board. These amendments, which came into force on 1 April 2019, were preceded by a significant consultation process launched by the Government in 2017¹⁴ as well as a 2016 study by the Senate Standing Committee on Banking, Trade, and Commerce.¹⁵ Changes included:

- Establishing a mandate for the Board and a list of criteria it must consider when setting a tariff (including fairness, competition, transparency, and the public interest);
- Providing shorter timelines for the process of proposing and approving tariffs;
- Reducing the number of “non-voluntary” matters (matters that must be addressed by the Board);
- Preventing the tariff-setting process from having retroactive effects; and
- Streamlining procedure and providing for a case management power for the Chair of the Board.

Sections 243 to 246 of Bill C-86 also made amendments that address concerns that some rights-holders were abusing the notice-and-notice regime by including settlement demands in the notices—unduly pressuring recipients to settle an alleged dispute even when they might not have done anything wrong. These amendments prohibit notices from containing offers to settle or demands for personal information and provide the Governor in Council with the ability to make further prescriptions on the content and the form of a notice.

FUTURE REVIEWS AND LEGISLATIVE COMPLEXITY

The Committee received submissions not only on the Act, but also on the review process itself. Noting that some of the 2012 amendments are still under litigation, Jeremy de Beer, Professor of Law at the University of Ottawa, argued that five-year intervals do not leave enough time to implement new provisions and interpret them in light of existing

14 Department of Innovation, Science and Economic Development [ISED], Department of Canadian Heritage [DCH] & Copyright Board of Canada [Copyright Board], *A Consultation on Options for Reform to the Copyright Board of Canada*, 2017.

15 Senate, Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review*, Seventh Report, 1st session, 42nd Parliament, November 2016.



principles. Mr. de Beer added that frequent parliamentary reviews are resource-intensive and time-consuming, encourage short-sighted legislation, and hinder progress by postponing the resolution of difficult issues to the next review.¹⁶ Howard P. Knopf, Counsel at Macerac & Jarzyna, argued that short-interval, periodic reviews increase the risk that Parliament could react prematurely to technological change and before the market develops solutions of its own.¹⁷

While he believed the current review to be timely, Casey Chisick, Partner at Cassels Brock & Blackwell, maintained that deciding when to review the Act should remain Parliament's prerogative rather than being dictated by statute.¹⁸ Given the lack of publicly available data on the effects of copyright reform, the Intellectual Property Institute of Canada (IPIC) suggested that the Government refrain from making significant amendments to the Act and instead lay down the groundwork for its next mandated review, scheduled in 2022.¹⁹ According to Michael Geist, Professor of Law at the University of Ottawa, the 2016 and 2018 amendments show that Parliament can change the Act whenever appropriate, outside of the review process.²⁰

[F]ive-year intervals do not leave enough time to implement new provisions and interpret them in light of existing principles.

Other witnesses argued that Parliament should retain the five-year review process to keep up with technological change, address outstanding issues, and ensure the Act works properly.²¹ Barry Sookman, Partner at McCarthy Tétrault, suggested to keep reviewing the Act on a regular basis, but to increase the interval of the reviews in order

16 House of Commons, Standing Committee on Industry, Science and Technology [INDU], *Evidence*, 1st Session, 42nd Parliament, 28 November 2018, 1600, 1700 (Jeremy de Beer, as an individual). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 10 December 2018, 1700 (Michael Geist, as an individual); Canadian Association of Research Libraries [CARL], *Brief Submitted to INDU*, 28 September 2018.

17 INDU, *Evidence*, 1st Session, 42nd Parliament, 28 November 2018, 1625, 1705 (Howard P. Knopf, as an individual); Howard P. Knopf, *Brief Submitted to INDU*, 7 January 2019.

18 INDU (2018), *Evidence*, 1600 (de Beer); INDU, *Evidence*, 1st Session, 42nd Parliament, 10 December 2018, 1705 (Casey Chisick, as an individual).

19 INDU, *Evidence*, 1st Session, 42nd Parliament, 10 December 2018, 1555 (Bob Tarantino & Catherine Lovrics, Intellectual Property Institute of Canada [IPIC]).

20 INDU (2018), *Evidence*, 1725 (Geist).

21 INDU, *Evidence*, 1st Session, 42nd Parliament, 3 December 2018, 1605 (Sarah Mackenzie & Steven Seiferling, Canadian Bar Association [CBA]); INDU, *Evidence*, 1st Session, 42nd Parliament, 10 December 2018, 1700 (Ysolde Gendreau, as an individual); INDU (2018), *Evidence*, 1705 (Tarantino & Lovrics, IPIC).

to allow more time to implement amendments and thoroughly observe their effects.²² The Screen Composers Guild of Canada (SCGC) suggested reviewing the Act at much shorter intervals than every five years to ensure quick legislative responses to technological changes.²³

Some witnesses highlighted the complexity of the Act itself as a problem. Copyright legislation was described as “incredibly complex,” at least for non-experts.²⁴ Arguing that people will tend not to comply with confusing and complicated rules, Georges Azzaria, Full Professor at Université Laval, noted that poorly defined and somewhat redundant phrases increase the complexity of the Act, such as “non-commercial purpose,” “private use,” and “private study.”²⁵ More generally, Ariel Katz, Associate Professor at the University of Toronto, warned that ever-expanding rights lead to an ever-increasing list of exceptions, and that Parliament could scale down the Act by narrowing the scope of copyright.²⁶

Citing Australian copyright legislation as an example to follow, the Board encouraged the Committee to recommend a complete overhaul of the Act to reduce its complexity, notably to make it more understandable to lay creators:

Successive reforms and modifications have resulted in a legislative text that is not only hard to understand but that at times appears to bear some incoherencies. In a world where creators increasingly have to manage their rights themselves, it is important that our legislative tools be written in a manner that facilitates comprehension.²⁷

The Maple Family History Group suggested that users too would benefit from enhanced clarity:

Copyright should be simpler, easier to understand and to following both creating original works and in the use of these works in subsequent works either as references or as starting points for original works by other creators. We do want to respect the creators both as to crediting their work and allowing them the financial gain due to

22 INDU, *Evidence*, 1st Session, 42nd Parliament, 3 December 2018, 1605 (Barry Sookman, as an individual).

23 INDU, *Evidence*, 1st Session, 42nd Parliament, 22 October 2018, 1635 (Paul Novotny & Ari Posner, Screen Composers Guild of Canada [SCGC]).

24 INDU (2018), *Evidence*, 1625 (Tarantino & Lovrics, IPIC).

25 INDU, *Evidence*, 1st Session, 42nd Parliament, 3 December 2018, 1535 (Georges Azzaria, as an individual).

26 INDU, *Evidence*, 1st Session, 42nd Parliament, 3 December 2018, 1630 (Ariel Katz, as an individual). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 28 November 2018, 1615 (Mark Hayes, as an individual); INDU (2018), *Evidence*, 1640-1645, 1705 (de Beer).

27 INDU, *Evidence*, 1st Session, 42nd Parliament, 5 December 2018, 1625 (Gilles McDougall, Nathalie Théberge & Sylvain Audet, Copyright Board). See also INDU (2018), *Evidence*, 1720 (Chisick).



them. However, the rules must not be clouded by ambiguity and confusion as to allow diversity and development of new creations.²⁸

IPIC warned that while guiding principles can improve public understanding of the Act, they cannot overcome the ongoing tension between competing interests, the resolution of which forms the heart of copyright law.²⁹

Committee Observations and Recommendations

Reviewing the Act in a timely manner is a worthwhile exercise. However, there is not sufficient evidence that technology, industry practices, socio-economic circumstances, and case law change at a rate that justifies reviewing the Act every five years as opposed to any other (shorter or longer) interval. In this case, a five-year interval certainly did not provide enough time to fully assess the effects of the amendments made by the CMA.

Periodic reviews can undermine the stability of the copyright system if key provisions, amendments and precedents are called into question every few years. Frequent reviews also increase the politicization and polarization of copyright law. If stakeholders can rely on the opportunity to appeal to a parliamentary committee at the next review, they may divert time and resources towards lobbying rather than towards developing solutions of their own.

Parliamentary committees should only review the Act, in whole or in part, when the need and opportunity arise. In the meantime, the relevant government departments can monitor the implementation of copyright legislation, identify necessary adjustments, and propose appropriate amendments. The Committee therefore recommends:

Recommendation 1

That the Government of Canada introduce legislation to repeal section 92 of the *Copyright Act* in order to remove the requirement to conduct a five-year review of this Act.

The Committee cannot ignore the fact that legal professionals, academics, and even the Board testified that the Act is too complex and in need of a comprehensive overhaul. If the stakeholders understand the Act, they can more easily comply with or benefit from its provisions. Parliament could improve the Act by simplifying its wording and its

28 Maple Ridge Family History Group [MRFHG], [Brief Submitted to INDU](#), 7 January 2019.

29 INDU (2018), [Evidence](#), 1625 (Tarantino & Lovrics, IPIC).

structure. While such an endeavour would require much effort, it would benefit all stakeholders in the long term. The Committee therefore recommends:

Recommendation 2

That the Government of Canada simplify the wording and the structure of the *Copyright Act*.

Despite the volume and diversity of evidence submitted throughout the review, the Committee observed a problematic lack of authoritative and impartial data and analysis on major issues. Multiple witnesses either overestimated how strongly the data they presented supported their arguments or failed to disclose its limitations. It is worth noting that in recent proceedings before the Senate Committee on Banking, Trade and Commerce, the Board stated that Canadian policymakers and the Board itself lack authoritative economic data and analysis on copyright.³⁰ The Committee finds that all stakeholders would benefit from increased insight in the copyright system in an easily understandable format, when possible. The Committee therefore recommends:

Recommendation 3

That the Government of Canada establish a Research Chair on Remuneration and Business Models for Creators and Creative Industries in the Digital Economy as well as a Research Chair on the Economics of Copyright.

Recommendation 4

That the Government of Canada mandate Statistics Canada to develop consistent indicators and authoritative data on the economic impacts of copyright legislation in Canada, notably to determine its effects on the remuneration of Canadian creators and the revenues of Canadian creative industries.

30 Senate, Standing Committee on Banking, Trade and Commerce, *Minutes of Proceedings*, 1st Session, 42nd Parliament, 21 November 2018 (Robert A. Blair, Nathalie Théberge, Gilles McDougall & Sylvain Audet, Copyright Board).



INDIGENOUS MATTERS

During the statutory review, the Committee devoted sessions to drawing attention to ways in which Canadian copyright law may fail to protect traditional arts and cultural expressions:

Traditional arts may embody both traditional knowledge, the method of making; and traditional cultural expressions, their external appearance. Many forms of ceremonies, powwow, designs and totems of this heritage reside in the traditional custodians of the stories or images. They include oral traditions, literature, designs, sports and games, visual and performing arts, dances and songs. These manifestations carry not only the sacred knowledge but also the law of Aboriginal peoples.³¹

As described by Indigenous witnesses, copyright law raises difficulties for Indigenous communities in at least two ways. First, many foundational principles of copyright law do not align with the ways in which Indigenous peoples conceive of traditional arts and cultural expressions. Second, Indigenous artists appear especially vulnerable to economic exploitation. As a result, the Committee heard that the Act fails to effectively protect traditional arts and cultural expressions, and may even facilitate their misappropriation.

Contrary to classic conceptions of copyright ownership, which grants individual ownership based on the idea that works originate from one or a few individual authors, for Indigenous witnesses, traditional arts and cultural expressions have communal ownership. As Monique Manatch, Executive Director of the Indigenous Culture and Media Innovations, explained it:

In indigenous communities it is usually a group or society, rather than an individual, who holds the knowledge or expressions. These groups monitor or control the use of these expressions to pass on important knowledge, cultural values and belief systems to later generations. The groups have authority to determine whether the knowledge, expressions, stories and images may be used, who may create them and the terms of reproduction. Before the copyright law was developed in the Canadian common law and statutory law, the various confederations, nations, tribes, clans and societies created, preserved and nourished this knowledge and these expressions.³²

31 INDU, *Evidence*, 1st Session, 42nd Parliament, 31 October 2018, 1600 (Monique Manatch, Indigenous Culture and Media Innovations [ICMI]).

32 Ibid., 1600 (Manatch, ICMI). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 10 May 2018, 1615 (Lynn Lavallée, as an individual).

For Indigenous peoples, the value of art extends beyond the means of generating income: art is not only an economic pillar, but also a social one.³³ Lou-ann Neel, Kwagiulth Artists, explained that within Indigenous communities, knowledge is not protected with codified rules, but rather is based on the integrity of members and their sense of responsibility towards the community.³⁴ Therefore, an individual cannot choose to share or exploit traditional arts and cultural expressions without taking into account communal norms, even less so when that individual is an outsider to that community.³⁵

As described by Indigenous witnesses, ... many foundational principles of copyright law do not align with the ways in which Indigenous peoples conceive traditional arts and cultural expressions.

The interplay, in copyright law, between fixing a work in semi-permanent form and ownership constitutes another area of concern. Under the Act, an expression will not be recognized and thus protected as a work under the Act unless it is fixed in a more or less permanent form. Many traditional cultural expressions, however, are not fixed in such forms. A non-Indigenous person can, however, fix such cultural expressions in a permanent form and thus claim copyright over the resulting work or subject-matter for themselves.³⁶

For example, Andrea Bear Nicholas, Professor Emeritus at St. Thomas University, shared with the Committee her experience working with a group of Maliseet families who faced difficulties when they attempted to publish some of their stories in their native language. These stories had been recorded by a non-Indigenous academic between 1970 and 1983, and those holding the rights to the recordings would not authorize them to be published. Ms. Bear Nicholas said that

33 Tony Belcourt [Belcourt], [Brief Submitted to INDU](#), 14 December 2018.

34 INDU, [Evidence](#), 1st Session, 42nd Parliament, 31 October 2018, 1640 (Lou-ann Neel, as an individual).

35 INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1700-1705 (Georgina Liberty & Sharon Parenteau, Manitoba Metis Federation Inc. [MMF]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1710 (Camille Callison, as an individual).

36 *Ibid.*, 1625 (Callison). See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1620 (Andrea Bear Nicholas, as an individual); INDU (2018), [Evidence](#), 1615 (Lavallée).



[f]or anthropologists, linguists, and others ... Canadian copyright law has served as the perfect tool for stealing and exploiting our intellectual and cultural heritage, rather than for protecting it and promoting the survival of indigenous cultures.³⁷

Thus, even if the cultural expression originates in fact from Indigenous peoples, the law can deprive them from owning copyright on these expressions.³⁸ Witnesses urged the Committee to review copyright legislation to address the misappropriation of traditional Indigenous art forms.³⁹

Witnesses also argued that Indigenous artists face more difficulties obtaining fair remuneration for their work than non-Indigenous artists. Indigenous art is now recognized nationally and internationally, and its sale is an important source of income for many Indigenous artists and their communities, but the sector is undermined by copyright infringement and fraudulent imitation.⁴⁰ Witnesses thus reported that Indigenous art is often forged or commercialized without approval, recognition or compensation.⁴¹ Ms. Neel asserted that Indigenous artists are not taken as seriously as other Canadian artists, and thus are unfairly treated.⁴²

Witnesses made different proposals to support Indigenous artists and ensure their fair remuneration. Ms. Neel advocated for the establishment of a “national Indigenous arts advocacy and service organization” supported by provincial organizations. Such an organization would collaborate with Canadian Artists’ Representation (CARFAC) and Copyright Visual Arts to support Indigenous artists, fight copyright infringement and misappropriation, and educate the public.⁴³ Tony Belcourt, Arts and Cultural Knowledge Keeper, argued in favour of establishing an Indigenous Art Registry supported by blockchain technology to authenticate and track sales of Indigenous art.⁴⁴ Mr. Belcourt

37 INDU (2018), [Evidence](#), 1620 (Nicholas). See also INDU (2018), [Evidence](#), 1625 (Callison).

38 Ibid. (Callison).

39 INDU (2018), [Evidence](#), 1550 (Neel). See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 April 2018, 1605 (Charlotte Kiddell, Canadian Federation of Students [CFS]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 1635 (Pamela Foster & Paul Jones, Canadian Association of University Teachers [CAUT]).

40 INDU, [Evidence](#), 1st Session, 42nd Parliament, 31 October 2018, 1535 (Tony Belcourt, as an individual).

41 Ibid., 1535 (Belcourt); INDU (2018), [Evidence](#), 1550 (Neel); Belcourt, [Brief Submitted to INDU](#), 14 December 2018.

42 INDU (2018), [Evidence](#), 1630 (Neel).

43 Ibid., 1550 (Neel); Lou-ann Neel, [Brief Submitted to INDU](#), 14 December 2018.

44 INDU (2018), [Evidence](#), 1625 (Belcourt). See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 31 October 2018, 1540 (Johnny Blackfield, as an individual); Belcourt, [Brief Submitted to INDU](#), 14 December 2018.

added that an organization like the one proposed by Ms. Neel could help create and maintain such a Registry.⁴⁵

Witnesses proposed various changes to the Act to protect Indigenous culture and better recognize their rights.⁴⁶ Mr. Belcourt added that the Act should recognize cultural rights as it is already the case in the United Nations *Declaration on the Rights of Indigenous Peoples*.⁴⁷ In addition to amending the Act, the University of Manitoba's National Centre for Truth and Reconciliation also proposed the consideration of "*sui generis* concepts and methods to recognize, preserve and share Indigenous Traditional Cultural Expressions such as an Indigenous cultural commons."⁴⁸ ICMI argued that a non-derogation clause should be added to the Act "to clarify that aboriginal knowledge and cultural expressions are protected and promoted under subsection 52(1) and section 35 of the *Constitution Act, 1982*, and section 25 of the [*Canadian Charter of Rights and Freedoms*]."⁴⁹ Such a clause would prevent the misappropriation of Indigenous knowledges and cultures by acknowledging that Indigenous peoples have ceded none of their ancestral rights over traditional arts and cultural expressions.

More generally, several witnesses recommended that the government launch extensive consultations to explore ways to protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act.⁵⁰

45 INDU (2018), [Evidence](#), 1605 (Belcourt).

46 INDU (2018), [Evidence](#), 1615 (Lavallée); INDU (2018), [Evidence](#), 1630 (Callison); INDU (2018), [Evidence](#), 1625 (Liberty & Parenteau, MMF); *ibid.*, 1535 (Belcourt); INDU (2018), [Evidence](#), 1600 (Manatch, ICMI); Canadian Federation of Library Associations [CFLA], [Brief Submitted to INDU](#), 20 December 2018.

47 INDU (2018), [Evidence](#), 1535 (Belcourt). See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1600 (David Westwood, Dalhousie Faculty Association [DFA]); INDU (2018), [Evidence](#), 1630 (Callison).

48 National Centre for Truth and Reconciliation [NCTR], [Brief Submitted to INDU](#), 14 December 2018.

49 INDU (2018), [Evidence](#), 1600 (Manatch, ICMI). See also INDU (2018), [Evidence](#), 1555 (de Beer); Sa'ke'j Henderson, [Brief Submitted to INDU](#), 3 August 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018.

50 INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1605 (Alexis Kinloch & Dominic Lloyd, Winnipeg Arts Council [WAC]); INDU (2018), [Evidence](#), 1550 (Neel); INDU (2018), [Evidence](#), 1605 (Manatch, ICMI). See also INDU (2018), [Evidence](#), 1555 (Kiddell, CFS); INDU (2018), [Evidence](#), 1645 (Foster & Jones, CAUT); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 April 2018, 1555 (Denise Amyot & Mark Hanna, Colleges and Institutes Canada [CIC]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 April 2018, 1530 (Glenn Rollans & Kate Edwards, Association of Canadian Publishers [ACP]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 April 2018, 1535 (Katherine McColgan & Victoria Owen, CFLA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1415 (Teresa Workman, Association of Nova Scotia University Teachers [ANSUT]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1400 (Andrea Stewart & Donna Bourne-Tyson, Council of Atlantic University Libraries [CAUL]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1910 (Lisa Macklem, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018,



COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

The Committee recognizes that, in many cases, the Act fails to meet the expectations of Indigenous peoples with respect to the protection, preservation, and dissemination of their cultural expressions. The Committee also recognizes the need to effectively protect traditional arts and cultural expressions in a manner that empowers Indigenous communities, and to ensure that individual Indigenous creators have the same opportunities to fully participate in the Canadian economy as non-Indigenous creators.

Achieving these objectives will require that policymakers approach the matter in creative ways. They could, for example, draw inspiration outside of copyright and intellectual property law and carefully consider how different legal traditions, including Indigenous legal traditions, interact with each other. Such work requires a more focused and extensive consultation process than this statutory review. However, the Committee cannot stress enough the importance of moving forward collaboratively with Indigenous groups and other stakeholders on the matter, and that potential solutions proposed by Indigenous witnesses in this review should serve as a starting point. The Committee therefore recommends:

Recommendation 5

That the Government of Canada consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context

1905 (Daniel Elves, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2018, 1555 (Nancy Marrelli, Canadian Council of Archives [CCA]); Meera Nair, [Brief Submitted to INDU](#), 31 May 2018; Dalhousie Faculty Association [DFA], [Brief Submitted to INDU](#), 13 June 2018; Mount Royal University [MRU], [Brief Submitted to INDU](#), 18 June 2018; Writers' Union of Canada [WUC], [Brief Submitted to INDU](#), 18 June 2018; CIC, [Brief Submitted to INDU](#), 3 August 2018; University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; CCA, [Brief Submitted to INDU](#), 13 September 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; Quebec Library Association [QLA], [Brief Submitted to INDU](#), 13 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; Canadian Research Knowledge Network [CRKN], [Brief Submitted to INDU](#), 28 September 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; Council of Post-Secondary Library Directors of British Columbia [CPSLDBC], [Brief Submitted to INDU](#), 4 December 2018; CAUT, [Brief Submitted to INDU](#), 14 December 2018; Emily Carr University of Art and Design [ECUAD], [Brief Submitted to INDU](#), 14 December 2018; NCTR, [Brief Submitted to INDU](#), 14 December 2018; NorQuest College, [Brief Submitted to INDU](#), 14 December 2018; University of Victoria, [Brief Submitted to INDU](#), 14 December 2018; CFLA, [Brief Submitted to INDU](#), 20 December 2018; Canadian Association of Law Libraries [CALL], [Brief Submitted to INDU](#), 7 January 2019; Sara Bannerman, Pascale Chapdelaine, Olivier Charbonneau, Carys Craig, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, Myra Tawfik & Samuel E. Trosow [Tawfik et al.], [Brief Submitted to INDU](#), 18 January 2019. See also House of Commons, Standing Committee on Canadian Heritage, [Evidence](#), 1st Session, 42nd Parliament, 27 November 2018, 1235 (Scott Robertson, Indigenous Bar Association).

of Reconciliation, and that this consultation address the following matters, among others:

- **The recognition and effective protection of traditional arts and cultural expressions in Canadian law, within and beyond copyright legislation;**
- **The participation of Indigenous groups in the development of national and international intellectual property law;**
- **The development of institutional, regulatory, and technological means to protect traditional arts and cultural expressions, including but not limited to:**
 - **Creating an Indigenous Art Registry;**
 - **Establishing an organization dedicated to protecting and advocating for the interests of Indigenous creators; and**
 - **Granting Indigenous peoples the authority to manage traditional arts and cultural expressions, notably through the insertion of a non-derogation clause in the *Copyright Act*.**



RIGHTS

TERM EXTENSION, REVERSION RIGHT AND TERMINATION RIGHT

In Canada, a copyright work is generally protected for 50 years after the life of the author but subsists for 70 years in a performer’s performance or a sound recording after their first publication.⁵¹ The duration of the general term of copyright in Canada is shorter than in most of its main economic partners (see Figure 1), but some of these countries provide shorter or longer terms to different types of works and other subject-matters. For example, in Japan, the term lasts 50 years after the life of the author, but subsists for 70 years in a cinematographic work.⁵² In the United Kingdom (UK), copyright generally expires 70 years after the life of the author, but in the case of a computer-generated work or a broadcast, the term only extends to 50 years, while copyright in typographical arrangements of a published edition extends to 25 years after the edition was first published.⁵³ German copyright legislation provides more variations: copyright term generally lasts for 70 years after the life of the author, but certain neighbouring rights last between one year (for press products) and 50 years (for photographs, moving pictures, and broadcasts), while such rights in databases last for 15 years.⁵⁴

[S]ome witnesses urged the Committee to recommend measures that would mitigate the possible adverse impacts of term extension.

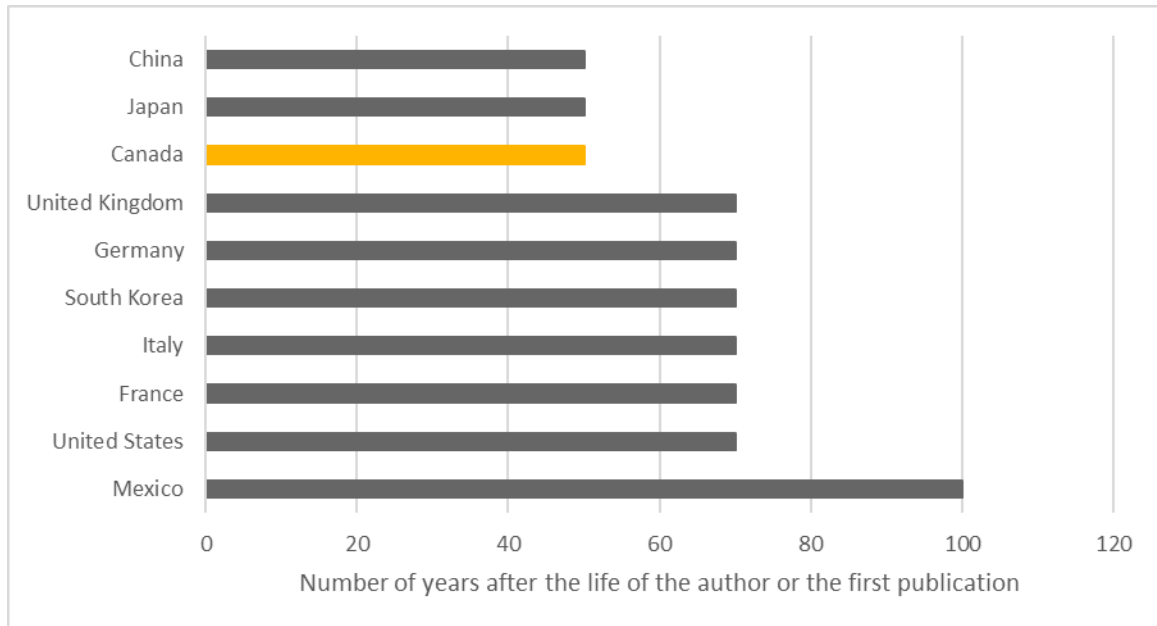
51 *Copyright Act*, s. 6, 23(1).

52 Masayuki Yamanouchi & Yuri Fukui, “[Japan: Copyright 2019](#),” *International Comparative Legal Guides*, 2018.

53 Rebecca O’Kelly-Gillard & Phil Sherell, “[United Kingdom: Copyright 2019](#),” *International Comparative Legal Guides*, 2018.

54 Piet Bubbenzer & David Jahn, “[Germany: Copyright 2019](#),” *International Comparative Legal Guides*, 2018.

Figure 1—Comparison of general copyright terms in various countries



Source : Figure prepared from Phil Sherrell (ed.), “[Copyright Laws and Regulations 2019](#),” *Copyright Laws and regulations 2019*, 2018.

Several witnesses supported extending the copyright term from 50 to 70 years after the death of the author of a work.⁵⁵ While authors would not directly benefit from term extension, its proponents argued that it would increase opportunities to monetize copyrighted content, and thus increase the value of copyright holdings and encourage investments in the creation, acquisition, and commercialization of existing and future copyrighted content.⁵⁶ Term extension would also further harmonize our legislation with

55 INDU, [Evidence](#), 1st Session, 42nd Parliament, 14 June 2018, 1550 (Ian MacKay, Re:Sound Music Licensing Company [Re:Sound]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 14 June 2018, 1600 (Solange Drouin, Association Québécoise de l’industrie du disque, du spectacle et de la vidéo [ADISQ]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 June 2018, 1615 (Caroline Rioux, Canadian Musical Reproduction Rights Agency [CMRRA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 12 December 2018, 1705 (Patti-Anne Tarlton, Ticketmaster Canada [Ticketmaster]); Music Canada, [Brief Submitted to INDU](#), 14 December 2018; Société des auteurs de radio, télévision et cinéma [SARTEC], [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2018 1610 (Christine Peets, Professional Writers Association of Canada [PWAC]).

56 INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 June 2018, 1705 (Margaret McGuffin, Canadian Music Publishers Association [CMuPA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 12 June 2018, 1550 (Graham Henderson, Music Canada); INDU, [Evidence](#), 1st Session, 42nd Parliament, 14 June 2018, 1630, 1640 (Eric Baptiste & Gilles Daigle, Society of Composers, Authors and Music Publishers of Canada [SOCAN]); INDU (2018), [Evidence](#), 1640 (Chisick); Société des auteurs et compositeurs dramatiques & Société civile des auteurs multimédia [SACD & SCAM], [Brief Submitted to INDU](#), 12 June 2018; SOCAN, [Brief Submitted to INDU](#), 13 June 2018; Syndicat national de l’édition [SNE], [Brief Submitted to INDU](#), 22 June 2018; George



that of major trading partners, and so ensure that Canadian rights-holders compete internationally on a levelled playing field. Finally, term extension would benefit a deceased author's descendants—providing they hold copyright.⁵⁷

Several witnesses opposed extending the term of copyright.⁵⁸ They predicted it will worsen the problem of orphan works,⁵⁹ and make it harder to access, build on, disseminate, and preserve works for commercial and non-commercial purposes.⁶⁰ For

Barker, [Brief Submitted to INDU](#), 14 December 2018; Canadian Independent Music Association [CIMA], [Brief Submitted to INDU](#), 14 December 2018; ole Media Management [OMM], [Brief Submitted to INDU](#), 14 December 2018.

- 57 INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1405 (Marian Hebb & William Harnum, Canadian Copyright Institute [CCI]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1620 (Ken Thompson & Marian Hebb, Artists and Lawyers for the Advancement of Creativity [ALAC]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 June 2018, 1600 (Éric Lefebvre, Guilde des musiciens et musiciennes de Québec [GMMQ]); INDU (2018), [Evidence](#), 1635 (McGuffin, CMuPA); INDU (2018), [Evidence](#), 1550 (Henderson, Music Canada); INDU (2018), [Evidence](#), 1630 (Baptiste & Daigle, SOCAN); INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 June 2018, 1620 (Wendy Noss, Motion Picture Association-Canada [MPAC]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 June 2018, 1630 (Alain Lauzon & Martin Lavallée, Society for Reproduction Rights of Authors, Composers and Publishers in Canada [SODRAC]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 September 2018, 1555, 1620 (Mathieu Plante & Stéphanie Hénault, SARTEC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 15 October 2018, 1555 (Elisabeth Schlittler & Patrick Lowe, SACD); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 November 2018, 1605 (Jeff Price, as an individual); SOCAN, [Brief Submitted to INDU](#), 13 June 2018; Canadian Association of Professional Image Creators & Professional Photographers of Canada [CAPIC & PPC], [Brief Submitted to INDU](#), 4 July 2018; CCI, [Brief Submitted to INDU](#), 21 September 2018; ALAC, [Brief Submitted to INDU](#), 14 December 2018; Canadian Authors Association [CAA], [Brief Submitted to INDU](#), 14 December 2018; OMM, [Brief Submitted to INDU](#), 14 December 2018.
- 58 INDU (2018), [Evidence](#), 1650 (Foster & Jones, CAUT); INDU (2018), [Evidence](#), 1400 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1600 (Westwood, DFA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 May 2019, 1605 (Jean-Philippe Béland, Wikimedia Canada); University of Lethbridge, [Brief Submitted to INDU](#), 28 September 2018.
- 59 Consumer Technology Association [CTA], [Brief Submitted to INDU](#), 11 September 2018; University of New Brunswick [UNB], [Brief Submitted to INDU](#), 4 December 2018.
- 60 INDU (2018), [Evidence](#), 1910 (Macklem); INDU, [Evidence](#), 1st Session, 42nd Parliament, 1410 (Christine Middlemass & Donald Taylor, British Columbia Library Association [BCLA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 October 2018, 1640, 1720 (Michael Petricone, CTA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 October 2018, 1640 (Kelsey Merkley, Creative Commons Canada [CrCC]); INDU (2018), [Evidence](#), 1600 (de Beer); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1910 (Christina de Castell, as an individual); Creative Commons, [Brief Submitted to INDU](#), 25 May 2018; DFA, [Brief Submitted to INDU](#), 13 June 2018; MRU, [Brief Submitted to INDU](#), 18 June 2018; International Federation of Library Associations and Institutions [IFLA], [Brief Submitted to INDU](#), 12 October 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; CPSLDBC, [Brief Submitted to INDU](#), 4 December 2018; Mark Akrigg, [Brief Submitted to INDU](#), 14 December 2018; Carley Angelstad, Sara Barnard, Joel Blechinder, Allison Easton, Erin Hoar, Christine Hutchinson, Christian Isbiter, Jack Lawrence, Jennifer McDevitt, Deniz Ozgan, Holly Pickering, Emily Villanueva & Katherine Welss, [Brief Submitted to INDU](#), 14 December 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018; Bibliothèque et Archives nationales du Québec [BANQ], [Brief Submitted to INDU](#), 14 December 2018; Campus Stores Canada [CSC], [Brief Submitted to INDU](#),

example, Don LEPAN, CEO and founder of Broadview Press, argued that term extension reduces competition by delaying the publication of value-added editions of century-old works.⁶¹ Others also argued that a period equal to the life of the author plus 50 years offers more than enough time for rights-holders to profit from copyrighted content and that extending it would not increase incentives to create.⁶² While the Society of Composers, Authors and Music Publishers of Canada claimed that no evidence suggests that extending the term of copyright would have a noticeable impact on users and music consumption.⁶³ Author-composer-performer Bryan Adams commented that extending the term of copyright would “essentially [enrich] large firms of intermediaries, without providing money to creators.”⁶⁴

[A] termination right would address the bargaining imbalance between creators and other members of creative industries.

If the current version of the CUSMA is ratified, Parliament would need to make the Act compliant with the new agreement by extending copyright from 50 to 70 years after the death of the author of a work. While this development would likely please many stakeholders, some witnesses urged the Committee to recommend measures that would mitigate the possible adverse impacts of term extension.⁶⁵ These measures could include expanding fair dealing, for example by adopting an illustrative rather than exhaustive approach, as discussed later in this report.⁶⁶ Other witnesses suggested subjecting copyright protection for an extra 20 years to formalities, such as registration

14 December 2018; ECUAD, [Brief Submitted to INDU](#), 14 December 2018; MRFHG, [Brief Submitted to INDU](#), 7 January 2019.

61 Don LePan, [Brief Submitted to INDU](#), 5 September 2018. See also Broadview Press, [Brief Submitted to INDU](#), 16 April 2018.

62 INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1905 (Jean Dryden, as an individual); INDU (2018), [Evidence](#), 1405 (Allan Bell & Susan Parker, University of British Columbia [UBC]); MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; UBC, [Brief Submitted to INDU](#), 21 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018.

63 INDU (2018), [Evidence](#), 1535 (Baptiste & Daigle, SOCAN).

64 Bryan Adams & Mario Bouchard [Adams & Bouchard], [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 October 2018, 1730 (Laura Tribe & Marie Aspiazu, OpenMedia); CAUT, [Brief Submitted to INDU](#), 3 August 2018.

65 INDU (2018), [Evidence](#), 1645 (Tribe & Aspiazu, OpenMedia); Michael Geist, [Brief Submitted to INDU](#), 14 December 2018.

