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Chair

Mr. Dan Ruimy

Standing Committee on Industry, Science and Technology

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● (1620)

[*English*]

The Chair (Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.)): Welcome, everybody. We're going to get started, because we are almost an hour behind—which happens in the House.

Welcome, everybody, as we continue our five-year statutory review of the Copyright Act.

Today we have with us, from the Copyright Board, Nathalie Théberge, vice-chair and chief executive officer; Gilles McDougall, secretary general; and Sylvain Audet, general counsel.

From the Department of Canadian Heritage, we have Kahlil Cappuccino, director of copyright policy in the creative marketplace and innovation branch. We also have Pierre-Marc Lauzon, policy analyst, copyright policy, creative marketplace and innovation branch.

And finally, from the Department of Industry, we have Mark Schaan, director general, marketplace framework policy branch; and Martin Simard, director, copyright and trademark policy directorate.

As we discussed on Monday, the witnesses will have their regular seven-minute introduction. We do have a second panel, so each party will get that initial seven minutes of questions and then we'll suspend. We'll bring in the second round, and we'll do the same thing all over again. We'll finish when we finish, so that will be good.

We're going to get started right away with the Copyright Board.

Ms. Théberge, go ahead.

[*Translation*]

You have seven minutes.

Ms. Nathalie Théberge (Vice-Chair and Chief Executive Officer, Copyright Board): Mr. Chair and distinguished members of this committee, thank you.

My name is Nathalie Théberge. I am the new vice-chair and CEO of the Copyright Board, as of October. I will be speaking today as CEO.

As you said, Gilles McDougall, secretary general, and Sylvain Audet, general counsel, both from the board, are with me today. I would like to thank the committee for giving us the opportunity to speak on the parliamentary review of the Copyright Act.

First, I'd like to provide a reminder: The Copyright Board of Canada is an independent, quasi-judicial tribunal created under the Copyright Act. The board's role is to establish the royalties to be paid for the use of works and other subject matters protected by copyright, when the administration of these rights is entrusted to a collective society. The direct value of royalties set by the board's decisions is estimated to almost $500 million annually.

The board sits at the higher end of the independent spectrum for administrative tribunals. Its mandate is to set fair and equitable tariffs in an unbiased, impartial and unimpeded fashion. This is not an easy task, especially as information required to support the work of the board is not easily acquired. The board is on the onset of a major reform following the introduction of changes to the Copyright Act imbedded in the Budget Implementation Act, Bill C-86.

If I may, I would like to state how committed the board is towards implementing the reform proposals. Of course, the impact of these proposals will take some time to assess as there will be a transition period during which all players involved, including the board and the parties that appear before it, will need to adapt and change their practices, behaviours and, to some extent, their organizational culture.

This transition period is to be expected due to the ambitious scope of the reform proposals, but we believe that the entire Canadian intellectual property ecosystem will benefit from a more efficient pricing system under the guidance of the Copyright Board.

However, reforming the board is not a panacea for all woes affecting the ability for creators to get fairly compensated for their work and for users to have access to these works. As such, the board welcomes the opportunity to put forward a few *pistes de réflexion* to the committee, hoping its experience in the actual operationalization of many provisions of the Copyright Act may be useful.

Today, we would like to suggest three themes the committee may want to consider. We were very careful as to choose only issues of direct implication for the board's mandate and operations, as defined in the Copyright Act and amended through the Budget Implementation Act 2018, No. 2, currently under review by Parliament.

● (1625)

[*English*]

The first theme relates to transparency. Committee members who are familiar with the board know that our ability to render decisions that are fair and equitable and that reflect the public interest depends on our ability to understand and consider the broader marketplace. For that, you need information, including on whether other agreements covering similar uses of copyrighted material exist in a given market. This is a little bit like real estate, where to properly establish the selling price of a property you need to consider comparables, namely, the value of similar properties in the same neighbourhood, the rate of the market, etc.

Currently, filing of agreements with the board is not mandatory, which often leaves the board having to rely on an incomplete portrait of the market. We believe that the Copyright Act should provide a meaningful incentive for parties to file agreements between collectives and users. Some may argue that the board already has the authority to request from parties that they provide the board with relevant agreements. We think that legislative guidance would avoid the board having to exert pressure via subpoena to gain access to those agreements, which in turn can contribute to delays that we all want to avoid.

More broadly, we encourage the committee to consider in its report how to increase the overall transparency within the copyright ecosystem in Canada. As part of the reform, we will do our part at the board by adding to our own processes steps and practices that incentivize better sharing of information among parties and facilitate the participation of the public.

The second theme relates to access. We encourage the committee to include in its report a recommendation for a complete scrub of the act, since the last time it was done was in 1985. Successive reforms and modifications have resulted in a legislative text that is not only hard to understand but that at times appears to bear some incoherencies. In a world where creators increasingly have to manage their rights themselves, it is important that our legislative tools be written in a manner that facilitates comprehension. As such, we offer as an inspiration the Australian copyright act.

We further encourage the committee to consider modifying the publication requirements in the orphan works regime. Currently, where the owner of copyright cannot be located, the board cannot issue licences in relation to certain works, such as works that are solely available online or deposited in a museum. We believe the act should be amended to permit the board to issue a licence in those cases, with safeguards.

Finally, our third theme relates to efficiency. The board reform as proposed in Bill C-86 would go a long way in making the tariff-setting process in Canada more efficient and predictable and ultimately a better use of public resources. I believe the committee has heard the same message from various experts.

We recommend two other possible means to achieve these objectives.

First, we encourage the committee to consider changing the act to grant the board the power to issue interim decisions on its motion. Currently, the board can only do so on application from a party. This power would provide the board with an additional tool to influence the pace and dynamics of tariff-setting proceedings.

● (1630)

[*Translation*]

Second, we encourage the committee to explore whether the act should be modified to clarify the binding nature of board tariffs and licences. This proposal follows a relatively recent decision of the Supreme Court of Canada where the court made a statement to the effect that when the board sets royalties within licences in individual cases—the arbitration regime—such licences did not have a mandatory binding effect against users in certain circumstances. Some commentators have also expressed different views on how that statement would be applicable to the tariff context before the board.

We are aware that this is a controversial issue, but would still invite you to study it if only because parties and the board spend time, efforts and resources in seeking a decision from the board.

On that happy note, we congratulate each member of the committee for the work accomplished thus far, and thank you for your attention.

The Chair: Thank you.

[*English*]

We're going to move directly to the Department of Canadian Heritage.

Mr. Cappuccino, you have up to seven minutes.

Mr. Kahlil Cappuccino (Director, Copyright Policy, Creative Marketplace and Innovation Branch, Department of Canadian Heritage): It's actually Mark Schaan who will start.

The Chair: Okay. We're going to go to the Department of Industry.

Mr. Schaan, you have up to seven minutes.

[*Translation*]

Mr. Mark Schaan (Director General, Marketplace Framework Policy Branch, Department of Industry): The Department of Innovation, Science and Economic Development Canada will share the time available with the Department of Canadian Heritage.

Thank you very much, Mr. Chair.

Good afternoon, distinguished members of the committee.

It is a pleasure for me to be before you again to discuss copyright. My name is Mark Schaan. I am the director general of the Marketplace Framework Policy Branch at Innovation, Science and Economic Development Canada.

