**University of Alberta Fair Dealing Week 2018**

**How You Can Contribute to the 2018 Copyright Act Review**

Michael B. McNally

Assistant Professor, School of Library and Information Studies, University of Alberta

**Note:** This presentation was originally made on Feb. 28, 2018, at which time the process for contributing to the Copyright Act review was not known. An Epilogue section has been added at the end (after the original presentation date) with additional details.

**Learning Objective** – Get involved and make your voice heard

* If you don’t make your voice heard others will speak for you
* If you stay silent it doesn’t mean that you support the status quo –it means you acquiesce to the loudest voices

**Setup** – I was asked to give a talk on the Copyright Act review in late 2017 under the belief the process would be known by Feb 2018.

* Process for public involvement in the Copyright Act review still not known as of late Feb. 2018, though the review is underway
* Despite this, my talk draws on insights from my participation in various public consultations (from Industry Canada/Innovation, Science and Economic Development (in relation to spectrum management), Canadian Radio-television and Telecommunications Commission regulatory proceedings and House of Commons Industry Committee study on rural broadband)

**What are we going to do for the next hour? – Outline of the Talk**

* Why get involved
* A little discussion of the academic literature and theory around government consultations
* Review of the 2009 process
* Quick review of what changed in 2012 and what might be worth commenting
* Some insights from my own involvement in other consultations

Public participation is not a glamorous processes, but it is a worthwhile one – though do have realistic expectations:

* Not everything you say will be adopted, and quite possibly nothing you say will be adopted
* Don’t expect to see your name mentioned in any sort of deliberation or remarks about the changes
* However, there are many reasons to get involved

**Why get involved?**

* Make your own voice heard
* Move, in general, for more public participation
  + Outside Canada – in the US there were 50,000 submissions to the USTR for a NAFTA agreement that benefited people not corporations;[[1]](#footnote-1) over 500,000 public responses to BEREC – (Body of European Regulators for Electronic Communication)[[2]](#footnote-2)
  + CRTC two major reviews on TV and Broadband – broadband had 30k survey respondents[[3]](#footnote-3)
    - Nearly 6000 interventions so far on the FAIR PLAY proposal to have the CRTC regulate copyright infringement – comments have been extend until Mar 28[[4]](#footnote-4)
* Not everything has been a massive wave of public success
  + 60 responses to the Copyright Board consultation from last fall[[5]](#footnote-5)
  + ISED Spectrum Outlook Consultation had 2 individuals respond[[6]](#footnote-6)
* You don’t need to be an expert/researcher
  + Importance of stories – even more valuable if you are able to do this in person (and in writing) than just in writing
  + There is a critical window right now if the Telecom and Broadcasting Act reviews go ahead
* History teaches us that there is value in being involved
  + C-60, C-61, C-32, C-11 – we got a better bill in C-32 and C-11 than C-61 because people spoke up (about C-61 and in the consultations)
  + ACTA (Anti-Counterfeiting Trade Agreement) and SOPA (Stop Online Piracy Act), while more situations of protest than consultation involvement, show that these are issues where politicians will listen
* You are a creator and you are a user – the user/creator dichotomy is fictional as we are all creators and users

**Regulatory Theory**

* Several different regulatory theories
  + Oldest major theory is Pigou and *Public Interest* – in it regulators are benevolent protectors of the public interest – I’d really like to believe this, but it fails to account for ‘special interests’
    - Another issue is how do you determine what the public interest is – particularly in a realm where you are balancing two sets of rights
* *Capture* is the most well-known – in it the regulator (and Parliament isn’t perfectly analogous to a ‘regulator’ ends up captured by industry)
  + Important insight from capture is not so much the idea, but the recognition that industry supplies the data necessary for regulation – that is the case here
* Mancur Olson’s collective action problem relevant
  + Certain groups have most to gain while individuals have relatively little, and hence certain groups will aim to dominate the process
* Both capture and public interest would seem to suggest the importance of involvement
* There are theories which more critically problematize involvement
  + Capitalist state – developed from Habermas’ legitimation crisis, suggests such participation is done simply to legitimize the state (the second key function) in light of the first (accumulation)

