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To: Members of the Legislative Committee on Bill C-32

From: Dr. Meera Nair

In September 2009 I contributed a submission to the public consultation on copyright; it can be found at: <http://www.ic.gc.ca/eic/site/008.nsf/eng/01739.html>

As my feelings concerning the specifics of the law have not changed, I wish to take this opportunity to address the toxic atmosphere that developed after the amendments were proposed and ask the Federal Government for help in relieving the hostilities. The misinformation surrounding Bill C-32 is detrimental to any hope for productive change.

Access Copyright and writers' associations in Canada were quick to denounce Bill C-32. They claimed that the inclusion of "education" as a permissible category within fair dealing would lead to wholesale expropriation of authors' works. This is false; Canada's best legal scholars have already spoken on this issue. But we need not rely solely on theory for comfort. If the announcement of Bill C-32 caused concern in June 2010, relief was there for the taking in July 2010.

On July 23, 2010, the Federal Court of Appeal (FCA) upheld a decision by the Copyright Board which assures Canadians that the majority of duplication conducted in educational settings remains subject to payment. The FCA affirmed that fair dealing requires a two-part test: the use must fall within the acceptable set of categories, and, the copying must be examined via a fairness test offered by the Supreme Court of Canada in 2004. Yet those in a position to allay the fears of writers chose not to publicize this decision and embarked upon a campaign of fear-mongering instead.

In November and December of 2010, a full page advertisement titled "Canada's Digital Economy at Risk" ran in both *The Globe and Mail* and *The Hill Times*. Supported by Canada's literary elite, and sponsored by a number of writers' associations, the advertisement tells readers that Bill C-32 threatens creators, and thereby threatens the wellbeing of the Canadian economy. The message presented is that Canadian legislators are embarking on a never-before-tried and highly-risky strategy. The truth is far more prosaic; the inclusion of education to fair dealing simply brings Canada closer to the United States' allowance of fair use. A measure Americans recognized legally in 1841, and formally adopted into their legal code in 1976. And despite efforts by some to undermine the usefulness of fair use, empirical evidence contradicts those assertions.¹

Canada is not alone in trying to find a better balance between facilitating access to works for some educational purposes and protect the rights of creators. I respectfully ask

¹ For instance, see Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions: 1978–2005." (2008) 156(3) U. Pa. L. Rev. 549. Professor Beebe's work is a landmark study; he ably refutes much of the misconception surrounding the handling of fair use by American courts. In terms of financial wellbeing, continued study of the subject by the firm of Thomas Rogers & Andrew Szamosszegi, indicates sizeable benefits are gained by fair use allowances. Their 2010 assessment is available at: ccianet.org

Committee Members to examine recent copyright events in Israel. Professor Ariel Katz of the University of Toronto drew attention to Israel some years ago, stating that:

Israel has emerged as a technological and creative powerhouse. Being the world's 100th smallest country, with less than 1/1000th of the world's population, Israel has the world's second highest per capita of new books; it produces more scientific papers per capita than any other nation by a large margin – 109 per 10,000 people. In proportion to its population, Israel has the largest number of startup companies in the world. In absolute terms, Israel has the largest number of startup companies than any other country in the world, except the U.S.²

When Israel updated their copyright law in 2007, their former exception of fair dealing was replaced with fair use. For a country so dependent on its creative talent; it stands to reason that the Israeli government would not jeopardize the wellbeing of its creative community.

The challenge associated to fair dealing, or fair use, is to broaden the understanding of the exception. Educational institutions can be allies in this undertaking, if such a partnership is sought. Notably, Israeli universities have devised and are adopting a best practices code of conduct, precisely to ensure that copyrighted material is used appropriately in educational settings.³ Here, the deepening of suspicion between the educational institutions and creative communities only weakens Canada's creative prospects.

Finally, I ask the Committee to bear in mind that excessive intellectual property rights impede creativity. Literature in particular shows the necessity for cultural borrowing. Judge Richard Posner, a respected figure within the American justice system, turns to one of our own native sons on this matter:

The pervasiveness of borrowing in literature is captured in Northrop Frye's dictum that "poetry can only be made out of other poems; novels out of other novels." Frye had some tart words about copyright. He notes the challenge to the assumptions underlying the copyright law posed by "a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others, Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible."⁴

Thank you for this opportunity to share my thoughts.

Regards,
Dr. Meera Nair

² Ariel Katz, 8 December 2007, *What Can Canada Learn from Israel about Copyright Reform*, http://utorontolaw.typepad.com/faculty_blog/2007/12/what-can-canada.html

³ Amira Dotan et al, "Fair Use Best Practices for Higher Education Institutions," *Journal of the Copyright Society of the U.S.A.* (2010).

⁴ Northrop Frye, *Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957) at 95-104, quoted in William M. Landes and Richard A. Posner, in *The Economic Structure of Intellectual Property Law* (Cambridge: Belknap Press, 2003) at 59-60.