I am accompanied by Martin Simard, who is the director of the Copyright and Trademarks Policy Directorate in my branch.

We are here with our Canadian Heritage colleagues, Kahlil Cappuccino and Pierre-Marc Lauzon, to update the committee on two recent developments that relate to your review of the Copyright Act.

First, we will speak about the Canada-United States-Mexico Agreement and the obligations the agreement contains regarding copyright.

Second, we will highlight the comprehensive actions taken by the government to modernize the Copyright Board of Canada, including the legislative proposals contained in Bill C-86, the Budget Implementation Act 2018, No. 2, which were generally noted as forthcoming in the first letter to your committee on the review and then again more specifically in Minister Bains and Minister Rodriguez's recent letter to you.

[*English*]

On November 30, Canada, the United States and Mexico signed a new trade agreement that preserves key elements of the North American trading relationship and incorporates new and updated provisions to address modern trade issues. Particularly germane to your review of the Copyright Act, the new agreement updates the intellectual property chapter and includes shared commitments specific to copyright and related rights, which will allow Canada to maintain many of the important features in our copyright system with some new obligations as well. As a result, the modernized agreement requires Canada to change its legal and policy framework with respect to copyright in some limited areas, including the following.

[*Translation*]

First, the agreement requires parties to provide a period of copyright protection of life of the author plus 70 years for works of authorship, a shift from Canada's current term of life of the author plus 50 years. The extension to life plus 70 is consistent with the approach in the United States, Europe and other key trading partners, including Japan. It will also benefit creators and cultural industries by giving them a longer period to monetize their works and investments.

That said, we are aware that term extension also brings challenges, as stated by several witnesses during your review. Canada negotiated a two-and-a-half-year transition period that will commence on the agreement entering into force, which will ensure that this change is implemented thoughtfully, in consultation with stakeholders, and with the full knowledge of the results of your review.

[*English*]

The provisions on rights management information will also require Canada to add criminal remedies for altering and removing a copyright owner's rights management information to what it already provides in respect of civil rights management information. In addition, there is an obligation to provide full national treatment to copyright owners from each of the other signatories.

● (1635)

[*Translation*]

The agreement includes important flexibilities that will allow Canada to maintain its current regime for technological protection measures and Internet service providers' liability, such as Canada's notice and notice regime. The government has stated it intends to implement the agreement in a fair and balanced manner, with an eye towards continued competitiveness of the Canadian marketplace.

Moving now to the Copyright Board of Canada. My colleague Kahlil Cappuccino, director of Copyright Policy in the Creative Marketplace and Innovation Branch at Canadian Heritage, will now provide you with an overview of recent measures to modernize the Copyright Board.

[*English*]

Mr. Kahlil Cappuccino: Thanks very much, Mark.

Mr. Chair and distinguished members of the committee, as the ministers of ISED and PCH committed to in their first letter to your committee in December 2017, and pursuant to public consultations and previous studies by committees of both the House of Commons and the Senate, the government has taken comprehensive action to modernize the board.

First, budget 2018 increased by 30% the annual financial resources of the board. Second, the government appointed a new vice-chair and CEO of the board, Madame Nathalie Théberge, who is sitting with us, as well as appointing three additional members of the board. With these new appointments and additional funding, the Copyright Board is on its way and ready for modernization. Third, Bill C-86, which is now before the Senate, proposes legislative changes to the Copyright Act to modernize the framework in which the board operates.

[*Translation*]

As numerous witnesses stated to you as part of your review, more efficient and timely decision-making processes at the Copyright Board are a priority. The proposed amendments in the bill seek to revitalize the board and empower it to play its instrumental role in today's modern economy.

It would do this by introducing more predictability and clarity in board processes, codifying the board's mandate, setting clear criteria for decision-making and empowering case management. To tackle the delays directly, the proposed amendments would require tariff proposals to be filed earlier and be effective longer, and a proposed new regulatory power would enable the Governor-in-Council to establish decision-making deadlines. Finally, the proposed amendments would allow direct negotiation between more collectives and users, ensuring that the board is only adjudicating matters when needed, thus freeing resources for more complex and contested proceedings.

These reforms would eliminate barriers for businesses and services wishing to innovate or enter the Canadian market. They would also better position Canadian creators and cultural entrepreneurs to succeed so they can continue producing high-quality Canadian content. Overall, these measures would ensure that the board has the tools it needs to facilitate collective management and support a creative marketplace that is both fair and functional.

[*English*]

However, the changes do not address broad concerns that have been raised around the applicability and enforceability of board-set rates. Certain stakeholders asked that the government clarify when users have to pay rates set by the board and provide stronger tools for enforcement when those rates are not paid. The ministers felt that these important issues were more appropriately considered as part of the review of the Copyright Act, with the benefit of the in-depth analysis being undertaken by this committee and the Standing Committee on Canadian Heritage.

We look forward to recommendations that will help foster sustainability across all creative sectors, including the educational publishing industry.

At this point, I'd like to hand things back over to Mark to conclude.

[*Translation*]

Mr. Mark Schaan: Thank you, Mr. Cappuccino.

Allow me to also mention that, as committed in the government's intellectual property strategy, Bill C-86 proposes a change to the notice and notice provisions of the Copyright Act to protect consumers while ensuring that the notice and notice regime remains effective in discouraging infringement.

The proposed amendments would clarify that notices that include settlement offers or payment demands do not comply with the regime. This was an important shift, given the consensus of all parties in the copyright system, and the continued fear of consumer harm in the face of the continued use of settlement demands.

● (1640)

[*English*]

In closing, we would like to applaud the committee for the thorough review of the Copyright Act that you've conducted so far. We've particularly noted members' efforts to raise issues related to indigenous traditional knowledge throughout the exercise. Such probing and open consultations are invaluable to the development of strong public policy.

We would be pleased to answer your questions.

Thank you.

The Chair: Thank you all very much for your presentations.

We're going to move directly into questions, starting with Mr. Longfield.

You have seven minutes.

Mr. Lloyd Longfield (Guelph, Lib.): Thank you, Mr. Chair.

Thank you all for being here. It's good timing when we're trying to pull it all together.

Particularly, Mr. Schaan, I was pleased to see that you were on the witness list, and I want to start with you.

We're talking about a market, and how the market efficiency doesn't work for creators and how it works for other people. When we talk about the market itself, transparency seems to be an issue. I'm trying to picture a flow chart in my head that goes from creator through the Copyright Board, Access Copyright and all the holders.

Do you have that type of a flow chart in your department?

Mr. Mark Schaan: There certainly exists a flow chart about how board-set rates and other aspects of copyright are adjudicated. When there's a public role in those, it can get quite complicated, in terms of the mechanical right, the reproduction right, the performance right and other sorts of rights. It does exist, in some regard, of how that all flows through.

There is also a significant amount of copyright that's negotiated directly between those who own the rights and those who seek to utilize or draw upon those rights. In many cases, that information is proprietary and held within.

Is it possible to understand, for instance, on a board-set rate, how a musician or a photographer or a choreographer may be remunerated for their work? The answer is yes.

In the case where it's potentially engaging with a third party in terms of the distribution within a given contract—what an artist makes from Spotify or from any of the other platforms—that's more complicated, because much of that is proprietary and is a function of the marketplace in terms of how they negotiate those rates.

Mr. Lloyd Longfield: Thank you.