**Literature Review**

* Literature on Copyright Consultation – 4 key papers (conversely there are only two core papers on telecom, despite the fact there are hundreds of telecom consultations and just the 2009 copyright consultation):
  + Richard Owens’ “Noises Heard: Canada’s Recent Online Copyright Consultation Process: Teachings and Cautions.”[[7]](#footnote-7)
  + Alex Mochnacki’s “Calling All Copyfighters: Experts as Superheroes , Comic Books and Intervention and Boundary Making in Canadian Copyright Policy.”[[8]](#footnote-8)
  + Blayne Haggart’s “Fair Copyright for Canada: Lessons for Online Social Movements from the First Canadian Facebook Uprising.”[[9]](#footnote-9)
  + Michael Gesit’s “The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective.”[[10]](#footnote-10)
* Haggart
  + Looks at the 2007-8 Fair Copyright for Canada Facebook page
  + Important take away is that institutional context of policy debates still important – Facebook group was important, and helped spur organization around copyright specifically on the users rights side
* Owens
  + Noted a problem with gender balance in responses – gender imbalance is certainly a real concern and one that this government, particularly with its recent budget should concern itself
  + Also concerned with lack of Francophones
  + Concerned about CCER
  + Concerned over poorly informed/lack of expertise
* Mochnacki
  + Examines the “Superhero” status Geist had in the consultations – many submissions defer to Geist:
    - *“And do what Michael Geist suggests. He articulates the points much better than I ever could and I agree with him 100%”*
    - *“I don’t think I need to go into great detail here, Dr. Geist has summed it up pretty well”*
  + However he also notes the domain of discourse on copyright dominated by legal scholars, IT experts and politics
  + He also problematizes the “hero making” role – noting how the heroes, in this case Dr. Geist, who is privileged for his high degree of competency, isn’t problematized for the unequal distribution of resources that enable Geist – indeed, I’m not sure yesterday’s budget had enough money in it for all of us to get our Canada research chairs.
  + He very much highlights the importance of having resources that discuss copyright in terms for the general public – noting Murray and Trosow’s *Canadian Copyright: A Citizen’s Guide* as an example
* Geist
  + The most recent of the works, aims to argue the public has been given a new prominence in digital policy
  + Evidence is selective, and some key problematization around certain spheres of digital policy - notably spectrum consultations - is absent
  + Critique aside, the article is valuable in showing that copyright is an area where public involvement is arguably most important of all digital policy realms
* Finally I’ll note there has been much work in the run up to the review – the series in Policy Options, notably, and of course the MacDonald Laurier Institute has been running a series of articles, and of course the key blogs (Geist,[[11]](#footnote-11) Knopf,[[12]](#footnote-12) Katz,[[13]](#footnote-13) and of course Meera (Nair)[[14]](#footnote-14) – in particular her Plea to the Academics[[15]](#footnote-15) to critically and substantively engage.)

**2009 Consultation**

2008 Protests

* Copyright was a news story in 2008 because people were protesting the bill C-61
* Nearly 100,000 Canadians signed up for the Fair Copyright for Canada Facebook page[[16]](#footnote-16)
* C-61 died with the 39th Parliament and the 2008 election

2009 Consultations

* Combination of 11 townhalls and submissions[[17]](#footnote-17) – you can pull some of the transcripts of the roundtables through the Internet Archive[[18]](#footnote-18)

***Questions from the 2009 consultation[[19]](#footnote-19)***

1. *How do Canada’s copyright laws affect you? How should existing laws be modernized?*
2. *Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time*
3. *What sorts of copyright changes do you believe would best foster innovation and creativity in Canada?*
4. *What sorts of copyright changes do you believe would best foster competition and investment in Canada?*
5. *What kinds of changes would best position Canada as a leader in the global, digital economy?*

Stats from Geist (2010)[[20]](#footnote-20):

