

December 14, 2018

Re: Remuneration models for artists and creative industries

Dear Committee Members:

I commend this department's interest in supporting Canadian artists across the spectrum of creative endeavor. However, I ask that you expand your scope of inquiry to include not only the artists we have today, but those to come tomorrow. Given the tenor of dialogue so far, students are particularly vulnerable to assume costs that are irrelevant to their studies, and irreconcilable to their means. Moreover, our youth are not being afforded the fullest opportunity to further their creative instincts through measures already available under the law. Copyright chill and abuse are real.

I also ask that this Committee consider a different perspective to the challenges faced by Indigenous communities with respect to their intellectual property. As is acknowledged, the system of copyright is structurally antagonistic to the norms of Indigenous creative effort, where ownership is set by communities and dates back to time immemorial. Our *Copyright Act* assumes that creativity is an individual affair, and curtails protection to a set duration. In addition, an unfortunate choice of vocabulary lifted from ownership of landed property heightens the misconception that intellectual property is subject to a concomitant framework of rigid boundaries.

Ironically, the universal act of creation, as well as characteristics of all intellectual property, align well with Indigenous paradigms where creativity is community based, and, property is not an article of ownership but a source of belonging.¹ If Canadians could recognize these commonalities, that all intellectual property is cultural property,² it might become that much easier to find responses and solutions to Indigenous challenges.

To that end, I request that the Department of Canadian Heritage support the following statement:

*Recognizing the Indigenous traditions, which all Canadians implicitly follow when pursuing creative endeavor, supports the objectives of the Truth and Reconciliation Commission, particularly the recurring call for better integration of Indigenous law into Canadian life.*³

With respect to the current discussion, there appears emphatic belief that further support for artists can be achieved via the *Copyright Act*. That may be possible. However, as a body of law, copyright is over three hundred years old and its scope was continually expanded in both depth and breadth, all in the name of the starving author, artist or musician. Yet creative individuals are

¹ Brian Noble, "Owning as Belonging/Owning as Property ..." in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law* (Vancouver: UBC Press, 2008) 465. See also, Meera Nair, "Indigenous paradigms," *Fair Duty*, 25 June 2018, <https://fairduty.wordpress.com/2018/06/25/indigenous-paradigms/>.

² This research was first presented at *Copyright User Rights and Access to Justice Symposium*, Faculty of Law—University of Windsor, May 2017.

³ *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), <www.trc.ca>.

still disadvantaged. New rights might only become more articles signed over to publishers and distributors.

In Canada, the disadvantage has been even greater, given that our system was expressly designed to benefit Britain and the United States.⁴ Over the past 150 years, the majority of copyright revenues raised from Canadians has lined the pockets of copyright-owners outside the country. Any hope for increasing copyright revenue must be tempered by the realities of the copyright trade imbalance.

It would be preferable to use all Canadian dollars to Canadian benefit.

To the extent that we have successful authors, artists, musicians and publishers, those gains came despite our system of copyright, not because of it. I encourage this Committee to pay close attention to the work of Nick Mount, a respected authority in Canada. In his most recent work *Arrival—The Story of CanLit* (2017) Mount makes plain that successes enjoyed today, came via government stimulus during the post WWII years. (The word *copyright* is conspicuous by its sparse appearance in the book.) Through direct funding, the foundations necessary for the infrastructure of professional creative endeavor were laid.⁵

Mount is optimistic regarding the future of Canadian letters; he writes:

“Canadian literature is more alive and more exciting than ever. ... The country is producing many more writers and many more books than ever before, books by and about many more different kinds of Canadians than ever before. It also has more readers—they’re just spread out now, among so many more books and so many more ways to read, that it’s hard to see them all. And last but not least, the average quality of the literature published in Canada is higher today ... Quite simply there has never been a better time to be a Canadian reader.”⁶

It is worth emphasizing that out of readers, come writers.⁷ Canada’s literary future is bright.