In terms of our report, maybe you've just answered part of the question, which is that we can't get some of that information. We've been trying to get it, as a committee, to find out where the money is being made and where it's not being made at each stage of the process. Maybe we could have that as a recommendation, that it be developed, so people in the marketplace know where they sit in the marketplace and how it works.

Mr. Mark Schaan: There have definitely been significant efforts on the part of my colleagues at Canadian Heritage to try to ensure that creators at least understand where there are value gains to be made from their creative works.

I won't speak for my colleagues at Canadian Heritage, but I think part of it is also, as I said, the significant variation within the marketplace. In a board-set rate, everyone is compensated equally based on use, but in many other, proprietary cases.... A rock star doesn't necessarily make what someone with a YouTube channel makes, and might be compensated differently.

Mr. Lloyd Longfield: And we have different markets. We're focusing a little bit on the heritage markets—I'm seeing nodding of heads on that—but we also have the educational markets. We have similar streams, similar points of contact within the Copyright Act, but there are also divergent areas where they don't work in the same way.

Mr. Mark Schaan: It's also where you have a huge variety of content. You raised the subject of education. In the educational context, you have digital licences, potentially, that allow people access on a per-user basis or sometimes on a per-use basis, on a transactional basis that amounts to a certain amount of compensable copyrighted material. You then potentially have other subscription services, and you have a tariff licence that exists in both cases, which covers other uses.

In all of these cases, you'd have to amass...to know what is all the potential *n* or openness of content, and then the various mechanisms they're using to draw on that. I think what you probably found in the course of your study, and what we often find, is that the ubiquity of copyrighted content means we're accessing it in dozens of ways through dozens of providers, and each one of those has a remuneration stream that may or may not be governed by a tariff or a contract or a subscription fee, and it may be per use, per year.

● (1645)

Mr. Lloyd Longfield: Yes, or it may be per stream that gets created, so we don't know what's going to be the next stream of creation.

Mr. Mark Schaan: And then it's divvied up within that by who contributed to it.

Mr. Lloyd Longfield: Yes, okay.

Mr. Mark Schaan: Even in the case of a musical work, you're looking at who the background artists are, who the songwriter was, and the producer.

Mr. Lloyd Longfield: Thank you.

I'm sorry I'm cutting you short—

Mr. Mark Schaan: No, no.

Mr. Lloyd Longfield: —but it is a complex landscape.

Ms. Théberge, it's great to have you here. It's great to have you on the board and to see the changes on the board. I've heard some positive feedback already from some of the witnesses we've had.

Among the jurisdictions of the world, Australia was mentioned, but also France. The collective rights administration in France involves a significant amount of government oversight, maybe more than what we have here, to look at the behaviour and internal management of copyright collectives.

Is your board engaged in or looking at the tariff-setting power and the scrutiny and oversight of copyright collectives in a new way? We've heard a lot from collectives and how they're managed. It seems that there's.... On the record, I guess I'll watch how far I go with that comment, but it was very hard for me to understand how the collectives work, how they're managed and what role the Copyright Board could play in helping us to understand that situation.

Ms. Nathalie Théberge: I'll invite my colleagues to jump in if they have something to say.

We don't oversee copyright collectives. They come to the board as a party, as part of the process, just as other user organizations are part of the processes that are arbitrated by award. If ever there was an appetite to think from a policy perspective about how collective management in Canada should behave, what it should look like, it would be more of a policy question under the responsibility of the two lead departments.

Mr. Lloyd Longfield: Which departments?

Ms. Nathalie Théberge: It would be Canadian Heritage and ISED.

Mr. Lloyd Longfield: I just wanted to get that on the record.

We see how even in our study, both the heritage committee and us, trying to understand how we both get information and put it together has been a challenge, but a creative one.

Ms. Nathalie Théberge: I would just add that where we can have an influence is in the overseeing or monitoring and management of the process once it's before the board. One of the things we will be doing in the following months is trying to instill more discipline—on ourselves, certainly, but also among parties, because it takes two to tango. In this case it takes three to tango, and if you want a fully efficient process before the Copyright Board, everybody has to play nice; everybody has to show discipline from the get-go.

Mr. Lloyd Longfield: Right.

Thank you very much.

The Chair: That would be called line dancing.

Mr. Albas, you have seven minutes.

Mr. Dan Albas (Central Okanagan—Similkameen—Nicola, CPC): Thank you, Mr. Chair.

I'd like to start with the Copyright Board.

We've had witnesses say that decisions from the board can take years. I believe one witness stated it was seven years.

How is it even possible to take that long to get a decision on a tariff? Does one case take years of process, or does it just take years for the board to get to it?

Ms. Nathalie Théberge: I'll start with a few preliminary comments, and then I'll turn to the secretary general, who is one of the key persons involved in managing the process before the board. A lot of numbers fly around the board and a lot of myths as well.

The seven years assumes no stop between the beginning and the end of the process, but in reality a process can be stop-and-go. There are moments during the process when parties come to the board and say to hold off, because they're negotiating. That adds time to the clock.

That being said, we're fully conscious that there's pressure for the board to render decisions more quickly, hence the proposals that were presented by the government in Bill C-86, which would put in regulation a specific time frame for one piece of the process, which is the piece of the process that the board controls, the rendering of decision.

Gilles, I don't know if you want to add something.

Mr. Dan Albas: Will simply legislating a time period improve the system? How fundamentally will you address the current process?

● (1650)

Ms. Nathalie Théberge: It will be addressed based on that, but in addition the government will probably be introducing some regulations, and we will be introducing regulations because currently in the act, the board has a Governor in Council authority to be able to put in regulation—for instance, how we will be using case management to run a tighter ship so that eventually it leads to decisions being more thorough, still based on the evidence provided by the parties and still reflective of the public interest, which is a particular characteristic of the mandate of the Copyright Board, and ultimately to render decisions within the time frame the government will impose.

Mr. Dan Albas: I am mindful of the time that the chair will impose.

I questioned the deputy minister in regard to your not having asked for any budget extension or expansion, and he said it's simply because you have more than enough supply to be able to meet the demand.

How can you overhaul the Copyright Board and at the same time deliver or at least continue to process files without any extra resources?

Mr. Mark Schaan: Additional resources have been provided to the Copyright Board. They weren't in supplementary (A)s because our Treasury Board process is continuing. You wouldn't have seen an increase in the supplementary (A)s process, but it's a 30% increase in the total resources afforded to the board, so it's an increase of a third of their annual budget.

Mr. Dan Albas: That would have been really helpful to hear from the deputy.

Lastly, to the board, you say you would like the ability to issue licence for works the owner of which cannot be located. If the owner is not in the picture to make a claim, why would a licence even be necessary?

Ms. Nathalie Théberge: I'm going to ask my general counsel to take that question, if you don't mind.

Mr. Sylvain Audet (General Counsel, Copyright Board): That regime is one where the copyright subsists in the work; somebody wants to make use, so the rights are still protected. You cannot locate the owner, but the rights still subsist.

A regime under the act is provided for so there's a request, an application that can be submitted to the board. Some reasonable searches have to be done, and then the board oversees that process. Currently, one of the requirements is that it has to be a published work or published sound recording. Lately, especially, we've been facing a lot of situations where it's really hard to assess, and a lot of requests are based.... We're not able to determine with certainty that the work has been published.