|  |  |
| --- | --- |
| **Position** | **Number of Supporters** |
| Submissions against another Bill C-61 | 6138 |
| Submissions in favour of shorter Copyright terms or against extending Copyright terms | 5520 |
| Submissions against anti-circumvention or in favour of limiting DRM/Digital locks | 6641 |
| Submissions in favour of stronger personal use/copying and backup protections including format shifting and time shifting rights | 6242 |
| Submissions in favour of an “open copyright” system | 16 |
| Submissions advocating abolishing or reforming Crown Copyright | 209 |
| Submissions opposed to adopting an American-styled DMCA | 262 |
| Submissions in favour of stronger fair use/fair dealing protections | 5962 |
| Submissions opposed to implementing WIPO | 19 |
| Submissions in favour of eliminating all copyright | 14 |
| Submissions against a three-strikes rule | 170 |
| Submissions that favour a “notice and notice” approach | 6027 |
| Submissions in favour of instituting a levy for file-sharing/monetizing P2P | 104 |
| Submissions in favour of greater exemptions for education/research | 74 |
| Submissions in favour of establish a good-faith defence that the user believed their use of a work was fair and non-infringing | 5958 |
| Submissions in favour of laws that are technologically neutral | 5617 |
| Submissions that argue individuals should be protected from liability as long as their use was private and non-commercial | 5987 |
| Submissions in favour of a parody/satire exemption | 80 |
| Submissions in favour of ISP neutrality | 76 |
| Submissions satisfied with current laws | 29 |
| Submissions calling for a stronger/updated public domain | 133 |
| Submissions against media levies | 45 |
| Submissions that favour low caps on statutory damages for non-commercial infringement | 47 |
| Submissions in favour of digital access to archival holdings | 29 |
| Submissions concerned about maintaining privacy | 23 |
|  |  |
| Submissions in favour of stronger penalties for copyright infringement | 11 |
| Submissions in favour of turning copyright into a crime | 5 |
| Submissions arguing for more protections/reforms for photographers | 21 |
| Submissions against works being available in digital or other forms for free and that argue creators need to be fairly compensated | 256 |
| Submissions arguing for stronger protection for writers and other artists | 79 |
| Submissions opposed to creating new/expanding exceptions | 108 |
| Submissions opposed to an expansion of fair dealing | 107 |
| Submissions in favour of notice and takedown | 24 |
| Submissions in favour of implementing WIPO | 187 |
| Submissions promoting a collective licensing scheme | 97 |
| Submissions in favour of high statutory fines | 9 |
| Submissions promoting longer copyright terms/opposed to shortening copyright terms | 5 |
| Submissions in favour of fining those who violate copyright laws | 1 |
| Submissions in favour of limiting/halting unauthorized file sharing | 153 |
| Submissions endorsing Bill C-61 | 54 |
| Submissions proposing the expansion of the private copying levy | 73 |
| Submissions supporting anti-circumvention measures | 46 |
| Submissions proposing a re-sale right | 25 |
| Submissions calling for broader Moral Rights protections | 24 |
| Submissions calling for ISPs to play a bigger gatekeeping role in stopping online piracy | 19 |
| Submissions proposing a graduated response penalty system | 5 |
|  |  |
| **Total Submissions** | 8306 |

* 8,300 submissions, vast majority form letters (Internet Archive Record is incomplete[[21]](#footnote-21))
  + Form letters on both sides – majority were from CCER (Canadian Coalition for Electronic Rights )– Geist counts 5,025 copies
  + By contrast recording industry form letter submitted 8 times, publishing industry form letter was submitted 17 times and private copying levy form letter submitted 22 times[[22]](#footnote-22)
* Result was C-32, while not perfect, far more balanced

**Things in the Act to Consider**

Issues beyond Fair Dealing to consider

* Term – obviously a key issue –there will be strong push for life + 70, and sound recordings change already opens the door
* Crown Copyright – Amanda (Wakaruk) has done excellent work in leading discussion in this area[[23]](#footnote-23)
* Copyright Override – should contracts trump fair dealing rights?
* TPMs – should provisions on circumvention remain, even if the digital lock is picked for what would be a fair dealing purpose/action
* UGC 29.21 – still relatively untested
  + Section 29.21(d) quite relevant to determining future relevancy of the section
  + UGC an important exception for Makerspaces in public libraries
* Format and Time shifting (29.22 and 29.23) – not likely to be a point of contention, but perhaps worth reiterating their usefulness
* 29.4 to 30.04 – long and complicated, but not without some areas for clarification
  + Fix the circular definition of lesion “Lesson means a lesson, text or examination or part of one”
  + 30.01(5) and 30.01(6)(a) has that strange 30 day destruction timeline
  + 30.04(4)(b) –sign post for internet material that prohibits use
    - 30.04(6) allows government to regulate what the sign post looks like
* 30.2(5.02) – Digital ILL provisions – not necessary with FD, but also not practical on their own
* S. 77 – Orphan works – could there be an easier way to use orphan works?
* S. 92 –we have to do this all over again in 2022 (or maybe 2023, and 2027, and 2032…)

