

SUBMISSIONS TO: Government of Canada Copyright Consultation

**RE: Balanced, democratic copyright reform:  
ensuring an expressive, equal and privacy-  
respecting society**

FROM: Canadian Civil Liberties Association  
360 Bloor St. W., Suite 506  
Toronto, ON  
M5S 1X1  
Tel: (416) 363-0321  
Fax: (416) 861-1291

Per: Nathalie Des Rosiers, General Counsel  
Abby Dushman, Acting Project Director

Toronto, Ontario

September 10, 2009

Founded in 1964, the Canadian Civil Liberties Association (“CCLA”) is a national organization dedicated to the protection of civil liberties in Canada. The CCLA is supported by several thousand individual members across Canada, representing a wide variety of persons, occupations, and interests. The CCLA’s principal mandate is to promote and protect fundamental rights and liberties. In keeping with its ongoing commitment to the protection of civil liberties, the CCLA is concerned about the maintenance of a society that provides adequate space for individuals to express their thoughts, beliefs and opinions as well as receive expressions and information from others.

Copyright is at the heart of information exchange and expressive freedom in the private domain. As expressed by the Supreme Court of Canada, “the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of art and intellect and obtaining a just reward for the creator.”<sup>1</sup> In a market-based democracy, ensuring fair compensation for creative and intellectual works is essential to ensuring the continued viability of these careers. At the same time, the public’s ability to access, reshape and respond to intellectual creations is integral to education, debate, criticism, discussion, self-fulfillment and creativity. The critical nature of the public interest in producing, accessing, and responding to creative and intellectual works is underscored by the importance our society places on freedom of expression, which is enshrined within the *Canadian Charter* as one of our most fundamental rights.

### **1. Ensuring an expressive society: Meaningful and flexible protection for fair dealing user rights**

In its current form, the *Copyright Act* (the “Act”) recognizes some critical user rights that allow individuals and institutions to access, reproduce and distribute otherwise copyrighted work. The ‘fair dealing’ exemptions found under s. 29 of the *Act* state that using works for research or private study do not violate copyright, and neither does criticism, review or news reporting so long as the work is properly cited. There are also additional exemptions for educational institutions,<sup>2</sup> libraries, archives and museums.<sup>3</sup> These fair dealing rights are critical to maintaining a healthy balance between an author’s interests in compensation, and the public interest in maintaining an open, expressive and informed society. In order to maintain the delicate balance between expressive freedom and author compensation, **any future amendments to the *Copyright Act* should fully respect user rights, and recognition of these rights should be incorporated into all aspects of copyright protection.**

The Canadian Civil Liberties Association is also concerned that, under the current legislation, the ‘fair dealing’ categories have been interpreted as fixed and exhaustive, preventing a flexible and meaningful balancing that can take into account a rapidly changing field. In order to make ‘fair dealing’ more flexible and responsive to the purposes of the legislation, **the CCLA joins with others in calling for the addition of**

---

<sup>1</sup> *CCH v. Law Society of Upper Canada* [2004] 1 SCR 339 at 23.

<sup>2</sup> *Copyright Act* R.S., 1985, c. C-42, ss. 29.4-30.

<sup>3</sup> *Copyright Act* R.S., 1985, c. C-42, ss. 30.1-30.5.

**the words “such as,” to make the current list of fair dealing purposes suggestive rather than exhaustive.**

The CCLA is also concerned that the existing exemptions may not be expansive enough to allow for criticism in the form of parody and satire. Canada should celebrate intelligent, creative forms of social critique and commentary. Although Canadian courts have shown some willingness to consider parody as falling within the fair dealing category of criticism.<sup>4</sup> The current fair dealing provisions, however, requires critiques to cite the source and name of the author, performer or broadcaster. Because of the nature of parody and satire, however, full source citation should not be a requirement of fair use. In addition to amending the ‘fair dealing’ provision as suggested above, **parliament should also explicitly include parody and satire as examples of ‘fair dealing’.**

Finally, the CCLA urges the government to reconsider their treatment of Crown copyright. Canadians fund the production of government works, and they are presumably created in furtherance of the public interest. Public knowledge of the government’s research, decisions, studies and history greatly enhances government transparency and democracy. While the Canadian government may have a legitimate interest in ensuring its works are not wholly appropriated for profit without consent or acknowledgement, government-produced materials should not be treated in the same manner as private creative works. **Crown copyright should be abolished, or, in the alternative, the vast majority of usages should be exempted under a greatly expanded, specific ‘fair dealing’ provision.**

## **2. Ensuring an equal society: Copyright reforms should contemplate the needs of marginalized groups**

The right to equality, and equal treatment in Canadian society, is a fundamental right that is enshrined in the *Charter* and protected in the private sphere through Canada’s human rights legislation. Laws that do not sufficiently take into account the full diversity of Canadian society can often have unintended discriminatory effects on individuals based on sex, religion, disability, and a host of other factors. As a mature democracy, Canada should be proactive in examining the impact new legislation will have on diverse groups within our society.

During the last round of copyright reform, however, some organizations argued that the proposed changes did not adequately take into account the needs of those with perceptual

---

<sup>4</sup> *Productions Avanti Ciné-Vidéo Inc. c. Favreau* (1999), 1 C.P.R. (4th) 129. Note, however, that similar recognition has not been extended within claims based on trademark infringement. See, eg., *Source Perrier S.A. v. Fira-Less Marketing Co.*, [1983] 2 F.C. 18 (Fed. T.D.); *Cie général des établissements Michelin – Michelin & Cie. v. C.A.W. – Canada*, [1997] 2 F.C. 306.

disabilities.<sup>5</sup> Marginalized groups should not be forced to launch lawsuits in order to achieve equal standing under Canadian law. **Canada should proactively incorporate realistic and reasonable accommodations for affected groups into all legislative reforms.**

### **3. Respecting Canadians' privacy: Copyright reforms must fully comply with existing privacy law**

The history of copyright reform in Canada also leads CCLA to have concerns over the privacy implications of potential reforms. In January 2008, the Privacy Commissioner of Canada identified a number of serious privacy concerns regarding the then-suggested amendments to the *Copyright Act*.<sup>6</sup> These included the allowance of digital rights management technologies that could potentially collect a very wide swath of data about content users and covertly transmit this information back to the copyright holder or content provider. There were also serious concerns regarding the Internet Service Providers being required to monitor and retain customer data for extended periods of time. **All amendments to Canada's copyright laws must be protective of Canadians' privacy rights and fully comply with existing Canadian privacy law.**

---

<sup>5</sup> Canadian Library Association, "Briefing Note on Bill C-61, Unlocking the Public Interest" (September 2008) online:

<http://www.cla.ca/copyright/Unlocking%20the%20public%20interest-Final.pdf>.

<sup>6</sup> Letter from Jennifer Stoddart, Privacy Commissioner of Canada, to the Honourable Jim Prentice, Minister of Industry and the Honourable Josée Verner, Minister of Canadian Heritage (January 18, 2009) online: [http://www.priv.gc.ca/parl/2008/let\\_080118\\_e.cfm](http://www.priv.gc.ca/parl/2008/let_080118_e.cfm).