Osgoode Hall Review of Law and Policy

Volume 2
Number 2 *Volume 2, Number 2 (November 2009)*

Article 5

2009

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Samuel E. Trosow

Citation Information

Trosow, Samuel E.. "Copyright Consultations Submission." *Osgoode Hall Review of Law and Policy* 2.2 (2014): 169-183.
http://digitalcommons.osgoode.yorku.ca/ohrlp/vol2/iss2/5

COPYRIGHT CONSULTATIONS SUBMISSION[*]

Samuel E. Trosow[*]

In this submission, the author revisits and expands on various points highlighted during a roundtable session in Toronto relating to copyright reform. In doing so, he raises and responds to several fundamental questions affecting copyright law, including those relating to the modernization of existing copyright law, technological neutrality, changes that can foster innovation, creativity, competition and investment in Canada and consequently position Canada as a technological leader. The author then moves on to consider the notion of fair dealing, focusing specifically on the need to make current categories under the fair dealing provisions illustrative rather than exhaustive. Moreover, he argues for the need to include the list of factors endorsed by the Supreme Court of Canada in Canada's fair dealing provisions. Lastly, the author touches on a variety of issues that he argues are necessary to address in order to ensure that fair dealing rights in Canada are not undermined.

In this submission, I will expand on the points I raised at the Round-Table session in Toronto on August 27th.[1] In the first part, I will briefly address the five questions around which this consultation is organized. The second section will focus on fair-dealing, specifically the need to make the current categories illustrative instead of exhaustive and to include the list of factors endorsed by the Supreme

[*] Samuel Trosow is an Associate Professor at the University of Western Ontario with a joint appointment in the Faculty of Law and the Faculty of Information and Media Studies. (FIMS). He is also the author (with Laura Murray) of *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007). Before coming to Western in 2001, he was a librarian at the Boalt Hall Law School at the University of California, Berkeley. Professor Trosow primarily teaches courses at the law school in the area of Intellectual Property, and in FIMS in Library & Information Science. His research primarily focuses on different aspects of copyright law and policy in the digital environment.

[1] Toronto– Round Table and Public Hearings on Copyright (27 August, 2009) <http://www.ic.gc.ca/eic/site/008.nsf/eng/00893.html

Court of Canada in the text of the *Copyright Act*[2]. Finally, I will touch on some other issues that need to be addressed in order to ensure that fair dealing rights are not undermined.

I. ADDRESSING THE FIVE QUESTIONS

My responses to the third, fourth and fifth questions have been combined since there is much overlap. There are some recurring themes that come up in response to all of them; that is, the need for technological neutrality, the need to keep the laws simple and easy to understand, and, perhaps above all, the principle of "do no harm."

1. HOW DO CANADA'S COPYRIGHT LAWS AFFECT YOU? HOW SHOULD EXISTING LAWS BE MODERNIZED?

As a teacher, researcher and avid reader, my work consists in large part in creating and using copyrighted materials, very often in an iterative and transformative manner. As the fields of law and librarianship are both situated in information-intensive environments, the rules governing the creation, transfer, use, storage and re-use of information resources has a profound effect in both of the disciplines in which I teach and conduct research.

Personally, in the course of preparing for my teaching, as well as in the course of conducting my research, I am constantly engaging with existing works in which copyright subsists (or once subsisted) and I am constantly creating new ones. The result is the delivery of instruction to students who are going through similar processes as well as the creation of new works in which copyright will temporarily subsist. It is becoming increasingly difficult to segment those aspects of my work where I am a "user" of copyrighted works from those situations where I am a "creator" of new works, be they articles, books, or instructional materials. While the speed in which one is constantly going back and forth between these previously more separate roles is being increased by new technology, the need for "balanced" copyright laws becomes more evident. The term "balanced" may seem to be getting a bit over-used; perhaps it is

[2] *Copyright Act*, R.S.C., 1985, c. C-42 [*Copyright Act*]. Unless stated otherwise, all references to an "Act" are to the *Copyright Act*.

becoming a truism to say that copyright policy should strive to be "balanced." But given the increasingly tenuous state of the old creator-user dichotomy, not only in particular academic fields but in society as a whole covering a broad range of activities, the search for this "balance" becomes all the more important. Copyright laws, which should be designed to promote learning, culture and progress, to provide incentives for intellectual activity, and to reward creators for their efforts, need to be carefully crafted, implemented and assessed so that it does not impede the very purposes it was intended to promote.

In modernizing the law, I think it is important not to become too fixated on the particulars of the technologies of the day, or the minutiae of particular institutional settings, but to keep focused on the way in which people are generally becoming integrated creators and users of information resources.