66 INDU (2018), [Evidence](#), 1635, 1640 (Petricone, CTA); INDU (2018), [Evidence](#), 1640 (Merkley, CrCC); INDU (2018), [Evidence](#), 1600 (de Beer).



and the payment of a fee. Such a mitigation measure would comply with international obligations, promote copyright registration, and help lessen the orphan work problem.⁶⁷

As negotiated by the parties to the new trade agreement, Canada would benefit from a two-and-a-half-year transition period after the ratification of the CUSMA. This transition period would provide the Government enough time to implement the changes, including term extension, in consultation with stakeholders. Due to the difficulty of conducting such an analysis, however, the Department of Innovation, Science and Economic Development did not assess the specific economic implications of the transition period or its duration.⁶⁸

Mr. Adams proposed providing authors with a right to terminate all copyright assignment 25 years after the date of the assignment, which would be exercised with limited formality.⁶⁹ According to Mr. Adams, a termination right would address the bargaining imbalance between creators and other members of creative industries who often have the upper hand in negotiations over the transfer of copyright, which may lead creators to undersell their copyright. A termination right would grant creators the opportunity to resell their copyright with better knowledge of its market value, 25 years after its assignment. Mr. Adams added that introducing a termination right would “ensure that more of the benefits from copyright extension flow to creators.”⁷⁰

Jérôme Payette, Executive Director of the Professional Music Publishers Association (PMPA), did not believe termination rights to be necessary, arguing that the Act can already accommodate such an arrangement in the assignment contract. Mr. Payette would instead prefer amendments that would increase the revenues of all rights-

67 INDU (2018), [Evidence](#), 1640 (Petricone, CTA); INDU (2018), [Evidence](#), 1650 (Knopf); INDU (2018), [Evidence](#), 1600, 1655 (de Beer); INDU (2018), [Evidence](#), 1640 (Geist); INDU, [Evidence](#), 1st Session, 42nd Parliament, 12 December 2018, 1700 (Carys Craig, as an individual); Library Association of Alberta [LAA], [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1910 (Andrew Oates).

68 INDU, [Evidence](#), 1st Session, 42nd Parliament, 1630, 1700 (Mark Schaan & Martin Simard, ISED).

69 Adams & Bouchard, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1600-1605, 1610 (Peets, PWAC); INDU (2018), [Evidence](#), 1640 (Merkley, CrCC); INDU (2018), [Evidence](#), 1720 (Knopf); INDU (2018), [Evidence](#), 1710 (Craig); Authors Alliance, [Brief Submitted to INDU](#), 14 December 2018; Cultural Capital Project [CCP], [Brief Submitted to INDU](#), 7 January 2019; MRFHG, [Brief Submitted to INDU](#), 7 January 2019.

70 Adams & Bouchard, [Brief Submitted to INDU](#), 14 December 2018. But see INDU (2018), [Evidence](#), 1645 (Chisick).

holders, who can then determine amongst themselves how to best share these revenues.⁷¹

In the same vein, the Committee received testimony on section 14 of the Act, which provides a reversion mechanism to the benefit of the descendants of an author. As described by Bob Tarantino, Counsel at Dentons Canada, this provision “deems void any assignments, grants or exclusive licences that a deceased author entered into during their lifetime and re-vests copyright in the author’s heirs twenty-five years after the death of the author.”⁷² Section 14 of the Act provides the descendants of the author with the opportunity to renegotiate the assignment of copyright or the grant of an interest in copyright, which may have increased in value since the time of its transfer. Mr. Tarantino proposed eliminating this reversion mechanism because it significantly increases the uncertainty of copyright transfers with little benefit to creators and their descendants, and may instead hinder the commercial exploitation of the copyrighted content.⁷³

Arguments made by Mr. Tarantino in favour of repealing section 14 of the Act could very well apply against Mr. Adams’ proposal of a termination right:

[G]iven the uncertainty of their ownership and the fact that they will not be legally entitled to exploit rights in the work during the last twenty-five years of the copyright term, informed assignees and licensees will be inclined to discount the value they are prepared to pay up-front to an author for a work.... Similarly, owners will be disinclined to invest resources towards the exploitation of a work which is nearing the reversionary threshold, because they will be uncertain whether an author’s heirs will assert a reversionary claim.⁷⁴

In contrast, Mr. Geist argued that American copyright legislation provides a termination right to the benefit of creators, and that “there’s quite a lot of investment taking place in this sector, without concern about the way their system has worked, which has given rights back to the author.”⁷⁵ The fact that so many witnesses who represent the interests of rights-holders urged the Committee to extend the term of copyright, but said virtually nothing against the reversion mechanism, suggests its actual impact on business

71 INDU, *Evidence*, 1st Session, 42nd Parliament, 19 September 2018, 1605, 1645 (Jérôme Payette, Professional Music Publishers Association [PMPA]). See also INDU (2018), *Evidence*, 1645 (Chisick). But see INDU, *Evidence*, 1st Session, 42nd Parliament, 5 December 2018, 1725 (Warren Sheffer, as an individual).

72 Bob Tarantino, *Brief Submitted to INDU*, 13 June 2018.

73 Ibid. See also INDU (2018), *Evidence*, 1555-1600 (Marrelli, CCA); INDU (2018), *Evidence*, 1530, 1615, 1655 (Chisick); CCA, *Brief Submitted to INDU*, 13 September 2018.

74 Bob Tarantino, *Brief Submitted to INDU*, 13 June 2018.

75 INDU (2018), *Evidence*, 1645 (Geist).



practices remains limited.⁷⁶ The Artists and Lawyers for the Advancement of Creativity (ALAC) and the Authors Alliance proposed maintaining the reversion mechanism since it provides important benefits to the author's heirs.⁷⁷

Committee Observations and Recommendations

The Committee shares Mr. de Beer's pragmatic perspective on term extension,⁷⁸ it favours extending the term of copyright, but only if CUSMA is ratified. The Committee expects that rights-holders will benefit from term extension, but also notes the arguments made against it. The Committee believes that requiring rights-holders to register their copyright to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system. The Committee therefore recommends:

Recommendation 6

That, in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work.

Given that many witnesses supported term extension to increase the revenues of the descendants of the author, it would be counterproductive to repeal section 14 of the Act. The provision could be amended, however, to increase the predictability of the reversion mechanism. The Committee therefore recommends:

Recommendation 7

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion.

Arguments against the termination right failed to persuade the Committee. Creators already receive little remuneration for their work, the effective lifespan of most

76 But see INDU (2018), *Evidence*, 1615 (Tarantino & Lovracs, IPIC).

77 ALAC, *Brief Submitted to INDU*, 14 December 2018; Authors Alliance, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1710 (Hayes); Mark Hayes, *Brief Submitted to INDU*, 20 November 2018.

78 INDU (2018), *Evidence*, 1600 (de Beer).

copyrighted content tends to be short, and the American experience does not suggest that the termination right deter investment. The argument that individual creators do not need a statutory termination right because they can obtain its equivalent via contractual negotiations begs the question of what little bargaining power the authors and performers have to begin with—an imbalance the termination right is meant to address in the first place. The notion that providing a termination right to creators would somewhat hinder the economic exploitation of copyrighted content suggests that creators lack entrepreneurship, but like Graham Henderson, President and CEO of Music Canada, said, “every musician is a businessman, now more than ever.”⁷⁹

If copyrighted content is still commercially profitable 25 years after being created, its creator should have opportunity to increase the revenues they draw from it. The Government, should, however, take measures to make the exercise of the termination right predictable. The Committee therefore recommends:

Recommendation 8

That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration.

ARTIST’S RESALE RIGHT

The Committee received proposals to introduce an artist’s resale right (ARR) in the Act at a rate of 5% on sales of at least \$1,000.⁸⁰ An ARR would entitle visual artists to receive a

79 INDU (2018), [Evidence](#), 1605 (Henderson, Music Canada).

80 INDU (2018), [Evidence](#), 1605 (Kinloch & Lloyd, WAC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 15 October 2018, 1535 (David Yazbeck, Copyright Visual Arts [CVA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 October 2018, 1550 (Bernard Guérin & Banza, Regroupement des artistes en arts visuels du Québec [RAAVQ]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 October 2018, 1535 (April Britski & Vettivelu, Canadian Artists’ Representation [CARFAC]); INDU (2018), [Evidence](#), 1535 (Belcourt); INDU (2018), [Evidence](#), 1535 (Azzaria); CVA, [Brief Submitted to INDU](#), 15 October 2018; SOCAN, [Brief Submitted to INDU](#), 13 June 2018; CARFAC, [Brief Submitted to INDU](#), 26 October 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018; CBA, [Brief Submitted to INDU](#), 4 December 2018; ALAC, [Brief Submitted to INDU](#), 14 December 2018; Association acadienne des artistes professionnel(le)s du Nouveau-Brunswick, [Brief Submitted to INDU](#), 14 December 2018; Belcourt, [Brief Submitted to INDU](#), 14 December 2018; CVA, [Brief Submitted to INDU](#), 14 December 2018; International Authors Forum, [Brief Submitted to INDU](#), 14 December 2018; International Confederation of Societies of Authors and Composers [ICSAC], [Brief Submitted to INDU](#), 14 December 2018; SODRAC, [Brief Submitted to INDU](#), 20 December 2018.



royalty payment each time their work is resold publicly through an auction house or a commercial gallery.⁸¹ Witnesses reminded the Committee that the ARR is recognized in the Berne Convention as a reciprocal right,⁸² that it was discussed but not implemented in 2012, and that, in 2017, the House of Commons Standing committee on Finance recommended amending the Act and the *Income Tax Act* to include the ARR.⁸³

Proponents of the ARR argued that it would allow artists to promote their work and benefit from its ongoing profits.

While the proposed ARR reflects the Australian legislation,⁸⁴ implementing rules—including the royalty rate and application thresholds—vary from one jurisdiction to another.⁸⁵ For example, EU members must provide an ARR at a starting royalty rate of 4% or 5% that progressively decreases to 0.25% as the sale price increases, with a royalty cap set at €12,500. Moreover, each EU member sets the minimum sale price from which the ARR applies, never exceeding €3,000.⁸⁶

Proponents of the ARR argued that it would allow artists to promote their work and benefit from its ongoing profits, which can be substantial as the value of art sometimes

81 INDU (2018), *Evidence*, 1535 (Britski & Vettivelu, CARFAC). See also CARFAC, *Brief Submitted to INDU*, 26 October 2018.

82 ICSAC, *Brief Submitted to INDU*, 14 December 2018.

83 CARFAC, *Brief Submitted to INDU*, 26 October 2018.

84 *Resale Royalty Right for Visual Artists Act 2009*, No 125, s. 10, 18 (Australia: 5% royalty rate, minimum threshold set at AU\$1,000). See also *Civil Code*, s. 986 (California: 5% royalty rate, minimum threshold set at US\$1,000), but see Amanda Svachula, “California Tried to Give Artists a Cut. But the Judges Said No,” *The New York Times*, 11 July 2018.

85 Compare for example *Loi n. 491 du 24/11/1948 sur la protection des oeuvres littéraires et artistiques*, s. 11-1 (Monaco: 3% royalty rate); *Décret no 98-435 du 16 juin 1998 portant Règlement general de perception des droits d’auteur et des droits voisins*, s. 17 (Madagascar: 5% royalty rate); *Decree No 2000-573/PRES/PM/MAC/MCPEA/MJPDH on Fixing the Rate of the Droit de Suite (Resale Royalty Right) on Graphic and Three-dimensional Works*, s.2 (Burkina Faso: 10% royalty rate).

86 *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art*, 2001 OJ (L 272), a. 3-4. Compare for example *Code de la propriété intellectuelle*, s. L122-8, R122-2–R122-12 (France: minimum threshold set at €750); *The Artist’s Resale Right Regulations 2006*, 2006, No 346, s. 12, Schedule 1 (United Kingdom: minimum threshold set at €1,000); *Code de droit économique*, art. XI.175-XI.178 (Belgium: minimum threshold set at €2,000).

increases over time.⁸⁷ As a royalty, the ARR would be administered by a collective agency.⁸⁸ Moreover, the International Confederation of Societies of Authors and Composers (ICSAC) argued that no data prove that it would have a negative impact on the market, with evidence showing instead that, in the UK, the implementation of the ARR had no impact on market prices or sales.⁸⁹ CARFAC assured the Committee that an ARR would not encourage the displacement of sales in countries that do not provide such a right since the costs of exporting art would likely be greater than the fees associated with the ARR. Importantly, Indigenous peoples may strongly benefit from the ARR as many of them are visual artists.⁹⁰ Indeed, the ICSAC reported that in Australia, between 2010 and 2015, 65% of the artists who benefited from the ARR were Indigenous.⁹¹ However, Mr. Belcourt warned that, while an ARR is desirable, the ARR as proposed may not help Indigenous artists because only a few of them sell their art through auction houses or commercial galleries.⁹²

Other witnesses opposed the implementation of an ARR.⁹³ They argued that it is an inappropriate tool to help low-income visual artists, since only a small group of well-known artists have their work sold by professionals and for a significant price. Indeed, Mr. Katz and Guy Rub, Professor of Law at Ohio State University, reported that, in the UK, “the top 100 artists shared 80% of all royalties collected” under the ARR.⁹⁴ Despite reassurances of the proponents of the ARR, some witnesses contended that it would have a negative impact on the artwork market as it could lead to a decline in the price

87 INDU (2018), [Evidence](#), 1635 (Yazbeck, CVA); INDU (2018), [Evidence](#), 1535 (Britski & Vettivelu, CARFAC); SOCAN, [Brief Submitted to INDU](#), 13 June 2018; CARFAC, [Brief Submitted to INDU](#), 26 October 2018; ICSAC, [Brief Submitted to INDU](#), 14 December 2018.

88 INDU (2018), [Evidence](#), 1535 (Britski & Vettivelu, CARFAC). See also SOCAN, [Brief Submitted to INDU](#), 13 June 2018; CARFAC, [Brief Submitted to INDU](#), 26 October 2018.

89 ICSAC, [Brief Submitted to INDU](#), 14 December 2018.

90 INDU (2018), [Evidence](#), 1540 (Britski & Vettivelu, CARFAC); SOCAN, [Brief Submitted to INDU](#), 13 June 2018.

91 ICSAC, [Brief Submitted to INDU](#), 14 December 2018.

92 INDU (2018), [Evidence](#), 1625 (Belcourt); Belcourt, [Brief Submitted to INDU](#), 14 December 2018.

93 INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 October 2017, 1530 (Mark London, Art Dealers Association of Canada [ADAC]); INDU (2018), [Evidence](#), 1720 (Knopf); INDU (2018), [Evidence](#), 1720 (Hayes). See also Canadian Museums Association, [Brief Submitted to INDU](#), 5 September 2018; Ariel Katz & Guy Rub, [Brief Submitted to INDU](#), 14 December 2018.

94 Katz & Rub, [Brief Submitted to INDU](#), 14 December 2018. See also ADAC, [Brief Submitted to INDU](#), 17 October 2018.



and the number of primary sales of artwork,⁹⁵ and it would displace resale activities in private sales and in other jurisdictions.⁹⁶

Witnesses also noted possible logistical concerns in implementing the ARR. Some argued that the administration of the ARR would be expensive and time-consuming, and that the only real beneficiary would be the collective society administering it.⁹⁷ On the other hand, CARFAC and ICSAC claimed that the burden would be minimal.⁹⁸ The ADAC also stated that because artworks enter the market in various ways, determining their ownership would be very complex.⁹⁹ Nevertheless, the CARFAC and the Regroupement des artistes en arts visuels du Québec argued that there are tools available to ensure that works of art are effectively tracked and authenticated,¹⁰⁰ such as blockchain technology.¹⁰¹ Mr. Katz and Mr. Rub argued that, because the ARR is in fact a personal property right associated with a tangible good, rather than an intangible asset, the ARR does not belong to copyright and falls rather under provincial jurisdiction.¹⁰²

Committee Observations and Recommendations

The enactment of an ARR by Parliament could face constitutional challenges. Indeed, while ARR is conceptually associated with copyright, it is closer in nature to a personal right attached to a tangible good. Section 91(23) of the *Constitution Act, 1867* provides Parliament the power to legislate over copyright matters, but the ARR could fall under provincial legislative powers under its section 92(13).

That being said, the Committee recognizes that, to be effective, an ARR would likely need to be national in scope. The Government should therefore play a leadership role in championing cooperation between provincial and territorial governments, Indigenous

95 INDU (2018), [Evidence](#), 1540 (London, ADAC); Katz & Rub, [Brief Submitted to INDU](#), 14 December 2018.

96 INDU (2018), [Evidence](#), 1615 (London, ADAC); Katz & Rub, [Brief Submitted to INDU](#), 14 December 2018.

97 INDU (2018), [Evidence](#), 1530 (London, ADAC); Katz & Rub, [Brief Submitted to INDU](#), 14 December 2018; ADAC, [Brief Submitted to INDU](#), 17 October 2018.

98 CARFAC, [Brief Submitted to INDU](#), 26 October 2018; ICSAC, [Brief Submitted to INDU](#), 14 December 2018.

99 INDU (2018), [Evidence](#), 1530 (London, ADAC).

100 INDU (2018), [Evidence](#), 1705 (Guérin & Banza, RAAVQ).

101 INDU (2018), [Evidence](#), 15 October 2018, 1650 (Robin Sokolosoki, Playwrights Guild of Canada [PGC]). See also INDU (2018), [Evidence](#), 1540 (Blackfield); INDU (2018), [Evidence](#), 1625 (Belcourt); Belcourt, [Brief Submitted to INDU](#), 14 December 2018.

102 Katz & Rub, [Brief Submitted to INDU](#), 14 December 2018. See also ADAC, [Brief Submitted to INDU](#), 17 October 2018.

groups, and other stakeholders to implement the ARR in Canada. The Committee therefore recommends:

Recommendation 9

That the Government of Canada consult with provincial and territorial governments, Indigenous groups, and other stakeholders to explore the costs and benefits of implementing a national artist’s resale right, and report on the matter to the House of Commons Standing Committee on Industry, Science and Technology within three years.

The Committee agrees that artists of all ages should equally benefit from exhibition rights provided under section 3(1)(g) of the Act.¹⁰³ If the phrase “created after June 7, 1988” served a transitional purpose, the Committee considers that this transitional period should soon come to an end. The Committee therefore recommends:

Recommendation 10

That the Government of Canada consider amending the *Copyright Act* to remove the words “created after June 7, 1988,” from section 3(1)(g) of this Act, with no retroactive effect and providing stakeholders with a significant transitional period.

CROWN COPYRIGHT

Several witnesses criticized section 12 of the Act and called for its reform. In fact, no witness supported its continuation, at least in its current form—a rare point of consensus. Many of them proposed abolishing Crown copyright entirely, arguing that it creates unnecessary barriers to the use of works produced with public funds and that all government works should automatically enter the public domain.¹⁰⁴ Short of abolishing Crown copyright, some witnesses argued for its elimination for all government publications—including primary law, such as federal, provincial, and territorial

103 INDU (2018), *Evidence*, 1605 (Kinloch & Lloyd, WAC); INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); INDU (2018), *Evidence*, 1550, 1620 (Guérin & Banza, RAAVQ); INDU (2018), *Evidence*, 1625 (Britski & Vettivelu, CARFAC); CARFAC, *Brief Submitted to INDU*, 26 October 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; CVA, *Brief Submitted to INDU*, 14 December 2018.

104 INDU, *Evidence*, 1st Session, 42nd Parliament, 10 May 2018, 1900 (Brianna Selman, as an individual); INDU, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1905 (Susan Paterson, as an individual); INDU (2018), *Evidence*, 1645 (Merkley, CrCC); INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia); INDU (2018), *Evidence*, 1545 (Geist); Meera Nair, *Brief Submitted to INDU*, 31 May 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018.



legislation, as well as court and administrative tribunal decisions at all levels.¹⁰⁵ Other witnesses argued that Crown copyright is unique in Canadian law in allowing copyright on an unpublished work to last indefinitely.¹⁰⁶

Witnesses also highlighted a lack of consistency in the administration of Crown copyright, which further obfuscates how Canadians can use different materials. Indeed, each federal, provincial, and territorial government administers its own copyrighted content, and practices may vary. At the federal level, the administration of copyrighted content further varies between departments.¹⁰⁷

Some witnesses therefore suggested to uniformly licence all Crown copyright content under a Creative Commons licence.¹⁰⁸ Kelsey Merkley, CEO of Creative Commons, reported that the Australian government already licenses all government works under such a licence.¹⁰⁹

While Mr. de Beer stated being in favour of abolishing Crown copyright, he reserved final judgment until the SCC issues a decision on the [*Keatley Surveying*](#) case, which “could either solve

Witnesses also highlighted a lack of consistency in the administration of Crown copyright, which further obfuscates how Canadians can use different materials.

105 INDU (2018), [*Evidence*](#), 1535 (McColgan & Owen, CFLA); INDU (2018), [*Evidence*](#), 1600 (Westwood, DFA); INDU, [*Evidence*](#), 1st Session, 42nd Parliament, 11 May 2018, 1425 (Kim Nayyer, CALL); INDU (2018), [*Evidence*](#), 1550 (Béland, Wikimedia Canada); INDU (2018), [*Evidence*](#), 1640 (Merkley, CrCC); Creative Commons, [*Brief Submitted to INDU*](#), 25 May 2018; Nair, [*Brief Submitted to INDU*](#), 31 May 2018; DFA, [*Brief Submitted to INDU*](#), 13 June 2018; Concordia University, McGill University, Université de Montréal & Université de Sherbrooke, [*Brief Submitted to INDU*](#), 18 June 2018; Amanda Wakaruk, [*Brief Submitted to INDU*](#), 22 June 2018; MacEwan University, [*Brief Submitted to INDU*](#), 13 September 2018; Canadian Legal Information Institute, [*Brief Submitted to INDU*](#), 21 September 2018; Southern Alberta Institute of Technology [SAIT], [*Brief Submitted to INDU*](#), 21 September 2018; CAUL, [*Brief Submitted to INDU*](#), 28 September 2018; University of Alberta, [*Brief Submitted to INDU*](#), 20 November 2018; CPSLDIBC, [*Brief Submitted to INDU*](#), 4 December 2018; Angelstad et al., [*Brief Submitted to INDU*](#), 14 December 2018; BAnQ, [*Brief Submitted to INDU*](#), 14 December 2018; CSC, [*Brief Submitted to INDU*](#), 14 December 2018; CAUT, [*Brief Submitted to INDU*](#), 14 December 2018; Langara College, [*Brief Submitted to INDU*](#), 14 December 2018; James Lee, [*Brief Submitted to INDU*](#), 14 December 2018; LAA, [*Brief Submitted to INDU*](#), 14 December 2018; CFLA, [*Brief Submitted to INDU*](#), 20 December 2018; CALL, [*Brief Submitted to INDU*](#), 7 January 2019; MRFHG, [*Brief Submitted to INDU*](#), 7 January 2019. See also INDU (2018), [*Evidence*](#), 1905 (Dryden); INDU (2018), [*Evidence*](#), 1905 (Paterson); INDU (2018), [*Evidence*](#), 1555 (Marrelli, CCA). See also CCA, [*Brief Submitted to INDU*](#), 13 September 2018.

106 INDU (2018), [*Evidence*](#), 1905 (Dryden); INDU (2018), [*Evidence*](#), 1555 (Marrelli, CCA); BAnQ, [*Brief Submitted to INDU*](#), 14 December 2018.

107 INDU (2018), [*Evidence*](#), 1700 (Chisick).

108 INDU (2018), [*Evidence*](#), 1705 (Geist); INDU (2018), [*Evidence*](#), 1705 (Tarantino & Lovrics, IPIC).

109 INDU (2018), [*Evidence*](#), 1715 (Merkley, CrCC).

the problem or exacerbate it.”¹¹⁰ Probably with this case in mind, Derek Graham, a professional surveyor, proposed to amend the Act to clarify that the “lodging or registering of a copyrightable document or work with a government body, such as a plan or text material, does not automatically transfer it to Her Majesty without the specific written permission of the author.”¹¹¹

Committee Observations and Recommendation

The *Keatley Surveying* case reveals that Crown copyright serves two distinct functions. The first function is to assert ownership over works prepared and published by or under the direction or control of Canadian governments. The second function allows Canadian governments to disseminate works they do not own for policy purposes, sometimes through private-public partnerships, and without having to request the authorization to do so. Section 12 of the Act must therefore be reviewed with both functions in mind.

The rationale under which Canadian governments would exercise copyright over publicly funded works they prepare and publish in the public interest is questionable at best. The current web of licensing agreements, orders, policies, and standing practices certainly does not promote the dissemination of these essential works. Exercising copyright over governmental publications created in the public interest should be the exception rather than the rule.

The Committee believes that the second function of Crown copyright remains relevant today. The public interest warrants authorizing Canadian governments to disseminate works to fulfill policy functions, including protecting the health and the safety of the public in emergency situations. However, as shown by measures taken in other jurisdictions where the distinct functions of Crown copyright are addressed in separate provisions,¹¹² providing such an authorization does not require an approach as drastic as transferring copyright ownership to the Crown. The Committee therefore recommends:

110 INDU (2018), *Evidence*, 7120 (de Beer).

111 Derek Graham, *Brief Submitted to INDU*, 3 August 2018.

112 See for example *Copyright, Designs and Patent Acts 1988*, 1988 c. 48, s. 48, 50, 163-167 (United Kingdom) [CDPA]; *Copyright Act 1968*, No. 63, 1968, s. 176-182A, 183 (Australia); *Copyright Act 1994*, 1994 No 143, s. 26-28, 63, 64, 66 (New Zealand).



Recommendation 11

That the Government of Canada improve Crown copyright management policies and practices by adopting open licences in line with the open government and data governance agenda, with respect to any work prepared and published:

- **By or under the direction or control of a Canadian government; and**
- **In the public interest and for the purpose of public use, education, research, or information.**

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that no Canadian government or person authorized by a Canadian government infringe copyright when committing an act, either:

- **Under statutory authority; or**
- **For the purpose of national security, public safety, or public health.**

In the context of Crown copyright and acts done under statutory authority or for the purpose of national security, public safety, or public health, that the Government of Canada consider implementing measures to compensate rights-holders for acts done by a Canadian government or a person authorized by a Canadian government that would otherwise infringe copyright, when appropriate.

That the Crown exercise copyright protections that are reasonably in the public interest.

DEFINITION OF SOUND RECORDINGS

Numerous stakeholders, mostly from the music industry, proposed amending the definition of “sound recording” under the Act,¹¹³ which currently “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic

113 INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1605, 1610 (Scott Long, Music Nova Scotia [MNS]); INDU (2018), [Evidence](#), 1620 (Thompson & Hebb, ALAC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 June 2018, 1535 (Alan Willaert, Canadian Federation of Musicians [CFM]); INDU (2018), [Evidence](#), 1545 (Lefebvre, GMMQ); INDU (2018), [Evidence](#), 1550 (Henderson, Music Canada); INDU (2018), [Evidence](#), 1540 (Baptiste & Daigle, SOCAN); INDU (2018), [Evidence](#), 1555 (Drouin, ADISQ); INDU (2018), [Evidence](#), 1705 (Tarlton, Ticketmaster); CFM, [Brief Submitted to INDU](#), 31 May 2018; Barker, [Brief Submitted to INDU](#), 14 December 2018; Music Canada, [Brief Submitted to INDU](#), 14 December 2018; OMM, [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 June 2018, 1725 (Erin Finlay & Stephen Stohn, Canadian Media Producers Association [CMePA]).

work.”¹¹⁴ Proponents of the amendment argue that performers and makers should earn royalties when sound recordings accompanying cinematographic works are “exhibited in theatres or broadcast on television or streamed on or downloaded from the Internet,” as well as “for the transmission of distant signals carrying television (and radio) programming.”¹¹⁵ Removing the exclusion from the definition would allow performers and makers to benefit from a new stream of revenues, one from which authors (composers and songwriters) already benefit.¹¹⁶

The Canadian Association of Broadcasters (CAB) and the Movie Theatre Association of Canada (MTACT) urged the Committee to reject the proposal. Given that producers of a cinematographic work typically pay rights-holders for the inclusion of a sound recording up front, they claimed that the proposed amendment would result in paying performers and makers twice for the integration of their recording into a cinematographic work: first, during the production of a cinematographic work and, again, whenever the same work is publicly presented.¹¹⁷ Such “double dipping” would increase the operational costs of broadcasting and exhibiting the accompanying cinematographic works by an estimated \$45 to \$50 million.¹¹⁸ CAB and MTAC also believed that the proposed amendment would provide performers and makers significant control over the cinematographic works that include their sound recording, which could in turn hinder their distribution.¹¹⁹ Finally, they warned the Committee that the proposed amendment would mainly benefit foreign record labels, as opposed to Canadian creators, and reduce the capability of Canadian broadcasters to invest in local productions.¹²⁰

114 *Copyright Act*, s. 2.

115 ALAC, [Brief Submitted to INDU](#), 14 December 2018.

116 INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 June 2018, 1540 (Annie Morin & Sophie Prigent, Artisti); INDU, [Evidence](#), 1st Session, 42nd Parliament, 12 June 2018, 1600 (Elliott Anderson & Laurie McAllister, Alliance of Canadian Cinema, Television and Radio Artists [ACTRA]); INDU (2018), [Evidence](#), 1550 (MacKay, Re:Sound); SOCAN, [Brief Submitted to INDU](#), 13 June 2018; CIMA, [Brief Submitted to INDU](#), 14 December 2018.

117 INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 September 2018, 1545-1550 (Michael Paris, Movie Theatre Association of Canada [MTAC]); MTAC, [Brief Submitted to INDU](#), 28 September 2018; Canadian Association of Broadcasters [CAB], [Brief Submitted to INDU](#), 13 September 2018. See also Hayes, [Brief Submitted to INDU](#), 20 November 2018; Corus Entertainment Inc. [Corus], [Brief Submitted to INDU](#), 14 December 2018.

118 INDU (2018), [Evidence](#), 1635-1640 (Paris, MTAC); MTAC, [Brief Submitted to INDU](#), 28 September 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 November 2018, 1535 (Gerald Kerr-Wilson, Business Coalition for Balanced Copyright [BCBC]).

119 MTAC, [Brief Submitted to INDU](#), 28 September 2018.

120 INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 September 2018, 1545 (Nathalie Dorval & Susan Wheeler, CAB); CAB, [Brief Submitted to INDU](#), 13 September 2018.



Committee Observations and Recommendation

Contrary to witnesses who opposed this proposal, including cinematographic works in the legal definition of sound recording would likely not result in a double-payment system. Instead, the Committee fears that performers would receive little (if any) payment up front for the integration of a sound recording in a cinematographic work, but would instead be asked to perceive later royalties—provided the cinematographic work is profitable or even released. The Committee is wary of recommending any measure that would compromise payments to performers, especially at a time when Canadian musicians and singers are among the few members of the music industry who do not benefit from this industry’s growing revenues. The Committee therefore recommends:

Recommendation 12

That the Government of Canada maintain the definition of “sound recording” under section 2 of the *Copyright Act*.

OWNERSHIP OF CINEMATOGRAPHIC WORKS

Several witnesses debated to whom the Act should attribute first ownership of copyright in cinematographic works, the creation of which may involve several collaborators. Contrary to some other jurisdictions, the Act does not explicitly grant first ownership of copyright in such works to producers, directors or screenwriters.¹²¹ Instead, first ownership is determined on a case-by-case basis under private agreements or, in their absence and in case of litigation, by the courts.¹²² According to witnesses, increasing certainty about first ownership of copyright in cinematographic works would resolve ambiguities regarding the implementation of the Act *vis-à-vis* cinematographic works, notably to determine the term of their copyright.¹²³

Much of the debate focused on who should be attributed first ownership of copyright in cinematographic works—between directors and screenwriters on the one hand, or

121 INDU (2018), *Evidence*, 1610-1615 (Hayes).

122 INDU, *Evidence*, 1st Session, 42nd Parliament, 1 October 2018, 1535 (Hélène Messier & Marie-Christine Beaudry, Association québécoise de la production médiatique [AQPM]); Directors Guild of Canada [DGC], *Brief Submitted to INDU*, 3 August 2018; WGC, *Brief Submitted to INDU*, 3 August 2018.

123 INDU, *Evidence*, 1st Session, 42nd Parliament, 19 June 2018, 1720 (Maureen Parker & Neal McDougall, WGC); INDU (2018), *Evidence*, 1620 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1620 (Gabriel Pelletier & Mylène Cyr, Association des réalisateurs et réalisatrices du Québec [ARRQ]); INDU (2018), *Evidence*, 1530 (Chisick).

producers on the other. Proponents of attributing it to directors and screenwriters highlighted that only they “exercise the skill and judgment that result in the expression of cinematographic works,”¹²⁴ whereas producers distribute and finance them.¹²⁵ They assured that such attribution would not disrupt business practices, given that it aligns with existing case law on the matter.¹²⁶ The fact that many producers often work on a single production would spread ownership among too many people and create further uncertainty.¹²⁷ Witnesses added that such an attribution would increase the bargaining power of directors and screenwriters so they can negotiate fair compensation for their work in Canada and internationally.¹²⁸

Other witnesses argued that changing the rules governing the attribution of first ownership of copyright in cinematographic works in the Act would negatively impact current business practices, but if there is a change, producers should be recognized as the authors of cinematographic work.¹²⁹ They argued that matters of first ownership and licences are already covered by collective agreements of unions, allowing directors and screenwriters to receive royalties through those agreements.¹³⁰

Much of the debate focused on who should be attributed first ownership of copyright in cinematographic works.

Some witnesses highlighted that producers often take an active creative role in the

124 INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 7 June 2018, 1545 (Dave Forget & Tim Southam, DGC); INDU (2018), *Evidence*, 1550 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1555 (Pelletier & Cyr, ARRQ); INDU (2018), *Evidence*, 1550 (Schlittler & Lowe, SACD); DGC, *Brief Submitted to INDU*, 3 August 2018; WGC, *Brief Submitted to INDU*, 3 August 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; ARRQ, *Brief Submitted to INDU*, 14 December 2018; SARTEC, *Brief Submitted to INDU*, 14 December 2018; SACD & SCAM, *Brief Submitted to INDU*, 12 June 2018.

125 INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC); INDU (2018), *Evidence*, 1550, 1655 (Plante & Hénault, SARTEC).

126 INDU (2018), *Evidence*, 1545 (Forget & Southam, DGC); INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC); WGC, *Brief Submitted to INDU*, 3 August 2018; ARRQ, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1535 (Messier & Beaudry, AQPM).

127 DGC, *Brief Submitted to INDU*, 3 August 2018.

128 INDU (2018), *Evidence*, 1625, 1720 (Parker & McDougall, WGC); INDU (2018), *Evidence*, 1655 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1555, 1645 (Pelletier & Cyr, ARRQ); INDU (2018), *Evidence*, 1550 (Schlittler & Lowe, SACD). See also SACD & SCAM, *Brief Submitted to INDU*, 12 June 2018.

129 INDU (2018), *Evidence*, 1635 (Finlay & Stohn, CMePA); INDU (2018), *Evidence*, 1535 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1530 (Chisick). See also AQPM, *Brief Submitted to INDU*, 14 December 2018; CMePA, *Brief Submitted to INDU*, 14 December 2018.