Yet a very different narrative has emerged concerning the prospects of Canadian writing. Essentially, the blame for current distress among Canadian writers is laid at the feet of the amendments of 2012; it is argued that because of the inclusion of “education” as a permissible

⁴ As a nation, Canada was born caught between British Imperialism and American capitalism; in copyright, we received the worst of both worlds. Canadian publishers were effectively barred from serving the Canadian market. Successive Canadian governments endeavored to appeal to Britain, to no avail. Given the awkward nature of the truth—that Canada was indeed being sacrificed to serve not only London publishers but American publishers as well—British voices amplified the rhetoric of “British authors are starving.” They insisted that following British edicts would eventually be useful to future Canadian writers, conveniently glossing over the fact that Canada already had writers. See Meera Nair, “The Copyright Act of 1889—A Declaration of Independence,” *Canadian Historical Review*, Vol. 90, Issue 1, March 2009, 1-28.

⁵ Nick Mount, *Arrival: The Story of CanLit*, (Toronto: House of Anansi Press, 2017) 24-31.

⁶ *Ibid.*, 293.

⁷ Early American intellectual property policies actively sought to encourage reading by the general population resulted in a healthy, competitive, body of American literature. See forthcoming, Meera Nair, “The Geopolitics of Nineteenth-Century Canadian Copyright, as seen by some British Authors,” *The Papers of the Bibliographical Society of Canada—Commemorative Canada 150 Issue*. Pre-print version available by request.

category within the exception of fair dealing, educational institutes declined to maintain collective licensing agreements with Access Copyright. This is incorrect.

The catalyst for the exodus from collective licensing occurred two years prior. In 2010, Access Copyright sought a 1300% fee increase.⁸ Granted, the earlier fee was out of date; an increase commensurate with inflation would not have attracted much attention. But given the extent of the increase, coupled with not only heightened requirements of reporting (which raised concerns of privacy) but also an effort to redefine the very nature of copyright (something only Parliament may do), many institutions began to give serious consideration to the viability of managing their operations internally.

In the wake of Access Copyright's proposal, I was asked by the British Columbia Library Association to address these issues. From my opening remarks:

Collective licensing is as deserving of a place in modern markets as any other business model, but our current situation is troubling.

Access Copyright describes its purpose as “to protect the value of intellectual property” owned by authors and publishers “by ensuring fair compensation when their works are copied.” Value is an interesting concept – value can increase by market demand. Value can also be artificially elevated by restricting supply. What concerns me is that Access Copyright is able to control both axes.⁹

I based my remarks on material gleaned from academic journals as well as Access Copyright's own documentation. To its credit, Access Copyright had undertaken an internal review in 2007, which brought to light the challenges the organization had encountered early in its operation.¹⁰ Chief among them was the difficulty of serving two masters, publishers and authors. As I said then: “At the outset [Access Copyright] had proposed a split of royalties 50/50 between writers and educational publishers... The publishers threatened to walk away, if they were not permitted to set their own distribution arrangements.”¹¹

In an effort to support writers, Access Copyright bolstered payments, regardless of whether works were used in educational institutions. Unfortunately, that set the stage for an unsustainable operation. Despite some evolution, it continues today. The payments provided by Access Copyright to its creator affiliates through its Payback system, rely on creation of work, rather than the use thereof.¹² As Access Copyright's creator affiliates grow in number, one should expect that fees will escalate just to keep pace with distribution payments.

⁸ Access Copyright. *Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, 12 June 2010, <https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/reprographic-reprographie-e.html>.

⁹ My complete remarks are available at: <https://fairduty.files.wordpress.com/2011/11/brief-history-of-ac1.pdf>.

¹⁰ Access Copyright's internal review was conducted a member of its board, Martin Friedland. The conclusions became known as the Friedland Report and was made publicly available. The link of the time is now inoperable.

¹¹ Note 9 above.

¹² Access Copyright, *Payback—Frequently Asked Questions*, https://www.accesscopyright.ca/media/1316/2018_payback_faqs.pdf.