Mr. Dan Albas: I would go back to it, then. If you're having difficulty resolving the fallacy you have where you have active rights holders who are seeking redress, then why would you want to have jurisdiction over areas where you cannot even locate someone who has it? To me, it sounds as if you're spending more time rather than servicing the people who are before the board.

Mr. Sylvain Audet: It is in the act. It doesn't mean that they don't exist. There is still a provision, and a period of time where the rightful owner can come forward—there's a mechanism for them to come forward—and the licence provides for that eventuality.

Mr. Dan Albas: Mr. Lloyd, you can have the remainder of my time.

Thank you, Mr. Chair.

Mr. Dane Lloyd (Sturgeon River—Parkland, CPC): Thank you.

Thank you to the witnesses.

Madame Théberge, you noted in your written testimony here that you're recommending we change the act to grant the board the power to issue interim decisions. To your knowledge, why wasn't this included in Bill C-86?

Ms. Nathalie Théberge: I think it's probably a question more for the department than for the Copyright Board.

Mr. Martin Simard (Director, Copyright and Trademark Policy Directorate, Department of Industry): Yes, it was a request that we were conscious of. It was part of the consultation we ran. Some stakeholders were in favour of this; others were against it. Ultimately, the government felt that if either party can now request an interim decision, it seemed superfluous to have the board be able to come at it of its own volition, if neither the demander nor the opponent feel there's a need for an interim tariff.

It was not consensual in our consultation, so ultimately it was not included in the reforms.

Mr. Dane Lloyd: Madame Théberge, do you think we missed an opportunity? Your second recommendation was to clarify the binding nature of the board tariffs. Do you think that in Bill C-86 we missed the opportunity, and that maybe this committee could, in part of its recommendations, encourage government to further clarify the binding nature of board tariffs and licences?

Ms. Nathalie Théberge: The board operates within a legislative framework that is imposed on the board. It is the government's prerogative to decide which is the most appropriate legislative vehicle to make changes to the act.

What we wanted to do here was acknowledge what we feel is an issue worthy of some study by the committee, because it is an issue that has an impact on what we do, on our business. What we hear through our business, or what we can certainly see from our business, is that there is some uncertainty with the interpretation of a Supreme Court decision. So we felt it was appropriate, given the scope of the parliamentary review, to put that forward.

I believe my colleague from the Department of Canadian Heritage also raised it. We just felt that it was appropriate to at least signal that this is something we think the committee members should be thinking about. It echoes a little bit what both department ministers have said in their letter to the chair of the committee.

● (1655)

The Chair: Thank you very much.

We're going to move to Mr. Masse.

You have seven minutes.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

Continuing on that line, it's really great to hear the eagerness to reform the Copyright Board. It's actually one of the things on which we see some consensus on this file. The noting of transparency, access and efficiency is, I think, hitting the mark with regard to what we're seeing on building consensus.

You suggested everything from a scrub to pre-emptive decision-making. My understanding is that the three suggestions you're making are all legislative requirements. Is that correct, that those would require some legislative amendments? My question is for your legal counsel.

Mr. Sylvain Audet: Yes, absolutely.

Mr. Brian Masse: Thank you.

My question is for Mr. Simard. Did you consult the Copyright Board, and did they make these suggestions to your department for Bill C-86?

Mr. Martin Simard: Go ahead, Mark.

Mr. Mark Schaan: We can both take that.

Yes, the legislative effort related to Bill C-86 was conceived and worked on by the Department of Canadian Heritage, the Department of Innovation, Science and Economic Development Canada, and the Copyright Board.

Mr. Brian Masse: And at the end of the day, you just decided to leave those out.

Mr. Mark Schaan: Obviously, at the end of the day, the government holds policy authority for the overall process, and so they came to decisions that they felt were in the best interests of the overall system and that reflected what we heard from all parties.

Mr. Brian Masse: This is what the Prime Minister said:

> We will not resort to legislative tricks to avoid scrutiny.
>
> Stephen Harper has...used omnibus bills to prevent Parliament from properly reviewing and debating...proposals. We will change the House of Commons Standing Orders to bring an end to this undemocratic practice.

Here we are again today, back to going through a process on which we are actually spending our time and resources. We are now seeing a legislative requirement—not even a regulatory requirement, which I've been asking for for a period of time, whereby we could have actually seen a proper fix. It's very disappointing and frustrating, especially given the fact that we have this opportunity in front of us.

I want to move now to the USMCA.

Mr. Schaan, you mentioned two and a half years for implementation. Is that ratification of the agreement by the United States or by Canada, with regard to the USMCA? How long does the two and a half years...? What triggers the start time?

Mr. Mark Schaan: It's from the signing of the agreement. Is that correct?

Mr. Martin Simard: It would be the coming into force of the agreement, so that would have to be the mechanism. We can come back to you with the exact.... It's the three countries, so I would assume that when the three countries have ratified it through their Parliament, the USMCA, or CUSMA, would come into force. I would have to confirm the understanding of the coming into force of the agreement.

Mr. Brian Masse: Okay. That's fine, to make sure that it's not just.... People who have a vested interest, a financial interest, in this are going to want to know when the two and a half years starts exactly, whether it's Canada, the United States, or Mexico that is the final signatory to that deal. If they sign on, it will still have to wait, because in the U.S., Congress still has to pass it. It's also highly debatable whether this will be passed.

What particular studies were done by the department—and will you table those—about the economic implications of a two-and-a-half-year notification process and introduction of that change? What has the department done with regard to studying the economic repercussions for those affected by the two and a half years?

Mr. Mark Schaan: Obviously, we take a broad analysis of the overall impacts of trade negotiations. On the specifics of the enhanced term of protection, it's very difficult to model.

Mr. Brian Masse: There was no study done, then, on the two and a half years.

Mr. Mark Schaan: There was considerable analysis of the overall provisions, but not a specific modelling of those, because it's very difficult to do.

Mr. Brian Masse: Why two and a half years—and not three years, or three and a half years, or one and a half years—or why have a notification process for the transition? Why two and a half years versus any other option?

Mr. Mark Schaan: The transition period was negotiated among all parties, and it was agreed that this was a sufficient time period to allow for appropriate study and implementation.

Mr. Brian Masse: Would you be willing to table that information so that we can see what the decision-making process was based upon? If there is no actual study for the two and a half years, in particular, it would be interesting for the financial interests of people who are involved in this to know exactly why two and a half years and what data was used to accumulate that actual decision at the end of the day.

● (1700)

Mr. Mark Schaan: There was no economic modelling done of a transition period of two and a half years. Two and a half years was a dialogue between those who would have to implement the system to understand how long we thought we would need to consult appropriately.

Mr. Brian Masse: There you have it.

Thank you, Mr. Chair. Those were all of my questions.

The Chair: Thank you very much.

Before we break off, because we didn't have a full round of questions, if any of the members have any questions they want to submit in writing, could we get them in by Friday at noon to the clerk, and then we could submit them to our panellists?

On that note, thank you very much to our first panel. There is lots of work ahead of us.

We will suspend briefly to change panels, and we'll come right back. Thank you.

● (1700)

(Pause)

● (1705)

The Chair: We will resume.

We're moving into the second panel. With us we have, as individuals, Warren Sheffer, from Hebb & Sheffer; Pascale Chapdelaine, associate professor in the faculty of law at the University of Windsor; and Myra Tawfik, professor in the faculty of law at the University of Windsor.

