

March 24, 2010

VIA Email (minister.industry@ic.gc.ca and james.moore@pch.gc.ca)

The Honourable Tony Clement, P.C., M.P. Minister of Industry
5th Floor, West Tower, C.D. Howe Bldg.
235 Queen St.
Ottawa, Ontario K1A 0H5

The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage
25 Eddy St.
Gatineau, Quebec K1A 0M5

Dear Ministers Clement and Moore,

Re: Fair Is Fair – Fix Fair Dealing

Canada's 2009 copyright consultations demonstrate that Canadian copyright law's most pressing need is to adapt the fair dealing defence to better accommodate Canadians' expressive and innovative values in a digital age. We write to you as a growing collection of organizations representing creators, innovators, educators, students and consumers to ask you to address this need: the first priority of any legislation to amend the *Copyright Act* should be to transform fair dealing from an artificially narrow defence into a flexible tool that focuses on the fairness of dealings with content by downstream creators, innovators, and users.

Summary of Position

We call on the Canadian government to amend the *Copyright Act* to clarify that:

1. *any* dealing may qualify for the defence so long as it is *fair*, and
2. the enumerated categories of dealings are illustrative of potentially fair dealings, rather than exclusive categories of qualifying dealings.

Three truths counsel the wisdom of this amendment:

1. Flexible fair dealing advances copyright law's policy objectives in a digital age.
2. Flexible fair dealing advances Canadian values.
3. Flexible fair dealing is consistent with Canada's international obligations and the policies of Canada's major trading partners.

The change we seek is simple and equitable: if a dealing is fair, then it should be legal. After all, what's fair is fair.

1. Advancing Copyright's Policy Objectives in a Digital Age

The object of Canada's *Copyright Act* is to balance the promotion of the public interest in the encouragement and dissemination of works of the arts and intellect with obtaining a just reward for the creators of those works. Fair dealing is copyright's primary means of mediating conflicting interests of upstream and downstream creators, innovators, distributors and users, and fairness should be its focus. Yet fairness, under the current law, is only a subsidiary consideration to an artificial, almost arbitrary legal test of whether a dealing fits within certain privileged categories of dealings. Creators and innovators who do not fit within these categories are denied the benefits of both copyright's access provisions and its economic incentives. Documentary filmmakers and contemporary artists need to "quote" from the works of others without having to worry about fitting within an arbitrary category of dealing. Innovators designing consumer products and services need confidence that their commercial endeavours won't be targeted by rightsholders. Ordinary Canadians need the law to respect their ordinary day-to-day dealings with content: Personal Video Recorders, for example, should not violate the law. The simple and obvious means of addressing these shortcomings is to give fair dealing the flexibility to address them.

Transforming fair dealing from its present, artificially restricted form into a flexible tool focused on fairness for creators, innovators and users better advances copyright's broad policy goals than the present law. On the one hand, flexible fair dealing would remove artificial barriers to certain forms of creativity and innovation, and so promote equality among creators. On the other hand, flexible fair dealing would also remove arbitrary barriers to fair access to content, promoting innovation among consumer service and device providers by facilitating fair time, space and format-shifting practices. Limiting such access to *fair* practices addresses creators' need to limit the scope and reach of general-purpose access rights.

Flexible fair dealing will also permit copyright law to better accommodate the pace and unpredictability of technological innovation. Creators, innovators and users undertaking a flexible fair dealing analysis need not worry about the fiction of how Parliament intended a category of dealing to apply to a dealing involving a technology that did not even exist the last time the Act was amended. A flexible approach to fair dealing that defines lawful conduct based on the character of the conduct.

2. Advancing Canadian Values

Flexible fair dealing is also consistent with Canadian values, in at least two ways. First, flexible fair dealing puts the focus on the *fairness* of conduct. What could be more just than asking the law to make fair conduct lawful? Those who oppose recognition of flexible fair dealing in Canadian law demand something remarkable: a law that makes certain fair conduct illegal. Such a law is neither fair nor just.

Flexible fair dealing also resonates with Canadian values in a second way: flexible fair dealing is consistent with the fundamental values of freedom of expression embodied in our Constitution. Flexible fair dealing recognizes that legitimate and fair forms of speech are not confined to purposes of new reporting, critique, review, research, and personal

study. Intellectual property has become an integral part of our culture and society. Limiting fair dealing to these categories impedes the ability of users to effectively express beliefs and ideas that are central and essential to Canadian culture.

Finally, it deserves to be emphasized that flexible fair dealing will remain a Canadian solution to the conflicts inherent to copyright law. Flexible fair dealing does not simply jettison Canadian law in favour of the American standard of fair use, as some misleadingly claim. Instead, it is an incremental change to Canada's existing fair dealing standard. Under the present law, consideration of the fairness of any contested dealing is a fundamental element of fair dealing analysis. A flexible fair dealing standard would simply keep the focus of this analysis on the extent to which a dealing's purpose is fair. The jurisprudence Canada has built up under the present defense would continue to be relevant to any inquiry under a flexible fair dealing standard.

3. *International Law and Trade Considerations*

Flexible fair dealing is also consistent with Canada's international treaty and trade obligations. Opponents of flexible fair dealing suggest the contrary. This suggestion is remarkable given that the fair use defense in American copyright law eschews the rigid, categorical approach in favour of flexibility, and the United States is a party to these same treaty and trade instruments. Moreover, the trend among Canada's trade and treaty partners around the world is to question the continuing suitability of categorical approaches to defenses to copyright infringement. The United Kingdom, Australia and New Zealand in recent years have all openly contemplated jettisoning categorical approaches to fair dealing. Other nations, including Israel and Singapore, have enacted flexible fair use provisions, recognizing the trade advantages flexibility offers their creator, innovator and user communities.

Conclusion

We ask that you amend fair dealing to embrace Canadian values of fairness so that fair dealing applies to all dealings that are fair. No single change to Canada's *Copyright Act* could do more to address its long-recognized short-comings in a technologically neutral way. The change we ask for is simple and equitable: what's fair is fair, and should also be legal.

Sincerely,

Alliance for Equality of Blind Canadians

Appropriation Art Coalition

Association pour l'avancement des sciences et des techniques de la documentation (ASTED)

Athabasca University

BattleGoat Studios

British Columbia Freedom of Information and Privacy Association (BCFIPA)

Canadian Alliance of Student Associations (CASA)

Canadian Association of Law Libraries / Association canadienne des bibliothèques de droit
Canadian Association of Media Education Organizations (CAMEO)
Canadian Association of University Teachers (CAUT)
Canadian Coalition for Electronic Rights (CCER)
Canadian Federation for the Humanities and Social Sciences (CFHSS)
Canadian Federation of Students (CFS)
Canadian Library Association (CLA)
Canadian Museums Association (CMA)
Documentary Organization of Canada (DOC)
Distributed Proofreaders of Canada (DPC)
Independent Media Arts Alliance (IMAA)/Alliance des arts médiatiques indépendants (AAMI)
Manitoba Association for Media Literacy (MAML)
Media Awareness Network (MNet)
Project Gutenberg Canada
Public Interest Advocacy Centre (PIAC)
Public Knowledge Project (PKP)
Reddington Communications
The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)
The New Gallery
University of Manitoba