May 15, 2018

Hon. Dan Ruimy, MP
Chair, Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Dear Mr. Ruimy:

My name is Ryan Merkley, and I'm the CEO of Creative Commons. Thank you for the opportunity to provide input on the review of the Copyright Act.

Creative Commons (CC) is a global nonprofit organisation established in 2001.[1] We create, maintain, and promote open copyright licenses allowing creators to freely share their creative works under simple, standardized terms that fit their creation model, although all CC licences require that the author receive attribution.[2] CC licenses have been applied to over 1.4 billion copyrighted works around the world on over 9 million websites, and are relied on by major platforms including information sites like Wikipedia and ProPublica, and user-generated content sites like Flickr, YouTube, and SoundCloud.[3]

In addition to our licenses and tools, CC is a leading organization supporting the global movement for sharing and collaboration of creativity and knowledge. We do this by supporting collaborative communities in open data, open access to research, and open education, and by advocating for copyright regulation that enables creativity and knowledge to flourish.

We know that Canadian copyright law is a carefully crafted regime, and is well positioned to balance the needs of authors and creators with the public's right to access and use copyrighted works.

Below I offer a few thoughts and suggestions as the Committee continues its investigation into potential changes to the Copyright Act. First, the Canadian copyright term should stay where it is; there is no reason to consider any further extension of copyright. Second, Canada should protect and strengthen limitations and exceptions to copyright, as these important measures ensure balance in our legal framework. Third, Canada should maintain and improve its existing safe harbour protections with regard to intermediary liability and copyright. A healthy commons requires a healthy ecosystem of platforms and infrastructure for sharing. Finally, Canada should continue to support policy efforts to ensure open access to publicly funded resources, including clarifying that we have a right to use and re-use works produced by our government.

[1] https://creativecommons.org/
[2] https://creativecommons.org/licenses/
[3] https://stateof.creativecommons.org/

No increase in copyright term

First, we believe that Canada has been right to push back against any extension of copyright term or expansion of the scope. The copyright term of life of the author + 50 years is already far too long. Extremely long copyright terms prevent works from entering the public domain, where they may be used by anyone — including CC licensors — without restriction as the raw material for additional creative works.

Any extra investment incentive created by term extension, in other words, is far outweighed by the harm to creativity by foregoing the work's addition to the rich store of public domain materials which inspire and help drive creativity forward. Copyright term is a balance, and extending that term does not, on balance, incentivize new creativity. It restricts access and leaves Canadians out in the cold because they can't use this creativity locked up under copyright.

Ian Fleming's literary character James Bond, for example, entered the public domain in Canada on January 1, 2015. This allowed Canadian authors David Nickle and Madeline Ashby to produce *License Expired*, an anthology of unauthorized 007 stories for ChiZine Publications.[4] The end of copyright protection in a work allows for the production of new works. That is why term length is a balance to be struck — and one which Canada has handled well.

The Committee should not reopen the term discussion under the Copyright Act.

Support and expand users rights

Second, Canada should protect and strengthen limitations and exceptions to copyright. Creative Commons licenses are a valid and widespread way for creators to share their works on more open terms than the default "all rights reserved." But we know that not everything will ever, or ought to, be under a CC license.[5] Creators everywhere need to be able to leverage both open licenses, and also be confident they can exercise their legal rights to use and incorporate copyrighted works under limitations and exceptions.

In fact, this happens all the time within education: teachers regularly rely on fair dealing and educational exceptions, and also use CC licensed materials in their classroom instruction, or in online teaching and learning. Both open licensing and strong user rights regimes are crucial to ensuring access to information, but also encouraging educational activities, creative remix, and promoting innovation.

Limitations and exceptions ensure that copyright law fulfills its ultimate purpose of promoting essential aspects of the public interest.

[4] https://davidnickle.blogspot.co.uk/2015/01/licence-expired-unauthorized-james-bond.html
[5] https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/reform/

The review should shore up the rights available to teachers and learners under the existing fair dealing and limitations and exceptions system. Technological protection measures (TPMs) can make it difficult or impossible for users to take advantage of their rights in the digital age. For example, teachers and students can exercise their rights by legally photocopying a reasonable portion of a physical book, but they can effectively lose those rights if the work is an e-book wrapped in TPMs because these digital locks eliminate the ability to copy and paste portions of the text.

TPMs — as well as private contracts — must not restrict users' ability to exercise their legal rights to access and re-use works under limitations and exceptions to copyright.

