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Copyright Consultation Submission

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COPYRIGHT CONSULTATION SUBMISSION*

LAURA MURRAY

*In this submission, the author articulates the principles that she feels should guide copyright reform. Appropriate reforms would aim to restore legitimacy to the Copyright Act by ensuring technological neutrality, and by implementing the WIPO treaties in a manner that best suits Canada's specific circumstances, policy traditions, and cultural goals. Clear legal drafting so that ordinary Canadians can understand the Act is also essential. Strong users' rights foster expression, enhance learning opportunities, and make creation possible in the first place. With respect to specific reforms, Digital Rights Management must not prohibit anti-circumvention for non-infringing purposes, licensing regimes must be accountable and transparent, and copyright protection generally should be subject to a flexible and broad fair dealing test by the inclusion of a "such as" clause in the current fair dealing provision of the Copyright Act, as guided by the Supreme Court's test in *CCH v. Law Society of Upper Canada*.*

I. INTRODUCTION

I am pleased to have the opportunity to follow up on the comments I made at the Gatineau Round Table on 29 July 2009.¹ On that occasion I gave each of the ministers a copy of my book, written with Sam Trosow, *Canadian Copyright: A Citizen's Guide*.² In many ways I see that book as an answer to the five questions you have posed: I hope you find it useful. The last chapter in particular focuses

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² Gatineau - Round Table and Public Hearings on Copyright" (29 July 2009) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/00439.html>> [Gatineau Roundtable].

² Laura Murray and Sam Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007).

on policy and legislative imperatives. But here I offer a few more direct answers to your questions.

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

Canada’s copyright laws affect me profoundly. As a teacher of literature and culture — of “works” in the terms of the *Copyright Act*³ — everything I teach is either under copyright or in the public domain. My students pay for access to it via their tuition, at the bookstore, at the copy shop, or via university licenses. As a scholar and writer, I also depend on copyright. Together with some government support, it is what enables my publishers to be able to afford to publish my books and articles. Copyright gives me fair dealing rights so I can quote from and critique the work of others. It gives me moral rights to prevent misattribution. As a musician, I play and listen to music from both the public domain and living composers. As a parent, I watch my children devour copyrighted and public domain stories and images, and learn to create their own. And finally, as a citizen more generally, I benefit from copyright insofar as it may incentivize creativity and facilitate the next generation of expression and innovation, and I am limited by it insofar as it may impede my ability to engage with the culture and public discourse around me.

Nonetheless, I often think that we exaggerate the role of copyright within the creative process. A programmer doesn’t sweat over lines of code because of copyright. A drummer doesn’t play a Keith Moon solo 137 times because of copyright. Copyright may lie on the horizon as an underpinning for hopes of fame and fortune, but in the first instance, creators create because they want to. Creators need the freedom to tinker, dismantle, reconstruct, study, and play without the law intruding. Imitation and appropriation is part of that process. As the philosopher and linguist Mikhail Bakhtin said, “the word in language is half someone else’s.”⁴ Fear of copyright infringement, or

³ *Copyright Act*, R.S.C., 1985, c. C-42 [Hereinafter “Act”].

⁴ Mikhail Bakhtin, *The Dialogic Imagination: Four Essays*. ed. by Michael Holquist, trans. by Caryl Emerson & Michael Holquist. (Austin: University of Texas Press, 1981) at 293.

imposition of unreasonable permission costs or paperwork, should not be getting in the way of thinkers, doers, students, librarians, or teachers. That’s why users’ rights are so important. Copyright is most importantly a way of ordering the market stage of the creative cycle. It is essential in that role — but if it intrudes too far into the stages of inception and reception, it will fail or backfire. The Supreme Court said as much in the *Théberge* case:

“once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive 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.”⁵

In my view, the task at hand is not so much modernization of existing laws, as clarification of copyright’s longstanding underlying principles. This technological and economic moment is just that: a moment. Modernization will be best achieved by profound recognition of copyright’s role as a policy tool to foster Canadian culture and innovation. We should not presume that “everything has changed” or ought to change, but rather, we need to acknowledge all the things that work in the law as it stands, and adjust only with the awareness that what seems “modern” now may well be an impediment or irrelevance in the future, and that every change produces complex secondary effects. In that light, technological neutrality is a central imperative.

One thing that is certainly different now than in 1924, when our *Act*⁶ first came into being, is that more Canadians come face to face with it. So one way to modernize it is to be aware of that fact: it has to be written in a way that ordinary people can understand.