130 INDU (2018), *Evidence*, 1710 (Finlay & Stohn, CMePA).



production of cinematographic works, assume financial risks, and therefore need first ownership of such works to effectively commercialize them.¹³¹ Moreover, the involvement of directors and screenwriters in the creation of cinematographic works varies from one production to another, whereas producers are always involved.¹³²

Committee Observations and Recommendation

A founding principle of copyright law is that, in most cases, the first owner of a copyright in a work should be its actual creator. When the effective creators of a cinematographic work are its screenwriter and director, they should be deemed its authors and first owners. However, the evidence shows that the creation of a cinematographic work does not always involve screenwriters and directors, notably because not all “cinematographic works”—within the meaning of the Act—originate from the movie and television industry. Attributing first ownership of copyright to specific types of creator risks producing too rigid a rule that cannot adapt to the diverse circumstances in which cinematographic works are created. The Government should look to other policy rationales to attribute first ownership of copyright over cinematographic works. The Committee therefore recommends:

Recommendation 13

That the Government of Canada update the rules governing first ownership of cinematographic works in light of the digital age and in consideration of maintaining competitiveness in a global market.

OWNERSHIP OF AI-GENERATED WORKS

A few witnesses raised the question of whether Parliament should grant copyright to works created by or with the help of artificial intelligence (AI). Dessa warned that denying “copyright protection to works created in tandem with AI would produce a chilling effect on investment and advancement in the nascent Canadian AI sector.”¹³³ IPIC submitted that Parliament could grant copyright protection to works created without a human author in certain circumstances. Mr. Tarantino, speaking as Chair of IPIC’s Copyright Policy Committee, suggested drawing inspiration from the British

131 Ibid., 1635 (Finlay & Stohn, CMePA).

132 INDU (2018), *Evidence*, 1545 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1610 (Hayes). See also Hayes, *Brief Submitted to INDU*, 20 November 2018.

133 Dessa, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1625-1630 (Maya Medeiros, as an individual).

Copyright, Designs and Patents Act 1988 (CDPA), which grants copyright in a computer-generated work to “the person by whom the arrangements necessary for the creation of the work are undertaken.”¹³⁴ Such wording would be similar to the one employed to define the “maker” of a cinematographic work or a sound recording under section 2 of the Act.¹³⁵

Myra Tawfik, Professor of Law at the University of Windsor, argued that works generated by an AI without human intervention should not receive copyright protection.¹³⁶ Given that copyright legislation is meant to encourage human beings to create and disseminate works, the test to determine whether a work is original and, therefore, should be granted copyright should remain essentially the same, namely: “if a human being has exercised sufficient skill and judgment in the creation of that work using [AI], then they should be able to claim copyright.”¹³⁷ However, Dessa urged against presuming that a work generated by systems employing AI has been created exclusively by AI, given that “[h]uman skill and judgment are almost always required to direct such systems.”¹³⁸

Committee Observations and Recommendation

Parliament should enact legislation to help Canada’s promising future in artificial intelligence become reality. Our own legislation, perhaps informed by approaches taken in other jurisdictions, can be adapted to distinguish works made by humans with the help of AI-software from works created by AI without human intervention. The Committee therefore recommends:

Recommendation 14

That the Government of Canada consider amending the *Copyright Act* or introducing other legislation to provide clarity around the ownership of a computer-generated work.

134 CDPA, [s. 9\(3\)](#).

135 IPIC, [Brief Submitted to INDU](#), 4 December 2018.

136 INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 December 2018, 1720 (Myra Tawfik, as an individual). See also Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019.

137 INDU (2018), [Evidence](#), 1720 (Tawfik).

138 Dessa, [Brief Submitted to INDU](#), 14 December 2018.



REMUNERATION RIGHT FOR JOURNALISTIC WORKS

Inspired by similar proposals made in Europe, the Fédération nationale des communications (FNC) proposed granting journalists and news publishers a remuneration right under the Act.¹³⁹ Similarly to other neighbouring rights,¹⁴⁰ the Act would require that journalists be remunerated whenever their “journalistic work” is reproduced and communicated to the public on the Internet. FNC called for the Government to support the creation of one or more collective societies to manage this remuneration right to the benefit of the rights-holders and to request the Board to set a tariff for the use of journalistic works on the web. The FNC proposed additional ways to collect and distribute royalties under the basis of such a new remuneration right.¹⁴¹ The proposal stems from the growing influence of OSPs over the distribution of news media. FNC and News Media Canada claimed that not only do Google and Facebook now capture the lion’s share of the advertising revenues, but OSPs fail to compensate Canadian journalists and news publishers for the unauthorized reproduction and communication of their works on the digital platforms they operate, such as news aggregators.¹⁴²

The proposal [to grant journalists and news publishers a remuneration right] stems from the growing influence of OSPs over the distribution of news media.

In response to FNC’s proposal, Kevin Chan, Head of Public Policy at Facebook, expressed confusion about how the remuneration right would work given that individual users—including publishers—and not Facebook itself “are actually putting individual pieces of content on [Facebook’s] platform.”¹⁴³ While Chan conceded that Facebook should and would remove content shared by a unauthorized user on its platform, he argued that news publishers themselves authorize—in one way or

139 INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1645, 1705 (Normand Tamaro & Pascale St-Onge, Fédération nationale des communications [FNC]); FNC, *Brief Submitted to INDU*, 18 May 2018.

140 *Copyright Act*, s. 15 et seq.

141 INDU (2018), *Evidence*, 1740, 1800, 1805 (Tamaro & St-Onge, FNC). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1905 (Alain Brunet).

142 INDU (2018), *Evidence*, 1645, 1705 (Tamaro & St-Onge, FNC); INDU, *Evidence*, 1st Session, 42nd Parliament, 29 May 2018, 1545, 1700 (John Hinds, News Media Canada [NMC]); FNC, *Brief Submitted to INDU*, 18 May 2018. See also INDU (2018), *Evidence*, 1655 (Gendreau).

143 INDU, *Evidence*, 1st session, 42nd Parliament, 26 November 2018, 1635 (Kevin Chan & Probir Mehta, Facebook).

another—their content to be shared on Facebook, notably because it increases traffic on their website.¹⁴⁴ Mr. Geist observed that when other jurisdictions implemented measures similar to the FNC’s proposal, OSPs stopped disseminating the protected content, which proved even more damaging to publishers.¹⁴⁵ Mr. Knopf also noted that journalists are already remunerated for their work through their salary.¹⁴⁶

Committee Observations and Recommendation

The production and dissemination of news content is essential to democratic societies. While the Committee supports the notion that OSPs who profit from the dissemination of copyrighted content they do not own should fairly remunerate its rights-holders, legislators around the world are only starting to develop and implement legislative frameworks to compel OSPs to do so. Canada should learn from the failures and successes of these initiatives to determine whether they serve the interests of Canadians. The Committee therefore recommends:

Recommendation 15

That the House of Commons Standing Committee on Canadian Heritage consider conducting a study to investigate the remuneration of journalists, the revenues of news publishers, the licences granted to online service providers and copyright infringement on their platforms, the availability and use of online services, and competition and innovation in online markets, building on their previous work on Canada’s media landscape.

RETRANSMISSION RIGHT

The Committee received proposals to amend section 31 of the Act,¹⁴⁷ including providing broadcasters with the right to authorize the retransmission of a signal.¹⁴⁸ Section 31 allows the retransmission of broadcast signals carrying copyrighted content providing that the “retransmitter” meets certain requirements, including paying a tariff

144 Ibid., 1640 (Chan & Mehta, Facebook).

145 INDU (2018), *Evidence*, 1650 (Geist).

146 INDU (2018), *Evidence*, 1720 (Knopf).

147 CMePA, *Brief Submitted to INDU*, 14 December 2018; Canadian Retransmission Collective, *Brief Submitted to INDU*, 14 December 2018.

148 INDU, *Evidence*, 1st Session, 42nd Parliament, 12 June 2018, 1540, 1710 (Franbis Schiller, Border Broadcasters).



fixed by the Board.¹⁴⁹ Border Broadcasters affirmed that a right to authorize retransmission would allow American broadcasters to obtain fair compensation for retransmissions made by Canadian operators and assist in reporting Canadian viewership of American television services. Shaw Communications Inc. (Shaw) opposed the proposal, claiming that it “would force cable, satellite and [Internet Protocol television] subscribers to pay significant new fees for the same signals they have received for decades, lose access to these signals, or both, while creating no new value.”¹⁵⁰

Committee Observations

The Committee considers that problems that the broadcast transmission regime raises for US broadcasters would be better addressed in the context of Canada-US trade relations or through representations made by these broadcasters or their representatives before the Board.

149 *Copyright Act*, s. 31(2).

150 Shaw Communications Inc. [Shaw], [Brief Submitted to INDU](#), 14 December 2018. See also Canadian Communication Systems Alliance, [Brief Submitted to INDU](#), 13 September 2018.

EXCEPTIONS

EDUCATIONAL FAIR DEALING

Several witnesses claimed that introducing educational fair dealing in 2012 inflicted a significant loss of revenues to publishers, creators and others. In their view, the situation deteriorated after several educational institutions across the country opted out of collective licensing to instead rely on what some witnesses depicted as ill-founded fair dealing guidelines that enable copyright infringement on an unprecedented scale and continue to remain in place despite the fact that the Federal Court in *York* considered them unfair.¹⁵¹ Emboldened by overly broad and unclear direction from Parliament and

151 INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 April 2018, 1550, 1625 (Laurent Dubois & Suzanne Aubry, Union des écrivaines et des écrivains du Québec [UNEQ]); INDU (2018), [Evidence](#), 1530, 1610, 1620, 1630 (Rollans & Edwards, ACP); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 April 2018, 1545, 1610, 1625, 1630, 1635, 1655 (John Degen, WUC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1430 (Terrilee Bulger, Nimbus Publishing); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1910 (Brett McLenithan, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1920 (Harry Thurston, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1505 (Richard Prieur, Association nationale des éditeurs de livre [ANEL]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1915 (Sylvie Van Brabant, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1920 (Melikah Abdelmoumen, as an individual); INDU (2018), [Evidence](#), 1405, 1450 (Hebb & Harnum, CCI); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1410, 1455 (Hugo Setzer, International Publishers Association [IPA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1600 (David Caron, Ontario Book Publishers Organization [OBPO]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1605, 1635, 1715, 1725 (Sylvia McNicoll, Canadian Society of Children’s Authors, Illustrators and Performers [CSCAIP]); INDU (2018), [Evidence](#), 1620 (Thompson & Hebb, ALAC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1920 (Leslie Dema, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1915 (Todd Besant, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1615 (Jerry Thompson, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1415, 1510 (Lorimer, Canadian Association of Learned Journals [CALJ]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1910 (Georges Opacic); INDU, [Evidence](#), 1st Session, 42nd Parliament, 22 May 2018, 1645-1650, 1725 (Roanie Levy, Access Copyright); INDU, [Evidence](#), 1st Session, 42nd Parliament, 12 June 2018, 1535-1540, 1640 (Hugo Desrosiers & Jean-François Cormier, Audio Cine Films); INDU (2018), [Evidence](#), 1535 (Yazbeck, CVA); INDU (2018), [Evidence](#), 1555 (Guérin & Banza, RAAVQ); INDU (2018), [Evidence](#), 1735 (Sheffer); Broadview Press, [Brief Submitted to INDU](#), 16 April 2018; UNEQ, [Brief Submitted to INDU](#), 24 April 2018; Association of Book Publishers of British Columbia [ABPBC], [Brief Submitted to INDU](#), 22 May 2018; Copibec, [Brief Submitted to INDU](#), 31 May 2018; WUC, [Brief Submitted to INDU](#), 18 June 2018; Djanka Gajdel, [Brief Submitted to INDU](#), 22 June 2018; ACP, [Brief Submitted to INDU](#), 3 August 2018; Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018; Brush Education, [Brief Submitted to INDU](#), 5 September 2018; Access Copyright, [Brief Submitted to INDU](#), 7 September 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018; CAA, [Brief Submitted to INDU](#), 14 December 2018; International Federation of Reproduction Rights Organisations [IFRRO], [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1910 (Emmanuelle Bruno, as an individual); Donald Patriquin, [Brief Submitted to INDU](#), 31 May 2018; Derek Graham, [Brief Submitted to INDU](#), 3 August 2018.



the SCC, universities, colleges, and K-12 schools across Canada allegedly rely heavily on fair dealing to reproduce works without fair compensation. The withdrawal of educational institutions from collective licensing would have resulted in a loss of \$30 million in collected royalties for the Canadian publishing industry.¹⁵²

Individual publishers¹⁵³ and creators¹⁵⁴ testified that the implementation of educational fair dealing led to a decrease in the royalties perceived from collective societies, especially Access Copyright, which resulted in significant revenue losses.¹⁵⁵ Based on its own experience, Fernwood Publishing argued that such losses threaten the viability of the Canadian publishing industry:

Fernwood's revenue from post-secondary institution courses has plummeted from above 75% historically to just over 40% of total sales in the last fiscal year. The misuse of fair dealings has also impeded Fernwood's commitment to innovation: Fernwood has also been very reluctant to produce digital versions of books destined for the post-secondary market, unlike books destined for other markets which are produced simultaneously in print and digital. Given the unknown levels of copying, we are

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- 152 INDU (2018), [Evidence](#), 1550 (Dubois & Aubry, UNEQ); INDU (2018), [Evidence](#), 1410 (Bulger, Nimbus Publishing); INDU (2018), [Evidence](#), 1615 (Thompson); INDU (2018), [Evidence](#), 1645, 1710 (Levy, Access Copyright); INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 May 2018, 1535-1540, 1600 (David Swail, Canadian Publishers Council [CPC]); UNEQ, [Brief Submitted to INDU](#), 24 April 2018; ANEL, [Brief Submitted to INDU](#), 18 May 2018; ABPBC, [Brief Submitted to INDU](#), 22 May 2018; Access Copyright, [Brief Submitted to INDU](#), 7 September 2018. See also INDU (2018), [Evidence](#), 1535 (Yazbeck, CVA); ACP, [Brief Submitted to INDU](#), 3 August 2018.
- 153 INDU (2018), [Evidence](#), 1410 (Bulger, Nimbus Publishing); INDU (2018), [Evidence](#), 1910 (McLenithan); INDU (2018), [Evidence](#), 1600 (Caron, OBPO); INDU (2018), [Evidence](#), 1920 (Dema); Broadview Press, [Brief Submitted to INDU](#), 16 April 2018; Brush Education, [Brief Submitted to INDU](#), 5 September 2018; Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018.
- 154 INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1905 (Carol Bruneau, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1925 (Jill MacLean, as an individual), 1925; INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1910 (Pierre-Michel Tremblay, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1400 (Patricia Robertson, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1910 (Irene Gordon, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1920 (Laurie Nealin, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1905 (Joan Thomas, as an individual). See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1900 (Sandy Greer, as an individual).
- 155 INDU (2018), [Evidence](#), 1550 (Dubois & Aubry, UNEQ); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1640 (James Lorimer, Canadian Publishers Hosted Software Solutions [CPHSS]); INDU (2018), [Evidence](#), 1905 (Bruneau); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1935 (Jean Lachapelle, as an individual); INDU (2018), [Evidence](#), 1435 (Hebb & Harnum, CCI); INDU (2018), [Evidence](#), 1600 (Caron, OBPO); INDU (2018), [Evidence](#), 1605 (Kinloch & Lloyd, WAC); INDU (2018), [Evidence](#), 1550 (Peets, PWAC); INDU (2018), [Evidence](#), 1535 (Yazbeck, CVA); IPA, [Brief Submitted to INDU](#), 9 May 2018; ABPBC, [Brief Submitted to INDU](#), 22 May 2018; SNE, [Brief Submitted to INDU](#), 22 June 2018; Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018; CARFAC, [Brief Submitted to INDU](#), 26 October 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018.

concerned that digital versions will simply be copied as course resources. For us, producing for the post-secondary market is becoming unsustainable.¹⁵⁶

While a few witnesses recommended removing the word “education” from section 29 of the Act,¹⁵⁷ many more urged instead that the Act be amended to clarify educational fair dealing so as to stop a damaging pattern of rampant copyright infringement in education. Proponents of clarifying educational fair dealing suggested different avenues to the Committee.¹⁵⁸ However, most stakeholders from the Canadian publishing sector rallied around a single proposal: amending the Act to clarify “that fair dealing does not apply to educational institutions when the work is commercially available.”¹⁵⁹ This amendment, they argued, “will ensure creators are justly compensated for the mass and systemic use of their works by the educational sector.”¹⁶⁰

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- 156 Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018. See also INDU (2018), [Evidence](#), 1540 (Svail, CPC); Broadview Press, [Brief Submitted to INDU](#), 16 April 2018; Brush Education, [Brief Submitted to INDU](#), 5 September 2018.
- 157 INDU (2018), [Evidence](#), 1545 (Degen, WUC); INDU (2018), [Evidence](#), 1605 (McNicol, CSCAIP); WUC, [Brief Submitted to INDU](#), 18 June 2018; CAA, [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1910 (Martin Vallières, as an individual); INDU (2018), [Evidence](#), 1555 (Plante & Hénault, SARTEC).
- 158 INDU (2018), [Evidence](#), 1605 (Dubois & Aubry, UNEQ); INDU (2018), [Evidence](#), 1405, 1455 (Hebb & Harnum, CCI); INDU (2018), [Evidence](#), 1410 (Setzer, IPA); INDU (2018), [Evidence](#), 1710 (McNicol, CSCAIP); INDU (2018), [Evidence](#), 1415 (Lorimer, CALJ); INDU (2018), [Evidence](#), 1710, 1715 (Svail, CPC); INDU (2018), [Evidence](#), 1535 (Yazbeck, CVA); INDU (2018), [Evidence](#), 1625 (Britski & Vettivelu, CARFAC); UNEQ, [Brief Submitted to INDU](#), 24 April 2018; A.J.B. Johnston, [Brief Submitted to INDU](#), 18 May 2018; ANEL, [Brief Submitted to INDU](#), 18 May 2018; SNE, [Brief Submitted to INDU](#), 22 June 2018; Access Copyright, [Brief Submitted to INDU](#), 7 September 2018; CCI, [Brief Submitted to INDU](#), 21 September 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018; ALAC, [Brief Submitted to INDU](#), 14 December 2018; CAA, [Brief Submitted to INDU](#), 14 December 2018; CVA, [Brief Submitted to INDU](#), 14 December 2018; IFRRO, [Brief Submitted to INDU](#), 14 December 2018. See also Australian Copyright Council, Australian Publishers Association, Australian Society of Authors & Copyright Agency, [Brief Submitted to INDU](#), 12 June 2018; Derek Graham, [Brief Submitted to INDU](#), 3 August 2018; Copyright Licensing New Zealand, [Brief Submitted to INDU](#), 14 December 2018.
- 159 Access Copyright, ANEL, ABPBC, ACP, Association of Manitoba Book Publishers [AMBP], Atlantic Publishers Marketing Association, Book Publishers Association of Alberta, CARFAC, CALJ, CAPIC, CAA, CCO, CPC, CSCAIP, Copibec, CVA, Federation of British Columbia Writers, League of Canadian Poets, Literary Press Group of Canada, NMC, Outdoor Writers of Canada, PGC, PWAC, Quebec Writers’ Federation, RAAVQ, Saskatchewan Publishers Group, WUC, UNEQ, Writers’ Guild of Alberta, Writers’ Alliance of Newfoundland and Labrador, Writers’ Federation of New Brunswick, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1620, 1630 (Degen, WUC); INDU (2018), [Evidence](#), 1620, 1640 (Lorimer, CPHSS); INDU (2018), [Evidence](#), 1605 (Kinloch & Lloyd, WAC); INDU (2018), [Evidence](#), 1650 (Levy, Access Copyright); INDU, [Evidence](#), 1st Session, 42nd Parliament, 22 May 2018, 1700 (Frédérique Couette, Copibec); INDU (2018), [Evidence](#), 1710 (Sheffer); IPA, [Brief Submitted to INDU](#), 9 May 2018; Copibec, [Brief Submitted to INDU](#), 31 May 2018; WUC, [Brief Submitted to INDU](#), 18 June 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018; CARFAC, [Brief Submitted to INDU](#), 26 October 2018.
- 160 Access Copyright et al., [Brief Submitted to INDU](#), 14 December 2018.



The proposal relies on the legal definition of “commercially available.”¹⁶¹ Should Parliament endorse it, educational fair dealing would not be available when the copyrighted content is available on the Canadian market or when a licence can be obtained from a collective society “within a reasonable time and for a reasonable price and may be located with reasonable effort.”¹⁶² The proposal would support the re-establishment of collective licensing in the educational sector — an outcome supported by several stakeholders¹⁶³—and, according to Frédérique Couette, executive director of Copibec, would “allow students to meet their personal research requirements for their homework, for instance, whereas all institutional aspects would be covered by the [collective] licence.”¹⁶⁴ Stakeholders did not specify how the standard of reasonableness would apply in the educational context.

Individual publishers and creators testified that the implementation of educational fair dealing led to a decrease in the royalties perceived from collective societies.

In contrast, several witnesses disputed the claims that there is large-scale copyright infringement in the sector, noting that the difficulties faced by the publishing industry predate 2012 and are international in scope. Instead, they said that several overlapping factors are responsible for losses of revenues felt by the publishing industry in the educational sector, including a substantial shift to digital content, an increasing focus on open educational resources, and growing practices such as textbook rentals and peer-to-peer selling.¹⁶⁵

161 Copibec, [Brief Submitted to INDU](#), 31 May 2018; Access Copyright, [Brief Submitted to INDU](#), 7 September 2018.

162 *Copyright Act*, s. 2.

163 INDU (2018), [Evidence](#), 1530 (Rollans & Edwards, ACP); INDU (2018), [Evidence](#), 1545 (Degen, WUC); INDU (2018), [Evidence](#), 1510 (Bulger, Nimbus Publishing); INDU (2018), [Evidence](#), 1505 (Prieur, ANEL); INDU (2018), [Evidence](#), 1600 (Caron, OBPO); ACP, [Brief Submitted to INDU](#), 3 August 2018; WUC, [Brief Submitted to INDU](#), 18 June 2018; ABPBC, [Brief Submitted to INDU](#), 22 May 2018.

164 INDU (2018), [Evidence](#), 1700 (Couette, Copibec). See also INDU (2018), [Evidence](#), 1655 (Levy, Access Copyright).

165 INDU (2018), [Evidence](#), 1615 (Kiddell, CFS); INDU (2018), [Evidence](#), 1635 (Foster & Jones, CAUT); INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 April 2018, 1640 (Shawn Gilbertson, CSC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 April 2018 (Michael McDonald, Canadian Alliance of Student Associations [CASA]); INDU (2018), [Evidence](#), 1605, 1650 (Amyot & Hanna, CIC); INDU (2018), [Evidence](#), 1535 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1450, 1455, 1505 (Stewart & Bourne-Tyson, CAUL); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1535, 1550 (Guylaine Beaudry & Nicolas Sapp, Concordia

Several witnesses, including students and student organizations,¹⁶⁶ argued that limiting the application of educational fair dealing in any manner would severely restrict the dissemination of learning materials¹⁶⁷—in- and outside of educational institutions.¹⁶⁸ For

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- University); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1625 (Ann Ludbrook, Ryerson University); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1635 (Joy Muller, Colleges Ontario); INDU (2018), [Evidence](#), 1405, 1430 (Bell & Parker, UBC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 May 2018, 1540 (Cynthia Andrew, Canadian School Boards Association [CSBA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 May 2018, 1635 (Dru Marshall, University of Calgary); INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 May 2018, 1530 (H. Mark Ramsankar, Canadian Teachers' Federation [CTF]); INDU (2018), [Evidence](#), 1705 (Merkley, CrCC); University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; CFS, [Brief Submitted to INDU](#), 14 December 2018; University of Victoria, [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1935 (Julie Barlow, as an individual).
- 166 INDU (2018), [Evidence](#), 1540 (Kiddell, CFS); INDU (2018), [Evidence](#), 1535, 1620 (McDonald, CASA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1900 (Alison Balcom, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1915 (Denis Amirault, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1915, (Ossama Nasrallah, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1920 (Jordan Ferguson, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1510, 1545, 1615 (Guillaume Lecorps, Union étudiante du Québec [UEQ]); INDU (2018), [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1930 (Matis Allali, as an individual); INDU (2018), [Evidence](#), 1910 (Macklem); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1920 (Noah Berson, as an individual); Undergraduates of Canadian Research-Intensive Universities [UCRIU], [Brief Submitted to INDU](#), 13 September 2018; Ryerson Students' Union [RSU], [Brief Submitted to INDU](#), 4 December 2018; CFS, [Brief Submitted to INDU](#), 14 December 2018.
- 167 INDU, [Evidence](#), 1st Session, 42nd Parliament, 17 April 2018, 1535, 1620 (Paul Davidson & Wendy Therrien, Universities Canada); INDU (2018), [Evidence](#), 1535 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1400 (Stewart & Bourne-Tyson, CAUL); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1405 (H.E.A. Eddy Campbell & Lesley Balcom, UNB); INDU (2018), [Evidence](#), 1415 (Workman, ANSUT); INDU (2018), [Evidence](#), 1520, 1530, 1550 (Beaudry & Sapp, Concordia University); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1915 (Eli MacLaren, as an individual); INDU (2018), [Evidence](#), 1615 (Muller, Colleges Ontario); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1920 (Michael Serebriakov, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 22 May 2018, 1600 (Wanda Noel & Hon. Zach Churchill, Council of Ministers of Education, Canada [CMEC]); INDU (2018), [Evidence](#), 1530 (Andrew, CSBA); INDU (2018), [Evidence](#), 1540, 1600 (Marshall, University of Calgary); INDU (2018), [Evidence](#), 1640 (Merkley, CrCC); Nair, [Brief Submitted to INDU](#), 31 May 2018; DFA, [Brief Submitted to INDU](#), 13 June 2018; Concordia University et al., [Brief Submitted to INDU](#), 18 June 2018; CASA, [Brief Submitted to INDU](#), 4 July 2018; University of Guelph, [Brief Submitted to INDU](#), 4 July 2018; CIC, [Brief Submitted to INDU](#), 3 August 2018; CMEC, [Brief Submitted to INDU](#), 5 September 2018; University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; University of Winnipeg, [Brief Submitted to INDU](#), 5 September 2018; CCA, [Brief Submitted to INDU](#), 13 September 2018; Université Laval, [Brief Submitted to INDU](#), 21 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; CRKN, [Brief Submitted to INDU](#), 28 September 2018; University of Lethbridge, [Brief Submitted to INDU](#), 28 September 2018; Canadian Urban Libraries Council [CULC], [Brief Submitted to INDU](#), 12 October 2018; BCCLA, [Brief Submitted to INDU](#), 20 November 2018; CPSLDBC, [Brief Submitted to INDU](#), 4 December 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018; BANQ, [Brief Submitted to INDU](#), 14 December 2018; ECUAD, [Brief Submitted to INDU](#), 14 December 2018; Langara College, [Brief Submitted to INDU](#), 14 December 2018; Ryerson University, [Brief Submitted to INDU](#), 14 December 2018; University of Waterloo, [Brief Submitted to INDU](#), 14 December 2018; Western University, [Brief Submitted to INDU](#), 14 December 2018.
- 168 Association québécoise pour l'éducation à domicile [AQED], [Brief Submitted to INDU](#), 14 December 2018.



example, Sherri Rollins, Chair of the Board of Trustees of the Winnipeg School Division No. 1 (WSD), noted that fair dealing helps limit the cost of learning materials and, in doing so, facilitates access to education for Indigenous students and students from low-income communities.¹⁶⁹ When questioned on the matter that WSD only pays approximately \$34,000 towards copyright licensing out of a total budget of \$396 million, Ms. Rollins responded that cuts in public funding made WSD unable to afford collective licences, even at an estimated rate of \$2 per student.¹⁷⁰

Many witnesses denied claims of rampant copyright infringement in educational institutions, arguing that the education sector largely complies with the law.¹⁷¹ They maintained that existing fair dealing guidelines reflect Canadian law and established practices, and regulate the implementation of fair dealing in education rather than encouraging abuses.¹⁷² Educational institutions rely on multiple means to ensure copyright compliance, such as holding awareness campaigns, producing and disseminating education materials, providing training to staff and students, and having copyright clearance officers oversee the use of copyrighted content with the help of learning management systems.¹⁷³

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- 169 INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1420 (Sherri Rollins, Winnipeg School Division No. 1 [WSD]). See also Education International, [Brief Submitted to INDU](#), 13 September 2018; CULC, [Brief Submitted to INDU](#), 12 October 2018.
- 170 INDU (2018), [Evidence](#), 1445 (Rollins, WSD).
- 171 INDU (2018), [Evidence](#), 1505 (Campbell & Balcom, UNB); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1910 (Roger Gillis, as an individual); INDU (2018), [Evidence](#), 1550, 1615 (Noel & Churchill, CMEC); INDU (2018), [Evidence](#), 1540, 1605, 1615, 1625 (Andrew, CSBA); INDU (2018), [Evidence](#), 1530, 1610, 1645 (Ramsankar, CTF); INDU (2018), [Evidence](#), 1700 (Craig); CTF, [Brief Submitted to INDU](#), 21 September 2018; Nick Mount, [Brief Submitted to INDU](#), 4 December 2018.
- 172 INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019, 1415, 1450 (Heather Martin & Rebecca Graham, University of Guelph); INDU (2018), [Evidence](#), 1645 (Callison); INDU (2018), [Evidence](#), 1530 (Andrew, CSBA); MRU, [Brief Submitted to INDU](#), 18 June 2018; University of Guelph, [Brief Submitted to INDU](#), 4 July 2018; CMEC, [Brief Submitted to INDU](#), 5 September 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; CTF, [Brief Submitted to INDU](#), 21 September 2018; Université Laval, [Brief Submitted to INDU](#), 21 September 2018; CAUL, [Brief Submitted to INDU](#), 28 September 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018; Langara College, [Brief Submitted to INDU](#), 14 December 2018.
- 173 INDU (2018), [Evidence](#), 1535 (Davidson & Therrien, Universities Canada); INDU (2018), [Evidence](#), 1620 (Kiddell, CFS); INDU (2018), [Evidence](#), 1400 (Stewart & Bourne-Tyson, CAUL); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 May 2018, 1905 (Joshua Dickison, as an individual); INDU (2018), [Evidence](#), 1415 (Martin & Graham, University of Guelph); INDU (2018), [Evidence](#), 1700 (Ludbrook, Ryerson University); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1515 (Althea Wheeler, Mary-Jo Romaniuk & Naomi Andrew, University of Manitoba); INDU (2018), [Evidence](#), 1435, 1450 (Bell & Parker, UBC); INDU (2018), [Evidence](#), 1605 (Noel & Churchill, CMEC); INDU (2018), [Evidence](#), 1615, 1645, 1650 (Andrew, CSBA); INDU (2018), [Evidence](#), 1645 (Ramsankar, CTF); INDU (2018), [Evidence](#), 1635 (Marshall, University of Calgary); Concordia University et al., [Brief Submitted to INDU](#), 18 June 2018; University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; CAUL, [Brief Submitted to](#)

Several witnesses highlighted that, rather than overstretching the scope of fair dealing to avoid paying for copyrighted content, educational institutions spend increasing amounts on the lawful acquisition of learning materials, largely in digital form from a variety of distributors, including large, subscription-based content aggregators. They claimed that the main reason they opted out of Access Copyright's blanket licence was that it did not compete with new market alternatives that better suit the needs of educational institutions, such as arrangements providing both access and licence to content. They therefore urged the Committee to allow new alternatives to flourish instead of forcing educational institutions, faculty, and students back into inefficient licensing models that do not suit their needs.¹⁷⁴

Whether it is due to educational fair dealing or not, the withdrawal of Canadian educational institutions from Access Copyright's licence has led to a decrease of collected royalties that allegedly amounts to \$30 million per year. Access Copyright would have otherwise distributed a significant portion of these royalties to its affiliated publishers and creators, many of which testified that their revenues have severely

INDU, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018. But see *INDU*, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1920 (Michal Jaworski, as an individual).

174 *INDU* (2018), *Evidence*, 1535, 1550, 1630 (Davidson & Therrien, Universities Canada); *INDU* (2018), *Evidence*, 1655, 1700-1705 (Gilbertson, CSC); *INDU*, *Evidence*, 1st Session, 42nd Parliament, 24 April 2018, 1640, 1700 (Mark Swartz & Susan Haigh, CARL); *INDU* (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); *INDU* (2018), *Evidence*, 1605, 1650 (Amyot & Hanna, CIC); *INDU* (2018), *Evidence*, 1400, 1455 (Stewart & Bourne-Tyson, CAUL); *INDU* (2018), *Evidence*, 1525, 1610 (Beaudry & Sapp, Concordia University); *INDU* (2018), *Evidence*, 1705 (Muller, Colleges Ontario); *INDU* (2018), *Evidence*, 1625 (Ludbrook, Ryerson University); *INDU* (2018), *Evidence*, 1415, 1435, 1500, 1520 (Wheeler, Romaniuk & Andrew, University of Manitoba); *INDU* (2018), *Evidence*, 1905 (Elves); *INDU* (2018), *Evidence*, 1405 (Bell & Parker, UBC); *INDU*, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1925 (Kim Nayyer, as an individual); *INDU* (2018), *Evidence*, 1610 (Noel & Churchill, CMEC); *INDU* (2018), *Evidence*, 1600, 1605, 1620, 1645 (Andrew, CSBA); *INDU* (2018), *Evidence*, 1540-1545, 1630, 1635, 1640 (Marshall, University of Calgary); *INDU* (2018), *Evidence*, 1645 (Ramsankar, CTF); *INDU* (2018), *Evidence*, 1540, 1630, 1635 (Geist); Mark A. McCutcheon, *Brief Submitted to INDU*, 18 May 2018; MRU, *Brief Submitted to INDU*, 18 June 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; Kenneth Field, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; QLA, *Brief Submitted to INDU*, 13 September 2018; UCRIU, *Brief Submitted to INDU*, 13 September 2018; SAIT, *Brief Submitted to INDU*, 21 September 2018; UBC, *Brief Submitted to INDU*, 21 September 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; RSU, *Brief Submitted to INDU*, 4 December 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; Alberta College of Art and Design [ACAD], *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018; Heather Morrison, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC], *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019. See also *INDU* (2018), *Evidence*, 1615, 1640 (Lorimer, CPHSS).



decreased since 2012.¹⁷⁵ Several witnesses therefore urged the Government to encourage educational institutions to return to collective licensing—notably through financial pressures¹⁷⁶—to restore remuneration to rights-holders, support Canadian publishers and creators, and still provide convenient licensing of copyrighted content at a very affordable price for the education sector.¹⁷⁷

A few witnesses contradicted the claim that collective licensing provides significant financial support to Canadian publishers and writers. They noted, for example, that royalties distributed by collective societies may account for only a small share of the revenues of its affiliates, and that societies retain a substantial share of the collected royalties to cover administrative costs and distribute another significant portion to the foreign entities they partner with.¹⁷⁸ Mr. Katz also asserted that a collective society will

Several witnesses highlighted that ... educational institutions spend increasing amounts on the lawful acquisition of learning materials.

175 INDU (2018), [Evidence](#), 1625 (Dubois & Aubry, UNEQ); INDU (2018), [Evidence](#), 1410, 1425 (Bulger, Nimbus Publishing); INDU (2018), [Evidence](#), 1925 (MacLean); INDU (2018), [Evidence](#), 1410 (Setzer, IPA); INDU (2018), [Evidence](#), 1600 (Caron, OBPO); INDU (2018), [Evidence](#), 1920 (Dema); INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1920 (Barbara Spurril, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 1410, 1520 (Analee Greenberg & Michelle Peters, AMBP); INDU (2018), [Evidence](#), 1400, 1450 (Robertson); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1910 (Michel Grandmaison, as an individual); INDU, [Evidence](#), 1st Session, 42nd Parliament, 11 May 2018, 1710 (Kevin Williams, ABPBC); INDU (2018), [Evidence](#), 1540 (Sokoloski, PGC); Bernice Friesen, [Brief Submitted to INDU](#), 16 April 2018; ABPBC, [Brief Submitted to INDU](#), 22 May 2018; Guy Vanderhaeghe, [Brief Submitted to INDU](#), 22 May 2018; AMBP, [Brief Submitted to INDU](#), 3 August 2018; Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018; Brush Education, [Brief Submitted to INDU](#), 5 September 2018.

