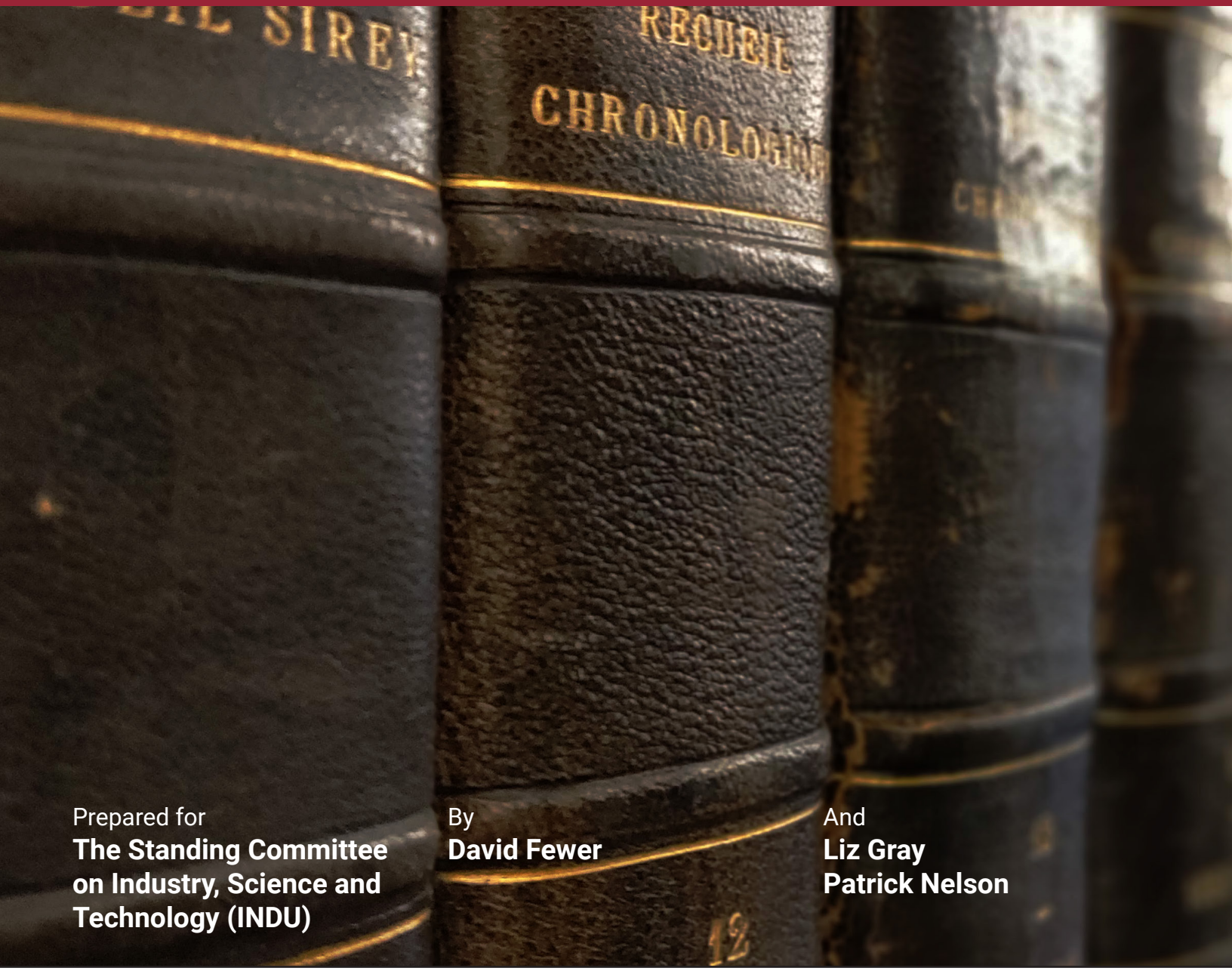
COPYRIGHT REVIEW 2018

Balance as the Guide



Prepared for
The Standing Committee on Industry, Science and Technology (INDU)

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ABOUT CIPPIC

CIPPIC is a public interest technology law clinic at the University of Ottawa Faculty of Law. We bring together expert legal professionals and students to advocate for the public interest on issues including privacy, data governance, artificial intelligence, smart city policy, net neutrality, state surveillance, and copyright.

EXECUTIVE SUMMARY

The 2018 review of the *Copyright Act* is an opportunity to address the needs of Canadian creators and Canadian content users, while strengthening the public domain. In light of the recent *CUSMA* treaty and its benefits for copyright holders and intermediaries, we ask the Committee to engage in this review with a view to restoring the essential balance at the heart of copyright policy.

Additionally, the past few years have seen great technological change, from the widespread adoption of subscription streaming services to explosive growth in Canada's AI sector. Copyright policy should seek to adapt to the new digital era, rather than impose outmoded models on the changing times.

