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Sent by e-mail:

Standing Committee on Industry,
Science and Technology
Comité permanent de l'industrie,
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**Brief - Statutory Review of the *Copyright Act*
submitted by Canadian scholars in intellectual property law***

Dear Chair and Committee members,
Cher(e) Président(e) et membres du Comité,

We are Canadian scholars in intellectual property law. We are submitting this brief in the context of the statutory review of the *Copyright Act*, R.S.C., 1985, c. C-42. The brief provides specific recommendations for amendments to the *Act* and addresses general issues and principles that the Committee should consider as part of the statutory review. The recommendations reflect the opinion of the signatories to this brief and are informed by years of study and teaching of Canadian and international intellectual property law. Links to the bios of each signatory are attached to this brief, as well as a bibliography of selected works relevant to our recommendations.

The signatories would welcome the opportunity to appear separately before the Committee to explain and expand upon particular aspects of this brief and/or other copyright reform proposals not addressed herein.

1. Introduction: Guiding Principles

Canadian copyright law is the result of legislative and judicial deliberations that have provided a robust set of rules and principles that conform to Canada's international obligations while being specific to our context and place. We invite the Committee to adopt three guiding principles as it contemplates amendments to the *Act*.

Firstly, the current *Act* and the jurisprudence that informs it are reflective of a copyright system that seeks to balance the rights and interests of both copyright users and copyright owners. A copyright system that is too attentive to the exclusive rights of copyright owners without taking into account the impact of new technologies, the interests of users accessing these works, and the

* An abbreviated version of this brief was submitted to the Standing Committee on Industry, Science and Technology.

public interest (e.g., access to knowledge, education, creativity and innovation, personal property rights in the copy of a work, privacy interests, and respect for fundamental rights) lacks credibility and ultimately legitimacy. From its inception, one of copyright law's predominant concerns was to ensure the public's access to creative works. Its primary policy purpose has never been exclusively about rewarding creators for the act of creating or exclusively about providing industry with a return on its investment.

The Canadian copyright system is being noticed worldwide for its unique and creative approach to balancing competing interests. (e.g., introducing an exception to copyright infringement for non-commercial user-generated content), and policy-makers should be proud of this recognition. It is with this in mind that the Committee should build from the existing body of copyright law, and should view with extreme caution any external sources of pressure regarding issues relating to user rights such as fair dealing, or copyright term extension, or changes to our current "notice and notice" system for copyright infringement, among other aspects of our law that have been identified as 'problematic' in international trade negotiations.

It is understood that new obligations undertaken by Canada under the new USMCA may limit the range of policy options available to the Committee in certain respects such as, e.g., term extension. We urge the Committee to identify and make use of flexibilities built into Canada's international agreements to minimize the impact of such external pressures and to prioritize Canadian interests and domestic policy goals to the extent possible. Where concessions have been made, counter-balancing policy solutions should be considered. In particular, the extension of copyright's term to seventy years after the death of the author imposes significant costs on Canada by diminishing the public domain without conferring corresponding benefits. This should be resisted or the consequences minimized by any means available.

Secondly and as a corollary of the first guiding principle regarding a properly calibrated copyright system, copyright law needs to move away from a tendency of exceptionalism and be integrated as much as possible with underlying general bodies of Canadian private and public law. This may seem obvious, but recent developments, especially the introduction of anti-circumvention measures in Canadian copyright law, have obscured this important consideration. The legislative reform process ought to review and ensure copyright law's compliance and consistency with other bodies of Canadian law. First and foremost, the *Act* must comply with the *Canadian Charter of Rights and Freedoms*, and the restrictions it imposes on freedom of expression must therefore be demonstrably justifiable. Also, copyright law needs to be, as much as possible, consistent with the law of (personal) property, contracts, remedies, competition law, etc. For instance, the Committee should resist calls to import copyright reform proposals from other jurisdictions (such as the creation of additional rights for newspaper publishers being debated in the European Union), without careful consideration as to whether and the extent to which these proposals comply and are consistent with Canadian law, including Charter-protected rights to freedom of expression and of the press.

Thirdly, the Committee should bear in mind the principle of technological neutrality as affirmed by the Supreme Court of Canada such that any further modernization of the legislation operates independently of any specific technology or anticipated future technologies, and seeks to

maintain copyright's balance through guiding principles that operate consistently across technologies and over time.