176 See for example ACP, [Brief Submitted to INDU](#), 3 August 2018.

177 INDU (2018), [Evidence](#), 1530, 1600, 1640, 1710 (Rollans & Edwards, ACP); INDU (2018), [Evidence](#), 1410, 1415, 1510 (Bulger, Nimbus Publishing); INDU (2018), [Evidence](#), 1605 (Prieur, ANEL); INDU (2018), [Evidence](#), 1405, 1445 (Hebb & Harnum, CCI); INDU (2018), [Evidence](#), 1600 (Caron, OBPO); INDU (2018), [Evidence](#), 1920 (Dema); INDU (2018), [Evidence](#), 1410 (Greenberg & Peters, AMBP); INDU (2018), [Evidence](#), 1500, 1510, 1530 (Robertson); INDU (2018), [Evidence](#), 1410 (Setzer, IPA); INDU (2018), [Evidence](#), 1545 (Sokoloski, PGC); ABPBC, [Brief Submitted to INDU](#), 22 May 2018; Vanderhaeghe, [Brief Submitted to INDU](#), 22 May 2018; ACP, [Brief Submitted to INDU](#), 3 August 2018; AMBP, [Brief Submitted to INDU](#), 3 August 2018; Fernwood Publishing, [Brief Submitted to INDU](#), 3 August 2018; Brush Education, [Brief Submitted to INDU](#), 5 September 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1600 (Benoit Prieur, Association des distributeurs exclusifs de livres de langue française); IPA, [Brief Submitted to INDU](#), 9 May 2018; Copibec, [Brief Submitted to INDU](#), 31 May 2018; IFRRO, [Brief Submitted to INDU](#), 14 December 2018.

178 INDU (2018), [Evidence](#), 1905 (Elves); MacEwan University, [Brief Submitted to INDU](#), 13 September 2018. See also INDU (2018), [Evidence](#), 1915 (MacLaren).

not adequately compensate rights-holders if it collects royalties for the use of works that do not appear in its repertoire without distributing them to their owners.¹⁷⁹

Instead of encouraging or forcing a return to collective licensing, several witnesses suggested that the federal and provincial governments increase public funding available to publishers and creators.¹⁸⁰ Many among them proposed extending or drawing inspiration from the [Public Lending Right Program](#) to compensate Canadian creators and publishers for the use of their works in Canadian educational institutions, whether or not such use falls under fair dealing.¹⁸¹ While some of the evidence suggests that rights-holders would better tolerate educational fair dealing if they received appropriate compensation for it,¹⁸² the Association of Canadian Publishers (ACP) responded that, in this case, compensation would not reflect the market value of copyrighted content, would reduce the capacity of the industry to adapt to technological changes, and would further prevent rights-holders from fully engaging in the economy.¹⁸³ The Union des écrivaines et des écrivains du Québec (UNEQ) also observed that, currently, only a minority of writers benefit from direct grants.¹⁸⁴

179 INDU (2018), [Evidence](#), 1540-1545 (Katz).

180 See for example INDU (2018), [Evidence](#), 1615 (Kiddell, CFS); INDU (2018), [Evidence](#), 1540 (Swartz & Haigh, CARL); INDU (2018), [Evidence](#), 1640 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1555 (Lecorps, UEQ); INDU (2018), [Evidence](#), 1900 (Selman); INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1915 (Ryan Regier, as an individual); INDU (2018), [Evidence](#), 1545, 1600 (Noel & Churchill, CMEC); BCLA, [Brief Submitted to INDU](#), 20 November 2018; Fédération québécoise des professeures et professeurs d'université, [Brief Submitted to INDU](#), 14 December 2018; Morrison, [Brief Submitted to INDU](#), 14 December 2018; ECUAD, [Brief Submitted to INDU](#), 14 December 2018; University of Manitoba, [Brief Submitted to INDU](#), 14 December 2018. See also INDU, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2018, 1915 (Ryan Regier, as an individual); Ryan Kelln, [Brief Submitted to INDU](#), 25 May 2018.

181 INDU (2018), [Evidence](#), 1705 (Foster & Jones, CAUT); INDU (2018), [Evidence](#), 1540 (Swartz & Haigh, CARL); INDU (2018), [Evidence](#), 1645 (Knopf); Nair, [Brief Submitted to INDU](#), 31 May 2018; Universities Canada, [Brief Submitted to INDU](#), 4 July 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; QLA, [Brief Submitted to INDU](#), 13 September 2018; University of Lethbridge, [Brief Submitted to INDU](#), 28 September 2018. But see Public Lending Right International, [Brief Submitted to INDU](#), 14 December 2018.

182 INDU, [Evidence](#), 1st Session, 42nd Parliament, 28 November 2018, 1605, 1610 (Marcel Boyer, as an individual); INDU (2018), [Evidence](#), 1535 (Azzaria); Coalition for Culture and Media [CCM], [Brief Submitted to INDU](#), 7 May 2018; ANEL, [Brief Submitted to INDU](#), 18 May 2018.

183 INDU (2018), [Evidence](#), 1655 (Rollans & Edwards, ACP). See also INDU (2018), [Evidence](#), 1710 (Williams, ABPBC); Brush Education, [Brief Submitted to INDU](#), 5 September 2018. But see INDU (2018), [Evidence](#), 1430 (Bulger, Nimbus Publishing).

184 INDU (2018), [Evidence](#), 1625 (Dubois & Aubry, UNEQ). But see INDU (2018), [Evidence](#), 1915 (MacLaren).



Committee Observations and Recommendations

The conflicting views presented on the matter of fair dealing are not entirely incompatible. The Canadian publishing sector is struggling to adjust to market disruptions that predate and are unrelated to amendments contained in the CMA. These disruptions will persist even if Parliament removed every single exception added to the Act in 2012. The decline of collective licensing in education has arguably more to do with technological change than it does with fair dealing. However, the CMA amendments expanded the breadth and number of exceptions to copyright liability available to educational administrators, educators, researchers and students. As one would expect, these exceptions affected their behavior and reduced the revenues of rights-holders.¹⁸⁵ This is particularly true when an educational institution argues that its activities fall under fair dealing, only to face appropriate scepticism in a court.

The evidence presented does give the Committee pause. Given that the fair dealing exception is normally applied on a case-by-case basis and in consideration of a number of different factors, condoning the use of copyrighted content under fair dealing on the basis of a bright-line criterion is questionable, especially when that criterion is at least partly based on a precedent that has little to do with the use of copyrighted content in the context of education.¹⁸⁶ A “one-size-fits-all” approach, while alluring to some, hardly suits section 29 of the Act as currently written. The fact that educational institutions spend increasing amounts to lawfully access and use some copyrighted content does not preclude infringement beyond the terms of licensing agreements. The Committee also notes that compliance mechanisms and disciplinary measures in case of copyright infringement vary from one institution to another, making it difficult to determine whether the education sector has adopted adequate measures to prevent and discourage copyright infringement since 2012.¹⁸⁷

The Committee cannot endorse the proposal to limit educational fair dealing to cases where access to a work is not “commercially available,” as defined under the Act. While licensing should be encouraged, this proposal risks reducing flexibility in the educational market by favouring blanket over transactional licensing. While the Government can facilitate negotiations between the relevant parties, it is not the role of Parliament to

185 See for example INDU (2018), [Evidence](#), 1610 (Ludbrook, Ryerson University).

186 INDU (2018), [Evidence](#), 1625 (Noel & Churchill, CMEC).

187 Compare INDU (2018), [Evidence](#), 1405 (Campbell & Balcom, UNB); INDU (2018), [Evidence](#), 1445 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1450 (Martin & Graham, University of Guelph); INDU (2018), [Evidence](#), 1505 (Rollins, WSD); INDU (2018), [Evidence](#), 1450 (Bell & Parker, UBC); INDU (2018), [Evidence](#), 1545, 1635 (Marshall, University of Calgary); Université Laval, [Brief Submitted to INDU](#), 21 September 2018. See also INDU (2018), [Evidence](#), 1625 (Noel & Churchill, CMEC).

compel provincial institutions into a specific licensing relationship. Moreover, claiming that parties engage in copyright infringement under an erroneous conception of fair dealing is an argument in favour of copyright enforcement; it does not, on its own, undermine the rationale that led Parliament to add the purpose of education to section 29 of the Act in 2012.

Considering evolving licensing models, ongoing court proceedings, and upcoming negotiations, the Committee is wary to intervene in the conflict surrounding educational fair dealing by recommending amendments to the Act—for now. The Government could instead help parties resolve their differences. The Committee therefore recommends:

Recommendation 16

That the Government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada.

Recommendation 17

That the House of Commons Standing Committee on Industry, Science and Technology resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments.

INSTITUTIONAL EXCEPTIONS

A few witnesses commented on exceptions available to educational institutions along with libraries, archives, and museums (LAMs). The British Columbia Library Association, for example, proposed amending the Act to state that LAMs are not required to pay statutory damages should they infringe on a non-published orphan work, provided they have reasonable grounds to believe that their use of the work conformed to a fair dealing purpose. Doing so would decrease liability risks LAMs face when dealing with such works.¹⁸⁸

Other witnesses proposed adjusting institutional exceptions to facilitate their implementation and help LAMs fulfil their institutional mission. For example, the Canadian Association of Law Libraries, among others, noted that the inter-library loan provisions of the Act—specifically its section 30.2(5.02)—exceed libraries’ enforcement

188 INDU (2018), *Evidence*, 1415 (Middlemadd & Taylor, BCLA).



capabilities and should only require LAMs to take “reasonable” measures to ensure an interlibrary borrower complies with legislative requirements.¹⁸⁹

UNEQ proposed repealing section 30.04 of the Act. This provision allows educational institutions to use copyrighted content available on the Internet for educational purposes, providing that they mention the source of the work. The exception cannot apply, however, when a TPM restricts access to the content or when “a clearly visible notice ... prohibiting that [use] is posted at the Internet site where the work or other subject-matter is posted or on the [content] itself.”¹⁹⁰ UNEQ argued that section 30.04 contradicts a fundamental copyright principle, namely that an original work should attract copyright protection upon fixation and without further formality.¹⁹¹

The University of Alberta, however, would see this exception reinforced. By allowing a rights-holder to easily circumvent the exception with a “clearly visible notice,” section 30.04 of the Act “seems inconsistent with a balanced approach to copyright to allow rights-holders to restrict educational use of material freely available on the [Internet].”¹⁹² Other witnesses argued that section 30.04, along with other educational exceptions, facilitates the dissemination and use of copyrighted content to the benefit of educational institutions, faculty and students, and should therefore be maintained.¹⁹³

EXHAUSTIVE OR ILLUSTRATIVE FAIR DEALING

A few witnesses, some of whom were representing the perspective of creators, proposed amending section 29 of the Act to add purposes to the fair dealing exception.

189 INDU (2018), *Evidence*, 1430 (Nayyer, CALL); BCLA, *Brief Submitted to INDU*, 20 November 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019. See also Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; James Lee, *Brief Submitted to INDU*, 14 December 2018. But see IPA, *Brief Submitted to INDU*, 9 May 2018.

190 *Copyright Act*, s. 30.04(4)(b).

191 UNEQ, *Brief Submitted to INDU*, 24 April 2018.

192 University of Alberta, *Brief Submitted to INDU*, 20 November 2018.

193 CAUL, *Brief Submitted to INDU*, 28 September 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018.

Such purposes include quotation,¹⁹⁴ pastiche and caricature,¹⁹⁵ reconciliation,¹⁹⁶ transformation,¹⁹⁷ as well as non-expressive or non-consumptive uses.¹⁹⁸

Rather than revisiting section 29 of the Act to add purposes to the fair dealing exceptions whenever the need arises, Mr. Geist—among others¹⁹⁹—proposed making the purposes enumerated under the fair dealing provision illustrative (rather than exhaustive) by adding the words “such as” to that provision. An illustrative fair dealing provision would let the courts determine which purposes are admissible to fair dealing and would rely on existing Canadian jurisprudence to “maintain the full fairness analysis ... to minimize uncertainty.”²⁰⁰ He argued that an illustrative fair dealing provision would simplify the Act, increase its flexibility, make it more technology neutral, and place Canadians on a level playing field with countries that have a similar provision, such as the US.²⁰¹

Carys Craig, Associate Professor of Law at York University, agreed that adding the phrase “such as” to section 29 of the Act would make the Canadian fair dealing model more

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- 194 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1900 (Devon Cooke, as an individual); INDU (2018), *Evidence*, 1535 (Azzaria).
- 195 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); ALAC, *Brief Submitted to INDU*, 14 December 2018.
- 196 NCTR, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018.
- 197 INDU (2018), *Evidence*, 1715 (Craig); ACAD, *Brief Submitted to INDU*, 14 December 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018.
- 198 INDU (2018), *Evidence*, 1640 (Merkley, CrCC). See also Kelln, *Brief Submitted to INDU*, 25 May 2018.
- 199 INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1720 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1635 (Petricone, CTA); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); INDU, *Evidence*, 1st Session, 42nd Parliament, 5 November 2018, 1550 (David Fewer, CIPPIC); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1640 (de Beer); INDU (2018), *Evidence*, 1700 (Hayes); INDU (2018), *Evidence*, 1625 (Katz); INDU, *Evidence*, 5 December 2018, 1715 (Pascale Chapdelaine, as an individual); INDU (2018), *Evidence*, 1730 (Tawfik); INDU, *Evidence*, 1st Session, 42nd Parliament, 12 December 2018, 1545 (Meera Nair, as an individual); Creative Commons, *Brief Submitted to INDU*, 25 May 2018; Organization for Transformative Works [OTW], *Brief Submitted to INDU*, 13 June 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; Sara Bannerman, Pascale Chapdelaine, Olivier Charbonneau, Craig Carys, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, Myra Tawfik & Samuel E. Trosow [Chapdelaine et al.], *Brief Submitted to INDU*, 22 October 2018; Luke Maynard, Pierre-Luc Racine & John Sime, *Brief Submitted to INDU*, 7 December 2018; LAA, *Brief*, 10 December 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; University of Waterloo, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018.
- 200 Geist, *Brief Submitted to INDU*, 14 December 2018.
- 201 INDU (2018), *Evidence*, 1545, 1605 (Geist); Geist, *Brief Submitted to INDU*, 14 December 2018.



open, general, and flexible.²⁰² She also suggested adding the fairness factors set up by the SCC to increase the clarity of the exception.²⁰³ She further proposed clarifying that fair dealing and other exceptions may be used to counter moral rights claims to protect some uses from the “chilling effects” of potential moral rights liability.²⁰⁴

Other witnesses opposed the proposal. Mr. Sookman argued that adding the words “such as” would only increase uncertainty and litigation, two things Canadian fair dealing already struggles with.²⁰⁵ He added that adopting a fair use model in Canada would be a “huge setback” by strengthening the bargaining power of OSPs, against whom small rights-holders would not be able to enforce their rights.²⁰⁶ According to Mr. Chisick, a majority of countries—

[A]n illustrative fair dealing provision would simplify the Act, increase its flexibility, make it more technology neutral, and place Canadians on a level playing field with countries that have a similar provision.

including Canada—have adopted a fair dealing model so that governments, rather than the courts, can decide what purposes are eligible for a fair dealing exception. The current fair dealing model is thus more predictable for stakeholders than a model in which a limited list of uses could expand overnight to an entire realm of potential dealings.²⁰⁷ Ysolde Gendreau, Professor of Law at the Université de Montréal, commented that the protection of copyright interests in Canada may not be as aggressive as in the US and would therefore not require adopting a fair use model.²⁰⁸

202 INDU (2018), [Evidence](#), 1655, 1720 (Craig).

203 Ibid., 1655, 1720 (Craig). See also INDU (2018), [Evidence](#), 1410 (Greenberg & Peters, AMBP); INDU (2018), [Evidence](#), 1600 (Guérin & Banza, RAAVQ); CAA, [Brief Submitted to INDU](#), 14 December 2018. But see RAAVQ, [Brief Submitted to INDU](#), 26 October 2018.

204 INDU (2018), [Evidence](#), 1655 (Craig).

205 INDU (2018), [Evidence](#), 1625 (Sookman). See also Giuseppina D’Agostino, [Brief Submitted to INDU](#), 10 December 2018.

206 INDU (2018), [Evidence](#), 1625 (Sookman); Barry Sookman, [Brief Submitted to INDU](#), 10 December 2018.

207 INDU (2018), [Evidence](#), 1610 (Chisick).

208 INDU (2018), [Evidence](#), 1610 (Gendreau).

Committee Observations and Recommendation

Parliament should make the list of purposes enumerated under section 29 of the Act an illustrative list rather than an exhaustive one. Doing so would increase the flexibility of the Act by allowing a broader range of admissible purposes to emerge from existing ones under the guidance and the supervision of the courts—for example, from criticism to quotation, from parody to pastiche, and from research to informational analysis. Such an amendment could allow new practices to fall under fair dealing, such as “reaction videos” and video game streaming. The Committee emphasizes that the purpose of a dealing is only one of many factors taken into account when determining whether this dealing is indeed fair under section 29 of the Act. The Committee therefore recommends:

Recommendation 18

That the Government of Canada introduce legislation amending section 29 of the *Copyright Act* to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one.

TECHNOLOGICAL PROTECTION MEASURES AND CONTRACT OVERRIDES

Several witnesses proposed allowing the circumvention of TPMs for non-infringing purposes. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) best summarized arguments in favour of this proposal as follows:

Currently, restrictions on digital lock circumvention are nearly all-encompassing, thereby preventing even legitimate copying activities. Archivists and librarians cannot preserve locked content without breaking the law; filmmakers, news reporters, and other innovative creators cannot legally access the content they need. These restrictions undermine Canadian innovation and the public domain. Furthermore, those who would infringe can easily access and use circumvention software through the Internet—almost all digital lock mechanisms are eventually broken. The locks thus do not stop those determined to break the law. Instead, they merely frustrate legitimate consumers and creators.²⁰⁹

209 CIPPIC, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1650 (Foster & Jones, CAUT); INDU (2018), *Evidence*, 1535 (McDonald, CASA); INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU, *Evidence*, 1st Session, 42nd Parliament, 24 April 2018, 1630 (Carol Shepstone, CRKN); INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1415 (Workman, ANSUT); INDU (2018), *Evidence*, 1600 (Westwood, DFA); INDU (2018), *Evidence*, 1615 (Muller, Colleges Ontario); INDU, *Evidence*, 1st Session, 42nd Parliament, 9 May 2018, 1420 (Susan Caron, Toronto Public Library); INDU, *Evidence*, 1st Session, 42nd Parliament, 9 May 2018, 1915 (Jess Whyte, as an individual); INDU (2018),



Evoking a “right to repair,” the Consumer Technology Association (CTA) added that the Act should not prevent anyone from circumventing a TPM in order to lawfully conduct the “diagnosis, maintenance and repair of modern cars, farm equipment and other devices, because embedded software has replaced analog circuitry in mechanical parts.”²¹⁰

Some witnesses objected to easing anti-circumvention rules, highlighting the important role TPMs play in the protection of copyright. The Canadian Publishers Council explained that publishers rely on TPMs to ensure payment for the use of digital content, such as e-books, and to ensure that the online distribution of copyrighted materials remains a sustainable business model for publishers.²¹¹ Similarly, the

[T]he Consumer Technology Association added that the Act should not prevent anyone from circumventing a TPM in order to lawfully conduct the “diagnosis, maintenance and repair of modern cars, farm equipment and other devices.”

Evidence, 1410 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1555, 1610, 1625 (Marrelli, CCA); INDU (2018), *Evidence*, 1545, 1620, 1625, 1650 (Fewer, CIPPIC); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1715 (Chapelaine); INDU (2018), *Evidence*, 1545 (Geist); INDU (2018), *Evidence*, 1700 (Craig); INDU (2018), *Evidence*, 1650 (Nair); Nair, *Brief Submitted to INDU*, 31 May 2018; DFA, *Brief Submitted to INDU*, 13 June 2018; OTW, *Brief Submitted to INDU*, 13 June 2018; Public Interest Advocacy Centre [PIAC], *Brief Submitted to INDU*, 13 June 2018; MRU, *Brief Submitted to INDU*, 18 June 2018; CASA, *Brief Submitted to INDU*, 4 July 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; Ontario Council of University Libraries’ Digital Curation Community, *Brief Submitted to INDU*, 5 September 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; Education International, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; AQED, *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018; Cory Doctorow, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; James Lee, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018; Ryerson University, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019. Compare with Matthew Harvey, *Brief Submitted to INDU*, 26 October 2018; Albert Ng, *Brief Submitted to INDU*, 4 December 2018.

210 INDU (2018), *Evidence*, 1635 (Petricone, CTA). See also INDU (2018), *Evidence*, 1710, 1725 (Geist); CTA, *Brief Submitted to INDU*, 11 September 2018.

211 INDU (2018), *Evidence*, 1710 (Swail, CPC). See also INDU (2018), *Evidence*, 1610 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1610 (Degen, WUC).

Entertainment Software Association insisted that the video-game industry relies on TPMs to protect their financial investments and to enable business models based on selling console exclusives. Loosening anti-circumvention rules also raised concerns about the unauthorized modification of video games.²¹² Other witnesses representing the interests of rights-holders stated that TPMs are not effective at protecting copyrighted content and, therefore, they do not heavily depend on them.²¹³

Multiple witnesses also proposed introducing a provision to the Act that would prevent the enforcement of a contractual clause in relation to activities that would not constitute infringement under the Act.²¹⁴ Such an exception would counteract terms of uses that prevent licensees from taking advantage of statutory exceptions, including fair dealing:

For example, under a current licensing agreement, primary and secondary school teachers can combine excerpts and images from various publications only for exams or for digital presentations and slideshows. As such, creating course packs or exercise books bringing together selections from a variety of sources is not permitted, which severely hampers educators' ability to adapt lesson plans to their students' needs.²¹⁵

Given that such restrictive licences are more prevalent in the digital environment, where content is typically accessed under a licence, and coupled with TPMs and anti-

212 INDU, [Evidence](#), 1st Session, 42nd Parliament, 3 October 2018, 1710, 1720, 1725 (Jayson Hilchie, Entertainment Software Association of Canada).

213 INDU (2018), [Evidence](#), 1500 (Thompson & Hebb, ALAC); INDU (2018), [Evidence](#), 1500 (Hebb & Harnum, CCI); INDU (2018), [Evidence](#), 1630 (Dubois & Aubry, UNEQ).

214 INDU (2018), [Evidence](#), 1535 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1400 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1620 (Muller, Colleges Ontario); INDU (2018), [Evidence](#), 1410 (Middlemadd & Taylor, BCLA); INDU (2018), [Evidence](#), 1425 (Nayyer, CALL); INDU (2018), [Evidence](#), 1910 (de Castell); INDU (2018), [Evidence](#), 1550 (Fewer, CIPPIC); INDU (2018), [Evidence](#), 1620 (Knopf); INDU (2018), [Evidence](#), 1725 (Chapdelaine); INDU (2018), [Evidence](#), 1700 (Craig); MRU, [Brief Submitted to INDU](#), 18 June 2018; CIC, [Brief Submitted to INDU](#), 3 August 2018; Federation of Canadian Municipalities [FCM], [Brief Submitted to INDU](#), 3 August, 2018; Education International, [Brief Submitted to INDU](#), 13 September 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; CAUL, [Brief Submitted to INDU](#), 28 September 2018; University of Lethbridge, [Brief Submitted to INDU](#), 28 September 2018; IFLAI, [Brief Submitted to INDU](#), 12 October 2018; CULC, [Brief Submitted to INDU](#), 12 October 2018; Chapdelaine et al., [Brief Submitted to INDU](#), 22 October 2018; Simon Fraser University [SFU], [Brief Submitted to INDU](#), 15 October 2018; UNB, [Brief Submitted to INDU](#), 4 December 2018; ACAD, [Brief Submitted to INDU](#), 14 December 2018; AQED, [Brief Submitted to INDU](#), 14 December 2018; BAnQ, [Brief Submitted to INDU](#), 14 December 2018; ECUAD, [Brief Submitted to INDU](#), 14 December 2018; University of Manitoba, [Brief Submitted to INDU](#), 14 December 2018; Western University, [Brief Submitted to INDU](#), 14 December 2018; CALL, [Brief Submitted to INDU](#), 7 January 2019; CCP, [Brief Submitted to INDU](#), 7 January 2019; Knopf, [Brief Submitted to INDU](#), 7 January 2019.

215 QLA, [Brief Submitted to INDU](#), 13 September 2018.



circumvention rules, restrictive licensing is said to increase the discrepancy between the ways in which the Act applies to physical and digital environments.²¹⁶

Committee Observations and Recommendations

The Committee recognizes that the effective use of TPMs remains important in at least some creative industries and that Canada has international obligations in the matter. However, it agrees that the circumvention of TPMs should be allowed for non-infringing purposes, especially given the fact that the *Nintendo* case provided such a broad interpretation of TPMs. In other words, while anti-circumvention rules should support the use of TPMs to enable the remuneration of rights-holders and prevent copyright infringement, they should generally not prevent someone from committing an act otherwise authorized under the Act. The Committee therefore recommends:

Recommendation 19

That the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes.

USER-GENERATED CONTENT

Many witnesses expressed dissatisfaction with the exception for new non-commercial user-generated content.²¹⁷ UNEQ argued that the exception conflicts with the moral rights of authors by allowing the unauthorized modification of protected works and Parliament should thus repeal it.²¹⁸ ALAC proposed instead to limit the scope of section 29.21 of the Act by providing rights-holders with the right to authorize user-generated content “for either non-commercial or commercial purposes, and if the latter, to receive

216 INDU (2018), [Evidence](#), 1535 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1410 (Middlemadd & Taylor, BCLA); University of Guelph, [Brief Submitted to INDU](#), 4 July 2018; FCM, [Brief Submitted to INDU](#), 3 August, 2018; University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; Ryerson University, [Brief Submitted to INDU](#), 14 December 2018; University of Waterloo, [Brief Submitted to INDU](#), 14 December 2018. See also Kelln, [Brief Submitted to INDU](#), 25 May 2018.

217 INDU (2018), [Evidence](#), 1645 (Hebb & Harnum, CCI).

218 INDU (2018), [Evidence](#), 1635 (Dubois & Aubry, UNEQ); UNEQ, [Brief Submitted to INDU](#), 24 April 2018.

payment,” and to entrust the management of such rights to collective societies.²¹⁹ Some witnesses noted that OSPs profit from user-generated content uploaded on their platforms even as if creators of the user-generated content do not, thereby unduly exploiting an exception to appropriate revenues that should go to rights-holders.²²⁰

Other witnesses defended the exception. They celebrated section 29.21 of the Act for allowing Canadian creators to hone socially valuable skills by combining and recombining existing works to create and share new ones without having to pay rights-holders or seek their authorization. Limiting the scope of section 29.21 or repealing the provision would thus hinder activities they consider beneficial to Canadian society as a whole.²²¹ CTA warned against discouraging OSPs from hosting non-commercial user-generated content on their platforms.²²² Proponents of the exception suggested clarifying whether it applies even when the user-generated content is uploaded on a platform that has the capability for monetization, or when the content, while initially used for non-commercial purposes, “goes viral” upon reception and only then generates revenues.²²³

Committee Observations and Recommendation

The Committee finds it improper that an OSP would shield its commercial exploitation of a work behind section 29.21(1) of the Act. After all, this provision only applies to individuals. Moreover, an individual protected by the exception should not be liable for any unintended copyright infringement of a work or other subject-matter used to generate the new content. The Committee therefore recommends:

219 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC).

220 INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1735 (Patrick Curley, Third Side Music Inc. [TSM]); INDU (2018), *Evidence*, 1635 (Payette, PMPA); INDU, *Evidence*, 1st Session, 42nd Parliament, 1 October 2018, 1550 (Marie-Josée Dupré, Société professionnelle des auteurs et des compositeurs du Québec [SPACQ]); ALAC, *Brief Submitted to INDU*, 14 December 2018.

221 INDU (2018), *Evidence*, 1635 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1635, 1620 (McDonald, CASA); INDU (2018), *Evidence*, 1410 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1650 (Nair); OTW, *Brief Submitted to INDU*, 13 June 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; CULC, *Brief Submitted to INDU*, 12 October 2018; BCLA, *Brief Submitted to INDU*, 20 November 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018. See also Kelln, *Brief Submitted to INDU*, 25 May 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018.

222 INDU (2018), *Evidence*, 1635 (Petricone, CTA); CTA, *Brief Submitted to INDU*, 11 September 2018.

223 OTW, *Brief Submitted to INDU*, 13 June 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018.



Recommendation 20

That the Government of Canada review section 29.21 of the *Copyright Act* to ensure that the creator of non-commercial user-generated content is not held liable for unintended copyright infringement.

TECHNOLOGICAL EXCEPTIONS

Safe Harbour Provisions

Several witnesses proposed that sections 31.1 and 41.27 of the Act be reviewed. In general terms, these “safe-harbour provisions” limit the liability of ISPs and OSPs for acts of copyright infringement committed through their services. Proponents of reviewing these provisions argued that they had the unintended consequence of allowing “a massive reallocation of economic value from copyright owners to ad-supported online platforms that purport to qualify for the hosting exception while effectively functioning as ... streaming services.”²²⁴ As explained by Mr. Henderson, the music industry receives far more revenues from subscription-based streaming services than from ad-supported ones:

For the first time, streaming has surpassed physical, surpassed downloads, surpassed everything. It's the dominant method that people use. There are two specific models. One is the paid subscription model—that's Spotify or Deezer—and then you have the ad-supported services, which feature mostly user uploaded content—that's YouTube.

If you look at the digital breakdown, the revenue return from paid subscriptions as a percentage of the digital pie is almost 60%, and the revenue return from YouTube is under 6%. So fewer subscribers to Spotify—because they're paid subscribers and because we negotiated a deal with them—return an enormous amount of money despite the fact there are more YouTube users. It's just so little that comes back.²²⁵

Restricting safe harbour provisions would arguably force OSPs operating user-upload, ad-supported services such as YouTube to implement stronger measures to prevent unauthorized use of copyrighted content on their platforms and to compensate rights-holders at the level of subscription-based streaming services such as Spotify.²²⁶ Again, according to Mr. Henderson:

224 CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

225 INDU (2018), *Evidence*, 1650 (Henderson, Music Canada).

226 INDU (2018), *Evidence*, 1605, 1630 (Long, MNS); INDU (2018), *Evidence*, 1550, 1650 (McGuffin, CMuPA); INDU (2018), *Evidence*, 1545, 1625, 1645 (Henderson, Music Canada); INDU (2018), *Evidence*, 1620, 1715

[P]olicy-makers around the world—governments—decided to give the technology companies an advantage in the negotiations. It's very difficult to negotiate with somebody when they can stand behind a safe harbour. It's very difficult to negotiate and get.... We can't get market rates. The reason YouTube returns so little value as compared to Spotify is that in the case of Spotify, we were able to negotiate with them. There were no safe harbours. In the case of YouTube, hiding behind a safe harbour, the per-stream return is one-twentieth.

Part of what we're asking is for governments around the world to level this playing field, to remove all of these advantages that were afforded to these gigantic technological enterprises or broadcasting enterprises, and to return some semblance of balance to the market.²²⁷

The PMPA observed that ISPs and OSPs offer a variety of services that greatly differ in the ways in which they interact with copyrighted content, and that Parliament should adjust the Act accordingly: the “development of the Internet may have been difficult to predict, but today we know that not all those companies provide the same services. The *Copyright Act* must now consider those companies' spectrum of activities and ensure that their responsibilities are not automatically the same.”²²⁸ To many witnesses, Article 17 of the Directive promises to be an effective way to handle OSPs in the context of copyright law.²²⁹

Witnesses proposed different ways to readjust safe-harbour provisions to the benefit of rights-holders. For example, Music Canada proposed that the hosting services exception should only be available to technical, automated and passive intermediaries with no knowledge of alleged infringements.²³⁰ More specifically, the Canadian Musical Reproduction Rights Agency (CMRRA) and the Canadian Music Publishers Association (CMuPA) proposed to amend section 31.1(4) of the Act to clarify that the exception is not available to a “content provider,” i.e., a service playing “any active role in the

(Noss, MPAC); INDU (2018), [Evidence](#), 1620 (Plante & Hénault, SARTEC); INDU (2018), [Evidence](#), 1705, 1710 (Payette, PMPA); INDU (2018), [Evidence](#), 1535 (Chisick); INDU (2018), [Evidence](#), 1640, 1715 (Gendreau); CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018; MPAC, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1710 (Tarantino & Lovrics, IPIC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1935 (Julie Barlow, as an individual); CMuPA, [Brief Submitted to INDU](#), 14 December 2018.

227 INDU (2018), [Evidence](#), 1625 (Henderson, Music Canada).

228 INDU (2018), [Evidence](#), 1530 (Payette, PMPA).

229 See for example INDU (2018), [Evidence](#), 1620 (Noss, MPAC); *Ibid.*, 1530, 1700 (Payette, PMPA); Music Canada, [Brief Submitted to INDU](#), 14 December 2018; SCGC, [Brief Submitted to INDU](#), 20 November 2018. But see INDU (2018), [Evidence](#), 1715 (Rathwell & Kerr-Wilson, Shaw).

230 CMuPA, [Brief Submitted to INDU](#), 14 December 2018; Music Canada, [Brief Submitted to INDU](#), 14 December 2018; OMM, [Brief Submitted to INDU](#), 14 December 2018.



communication to the public of” copyrighted content.²³¹ The exception would thus not apply to a service that “promotes or optimizes the presentation of” copyrighted content, notably by “categorizing works, ... creating recommended playlists, [or] providing an ‘auto-complete’ search function.”²³² The FNC also proposed to amend section 41.27(5) of the Act to exclude from the definition of “information location tool” any such tool that endorses or encourages access to copyrighted material.²³³ The *Guilde des musiciens et musiciennes du Québec* suggested repealing section 31.1 altogether.²³⁴

Some witnesses argued that the safe-harbour provisions available to online service providers should be conditional on the implementation of effective anti-infringement policies. The Canadian Media Producers Association, for example, argued that an OSP should not benefit from a safe harbour when it has “knowledge that their systems are being used for infringing purposes, but take no steps to stop it.”²³⁵ One proposed method for the imposition of this condition is to require that online service providers adopt “content filters.” Such mechanisms would monitor content as it is introduced by users onto an online platform, compared to copyrighted content and, if found to be an unauthorized copy, blocked.²³⁶ Wendy Noss from the Motion Picture Association-Canada added that it would encourage “all intermediaries in the system to act responsibly” and assist in the fight against online piracy, particularly where a commercial infringer might rely on multiple intermediaries at once.²³⁷

Proposals to narrow safe-harbour provisions drew much opposition from other witnesses—including Google Canada, a subsidiary of Google, which operates YouTube:

Indeed, such protections are central to the very operation of the open Internet. If online services are liable for the activities of their users, then open platforms simply cannot function. The risk of liability would severely restrict their ability to allow user content onto their systems.