You will each have seven minutes to present. Again, we're going to do the same pattern, with one round of seven minutes.

Mr. Warren Sheffer (Hebb & Sheffer, As an Individual): Thank you Chair, and members of the committee, for giving me an opportunity to address you today.

I've practised law for 15 years. For 12 of those years, I've worked in association with my colleague Marian Hebb. Together, we are Hebb & Sheffer. My practice largely consists of advising and representing authors and performers who are the original owners of copyright.

In addition to my regular practice, I've spent over a decade serving as duty counsel with Artists' Legal Advice Services, known by its acronym ALAS. At ALAS, a small group of lawyers provide pro bono summary legal advice to creators of all artistic disciplines.

I also currently sit on the board of directors of the West End Phoenix. The West End Phoenix is a not-for-profit, artist-run broadsheet community newspaper, produced and circulated door to door in the west end of Toronto. It contains great writing, illustrations and photography, and the occasional great crossword puzzle. This is a copy of it, here. Our tag line is “Slow print for fast times”.

The West End Phoenix is solely funded by subscriptions and donations. Our freelance contributors include well-known voices like Margaret Atwood, Claudia Dey, Waubgeshig Rice, Michael Winter, rapper Michie Mee, and Alex Lifeson of the iconic Canadian rock band Rush. Other contributors are emerging writers like Alicia Elliott and Melissa Vincent.

The West End Phoenix pays decent rates and prides itself on seeking from authors only a six-month period of exclusivity within which we may publish their works. Our freelancers remain the copyright owners, as they should. After the six-month period of exclusivity, they are free to relicense their works to other parties or to sell or self-publish their contributions for extra income.

The West End Phoenix will typically pay a few hundred dollars for an article, which may seem modest. However, reliance on modest streams of income is a reality for most of Canada's professional writers.

Indeed, many of the creators I work with or have advised at ALAS, or who contribute to the West End Phoenix, rely on several streams of income to get by. For example, there are royalties from publishers and collective licensing, public lending rights payments, speaking engagements, and part-time work in or outside of the publishing industry.

As a lawyer to Canadian authors, I'd like to speak with you today about the general decline in their average income and its relation to the education exception in the Copyright Act. I'd also like to propose a statutory correction to help fix that decline in income, which accords with what the Supreme Court of Canada has declared about the purpose of the Copyright Act.

Specifically concerning the act's purpose, the Supreme Court stated in the 2002 Théberge case, and has repeated in other cases since that time, that the Copyright Act is meant to promote:

> a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).

In my view, the federal government missed the mark badly in 2012, when it boldly introduced into the Copyright Act education as a fair dealing exception. Prior to that 2012 amendment, education sector representatives testifying before legislative committees were insistent that the education exception would not be about getting copyright-protected works for free, and that, instead, the exception would only facilitate taking advantage of teachable moments without disrupting the market for published works.

In other words, using the language of the Supreme Court of Canada employed in Théberge, the exception was to be about ad hoc dissemination of works of art and intellect, and not about systematically appropriating benefits or royalties from creators.

The past six years have shown that notion, that it would do little harm, to be patently false. Royalties have been appropriated from creators on a massive scale.

We know from the Writers' Union of Canada's recently published 2018 income survey that the average net income from writing currently sits at $9,380, with a median net income of less than $4,000. We also know from that same survey that the authors' royalties earned in the education sector have declined precipitously with the implementation of the education exception.

In that regard, Access Copyright reports in its 2017 audited financial statements that since 2012 the amount of revenue collected from the K-to-12 and post-secondary sectors has declined dramatically, by 89.1%.

I won't repeat or drill down into all of the other lost income figures, which I know this committee has been supplied by the Writers' Union of Canada and Access Copyright. Instead of repeating numbers you've already seen or heard, I'd like to focus on the education sector's 2012 fair dealing guidelines, which the education sector unilaterally crafted.

● (1710)

In substance, these fair dealing guidelines look substantially similar to the Access Copyright licences that the education sector negotiated and paid for prior to 2012. In short, the education sector has substituted their own fair dealing guidelines for Access Copyright licences.

As you know, the fair dealing guidelines are the centrepiece of the litigation between Access Copyright and York University. In that matter, the federal court found that York created the fair dealing guidelines to reproduce copyright-protected works on a massive scale without licence, primarily to obtain for free that which they had previously paid for. The federal court also found that the guidelines were not fair, either in their terms or in their application. The Federal Court of Appeal will hear that matter next March.

I ask this committee to absorb the consequences of the declaration that York seeks in the appeal in the name of fair dealing, and I would ask that you consider what such a declaration would mean for artists who make publications like the West End Phoenix possible.

As you likely know, York and others in the education sector wish for the Federal Court of Appeal to declare, for example, that it's presumptively fair for York to take a publication like the West End Phoenix and systematically make multiple free copies of entire articles, entire illustrations and entire poems, and then include those works for its own financial benefit in course packs that it sells to students. It's hard to see how anyone could possibly find such an arrangement fair, let alone for Canadian creators getting by on incomes that are very low and declining. However, that has not stopped education bureaucrats from trying to get their fair dealing declaration.

Given the damage done since 2012, I think it's critically important that Parliament make it clear in the Copyright Act that the kind of institutional copying that is the subject of the York litigation does not qualify as fair dealing.

The statutory amendment I propose to fix the damage caused would simply make fair dealing exceptions inapplicable to educational institutions' use of works that are commercially available. In my view, the proposed amendment that Access Copyright submitted to this committee, in its submission dated July 20, 2018, would achieve that goal.

Thank you for your time and consideration.

The Chair: Thank you very much.

We're going to move to Pascale Chapdelaine.

Ms. Myra Tawfik (Professor, Faculty of Law, University of Windsor, As an Individual): If you don't mind, we'll do it together. I will start the presentation and then hand it over to Pascale.

The Chair: Okay. Go for it.

Ms. Myra Tawfik: Thank you.

Mr. Chair and members of the standing committee, thank you very much for having invited us here to address you regarding the review of Canada's Copyright Act. My colleague Pascale Chapdelaine and I are both law professors at the University of Windsor, and we're appearing here to elaborate further on the recommendations that we made in two briefs that were co-signed by 11 Canadian copyright scholars. Together, we represent a multidisciplinary group that includes librarians, copyright officers, communications scholars as well as legal scholars.

We'd like to begin our remarks with three overarching principles that guide the specific recommendations contained in the briefs, some of which we will elaborate on further in a moment.

We approached our submissions in light of three governing principles. The first is a matter of process with a view to expanding the framework of our law. We recommend, or urge that you consider, a process of consultation with indigenous peoples. In this respect, meaningful consultation must be had with Canada's indigenous peoples, which would seek to implement Canada's obligations under article 31 of the United Nations Declaration on the Rights of Indigenous Peoples. In the context of copyright, this means suitable recognition and protection of indigenous traditional cultural expressions, particularly those that are not currently protected by the act.

Second, in relation to the existing framework, there are two overarching principles that should govern. I'll address the first one, and then I'll turn the floor over to my colleague, who will address the second.

First—and I think everyone seems to be in general agreement about this—copyright involves a balancing act of various interests and is an integrated system of incentives whose overarching policy objective is to advance knowledge and culture.