Another aspect of improving user rights in copyright limitations and exceptions is around research, especially the ability for anyone to conduct text and data mining, and for unlimited purposes, always in harmony with applicable privacy laws. While text and data mining is a research activity that is clearly considered a fair use in the United States, Canada doesn't have such a clear rule.

Considering the massive potential for novel research discoveries, advancement in artificial intelligence and machine learning, and Canadian innovation, the Copyright Act should clarify that "the right to read is the right to mine."[6] It should ensure that these non-expressive / non-consumptive uses (like text and data mining) are included under the fair dealing framework, or otherwise explicitly covered within the Canadian system of limitations and exceptions.[7]

Maintain and improve safe harbours

Third, Canada should maintain and improve its existing safe harbour protections with regard to intermediary liability and copyright. Canada's current system says that online service providers are exempt from liability when they act strictly as intermediaries in communication, caching, and hosting activities. This rule works, and should continue, along with the "notice and notice" procedure regarding alleged copyright infringements.

Regarding "notice and notice," we applaud the inclusion, in the Government of Canada's Intellectual Property Strategy, of a commitment to make it explicit that notices that include threatening demands to make settlement payments do not comply with the regime.[8] We encourage you to consider taking further steps to strengthen this system, which has been shown to deter copyright infringement, through administrative improvements that avoid

[6] https://blog.okfn.org/2012/06/01/the-right-to-read-is-the-right-to-mine/
[7] http://www.michaelgeist.ca/2017/05/copyright-law-poses-barrier-canadas-artificial-intelligence-ambitions/
[8] http://www.cbc.ca/news/canada/ottawa/notice-and-notice-system-internet-copyright-enforcement-settlement-1.3823986

expensive court proceedings to decide on the rules of the road. One such improvement would be to require bulk claimants with no-cost access to the system to use standardized formats reasonably required by the online service provider. Another would be to create a due-diligence defence for online service providers who have built complex systems to process such notices.

More broadly, a healthy commons requires a healthy ecosystem of platforms and infrastructure for sharing. Weakening the rules around safe harbours would be detrimental to the commons.

CC licensors rely on the availability of large and small online platforms on the open web to share and distribute their works. Hundreds of platforms share over a billion CC licensed works online. The works are downloaded and reused millions of times a day, creating an expansive digital commons of works that anyone can view, use, and enjoy. For example, Flickr shares 381 million photos, YouTube 30 million videos, Wikimedia Commons 29 million media files, Thingiverse 1.6 million digital designs, and Medium 257,000 stories, all licensed under Creative Commons for creative reuse.

These and other platforms require protection against intermediary liability in order to ensure ongoing access to CC-licensed, public domain, and other openly licensed creative works.

The safe harbours that keep these sites up and running should be maintained and strengthened in order to ensure access to information and knowledge, promote creative collaboration, and champion new business models and opportunities. The Manila Principles of Intermediary Liability, which have been signed on to or cited by a broad range of organizations, provide an important touchstone in considering policy proposals that relate to safe harbours.[9]

Open access to government funded education, research, data

The sharing of works under Creative Commons licenses is a legitimate exercise of copyright, and should be the norm for all publicly-funded resources. The public deserves free and open access to the research, educational materials, government-collected data, and cultural works developed with our tax dollars.[10]

Canadian provincial governments are already investing millions in the development of openly-licensed digital textbooks, resulting in massive cost savings when compared to traditional commercial publishing methods, all while providing a product that is just as good—or even better — quality.[11] With an open license, all of these resources can be legally reused, updated, and customized to meeting the needs of teachers and students.

[9] https://www.manilaprinciples.org

[10] http://www.slaw.ca/2018/03/09/let-canada-be-first-to-turn-an-open-access-research-policy-into-a-legal-right-to-know/

[11] https://open.bccampus.ca/open-textbook-stats/

Related to improving public access to publicly funded materials, I urge the Committee to seriously consider reforms to Canada's Crown Copyright regime.[12] Canadians have a right to use and re-use works produced by their government, many of which could — as they already do in the United States — act as basic infrastructure for new and small businesses. Removing copyright protection from government works shared with the public will allow individuals, corporations, and other organizations to make better use of these important resources. It could do this by placing the materials into the public domain at the time of publishing.

Again, thank you to the Committee for the opportunity to provide feedback on the review of the Copyright Act. I'm happy to answer any questions you may have.

Sincerely,

Ryan Merkley
CEO, Creative Commons

[12] https://sites.google.com/a/ualberta.ca/wakaruk/fixcrowncopyright