CALL ACBD — CANADIAN ASSOCIATION OF LAW LIBRARIES / ASSOCIATION CANADIENNE DES BIBLIOTHÈQUES DE DROIT

10 December 2018

Mr Dan Ruimy, MP
Chair, Standing Committee on Industry, Science, and Technology

Submitted via webform

Dear Mr Ruimy and Committee Members:

Re: Statutory review of the Copyright Act Brief 1: Multiple issues

This is the first of two briefs by The Canadian Association of Law Libraries/L'Association Canadienne des Bibliothèques de Droit (CALL/ACBD) to assist the Committee's review of the *Copyright Act*.

This brief addresses interlibrary lending, fair dealing, the *Act*'s relationship with licenses, Indigenous knowledge, and USMCA implications as they may affect some of all of these matters.

(The second of the two briefs is filed separately and addresses CALL/ACBD's submission that the *Act* clarify or expressly confirm that copyright does not subsist in statutes, regulations, by-laws, orders, proclamations, judgments, case law and awards of courts and tribunals, which CALL/ACBD characterizes as "primary law.")

About CALL/ACBD and our relationship to the *Copyright Act* review

CALL/ACBD is a non-profit body corporate continued under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 whose objects include promoting access to legal information and to develop and increase the usefulness of Canadian law libraries. Our association has 370 legal information professional members representing 210 organizations from various legal environment sectors. About 25% of our membership work in law firms; 22% are in courthouse and law society libraries; 21% are in the academic sector; 10% work in government libraries; publishers represent about 5%; and 12% indicate other affiliations. Many of our members are also authors. CALL/ACBD members work daily with material protected by copyright law, with licensed copyright-protected material, and with primary law.

Some decades ago CALL/ACBD established a standing Copyright Committee to address copyright issues, including statutory reviews of the *Copyright Act*.

Summary of Recommendations in this brief

- Section 30.2 (5.02), on interlibrary lending, should be removed. Its enforcement is not feasible. If 30.2 (5.02) remains, it should establish a reasonable practice that would constitute compliance, for instance to add "reasonable" before "measures."

- No change should be made to the *Act* in respect of fair dealing. The *Act* offers a flexible and responsive approach that is fair to both copyright holders and users of protected materials.

- The *Act* should state that, where access to copyright-protected content is provided by license, clauses that purport to disallow the *Act*'s library exceptions or user rights are unenforceable.

- Clarification is needed on the scope of statutory copyright at its interface with conceptions of Indigenous knowledge of different Indigenous peoples. Canada must engage in consultation with Indigenous communities and scholars of Indigenous knowledge to ensure a Canadian copyright law in harmony with Indigenous legal orders relating to Indigenous knowledge.

- USMCA ratification is as an opportunity both to clarify explicitly that Crown or other copyrightdoes not subsist in primary law and to confirm a flexible and responsive approach to fair dealing that balances user rights and rights of authors.

Interlibrary lending provisions must not impose impractical or unachievable accountability measures on libraries for the actions of their borrowers

CALL/ACBD urges an amendment to section 30.2 (5.02), which requires a library as defined in the by the *Act* to take "measures" to prevent an interlibrary loan borrower from taking certain actions described in that section. The section must clarify that it does not create a positive obligation of a lending library to monitor and enforce the compliance by their borrowers.

Though some law libraries have technological capability to limit misuse of interlibrary loaned materials, many do not have such means. Law libraries cannot be accountable for behaviour of interlibrary borrowers who are in other locations. Indeed, such an onus would be contrary to principles of patron privacy to which libraries adhere. Further, a core function of law libraries, including those governed by section 30.2(5.02), is to share resources when they are needed and as law permits. CALL/ACBD sees this as an important element of access to legal information and access to justice.

Should a provision such as 30.2(5.02) remain in the *Act*, it should set out a reasonable practice that libraries may follow to establish compliance, such as issuing a copyright and terms of loan notice to the borrower. At minimum, addition of the word "reasonable" before "measures" would satisfy the policy and legal goal of the section.

Fair dealing remains flexible and responsive and should continue to do so

As noted, CALL/ACBD has a range of members, just as Canadian society does. Some of our members are creators, some are publishers who hold copyright, and most are users and purchasers of copyright-protected material. In our experience, fair dealing as it stands now[1] offers a proper balance of rights and exceptions. The current provisions are flexible and responsive. Interpretation of what constitutes a dealing that is fair should continue to be left to the context.

The Act should not permit copyright holders to require users to contract out of statutory rights and exceptions, particularly in contracts of adhesion or where an imbalance in negotiating position exists.

CALL/ACBD recommends the *Copyright Act* or related legislation disallow license provisions that would prevent law libraries from engaging the exceptions or fair dealing user rights Parliament has chosen to grant. The Act should not permit copyright holders to require users to contract out of statutory rights and exceptions, particularly in contracts of adhesion or where an imbalance in negotiating position exists.[2] Such a change will contribute to a proper balance of rights and exceptions.