I have been a law professor at the University of Windsor for close to 30 years. My primary area of research and teaching has been focused on copyright law. For the last 15 years, I have been studying Canada's early copyright history to try to tease out from the archival records an understanding of the policy rationale that led to its first enactment at a time when we could boast no professional authors and no publishing industry.

What, then, would have motivated those early parliamentarians to provide for copyright? At its inception, copyright was literally for the encouragement of learning. It was introduced to provide incentives for schoolteachers to write and print schoolbooks and other didactic works to encourage literacy and learning. This meant not only encouraging book production per se, but making sure that the books were affordable: in other words, accessible to the readership.

I am in no way suggesting that this history can automatically be transplanted to current constructions of copyright, but I believe that the foundational principles remain as relevant today. Copyright back then, as now, was not and should not be about rewarding creators for the mere fact of having created. In a similar vein, copyright back then was not about providing a monopoly to printers and publishers as an end in itself. Creators in industry were the means to a larger public policy end. In order to fulfill the law's overarching policy, copyright, which is a monopoly right, needs to be counterbalanced with the establishment and maintenance of robust spaces that can't be captured or owned. It's in this public interest that intellectual property rights should remain limited rights, and there's nothing suspect or ahistorical about this—to the contrary.

Copyright is a calibrated system that mediates the competing interests of creators, industry and users with the ultimate goal of advancing knowledge and facilitating innovation. The user side of copyright policy is integral to the system and manifests itself in our fair dealing provisions and the other statutory limitations and exceptions to copyright.

● (1715)

[*Translation*]

Ms. Pascale Chapdelaine (Associate Professor, Faculty of Law, University of Windsor, As an Individual): Mr. Chair and members of the committee, to continue on the theme of a balanced approach to copyright introduced by my colleague Myra Tawfik, allow me to briefly present the journey that has brought me here today.

My many years of practice as a lawyer, during which I ensured the protection of the intellectual property of my clients, as well as the findings of my academic research and my doctorate in law, which led to the publication of a book on the rights of users of copyrighted works in 2017 at Oxford University Press, allow me to assess the issues at stake, both on the side of copyright holders and on the side of users and the public. My remarks are, therefore, in line with this perspective.

Copyright has unique characteristics, but it should not be treated in an exceptional way. It is part of a framework of law and established standards that it must a priori respect. Any derogation from these principles must be taken seriously and cannot be done without thinking about the ramifications it may have on the credibility and legitimacy of copyright, in the eyes of the public as well. Recognizing that copyright must respect fundamental rights, the Canadian Charter of Rights and Freedoms and freedoms, property law and contract law is in fact one of the corollaries of the balanced and measured approach that we advocate in our brief.

[*English*]

My colleague and I will now address specific recommendations in passing that reflect these two guiding principles of a balanced system that must respect fundamental rights and general laws. I will start by making a few recommendations, as contained in the brief, with respect to solidifying exceptions to copyright infringement and user rights.

The specific recommendations made in our briefs regarding the rights of users of copyrighted works are in fact a continuum of the evolution in Canada toward a more balanced approach to copyright, recognizing that users play an integral part in fulfilling the objectives of copyright. We promote continuing an evaluation of recognizing the rights of users, but to the extent that it does promote the objectives of copyright—to the same extent that any expansion of the rights of copyright holders should be made only to the extent that it promotes the objectives of copyright, that is, the promotion of the creation of works and their dissemination to the public.

To begin, a fair use style of approach should replace fair dealing provisions. Eliminating a closed list of specific purposes—such as research, private study, criticism and parody, as in our current act—and replacing them with illustrative purposes, while maintaining a test of fairness justifying some uses of works without the authorization of the copyright holder, would continue to protect copyright holders' interests while offering more adaptability to include new purposes. For example, as we were contemplating, addressing text mining and data mining would come to mind. It wouldn't need to be added each time new technologies evolve. That would also be in keeping with the principle of technological neutrality.

Second, the act needs to clarify that copyright owners cannot contract out of exceptions to copyright infringement, and certainly that would be the case in non-negotiated standard form agreements. A “no contracting out” approach recognizes that exceptions to copyright infringement are an important engine to ensure that copyright respects fundamental rights and other interests that are essential to optimizing users' participation to the objectives of copyright. Such an approach has been taken by other jurisdictions, recently the U.K.

Third, and consistent with a “no contracting out” approach to user rights, technological protection measures should not override exceptions to copyright infringement, as they currently do to a large extent. Copyright holders choosing to secure access and use of their works through TPMs should have the obligation to provide access to the exercise of exceptions to copyright infringement through built-in architecture or other mechanisms.

Fourth, in relation to the constraining effects of TPMs on the legitimate exercise of user rights, specific remedies need to be built into the act when copyright holders fail to provide access to the legitimate exercises of user rights. In addition, proper administrative oversight should be in place to monitor automated business practices of copyright self-enforcement—here, content ID used on Google platforms such as YouTube comes to mind—to ensure that non-infringing material is not inappropriately removed and that freedom of expression is protected.

● (1720)

[*Translation*]

Just as copyright owners benefit from a wide range of legal remedies when their rights are infringed, it goes without saying that users should also have recourse against copyright owners when their rights of use are not respected. Unfortunately, this is not the case in the act at this time. The creation of specific remedies for users in the act would rectify this imbalance and crystallize the need to respect the rights of users of protected works. Specific remedies for users are provided for, for example, in legislation such as that of France and the United Kingdom.

[*English*]

Ms. Myra Tawfik: I'll just briefly highlight a couple more of our recommendations before concluding.

Again, and similar to the overarching approach upon which we have based our assessment of the Copyright Act review process, one of the recommendations we make is to introduce a provision relating to open access to research and scientific publications, especially in the context of publicly funded research. The federal government has already introduced a tri-agency open access policy for publicly funded research. Our recommendation is to provide for this type of open access provision as a principle within the Copyright Act, and this could be done in a manner that doesn't unduly interfere with the reasonable expectations of the copyright holder in that the publications could be deposited in an institutional repository after a reasonable period of time, with appropriate attribution.

In a similar vein, new technologies and new practices like text and data mining, which allow you to capture large amounts of data that offer insights and innovative solutions to pressing problems, have become important research methods for researchers at academic institutions. The risk of copyright infringement for reproducing copyright works when scraping, mining or downloading is an inhibiting factor that should militate in favour of a reasonable measure to remove some of the copyright barriers to this kind of research.

Finally, with regard to works generated by artificial intelligence, we take it that the rationale underlying copyright is to incentivize human beings to create, disseminate and learn, so we recommend that works entirely created by AI should not be subject to copyright protection. If a human being has exercised sufficient skill and judgment in the way in which they use software or other technologies to produce an original work, then the established copyright principles would apply. There is no policy consistent with history, theory or practice that would justify expanding copyright to works entirely created by artificial intelligence and without any direct human intervention.

The recommendations made in our briefs are modest and incremental steps to maintain a fair balance between the rights of copyright holders, users and the public interest. They are consistent with governing principles that inform our approach to the law. This approach advocates for a continuum on the evolution of copyright that takes a broader approach to competing interests rather than constantly increasing the protection of copyright holders as soon as new technologies emerge, without any consideration of the impact of such enlarged protection on copyright users.

This concludes our remarks. We'd like to thank you very much for hearing us out, and we'd be happy to answer any questions you may have.