A final note on modernization: sometimes this term is used to mean “WIPO implementation.” In my opinion and that of many legal experts, very few changes must be made to make Canada’s laws

⁵ *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336.

⁶ *Act supra* note 3.

compliant with the WIPO treaties.⁷ The treaties themselves are quite flexible, in order that nations can devise laws that best suit their circumstances and goals.

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

This is an excellent question. First, I note the emphasis on Canadian values and interests. Unlike the United States, Canada is not a net exporter of cultural goods, although we do of course produce many of them and want to foster that element of our economy. The Canadian cultural scene has, to a large part, been fostered since the 1960s by direct government funding because of the small size of the domestic market. This is a great success story and now a Canadian tradition. So I observe here that no Copyright Act alone could be expected to generate Canadian culture and innovation: before artists or innovators can produce marketable goods, they need access to libraries, to education, and to seed money in some form. This is partly a universal truth, and partly an effect of the small size of the Canadian market.

The Writers' Guild and other rights-holder organizations have called for broader licensing of online distribution via a levy on digital memory.⁸ Licensing may be seen to fit the "Canadian values" of collective action towards a greater social good. There may be models for it that could work. But it will not be in the interests of Canada to make our citizens and educational institutions bear higher costs for access to copyrighted materials higher than those borne by their counterparts in the United States and other major trade partners. Nor is it acceptable to ignore users' rights "just because we can": that would be no more appropriate than ignoring creators' rights "just because we can." Because expression emerges out of dialogue with previous expression, users' rights are connected to the Charter right of

⁷ See for e.g.: Michael Geist, My Submission, (13 September 2009), online: <<http://www.michaelgeist.ca/content/view/4377/125/>>.

⁸ Writers Guild of Canada, Copyright Consultations Submission, (11 September 2009), online: <<http://www.wgc.ca/files/WGC%20Submission%20to%20copyright%20consult.pdf>>.

freedom of expression. Users' rights are not unlimited, but they are not optional. In short, the Canadian value of collective good can be served only if it truly addresses the needs of all Canadians.

On the question of the test of time, the first thing to note is the legitimacy crisis copyright law faces. Copyright law as a whole is, to be frank, a joke to anyone under the age of 30, and maybe 40. In the big picture, then, legislation will stand the test of time if it manages to halt the erosion of copyright's legitimacy. To do this, it will have to demonstrate that it was not crafted to protect corporations above people. It will have to guarantee freedom of expression and users' rights, and recognize the internet as a space for free exchange of materials, except where posters explicitly limit access or use. And copyright will have to ensure that professional creators and performers are not unduly disadvantaged by new reproduction and distribution technologies.

Tools proposed to address this last goal include legal protection of Digital Rights Management. This, however, must not be done so as to interfere with users' rights. Another creators' rights mechanism I have already mentioned is collective licensing. If any new licensing regimes are contemplated, they must carry guarantees of accountability to both members and users, and declarations that pricing schemes must acknowledge users' rights with due amplitude. A major concern amongst writers, small publishers, and educators, for example, has been the lack of transparency and fairness in the way Access Copyright distributes its revenue, as revealed in the Friedland Report of 2007.⁹ This has eroded the legitimacy of the licensing model and must be addressed.

A law that avoids piecemeal provisions to address specific uses and interests is more likely to withstand the test of time. Some of those who promoted the Private Copying Levy, introduced in 1997, have distanced themselves from it,¹⁰ and others might note that in its focus on music alone, the levy does not address the needs of a broader

⁹ Martin L. Friedland, Report to Access Copyright on Distribution of Royalties (15 February 2007) online: <<http://www.accesscopyright.ca/docs/Access%20Copyright%20Report%20--%20February%2015%202007.pdf>>.

¹⁰ The Canadian Recording Industry Association, for example, objected to an extension of the levy to digital audio recorders: See: <<http://decisions.fca-cf.gc.ca/en/2008/2008fca9/2008fca9.html>>.

range of creators and users. Technological and media neutrality ought to guide changes to the owners' rights side of copyright. On the users' rights side, the 1997 educational, library, and museum exceptions are both too arcane for most people to understand, and too specific to allow reasonable practice. Instead of itemized exceptions, we ought to follow the Supreme Court and assert the fundamental role of fair dealing in the law. This is no "free ticket" for all consumer uses of works, but rather, if we incorporate the Supreme Court's tests articulated in *CCH v. Law Society of Upper Canada*¹¹ into the Act, a modest but flexible window for reasonable unauthorized use, particularly in creative, academic, and journalistic contexts. It will outlast changes in technology.