Throughout the review of the *Copyright Act*, many parties have called for compulsory collective licensing of educational copying. This is particularly disturbing given the volume of evidence that detail the rise in direct licensing between educational institutions and third-party publishers, licenses that include both journals and books, and allow for both access and reproduction.¹³ Furthermore, Canadian institutions are increasing their selection of open educational resources as primary textbooks.¹⁴ Taken together, we see not only the present, but a future where Access Copyright's services are relied on less and less, but would cost more and more.

Who will pay for this?

It has been suggested that dialogue with students would ensure Canadian writers have sufficient funding.¹⁵ The implication: that students are responsible for the challenges endured by some Canadian writers. Nothing could be further from the truth. When students independently engage in unauthorized copying towards completion of their homework, projects, presentations, *etc.*—that is, when they incorporate bits and pieces of text, imagery, multi-media—such copying falls within fair dealing (the principal exception within the Copyright Act, which supports learning). When guided by their teachers, content circulated likely either falls within fair dealing, or, has been paid for through an institutional license.¹⁶

Moreover, a blanket fee, charged to all students, ignores the reality that many disciplines do not engage with Canadian literature, or literature of any kind. To levy such a fee on all students is, at best, inappropriate. At worst, it is unconscionable.

We are leaving our next generations with some intractable problems including climate change, ballooning healthcare costs, the need to develop new industries, and the desperate need to diversify our markets. Fortunately, there are many bright, hardworking, dedicated students, overcoming their ever present hardships, rising to meet these challenges. But even so, **the political solution to a shortfall in income among writers cannot be a transfer of funds from the group that is even more impoverished.**

¹³ Numerous briefs from Canadian universities have been submitted on this topic to the Standing Committee on Industry, Science and Technology. For an illustrative summary of the data, please see Michael Geist, *Misleading on Fair Dealing, Part 5: The Multi-Million Dollar Educational Investment in EBook Licensing*, *MichaelGeist.ca*, 23 November 2018, <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-5-the-multi-million-dollar-educational-investment-in-e-book-licensing/>.

¹⁴ The province of British Columbia alone has documented savings of \$10 million for its students; <https://open.bccampus.ca/open-textbook-stats/>. Notably, in a report prepared by PriceWaterhouseCoopers (commissioned by Access Copyright), open educational resources are described as a threat to the proprietary textbook industry. Yet research indicates better outcomes for students through the use of open materials; see Rajiv Jhangiani, *Open Education Practices in Service of Sustainable Development*; <http://thatpsychprof.com/open-educational-practices-in-service-of-the-sustainable-development-goals/>. That it also saves money—a benefit to Canadian students, their families, and Canadian taxpayers in general—should be celebrated; Meera Nair, “With due respect to PricewaterhouseCoopers,” *Fair Duty*, 3 August 2015, <https://fairduty.wordpress.com/2015/08/03/>.

¹⁵For instance, see the remarks of Member of Parliament Randy Boissonnault on 22 November 2018, beginning at the 11:49 mark of, <http://www.ourcommons.ca/Committees/en/CHPC/StudyActivity?studyActivityId=10045359>. See also Meera Nair, “an open letter to MP Randy Boissonnault,” *Fair Duty*, 27 November 2018, <https://fairduty.wordpress.com/2018/11/27/>.

¹⁶ See note 13 above.

At a recent meeting of the Standing Committee for Industry, Science and Technology,¹⁷ I endeavored to emphasize the importance of maximizing our creative potential and the role of the system of copyright towards that goal. Canada should direct its gaze forward and provide fulsome support to youth, students, and, amateur writers, artists, musicians *etc.*:

We need our next generations to be at their best. ... Drawing from the combined wisdom of Julie Cohen and the late Oliver Sachs, it is important for individuals to play with whatever content they are interested in, to cultivate a capacity to see something that others cannot, to build the curiosity and determination that we hope will carry them into ground-breaking intellectual effort across all disciplines.¹⁸

The *Copyright Act* as it exists today provides some shelter to our next generations for their intellectual development. It protects individual study and research as it unfolds during schooling through to post-secondary studies and continuing research, and, allows for the necessary imitation and invocation that is the praecursor to original creation. Despite this, our next generations are not well supported in terms of maximizing their own potential.