Thank you.

● (1725)

The Chair: Thank you very much for your presentation.

We're going to go right into questions, and we're going to start with Mr. Graham.

You have seven minutes.

Mr. David de Burgh Graham (Laurentides—Labelle, Lib.): Thank you.

I'm going to share my time with Mr. Longfield. If you can cut me off at the halfway point, I'd appreciate it.

The Chair: Okay, I'll cut you off.

Mr. David de Burgh Graham: Thank you.

Ms. Chapdelaine, you talked about fair dealing as a more fluid model, if we could call it that. How do you see that actually looking, in the law? If there aren't specific fair dealing exceptions, what would it say?

Ms. Pascale Chapdelaine: Basically, it would be similar to the model in the U.S. The U.S., as you probably know—

Mr. David de Burgh Graham: Fair use—

Ms. Pascale Chapdelaine: —has a fair use model. So it does refer to purposes, but only in an illustrative way, not in a limiting way, as it does in Canada. Expanding that to not stating specific purposes would, I think, bring more flexibility and allow the act to evolve as new technologies arise. Still, there would be a test of fairness—that's very important—to determine whether use could be allowed without the authorization of the copyright holder. It would need to meet the fairness test.

Mr. David de Burgh Graham: Would you see this fair use model as something that would permit us to finally have right to repair, for example? Are you familiar with the movement to right to repair?

Ms. Pascale Chapdelaine: That would be one example, which is the common law, something that has been recognized in common law.

Mr. David de Burgh Graham: You also mentioned content ID. We heard from Google and Facebook here last week, and they admitted that their content ID systems don't really care about fair dealing exceptions. What kind of action should we be entitled to take, or should we be taking, against companies that have a system of copyright enforcement that doesn't actually follow Canadian law?

Ms. Pascale Chapdelaine: Actually, right now there is not much that is provided. That's the whole point of making sure to clarify that there's no contracting out possible of fair dealing, or let's say fair use. That's one of our recommendations, to actually build it in, make it a right, an obligation. Basically, they would be held liable to make sure access is being granted. That's what we're proposing in our recommendations.

Mr. David de Burgh Graham: I appreciate that. I don't have much time at all, so I'm going to jump to Mr. Sheffer.

I want to learn a bit more about ALAS, because it seems to be quite relevant to our study. I'll ask three questions together, so you can answer them in the 70 seconds or so I have remaining.

How many clients does ALAS have? What are the most common issues they face? What are the most common resolutions you see?

Mr. Warren Sheffer: On the question of how many clients ALAS has, we don't carry any caseload, so the—

Mr. David de Burgh Graham: What kind of legal advice are you providing?

Mr. Warren Sheffer: It's summary legal advice.

I should mention, too, that ALAS is the administrative end of things and is run by U of T law students. We have anywhere from three to four appointments a night on Tuesdays and Thursdays in Toronto. They're half-hour sessions.

Mr. David de Burgh Graham: Is it not-for-profit?

Mr. Warren Sheffer: It is not-for-profit, yes.

The corporation that runs ALAS is Artists and Lawyers for the Advancement of Creativity. The acronym is ALAC, so we have ALAS and ALAC.

Mr. David de Burgh Graham: ALAS and ALAC...I gotcha.

I'm already out of time, so thank you very much for that.

Mr. Lloyd Longfield: Thank you.

Thank you all for another interesting session.

Mr. Sheffer, the model that you put out, and the presentations we had in the last hour, made me think about value chains. There's no room in the value chain for legal advice, which is not what we need to see going forward. I think the artists need to have the right protection.

With regard to the value chain analysis of this, I was talking about flow charts and where value gets created. Who gets paid for it? How could we have legislation that gives fair value within the value chain?

You have a micromodel with the publication West End Phoenix that we could be using.

Mr. Warren Sheffer: I think it starts with solid copyright protection for the original owner of copyright, which is the author. Beyond that, one hopes that the author or performer is aware of his or her rights and doesn't go about signing those away. If the author or performer does retain his or her rights, that creator is in a good position to negotiate remuneration.

As I said in my presentation, I'm very proud of the fact that at the West End Phoenix, we make a point of—

Mr. Lloyd Longfield: Right.

Mr. Warren Sheffer: Sorry, I don't want to take up your time.

● (1730)

Mr. Lloyd Longfield: No, no. That's exactly where I was heading with that.

To the other two presenters, before we began this study, I read a couple of books on copyright history to understand where we're coming from. I remember one of the books talked about the history of copyright in the U.K. versus the U.S. and how very different the history was, and how Canada is somewhere in the middle, as we always are.

When you're looking at us taking ideas from the States—and looking at France and Germany—where are we in that continuum right now?

Ms. Myra Tawfik: I can tell you that at the very earliest, we modelled ourselves on American copyright law. In effect, some of the recommendations we have—to adopt an American fair use-style provision, for example—are actually quite consistent with our history. However, we're talking about over 200 years of history.

Although Canada has chosen traditions and had traditions imposed on us in the 20th century—the British tradition particularly—we've always taken some elements from the French, British, and American and incorporated them into things that are uniquely Canadian, to try to develop the flexibilities we need to manoeuvre.

In a sense, the quick answer is that it's all of the above, but we've done it differently and our approach has been different.

Mr. Lloyd Longfield: I loved your approach. I could picture you both having coffee over this and thinking of the guiding principles, going back to the guiding principles.

It seems that we've missed that whole piece in our study: What are our guiding principles as Canadians, and how does our legislation reflect our guiding principles?

That seems like the most common-sense place to start. Thank you for that.

Ms. Myra Tawfik: We thought so.

Mr. Lloyd Longfield: That's terrific.

Thank you very much. That's good insight.

The Chair: Knowing Mr. Longfield, he'll probably set up coffee with you.

We're going to move to Mr. Albas.

Mr. Dan Albas: Thank you, Mr. Chair. I'd like to split my time, if I can, with Mr. Lloyd.

Thank you, everyone, for your presentations.

Ms. Chapdelaine, I'm going to start with you. You argue that Canada should adopt fair use-style provisions. That is something we've started to hear quite a bit. Can you state why you think that fair use is a superior system?

Ms. Pascale Chapdelaine: It's superior for the reasons I mentioned earlier. There's no limited purpose to begin the analysis as to what would be a use that can be done without the authorization of the copyright holder. We would develop it with our own values and our own legal system. We're not suggesting that we would have to copy what has been done in the U.S., but as an approach at the legislative level, we think it's a good start that would be less limiting and more flexible.

Mr. Dan Albas: Ms. Tawfik, in your brief, you state that scientific works should be available after “a reasonable period of time”. Could you state what the “reasonable period of time” is in this context?

Ms. Myra Tawfik: Well, it's reasonable time, obviously, to give the publisher or whomever the return on their initial run. There have already been practices in the context, for example, of the arts and humanities law publishing, where after a period in which the journal gets a return, you can deposit it in an institutional repository, with attribution, for publicly funded research.

Mr. Dan Albas: I totally understand that the context may differ by industry and industry norms. The challenge for anyone in government is that obviously there needs to be a delineated line at some point, and it's the line in the sand that we're often contemplating on behalf of the government. Can you give any indication in the case of scientific works?

Ms. Myra Tawfik: For pure science, I can't, no.