3. WHAT SORTS OF COPYRIGHT CHANGES DO YOU BELIEVE WOULD BEST FOSTER INNOVATION, CREATIVITY, COMPETITION, AND INVESTMENT IN CANADA, OR WOULD BEST POSITION CANADA AS A LEADER IN THE GLOBAL, DIGITAL ECONOMY?

I have already discussed three potential changes:

- fair dealing: I say make it more flexible by the addition of a "such as" clause, but circumscribed by the tests from *CCH*.¹²
- expanded licensing: I say use with extreme caution, accompanied by stringent requirements for accountability and transparency. On the topic of competition, we must particularly attend to the question of licensing rights-owners outside of Canada: why would Canada volunteer to send revenue elsewhere when no analogous mechanism is directing revenue to our own rights-holders?
- DRM: I say refrain from creating a legal shell around digital locks: if a digital lock impedes non-infringing uses, Canadians must be enabled to bypass it

Some changes I support, articulated more fully in other submissions you will have received, are:

- ensure that standard form contracts cannot override users' rights or moral rights;
- eliminate Crown Copyright;

¹¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

¹² *Ibid.*

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- implement performers' rights as per the WIPO Performances and Phonograms Treaty;¹³
 - modify the statutory damages provision so it only applies to infringement for commercial gain, and includes a safe harbour where the alleged infringer believed in good faith that s/he was not infringing;
 - allow free conversion of works to different formats for those who have already legally acquired a copy in one medium, and enable libraries or other institutions to perform this service in order that the disabled may use materials in their collections; and
 - clarify that existing educational exceptions apply in distance education as well as classroom contexts.

And finally, three changes I do not support:

- do not give Internet Service Providers the power or responsibility to police copyright;
- do not extend copyright term; and
- do not implement an Educational Internet Exception: it is not necessary and wrongly implies that ordinary non-commercial use of the internet may be infringing.

CONCLUSION

I will close with the historical vignette I presented at the Gattineau Round Table.¹⁴

One of my main research projects at the moment is a study of the daily newspaper in New York City in the 1830s and 1840s. This was a revolutionary time in the business. In 1833, Benjamin Day started selling his New York Sun for a penny, and the older papers, selling for six cents, cried foul. Before long, many of them folded, others changed, and the penny paper became the norm, making news accessible to pretty much everybody. Strikingly, papers of all sorts in this period feature far more borrowed material than original material. None of the articles were copyrighted; no money changed hands; nobody complained. In fact postal regulations and pricing were designed to facilitate newspaper exchanges and thereby enable the

¹³ [*WIPO Performances and Phonograms Treaty*](#), 20 December 1996, 36 I.L.M. 76.

¹⁴ Gattineau Roundtable, *supra* note 1.

information dissemination necessary for a rapidly developing economy and democracy; editors wrote openly about waiting with their scissors for the next mails. In other words, the multimillion dollar American newspaper industry depended, in its origins, on lack of copyright regulation—it was subtended instead by particular postal laws, and by a system of norms and practices amongst editors about when and how cutting and pasting was acceptable. I should note that British politicians, publishers, and authors were not so happy about US copyright ways, but the US chose not to heed their protests until the very end of the nineteenth century, always keeping its own national interests clearly in view.¹⁵

I take you to the 1830s US not because the situation is identical to our own. But it does show that copyright is one of many tools available to make cultural industries work. In times of change, increased copyright regulation may or may not be the best way to go. Bowing to foreign pressures may or may not be the best way to go. Acknowledging its international obligations, Canada still has choices, and the responsibility and opportunity to make them itself.

¹⁵ William E. Huntzicker, *The Popular Press, 1833-1865*. (Westport: Greenwood Press, 1999); Richard R. John. *Spreading the News: The American Postal System from Franklin to Morse*. (Cambridge: Harvard University Press, 1995); Meredith L. McGill, "Copyright," in Scott E. Casper, Jeffrey D. Groves, Stephen W. Nissenbaum & Michael Winship, eds., *A History of the Book in America*, vol. 3 (Durham: University of North Carolina Press, 2007) at 158-178.