In light of these guiding principles, we will address five critical areas of concern in the remainder of this brief, namely:

- Initiating a process of consultation with Indigenous peoples
- Exceptions to copyright infringement and user rights
- Open access for scientific publications
- Major disruptive technological advances
- Remedies for copyright owners and copyright users

2. Initiating a Process of Consultation with Indigenous Peoples

We salute the Committee's announcement that it will consult with Canada's Indigenous communities. This important step is overdue, and may lead to suitable recognition and protection of Indigenous traditional cultural expressions, particularly those that are not protected by the *Act*. We would urge the Committee to recognize Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*, specifically article 31 aimed at moving forward with concrete action and to engage in comprehensive consultations with Canada's Indigenous communities to ensure that the rights and interests of Indigenous peoples are fully and properly addressed at national and international levels.

3. Exceptions to Copyright Infringement – “Users’ Rights”

The jurisprudential developments of the Supreme Court of Canada in recent years (in particular, the recognition of exceptions to copyright infringement as users' rights), and the introduction of new exceptions to copyright infringement in 2012, have contributed to the development of a copyright regime that is attentive to the rights of users and the public domain, as well as to authors' and owners' rights.

There has been much discussion concerning the recent addition of the purpose of “education” within fair dealing and the effects thereof. Data provided by multiple post-secondary institutions during this review illustrate that expenditure of educational content is increasing, particularly with respect to licensed digital resources. Furthermore, the use of open educational resources is also increasing. At the same time, Canadian publishing continues to do well, despite challenges for the publishing sector world-wide.

Bringing “education” into the ambit of fair dealing simply acknowledged that that some unauthorized uses pertaining to teaching and learning are legitimate, and should not be subjected to licensing and payment, provided that they meet the requirements of fairness as set out by case law.

While progress has been made, much remains to be done. In our rapidly changing technological environment, the lines between authors and users are often indistinct; so-called users now interact with works in ways that are creative, transformative and productive. More generally,

users' interactions with copyright works contribute as much as authors' original creations do to the pursuit of copyright's purpose as interpreted by the Supreme Court, namely "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."¹ Copyright law must do more to ensure that creators' rights are not strengthened to such an extent that the social and economic benefits of these interactions are lost.

(i) Substitute Fair Dealing Provisions with Fair-use Style Provisions

Parliament should clarify that the principle of fair dealing, now codified in ss 29-29.2, remains a cornerstone of the *Act* by ensuring its flexibility and applicability to a wide range of purposes, subject to a criterion of fairness. This could be done by adding "such as" before the listed purposes to clarify that they are merely illustrative, while embedding a judicially developed flexible test, as set out in *CCH Canadian Ltd v Law Society of Upper Canada*,² that would continue to guide a contextual assessment of the fairness of an unauthorized use with a view to the rights and interests of users, copyright owners, and the public.

Broadening the applicability of fair dealing to potentially any purpose (subject to the test of fairness) would be consistent with a noticeable trend worldwide,³ and would not be as drastic a change as some might suggest. The Supreme Court requires a large and liberal interpretation of the stated purposes for which a user may be allowed to deal fairly with a work. At the same time, a fair use-style provision, while allowing the judiciary to take into account the purpose of the use, has the benefit of not being limited at the outset by a closed list of purposes stated in the statute. Maintaining a list of acceptable purposes is likely to require amendments in the future (as was done with the addition of the parody, satire and education purposes in the last major copyright reform in 2012), and may exclude certain unforeseen uses that are otherwise fair and consistent with copyright's purposes. A fair-use style provision would ensure greater flexibility as new technologies, methods of creation and dissemination of copyright works arise.

(ii) No Contracting out of User Rights

The *Act* should specifically state that copyright owners cannot "contract out" of exceptions to copyright infringement. That is, contract terms setting aside exceptions to copyright infringement would be non-enforceable. This would be the natural evolution toward solidifying user rights. Recently the UK has introduced provisions that specifically state that copyright owners cannot contract out of certain exceptions to copyright infringement. A similar provision should be introduced with respect to non-negotiated standard form agreements. For negotiated agreements, a rebuttable presumption should apply that contract clauses setting aside the application of exceptions to copyright infringement are not enforceable. This would leave room for exceptional

¹ See *Théberge v Galerie d'art du petit Champlain Inc.*, 2002 SCC 34 at para 30, such purpose being frequently repeated in subsequent judgments by the SCC.

² 2004 SCC 13.