231 CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1655 (Rioux, CMRRA).

232 CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1615 (Chisick).

233 FNC, [Brief Submitted to INDU](#), 18 May 2018.

234 INDU (2018), [Evidence](#), 1545 (Lefebvre, GMMQ).

235 CMePA, [Brief Submitted to INDU](#), 14 December 2018.

236 INDU (2018), [Evidence](#), 1655 (Willaert, CFM).

237 INDU (2018), [Evidence](#), 1715, 1755 (Noss, MPAC).

This would have profound effects on open communication online, severely impacting the emerging class of digital creators who rely on these platforms for their livelihood and curtailing the broad economic benefits that intermediaries generate.²³⁸

Google Canada defended itself against accusations of rampant copyright infringement from the music industry, noting that most of the content on Google’s platforms is already licensed, as it is the case with Spotify.²³⁹ Indeed, according to Mr. Henderson, “98% of everything that’s on YouTube is licensed.”²⁴⁰ Google Canada argued that YouTube’s copyright-management system already monitors the unauthorized upload of copyrighted content and allows a rights-holder to choose whether to take it down or, as the majority of rights-holders do, to monetize it, making further measures unnecessary.²⁴¹ Shaw also argued in favour of maintaining safe-harbour provisions, arguing that obligations of ISPs under the notice-and-notice regime must be considered when assessing the network services exception, and noting that “the hosting exception is not available with respect to materials that the host knows infringe copyright.”²⁴²

YouTube’s content-management system does not apply the Canadian fair dealing exception.

Opposition to upload filtering focused on its market effects and its efficacy. OpenMedia, for example, argued that the implementation of content filtering would be expensive to implement and might have serious anti-competitive effects by raising the entry costs for new participants in the platform market.²⁴³ Witnesses also argued that it would likely result in the filtering out of non-infringing content, and thus limit creativity and

238 INDU, *Evidence*, 1st Session, 42nd Parliament, 26 November 2018, 1550-1555 (Jason Kee, Google Canada). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 26 September 2018, 1535 (Mark Graham & Robert Malcolmson, BCE Inc. [BCE]); Internet Association, *Brief Submitted to INDU*, 20 November 2018; BCE, *Brief Submitted to INDU*, 14 December 2018.

239 INDU (2018), *Evidence*, 1615 (Kee, Google Canada); Google Canada, *Brief Submitted to INDU*, 7 January 2019. See also INDU, *Evidence*, 1st Session, 42nd Parliament, 26 November 2018, 1550 (Darren Schmidt, Spotify).

240 INDU (2018), *Evidence*, 1615 (Henderson, Music Canada).

241 INDU (2018), *Evidence*, 1615 (Kee, Google Canada); Google Canada, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1630 (Long, MNS).

242 INDU (2018), *Evidence*, 1545 (Rathwell & Kerr-Wilson, Shaw). See also Internet Association, *Brief Submitted to INDU*, 20 November 2018.

243 INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1635 (Petricone, CTA); INDU (2018), *Evidence*, 1705 (Kee, Google Canada); INDU (2018), *Evidence*, 1630 (de Beer); CTA, *Brief Submitted to INDU*, 11 September 2018; Doctorow, *Brief Submitted to INDU*, 14 December 2018.



opportunities to share such content.²⁴⁴ Content filters may miss infringing content as well, with John Fewer, Director of CIPPIC, describing them as “both over-inclusive and under-inclusive.”²⁴⁵ Other witnesses added that even if content filters succeeded in reducing unauthorized content on online platforms—which is unlikely—they would still fail to increase the remuneration of rights-holders.²⁴⁶

Jason Kee, Public Policy and Government Relations Counsel at Google Canada, also indicated that YouTube’s content-management system does not apply the Canadian fair dealing exception, and that much of how the platform handles copyright infringements is left to the discretion of rights-holders:

Mr. David de Burgh Graham:

Do these systems currently handle Canadian fair dealing exceptions in their enforcement?

Mr. Jason Kee:

Essentially, no, effectively because fair dealing is a contextual test that requires analysis on each individual case. On any automated system, no matter how good the algorithm, no matter how sophisticated the machine learning that we’re applying—and we are doing that—basically, we’ll never be able to ascertain that. This is why it’s critically important that it has an appeal system: it’s so if a video that is a clear case of fair dealing is allowed and then gets caught by the system, they can appeal that decision. It will basically be determined and released.

Mr. David de Burgh Graham:

Then in both of your situations, why isn’t the system set up to say, “You have a flag; please respond within 24 hours, and then we’ll take it down”, to make it a system where one is innocent until proven guilty instead of guilty until proven innocent?

Mr. Jason Kee:

In some instances, that does happen. It depends on what policy the rights holder has chosen to enact and how they’ve selected to do so.²⁴⁷

244 INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1645 (Chan, Facebook); INDU (2018), *Evidence*, 1645 (Kee, Google Canada); INDU (2018), *Evidence*, 1630 (de Beer); Nami Cho, *Brief Submitted to INDU*, 14 December 2018.

245 INDU (2018), *Evidence*, 1610 (Fewer, CIPPIC).

246 INDU (2018), *Evidence*, 1715 (Rathwell & Kerr-Wilson, Shaw); INDU, *Evidence*, 1st Session, 42nd Parliament, 1715 (Andy Kaplan-Myrth, TekSavvy Solutions Inc. [TekSavvy]); Doctorow, *Brief Submitted to INDU*, 14 December 2018.

247 INDU (2018), *Evidence*, 1625-1630 (Kee, Google Canada). See also INDU (2018), *Evidence*, 1630 (Chan, Facebook); INDU (2018), *Evidence*, 1630-1635, 1705 (Kee, Google Canada).

More generally, the CTA urged the Committee to show caution when regulating technology:

The general trend is that new technologies open up new distribution platforms, allow access to new consumer groups, and allow new ways to monetize, as you're seeing now on the Internet with the growth of streaming music.

Our advice is always to be very light-handed on the regulation of new technologies because you're not sure what kinds of opportunities in terms of creative opportunities or economic opportunities you may be inadvertently foreclosing.²⁴⁸

Yet another strand of evidence suggested that the challenges the music industry and its creators currently face are much more complex and multi-faceted than what the value-gap theory suggests. Indeed, its proponents heavily criticized user-upload, ad-supported platforms such as YouTube, and argued that restricting safe-harbour provisions would increase the revenues of rights-holders by forcing them to licence the copyrighted content they distribute, as it is the case with Spotify.²⁴⁹ However, some witnesses, including creators, expressed strong dissatisfaction with the revenues they receive from any streaming service, not only YouTube, as related by author-composer-performer Pierre Lapointe:

Spotify has just gone public. Do you have any idea of the value of a Spotify logo? Have you tried to quantify the value of Canadian content that has not been paid to Canadian creators to increase the value of the Spotify logo? Think about iTunes and YouTube. They're laughing at us. That's money that's leaving Canada and that won't come back to the pockets of Canada.

I just want to tell you one thing: move fast, because I'm still able to live well with copyrights, but with a million streams on Spotify, I earned \$500. That's \$500 for a million streams. If I'm receiving \$500 for a million streams, I'm not mentioning others who are not as well known as me.²⁵⁰

[A]nother strand of evidence suggested that the challenges the music industry and its creators currently face are much more complex and multi-faceted than what the value-gap theory suggests.

248 INDU (2018), *Evidence*, 1700 (Petricone, CTA). See also INDU (2018), *Evidence*, 1710 (Rathwell & Kerr-Wilson, Shaw).

249 See for example INDU (2018), *Evidence*, 1625 (Henderson, Music Canada).

250 INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1925 (Pierre Lapointe, as an individual). See also INDU (2018), *Evidence*, 1905 (Brunet); INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1920 (Luc



Author-composer-performer David Bussi eres testified that he received more revenues from YouTube than he did from Spotify:

I do thorough research with my royalty statements for a song to find out that, after generating 30,000 streams on Spotify, we received \$8.50, while we hold all copyrights. ... On YouTube, after generating 60,000 views, we received \$151.37.²⁵¹

Alan Willaert, Vice-President of the Canadian Federation of Musicians, provided another example of what he described as one of many “anomalies” of current distribution models that disadvantage creators in relation to other members of the music industry:

For instance, Spotify, as 20% of it is owned by the labels, one issue for musicians is that, when Spotify approaches one of the major labels and acquires access to the catalogue, there's a several million dollar fee for that access and then, of course, there's a per stream fee as well. In that huge amount of money that is paid for catalogue access, the musicians see none of that at all—zero.²⁵²

When confronted with such testimony, Darren Schmidt, Senior Counsel at Spotify, and Mr. Kee, from Google Canada, denied that their employer has any visibility in or into responsibility towards the remuneration of rights-holders once they paid applicable royalties to the entities responsible for distributing these royalties:

Spotify pays SOCAN, CSI and others, and those entities in turn are responsible for distributing those royalties to rights holders, songwriters and music publishers. I should note that I’m leaving a lot out for the sake of brevity—primarily about how in Canada, unlike in some other territories, there is no blanket mechanical licence, which would be very helpful. ... These issues, and the resulting increase in fragmentation they represent, make it more difficult to ensure that songwriters are identified and appropriately paid for their contributions.

... In any event, the fact that Spotify pays entities who then distribute royalties to their members means that Spotify does not generally have visibility into the amount that an individual creator receives for their creative contribution. This is true in Canada and also in the rest of the world.²⁵³

Fortin, as an individual); INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1925 (David Bussi eres, as an individual); INDU (2018), *Evidence*, 1910 (Grandmaison); INDU, *Evidence*, 1st Session, 42nd Parliament, 11 May 2018, 1915 (Dusty Kelly, as an individual); INDU (2018), *Evidence*, 1620 (Lefebvre, GMMQ); INDU (2018), *Evidence*, 1640 (Dupr e, SPACQ).

251 INDU (2018), *Evidence*, 1925 (Bussi eres). But see INDU (2018), *Evidence*, 1630, 1635 (Long, MNS); INDU (2018), *Evidence*, 1610 (Schmidt, Spotify).

252 INDU (2018), *Evidence*, 1625 (Willaert, CFM).

253 INDU (2018), *Evidence*, 1555 (Schmidt, Spotify).

Part of the challenge we have collectively, I think, as an industry is that oftentimes there are large sums of money ... that are flowing into the music industry writ large, which is where I get these large numbers from, but then they're essentially transferring into a very complicated and opaque web of music licensing agreements that certainly we don't have visibility into, and frankly, neither does anybody else. We're into a particular situation where artists only see what they get at the far end of that process, which doesn't necessarily accord with what they're hearing from us.²⁵⁴

Jeff Price, CEO of Audiam Inc., argued that conflicting interests between the new streaming platforms that have come to dominate online music distribution and the creators themselves are responsible for the declining revenues of creators and other rights-holders. According to Mr. Price, the platforms that now dominate music distribution are run, at least for now, with an eye to maximizing short-term returns from the stock market, but have yet to settle on a sustainable revenue model. This would mean that companies like Spotify primarily focus on increasing their valuation, even at the expense of rights-holders:

Spotify, with market capital over \$25 billion, has never made money. YouTube, before it was acquired for \$1 billion, never made money. The value of those entities was predicated on their market share. It's the musicians' music that attracted the users to utilize the technology, which was rewarded by finance and Wall Street in the form of IPOs and sales, and there's nothing wrong with that.

What I do have an issue with is when I hear these companies getting upwards of a trillion-dollar market cap, or a half-trillion-dollar market cap, who have aggregated the world under the umbrellas that we're sitting with here. Facebook Google, Spotify — all wonderful companies — have hundreds of millions, billions, of users aggregated under those umbrellas with market caps up in the tens or hundreds of billions, yet they're turning around and giving someone ... \$0.0001 U.S. per stream on their ad-supported platform. Something's not right.²⁵⁵

Rather than restricting safe-harbour provisions, author and activist Cory Doctorow proposed reforming collective rights management and the tariff-setting process to restore fair remuneration to creators and other rights-holders in the online distribution of copyrighted content:

[W]e can create a blanket license regime, administered by a next-generation collecting society with the transparency of an open source project and the analytical nous of Google. We can set a rate for creative works that is judged fair by entertainment giants and creators, and we can set a portion of those revenues aside to go directly to creators, inalienable through contract. Such a system would encourage competition from smaller players (whose royalty pay-outs would be proportionally lower) and would be a

254 INDU (2018), *Evidence*, 1600 (Kee, Google Canada).

255 INDU (2018), *Evidence*, 1600 (Price).



guaranteed way to shift money from Big Tech to entertainment companies and (more importantly) to creators, who might otherwise see any gains moved to the entertainment companies' shareholders.²⁵⁶

Such a proposal reflects the argument that the imbalance of power between creators and large intermediaries—including OSPs, but also large record labels and publishers—as well as between small and large intermediaries, is at the root of the declining revenues felt by many Canadian rights-holders, and that addressing the matter in any lasting fashion requires a more diversified approach that includes competition and contract law,²⁵⁷ as well as facilitating the emergence of different models for the management of copyright that favour creators.²⁵⁸

Committee Observations and Recommendations

Copyright law provides limited tools to effectively address many of the problems reported during this statutory review. Moreover, the Government is constitutionally limited in the legislative measures it could adopt to address these problems. For example, many legislative instruments capable of addressing the imbalance of bargaining power felt by many Canadian creators, such as contract legislation and collective bargaining, rest in the hands of provincial legislatures. The Act alone does not and cannot suffice to ensure that Canadian creators and creative industries receive fair compensation.

The Committee understands that many rights-holders lack the bargaining power to increase the revenues they obtain from OSPs. The Committee also agrees with the principle that OSPs who profit from the dissemination of copyrighted content they do not own should fairly remunerate rights-holders. However, proposed amendments to sections 31.1 and 41.27 of the Act would be too blunt a solution to address the issue, especially since there is no consensus among stakeholders about which OSPs cause problems and why. Subjecting OSPs to increased regulations should also reflect a balanced approach. The Committee finds it questionable, for example, that an OSP's content management policies would require taking down or de-monetizing content uploaded on a platform before giving its uploader the opportunity to respond to allegations of copyright infringement.

256 Doctorow, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1630 (Long, MNS).

257 INDU (2018), *Evidence*, 1555, 1645 (de Beer); INDU (2018), *Evidence*, 1650 (Geist); CCP, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1635 (Gendreau).

258 See for example INDU (2018), *Evidence*, 1640 (Dupré, SPACQ).

Legislators around the world are only starting to develop and implement legislative frameworks to review the proper scope of liability exemptions available to OSPs and require them to fairly remunerate rights-holders. We are yet to see, for example, how EU members will implement the Directive and what results different approaches will yield. The Government should take the time to learn from the successes and failures of these initiatives to determine whether they serve the long-term interests of all Canadians.

The Committee emphasizes that no entity is entitled to safe harbour exceptions—there is no “right” to safe harbour in Canadian copyright law. These exceptions reflect instead the fact that Parliament recognizes that some entities serve an intermediary function that warrants a special status under the Act. However, this status must nonetheless be earned by complying with the Act as a whole. OSPs in particular would be wise to review their practices and the structure of their platforms to ensure that they reflect the full extent of applicable law, including the rules governing both copyright infringement and its exceptions. The Committee therefore recommends:

Recommendation 21

That the Government of Canada monitor the implementation, in other jurisdictions, of extended collective licensing as well as legislation making safe harbour exceptions available to online service providers conditional to measures taken against copyright infringement on their platforms.

Recommendation 22

That the Government of Canada assert that the content management systems employed by online service providers subject to safe harbour exceptions must reflect the rights of rights-holders and users alike.

Other Technological Exceptions

Witnesses reported that the introduction of technological exceptions negatively impacted royalties, and that Parliament should limit the scope of the relevant provisions or repeal them.²⁵⁹ Mr. Chisick provided the example of a decision in which the Board “found that backup copies of music made by commercial radio stations accounted for

259 INDU (2018), *Evidence*, 1610 (Rioux, CMRRA); INDU (2018), *Evidence*, 1730 (Lauzon & Lavallée, SODRAC); UNEQ, *Brief Submitted to INDU*, 24 April 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1545 (Rathwell & Kerr-Wilson, Shaw); Kelln, *Brief Submitted to INDU*, 25 May 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; Albert Ng, *Brief Submitted to INDU*, 4 December 2018. See also Corus, *Brief Submitted to INDU*, 14 December 2018; TELUS Communications Inc. [TELUS], *Brief Submitted to INDU*, 14 December 2018.



more than 22% of the commercial value of all of the copies that radio stations make. As a result of the expansion of the backup copies exception, the [Board] then proceeded to discount the stations' royalty payments by an equivalent percentage,"²⁶⁰ a loss estimated to reach \$5.6 million per year.²⁶¹ CMRRA and CMuPA proposed that Parliament limit the applicability of the backup copies exception to non-commercial purposes.²⁶²

Witnesses also commented on the case of ephemeral recordings. CMRRA estimated that removing section 30.9(6) from the Act in 2012 resulted in a loss of \$7 million per year in collected royalties. CMRRA commented that rights-holders also incur significant administrative and enforcement costs to demonstrate when a musical reproduction falls outside of the ephemeral copy exception, which has the net effect of further reducing revenues derived from copyright. Artisti and others called for the reintroduction of section 30.9(6) into the Act to limit the ephemeral-copy exception only to cases where no collective licence is available.²⁶³ More generally, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada maintained that the backup, ephemeral and private copies exceptions do not comply with the "three-step test" of the Berne Convention.²⁶⁴

Committee Observations

The economic rights provided by the Act enable rights-holders to obtain remuneration for the use of copyrighted content when such use has commercial value. Several exceptions in the Act reflect a policy choice about the value of some uses of copyrighted content, such as backup copies, ephemeral recordings, temporary reproductions for technological processes, and reproduction for private purposes. Parliament did not enact these exceptions to deprive rights-holders from sources of revenues, but to take down unjustified revenue streams. If their disappearance unduly distorted the market value of copyrighted content, the Board or the Government could address the matter, if needed, through the tariff-setting process. In any case, amending these provisions so soon after their enactment seems premature.

260 INDU (2018), [Evidence](#), 1530 (Chisick).

261 INDU (2018), [Evidence](#), 1610 (Rioux, CMRRA).

262 CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018.

263 INDU (2018), [Evidence](#), 1540 (Morin & Prigent, Artisti); CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018.

264 INDU (2018), [Evidence](#), 1635 (Lauzon & Lavallée, SODRAC).

INFORMATIONAL ANALYSIS

Several witnesses, many from the technology sector, proposed introducing into the Act a new exception to copyright infringement for informational analysis. Element AI described “informational analysis” as “the derivation of information from data,” for example through text and data analysis, “and not the actual use and commercialization of that data.”²⁶⁵ The new exception would prevent copyright legislation from hindering the development of AI software, a growing field in Canada.²⁶⁶

As Maya Medeiros, Partner at Norton Rose Fullbright Canada, explained, providing clarity on whether the Act allows the unauthorized use of copyrighted materials for informational analysis would assist in the development of AI software:

AI learns to think by reading, listening and viewing data, which can include copyrighted works such as images, video, text and other data.

...

The training process can involve reproductions of the training data, and these can be temporary reproductions to extract features of the data that can be discarded after the training process. ... It is unclear whether the use of copyrighted works for training an AI system is considered copyright infringement if the ... copyright owner’s permission is not obtained. This uncertainty exists even if the initial training is done for research purposes ... and then the trained system is eventually used for commercial purposes. ... This uncertainty can limit the data that is used by AI innovators to train the AI system. The quality of the dataset will impact the quality of the resulting trained algorithm.²⁶⁷

265 Element AI, [Brief Submitted to INDU](#), 12 October 2018.

266 INDU, [Evidence](#), 1st Session, 42nd Parliament, 3 October 2018, 1635-1640 (Christian Troncoso, BSA The Software Alliance [BSA]); INDU, [Evidence](#), 1st Session, 42nd Parliament, 3 October 2018, 1645 (Nevin French, Information Technology Association of Canada); INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 November 2018, 1545 (Scott Smith, Canadian Chamber of Commerce [CaCC]); INDU (2018), [Evidence](#), 1550 (Kee, Google Canada); Microsoft Canada Inc., [Brief Submitted to INDU](#), 13 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; BSA, [Brief Submitted to INDU](#), 12 October 2018; Element AI, [Brief Submitted to INDU](#), 12 October 2018; Internet Association, [Brief Submitted to INDU](#), 20 November 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; Alberta Machine Intelligence Institute [AMII], Montreal Institute for Learning Algorithms, Quaid Morris, Vector Insitute, [Brief Submitted to INDU](#), 14 December 2018; Dessa, [Brief Submitted to INDU](#), 14 December 2018; Ryerson University, [Brief Submitted to INDU](#), 14 December 2018; Google Canada, [Brief Submitted to INDU](#), 7 January 2019. See also INDU (2018), [Evidence](#), 1700 (McColgan & Owen, CFLA).

267 INDU (2018), [Evidence](#), 1625 (Medeiros). See also INDU (2018), [Evidence](#), 1635 (Troncoso, BSA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 3 October 2018, 1625-1630 (Paul Gagnon, Element AI); INDU (2018), [Evidence](#), 1550 (Kee, Google Canada); INDU (2018), [Evidence](#), 1720 (Tawfik); INDU (2018), [Evidence](#), 1555 (Tarantino & Lovrics, IPIC); Microsoft Canada, [Brief Submitted to INDU](#), 13 September 2018; BSA, [Brief Submitted to INDU](#), 12 October 2018; Element AI, [Brief Submitted to INDU](#), 12 October 2018; Internet



Witnesses suggested introducing the exception by enacting either a specific provision—similar to [section 29A](#) of the British CDPA—or by adding “informational analysis” among the purposes of fair dealing under section 29 of the Act. In any case, the exception would be limited to the use of lawfully accessed copyrighted content.²⁶⁸ IPIC added that, in amending the Act, Parliament should consider how licences and TPMs could impact the effectiveness of the new exception.²⁶⁹

[P]roviding clarity on whether the Act allows the unauthorized use of copyrighted materials for informational analysis would assist in the development of AI software.

Brush Education was one of the very few witnesses who argued against an exception for informational analysis. It suggested that collective societies should be allowed to licence uses made for the purpose of information analysis, adding that there “is no justification for turning authors and publishers into unpaid suppliers to technology developers—in other words, for requiring a sector that operates on very thin margins to subsidize a sector that can well afford to pay a fair price to its suppliers.”²⁷⁰

While he agreed that there are circumstances in which informational analysis should not amount to copyright infringement,²⁷¹ Mark Hayes, Partner at Hayes eLaw, proposed that Parliament focus instead on the larger, now-ubiquitous problem of how copyright

Association, [Brief Submitted to INDU](#), 20 November 2018; D’Agostino, [Brief Submitted to INDU](#), 10 December 2018; AMII et al., [Brief Submitted to INDU](#), 14 December 2018; Dessa, [Brief Submitted to INDU](#), 14 December 2018; Google Canada, [Brief Submitted to INDU](#), 7 January 2019; Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019.

268 INDU (2018), [Evidence](#), 1445 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1720 (Gagnon, Element AI); INDU (2018), [Evidence](#), 1640 (Merkley, CrCC); INDU (2018), [Evidence](#), 1715 (Tribe & Aspiazu, OpenMedia); INDU (2018), [Evidence](#), 1530 (Kerr-Wilson, BCBC); INDU (2018), [Evidence](#), 1550 (Fewer, CIPPIC); INDU (2018), [Evidence](#), 1715 (Chapdelaine); INDU (2018), [Evidence](#), 1600, 1630 (Tarantino & Lovrics, IPIC); INDU (2018), [Evidence](#), 1540 (Geist); Microsoft Canada, [Brief Submitted to INDU](#), 13 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; CAUL, [Brief Submitted to INDU](#), 28 September 2018; CRKN, [Brief Submitted to INDU](#), 28 September 2018; BSA, [Brief Submitted to INDU](#), 12 October 2018; Element AI, [Brief Submitted to INDU](#), 12 October 2018; IFLAI, [Brief Submitted to INDU](#), 12 October 2018; Internet Association, [Brief Submitted to INDU](#), 20 November 2018; IPIC, [Brief Submitted to INDU](#), 4 December 2018; Dessa, [Brief Submitted to INDU](#), 14 December 2018; Geist, [Brief Submitted to INDU](#), 14 December 2018; AMII et al., [Brief Submitted to INDU](#), 14 December 2018; Portage Network, [Brief Submitted to INDU](#), 7 January 2019; Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019. See also MacEwan University, [Brief Submitted to INDU](#), 13 September 2018.

269 IPIC, [Brief Submitted to INDU](#), 4 December 2018.

270 Brush Education, [Brief Submitted to INDU](#), 5 September 2018.

271 INDU (2018), [Evidence](#), 1710 (Hayes); Hayes, [Brief Submitted to INDU](#), 20 November 2018.

legislation should treat incidental copying, of which the issue of informational analysis is merely a subset. He invited the Committee to consider informational analysis as part of a possible reinforcement of section 30.71 of the Act, namely the exception for “temporary reproductions for technological processes.”²⁷² According to Mr. Hayes, relying on an existing and technology neutral exception would prove more efficient than adding a new provision for every innovation.²⁷³

Committee Observations and Recommendation

The evidence persuaded the Committee that facilitating the informational analysis of lawfully acquired copyrighted content could help Canada’s promising future in artificial intelligence become reality. The Committee therefore recommends:

Recommendation 23

That the Government of Canada introduce legislation to amend the *Copyright Act* to facilitate the use of a work or other subject-matter for the purpose of informational analysis.

PERCEPTUAL DISABILITY

In June 2016, to comply with World Intellectual Property Organisation’s Marrakesh Treaty, Parliament amended the Act to ensure that persons with a perceptual disability have access to copyrighted material.²⁷⁴ These amendments removed some of the legal hurdles that hindered the production of works in formats accessible to persons with a perceptual disability. However, witnesses contended that there is still no significant increase of works published in such formats, despite the fact that technology makes it easier than ever to produce works in such formats, because publishers lack incentives to produce them.²⁷⁵ The production of documents in Braille, which remains essential to

272 But see INDU (2018), *Evidence*, 1630 (Chisick); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

273 INDU (2018), *Evidence*, 1615, 1700 (Hayes); Hayes, *Brief Submitted to INDU*, 20 November 2018. See also D’Agostino, *Brief Submitted to INDU*, 10 December 2018.

274 See also Dara Lithwick, *Legislative Summary of Bill C-11: An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities)*, Publication no. 42-1-C11-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 May 2016.

275 INDU, *Evidence*, 1st Session, 42nd Parliament, 22 October 2018, 1530, 1655 (Lui Greco & Thomas Simpson, Canadian National Institute for the Blind [CNIB]); INDU, *Evidence*, 1st Session, 42nd Parliament, 22 October 2018, 1535 (John Rae, Council of Canadians with Disabilities [CCD]).



help blind people become literate, is decreasing.²⁷⁶ As John Rae, Chair of the Social Policy Committee of the Council of Canadians with Disabilities (CCD), put it, the “Marrakesh [Treaty] has turned on the tap, but the water’s not running.”²⁷⁷ He urged both the Government and Parliament to improve their efforts at providing publications in accessible formats.²⁷⁸

The lack of copyrighted content available in formats accessible to persons with a perceptual disability not only deprives them of academic and professional development opportunities, but also limits their contribution to the creative economy as consumers:

If I could have access to the magazines available in the shop or the bookstore down the street, I guarantee you that I would be spending a lot more money on consuming media. I don't spend much money, in fact I don't spend any money on media, because the things I really want to read just aren't available. Therefore, I consume what's available.²⁷⁹

When questioned on how the Act should define and distinguish “print disability” and “perceptual disability,” the CCD and Canadian National Institute for the Blind (CNIB) responded that Parliament should use consistent and inclusive language to describe disability.²⁸⁰

Witnesses suggested different measures to increase the availability of works in formats accessible to persons with a perceptual disability. The CNIB proposed to only grant copyright to literary works available in formats accessible to persons with a print disability.²⁸¹ Others proposed that section 32(1) of the Act be amended to allow a person to reproduce a cinematographic work in an accessible format, as it is already the case for literary, musical, artistic, and dramatic works

As ... the Council of Canadians with Disabilities put it, the “Marrakesh [Treaty] has turned on the tap, but the water’s not running.”

276 Ibid., 1535, 1705 (Rae, CCD). See also INDU (2018), [Evidence](#), 1530 (Greco & Simpson, CNIB).

277 Ibid., 1555 (Greco & Simpson, CNIB).

278 Ibid., 1535 (Rae, CCD).

279 Ibid., 1710 (Greco & Simpson, CNIB).

280 Ibid., 1600 (Greco & Simpson, CNIB); Ibid., 1605 (Rae, CCD).

281 Ibid., 1530 (Greco & Simpson, CNIB); CNIB, [Brief Submitted to INDU](#), 22 October 2018.

under this provision.²⁸² The CCD also suggested providing public funding to publishers to publish works in accessible formats.²⁸³

Committee Observations and Recommendation

All Canadians should have the same opportunity to engage with copyrighted content. Canada's international obligations prevent it from attributing copyright to works on the condition that they are disseminated in a format accessible to persons with a perceptual disability. The Government should explore ways to support the production of works in accessible format in consultation with industry representatives and other relevant stakeholders. To ensure progress on this front, the availability of works in accessible formats should be measured on a yearly basis. The Committee therefore recommends:

Recommendation 24

That the Government of Canada work with industry and relevant stakeholders to explore ways to support the production of works published in formats specially designed for persons with a perceptual disability, and to measure, on a yearly basis, the availability of works published in such formats.

282 Kelly Dermody, Monica S. Fazekas, Athol Gow, Heather Martin, Anne Pottier, Lisl Schoner-Saunders, Cecilia Tellis, Nancy Waite & Mark Weiler, *Brief Submitted to INDU*, 14 December 2018; Janice Adlington, Jacqueline Cato, George Duimovich, Sharon Engel, Vera Fesnak, Ian Gibson, Alex Homanchuk, Charlotte Innerd, Andrea McLellan, Ingrid Moisil, Laura Newton Miller, Joanne Oud, Cheryl Petrie, Anne Pottier, Helen Salmon, Lisl Schoner-Saunders, Victoria Sigurdson, Irene Tencinger, Matt Thomas, Ashley Thomson, Emily Tufts & Sharon Whittle, *Brief Submitted to INDU*, 20 December 2018.

283 INDU (2018), *Evidence*, 1535, 1705 (Rae, CCD).



ENFORCEMENT

NOTICE-AND-NOTICE REGIME

Some witnesses, such as the Canadian Bar Association (CBA), suggested replacing the notice-and-notice regime—established under sections 41.25, 41.26 and 21.27(3) of the Act—with a notice-and-takedown regime that would oblige an OSP, upon receipt of a notice of claimed infringement by a user of their service, to remove or block the infringing content.²⁸⁴ The CBA argued that, contrary to notice-and-takedown, notice-and-notice incurs “no tangible consequences” against an infringer and therefore offers little actual deterrent against copyright infringement and requires rights-holders to take further steps to enforce their rights.²⁸⁵ Proponents of notice-and-notice cautioned that notice-and-takedown can result in the removal of non-infringing materials, and as such is more likely to jeopardize users’ rights and freedom of expression online.²⁸⁶

Rather than replacing it with a notice-and-takedown regime, other witnesses proposed improving the notice-and-notice regime. Proposals included

- Standardizing the content of the notices, notably to prevent a person from including misleading content in notices such as settlement demands;²⁸⁷

284 INDU (2018), [Evidence](#), 1535 (Willaert, CFM); AQPM, [Brief Submitted to INDU](#), 14 December 2018.

285 INDU (2018), [Evidence](#), 1555, 1650, 1655 (Mackenzie & Seiferling, CBA); CBA, [Brief Submitted to INDU](#), 4 December 2018. See also INDU (2018), [Evidence](#), 1535, 1625 (Willaert, CFM); INDU, [Evidence](#), 1st Session, 42nd Parliament, 7 June 2018, 1530 (John Lewis, International Alliance of Theatrical Stage Employees [IATSE]); ANEL, [Brief Submitted to INDU](#), 18 May 2018; AQPM, [Brief Submitted to INDU](#), 14 December 2018; SARTEC, [Brief Submitted to INDU](#), 14 December 2018.

286 INDU (2018), [Evidence](#), 1910 (Macklem); Sara Bannerman & Charnjot Shokar, [Brief Submitted to INDU](#), 26 October 2018; Canadian Network Operators Consortium Inc. [CNOC], [Brief Submitted to INDU](#), 5 September 2018; CIPPIC, [Brief Submitted to INDU](#), 14 December 2018; Lisa Macklem, [Brief Submitted to INDU](#), 14 December 2018. See also CCP, [Brief Submitted to INDU](#), 7 January 2019.

287 INDU, [Evidence](#), 1st Session, 42nd Parliament, 19 September 2018, 1540 (Christian Tacit & Christopher Copeland, CNOC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 26 September 2018, 1540 (David Watt & Kristina Milbourn, Rogers Communications Inc. [Rogers]); INDU (2018), [Evidence](#), 1530 (Kaplan-Myrth, TekSavvy); INDU, [Evidence](#), 1st Session, 42nd Parliament, 1 October 2018, 1535, 1625, 1720 (Ann Mainville-Neeson & Antoine Malek, TELUS); INDU (2018), [Evidence](#), 1650 (Tribe & Aspiazu, OpenMedia); Nair, [Brief Submitted to INDU](#), 31 May 2018; PIAC, [Brief Submitted to INDU](#), 13 June 2018; CNOC, [Brief Submitted to INDU](#), 5 September 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; Bannerman & Shokar, [Brief Submitted to INDU](#), 26 October 2018; CIPPIC, [Brief Submitted to INDU](#), 14 December 2018;

- Standardizing the form of the notices in a machine-readable format to ease their reception, processing, and delivery;²⁸⁸
- Establishing a fee ISPs could charge to process notices to deter abuses of the notice-and-notice regime;²⁸⁹
- Requiring rights-holders to only send notices to email addresses ISPs register with the American Registry for Internet Numbers (ARIN) to “ensure that notices are directed to the correct email addresses that ISPs wish to use for processing notices;”²⁹⁰ and
- Limiting the number of notices a rights-holder can send to an ISP for an alleged infringement of a work associated with a specific IP address within a given period of time.²⁹¹

ARIN observed that the Act should also require that large corporations, ISPs, OSPs and Internet registrars that assign IP numbers to third parties maintain an up-to-date registry of such numbers to facilitate the implementation of the notice-and-notice regime.²⁹²

Committee Observations and Recommendations

While the Committee was conducting its statutory review, the Government introduced Bill C-86, which proposed amendments to sections 41.25 and 41.26 of the Act. Only a few witnesses were able to provide testimony on how the changes would affect the functioning of the notice-and-notice regime. That being said, proposals made by many

Rogers, [Brief Submitted to INDU](#), 14 December 2018. But see BCE, [Brief Submitted to INDU](#), 14 December 2018.

288 INDU (2018), [Evidence](#), 1540 (Tacit & Copeland, CNOC); INDU (2018), [Evidence](#), 1530, 1625 (Kaplan-Myrth, TekSavvy); INDU (2018), [Evidence](#), 1550 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), [Evidence](#), 1535 (Mainville-Neeson & Malek, TELUS).

289 INDU (2018), [Evidence](#), 1530 (Kaplan-Myrth, TekSavvy); INDU (2018), [Evidence](#), 1540 (Watt & Milbourn, Rogers); INDU (2018), [Evidence](#), 1535 (Mainville-Neeson & Malek, TELUS); Bannerman & Shokar, [Brief Submitted to INDU](#), 26 October 2018; CIPPIC, [Brief Submitted to INDU](#), 14 December 2018. See also Rogers, [Brief Submitted to INDU](#), 14 December 2018.

290 INDU (2018), [Evidence](#), 1540 (Tacit & Copeland, CNOC); CNOC, [Brief Submitted to INDU](#), 5 September 2018. See also American Registry for Internet Numbers [ARIN], [Brief Submitted to INDU](#), 9 January 2019.

291 INDU (2018), [Evidence](#), 1540 (Tacit & Copeland, CNOC); CNOC, [Brief Submitted to INDU](#), 5 September 2018.

292 ARIN, [Brief Submitted to INDU](#), 9 January 2019.



witnesses to reform this regime to curtail abuse ultimately align with the changes the Government proposed in Bill C-86.