A core function of law libraries is to share resources or excerpts of them when and to whom they are needed, within reason and the bounds of the law. It is well known that legal texts, which incorporate research and knowledge of skilled lawyers or scholars with considerable expertise, are often costly. Core titles may cost several thousands of dollars each. Law libraries are not able to hold in their collections all the resources their users may need. This is particularly so for law libraries of non-profit organizations or small law firms whose lawyers serve the needs of individuals. Borrowing and fair dealing provisions Parliament has granted enable these law libraries and their users to share materials in reasonable, fair ways to enable them to carry out their services.

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[1] As provided in the 2012 amendments to the *Act* and as established in the line of case law following CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 and Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

[2] CALL/ACBD refers the committee to the brief of CFLA-FCAB, which offers Ireland's legislation as an illustrative example of an amendment that may achieve the desired effect.

Many legal information resources are offered to law libraries by license. Licenses may be opaque, click-through, non-negotiable contracts of adhesion, or otherwise minimally negotiable. In other cases they are presented to someone other than the librarian and less connected with the daily use of the licensed material. Occasionally law libraries and publishers successfully negotiate out provisions in licenses that would prohibit activities the statute permits, such as some aspects of fair dealing or interlibrary loan. But not all our members are in that position. Instead, we may be inadvertently or inappropriately contractually prohibited from exercising rights Parliament has granted.

Copyright legislation must address principles applicable to Indigenous knowledge

The structure of the *Copyright Act*, including its identification of works in which copyright may subsist, definition of author, and terms of protection appear not to be consistent with conceptions of Indigenous knowledge. Clarification is needed on the scope of statutory copyright at its interface with conceptions of Indigenous knowledge of different Indigenous peoples. Canada must engage in consultation with Indigenous communities and scholars of Indigenous knowledge to ensure Canadian copyright law is in harmony with Indigenous legal orders relating to Indigenous knowledge and cultural property.

CALL/ACBD recognizes that legal systems and laws framed by the various Indigenous peoples of these lands exist, have long governed and continue to govern peoples, and continue in active development, interpretation, application, and study to this day. Many of our members work in organizations where Indigenous laws are studied, explored, surfaced, learned, and applied. These laws include legal conceptions of knowledge and cultural property. We understand through our study and informal consultations that many Indigenous peoples' conceptions of knowledge creation, authorship or ownership, transformation, publication, and preservation may differ from the English copyright and civil law *droit d'auteur* traditions that underlie the *Copyright Act*. A bill is before Parliament that would enable Parliament to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[3] This bill would ensure the laws of Canada are in harmony with UNDRIP, which refers to the recognition of Indigenous knowledge.

This review is an opportune occasion for Parliament or this committee to examine and prepare appropriate amendments to the *Copyright Act*, consistent with the standard proclaimed in UNDRIP, to further the recognition of intellectual property and knowledge as conceptualized by the various Indigenous peoples on whose land Canada rests.[4]

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[3] Bill C-262, 42nd Parliament, 1st Session, United Nations Declaration on the Rights of Indigenous Peoples Act.
[4] Reference may be made to the December 10, 2018 submission to this committee by the University of Victoria.

USMCA-required amendments can facilitate a modern *Copyright Act*

We have undertaken a preliminary study of the United States–Mexico–Canada Agreement (USMCA) and its intellectual property chapter. One outcome of USMCA appears to be that Canada will have agreed to implement some extended terms of copyright protection.[5]

We understand Canada's commitments are accompanied by resolutions that include Canada's inherent right to set legislative and regulatory priorities consistent with our legitimate public welfare objectives, fostering creativity and innovation.[6] Specific USMCA objectives relating to intellectual property include contribution to the promotion of technological innovation to the mutual advantage of creators and users, and to a balance of rights and obligations.[7] To borrow language from the agreement, Canada should take full advantage of its negotiated right, in formulating or amending laws and regulations, to adopt measures necessary to promote the public interest in sectors important to our socio-economic and technological development and to adopt measures that will prevent abuse of copyright by rights holders.[8]

USCMA can support some of CALL/ACBD's recommendations. We have noted the value of the current approach to fair dealing. We recommend the *Copyright Act* continue to maintain a flexible and responsive fair dealing approach after USCMA. An approach to fair dealing akin to the transformative use, market impact, and other factors considered in the US legal environment can ensure balance of respect for earned copyright of authors with appropriate fair activities by our members and others. The various legal environments in Canada—courts, legal education, legal practice, and access to justice efforts—are in the midst of rapid technological change. Tools that employ artificial intelligence and other innovative technologies can build on a flexible and responsive fair dealing environment to advance access to justice initiatives and improved legal information solutions.

Canada can take the opportunity of USMCA ratification to develop the copyright framework in a way that furthers such initiatives.

Respectfully submitted,

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[5] United States–Mexico–Canada Agreement (USMCA), Chapter 20, Intellectual Property Rights, Article 20.H.7
[6] USMCA, Preamble
[7] USMCA, Article 20.A.2. Objectives
[8] USMCA, Article 20.A.3. Principles