

September 4, 2009

Honourable James Moore
Minister of Canadian Heritage and Official Languages
House of Commons
Ottawa, Ontario
K1A 0A6

Honourable Tony Clement
Minister of Industry
House of Commons
Ottawa, Ontario
K1A 0A6

Re: Submission for Copyright Consultation

Dear Ministers Clement and Moore,

Thank you for the opportunity to convey input to the copyright consultation process. As evidenced by the volume of submissions, Canadians are eager to engage with the task of designing a copyright law that mediates between the challenges and opportunities of digital technology coupled with world-wide networks of circulation. However, given the polarity of opinion on this subject, responding to Canadian input will not be easy. One way forward is to consider, not only the content of opinion, but the line of thought that underwrites each remark or submission. The unspoken debate addresses the construction of copyright itself.

Many Canadians have unconsciously voiced a salient element of our current law, that copyright is a limited right. This needs to be consciously voiced now. Copyright is not, and has never been, a grant of absolute control. However, technology combined with licensing offers the possibility of such control. To succumb to that temptation means changing a structure of cultural policy that has been in place since its inception in 1710. Is Canada prepared for the consequences of such a change? Do we even know what the consequences could be?

To say the least, caution is advisable. I hope you will both be guided by a view often expressed through the roundtable discussions, the townhall meetings, and the submissions, namely, the importance of fair dealing. Fair dealing upholds the limitation upon a copyright holder's reach. It is designed to enhance individual creativity through learning, teaching, and research – the ingredients necessary for innovation to thrive in Canada.

The challenge, and benefit, of fair dealing is that its legitimacy is not granted by the copyright holder, but is achieved through the actions of those wishing to use the

copyrighted material. This places added responsibility upon individuals, which could be fostered through our educational and library institutions. Doing so would place Canadian creators on strong footing; it is in the space outside of copyright's control that critical thought can flourish and enable new developments in both technological form and creative content. Something Canada cannot afford to ignore in the much-touted knowledge economy of the day.

Please find below my submission towards amending the Copyright Act. For your convenience, I have also attached this document as a pdf file.

These remarks are my own, and not the opinion of any institution I work with. I write this based on my experiences as a student, small business owner, researcher, educator, and parent.

Regards,

Dr. Meera Nair
Burnaby, British Columbia

cc: Member of Parliament Bill Siksay, Representative for Burnaby-Douglas

Submission to the Federal Government of Canada – September 4, 2009
Dr. Meera Nair, Burnaby, BC

There are a number of areas within the Copyright Act that I would like to address, and one proposal that I wish to comment upon. I have endeavored to be brief. My concerns lie with: (1) crown copyright; (2) term extension; (3) moral rights; (4) parody; and (5) fair dealing. It is in the context of fair dealing that I have concerns about the proposal of the Association of Universities and Colleges of Canada – their request for a special exception for the use of publicly available Internet materials in educational institutions.

In various places I make reference to *CCH Canadian* (2004). The complete citation is: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

I. Areas of Concern

- 1) Abolish Crown Copyright. Section 12 of the Copyright Act stipulates:
“Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.”

This is a remnant of a sixteenth century practice which vested control in the Crown of the printing of an indeterminate body of materials. In a modern democracy, such control is distinctly undemocratic. While there is a patchwork of federal and provincial allowances to reproduce laws and judicial activity, all materials prepared by any branch of government should be available for scrutiny by Canadians.

Journalist Stanley Tromp has written of the misuse of crown copyright; see “Stonewalling Freedom,” April 4, 2008, *Vancouver Sun*. Responses to his requests for material through the British Columbia Freedom of Information Act, came with the edict that the information could not be reproduced without permission. Such control, proclaimed in the name of crown copyright, denies citizens the opportunity to be better informed of activity within their own governments.

Mr. Tromp has recourse to publish his findings through the right of fair dealing (see item 5 below) but if a professional journalist felt intimidated, individual citizens are even more likely to take such an edict as the rule of law. Copyright is too easily wielded as an instrument of complete control, even though the law does not support such control. It is in the interests of all Canadians, and Canadian democracy itself, that crown copyright be abolished.

- 2) Maintain Copyright Term. Section 6 of the Copyright Act stipulates the duration of copyright:

“The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.”