However, if the purpose of notice-and-notice is educational, and the new amendments are intended to curb what are understood to be abuses of the system, then it is in stakeholders' interests that the system be as efficient as possible. As such, the proposal that the Government require notices to be sent in a machine-readable format that eases reception, processing, and delivery should be seriously considered. The Committee also believes that the Government should respond to the concerns expressed by ARIN. The Committee therefore recommends:

Recommendation 25

That the Government of Canada make regulations to require notices sent under the notice-and-notice regime be in a prescribed machine-readable format.

Recommendation 26

That the Government of Canada examine ways to keep IPv6 address ownership information up-to-date in a publicly accessible format similar in form and function to American Registry for Internet Numbers' IPv4 "WHOIS" service.

SITE-BLOCKING, DE-INDEXING, AND OTHER ORDERS

According to many witnesses, particularly from the audio, TV, and film industries, piracy remains a problem, but the nature of piracy has shifted considerably since the passage of the *Copyright Modernization Act*. In 2012, rights-holders were predominantly concerned with peer-to-peer file-sharing, through which copyrighted works could be shared through sites like The Pirate Bay.

By 2018, peer-to-peer piracy had declined, but other forms of piracy emerged. These new forms of piracy include stream-ripping (copying a work off a legitimate streaming service like Spotify), unauthorized commercial streaming sites, and preloaded set-top boxes (devices that allow a user to easily access online streams of infringing content).²⁹³ Witnesses also focused their attention on platforms like Facebook and YouTube. Author Ann Brocklehurst told the committee that a Google search of her latest book can easily

293 INDU (2018), *Evidence*, 1535 (Graham & Malcolmson, BCE); INDU (2018), *Evidence*, 1540 (Watt & Milbourn, Rogers); Rogers, *Brief Submitted to INDU*, 14 December 2018.

lead a user to a free PDF version, and that the very day the book was published, it was being distributed for free through Facebook by some of its users.²⁹⁴

Given this shifting environment, rights-holders are pushing for simpler, cheaper and faster methods of enforcing their rights. Several of the witnesses who appeared before the Committee were members of the FairPlay Coalition, which submitted a proposal to the CRTC to establish an administrative body that could require ISPs

By 2018, peer-to-peer piracy had declined, but other forms of piracy emerged.

to block access to entities “that are blatantly, overwhelmingly, or structurally engaged in copyright piracy.”²⁹⁵ The Coalition and its supporters proposed amending the Act to provide rights-holders access to similar, effective tools against copyright infringement occurring online—either through an administrative tribunal or through the courts.

Some witnesses advocated only for a “site-blocking” remedy, where a rights-holder could require online service providers to block end-user access to an infringing website. Others argued for a “de-indexing” remedy as well, where a rights-holder can obtain an injunction to require search engines to remove infringing websites from their search results.²⁹⁶ Others still requested that the Act be amended to provide for a court to issue a “blocking order against an ISP requiring an ISP to disable access to stolen content available on preloaded set-top boxes.”²⁹⁷ BCE Inc. (BCE) and Rogers Communications Inc. (Rogers) offered the broadest suggestion, advocating for a new provision that would allow courts to provide remedies that would compel “all of the intermediaries that form part of the online infrastructure distributing stolen content”²⁹⁸ to deny service to infringing entities:

294 INDU, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2018, 1925 (Ann Brocklehurst, as an individual).

295 CRTC, [Telecom Decision CRTC 2018-384](#), Ottawa, 2 October 2018, para. 6.

296 INDU (2018), [Evidence](#), 1535, 1615, 1620, 1700 (Lewis, IATSE); INDU (2018), [Evidence](#), 1635 (Drouin, ADISQ); INDU (2018), [Evidence](#), 1620, 1700, 1740 (Noss, MPAC); INDU (2018), [Evidence](#), 1550 (Rathwell & Kerr-Wilson, Shaw); INDU, [Evidence](#), 1st Session, 42nd Parliament, 29 October 2018, 1630 (Lorne Lipkus, Canadian Anti-Counterfeiting Network [CACN]); INDU (2018), [Evidence](#), 1535 (Kerr-Wilson, BCBC); INDU (2018), [Evidence](#), 1540-1545, 1620 (Smith, CaCC); INDU (2018), [Evidence](#), 1645, 1700 (Sookman); IATSE, [Brief Submitted to INDU](#), 3 August 2018; AQPM, [Brief Submitted to INDU](#), 14 December 2018; CMePA, [Brief Submitted to INDU](#), 14 December 2018; Hugh Stephens, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1610 (Mainville-Neeson & Malek, TELUS).

297 INDU (2018), [Evidence](#), 1540 (Watt & Milbourn, Rogers). See also INDU (2018), [Evidence](#), 1535 (Kerr-Wilson, BCBC).

298 INDU (2018), [Evidence](#), 1540 (Watt & Milbourn, Rogers). See also , [Brief Submitted to INDU](#), 5 June 2018; CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018; Corus, [Brief Submitted to INDU](#),



This would apply to intermediaries such as ISPs, web hosts, domain name registrars, search engines, payments processors, and advertising networks. In practice this would mean that a new section of the Copyright Act would allow a court to issue an order directly to, for example, a web host to take down an egregious piracy site, a search engine to delist it, a payment processor to stop collecting money for it, or a registrar to revoke its domain.²⁹⁹

BCE, Shaw, and Rogers acknowledged that many such remedies are already available to them under common law, both against infringers and intermediaries, but that several hurdles make them ineffective.³⁰⁰ Injunctions against infringers are hard to enforce since “generally speaking ... piracy operators operate anonymously, operate online and operate outside of Canadian jurisdiction.”³⁰¹ Moreover, courts may be reluctant to issue injunctions on non-infringing third parties without guidance from Parliament, which may add costs and delay.³⁰² The current process was also described as “too slow and too cumbersome,” since it requires complainants “to effectively go and prove the case, and ... then ask for a remedy to the particular problem,” as opposed to a quicker process that would allow obtaining an injunctive relief on a strong *prima facie* case.³⁰³

Some witnesses also pointed to the *Telecommunications Act*, which states that “[e]xcept where the [CRTC] approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.”³⁰⁴ They signalled that this provision requires a rights-holder first to seek an injunction against an ISP or other online intermediary in court, then apply to the CRTC for its permission to enforce this injunction, which would amount to an unnecessary duplication of processes.³⁰⁵

14 December 2018; MPAC, [Brief Submitted to INDU](#), 14 December 2018; OMM, [Brief Submitted to INDU](#), 14 December 2018; Rogers, [Brief Submitted to INDU](#), 14 December 2018; BCBC, [Brief Submitted to INDU](#), 7 January 2019.

299 INDU (2018), [Evidence](#), 1535 (Graham & Malcolmson, BCE).

300 But see INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1930 (Adam Lackman, as an individual).

301 INDU (2018), [Evidence](#), 1550 (Graham & Malcolmson, BCE).

302 INDU (2018), [Evidence](#), 1700 (Rathwell & Kerr-Wilson, Shaw).

303 INDU (2018), [Evidence](#), 1555 (Watt & Milbourn, Rogers).

304 S.C. 1993, c. 38, s. 36.

305 INDU (2018), [Evidence](#), 1650 (Graham & Malcolmson, BCE); INDU (2018), [Evidence](#), 1700 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), [Evidence](#), 1720 (Mainville-Neeson & Malek, TELUS); INDU (2018), [Evidence](#), 1535 (Kerr-Wilson, BCBC).

More generally, Mr. Sookman found that the law currently leaves many important questions unanswered:

There are going to be questions about what type of sites should be blocked. Should they be primarily infringing, or should they be something else? What factors should the court take into account when deciding to make an order? Who should bear the cost of site-blocking orders? What method should be ordered to be used for site blocking? Then, how do we deal with the inevitable attempts to circumvent these orders, which, by the way, courts have said don't undermine their effectiveness?

I believe those questions are fundamental ones for Parliament. Courts can make them up, but we might end up with one or two trips to the Supreme Court and with rights holders and users spending a ton of money.³⁰⁶

FairPlay's proposal of an administrative regime raised concerns of procedural fairness among witnesses who feared such a process would "inevitably censor legitimate content and speech online and violate net neutrality protections, all without court oversight."³⁰⁷ The fact that such orders may also hinder lawful trade would offer another reason to proceed with caution.³⁰⁸

Critics of the proposal also focused on whether there really was a strong enough case against online piracy to merit an amendment to allow for more easily accessible injunctions on third parties. John Lawford, Executive Director of the Public Interest Advocacy Centre (PIAC), argued that "the evidence suggests that online piracy is a small and shrinking problem, and that site blocking will have minimal benefits for Canadian creators."³⁰⁹ Mr. Katz added that because site-blocking can be circumvented, it may not prove as effective at ensuring that a competitive market provides consumers with more convenient and affordable options than pirate sites.³¹⁰

306 INDU (2018), [Evidence](#), 1640 (Sookman). See also INDU (2018), [Evidence](#), 1535 (Chisick).

307 INDU (2018), [Evidence](#), 1650 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), [Evidence](#), 1720 (de Beer); INDU (2018), [Evidence](#), 1540 (Geist); Geist, [Brief Submitted to INDU](#), 14 December 2018; CCP, [Brief Submitted to INDU](#), 7 January 2019; Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019. See also INDU (2018), [Evidence](#), 1540 (Tacit & Copeland, CNOC).

308 INDU (2018), [Evidence](#), 1640 (Petricone, CTA); INDU (2018), [Evidence](#), 1720 (de Beer).

309 PIAC, [Brief Submitted to INDU](#), 13 June 2018. See also INDU (2018), [Evidence](#), 1540, 1640 (Tacit & Copeland, CNOC); INDU, [Evidence](#), 1st Session, 42nd Parliament, 5 November 2018 1640 (John Lawford, PIAC); CIPPIC, [Brief Submitted to INDU](#), 14 December 2018.

310 INDU (2018), [Evidence](#), 1640 (Katz). See also INDU (2018), [Evidence](#), 1915 (Ryan Regier); INDU (2018), [Evidence](#), 1640 (Lawford, PIAC).



Andy Kaplan-Myrth, Vice-President of Teksavvy Solutions Inc., argued that the FairPlay proposal contradicted the principle of net neutrality—the principle that ISPs should provide equal treatment to all Internet traffic—“without any real urgent justification.”³¹¹ He added not only that site-blocking could be easily circumvented and is thus ineffective,³¹² but that the proposal stems from a convergence of interests derived from the vertical integration of telecommunications firms that runs contrary to the role of ISPs as common carriers:

[Ariel] Katz added that because site-blocking can be circumvented, it may not prove as effective at ensuring that a competitive market provides consumers.

I don't think we should be focused on blocking other content, because now we're running up against network neutrality in our common carriage roles.

My point is that if we were going to look at illegal content, we would be talking about terrorism content. You know, there are bad things out there.

We carry the bits, and we do that because we're common carriers. We carry the bits without looking at them. Just as you can pick up the phone and speak to another person and say whatever you want on that phone line and that phone company won't cut off your call because of the words you say, we will carry the bits.

I think the large ISPs are preoccupied with copyright in particular, and website blocking to enforce copyright, because of their interests on their media sides.³¹³

David Watt, Senior Vice-President at Rogers, responded that there is no inherent conflict between the role an ISP plays in transmitting content and its interests as content owner, and that Canada is governed by strict rules that prevent an ISP such as Roger to favour its own content over others', qualifying the “vertical integration argument” as a red herring.³¹⁴ Rogers and BCE added that a reasonable interpretation of the principle of net neutrality would only extend its application to legal content circulating over the Internet,

311 INDU (2018), [Evidence](#), 1530 (Kaplan-Myrth, TekSavvy). See also INDU (2018), [Evidence](#), 1540 (Tacit & Copeland, CNOC); INDU (2018), [Evidence](#), 1650 (Tribe & Aspiazu, OpenMedia); INDU (2018), [Evidence](#), 1540 (Geist).

312 INDU (2018), [Evidence](#), 1645, 1705 (Kaplan-Myrth, TekSavvy). But see INDU (2018), [Evidence](#), 1630, 1645 (Watt & Milbourn, Rogers).

313 INDU (2018), [Evidence](#), 1600 (Kaplan-Myrth, TekSavvy).

314 INDU (2018), [Evidence](#), 1600 (Watt, Rogers). See also INDU (2018), [Evidence](#), 1605 (Graham & Malcolmson, BCE). But see INDU (2018), [Evidence](#), 1710 (Mainville-Neeson & Malek, TELUS).

meaning that it would and should not prevent ISPs from blocking illegal content such as materials that infringe copyright.³¹⁵

There may be a possible compromise in amending the Act to allow a court to issue a site-blocking and de-indexing order, provided that such amendments also include rigorous measures to prevent overreach and infringements of freedom of expression.³¹⁶ A number of witnesses suggested drawing inspiration from the Australian *Copyright Act*.³¹⁷ The Canadian Network Operators Consortium commented that, should Parliament enact a site-blocking regime, it should also allow ISPs to recover the cost of implementing and administering blocking mechanisms, notably to ensure that such requirements do not put too high a burden on small ISPs.³¹⁸

Committee Observations and Recommendation

The fight against piracy should focus more on large-scale, commercial infringers, and less on individual Canadians who may or may not understand that they are engaged in infringement. This makes sense from a practical perspective and from the perspective of the distinction in the Act between the severity of commercial and non-commercial infringement. The Committee therefore agrees that there is value in clarifying within the Act that rights-holders can seek injunctions to deny services to persons demonstrably and egregiously engaged in online piracy, provided there are appropriate procedural checks in place. The Committee also supports amending the *Telecommunications Act* to remove any procedural duplication or unnecessary hurdles.

The Committee does not, however, support the development of an administrative regime to these ends. It is for the courts to adjudicate whether a given use constitutes copyright infringement and to issue orders in consequence. The courts already have the expertise necessary to protect the interests of all involved parties.

The Committee emphasizes that the enforcement of copyright is made especially difficult by the vertical integration of ISPs and content providers. Parliament and the

315 INDU (2018), *Evidence*, 1605 (Watt, Rogers); INDU (2018), *Evidence*, 1605 (Graham & Malcolmson, BCE). See also INDU (2018), *Evidence*, 1535 (Lewis, IATSE); INDU (2018), *Evidence*, 1700 (Noss, MPAC).

316 INDU (2018), *Evidence*, 1550 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), *Evidence*, 1645 (Chisick); INDU (2018), *Evidence*, 1555-1600 (Tarantino & Lovrics, IPIC). See also INDU (2018), *Evidence*, 1650 (Kaplan-Myrth, TekSavvy); INDU (2018), *Evidence*, 1550 (Lawford, PIAC); But see INDU (2018), *Evidence*, 1720 (de Beer); INDU (2018), *Evidence*, 1540 (Geist); Geist, *Brief Submitted to INDU*, 14 December 2018.

317 INDU (2018), *Evidence*, 1630, 1635 (Smith, CaCC); Rogers, *Brief Submitted to INDU*, 14 December 2018; Stephens, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1700 (Knopf).

318 INDU (2018), *Evidence*, 1545 (Tacit & Copeland, CNOC).



courts need to be particularly careful that the preservation of net neutrality and of the rights of all parties, including those of the public, are fully considered. It is not hard to imagine a situation where one vertically integrated ISP–rights-holder seeks an injunction that would apply to another ISP–rights-holder, who would gladly provide it with little contest given that they share similar interests in the outcome of the case. In such situations, where the actual alleged infringer is most likely *ex parte*, the risk for overreach is obvious.³¹⁹ The Committee therefore recommends:

Recommendation 27

Following the review of the *Telecommunications Act*, that the Government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law.

ANTI-COUNTERFEITING MEASURES

To the CBA, the anti-counterfeiting enforcement measures laid out in sections 44 to 45 of the Act are “cumbersome and disproportionately place significant financial and procedural burdens on rights-holders.”³²⁰ In particular, the CBA took issue with the fact that rights-holders may rely on the Canadian Border Services Agency to temporarily detain imported counterfeited goods, but not to seize and destroy those goods without a court order. Lorne Lipkus, Chair of the Canadian Anti-Counterfeiting Network (CACN), noted that during this temporary detention, importers of counterfeit goods often fail to respond to requests from rights-holders, adding costs and complications to the process.³²¹ The CBA and the CACN thus proposed to establish a “simplified procedure” under which the importer would be notified of the allegation that its imported goods are counterfeit and provided a short time to respond. If it failed to respond, it would be deemed to have consented to the release of those goods to the rights-holder, who could then proceed to their destruction.³²²

319 See also Doctorow, *Brief Submitted to INDU*, 14 December 2018.

320 CBA, *Brief Submitted to INDU*, 4 December 2018.

321 INDU (2018), *Evidence*, 1710 (Lipkus, CACN).

322 *Ibid.*, 1710 (Lipkus, CACN); INDU (2018), *Evidence*, 1555, 1630 (Mackenzie & Seiferling, CBA).

STATUTORY DAMAGES

Critics of section 38.1 of the Act generally fell into two broad camps. In the first camp, some witnesses took issue with the upper limits on the amounts of statutory damages a court may award a rights-holder. Ken Thompson, Chair of ALAC, argued that the \$5,000 ceiling for non-commercial infringement and the fact that it applies to multiple acts, rather than per act, “make the remedy ... potentially nothing more than a single licence fee for many non-commercial infringements.”³²³ ACP submitted that the legal fees alone required to pursue a non-commercial infringer would exceed whatever statutory award might result under the Act, and that Parliament should increase the limit of statutory damages to discourage systematic infringement.³²⁴ Along similar lines, the Canadian Association of Professional Image Creators and the Professional Photographers of Canada proposed raising the maximum limit for commercial copyright infringement to \$50,000, arguing that the current \$20,000 limit is “outdated” and implies to “creators that their work is not highly valued.”³²⁵

In the second camp, other witnesses submitted that the entire structure of statutory damages needs reconsidering. Copibec argued that the distinction between non-commercial and commercial infringement, first added in 2012, “continues to blur in the digital world” and thus prevents the courts from fixing effective remedies.³²⁶ Ann Mainville-Neeson, Vice-President of Telus, suggested that “statutory damages can be completely detached from ... the actual harms suffered” and that, as a result, courts must be given the discretion to set damages in a way that corresponds with the circumstances of each case, including whether the defendant acted in bad faith.³²⁷ The UNEQ also proposed to make statutory damages

[S]ome witnesses took issue with the upper limits on the amounts of statutory damages a court may award a rights-holder.

323 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC).

324 INDU (2018), *Evidence*, 1530 (Rollans & Edwards, ACP); ACP, *Brief Submitted to INDU*, 3 August 2018. See also INDU (2018), *Evidence*, 1600 (Caron, OBPO); UNEQ, *Brief Submitted to INDU*, 24 April 2018; Copibec, *Brief Submitted to INDU*, 31 May 2018; AMBP, *Brief Submitted to INDU*, 3 August 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018. See also INDU (2018), *Evidence*, 1725 (Price).

325 CAPIC & PPC, *Brief Submitted to INDU*, 4 July 2018.

326 Copibec, *Brief Submitted to INDU*, 31 May 2018. See also INDU (2018), *Evidence*, 1550 (Gendreau); CCI, *Brief Submitted to INDU*, 21 September 2018.

327 INDU (2018), *Evidence*, 1530 (Mainville-Neeson & Malek, TELUS).



commensurate with the circumstances of the case in order to provide enough deterrence against copyright infringement.³²⁸

Proponents of maintaining the status quo on statutory damages submitted that the current limits are essential to maintaining the balance between rights-holders' and users' rights Parliament achieved in 2012.³²⁹ More specifically, the upper limit of statutory damages for non-commercial copyright infringement provides users with the confidence to rely on copyright exceptions and engage in socially desirable activities, such as research.³³⁰ Similarly, some educational institutions argued that the threat of unpredictable statutory damages for unintentional non-commercial copyright infringement would compel them to enter into costly but otherwise disadvantageous licensing agreements.³³¹ To increase the predictability of the copyright system, several Canadian intellectual property law scholars proposed to only allow awards of statutory damages in relation to publicly registered works, as it is the case in the US.³³²

Committee Observations and Recommendation

To ensure statutory damages remain relevant and effective at deterring copyright infringement, the Committee finds that their lower and upper limits provided under sections 38.1(1), 38.1(2) and 38.1(3) of the Act should be raised to the extent necessary to account for inflation on the basis of the year in which they were originally set. To reduce the need to constantly review these provisions, Parliament could empower the Government to periodically increase these limits to take inflation into account. The Committee therefore recommends:

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- 328 UNEQ, [Brief Submitted to INDU](#), 24 April 2018. But see Concordia University et al., [Brief Submitted to INDU](#), 18 June 2018.
- 329 University of Winnipeg, [Brief Submitted to INDU](#), 5 September 2018; University of Waterloo, [Brief Submitted to INDU](#), 14 December 2018.
- 330 University of Guelph, [Brief Submitted to INDU](#), 4 July 2018; Concordia University et al., [Brief Submitted to INDU](#), 18 June 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; CCP, [Brief Submitted to INDU](#), 7 January 2019; Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019.
- 331 University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; ACAD, [Brief Submitted to INDU](#), 14 December 2018; Athabasca University, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1540 (Geist); Internet Archive & Internet Archive Canada, [Brief Submitted to INDU](#), 14 December 2018.
- 332 Tawfik et al., [Brief Submitted to INDU](#), 18 January 2019.

Recommendation 28

That the Government of Canada introduce legislation amending the *Copyright Act* to increase upper and lower limits of statutory damages provided under sections 38.1(1), 38.1(2) and 38.1(3) of this Act to account for inflation, based on the years when they were originally set.



COLLECTIVE ADMINISTRATION OF RIGHTS

PROCEEDINGS AND MANDATE OF THE COPYRIGHT BOARD

Witnesses prevalently complained about the inefficiency of the proceedings of the Board, more specifically the amount of time it takes to certify a tariff.³³³ Closely tied to the issue of delay is that of retroactive application. For the parties involved, this can create a sudden and significant liability, and waiting for a tariff may discourage businesses from entering the market. In the words of Patrick Curley, President of Third Side Music, it is “hard to do business when you have no idea what the tariff will be for a period of five years after use.”³³⁴

To resolve issues of delays and retroactive tariffs, witnesses offered a variety of recommendations that included increasing the resources of the Board,³³⁵ renewing the tenure of its members in a timely manner,³³⁶ enhancing the Board’s case-management

333 INDU (2018), [Evidence](#), 1555 (Davidson & Therrien, Universities Canada); INDU (2018), [Evidence](#), 1700 (Amyot & Hanna, CIC); INDU (2018), [Evidence](#), 1650, 1715 (Degen, WUC); INDU (2018), [Evidence](#), 1715 (Rollans & Edwards, ACP); INDU (2018), [Evidence](#), 1515 (Campbell & Balcom, UNB); INDU (2018), [Evidence](#), 1700, 1735, 1755 (Curley, TSM); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1940 (David Murphy, as an individual); INDU (2018), [Evidence](#), 1650 (Thompson & Hebb, ALAC); INDU (2018), [Evidence](#), 1650 (Muller, Colleges Ontario); INDU (2018), [Evidence](#), 1650 (Ludbrook, Ryerson University); INDU (2018), [Evidence](#), 1530 (Greenberg & Peters, AMBP); INDU (2018), [Evidence](#), 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), [Evidence](#), 1725 (Callison); INDU (2018), [Evidence](#), 1515 (Middlemadd & Taylor, BCCLA); INDU (2018), [Evidence](#), 1705 (McGuffin, CMuPA); INDU (2018), [Evidence](#), 1700 (Anderson & McAllister, ACTRA); INDU (2018), [Evidence](#), 1610 (Rioux, CMRRA); INDU, [Evidence](#), 1st Session, 42nd Parliament, 24 September 2018 (Freya Zaltz, National Campus and Community Radio Association [NCCRA]); INDU (2018), [Evidence](#), 1550, 1645 (Dupré, SPACQ); INDU (2018), [Evidence](#), 1615 (Kerr-Wilson, BCBC); INDU (2018), [Evidence](#), 1615 (Smith, CaCC); INDU (2018), [Evidence](#), 1605 (Price); WUC, [Brief Submitted to INDU](#), 18 June 2018; CCI, [Brief Submitted to INDU](#), 21 September 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018; Hotel Association of Canada [HAC], Restaurants Canada & Retail Council of Canada, [Brief Submitted to INDU](#), 14 December 2018.

334 INDU (2018), [Evidence](#), 1700 (Curley, TSM). See also INDU (2018), [Evidence](#), 1440 (Martin & Graham, University of Guelph); INDU (2018), [Evidence](#), 1650 (Ludbrook, Ryerson University); INDU (2018), [Evidence](#), 1620 (Dorval & Wheeler, CAB); INDU (2018), [Evidence](#), 1615 (Kerr-Wilson, BCBC).

335 INDU (2018), [Evidence](#), 1555 (Davidson & Therrien, Universities Canada); INDU (2018), [Evidence](#), 1700 (Amyot & Hanna, CIC); INDU (2018), [Evidence](#), 1700, 1745 (Curley, TSM); INDU (2018), [Evidence](#), 1550, 1645 (Dupré, SPACQ); Broadview Press, [Brief Submitted to INDU](#), 16 April 2018; CCI, [Brief Submitted to INDU](#), 21 September 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; CIPPIC, [Brief Submitted to INDU](#), 14 December 2018.

336 INDU (2018), [Evidence](#), 1625 (Davidson & Therrien, Universities Canada).

powers and simplifying its procedures,³³⁷ imposing mandatory decision-making timelines,³³⁸ preventing the Board from issuing decisions with retroactive effects,³³⁹ limiting expert evidence parties can submit to the Board,³⁴⁰ and allowing collective societies referred to under section 67 of the Act to negotiate rates directly with users.³⁴¹

While Shaw shared others' concerns regarding the efficiency of proceedings before the Board, it "recommended that the [Act] be amended to expressly confirm that users are entitled to negotiate as a group when negotiating with a collective, as well as when applying to the Board for arbitration when a collective and users are unable to agree on royalty rates or related terms and conditions."³⁴² Such an amendment would "permit users to partially offset the imbalance of power that would otherwise be enjoyed by the near-monopoly collectives," as well as further increase the efficiency of the collective rights management system.³⁴³

Appearing before the Committee after the tabling of Bill C-86, the Board itself made two proposals. First, it proposed amending the Act to require that any agreement made between users and collectives be provided to the Board to help set similar tariffs. The Board maintained that while it can order parties to provide such agreements, amendments to the Act could provide a more efficient process to gather information the Board considers essential to the fulfilment of its mandate.³⁴⁴ Mr. Chisick later urged the Committee to show caution in the matter:

Users may be reluctant to enter into agreements with collectives if they know they're going to be filed with the Copyright Board and thus become a matter of public record.

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- 337 INDU (2018), [Evidence](#), 1700 (Amyot & Hanna, CIC); INDU (2018), [Evidence](#), 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), [Evidence](#), 1705 (McGuffin, CMuPA); CCI, [Brief Submitted to INDU](#), 21 September 2018; CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018.
- 338 INDU (2018), [Evidence](#), 1705 (McGuffin, CMuPA); CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018; HAC et al., [Brief Submitted to INDU](#), 14 December 2018.
- 339 INDU (2018), [Evidence](#), 1715 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1515 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1515 (Campbell & Balcom, UNB); INDU (2018), [Evidence](#), 1700 (Curley, TSM); INDU (2018), [Evidence](#), 1440 (Martin & Graham, University of Guelph); INDU (2018), [Evidence](#), 1650 (Ludbrook, Ryerson University); INDU (2018), [Evidence](#), 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); HAC et al., [Brief Submitted to INDU](#), 14 December 2018.
- 340 INDU (2018), [Evidence](#), 1645 (Tamaro & St-Onge, FNC).
- 341 INDU (2018), [Evidence](#), 1745 (Curley, TSM); INDU (2018), [Evidence](#), 1715 (MacKay, Re:Sound); INDU (2018), [Evidence](#), 1615 (Smith, CaCC); INDU (2018), [Evidence](#), 1605 (Price); CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018; HAC et al., [Brief Submitted to INDU](#), 14 December 2018.
- 342 Shaw, [Brief Submitted to INDU](#), 14 December 2018.
- 343 Shaw, [Brief Submitted to INDU](#), 14 December 2018.
- 344 INDU (2018), [Evidence](#), 1625 (McDougall, Théberge & Audet, Copyright Board).



The concern would be, of course, that services in the marketplace are operating in a very competitive environment. The last thing they want to do is make the terms of their confidential agreements known to everyone, including their competitors.³⁴⁵

Second, the Board requested the power to issue interim decisions on its own motion to provide it with an “additional tool to influence the pace and dynamics of tariff-setting proceedings.”³⁴⁶

With the adoption of Bill C-86, section 66.501 was added to the Act and came into force on 1 April 2019. The provision marks the first attempt in the Board’s history to provide explicit criteria to guide its decision-making processes and outcomes. Under the new section, these criteria include “what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints,” “the public interest,” as well as “any other criterion that the Board considers appropriate.”

The introduction of section 66.501 of the Act came late in the Committee’s review, so only a few witnesses could comment on it. Mr. Chisick applauded the introduction of mandatory rate-setting criteria as it would contribute to a “more timely, efficient and predictable tariff process.”³⁴⁷ Nevertheless, Mr. Chisick expressed concern about the addition of “any other criterion that the Board considers appropriate.” He argued that, by making the criteria open-ended, the Board’s decision-making might remain or even become more unpredictable and costlier, as parties seek to provide evidence to meet a growing list of undefined principles and criteria.³⁴⁸

Other witnesses took issue with the inclusion of “public interest.” According to Mr. Katz, “[i]ntroducing public interest, in principle, is a good thing, except that the Board could then introduce anything under “public interest” and could actually empty out all the other criteria.”³⁴⁹ Mr. Sookman agreed, arguing that using the term “competitive market” was sufficient to reduce the uncertainty of the tariff-setting process and help increase the speed of proceedings before the Board.³⁵⁰

345 INDU (2018), [Evidence](#), 1535 (Chisick).

346 INDU (2018), [Evidence](#), 1625 (McDougall, Théberge & Audet, Copyright Board).

347 INDU (2018), [Evidence](#), 1535 (Chisick). See also INDU (2018), [Evidence](#), 1615 (Smith, CaCC); CMRRA & CMuPA, [Brief Submitted to INDU](#), 14 December 2018.

348 INDU (2018), [Evidence](#), 1535 (Chisick).

349 INDU (2018), [Evidence](#), 1630 (Katz).

350 INDU (2018), [Evidence](#), 1630 (Sookman). See also INDU (2018), [Evidence](#), 1605, 1655, 1725 (Boyer).

Committee Observations and Recommendations

Over the course of its review, this Committee received nearly unanimous testimony that the Board is failing to provide the certainty, stability, and clarity that Canadian creative industries require to grow and compete. Witnesses described an institution that lacked the resources and the authority to curtail lengthy tariff-setting processes, that struggled to implement some of the exceptions added to the Act by the CMA, and whose decisions are too-often overturned upon judicial review.

The issue of delay of proceedings before the Board is exacerbated by complexity and uncertainty surrounding collective rights administration and the tariff-setting process. Collective rights administration in Canada is undeniably a complicated system, a product of three interrelated factors. First, the Board is, with some exceptions, allowed to structure its procedures freely and flexibly. As a result, proceedings before the Board can take any number of different forms, creating an intricate and unpredictable environment for parties.

Second, the Board considers applications made under several different regimes across several different industries involving several different types of works. These applications combine substantive complexity (making economic valuations in rapidly changing technological contexts) with legal complexity (applying the Act to new practices and understanding the extent of its statutory power in each regime). As noted above, uncertainty over the binding nature of different types of Board decisions has played a sizeable role in recent litigation at the Federal Court of Appeal and the SCC.

Third, the Board considers applications from collective societies that have highly dissimilar structures and practices. Even those relying on the same tariff might have different distribution models or have received different grants of rights from their members. Since users and rights-holders interact with collectives, rather than with the Board itself, the practices and policies of copyright collectives play a significant role in how the public engages with copyright law.

Through Bill C-86, Parliament enacted a sweeping reform of the Board in the later stages of the review to streamline and simplify its proceedings. The Committee notes that many proposals made in this review to improve the speed and efficiency of Board proceedings were included in submissions on the consultation around Board reform and are now reflected in the changes made to the Act through Bill C-86. The Committee also



acknowledges that the Government increased the annual financial resources of the Board by 30% in 2018.³⁵¹

While the Committee is heartened that the Government heard and responded to stakeholders, it is limited in how much more it can say on the reform of the Board. The changes have only very recently come into effect, and only a few witnesses were able to comment on them as they were being considered in Parliament. The Committee feels that it is too early to assess whether the Government's approach will result in increased efficiency, speed, and certainty in tariff setting.

The Government should consider amending the Act to allow and encourage users to negotiate with a collective society and apply to the Board as a group. Doing so may not only encourage fair licensing practices, but also increase the overall efficiency of the collective rights management regime, including the proceedings before the Board. The Committee therefore recommends:

Recommendation 29

That the Government of Canada introduce legislation amending the *Copyright Act* to clarify that users can negotiate with a collective society as a group and to allow users to jointly apply to the Copyright Board of Canada, when the Board deems it appropriate.

From a perspective of enhancing the transparency of the tariff-setting process, a list of criteria detailing the mandate of the Board has much to offer. A mandate should allow the public to understand the Board's role and in turn give the Board a sound basis for building consistent procedure and principled tariffs. A mandate might also encourage the Board to adopt a more active role in the oversight of collectives and their internal operations, driven by a public interest concern.

Mr. Chisick, Mr. Katz, and Mr. Sookman shared the underlying concern that the criteria set out under the new section 66.501 of the Act are written in such a broad fashion that they may reduce the certainty and predictability that Bill C-86 was intended to provide. Indeed, it is not difficult to imagine a scenario where the Board either interprets "public interest" in a way that at least one party finds objectionable or applies some as-of-yet not defined principle in a way no party could predict, prompting a costly, lengthy appeal process that could have significant effects on the application or interpretation of other tariffs.

351 INDU, *Evidence*, 1st Session, 42nd Parliament, 5 December 2018, 1635 (Kahlil Cappuccino & Pierre-Marc Lauzon, DCH).

This Committee thus urges the Government and the Board to proceed carefully in defining, elaborating on, and adding to the decision-making criteria enumerated under section 66.501 of the Act. Detail could and should be added via regulations, always with an eye to promoting remuneration, access to copyrighted content, and transparency. The Committee therefore recommends:

Recommendation 30

That the Government of Canada report to the House of Commons Standing Committee on Industry, Science and Technology within three years on the effectiveness of the reform of the Copyright Board of Canada, including measures introduced and amended by the *Budget Implementation Act, 2018, No. 2*.

RADIO ROYALTY EXEMPTION

Witnesses from across the music industry were nearly unanimous in requesting the repeal of section 72(2)—previously 68.1(1)(a)—of the Act.³⁵² Music Canada suggested that the radio royalty exemption provided by this section “amounts to an \$8 million annual cross-industry subsidy paid by artists and their recording industry partners to large, vertically integrated and highly profitable media companies. The costs to creators since inception have been \$150 million.”³⁵³ Laurie McAllister, Director of the Alliance of Canadian Cinema, Television and Radio Artists, noted that—unlike when the provision was enacted in 1997 “as a temporary solution” to ease the introduction of neighbouring rights in Canadian copyright law “for a struggling commercial radio industry”—today’s commercial radio sector, “now vertically integrated and run by a handful of large media corporations,” can afford to pay legitimate royalties in full.³⁵⁴

Radio broadcasters, however, were resistant. Corus Entertainment Inc. (Corus) argued that Parliament did not enact section 72(2) of the Act as a transitional measure, but to mitigate “Canadian radio’s competitive disadvantage” vis-à-vis American radio stations,

352 INDU (2018), *Evidence*, 1610 (Long, MNS); INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU (2018), *Evidence*, 1535 (Willaert, CFM); INDU (2018), *Evidence*, 1540 (Baptiste & Daigle, SOCAN); INDU (2018), *Evidence*, 1600 (Drouin, ADISQ); INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound); INDU (2018), *Evidence*, 1705 (Tarlton, Ticketmaster); CFM, *Brief Submitted to INDU*, 31 May 2018; SOCAN, *Brief Submitted to INDU*, 13 June 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; Barker, *Brief Submitted to INDU*, 14 December 2018; CIMA, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1555 (Tarantino & Lovrics, IPIC).