A few of the problems that have been brought to my attention:

1. A parent informed me that her twelve-year-old had come home “scared to death,” all because of a strident lecture at school. A teacher had forbidden the students from engaging with content found via the Internet, a prohibition expounded in the name of copyright. As explained above, fair dealing would amply protect students’ efforts. Moreover, the *Copyright Act* includes a specific exception for use of Internet materials towards meeting educational tasks.¹⁹
2. A parent informed me that her daughter’s creative efforts, posted to YouTube, had resulted in a takedown. This budding filmmaker said to her mother: “I didn’t know it was wrong.” **To be clear, she did nothing wrong.** YouTube’s overzealous content-identification system had resulted in the takedown of her creation, which included approximately 17 seconds of audible music from a popular song. It is questionable as to whether 17 seconds would even breach the threshold of substantiality necessary to a claim of copyright, but if it did, exceptions beckon.²⁰
3. A group of worried students showed me a notice from a copyright-owner, threatening them with serious consequences if they had the temerity to quote from his father’s work,

¹⁷ Notice of Meeting, 12 December 2018, <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-144/notice>.

¹⁸ “Both copyright law and policy have shown little interest in understanding the processes by which these roles are performed, nor in inquiring what users need to perform their roles in a way that optimizes the performance of the copyright system as a whole (348).” See Julie Cohen, “The Place of the User in Copyright Law,” *Fordham Law Review*, Vol. 74, (347-374) 348, 2005. “Imitation and mastery of form or skills must come before major creativity.” See Oliver Sacks, “The Creative Self” in *The River of Consciousness* (2017) 137.

¹⁹ Canada. “Section 30.04, Work available from the Internet,” *Copyright Act* (R.S.C., 1985 c., C-42). While the measure was designed to support teachers’ use of Internet materials, it stands to reason that a student completing an assignment as directed by a teacher, may avail themselves of the same exception.

²⁰ I described this particular event in a five part series on my blog; see “Fair Use Denied,” *Fair Duty*, <https://fairduty.wordpress.com/2016/02/22/>.

without first seeking his permission and making payment.²¹ The right of quotation was enshrined in the *Berne Convention*, a convention hailed as the first international treaty of authors' rights.

4. A parent sent me a *Use of Technology* agreement required at the local high-school. Parents were asked to give consent such that the school may search a student's smartphone if the school "feels" that a rule has been broken. Among the rules listed: "honour copyright." This may be due to the misplaced fear that schools could be liable for the activity of students; it speaks to the reality that administrations prefer to play it safe and discourage young people from lawful uses of copyright-protected materials.²²

Attitudes like these will not place Canada in a position of strength in a world governed by knowledge economies. If we train generations of Canadians into believing that creative effort, scientific inquiry, technology advancement, or a free press, are all predicated on a system of permission-then-payment, Canada's creative future looks bleak.

This will be all the more painful when we consider that current technology and current modes of engagement offer promise to young creators today. They now enjoy what eluded Canadian creators in the nineteenth century: the capacity to promote themselves at minimal cost. Upcoming creators have the opportunity to find their own audience;²³ a lack of publisher no longer limits awareness of Canadian talent.

Prime Minister Justin Trudeau has made *youth* a central part of his agenda. This is admirable and necessary. With difficult years ahead for Canada, supporting our next generation is in the best interests of all Canadians. Earlier this week, the Prime Minister issued this communiqué: "As Minister of Youth, it's my job to make sure young people's voices are counted when we make plans that shape this country's future."²⁴

Revision of the *Copyright Act* and revision of cultural policies are due for pride of place in such plans. I offer the following:

²¹ Meera Nair, "As you wish Mr. Zukofksy," *Fair Duty*, 24 October 2009, <https://fairduty.wordpress.com/2009/10/24/>.