Another reason why it is important to avoid legislative over-drafting is that the law needs to be kept simple enough so it can be broadly understood. As the roles of users and creators become more and more integrated, most Canadians will truly want to consistently engage in *fair copyright practices*. But respect for the law is eroded by those long cryptic passages that dwell on technical details and contain rules, exceptions, conditions, and counter exceptions, etc. Any attempt to "modernize" the law should recognize the need to encourage the population to learn the law and take some ownership and responsibility for it. This is best accomplished through the enunciation of clear and consistent principles that people can adopt and use in their daily lives.

2. BASED ON CANADIAN VALUES AND INTERESTS, HOW SHOULD COPYRIGHT CHANGES BE MADE IN ORDER TO WITHSTAND THE TEST OF TIME?

Copyright laws must be technologically neutral. The pace of technological change is such that provisions that become mired in technology-specific detail will quickly become outdated (like the dry erase board and flip chart exception in section 29.4 added in 1997).[3] The same can be said for provisions that are overly-specific to particular institutional settings. As for Canadian values and interests,

[3] *Copyright Act*, *supra* note 2, s. 29.4.

any changes to the law must reflect the broad concerns of the Canadian public, a public that is increasingly engaging in information and media resources in interactive ways.

In terms of standing the test of time and the related goal of technological neutrality, it is useful to look at some bad examples of provisions from Bill C-61[4] which were unduly specific to particular technologies and institutions. These included sections 29.21, 29.22, 29.23, 30.01, 30.02, 30.04 and the labyrinth exceptions to the anti-circumvention rules. While these provisions may have been well meaning, they basically tended to give people specific rights that they already had and then purported to limit them through onerous and complex conditions and counter-exceptions. These types of provisions should be avoided.

3-4-5. What Sorts of Copyright Changes do you Believe would Best Foster Innovation, Creativity, Competition and Investment in Canada and Best Position Canada as a Leader in the Global, Digital Economy?

The goals of fostering innovation and creativity are closely linked to promoting competition and investment in Canada, which in turn relate to Canada's position in the global, digital economy.

A primary concern in all of these areas should be to "do no harm." We should reject the often-stated premise that the Canadian *Act* is somehow broken, outdated, or in need of major revision. In fact, the current law has worked relatively well, and while there is always room for improvement, it is hardly the crisis situation that some stakeholders bemoan. We do not see some of the more overly litigious behaviours that have become evident in the United States as a result of some of their legislative changes of the late 1990's. We also see evidence of thriving economic activity in Canada in the areas of consumer electronics, games development, the provision of internet services, computer and security research and the promotion of Canadian content in the arts and entertainment sector. So despite all

[4] Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008 [Bill C-61]. Bill C-61 was introduced to Parliament in June 2008 though died on the order paper after passing First Reading as a result of the September, 2008 election.

of the hand-wringing about how out-of-date our copyright laws are, some historical perspective is needed.

This is not the first time in history when technological changes challenge existing ways of doing things, when changes on the international stage suggest revisions to domestic laws are needed, or when economic uncertainty is cause for concern about existing laws.

Before Parliament makes any drastic changes to Canada's copyright laws, a real problem in need of a legislative solution should be identified and the potential consequences of the proposed solution should be considered. It is not enough to speak vaguely about international obligations, keeping up with trading partners, or the woes and downturns faced by certain industries. Rather the burden should be on proponents for any changes to demonstrate that their proposals are reasonable, warranted, and that some thought has been given to the consequences that are likely to flow from the measure, especially if we can look at the experiences in other countries that have adopted the measure. It should also be the responsibility of proponents of amendments to frame their proposals as specifically as possible.

Staying the course on some existing policies may well be the best solution in many cases. For example, proponents of DMCA-style anti-circumvention measures (complete with device prohibitions, and draconian penalties with only specific and limited exemptions) have not met their burden of showing the need for these sorts of changes. They need to do so in terms of the *specific* benefits that will accrue to Canadians. What are the specific instances of competitive advantage that will accrue to Canada, and how do these benefits balance against potential losses or harms? Amendments that are designed primarily to preserve obsolete business models may just as well end up stifling new ideas or having other unanticipated consequences.

This is not to say that Canada should never look to other countries for ideas in terms of how their copyright laws are operating. But Parliament does need to pick and choose very carefully. The *Digital Millennium Copyright Act ("DMCA")*[5] is a bad law not because it is American. It is a bad law because of its specific terms and because the U.S. Congress did not pay adequate attention to its

[5] *Digital Millennium Copyright Act*, 17 U.S.C. (1998) [*DMCA*].

implications in its headlong rush to implement the WIPO Treaties[6] in such an excessive manner.