Copyright is alternately described as an inducement to creativity, or means of upholding respect for creative individuals. In either case, lengthening the duration of copyright serves no purpose. For dead authors, no amount of added time can induce them to produce more works. With respect to living authors, an economic analysis written by seventeen economists (including five Nobel laureates) indicated that increased duration did nothing to enhance creativity. While this assessment was carried out for the American court proceeding, *Eldred v. Ashcroft* (2002), the analysis transcends jurisdictions.

Extending the duration of copyright beyond our current term of life plus fifty (which remains the standard for the majority of the world’s nations) is to the detriment of the goal of creativity; new creators would be delayed from accessing or building upon past material. In terms of ensuring respect for creative people, that could be better handled by changing the implementation of moral rights (see item 3 below.)

- 3) Revise Moral Rights. Section 14.1 of the Copyright Act stipulates:

“The author of a work has, subject to section 28.2, the right to the integrity of the work and, ... the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”

Section 28.2 of the Copyright Act stipulates:

“1) The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
(a) distorted, mutilated or otherwise modified; or
(b) used in association with a product, service, cause or institution...”

Mira Sundara Rajan, a leading authority on the subject of moral rights and author of *Copyright and Creative Freedom* (2006), explains that this implementation of the protection of moral rights is too narrow. Authors etc. can only seek recourse after their reputation has suffered. This is not an easy case to illustrate even for established creators, and almost impossible for a fledgling creator.

Instead of leaving the burden of proof upon the creator, an alternate implementation would be to lay the responsibility upon the individual wishing to use the creation, much like the situation with fair dealing (item 5 below). But care must be taken to ensure that in the name of moral rights, legitimate transformative work cannot be inhibited. For instance, French law, considered the epitome of creators’ rights

regimes, contains broader measures of moral rights with a stipulated allowance for parody.

4) Allow Parody and Satire

The omission of an allowance for parody or satire leaves Canadians at risk when pursuing an artform that has played an important role in Canadian culture. While fair dealing (item 5 below) allows for the possibility of unauthorized reproduction of copyrighted material for criticism and review, to-date parody has not successfully defended itself via fair dealing. In 1996, a parody of the Michelin Man, utilized during labour negotiations, was defeated. More recently, a parodic version of the Vancouver Sun was also deemed to be copyright infringement. Extending fair dealing to clearly include parody and satire as permissible uses will further Canadian creativity.

In a report prepared for the Ministry of Canadian Heritage, *Fair Dealing After CCH* (2007), Giuseppina D'Agostino reminds us that the inclusion of parody in the American provision of fair use does not mean reproduction is automatically granted; each use is still subject to consideration. Including this allowance in Canadian fair dealing would necessarily imply the same careful analysis which our Supreme Court advocated in *CCH Canadian* (2004). As is the case for any of the existing measures of fair dealing, an allowance for parody and satire would not signal an invitation to copy without restriction (see item 5 below).

5) Uphold Fair Dealing. Sections 29, 29.1, and 29.2 of the Copyright Act stipulates "Fair dealing for the purpose of research or private study does not infringe copyright. Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and (b) if given in the source, the name of the author, in the case of a work, performer, in the case of a performer's performance, maker, in the case of a sound recording, or broadcaster, in the case of a communication signal.

Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and (b) if given in the source, the name of the author, in the case of a work, performer, in the case of a performer's performance, maker, in the case of a sound recording, or broadcaster, in the case of a communication signal."

Fair dealing is a modest measure, but is critically important to maintaining the structure of copyright as a set of limited rights. Fair dealing permits some unauthorized good-faith productive uses of copyrighted material. There is an abundance of literature illustrating that creative development flourishes under systems of less control, and are stifled now with excess control. For instance, in *Digital Copyright* (2001) Jessica Litman explains that each and every new media technology of the 20th century developed outside of the reach of copyright holders,

and in *Gridlock Economy* (2008) Michael Heller describes how fruitful creative effort is currently thwarted by the expansion of intellectual property rights.

If copyright is to be anything other than a state-granted monopoly, the right of fair dealing must be upheld. Under the terms of the law, every published work is eligible as a site of fair dealing. Its applicability should not be reduced through technological protection measures, nor should it be placed as secondary to systems of licensing.

Bill C-61 carried an unfortunate clause, via Section 29.21, which stipulated:
(2) If the individual has downloaded the work or other subject-matter from the Internet and is bound by a contract that governs the extent to which the individual may reproduce the work or other subject-matter, the contract prevails over subsection (1) to the extent of any inconsistency between them.