353 INDU (2018), *Evidence*, 1550 (Henderson, Music Canada). See also INDU (2018), *Evidence*, 1605 (Morin & Prigent, Artisti); Music Canada, *Brief Submitted to INDU*, 14 December 2018.

354 INDU (2018), *Evidence*, 1600 (Anderson & McAllister, ACTRA). See also INDU (2018), *Evidence*, 1545 (Morin & Prigent, Artisti); INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound).



which do not pay royalties for neighbouring rights. Corus also noted that commercial radio broadcasters already pay \$91 million every year in Board-set royalty tariffs and that the repeal of the exemption would only serve the interests of foreign conglomerates at the expense of “a vital Canadian medium.”³⁵⁵ In any case, the National Campus and Community Radio Association urged the Committee to retain the exemption under section 72(3) of the Act, which spares small-budget, non-profit community radio stations from having to pay heavy royalty fees.³⁵⁶

The CBA added that the rhetoric of a “subsidy” from struggling artists to successful radio conglomerates obscured the fact that the music industry itself absorbs most of royalty income paid by the radio broadcasters. According to the CBA, and that removing the exemption would penalize 60% of Canadian radio stations, most of them local stations, without significantly increasing the revenues of Canadian creators.³⁵⁷

Committee Observations and Recommendation

Music industry representatives focused on the “radio royalty exemption” as a piece of the “value gap,” or the discrepancy between the economic value produced by the music industry and the economic value that ultimately accrues to its rights-holders. There is no need, however, to endorse the value-gap theory to conclude that this exemption deprives the music industry of millions of dollars of revenues annually and that it is difficult to justify why it should apply indiscriminately to all commercial broadcasters, no matter how profitable they are.

The Committee expresses concern about the impact of removing the radio royalty exemption on small, independent, and Canadian-controlled commercial broadcasters who provide important services to their communities. The Committee thus favours scaling down the exemption rather than removing it entirely from the Act. For instance, the exemption could only be available to broadcasters whose total revenues do not exceed a specified amount, or the exempted revenues would progressively diminish as the revenues of a broadcaster or the size of its operations increase. In any case, parent

355 Corus, *Brief Submitted to INDU*, 14 December 2018. See also House of Commons, INDU (2018), *Evidence*, 1540, 1615 (Dorval & Wheeler, CAB); CAB, *Brief Submitted to INDU*, 13 September 2018.

356 INDU (2018), *Evidence*, 1530, 1605, 1625 (Zaltz, NCCRA); See also INDU (2018), *Evidence*, 1725 (MacKay, Re:Sound); Alliance des radios communautaires du Canada, Association des radiodiffuseurs du Québec & NCCRA, *Brief Submitted to INDU*, 31 May 2018.

357 House of Commons, INDU (2018), *Evidence*, 1540, 1555, 1620, 1700 (Dorval & Wheeler, CAB). See also INDU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2018, 1540 (Debra McLaughlin, Radio Markham York Inc.); Corus, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound).

and subsidiary entities should be taken into account when determining the would-be beneficiary's total revenues or the extent of its operations to avoid that large enterprises take advantage of the exemption by operating multiple wireless transmission systems.

As for community stations and other non-profits, the Act already allows the Governor in Council to enact regulations in order to define "community systems," which, under its section 72(3) would retain the exemption for all their revenues, even above \$1.25 million. This distinction between profit and non-profit stations is also considered by the Board when setting radio royalties and reflects a distinction that appears throughout the Act between commercial and non-commercial purposes. The Committee endorses any approach that would remove this exemption for organizations that make a profit and do not, as community and campus radio stations do, primarily serve a non-commercial purpose. The Committee therefore recommends:

Recommendation 31

That the Government of Canada introduce legislation amending section 72(2) of the *Copyright Act* to ensure that the radio royalty exemption only applies to small, independent broadcasters.

That the Government of Canada make regulations to define "community systems" under section 72(6) of the *Copyright Act* in order to identify broadcasters to which section 72(3) of this Act applies.

MANDATORY TARIFFS

Witnesses raised the question of whether tariffs set by the Board should be mandatory to users. This question is especially contentious after several educational institutions decided not to renew their licensing relationship with Access Copyright. The ACP, the Writers' Union of Canada and the Canadian Copyright Institute asserted that users will not abide by the decisions of the Board unless its tariffs are mandatory to users. While they asserted that tariffs fixed by the Board are already mandatory to users under the Act, they proposed that Parliament enact legislation to clearly settle the matter.³⁵⁸ The Board itself invited the Committee to consider if Parliament should clarify the

358 INDU (2018), *Evidence*, 1630 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1650, 1705 (Degen, WUC); INDU (2018), *Evidence*, 1405, 1440 (Hebb & Harnum, CCI); WUC, *Brief Submitted to INDU*, 18 June 2018; ACP, *Brief Submitted to INDU*, 3 August 2018; CCI, *Brief Submitted to INDU*, 21 September 2018. See also IPA, *Brief Submitted to INDU*, 9 May 2018; House of Anansi Press/Groundwood Books [HAP], *Brief Submitted to INDU*, 25 April 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018. But see CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.



mandatory nature of tariffs fixed under section 71(2) of the Act—previously its section 70.2(2).³⁵⁹

Stakeholders from the educational sector vigorously opposed mandatory tariffs. They argued that educational institutions should be free to efficiently manage their resources at a time when traditional licensing models are rejected in favour of alternatives deemed to be more cost-effective. Mandatory tariffs would force these institutions to commit funds to—and sometimes pay twice for—licensing agreements and copyrighted content that fail to meet the needs of faculty, researchers and students.³⁶⁰ More generally, Mr. Knopf added that “Board tariffs are mandatory only for [collective societies] but optional for users, who remain free to choose how they can best legally clear their copyright needs.”³⁶¹

While they asserted that tariffs fixed by the Board are already mandatory to users under the Act, [some witnesses] proposed that Parliament enact legislation to clearly settle the matter.

Committee Observations

It seems evident that a tariff approved by the Board under section 70 of the Act should only be mandatory to the parties of a licensing agreement to which the tariff applies—no stakeholder argued otherwise. The Committee notes that Parliament has amended

359 INDU (2018), [Evidence](#), 1630 (McDougall, Th  berge & Audet, Copyright Board). See also INDU (2018), [Evidence](#), 1630 (Lauzon & Lavall  e, SODRAC).

360 See for example INDU (2018), [Evidence](#), 1620 (Davidson & Therrien, Universities Canada); INDU (2018), [Evidence](#), 1540 (Swartz & Haigh, CARL); INDU (2018), [Evidence](#), 1715 (McColgan & Owen, CFLA); INDU (2018), [Evidence](#), 1405, 1515 (Stewart & Bourne-Tyson, CAUL); INDU (2018), [Evidence](#), 1440 (Martin & Graham, University of Guelph); INDU (2018), [Evidence](#), 1500 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), [Evidence](#), 1905 (Elves); INDU (2018), [Evidence](#), 1540, 1545, 1610 (Noel & Churchill, CMEC); INDU (2018), [Evidence](#), 1540, 1555 (Marshall, University of Calgary); Robert Tiessen, [Brief Submitted to INDU](#), 22 June 2018; Universities Canada, [Brief Submitted to INDU](#), 4 July 2018; University of Guelph, [Brief Submitted to INDU](#), 4 July 2018; CAUT, [Brief Submitted to INDU](#), 3 August 2018; CIC, [Brief Submitted to INDU](#), 3 August 2018; CMEC, [Brief Submitted to INDU](#), 5 September 2018; University of Calgary, [Brief Submitted to INDU](#), 5 September 2018; University of Winnipeg, [Brief Submitted to INDU](#), 5 September 2018; MacEwan University, [Brief Submitted to INDU](#), 13 September 2018; SAIT, [Brief Submitted to INDU](#), 21 September 2018; UBC, [Brief Submitted to INDU](#), 21 September 2018; CARL, [Brief Submitted to INDU](#), 28 September 2018; CAUL, [Brief Submitted to INDU](#), 28 September 2018; University of Lethbridge, [Brief Submitted to INDU](#), 28 September 2018; SFU, [Brief Submitted to INDU](#), 15 October 2018; University of Alberta, [Brief Submitted to INDU](#), 20 November 2018; ACAD, [Brief Submitted to INDU](#), 14 December 2018; ECUAD, [Brief Submitted to INDU](#), 14 December 2018; NorQuest College, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1900 (Selman).

361 INDU (2018), [Evidence](#), 1620 (Knopf). See also Knopf, [Brief Submitted to INDU](#), 7 January 2019.

provisions governing the fixing of royalty rates in individual cases as part of the latest reform of the Board. Unlike the previous section 70.2(1) of the Act, its new section 71(1) refers not to a “person” but to a “user” defined under its new section 71(6). The Committee leaves to the Board and to the courts the task of determining whether these new provisions change the state of the law regarding the nature of royalties fixed in individual cases. The Committee will have the opportunity to re-examine this issue should the Government report on the implementation of the reform of the Board, as recommended above.

STATUTORY DAMAGES

Several witnesses suggested allowing any collective society referred to in section 70.1 of the Act to elect to recover statutory damages for infringement of their repertoire under its section 38.1(4), rather than only societies that managed rights referred to in section 38(4.1) of the Act. Proponents of extending statutory damages to all collective societies argued that there is no compelling reason why some remedies should be available to some collective societies, but not others when they all operate under tariffs set by the Board. Instead, all collective societies and their affiliates should benefit from the advantages statutory damages provide, namely encouraging licensing, deterring infringement, and improving the overall effectiveness of the collective rights management regime.³⁶²

Witnesses who opposed the proposal fear collective societies would use them to coerce lawful users into entering licensing agreements they would not otherwise enter.³⁶³ Mr. Hayes reported that the societies that currently can seek statutory damages under section 38.1(4) do engage in such practices.³⁶⁴ To prevent them from using statutory damages “as a threat to force users to accept questionable demands for royalties using aggressive and often questionable interpretations of the Act and relevant tariffs,” he proposed that a collective society should only be allowed to recover such damages when

362 INDU (2018), *Evidence*, 1705 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1605, 1720 (Swail, CPC); INDU (2018), *Evidence*, 1630, 1635 (Sookman); HAP, *Brief Submitted to INDU*, 25 April 2018; WUC, *Brief Submitted to INDU*, 18 June 2018; CPC, *Brief Submitted to INDU*, 4 July 2018; Access ACP, *Brief Submitted to INDU*, 3 August 2018; Copyright, *Brief Submitted to INDU*, 7 September 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; Access Copyright et al., *Brief Submitted to INDU*, 14 December 2018. See also CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

363 INDU (2018), *Evidence*, 1600 (de Beer); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1540, 1720 (Geist). See also University of Manitoba, *Brief Submitted to INDU*, 14 December 2018.

364 INDU (2018), *Evidence*, 1610 (Hayes).



the defendant “has not raised a legitimate dispute concerning the amount payable or the application of the tariff to the defendant.”³⁶⁵

Other witnesses argued that, because this section provides little discretion to courts to modulate statutory damages depending on the extent of the infringement, allowing any collective society to recover such damages would expose users to extensive liability risk and thus discourage them from relying on statutory exceptions:

We understand that in recent government consultations on reforming the Copyright Board of Canada, Access Copyright proposed statutory damages in the range of three to 10 times the royalty for even the smallest case of infringement, with no discretion for the courts to vary from this. We also understand that Access Copyright is currently pursuing royalties, at a rate of \$26 per FTE student for the university sector, through rate-setting proceedings at the Copyright Board of Canada. This rate has not yet been confirmed by the board, but if it were, this would mean statutory damages for a university, hypothetically, in the range of \$78 to \$260 per FTE student at the institution. That scenario would be difficult for any publicly funded institution.³⁶⁶

Mr. Knopf and Mr. Geist asserted that a collective society should only be allowed to recover statutory damages when it is subjected to a mandatory tariff-setting process,³⁶⁷ which, following the reform of the Board, would lead to repealing section 38.1(4) of the Act.

Committee Observations and Recommendation

Without contradicting the merits of the reform of the Board brought about by Bill C-86, the Committee acknowledges that it created a formal inequality within the Act. Indeed, while the vast majority of collective societies now operate under the same legal regime, only collective societies licensing acts referred to in section 38.1(4.1) of the Act may elect to recover an award of statutory damages under its section 38.1(4), whereas most collective societies can only recover royalties they would have been entitled to.

Unless the evidence shows that some collective societies should have more remedies than others, the Act should strive to treat like cases alike. In other words, either all collective societies should be able to recover an award of statutory damages or none of

365 Hayes, *Brief Submitted to INDU*, 20 November 2018.

366 INDU (2018), *Evidence*, 1540 (Marshall, University of Calgary). See also INDU (2018), *Evidence*, 1905 (Elves); SFU, *Brief Submitted to INDU*, 15 October 2018; University of Winnipeg, *Brief Submitted to INDU*, 5 September 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018.

367 INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1540, 1720 (Geist); Knopf, *Brief Submitted to INDU*, 7 January 2019.

them should. The Committee received no substantial evidence that remedies available to collective societies should differ from one sector of operation to another or on the basis of their licensing activities. Arguments for or against statutory damages must therefore be considered generally.

The Committee finds that collective societies would benefit from being able to seek statutory damages as much as any rights-holder. The Committee also finds that, in practice, section 38.1(4) of the Act led to unintended consequences that would threaten to spread throughout the copyright system if it were to apply to any collective society, namely the risk that a collective society use the threat of statutory damages to strong-arm users into entering disadvantageous licensing agreements. Extending section 38.1(4) of the Act to all collective societies would also require the Government to review the basis on which statutory damages are calculated. While that basis may be appropriate in relation to the acts referred to in section 38.1(4.1) of the Act, it may be inappropriate in relation to other tariffs.

For example, what would be an acceptable amount of statutory damages for the infringement of a single work included in the repertoire of a collective society occurring in a classroom of 50 full-time students, in a school of 5,000 full-time students, and when the relevant approved tariff amounts to \$5 per full-time student? Some stakeholders might find that the statutory damages should be directly proportionate to the infringement and amount to between \$750 and \$2,500. Other stakeholders would respond that, to effectively deter infringement, these damages should, at least, exceed \$25,000—the price of a blanket licence for that school. Others might argue that the appropriate award, in this case, lies between \$2,500 and \$25,000. In any case, the Committee finds it excessive that, for the infringement of a single work made for non-commercial purposes and implicating only 1% of the student body of a school acting in good faith, the Act would require a court to rule that this school pay no less than \$75,000 in damages to the collective society.

Moreover, given that statutory damages would only be awarded in relation to an approved tariff, allowing any collective society to recover such damages would likely encourage many if not most of these societies to launch proceedings before the Board instead of privately negotiating licensing agreements with users. Given that almost all witnesses—including collective societies—rightfully complained about lengthy tariff-setting proceedings throughout the review of the Act, the Government should be careful not to negate any gain recent amendments to the Act aim to achieve.

The Committee is thus inclined to allow any collective society to recover an award in statutory damages but finds the current section 38.1(4) of the Act to be inadequate to



implement such a policy. Should Parliament extend this remedy to all collective societies as well as the rights-holders who have authorized them to act on their behalf, it should do so with a more sophisticated regime that reflects, notably, the following policy objectives: encouraging fair licensing practices, deterring copyright infringement, enabling courts to award proportional statutory damages that account for different types of tariffs, and ensuring that proceedings before the Board proceed efficiently and in a timely manner. The Committee therefore recommends:

Recommendation 32

That the Government of Canada evaluate the forms of statutory damages available under the *Copyright Act* to a collective society or a rights-holder who has authorized a collective society to act on their behalf where applicable royalties are set by the Copyright Board of Canada and the defendant has not paid them.

PRIVATE COPYING REGIME

Several witnesses called for extending the private copying regime established under Part VIII of the Act to digital devices, including smart phones and tablets, to compensate rights-holders for copies made on such devices.³⁶⁸ The Canadian Private Copying Collective (CPCC) reported that revenues from copying levies decreased from \$38 million to \$3 million from 2004 to 2016 even though the number of music tracks Canadians copied doubled in the same period. The fact that consumers copy music onto devices such as smart phones rather than on the blank audio recording devices to which the

368 INDU (2018), [Evidence](#), 1500-1505 (Prieur, ANEL); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1655, 1715 (Annie Morin & Martin Lavallée, CCM); INDU (2018), [Evidence](#), 1700 (Curley, TSM); INDU, [Evidence](#), 1st Session, 42nd Parliament, 8 May 2018, 1905 (Julien Bidar, as an individual); INDU (2018), [Evidence](#), 1940 (Murphy); INDU (2018), [Evidence](#), 1535 (Willaert, CFM); INDU (2018), [Evidence](#), 1545, 1610 (Lefebvre, GMMQ); INDU (2018), [Evidence](#), 1550, 1630 (McGuffin, CMuPA); INDU (2018), [Evidence](#), 1540, 1635 (Morin & Prégent, Artisti); INDU (2018), [Evidence](#), 1550 (Henderson, Music Canada); INDU (2018), [Evidence](#), 1600 (Anderson & McAllister, ACTRA); INDU (2018), [Evidence](#), 1550 (MacKay, Re:Sound); INDU (2018), [Evidence](#), 1540, 1640 (Baptiste & Daigle, SOCAN); INDU (2018), [Evidence](#), 1600 (Drouin, ADISQ); INDU (2018), [Evidence](#), 1615 (Rioux, CMRRA); INDU (2018), [Evidence](#), 1630, 1745 (Lauzon & Lavallée, SODRAC); INDU (2018), [Evidence](#), 1530 (Payette, PMPA); INDU (2018), [Evidence](#), 1555 (Plante & Hénault, SARTEC); INDU (2018), [Evidence](#), 1550 (Dupré, SPACQ); INDU (2018), [Evidence](#), 1555 (Schlittler & Lowe, SACD); INDU (2018), [Evidence](#), 1650 (Boyer); CCM, [Brief Submitted to INDU](#), 7 May 2018; UNEQ, [Brief Submitted to INDU](#), 24 April 2018; ANEL, [Brief Submitted to INDU](#), 18 May 2018; CFM, [Brief Submitted to INDU](#), 31 May 2018; SOCAN, [Brief Submitted to INDU](#), 13 June 2018; RAAVQ, [Brief Submitted to INDU](#), 26 October 2018; Marcel Boyer, [Brief Submitted to INDU](#), 28 November 2018; ARRQ, [Brief Submitted to INDU](#), 14 December 2018; CIMA, [Brief Submitted to INDU](#), 14 December 2018; OMM, [Brief Submitted to INDU](#), 14 December 2018; SARTEC, [Brief Submitted to INDU](#), 14 December 2018. See also INDU (2018), [Evidence](#), 1630 (Lauzon & Lavallée, SODRAC); INDU (2018), [Evidence](#), 1645-1650 (Novotny & Posner, SCGC); INDU (2018), [Evidence](#), 1630, 1645 (Azzaria); SACD & SCAM, [Brief Submitted to INDU](#), 12 June 2018; ACTRA, [Brief Submitted to INDU](#), 14 December 2018; AQPM, [Brief Submitted to INDU](#), 14 December 2018.

regime currently applies, such as CD-R, explains the decrease in revenues. CPCC argued that the private copy regime should be made technology neutral, as in some European countries, and expected that the price of the levy would amount to an average of \$3 per digital device and would not affect their retail price.³⁶⁹

According to CPCC, the private copy levy is the most efficient way to implement the principle that rights-holders should be compensated for the use of their content, even though they may not have the means to control these reproductions. The amount of the levy may acknowledge the fact that not all users will use their device for that purpose. Moreover, manufacturers of smart phones such as Apple already pay a levy for Bluetooth, whether or not their consumers use this feature.³⁷⁰ Noting the mass use of copyrighted content, Ms. Gendreau added that refusing to modernize the private copy regime reflects a “misguided approach of individual enforcement of copyright on the Internet.”³⁷¹

[W]itnesses who proposed the creation of the \$40-million-a-year fund portrayed it as a short-term solution, [but] the Internet Association found it a more effective way to directly support artists ... than the private copying regime.

Opposing the proposal, OpenMedia argued that it “ignores the decrease in private music copying with the rise of subscription-based services, and the fact that people use smart phones for a wide variety of reasons far beyond music consumption—let alone illegal music consumption.”³⁷² PIAC also found the proposal unfair as it “makes the person who uses only licensed content pay twice: once for a licensed copy of the content, and again for others who are presumed to violate the Act.”³⁷³ The Internet Association warned that levies on digital devices could well exceed \$3, as it is the case in some European countries. Indeed, before digital devices were excluded from the regime, the Board had

369 INDU, *Evidence*, 1st Session, 42nd Parliament, 14 June 2018, 1540, 1605 (Lisa Freeman & Lyette Bouchard, Canadian Private Copying Collective [CPCC]); CPCC, *Brief Submitted to INDU*, 14 December 2018.

370 INDU (2018), *Evidence*, 1625, 1715 (Freeman & Bouchard, CPCC).

371 INDU (2018), *Evidence*, 1550 (Gendreau).

372 INDU (2018), *Evidence*, 1640 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1550 (Lawford, PIAC); INDU (2018), *Evidence*, 1650 (Knopf); Internet Association, *Brief Submitted to INDU*, 20 November 2018.

373 INDU (2018), *Evidence*, 1550 (Lawford, PIAC). See also PIAC, *Brief Submitted to INDU*, 13 June 2018.



approved a levy of \$75 for devices with a storage capacity of 30 or more gigabytes.³⁷⁴ CTA doubted that imposing a levy on digital devices would resolve tensions associated with the mass use of copyrighted content, as rights-holder continue to seek aggressive measures against the unauthorized use of content online even when levies apply to digital devices.³⁷⁵ Mr. Knopf asserted that Part VIII of the Act had long lost its *raison d'être* and should therefore be repealed.³⁷⁶

In the hope that Parliament amend the Act to extend the private copy regime to digital devices and to show “that the government is recognizing the importance of performers and others getting paid for this type of copying,”³⁷⁷ Music Canada and other witnesses proposed that the Government commit public funds over the next four years to provide rights-holders \$40 million per year—an amount estimated to reflect the loss of royalties from the private copy regime.³⁷⁸ Proponents of this fund based its amount on the estimated revenues a levy applicable to smart phones and tablets should generate annually.³⁷⁹ While most witnesses who proposed the creation of the \$40-million-a-year fund portrayed it as a short-term solution, the Internet Association found it a more effective way to directly support artists—as opposed to record labels—than the private copying regime.³⁸⁰

Committee Observations and Recommendation

Given the contradictory evidence the Committee received on the matter, the Government should extensively assess the opportunity to extend the private copying regime to digital devices. Relevant departments should look to other jurisdictions to determine, notably, how these regimes impact the retail prices of the digital devices on which they apply. The Committee therefore recommends:

374 Internet Association, *Brief Submitted to INDU*, 20 November 2018.

375 CTA, *Brief Submitted to INDU*, 11 September 2018.

376 INDU (2018), *Evidence*, 1625 (Knopf).

377 INDU (2018), *Evidence*, 1650 (Henderson, Music Canada).

378 INDU (2018), *Evidence*, 1550, 1640 (Henderson, Music Canada); INDU (2018), *Evidence*, 1640 (Anderson & McAllister, ACTRA); INDU (2018), *Evidence*, 1540, 1610 (Freeman & Bouchard, CPCC); INDU (2018), *Evidence*, 1650 (Baptiste & Daigle, SOCAN); Barker, *Brief Submitted to INDU*, 14 December 2018; CPCC, *Brief Submitted to INDU*, 14 December 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018.

379 INDU (2018), *Evidence*, 1620 (Freeman & Bouchard, CPCC).

380 Internet Association, *Brief Submitted to INDU*, 20 November 2018.

Recommendation 33

That the Government of Canada study the private copying regimes in place in other countries with a view to identifying the digital environment, the distribution of royalties flowing from the private copying levy, and the impact on consumers on which a private copying levy applies, including the impact of the private copying regime on the retail prices of the different types of digital device to which they apply.

TRANSPARENCY

A few witnesses called for increased regulatory oversight of collective societies, notably to increase transparency in the collective administration of rights.³⁸¹ For example, Michael McDonald, Executive Director of the Canadian Alliance of Student Associations (CASA), observed that licensing fees demanded by a collective society can vary dramatically from one period to another, with little to no explanation:

We're also extremely concerned that the fees proposed in other sectors by Access Copyright have so far been found to be much higher than deemed appropriate by the Copyright Board. This is deeply troubling, and we're calling on the committee to ensure that the Copyright Board provides clear, public rationale for why fees exist and to demand public accounting for those who wish to operate tariffs.³⁸²

Mr. Knopf agreed that the Board could emphasize disclosure, notably on “the average and median return to members of collectives on an annual basis.”³⁸³ As noted by Ms. Gendreau, other jurisdictions, including in Europe, regulate the internal management of collective societies: “I would think that such rules, even though they are probably perceived by collectives as annoying, should actually be embraced precisely because they would give greater legitimacy to their work.”³⁸⁴

Other witnesses raised the issue of representation in proceedings before the Board. They argued that parties affected by a tariff may lack the opportunity to appear before the Board and defend their interests, which in turn diminishes the openness and transparency of the collective rights management regime.³⁸⁵ CASA thus recommended that the tariff-setting process be amended to allow “public interest and non-commercial

381 INDU (2018), *Evidence*, 1515 (Stewart & Bourne-Tyson, CAUL).

382 INDU (2018), *Evidence*, 1535 (McDonald, CASA).

383 INDU (2018), *Evidence*, 1635 (Knopf).

384 INDU (2018), *Evidence*, 1625 (Gendreau).

385 INDU (2018), *Evidence*, 1535 (McDonald, CASA); INDU, *Evidence*, 1st Session, 42nd Parliament, 15 October 2018, 1535 (Kate Cornell, Canadian Dance Assembly).



stakeholders to intervene in hearings and contribute to legal arguments.”³⁸⁶ While it acknowledged that it might impact the speed and efficiency of proceedings before the Board, CIPPIC also proposed to allow interveners to participate to the tariff-setting process, as opposed to only in its appeal process.³⁸⁷

Committee Observations and Recommendations

While the tariff-setting process could benefit from allowing interveners to participate in proceedings before the Board, at this point the Committee is wary of recommending it. The reform of the Board having only recently began, bringing further substantial changes to the tariff-setting process would make it difficult for the Government to assess whether the reform succeeded at improving its speed and efficiency. Once they have improved, the Government will be able to determine whether these proceedings can accommodate interveners. In the meantime, users can continue to make representations to the Board, notably under section 68.3(1)(c) of the Act, while other stakeholders can intervene in the appeal process or advise users at any other time.

Fairness starts with transparency.

Copyright-dependent industries suffer from what Mr. Price referred to as a “black box” problem: creators create, users use, and somewhere in between, increasingly large sums of money are collected by a plethora of intermediaries, including producers, publishers, labels, distributors, OSPs, studios, and collective societies.³⁸⁸ While they provide essential services, when this Committee pressed intermediaries to explain the declining standards of living of Canadian creators, many claimed ignorance and blamed each other, or claimed to suffer as much as creators despite evidence to the contrary. Meanwhile, creators and users blame each other for what goes on in the black box, even though in practice neither of them has much to say over how much of the money users put through one side of the box will exit to creators from the other side.

Fairness starts with transparency. Every copyright transaction should allow its parties to clearly ascertain the scope of each transferred right, along with the corresponding remuneration—a measure “found to have the most significant positive effect on the

386 CASA, *Brief Submitted to INDU*, 4 July 2018.

387 INDU (2018), *Evidence*, 1615 (Fewer, CIPPIC).

388 INDU (2018), *Evidence*, 1710, 1725 (Price).

contractual position and the remuneration of authors.”³⁸⁹ Any person with an interest in a work or other subject-matter should be able to track all revenues made from it along its value chain to be able to determine how these revenues were shared and among whom—a principle reflected in article 19 of the new EU Directive.

Legislation could compel private agreements transferring a right provided under the Act to specify the scope of every transfer and its corresponding remuneration, but without prescribing the terms themselves. To further strengthen the bargaining position of creators, the transfer of future copyrighted content could also be prohibited. Doing so, however, would likely require enacting rules pertaining to contract law, which may belong within the legislative powers of provincial legislatures rather than those of Parliament under the *Constitution Act, 1867*. The Committee therefore recommends:

Recommendation 34

That the Government of Canada evaluate the constitutional feasibility of establishing minimal standards in private agreements relating to a transfer of a right provided by the *Copyright Act*.

Parliament would stand on stronger constitutional grounds if it were to demand more transparency from the collective rights management regime. In most creative industries, collective societies continue to play a critical role in reducing the transaction costs of licensing copyrighted content and protecting it from infringement. Collective societies thus serve an important market-structuring function, but in so doing are granted monopolistic or quasi-monopolistic powers. They should play a role in developing the kind of transparency that is crucial to a healthy cultural sector. Parliament will be much more inclined to increase the means of collective societies—including the remedies available to them—if the content of their repertoire, their licensing practices, and their distribution schemes are transparent to users, rights-holders, and policymakers alike.

The Committee insists that the Board consider whether it can require a degree of transparency in collective rights management, extending to both collective societies and their licensees. Section 67.2 of the Act already provides a basis to do so, as well as the Board’s power to set the terms and conditions of licences. The Act could also require collective societies to file licensing agreements with the Board outside of the tariff-setting process and allow the Board to consider the aggregate information as part of its decision process, but prohibit the Board from disclosing the content of any specific

389 Lucie Guibault, Olivia Salamaca & Europe Economics, *Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of their Works*, Brussels, European Commission, 2016, p. 237.



licensing agreement filed by a collective society, similar to rules governing the provision of information to the Patented Medicine Prices Review Board.³⁹⁰ Ultimately it would be to the benefit of creators and users, who would all get a clearer sense of the value that collective societies—and collective rights management as a whole—can and do provide. The Committee therefore recommends:

Recommendation 35

That the Copyright Board of Canada review whether provisions of the *Copyright Act* empower the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and report to the House of Commons Standing Committee on Industry, Science and Technology within two years.

Recommendation 36

Given the important role of collective societies in the copyright framework and in the collective administration of rights, that the Government of Canada consider the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations and the disclosure of their repertoire.

390 [*Patent Act*](#), R.S.C., 1985, c. P-4, s. 87-88.

CONCLUSION

A parliamentary report of this nature must find a compromise between different perspectives. Any stakeholder has a preferred course of action that will be appealing, when considered on its own. Finding the best course of action, however, becomes harder as soon as different viewpoints are taken into account. Things get more complicated, but in doing so they also come closer to reality. Reviewing the Act is not about deciding who is right between stakeholders, but about capturing as many perspectives as possible to ensure that, on the whole, the resulting recommendations reflect the reality of living together.

This report was informed by many different perspectives, which is why no single stakeholder may find it entirely satisfactory. The fact that this report will provoke disagreements among various stakeholders speaks of the depth of its substance and the quality of the process that led to it: copyright policy raises complex and multifaceted issues about which people reasonably disagree. This report's success lies in making stakeholders feel compelled to respond to it with passion, integrity, and rigour – whether or not they agree with its content. It is the review process as a whole, including how stakeholders respond to the report, that helps Government determine its next course of action.

The Committee does not contradict itself by underlining the value of the review process on the one hand, and by recommending that Parliament repeal the provision that initiated it on the other. There is no need to repeat why the Committee recommended dispensing with a particular way to review the Act. However, this recommendation also leaves room for a different perspective: there is no wrong time to discuss the Act. Nobody needs to wait five years before making a case for change. The conversation on copyright is ongoing and dynamic. Instead of ending this conversation, the report will serve as a platform from which it can move forward.

The Committee thanks all who took part in the review of the Act. Whether you did so as the representative of an organisation or as an individual, by providing oral or written testimony, by participating in the Committee's town halls, or by using another way to make your views known, the members of the Committee deeply appreciated your insight. It was a privilege to learn about your perspective. We look forward to doing it again.

APPENDIX A LIST OF WITNESSES

The following table lists the witnesses who appeared before the Committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the Committee’s [webpage for this study](#).