Along the same lines, utilizing restraint in its approach to copyright amendments would better position Canada as a leader in the global digital economy than taking a purely maximalist position and copying the worst aspects of U.S. policies. Canada should adopt a decidedly minimalist approach on the issue of WIPO implementation, perhaps focusing on some of the performers' issues in this current legislative round. As the years go by, some of the provisions of the WIPO treaties (those dealing with technological protections and rights management) seem increasingly archaic, geared more towards what some thought were the technological imperatives of the mid-1990's than a forward-looking set of principles that would stand the test of time. Also, given some of the rethinking evident in WIPO over the past few years, as notably evidenced by the success of the Development Agenda, one wonders whether the same language would even pass muster if a Diplomatic Conference were held today. In any event, to read the WIPO Treaty as requiring the excess of the DMCA (particularly with respect to the broad sweep of the anti-circumventions to include otherwise lawful activities as well as device prohibitions) is not warranted. It is evident that the DMCA went well beyond the actual requirements of the WIPO Treaties with respect to technological protection measures. There is no reason why Canada should be under any compulsion to repeat the same mistake.

To answer this set of questions positively though, there are some changes that would improve the *Act's* ability to foster competition and investment, encourage creativity and innovation, and best position Canada as a leader in the global, digital economy.

Most particularly, the *Act* should be amended so that the fair dealing provisions correspond with the direction of the Supreme Court of Canada as well as correspond with the reality of Canadian practice. This change is of central importance because all of these goals (innovation, creativity, investment, competition, global leadership) are best met by turning Canada into a haven for the practice of *fair copyright*. Canadians in all walks of life should be encouraged to engage in fair copyright practices. Practising fair copyright, which may take on different forms in different contexts,

[6] *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76.

should become the hallmark of a Canadian copyright culture that reflects Canadian values.

II. ENCOURAGING THE PRACTICE OF *FAIR COPYRIGHT* BY AMENDING THE FAIR DEALING PROVISIONS

Section 29 of the *Act* provides that "fair dealing for the purpose of research or private study does not infringe copyright."[7] Section 29.1 and 29.2 similarly provide that fair dealing for purposes of criticism or review and news reporting does not infringe copyright if the source and name of the author (or performer, maker or broadcaster) is given.

Fair dealing in Canada is therefore categorical; one must first come within one of the categories listed in the *Act* in order to invoke fair dealing. And assuming you have invoked one of these categories, the *Act* is silent as to the actual criteria to use in determining whether or not the use is indeed fair. You have to look to the case law for guidance.

This state of affairs runs counter to popular belief; people often talk about fair dealing by noting that they have not used very much of the source, that the original work was transformed to a great extent, or that the use was not commercial in nature. While these types of factors are relevant for assessing whether a particular use was "fair", under a strict interpretation of the Canadian *Act* they only come into play if the use fits within one of the five enumerated categories. Some of this popular confusion comes from the difference between American "fair use" and Canadian "fair dealing." In contrast to Canada's categorical requirement, U.S. fair-use is open-ended, that is, you do not have to fit into a stated category, you go right to the assessment of whether or not the use was fair under the circumstances.

Section 107 of the U.S. *Copyright Act* provides:

> . . . fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [section 106], for purposes such as criticism, comment, news reporting, teaching (including

[7] *Copyright Act, supra* note 1, s. 29.

> multiple copies for classroom use), scholarship, or research, is not an infringement of copyright... [8]

Note the open ended usage of the words '*such as*'. The section then goes on to specify how fair use is determined. Whether or not a particular use will be considered fair is dependant on several enumerated factors:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[9]

Here again, the text of the U.S. *Copyright Act* is open-ended. While four factors are set forth, they are preceded by the important signal words *shall include*, inviting a consideration other factors that may be pertinent. It is suggested that this open-ended nature of fair-use, both in terms of what it applies to and how it is determined is a good feature because of its simplicity, technological neutrality, and its ultimate emphasis on the fairness of the use itself

The policy question facing Parliament is whether this important users right be strictly restricted to certain limited categories as a threshold requirement, or whether the categories and the open ended approach of section 107 should be adopted.

The answer to the question really depends on what purpose fair-dealing is supposed to serve. If it is simply a technical defence to an infringement action to be sparingly used, then the strict categorical approach is compatible. However, if the purpose of fair-dealing is to provide some balance into the *Act* by articulating and giving substance to an important users' right, then the categories should be

[8] *Copyright Act*, U.S.C. 17, § 107 (2006).
[9] *Ibid.*

relaxed and the emphasis should be shifted to the actual fairness of the use.