²² Some years ago, I sought to provide better information for Canadian teachers and administrators, hoping to bolster their confidence to the extent that overt policing of students would cease. Regrettably, this initiative has not had much effect. See Meera Nair, "Fair dealing and students," *Fair Duty*, last updated October 2017, <https://fairduty.wordpress.com/resources/fair-dealing-for-students/>.

²³ Canada's Instagram poet Rupi Kaur comes to mind; her own self-promotion led to a publisher and then 77 weeks on the *New York Times*' best-seller list; Tariro Mzezewa, *New York Times*, <<https://www.nytimes.com/2017/10/05/fashion/rupi-kaur-poetry-the-sun-and-her-flowers.html>>. Similarly, 2011 Canada Reads' winner Terry Fallis began his successful journey via his own podcasts; Shannon Rupp, *The Tye*, <https://thetyee.ca/Books/2010/10/20/TerryFallisSatirist/>. Martin Kerr is a much-loved singer/songwriter/musician based in Edmonton; through his own talent and hard work, he has been independently producing music for ten years. Kerr began by singing in markets and festivals; today he sells out the Winspear Centre. One generation earlier that would have been an impossibility. With dreams of making it big, too many musicians were conscripted by record companies and emerged with only debt to show for it.

²⁴ Justin Trudeau, "As Minister of Youth, it's my job to make sure young people's voices are counted when we make plan that shape this country's future." <https://twitter.com/JustinTrudeau/status/1072478934443413505>.

Recommendation 1: Refrain from returning to the regime of collective licensing with respect to educational materials. Instead, encourage Access Copyright to participate in transactional licensing. Inexperienced creators who do not have a publisher to assist them, could benefit from Access Copyright's services.

Recommendation 2: Expand the Public Lending Right to include books purchased for K-12 libraries and class-sets. This will enable Canadian support to be directed exclusively to Canadian writers.

Recommendation 3: Amend the *Copyright Act* to include explicit language that willful misuse of the Act by copyright owners seeking to assert more control than that provided by the Act, is an offense, with damages to be awarded.

Recommendation 4: Ensure that all exceptions present in the *Copyright Act* remain, and/or, the Act be revised to include a more flexibly worded exception similar to that of American Fair Use. However, to the degree that fair use may be codified in Canadian law, it should include the guidance developed by the Supreme Court concerning the use of exceptions. In particular, our Supreme Court's explicit instructions that the presence of a license is not relevant to a decision of fairness, ensures that Canada can avoid the challenges experienced by the United States in the later twentieth century.²⁵

Recommendation 5: Amend the *Copyright Act* to allow the use, manufacture or importation of devices capable of overcoming a TPM, if the intended use of the underlying content is lawful.

Recommendation 6: The Federal Government ought to emulate previous measures that successfully kept Canadian dollars in Canada, to the benefit of artists, authors, musicians, *etc.* For instance, dedicating funds to municipal grants to enable communities to target support to their local, nascent creators.

Sincerely,

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²⁵ In one of the meetings conducted by the Standing Committee on Industry, Science and Technology, a speaker quoted Lawrence Lessig as saying "Fair use was simply the right to hire a lawyer." A little context may dispel any concerns over Canada bringing in Fair Use. Lessig wrote those words after losing a pivotal Supreme Court case in the United States. He had led a constitutional challenge, arguing that Congress had overstepped its bounds by lengthening copyright term. The loss was difficult to accept; while fair use is meaningful, it is no substitute for shorter copyright terms. Adding to Lessig's distress was likely the reality that the United States had made a bit of mess of fair use in later 20th century. They are correcting that misstep; but at the time, their courts began treating fair use as simply a response to market failure. Fortunately, the Canadian judiciary has already ensured that Canada can avoid such a self-defeating step.