[Subclause (1) listed terms of acceptable copying on behalf of individuals, terms that were narrower than current fair dealing.] The crux of my concern with Section 29.21 is it permitted contractual agreement to override fair dealing. This must be avoided. The threat to creativity in Canada is not merely the added cost of replacing fair dealing by licensing, but by the control that is weighted disproportionately in the hands of copyright holders. Critical work, work that disputes or challenges prevailing art, technologies, and social discourse, will be stunted.

Canada is a small nation, which makes knowledge production doubly important, and doubly difficult if we introduce unnecessary intellectual property restraints into law. Instead, Canada would be better positioned by bringing flexibility into fair dealing. As many contributors have already suggested, inserting the words “for purposes such as” before the current list of fair dealing activities will permit currently unforeseen uses of copyrighted material adequate latitude, if used in good-faith productive ways consistent with the *CCH Canadian* (2004) framework.

II. Comments upon the Proposal by the Association of Universities and Colleges of Canada (AUCC)

The request by AUCC for an exception for educational use of publicly available Internet materials is a regressive response to the challenges of using copyrighted material responsibly. Any blanket exception will perpetuate the confusion currently surrounding fair dealing in Canadian educational communities. Simply put, the activities of teaching and learning are implicitly supported under the names of private study, research, criticism, and review. But, this is not permission to copy at will, nor to violate existing commercial markets. Our educational institutions have an obligation to educate students as to the appropriate use of fair dealing, and not leave them in a state of ignorance upon graduation. This is best accomplished by developing a set of responsible practices on the part of students, staff and faculty, consistent with the fair dealing framework proposed in

CCH Canadian (2004). Something the Canadian Association of University Teachers have advocated in their *Intellectual Property Advisory* (Nov. 2008).

The risks of the AUCC request are twofold. First, implementing the exception concedes infringement where none has occurred. Therefore, while educational staff and students become sheltered by the exception, individuals outside such institutions, accessing that same publicly available material, become at risk for a charge of infringement.

Second, such an exception could place a significant and unnecessary financial burden upon Canadian education. If Bill C-61 had become law, a teacher accessing a publicly available website must ensure that the work does not contain a notice denying use of that material for educational purposes. This implies that if such a notice existed, the institution must either pay for the use of the work (presumably according to some fee schedule) or refrain from using the work.

In this scenario, Canadian students are either denied access to materials that other nations' students enjoy, OR, the cost of education rises. By virtue of national treatment, Canada would be obligated to render fees to foreign copyright holders, if their work was accessed. Which raises the question of what would happen if the world realizes that there is money to be made from Canadian taxpayers, simply by labeling work "do not use in a Canadian institution"? It should not surprise the government when content creators, from across the globe, come calling with upturned palms.

As no other nation has such a program in place, Canada will not see a reciprocal flow of fees. Even if such programs were in place, given the modest presence of Canadian creation on the Internet, Canadian teachers and students will most likely access non-Canadian work. This will result in another deficit in cultural trade.

An advocate of the AUCC proposal was concerned that material posted to the Internet may not have been intended for multiple uses by teachers and students for specific classroom need. The Internet is an environment composed with its own cultural practices, both commercial and noncommercial. As convention exists today, it is expected that if a work is publicly available (i.e. not locked behind a payment mechanism or a technological protection measure), then it is going to be viewed and read by multiple parties, irrespective of whether they share a common goal or not. The AUCC proposal seeks to remake the culture of the Internet itself, by offering a commercial market to those who have decided for themselves to leave the work available without payment. Whether it is altruism or advertising, copyright holders can choose to sell or offer their work – AUCC need not do it for them.

It was also suggested that while publicly available work is eligible for fair dealing, perhaps teaching is not an application of fair dealing? In answer; first, all published work, whether commercial or noncommercial, is eligible as a site of fair dealing. It is inconsistent within our law to affirm copyright in a work, and deny the possibility of fair dealing in that same work. Second, teaching routinely involves review and criticism of other works – to explain or challenge the world around us. As I stated earlier, fair

dealing is not an invitation to copy without restriction. If better educated about fair dealing, teachers would better understand their rights of fair dealing, and their obligation to use it responsibly.

And the last issued raised with me was that without the option to abstain from classroom use, educational publishers would choose to withhold material from the Internet. To which I must reply: that is their prerogative. The response from the Canadian government should not be to reserve a distinct market for those publishers, but to encourage teachers to seek out other material. This is a task that the Internet facilitates, if teachers have the freedom to do so.