In Canada, the fair dealing categories of research, private study, criticism, review and news reporting were traditionally construed in a narrow manner. Throughout the twentieth century, fair dealing was consistently viewed in Canadian courts and legal circles as nothing more than a limited defence to infringement. Courts strictly construed fair-dealing because they felt it was a limited exception to the more significant rights of the copyright owner. But this judicial deference towards owners rights has shifted in recent years. In 2002, the Supreme Court of Canada stated that the proper balance in Copyright

> ... lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.[10]

The court went on to state that:

> [e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.[11]

While *Théberge* was a split decision which did not deal directly with fair dealing, the opinion foreshadowed the unanimous decision of the court two years later.

In 2004 the Supreme Court directly addressed fair dealing in *CCH Canadian Ltd. v. Law Society of Upper Canada*[12], where the provision of a fee-based document delivery service maintained by a law library was held to constitute fair dealing. In an important passage, the court stated:

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[10] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at para. 31.
[11] *Ibid.,* at para. 32.
[12] *CCH Canadian Ltd. v. Law Society of Upper Canada,* [2004] 1 S.C.R. 339 [*CCH Canadian Ltd*].

> ... Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[13]

The court went on to quote and adopt Professor David Vaver's observation that: "[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[14]

In reaching its ultimate conclusion that the copying of the plaintiffs' works for private law firms by the library constituted fair dealing, a number of other important points were made by the court which are relevant to this consultation.

For example, the court indicated that fair dealing is always available, even where there is a more specific special exemption which could be applicable. The court said,

> As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Act* to prove that it qualified for the library exemption.[15]

With respect to the enumerated categories, the court stated that they must not be strictly construed. They stated that "'Research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."[16] While the case before the court dealt specifically with the category of research, this reasoning

[13] *Ibid.,* at para. 48.
[14] *Ibid.*
[15] *Ibid.,* at para. 49.
[16] *Ibid.,* at para. 51.

should equally apply to situations where the scope of private study, criticism, review or news reporting is being considered.

The court also grappled with the lack of clear definition of the fairness factors in the *Act* itself. They adopted the six factors used by the Court of Appeals to

> be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.[17]

What is significant here is that several opponents of expanding fair dealing have expressed worries that by relaxing the categories and opening up fair-dealing, everything would become free to use. This concern is simply misplaced. The open-ended and flexible fair dealing advocated here still has to meet the factual tests of fairness. There is nothing automatic about fair-dealing. It is not free-dealing, you still have to make a showing under these factors that your use meets the fairness criteria.

The other misconception that has been raised during the course of the consultation is that once a license is readily available, there should be no claim to fair dealing. This was characterized by some observers as "smart" fair dealing. This issue is especially salient given the importance of collective licensing in Canada. But the issue of the effect of the availability of a license on the fair dealing claim was addressed by the *CCH Court* directly:

> The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the

[17] *Ibid.,* at para. 53.

> owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Act*'s balance between owner's rights and user's interests.[18]

Going back to the threshold policy facing Parliament with respect to the nature of fair-dealing, I would suggest that the Supreme Court has effectively answered the question in a very compelling, authoritative and persuasive manner. What is clear now is that fair dealing in Canada is no longer simply a technical defence to an infringement action, it is in itself a substantive users' right that is an integral part of the whole of the *Act*.

As a result, we have an unfortunate disconnect between the actual state of copyright law as it is construed in the courts, and the actual text of the *Act* itself. This discrepancy should be harmonized so the *Act* reflects the case-law as set down by the Supreme Court. Not only is there a discrepancy between the text of the *Act* and the Supreme Court case-law, but there is a whole set of discrepancies between common ordinary everyday practices of Canadians and the text of the *Act*. For example, while it is common practice to utilize VCR and other types of recorders in the home, it is not at all clear how such use fits neatly within any of the enumerated categories of research, private study, criticism, review or news reporting. Yet these devices are lawfully sold by Canadian retailers and purchased and used routinely by Canadian consumers. There are many other examples of how typical information usage practices do not neatly fit within the narrow confines of the fair dealing provisions of the *Act* as it was drafted.

One set of options is to draft specific language to address particular situations. But as discussed above, and as reflected in so many of the submissions in this consultation, such detail is not in keeping with the stated goals of simplicity, technological neutrality and standing the test of time. The provisions which would have added sections 29.21, 29.22 and 29.23 in Bill C-61 exemplified this flawed technology-specific approach that should be rejected in favour of general principles that can be applied in a variety of circumstances.