We make the following recommendations:

(1) Retain and strengthen fair dealing

(2) Permit the circumvention of digital locks for legitimate purposes

(3) Support the Copyright Board and increase ease-of-access

(4) Retain notice-and-notice and curb notice misuse

(5) Reject website blocking and filtering proposals

Balance as the Guide

The ideal of ***balance***, between the private interests of a work's creator and the public interest in broad dissemination, has been the guiding principle behind copyright in Canada for many years, and is the principle that guides this review of the *Copyright Act*.

The new North American trade agreement dramatically upsets that balance. The *CUSMA* will turn Canadian copyright policy away from the public domain. Among its other features, the agreement includes provisions that extend the copyright term to 70 years; that enhance already stringent digital lock provisions; and that allot new customs enforcement rights to copyright holders.[1] We would ask this Committee to be wary of placing further limits on the Canadian public's rights.

(1) Retain and strengthen fair dealing

Educational fair dealing is a critical part of Canada's cultural landscape. Fair dealing policies allow students to access otherwise unobtainable material. Additionally, fair dealing policies underpin distance and online learning, thereby improving access to education for all.

Any restriction of educational fair dealing would be burdensome and counterproductive. Instructors should be permitted to use content without paying twice. Many educational content users are also authors—yet, as has been repeatedly detailed, the primary beneficiaries of educational copyright restrictions before 2012 were multinational publishing groups and copyright organizations, not individual Canadian authors.[2]

As a clinic embedded within a university law faculty, CIPPIC's experience is that academics rely on material created by other academics. Thus, whatever benefits these educators might receive from restrictions on fair dealing would be offset by the attendant costs of providing material to their classes.[3] Other disciplines, and

[1] *Agreement Between the United States of America, the United Mexican States, and Canada*, 30 Nov 2018, arts 20.63, 20.67, 20.84.
[2] Canadian Association of Research Libraries *Brief*, at 2.
[3] As far as such restrictions would add to postsecondary students' already significant financial burdens, CIPPIC defers to student advocacy groups.

K-12 institutions, may not see this same overlap between creators and users—but this only highlights the futility of a blanket policy solution for copyright in Canada. Canadian educators use many forms of content in many ways, and the call to reinstate a single collective license overlooks that need for flexibility.

CIPPIC sympathizes with authors and creators, and particularly with those outside the institutional context. However, in submissions to this Committee, copyright collectives and publishing groups have made extraordinary claims about the effects of educational fair dealing, claims that are supported only by self-sponsored research and rhetoric.[4] While we recognize that authors' revenues have declined over the last several years, that decline began ***before*** the last review and cannot be easily laid at the feet of fair dealing.[5] The digital explosion has changed both the supply of, and the demand for, educational resources.[6] At the same time, enrolment in the humanities and social sciences has declined, lessening the demand for material offered through Access Copyright.[7] Retreating to pre-digital licensing models would thus burden educators, taxpayers, and students, and simultaneously fail to address the systemic problems of today's markets.

Rather than adding copyright restrictions, CIPPIC recommends strengthening fair dealing. In particular, we suggest **making the list of fair dealing purposes non-exhaustive**. The United States already follows this model, with its list of protected fair uses including "purposes **such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research".[8] Some submissions to this Committee have proposed redefining "education" in s 29 to explicitly bar classroom copying; following the US model, we would propose explicitly permitting it.

At minimum, however, CIPPIC recommends extending fair dealing to include "transformative dealings", to thereby recognize different kinds of authors, including appropriation artists and documentary filmmakers. Additionally, we recommend establishing that fair dealing rights cannot be superseded by contract, and that

[4] Michael Geist, "Inside Views: Why Fair Dealing Is Not Destroying Canada Publishing", *Intellectual Property Watch* (blog), 25 July 2017.
[5] Campus Stores Canada, *Copyright and the Evolving Learning Materials Market*, 2018.
[6] Sharon Howell & Brian O'Donell, *Digital Trends and Initiatives in Education*, 2017, Association of Canadian Publishers, , at 48-49; Michael Geist, "Misleading on Fair Dealing: The Remarkable Growth of Free and Open Materials", 30 November 2018.
[7] Simon Fraser University *Brief*, at 2-3.
[8] *Copyright Act*, 17 USC § 107 (2016), emphasis added.

contract provisions attempting to override such rights will therefore be null and void.

Further, CIPPIC recognizes that Canada is a leader in AI technologies and has the opportunity to establish itself as a dominant power in artificial intelligence research in the coming decades. Yet uncertainties over legal liability for the use of data—the raw material of AI—may jeopardize that future. To maintain Canada's advantage in this growing field,[9] we propose adding "informational analysis" as an explicit exception in the fair dealing framework.[10]

(2) Permit the circumvention of digital locks for legitimate purposes

CIPPIC recommends scaling back over-protective digital lock provisions.[11] Currently, restrictions on digital lock circumvention are nearly all-encompassing, thereby preventing even legitimate copying activities. Archivists and librarians cannot preserve locked content without breaking the law;[12] filmmakers, news reporters, and other innovative creators cannot legally access the content they need. These restrictions undermine Canadian innovation and the public domain. Furthermore, those who would infringe can easily access and use circumvention software through the Internet—almost all digital lock mechanisms are eventually broken. The locks thus do not stop those determined to break the law. Instead, they merely frustrate legitimate consumers and creators.