Mr. Dan Albas: Your brief also states that the risk of being liable to statutory damages for infringement "creates a serious chill on socially desirable activities". Can you explain what you mean by "socially desirable activities"?

Ms. Myra Tawfik: Again, it's obviously the other side of the coin: users being able to adapt or do whatever copyright permits them to do without the threat or the fear that they will be subject to statutory damages without the plaintiff having to prove them. Anything that short-circuits the regular system is potentially chilling on those people who want to adapt, create, build on knowledge, and use what's out there in a way that is legitimate within the confines of what's reasonable and fair but without these hammers hanging over their heads, which would be huge damages.

Again, this is not to suggest that people who are downloading music or whatever for commercial purposes—there was a big case in the United States involving this—should not be subject to whatever the remedies are. The hammers that are incorporated, and the statutory damages as a hammer, would have a chilling effect on those who might do things that are legitimate but would be inhibited from doing them.

● (1735)

Mr. Dan Albas: Okay. Thank you for that explanation.

One of the concerns I've raised a number of times is with content ID. Many of the platforms have said they are doing the best they can within the contextual environment they're operating in.

One of the cases is where someone pays a tariff for a sound clip and then finds that, even though they've paid the tariff, they can't post the content because Sony or another company will have it pulled down. Another, more extreme, example I cited at the last meeting was a YouTube clip that a network television show clipped, put it in the show, and then had the original clip taken down because it was violating their content.

How do we deal with this? A lot of smaller companies—and not even companies, just creators themselves—are posting real, innovative work but are unable to defend themselves. Can you give us any ideas on that?

Ms. Pascale Chapdelaine: What we're recommending is an administrative body that would have oversight to address such complaints, basically. In cases where it would inhibit user-generated content, which is one of the possibilities under our act, there should be rectification of the information to allow the copyright work to be posted or whatever. That's the oversight part of giving true remedies to users that we were referring to.

Mr. Dan Albas: I like the word "remedies", too.

It's over to Mr. Lloyd.

Mr. Dane Lloyd: Thank you.

Thank you for the opportunity to speak to you as witnesses.

Mr. Sheffer, you've laid out a case about institutional abuse in copyright. I think most Canadians would agree that education, as a fundamental principle of fair use, is completely legitimate. If the committee were to recommend clarifying the scope of what we mean by "education" to mean an individual's right to education, as opposed to an institutional right to use education as fair use, do you think that would have a significant impact on the rights of authors?

Mr. Warren Sheffer: Yes, I think it could. I think what you just described squares nicely with the proposal I'm suggesting would work, and it's the one that Access Copyright gave you.

Nobody is disputing a student's ability to make a copy of a work for that student's education and private study—research and what have you. What creators take exception to is when institutions engage in massive copying of copyright-protected works, then turn around and put them in course packs, sell them to students and call it fair dealing.

Mr. Dane Lloyd: Do you think that our government—at all levels, but I guess mostly federally—is doing enough to protect the cultural tapestry of our literary sector in this country? Are we really at risk of losing what makes us unique as Canadians in the literary sense?

Mr. Warren Sheffer: Yes. I think if the education exception is allowed....

I will just back up for a second. If there's one thing I could leave this committee with, it's that if you haven't already read the York University case, I implore you to do that. You can see exactly how York University—the third-largest institution in this country, with 50,000-plus students—has actually used their fair dealing guidelines.

There's no disputing the findings of fact. I really implore you to read that decision, because if that is allowed to stand as something that's fair dealing, then yes, creators are definitely harmed by that.

● (1740)

Mr. Dane Lloyd: That's what I have left for my questioning. Thank you.

The Chair: Thank you very much.

Mr. Masse, you have the final seven minutes.

Mr. Brian Masse: Thank you, Mr. Chair.

Thanks for being here.

Let's just finish with Mr. Sheffer. Really, at the end of the day, your concern is that the publication they're using is actually creating income for them, and a source of revenue and so forth, but at the end of the day the people are not getting any compensation for that. Is that really the...?

Mr. Warren Sheffer: Yes, absolutely.

Mr. Brian Masse: I just wanted to make sure.

I'm going to skip over to artificial intelligence, actually. We haven't heard a lot about that, so I want to spend a little time here on it. Thank you for raising that. It hasn't been raised a lot.

Can you highlight what the concern is? We've heard an argument that if you're the creator of the artificial intelligence, you should then be the owner of the work of the artificial intelligence. Could you perhaps talk a little about that?

Ms. Myra Tawfik: That's a position we don't uphold. Copyright can't be the policy vehicle or legislative vehicle to deal with everything that's emerging in technology or otherwise today.

Artificial intelligence as technology can be protected through patents, and there are other ways of protecting the technology itself. Copyright, really, is about incenting human beings to create and disseminate, etc. To the extent that we have moved into areas in which copyright is actually protecting technologies, or software and those things, it has already created a distortion not only in the way in which copyright originated, but also, frankly, in its fundamental principle, the intention behind it.

We're not saying that one could never hold copyright in a work that's produced through artificial intelligence, but the copyright tests should not be changed. We should apply the same tests. If a human being has exercised sufficient skill and judgment in the creation of that work using artificial intelligence, then they should be able to claim copyright. If it's just that they've produced the technology that enables the artificial intelligence to create something new, then our position is that copyright ought not to extend to that.

If there is a need to protect the creative output of a robot, then other mechanisms can come into play, not copyright.

Mr. Brian Masse: It's an interesting aspect that we haven't gone into a lot.

I raised this argument at the beginning of these hearings. Especially when we look at artificial intelligence and the massive government and public subsidization of research into that technology and its products, we see there is an argument for the public expectation for some of that to be shared as well, in my opinion. When we do these public-private partnerships, there is a considerable amount of public resources—be it money, infrastructure, or processes and government resources and so forth—that the public has paid as part of that equity. There needs to be a little discussion there.

I want to quickly turn, with the rest of my time, to sharing information coming from the government. We heard just prior to your coming to the table here that apparently there have been some work and some studies done. I was asking about the USMCA and the extension of copyright and what information they were using for it. There has been no particular study, but they have some government information and documents and so forth. We still don't even know what that is, although government resources and research have been used to do that.

How does Canada rank as a government, among our neighbours and other Commonwealth nations, with regard to disclosure of public information of government materials, research and other types of work that have been done?

Ms. Myra Tawfik: I have an example.

Because I've been going back into the archives, I made a number of requests to look at 19th century copyright works and 19th century patents. I was blocked and asked to do an ATIP to get the patent information. This is a 19th century patent. The copyright was protected under a Crown prerogative rather than.... In terms of my experience of these kinds of capture of what should otherwise be public documents, it's a very small example, but there isn't a sort of openness in the same way as one sees perhaps in other jurisdictions, although I understand there may be constraints in certain circumstances.

Mr. Brian Masse: I know that we rank very poorly with our economic partners in the OECD for public disclosure of public-gathered works.

Thank you, Mr. Chair, for the opportunity.

Thank you to the witnesses for being here today.

● (1745)

The Chair: Thank you very much.

It was a short session, but I think we got quite a bit out of it. Again, for the members, if there are any extra questions that you would like us to forward to the witnesses, please give them to the clerk by noon on Friday.

Finally, for Monday, just be aware of the room, because we're not sure where the room is going to be. The clerk will advise you.

On that note, thank you to our guests.

We are now adjourned.