Organizations and Individuals	Date	Meeting
<p>Department of Canadian Heritage</p> <p>Ian Dahlman, Manager Creative Marketplace and Innovation</p> <p>Lara Taylor, Director Creative Marketplace and Innovation</p> <p>Nathalie Théberge, Director General Creative Marketplace and Innovation and Deputy Director of Investments</p>	2018/02/13	95
<p>Department of Industry</p> <p>Robert DuPelle, Senior Policy Advisor Copyright and Trademark Policy, Marketplace Framework Policy Branch</p> <p>Mark Schaan, Director General Marketplace Framework Policy Branch</p> <p>Martin Simard, Director Copyright and Trademark Policy Directorate</p>	2018/02/13	95
<p>Campus Stores Canada</p> <p>Shawn Gilbertson, Manager, Course Materials University of Waterloo</p>	2018/04/17	101
<p>Canadian Association of University Teachers</p> <p>Pamela Foster, Director, Research and Political Action</p> <p>Paul Jones, Education Officer</p>	2018/04/17	101
<p>Canadian Federation of Students</p> <p>Charlotte Kiddell, Deputy Chairperson</p>	2018/04/17	101

Organizations and Individuals	Date	Meeting
Universities Canada Paul Davidson, President Wendy Therrien, Director External Relations and Research	2018/04/17	101
Canadian Alliance of Student Associations Michael McDonald, Executive Director	2018/04/24	102
Canadian Association of Research Libraries Susan Haigh, Executive Director Mark Swartz, Program Officer	2018/04/24	102
Canadian Research Knowledge Network Carol Shepstone, Past Vice-Chair, Chief Librarian Ryerson University	2018/04/24	102
Union des écrivaines et des écrivains québécois Suzanne Aubry, President Laurent Dubois, General Manager	2018/04/24	102
Association of Canadian Publishers Kate Edwards, Executive Director Glenn Rollans, President	2018/04/26	103
Canadian Federation of Library Associations Katherine McColgan, Executive Director Victoria Owen, Chief Librarian University of Toronto Scarborough	2018/04/26	103
Colleges and Institutes Canada Denise Amyot, President and Chief Executive Officer Mark Hanna, Associate Dean The Business School, Humber Institute of Technology and Advanced Learning	2018/04/26	103
The Writers' Union of Canada John Degen, Executive Director	2018/04/26	103
As an individual Andrea Bear Nicholas, Professor Emeritus	2018/05/07	106
Association of Nova Scotia University Teachers Teresa Workman, Communications Manager	2018/05/07	106

Organizations and Individuals	Date	Meeting
Canadian Publishers Hosted Software Solutions James Lorimer, Treasurer	2018/05/07	106
Council of Atlantic University Libraries Donna Bourne-Tyson, Chair of the Board of Directors and University Librarian Dalhousie University Andrea Stewart, Board of Directors Liaison to the Copyright Committee and Director of Libraries and Educational Technology	2018/05/07	106
Dalhousie Faculty Association David Westwood, President	2018/05/07	106
Music Nova Scotia Scott Long, Executive Director	2018/05/07	106
Nimbus Publishing Terrilee Bulger, Co-owner	2018/05/07	106
University of New Brunswick Lesley Balcom, Dean Libraries H.E.A. (Eddy) Campbell, President and Vice-Chancellor	2018/05/07	106
As individuals Denis Amirault, Student and Musician Saint Mary's University Alison Balcom, Vice-President Internal University of New Brunswick Carol Bruneau, Author Joshua Dickison, Copyright Officer University of New Brunswick Libraries Jordan Ferguson, Student Acadia University Roger Gillis, Copyright Librarian Dalhousie University Jill MacLean, Writer Brett McLenithan, Broadview Press	2018/05/07	107

Organizations and Individuals	Date	Meeting
Ossama Nasrallah, President Saint Mary's University Students' Association Harry Thurston, Writer		
Association des distributeurs exclusifs de livres en langue française	2018/05/08	108
Benoit Prieur, Director General		
Association nationale des éditeurs de livres	2018/05/08	108
Richard Prieur, Executive Director		
Coalition for Culture and Media	2018/05/08	108
Martin Lavallée, Lawyer Annie Morin		
Concordia University	2018/05/08	108
Guylaine Beaudry, Vice-President of Digital Strategy and University Librarian Nicolas Sapp, Lawyer, Partner, ROBIC University Secretariat		
Fédération nationale des communications	2018/05/08	108
Pascale St-Onge, President Normand Tamaro, Lawyer		
Third Side Music Inc.	2018/05/08	108
Patrick Curley, President Business and Legal Affairs		
Union étudiante du Québec	2018/05/08	108
Guillaume Lecorps, President		
As individuals	2018/05/08	109
Melikah Abdelmoumen Matis Allali, General Secretary Fédération des associations étudiantes du campus de l'Université de Montréal Julie Barlow, Writer Tyrone Benskin Julien Bidar, President Éditions Outloud Alain Brunet, Journalist		

Organizations and Individuals	Date	Meeting
Emmanuelle Bruno		
David Bussi�eres, Singer-songwriter		
Luc Fortin, Musician		
Jean Lachapelle, Editor		
Adam Lackman		
Pierre Lapointe, Singer-songwriter		
Eli MacLaren, Assistant Professor Department of Literature, McGill University		
Nancy Marrelli		
David Murphy, Music Editor		
Pierre-Michel Tremblay, Writer		
Martin Valli�eres, Vice-President �ditions CEC		
Sylvie Van Brabant, Founding President Productions du Rapide-Blanc		
Artists and Lawyers for the Advancement of Creativity	2018/05/09	110
Marian Hebb, Member of the Board of Directors		
Ken Thompson, Chair		
Canadian Copyright Institute	2018/05/09	110
William Harnum, Chair		
Marian Hebb, Vice-Chair		
Canadian Society of Children's Authors, Illustrators and Performers	2018/05/09	110
Sylvia McNicoll, Author		
Colleges Ontario	2018/05/09	110
Joy Muller, Chair, Copyright Interest Group Heads of Libraries and Learning Resources		
International Publishers Association	2018/05/09	110
Hugo A. Setzer, Vice-President Publishing		
Ontario Book Publishers Organization	2018/05/09	110
David Caron, President		

Organizations and Individuals	Date	Meeting
Ryerson University Ann Ludbrook, Copyright and Scholarly Engagement Librarian	2018/05/09	110
Toronto Public Library Susan Caron, Director Collections and Membership Services	2018/05/09	110
University of Guelph Rebecca Graham, Chief Information Officer and Chief Librarian Chief Librarian's Office Heather Martin, Copyright Officer E-Learning and Reserve Services	2018/05/09	110
As individuals Ann Brocklehurst Leslie Dema, President Broadview Press Jean Dryden Sandy Greer Lisa Macklem Andrew Oates Barbara Spurrll Andy Turnbull Jessica Whyte, Digital Preservation Intake Coordinator University of Toronto	2018/05/09	111
As individuals Camille Callison, Indigenous Services Librarian PhD candidate, University of Manitoba Lynn Lavallée, Vice Provost Indigenous Engagement University of Manitoba Patricia Robertson, Author	2018/05/10	112
Association of Manitoba Book Publishers Annalee Greenberg, Editorial Director Portage and Main Press Michelle Peters, Executive Director	2018/05/10	112

Organizations and Individuals	Date	Meeting
Manitoba Metis Federation Georgina Liberty, President Sharon Parenteau, General Manager	2018/05/10	112
University of Manitoba Naomi Andrew, Director and General Counsel Office of Fair Practices and Legal Affairs Mary-Jo Romaniuk, University Librarian Althea Wheeler, Copyright Strategy Manager Office of Fair Practices and Legal Affairs	2018/05/10	112
Winnipeg Arts Council Alexis Kinloch, Public Art Project Manager Dominic Lloyd, Program and Arts Development Manager	2018/05/10	112
Winnipeg School Division Sherri Rollins, Chair of the Board of Trustees	2018/05/10	112
As individuals Todd Kevin Besant Daniel Elves Irene Gordon Michel G. Grandmaison Laurie Nealin Ryan Regier Brienne Selman Joan Thomas	2018/05/10	113
As individuals Carellin Brooks, Author, university and college instructor Maya Medeiros, Lawyer Norton Rose Fulbright Canada Jerry Thompson, Author and Journalist	2018/05/11	114
Association of Book Publishers of British Columbia Kevin Williams, Past President and Publisher Talonbooks	2018/05/11	114

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British Columbia Library Association Christine Middlemass, President Donald Taylor, Copyright Representative	2018/05/11	114
Canadian Association of Law Libraries Kim Nayyer, Co-Chair Copyright Committee	2018/05/11	114
Canadian Association of Learned Journals Rowland Lorimer, Treasurer	2018/05/11	114
University of British Columbia Allan Bell, Associate University Librarian Digital Programs and Services Susan Parker, University Librarian	2018/05/11	114
As individuals Noah Mackenzie Berson, Student Capilano University Devon Cooke, Documentary Film-maker Christina de Castell, Chief Librarian Vancouver Public Library Michal Jaworski, Lawyer Partner, Clark Wilson LLP Dusty Kelly Kim Nayyer George Opacic Susan Paterson Michael Serebriakov	2018/05/11	115
Access Copyright Roanie Levy, President and Chief Executive Officer	2018/05/22	116
Copibec Frédérique Couette, Executive Director	2018/05/22	116

Organizations and Individuals	Date	Meeting
Council of Ministers of Education, Canada Zach Churchill, Minister Nova Scotia Department of Education and Early Childhood Development Wanda Noel, External Legal Counsel Copyright Consortium	2018/05/22	116
Canadian School Boards Association Cynthia Andrew, Policy Analyst	2018/05/24	117
Canadian Teachers' Federation H. Mark Ramsankar, President	2018/05/24	117
University of Calgary Dru Marshall, Provost and Vice-President	2018/05/24	117
Canadian Publishers' Council David Swail, President	2018/05/29	118
News Media Canada John Hinds, President and Chief Executive Officer	2018/05/29	118
Wikimedia Canada Jean-Philippe Béland, Vice-President	2018/05/29	118
Canadian Council of Archives Nancy Marrelli, Special Advisor Copyright	2018/05/31	119
Professional Writers Association of Canada Christine Peets, President	2018/05/31	119
Canadian Federation of Musicians Alan Willaert, Vice-President from Canada (American Federation of Musicians)	2018/06/05	120
Canadian Music Publishers Association Margaret McGuffin, Executive Director	2018/06/05	120
Guilde des musiciens et musiciennes du Québec Éric Lefebvre, Secretary-Treasurer	2018/06/05	120
Artisti Annie Morin, General Manager Sophie Prigent, Vice-President	2018/06/07	121

Organizations and Individuals	Date	Meeting
<p>Directors Guild of Canada</p> <p>Dave Forget, Director of Policy National Office</p> <p>Tim Southam, President National Office</p>	2018/06/07	121
<p>International Alliance of Theatrical Stage Employees</p> <p>John Morgan Lewis, International Vice-President and Director of Canadian Affairs</p>	2018/06/07	121
<p>Alliance of Canadian Cinema, Television and Radio Artists</p> <p>Elliott Anderson, Director Public Policy and Communications, National</p> <p>Laurie McAllister, Director Performers' Rights Society and Recording Artists' Collecting Society</p>	2018/06/12	122
<p>Audio Cine Films Inc.</p> <p>Jean-François Cormier, President</p> <p>Hugo Desrosiers, Vice-President</p>	2018/06/12	122
<p>Border Broadcasters, Inc.</p> <p>Francis Schiller, First Director Public Interests Research and Communications Inc.</p>	2018/06/12	122
<p>Music Canada</p> <p>Graham Henderson, President and Chief Executive Officer</p>	2018/06/12	122
<p>Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)</p> <p>Solange Drouin, Vice-President Public Affairs</p>	2018/06/14	123
<p>Canadian Private Copying Collective</p> <p>Lurette Bouchard, Chair</p> <p>Lisa Freeman, Executive Director</p>	2018/06/14	123
<p>Re:Sound Music Licensing Company</p> <p>Ian MacKay, President</p>	2018/06/14	123

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Society of Composers, Authors and Music Publishers of Canada Eric Baptiste, Chief Executive Officer Gilles Daigle, General Counsel and Head of Legal Services	2018/06/14	123
Canadian Media Producers Association Erin Finlay, Chief Legal Officer Stephen Stohn, President SkyStone Media	2018/06/19	124
Canadian Musical Reproduction Rights Agency Ltd. Caroline Rioux, President	2018/06/19	124
Motion Picture Association-Canada Wendy Noss, President	2018/06/19	124
Society for Reproduction Rights of Authors, Composers and Publishers in Canada Alain Lauzon, General Manager Martin Lavallée, Director Licensing and Legal Affairs	2018/06/19	124
Writers Guild of Canada Neal McDougall, Director of Policy Maureen Parker, Executive Director	2018/06/19	124
Canadian Network Operators Consortium Inc. Christopher Copeland, Counsel Christian S. Tacit, Barrister and Solicitor, Counsel	2018/09/19	126
Movie Theatre Association of Canada Michael Paris, Director Legal and Chief Privacy Officer	2018/09/19	126
Professional Music Publishers' Association Jérôme Payette, Executive Director	2018/09/19	126
Société des auteurs de radio, télévision et cinéma Stéphanie Hénault, Executive Director Mathieu Plante, President	2018/09/19	126

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Canadian Association of Broadcasters Nathalie Dorval, Chair Board of Directors Susan Wheeler, Chair Copyright Committee	2018/09/24	127
National Campus and Community Radio Association Freya Zaltz, Regulatory Affairs Director	2018/09/24	127
Stingray Digital Group Inc. Annie Francoeur, Vice-President Legal and Business Affairs	2018/09/24	127
BCE Inc. Mark Graham, Senior Legal Counsel Robert Malcolmson, Senior Vice-President Regulatory Affairs	2018/09/26	128
Rogers Communications Inc. Kristina Milbourn, Director Copyright and Broadband, Legal and Regulatory Affairs David Watt, Senior Vice-President Regulatory	2018/09/26	128
Shaw Communications Inc. Jay Kerr-Wilson, Legal Counsel Fasken Martineau Cynthia A. Rathwell, Vice-President, Legislative and Policy Strategy	2018/09/26	128
TekSavvy Solutions Inc. Andy Kaplan-Myrth, Vice-President, Regulatory and Carrier Affairs	2018/09/26	128
Association des réalisateurs et réalisatrices du Québec Mylène Cyr, Executive Director Gabriel Pelletier, President	2018/10/01	129

Organizations and Individuals	Date	Meeting
Association québécoise de la production médiatique Marie-Christine Beaudry, Director, Legal and Business Affairs Zone 3 Hélène Messier, President and Chief Executive Officer	2018/10/01	129
Société professionnelle des auteurs et des compositeurs du Québec Marie-Josée Dupré, Executive Director	2018/10/01	129
TELUS Communications Inc. Ann Mainville-Neeson, Vice-President Broadcasting Policy and Regulatory Affairs Antoine Malek, Senior Regulatory Legal Counsel	2018/10/01	129
BSA The Software Alliance Christian Troncoso, Director Policy	2018/10/03	130
Element AI Paul Gagnon, Legal Advisor	2018/10/03	130
Entertainment Software Association of Canada Jayson Hilchie, President and Chief Executive Officer	2018/10/03	130
Information Technology Association of Canada Nevin French, Vice-President Policy	2018/10/03	130
Canadian Dance Assembly Kate Cornell, Executive Director	2018/10/15	131
Copyright Visual Arts David Yazbeck, Administrator	2018/10/15	131
Playwrights Guild of Canada Robin Sokoloski, Executive Director	2018/10/15	131
Société des auteurs et compositeurs dramatiques Patrick Lowe, Scriptwriter and member Authors' Committee Élisabeth Schlittler, General Delegate for Canada	2018/10/15	131

Organizations and Individuals	Date	Meeting
Art Dealers Association of Canada Mark London, Director	2018/10/17	132
Canadian Artists' Representation April Britski, Executive Director Joshua Vettivelu, Director	2018/10/17	132
Radio Markham York Inc. Debra McLaughlin, General Manager	2018/10/17	132
Regroupement des artistes en arts visuels du Québec Bernard Guérin, Executive Director Moridja Kitenge Banza, President	2018/10/17	132
Canadian National Institute for the Blind Lui Greco, National Manager Advocacy Thomas Simpson, Head Public Affairs	2018/10/22	133
Council of Canadians with Disabilities John Rae, Chair Social Policy Committee	2018/10/22	133
Screen Composers Guild of Canada Paul Novotny, Screen Composer Ari Posner, Screen Composer	2018/10/22	133
Canadian Anti-Counterfeiting Network Lorne M. Lipkus, Chair	2018/10/29	134
Consumer Technology Association Michael Petricone, Senior Vice-President Government Affairs	2018/10/29	134
Creative Commons Canada Kelsey Merkley, Representative	2018/10/29	134
OpenMedia Marie Aspiazu, Digital Rights Specialist Laura Tribe, Executive Director	2018/10/29	134

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As individuals Tony Belcourt, Arts and Cultural Knowledge Keeper Johnny Blackfield, Certified Blockchain Professional Lou-Ann Neel, Kwagiulth Artist	2018/10/31	135
Indigenous Culture and Media Innovations Monique Manatch, Executive Director	2018/10/31	135
Business Coalition for Balanced Copyright Gerald Kerr-Wilson, Partner Fasken Martineau DuMoulin LLP	2018/11/05	136
Canadian Chamber of Commerce Scott Smith, Senior Director Intellectual Property and Innovation Policy	2018/11/05	136
Canadian Internet Policy and Public Interest Clinic David Fewer, Director	2018/11/05	136
Public Interest Advocacy Centre John Lawford, Executive Director and General Counsel	2018/11/05	136
As an individual Jeff Price, Chief Executive Officer and Founder Audiam Inc.	2018/11/26	139
Facebook Inc. Kevin Chan, Head of Public Policy Probir Mehta, Head of Global Intellectual Property Policy	2018/11/26	139
Google Canada Jason J. Kee, Public Policy and Government Relations Counsel	2018/11/26	139
Spotify Darren Schmidt, Senior Counsel	2018/11/26	139
As individuals Marcel Boyer, Emeritus Professor of Economics Department of Economics, Université de Montréal Jeremy de Beer, Professor of Law Faculty of Law, University of Ottawa	2018/11/28	140

Organizations and Individuals	Date	Meeting
<p>Mark Hayes, Partner Hayes eLaw LLP</p> <p>Howard P. Knopf, Counsel Macera & Jarzyna, LLP</p> <p>As individuals</p> <p>Georges Azzaria, Director Art School, Université Laval</p> <p>Ariel Katz, Associate Professor and Innovation Chair Electronic Commerce, University of Toronto</p> <p>Barry Sookman, Partner with McCarthy Tétrault and Adjunct Professor Intellectual Property Law, Osgoode Hall Law School</p>	2018/12/03	141
<p>Canadian Bar Association</p> <p>Sarah MacKenzie, Lawyer Law Reform</p> <p>Steven Seiferling, Executive Officer Intellectual Property Law Section</p>	2018/12/03	141
<p>As individuals</p> <p>Pascale Chapdelaine, Associate Professor Faculty of Law, University of Windsor</p> <p>Warren Sheffer, Hebb & Sheffer</p> <p>Myra Tawfik, Professor Faculty of Law, University of Windsor</p>	2018/12/05	142
<p>Copyright Board</p> <p>Sylvain Audet, General Counsel</p> <p>Gilles McDougall, Secretary General</p> <p>Nathalie Thériège, Vice-Chair and Chief Executive Officer</p>	2018/12/05	142
<p>Department of Canadian Heritage</p> <p>Kahlil Cappuccino, Director Copyright Policy, Creative Marketplace and Innovation Branch</p> <p>Pierre-Marc Lauzon, Policy Analyst Copyright Policy, Creative Marketplace and Innovation Branch</p>	2018/12/05	142

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Department of Industry Mark Schaan, Director General Marketplace Framework Policy Branch Martin Simard, Director Copyright and Trademark Policy Directorate	2018/12/05	142
As individuals Casey Chisick, Partner Cassels Brock & Blackwell LLP Michael Geist, Canada Research Chair in Internet and E-Commerce Law Faculty of Law, University of Ottawa Ysolde Gendreau, Full Professor Faculty of Law, Université de Montréal	2018/12/10	143
Intellectual Property Institute of Canada Catherine Lovrics, Vice-Chair Copyright Policy Committee Bob Tarantino, Chair Copyright Policy Committee	2018/12/10	143
As individuals Carys Craig, Associate Professor of Law Osgoode Hall Law School, York University Meera Nair, Independent Scholar and Copyright Officer Northern Alberta Institute of Technology	2018/12/12	144
Ticketmaster Canada Patti-Anne Tarlton, Chief Operating Officer	2018/12/12	144

APPENDIX B LIST OF BRIEFS

The following is an alphabetical list of organizations and individuals who submitted briefs to the Committee related to this report. For more information, please consult the Committee's [webpage for this study](#).

Access Copyright (2)

Adams, Bryan

Adlington, Janice

Akrigg, Mark

Alberta College of Art and Design

Alberta Machine Intelligence Institute

Alliance des radios communautaires du Canada

Alliance of Canadian Cinema, Television and Radio Artists

American Registry for Internet Numbers

Angelstad, Carley

Art Dealers Association of Canada

Artists and Lawyers for the Advancement of Creativity

Association acadienne des artistes professionnel(le)s du Nouveau-Brunswick

Association des radiodiffuseurs communautaires du Québec

Association des réalisateurs et réalisatrices du Québec

Association nationale des éditeurs de livres (2)

Association of Book Publishers of British Columbia (2)

Association of Canadian Publishers (2)

Association of Manitoba Book Publishers (2)

Association québécoise de la production médiatique

Association québécoise pour l'éducation à domicile

Athabasca University

Atlantic Publishers Marketing Association (2)

Australian Copyright Council
Australian Publishers Association
Australian Society of Authors
Authors Alliance
Bannerman, Sara (3)
Barker, George
Barnard, Sara
BCE Inc.
Belcourt, Tony
Bibliothèque et Archives nationales du Québec
Blechinger, Joel
Book Publishers Association of Alberta
Bouchard, Mario
Boyer, Marcel
British Columbia Library Association
Broadview Press
Brush Education Inc.
BSA The Software Alliance
Business Coalition for Balanced Copyright
Campus Stores Canada
Canadian Alliance of Student Associations
Canadian Artists' Representation
Canadian Artists Representation Copyright Collective Inc.
Canadian Association of Broadcasters
Canadian Association of Law Libraries
Canadian Association of Learned Journals (2)
Canadian Association of Professional Image Creators (2)
Canadian Association of Research Libraries
Canadian Association of University Teachers (2)
Canadian Authors Association (2)

Canadian Bar Association
Canadian Communication Systems Alliance
Canadian Copyright Institute (2)
Canadian Council of Archives
Canadian Federation of Library Associations
Canadian Federation of Musicians
Canadian Federation of Students
Canadian Independent Music Association
Canadian Legal Information Institute
Canadian Media Producers Association
Canadian Museums Association
Canadian Music Publishers Association
Canadian Musical Reproduction Rights Agency Ltd.
Canadian National Institute for the Blind
Canadian Network Operators Consortium Inc.
Canadian Private Copying Collective
Canadian Publishers' Council (2)
Canadian Research Knowledge Network
Canadian Retransmission Collective
Canadian Teachers' Federation
Canadian Urban Libraries Council
Cato, Jacqueline
Chapdelaine, Pascale
Charbonneau, Olivier
Cho, Nami
Coalition for Culture and Media
Colleges and Institutes Canada
Concordia University
Consumer Technology Association
Copibec (2)

Copyright Agency
Copyright Licensing New Zealand
Copyright Visual Arts (2)
Corus Entertainment Inc.
Council of Atlantic University Libraries
Council of Ministers of Education, Canada
Council of Post Secondary Library Directors of British Columbia
Craig, Carys
Creative Commons
Cultural Capital Project
D'Agostino, Giuseppina
Dalhousie Faculty Association
Dermody, Kelly
Dessa
Directors Guild of Canada
Doctorow, Cory
Duimovich, George
Easton, Allison
Education International
Element AI
Emily Carr Institute of Art and Design
Engel, Sharon
Fazekas, Monica S.
Fédération des télévisions communautaires autonomes du Québec
Fédération nationale des communications
Federation of British Columbia Writers (2)
Federation of Canadian Municipalities
Fédération québécoise des professeures et professeurs d'université
Fernwood Publishing
Fesnak, Vera

Field, Kenneth
Friesen, Bernice
Gajdel, Djanka
Geist, Michael
Gibson, Ian
Google Canada
Gow, Athol
Graham, Derek
Graham, Monica
Greer, Sandy
Guibault, Lucie
Harvey, Matthew
Hayes, Mark
Henderson, Sakej
Hoar, Erin
Homanchuk, Alex
Hotel Association of Canada
House of Anansi Press / Greenwood Books
Hutchinson, Christine
Innerd, Charlotte
Intellectual Property Institute of Canada
International Alliance of Theatrical Stage Employees
International Authors Forum
International Confederation of Societies of Authors and Composers
International Federation of Library Associations and Institutions
International Federation of Reproduction Rights Organisations
International Publishers Association
Internet Archive
Internet Archive Canada
Internet Association

Isbister, Christian
Johnston, A. J. B.
Katz, Ariel
Kelln, Ryan
Knopf, Howard P.
Langara College
Lawrence, Jack
League of Canadian Poets (2)
Lee, James
LePan, Don
Library Association of Alberta
Literary Press Group of Canada (2)
MacEwan University
Macklem, Lisa
Maple Ridge Family History Group
Martin, Heather
Maynard, Luke
McCutcheon, Mark
McDevitt, Jennifer
McGill University
McLellan, Andrea
Microsoft Canada Inc.
Moisil, Ingrid
Montreal Institute for Learning Algorithms
Morris, Quaid
Morrison, Heather
Motion Picture Association-Canada
Mount Royal University
Mount, Nick
Movie Theatre Association of Canada

Music Canada
Nair, Meera (3)
National Campus and Community Radio Association
National Centre for Truth and Reconciliation
Neel, Lou-Ann
News Media Canada (2)
Newton Miller, Laura
Ng, Albert
NorQuest College
ole Media Management
Ontario Council of University Libraries' Digital Curation Community
OpenMedia
Organization for Transformative Works
Oud, Joanne
Outdoor Writers of Canada (2)
Ozgan, Deniz
Patriquin, Donald
Petrie, Cheryl
Pickering, Holly
Playwrights Guild of Canada (2)
Portage Network
Pottier, Anne
Professional Photographers of Canada
Professional Writers Association of Canada
Public Interest Advocacy Centre
Public Lending Right International
Quebec Library Association
Quebec Writers' Federation (2)
Racine, Pierre-Luc
Regroupement des artistes en arts visuels du Québec (2)

Restaurants Canada
Retail Council of Canada
Reynolds, Graham
Rogers Communications Inc.
Rub, Guy
Ryerson Students' Union
Ryerson University
Salmon, Helen
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
Saskatchewan Publishers Group (2)
Scassa, Teresa
Schoner-Saunders, Lisl
Screen Composers Guild of Canada
Shaw Communications Inc.
Shokar, Charnjot
Sigurdson, Victoria
Sime, John
Simon Fraser University
Société civile des auteurs multimédia
Société des auteurs de radio, télévision et cinéma
Société des auteurs et compositeurs dramatiques
Society for Reproduction Rights of Authors, Composers and Publishers in Canada
Society of Composers, Authors and Music Publishers of Canada
Sookman, Barry
Southern Alberta Institute of Technology
Stephens, Hugh
Syndicat national de l'édition
Tarantino, Bob
Tawfik, Myra
Tellis, Cecilia

TELUS Communications Inc.
Tencinger, Irene
The Writers' Union of Canada (2)
Thomas, Matt
Thomson, Ashley
Tiessen, Robert
Trosow, Samuel
Tufts, Emily
Undergraduates of Canadian Research-Intensive Universities
Union des écrivaines et des écrivains québécois (2)
Université de Montréal
Université de Sherbrooke
Université Laval
Universities Canada
University of Alberta
University of British Columbia
University of Calgary
University of Guelph
University of Lethbridge
University of Manitoba
University of New Brunswick
University of Victoria
University of Waterloo
University of Winnipeg
Vanderhaeghe, Guy
Vector Institute
Villanueva, Emily
Waite, Nancy
Wakaruk, Amanda
Weiler, Mark

Wells, Katherine

Western University

Whittle, Sharon

Willinsky, John

Writers' Guild of Alberta (2)

Writers Guild of Canada

Writers' Alliance of Newfoundland and Labrador (2)

Writers' Federation of New Brunswick (2)

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 95, 96, 101 to 103, 106 to 124, 126 to 136, 139 to 146 and 155 to 163](#)) is tabled.

Respectfully submitted,

Dan Ruimy
Chair

Dissenting Report from the Official Opposition Conservative Party of Canada on the Statutory Review of the *Copyright Act*

The Conservative Party of Canada members of the Standing Committee on Industry, Science and Technology would like to thank all the witness who appeared before the committee on this study, as well as all of those who submitted written briefs. Overall, we feel this final report includes many good recommendations that will improve Canada's copyright regime for users and rights holders alike. However, there were two specific items for which we could not support the recommendations in the report and in light of these concerns are presenting the following dissenting recommendations.

Artist Resale Right

We heard from several witnesses who requested Canada introduce an Artist's Resale Right (ARR) in Canada. This right exists in some other nations and provides for a payment to go to the original artist when a gallery or art dealer sells a piece to a customer. Specifically, the artist would receive a piece of every subsequent sale after making the original sale themselves. The suggested number we heard from testimony was 5% of the sale being returned to the original artist.

The Committee heard several objections to an ARR in Canada. The first is that the sale of a painting or sculpture is a sale of a tangible good, as such, it is not appropriate for this topic to fall under a copyright review. While a creator may maintain copyright on a work, such as a song and license that work, they maintain the original version. If an artist sells a painting, that painting is now owned by another and they possess ownership rights. It is our opinion that copyright law is not the proper avenue to address this request.

A second problem is that, as a tangible good, for the Federal Government to implement such a right could face constitutional challenges. Section 91(23) of the Constitution Act, 1867 provides Parliament with the power to legislate over copyright matters, but the ARR could fall under provincial legislative powers under its section 92(13). If a province wished to proceed with such a right that would be their prerogative to do so, but it is outside Federal jurisdiction.

There was also the challenge of not having enough time in the study to explore alternative recommendations to an ARR. There could be other policies the Federal government could enact that could achieve the goal of an ARR, namely to ensure artists are justly remunerated. This issue merits further study.

The Conservative members of the Committee do not think it is appropriate for the Federal Government to implement an ARR in Canada.

Recommendation 1

That the Government of Canada not follow recommendation 9 in the main report and do not seek to implement an Artist's Resale Right in Canada.

Crown Copyright

Other than the unanimous agreement from witnesses that the Copyright Board should be reformed, the only universal point of agreement among witnesses was that Government should not continue to enforce Crown copyright. There was disagreement over how specifically the Government would change the Crown copyright rules, but no witness supported maintaining the current regime. While we heard from witnesses that the Committee should hold off on changing Crown copyright until certain court cases are ruled on, we feel it is important enough a topic to make a recommendation at this time.

The concept of copyright is designed so that creators of works can be remunerated for those works in a free market. Without protections, those works could be stolen and used by others for their own profit. These protections do not need to exist when the creator is the Crown. Works created by the Crown are inherently funded by the public and created in their interests. As such, they must belong to the public, and be freely accessible at any time. All laws, documents, official orders and court decisions are the property of the public and must be available to them.

We do not feel that creating an open license for Government created works is sufficient. This will still express Government ownership of these works, when the owners are the public who paid for their creation. There are also already adequate protections to ensure that sensitive material, such as works created by the Ministries of Defence or Health, are withheld from public view. There do not need to be any copyright protections of those works. If the government determines they have lost classified material, they are not going to remedy that situation through copyright protections.

Works that are funded by Government, but that Government does not directly create, such as those created by Government funded research or grants, should also be publicly available. Works that are paid for by the public and produced for the public good belong to the public and should be freely accessible by them. We also believe, however, that in certain cases when producing a work has significant cost, Government may employ a cost recovery model for public access to that work.

Recommendation 2

That the Government of Canada introduce legislation amending the *Copyright Act* to completely abolish Crown copyright.

NDP SUPPLEMENTARY RECOMMENDATION: CROWN COPYRIGHT

Crown copyright was added to the Canadian Copyright Act of 1921, based on language in the 1911 UK Act. This provision (Section 12) provides the government with control over the use, re-use, and distribution of government works, despite the fact that necessary controls are now rendered via the Access to Information Act, enacted more than 30 years ago (in 1983), and the Treasury Board Secretariat Policy on Communications and Federal Identity.

Due to this Canadians must ask for permission to re-use and distribute government works or risk a claim of copyright infringement. Such requests are often delayed and sometimes denied. In contrast, the United States Congress mandated in 1895 that federal government works in that country were not subject to copyright protection. Thus, U.S. federal works are freely available for re-use without threat of copyright infringement. This feeds the democratic deficit in Canada and creates a policy misalignment with our largest trading partner that puts Canadian innovators at a disadvantage.

Section 12 creates unnecessary and undemocratic barriers to the access and re-use of government information. There is no justifiable rationale for the government to hold economic control over publications that were created to fulfill a government mandate.

Economic incentives related to copyright are meant to encourage the creation of new works, but the creation of government works is motivated by factors associated with good governance, not economic gain. Indeed, the government's own policies make it clear that economic exploitation of government works is best conducted by private industry.

For more than four decades, parliamentarians (e.g., 1985 House of Commons Committee, MPs in the House of Commons, 1981, 1993), government employees (e.g., 1981 study, 1984 white paper, 2002 report), and academics (e.g., Judge, Vaver, Dryden) have recommended that Crown copyright be reviewed or abolished.

During the previous review of the Copyright Act, the Government of Canada received more than 200 submissions calling for Crown copyright to be abolished. As part of the current (2018/19) review, a range of stakeholder organizations and individuals have asked parliament to review and/or abolish Crown copyright.

Restricting re-use of government works is antithetical to the aims of open government and liberal democracy. In addition, the permissions process incurs administrative costs for government departments, who have been fielding such requests since a centralized agency was removed in 2013. This decentralization (and the lack of training or education for federal employees) has resulted in inconsistent approaches between departments, creating complexities and denials for legitimate requests made by Canadians.

In 2017, Copyright Librarian Amanda Wakaruk petitioned Parliament to remove copyright protection from publicly available government works. The petition was signed by almost 1,500 Canadians. In his response, Minister Bains (ISED) noted that parliamentarians will have an opportunity to consider provisions related to Crown copyright during the Copyright Act review.

Committee Observations and Recommendations

- On page 45, the discussion of “two distinct functions” does not contribute meaningfully to the discussion of s.12. The “second function” of Crown copyright, also referred to on page 45, pertains to works covered under the Act as a whole (not Crown works covered under section 12). Therefore, relevant paragraphs can be deleted and related content should be removed from this section and addressed elsewhere in the report, perhaps as a section dedicated to statutory authority (not as part of the section on Crown copyright).

Recommendation 11:

This Recommendation should be reduced to one statement rather than two, as indicated below.

- Recommendation 11 should be revised to read: That the Government of Canada introduce legislation to amend the Copyright Act to provide that copyright is not available for:
 - (a) Statutes and regulations;
 - (b) Official orders and notices;
 - (c) Court and administrative tribunal decisions; and
 - (d) Any work prepared or published by or under the direction or control of the Government of Canada, unless there is an order of the Governor in Council that specifies otherwise in relation to a particular work.
- Exceptional materials for which Crown copyright protection might be preserved through an order of the Governor in Council should be clearly described, with some guidance around what might be a reasonable justification for such protection. Associated regulations could be developed in this regard.

The committee’s recommendations for Crown copyright are inadequate and do not fundamentally address the problems it has created. They can be best characterized as dismissive of witness testimony, indulging in phoney arguments, undercutting significant

economic concerns and further jeopardizing cultural preservation and academic research. Accordingly, they cannot be supported.

NDP Recommendation

Abolishing the current all rights reserved system of Crown copyright would support Open Government principles and related initiatives.

From the Private Members' Bill C-440 (Act to amend the Copyright Act (Crown copyright)) introduced in the 42nd parliament on April 9, 2019, the following clauses should be passed in legislation:

Section 12 of the Copyright Act is replaced by the following:

No copyright

- *“Without prejudice to any rights or privileges of the Crown, no copyright subsists in any work that is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department.”*

Copyright ceases to subsist

- *“Without prejudice to any rights or privileges of 10 the Crown, any copyright subsisting in a work referred to in section 12 of the Copyright Act, as it read immediately before the day on which this Act comes into force, ceases to subsist as of the day of that coming into force.”*

These changes would abolish crown copyright and reinforce Canada's commitment to Open Government by making government works available for re-use without payment or permission and removes barriers to important work related to stewardship, scholarship, and journalism.

Written briefs to committee requesting removal of Crown copyright

- Canadian Legal Information Institute
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10020436/br-external/CanadianLegalInformationInstitute-e.pdf>

- Council of Atlantic University Libraries
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10040854/br-external/CouncilOfAtlanticUniversityLibraries-e.pdf>
- Council of Post Secondary Library Directors BC
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10201979/br-external/CouncilOfPostSecondaryLibraryDirectorsOfBritishColumbia-e.pdf>
- Creative Commons
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9887146/br-external/CreativeCommons-e.pdf>
- Dalhousie Faculty Association
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9973654/br-external/DalhousieFacultyAssociation-e.pdf>
- Macewan University
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008893/br-external/MacEwanUniversity-e.pdf>
- Maple Ridge Family History Group
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10276811/br-external/MapleRidgeFamilyHistoryGroup-e.pdf>
- Meera Nair
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921772/br-external/NairMeera-e.pdf>
Note: Microsoft Canada brief includes government reports in its list of “raw materials” that should be available for re-use in AI innovations:
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008894/br-external/MicrosoftCanada-e.pdf>
- Microsoft Canada
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008894/br-external/MicrosoftCanada-e.pdf>
- Mount Royal University
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9990281/br-external/MountRoyalUniversity-e.pdf>

Written briefs requesting review / reform of Crown copyright

- Canadian Federation of Library Associations. (August 1, 2018) Position Statement: Modernizing Crown Copyright. http://cfla-fcab.ca/wp-content/uploads/2018/09/Doc12-CFLA-FCAB_statement_crown_copyright-Aug-1-2018-final.pdf

- Council of Atlantic University Libraries
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10040854/br-external/CouncilOfAtlanticUniversityLibraries-e.pdf>
- Canadian Council of Archives
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008890/br-external/CanadianCouncilOfArchives-e.pdf>

Oral testimony supporting review or abolishment of Crown copyright

- Canadian Association of University Teachers
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-101/evidence>
- Canadian Association of Research Libraries
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-102/evidence>
- Canadian Federation of Library Associations
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-103/evidence>
- Brianne Selman <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-113/evidence>
- Canadian Association of Law Libraries
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-114/evidence>
- Susan Paterson <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-115/evidence>
- Wikimedia Canada <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-118/evidence>
- Canadian Council of Archives <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-119/evidence>
- Creative Commons Canada and Open Media
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-134/evidence>
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-140/evidence>
- Michael Geist <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-143/evidence>