CIPPIC accepts that the *CUSMA* limits Parliament's options with regard to digital locks. Nevertheless, individual consumers should not risk criminal liability by converting a document to a more convenient form. We recommend that the Committee commission a study to determine how best to adopt fair and flexible circumvention standards in light of the *CUSMA*.

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[9] Japan has an AI exception; Europe is debating one; the inclusive US approach can justify fair uses for AI.
[10] As Element AI notes, "informational analysis" captures the range of techniques and uses that AI supports, better than the alternative "text and data mining".
[11] Also referred to as "technological protection mechanism" or "TPM" provisions.
[12] Canadian Council of Archives *Brief*, at 1.

(3) Bolster the Copyright Board

The Copyright Board is a critical element of Canada's copyright landscape. Conflicts between copyright law and new technologies frequently make their first appearance at Board hearings, and many law-making Supreme Court cases have their roots in Board decisions. However, the Board lacks the resources to stay ahead of technological change and is notoriously inefficient.[13] Additionally, obtaining Objector status is often challenging and community voices are therefore under-represented on significant issues. CIPPIC therefore proposes streamlining decision-making at the Copyright Board; mitigating delays; and introducing an intervention process.

(4) Retain notice-and-notice and curb notice misuse

CIPPIC recommends maintaining the current notice-and-notice regime. This balanced model protects both intellectual property rights and free expression on the Internet. Notices educate users about potential infringement, thereby providing a deterrent without requiring ISPs to censor user-generated content. Alternative measures—such as US-style "notice-and-takedown" procedures—provide meagre deterrence while arbitrarily stifling online speech.

However, the form and content of notices should be standardized. Presently, email notices may include risky file attachments or hotlinks, aggressive and misleading content, and even illegitimate settlement demands and payment instructions.[14] These abusive notices mislead consumers and give malicious actors free rein to conduct so-called "speculative invoicing", wherein frightening litigation threats are sent to users *en masse* in the hopes that some will pay exorbitant settlements to avoid being hauled into Court.

CIPPIC recommends a regulated and restricted form for notices, with the notice in plain text and in the body of an email that is easy to forward. The notices should indicate in plain language (a) the infringing content; (b) the owner of that content; and (c) when the infringement was recorded. Settlement demands should not be permitted.

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[13] *A Consultation on Options for Reform to the Copyright Board of Canada*, 9 August 2017.

[14] Michael Geist, "Why Has the Government Failed to Act on Copyright Notice-and-Notice When Internal Docs Raise Abuse and Fraud Concerns?", September 13, 2017.

Additionally, ISPs should be reimbursed for forwarding notices to their customers. As several submitters have noted, forwarding notices can be time-consuming and complex, and especially burdensome for small service providers. Ultimately, the financial burden of copyright enforcement should rest with copyright holders, not ISP customers.

(5) Reject website blocking and filtering proposals

Website blocking and censorship proposals, including the recent FairPlay proposal, are, at best, misguided. First, website blocking both ***over-censors*** and ***under-censors***. Legitimate content is often unfairly suppressed, prompting costly and unnecessary legal battles. The malicious actors responsible for illegitimate content, on the other hand, can simply switch that content to a new domain. The multi-jurisdictional nature of the Internet, moreover, means that attempting to block illegitimate content by applying naïve censor walls is costly and arduous.

Additionally, there are serious constitutional issues raised by blocking proposals, the most evident being their impact on free expression. Further, copyright-infringing content is neither the only form of malicious content on the Internet nor, arguably, the most damaging. Folding blacklist-style censorship provisions into the *Act* would give copyright holders a unique power, not afforded to victims of libel, misogyny, religious intolerance, racist vitriol, or malicious pornography.

Moreover, website blocking is not ***necessary***. The massive growth of subscription content services clearly indicates that Canadians are willing to pay for accessible, safe content. Many of these services are not Canadian, and their profits may not benefit Canadian creators. Nevertheless, by the creative industries' own report, Canadian content production and revenues have reached record highs.[15] Public policy should therefore seek to encourage these trends, rather than pumping money into censorship programs that are destined both to fail and to disrupt a digital content market that has finally begun to function.

[15] Nielsen, *Canada Mid-Year Music Report 2018*, page 2; CMPA et al, *Profile 2017-Economic Report on the Screen-Based Media Production Industry in Canada*, page 4.

Conclusion

Since the last review, drastic changes in technology and society have altered the cultural landscape of Canada. Copyright policy continues to be affected by seismic shifts, of which the *CUSMA* is only the most recent. We would ask that the Committee not try to return to a pre-digital age, whether in the context of educational fair dealing or content blocking, but to continue to seek the essential aim of *balance*.

We thank the Committee for the opportunity to make these submissions.