³ See Peter K. Yu, "Customizing Fair Use Transplants" 7 *Laws* 2018 9, online: <http://www.mdpi.com/2075-471X/7/1/9>, detailing the several jurisdictions that have adopted a fair use regime and examining efforts to transplant fair-use style provisions into their copyright regime.

cases where contracting out of exceptions to copyright infringement may be required to fulfill other important goals of copyright law.

(iii) Technological Protection Measures (TPMs) not to Override User Rights

The *Act*'s TPM anti-circumvention measures deprive users of their rights by making it an infringement to circumvent access control TPMs even to perform legitimate acts. In other words, anti-circumvention measures apply regardless of copyright infringement. The Committee should make recommendations that invite Parliament to use all flexibilities, including the grandfathering effect of the USMCA,⁴ to ensure that TPM protections do not override the application of exceptions to copyright infringement. Circumvention for non-infringing purposes should be lawful.

“Code is law”⁵ and anti-circumvention measures are *de facto* stronger obstacles to the legitimate exercise of exceptions to copyright infringement than contract terms that override user rights. Allowing the use of TPMs to essentially eviscerate the application of exceptions to copyright infringement seriously undermines the concept of “user rights” as it has progressively evolved in Canada.

The *Act* should oblige copyright owners to facilitate the legitimate exercise of exceptions to copyright infringement in the architecture of their TPMs, failing which an administrative body could be given the power to intervene and provide access for lawful users. In addition, users would have remedies against copyright owners in breach of such obligation (see below “Remedies for copyright infringement and remedies for copyright users”).

(iv) Application of Exceptions to Copyright Infringement to Moral Rights

As recognized by the Supreme Court, “an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity.”⁶ The fair dealing provisions in the *Act* should be amended to clarify that fair dealing “does not infringe copyright or moral rights.” The non-commercial user-generated content exception in section 29.21 should similarly be amended to confirm its availability as a defence to both moral rights and copyright infringement. The same reasoning applies to other limits and exceptions in the *Act* that are designed to permit downstream creative uses without the chilling risk of liability for moral rights infringement, including, e.g., the exception for “incidental use” in section 30.7 and other permitted acts in section 32.2.

4. Open Access to Scientific Publications

In support of a national Open Access policy, the *Act* should include a provision according to which the author of a scientific publication that is the result of research activities partly financed

⁴ Footnote 64 provides that limitations, exceptions and regulations in respect of TPM protections that are in place prior to the coming into force of the USMCA can be maintained provided that protections meet the requirements of Art. 20.H.11.1.

⁵ Often attributed to Lawrence Lessig, *Code and other laws of cyberspace* (New York: Basic Books, 1999).

⁶ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para. 21.

by public funds, has the right to make that work available to the public after a reasonable period of time following its first publication, provided that the source of the first publication is clearly stated. A similar provision exists in several jurisdictions, including France, Germany, Italy and the Netherlands.

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

5. Major Disruptive Technological Advances

(i) Works Created by Artificial Intelligence

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

(ii) Text and Data Mining

Another major disruptive use of technology that has copyright implications relates to text and data mining. The UK has made provision for researchers to reproduce copyright material for text and data analysis as an exception to copyright infringement. While we are of the view that such activities would fall for the greater part under the purview of fair dealing (or a fair-use style provision as suggested above which could add text and data mining as one additional illustrative purpose), Canada should consider the best way to safeguard the practice of text and data mining. This could include enacting a specific exception to copyright infringement similar to the UK and that could extend beyond non-commercial uses. The lack of an explicit text and data mining exception could significantly undermine Canada's position as a leader in AI and other innovations by creating uncertainty around the legality, cost and repercussions of activities essential to such innovations. Text and data mining are non-expressive uses that permit vital research without producing copies that reach consumers or substitutes in the market for the original. Limiting TDM frustrates the immense potential of generation of knowledge, business opportunities, and citizen participation, and cannot be justified as a matter of copyright policy.

6. Remedies for Copyright Owners and for Copyright Users

(i) Remedies for Copyright Owners

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

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

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

(ii) Remedies for Copyright Users

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

The introduction of new administrative oversight could extend to copyright owners’ business practices and increasing use of algorithms and AI as copyright self-enforcement mechanisms.

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

To conclude, reforming the *Act* so as to provide greater protection to copyright owners at the expense of users and the public interest, for instance by limiting the scope of fair dealing or adding exceptional remedies over and above the panoply of existing remedies available to copyright owners, would be to resile from what has become a quintessentially Canadian approach to copyright, under which the rights and interests of both users and owners are carefully balanced with a view to the overall objectives of the copyright system.

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