It is proposed that sections 29, 29.1 and 29.2 be replaced with the following:

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[18] *Ibid.,* at para. 70.

Section 29: Fair Dealing
(1) Fair dealing for purposes such as research, private study, criticism, review or news reporting does not infringe copyright.
(2) In determining whether the use made in any particular case is fair-dealing, the factors to be considered may include—
(a) the purpose of the dealing,
(b) the character of the dealing,
(c) the amount of the dealing,
(d) the nature of the work or other subject matter,
(e) alternatives to the dealing,
(f) the effect of the dealing on the work or other subject matter,
(g) the extent to which attribution was made where reasonable in the circumstances.

This proposal avoids having to pick and choose between a whole range of worthy candidates for inclusion to the enumerated list. Using the words of inclusion *such as* shows an intention that the stated categories are merely illustrative examples, not exhaustive categories. In subsection (2), the listing is generally adopted from paragraph 53 of the *CCH* decision. The attribution criteria in subsection (2)(g) is in lieu of the requirement in the current text. The term *may* in subsection (2) is used to reflect the statement from the Supreme Court that not every factor will be present in every case.

III. AVOID OTHER PROVISIONS THAT WILL TEND TO UNDERMINE FAIR-DEALING

In this last section I will briefly identify some other issues that should considered for inclusion (or exclusion as the case may be) in revisions to the *Act* that are necessary in order to protect the integrity of fair dealing.

1. Limit the availability of statutory damages in situations where there is a reasonable and good faith belief that an act constituted fair dealing.

Unfortunately, many Canadians are not willing to exercise their existing fair-dealing rights because they are afraid of the financial liability that can result from an award of statutory damages. Accordingly, for fair dealing rights to be at all meaningful, this chilling effect needs to be ameliorated. Statutory damages should not be available in situations where a person had a reasonable and good faith belief that their use constituted fair-dealing. This should especially be the case where the use was done pursuant to a stated institutional policy on fair-dealing practices.

2. There should be no liability for acts of circumvention where the use constitutes fair dealing.

Fair dealing rights should not be vitiated by new liability rules pertaining to the circumvention of technological protection measures. Many submissions have made the point that any implementation of the WIPO Treaties with respect to anti-circumvention measures should be limited to situations that otherwise constitute actionable infringement. This more moderate approach was used in Bill C-60.[19] A user should be free to exercise their fair dealing or other rights without being impeded by the use of technological measures designed to limit access to or copying of a work or other subject matter. And any prohibitions which are adopted should not extend to devices or services that have non-infringing uses or which would come within the scope of fair-dealing or another exemption or limitation.

3. Special Exemptions should be generally avoided.

Bill C-61 proposed numerous several special exemptions which contained their own counter limitations and conditions.[20] These sections included sections 29.21, 29.22, 29.23, 30.01, 30.02, 30.04 as well as the various exceptions to the anti-circumvention rules. These sections would be unnecessary under open-ended fair dealing. Generally, exemptions which are limited to particular types of technologies, or only available in particular institutional settings, are the types of special exemptions that should be avoided.

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[19] Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005.
[20] Bill C-61, *supra* note 4.

In particular, calls for a special Internet Exception that would only be available to certain enumerated educational institutions should be rejected. The same fair copyright practices should apply at home as at school. Educational institutions do not need special exemptions to promote teaching and learning, rather they should be adopting their own sets of best practices for determining what does and does not constitute fair-dealing.

4. Consider limitations on standard form contracts which defeat fair-dealing

Standard Form Contracts are often imposed on purchasers of digital goods through "shrinkwrap" or "click-wrap" licenses which contain terms and conditions in derogation of users' rights under the *Act*. The *Act* should be amended to provide that such contracts are void as contrary to public policy to the extent they exclude or limit statutory user's rights.

5. Internet Service Liability rules must not impede fair dealing rights or chill protected expression

There is currently much discussion between proponents of "Notice and Take-Down" and "Notice and Notice." I will not expand on it here other than to indicate that "Notice and Take-Down" does not adequately account for those uses that may be fair dealing. Notice and Notice seems to be a reasonable compromise on this issue. Proposals such as "three strikes" must also be rejected as it would tend to place chill on protected fair dealing and other expression rights online.

6. Crown Copyright should be reformed or abolished

While the potential severity of Crown Copyright has been lessened by several orders which grant broad licenses to use certain materials such as statutes, regulations and case-law, these limitations on Crown Copyright need to be extended to other types of government documents.