**2018 Consultation – What we know**

* Not much and behind schedule
* Linked to Creative Canada framework[[24]](#footnote-24)
  + *In today’s fast-paced creative economy, it is critical for Canada to maintain a comprehensive copyright framework,* ***one in which Canadian creators get fairly compensated for their work, users benefit from great choices and business can thrive. The Act creates a healthy environment facilitating investments, job creation and opportunities for all Canadians****.*
  + *A well-functioning copyright framework should enable Canada’s creators to take full advantage of the opportunities presented by digital technology****, provide a supportive environment for business and investment, and position creators for success in a competitive marketplace.*** *This framework should also make it easy for users to discover, access and use a variety of quality content, as well as promote our culture and heritage.*
  + *The review will provide parliamentarians with an opportunity to examine the legislative framework in support of these objectives.*
* The business/investment/job creation justification for copyright is not present in the traditional justificatory theories (Locke/natural rights, Kant and Hegel/personality, Bentham/utilitarian)

**My Own Involvement and Insights**

Involvement

* I’ve been involved primarily in telecom consultations – House of Commons, ISED/IC and CRTC
* Every consultation has its own flavor, style and format

Suggestions

* Consider audience
  + This is not a bunch of copyright lawyers or experts
  + Not an academic audience
* Write for your audience – simple paragraphs (1 idea/point/suggestion) (number paragraphs)
* Make recommendations stand out (bold/list at end)
* Have an executive summary/introductory paragraph if you only have a longer submissions
* If there are discussion questions uses these to structure the response
* Be mindful of the tradeoff between boldness of an idea and the likelihood of adoption
* Be mindful of external limitations – we are bound by Berne and TRIPS
* You don’t have to reinvent the wheel
  + If you are working ahead and have some means to, make your submission available to others
  + If you are working to the deadline and can access other’s submissions, agree/critique – engage with what others are saying
* Certainly if there is a draft direction/reply comment/multi-phase set up consider responding to others
* Do consider the value of the form letter and just agreeing with an authority

**Epilogue (May 2018)**

Shortly after Fair Dealing week the process participating in the Copyright Act review was clarified. An excellent summary with links for the process, and more arguments for why one should participate, was written by Adrian Sheppard and featured in the (Ualberta) Quad in April 2018.[[25]](#footnote-25)

Notably the INDU Committee has limited briefs to 2000 words, suggesting that contributors be judicious in their arguments (or they write the clerk of the committee asking for an extension).

1. <http://www.jwj.org/press_release-post/as-nafta-hearings-open-more-than-100000-petitions-delivered-and-50000-public-comments-filed-demanding-a-new-deal-to-benefit-working-people-not-just-corporations> [↑](#footnote-ref-1)
2. <https://berec.europa.eu/eng/news_and_publications/whats_new/3893-public-consultation-on-net-neutrality-closed-almost-half-a-million-contributions-received> [↑](#footnote-ref-2)
3. <http://madgic.library.carleton.ca/deposit/govt/ca_fed/crtc_letstalkbroadband_2016.pdf> [↑](#footnote-ref-3)
4. <https://services.crtc.gc.ca/pub/ListeInterventionList/Default-Defaut.aspx?en=2018-0046-7&dt=i&lang=e&S=C&PA=t&PT=pt1&PST=a> [↑](#footnote-ref-4)
5. <https://www.ic.gc.ca/eic/site/693.nsf/eng/00162.html> [↑](#footnote-ref-5)
6. <http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11377.html> [↑](#footnote-ref-6)
7. <https://www.iposgoode.ca/wp-content/uploads/2010/04/RichardOwens_Online_Copyright_Consultation_19April2010.pdf> [↑](#footnote-ref-7)
8. <https://onlinelibrary.wiley.com/doi/abs/10.1111/cccr.12032> [↑](#footnote-ref-8)
9. <http://www.dr.library.brocku.ca/bitstream/handle/10464/8246/Fair%20Copyright%20for%20Canada%20postprint%20peer%20reviewed.pdf?sequence=1&isAllowed=y> [↑](#footnote-ref-9)
10. <http://www7.tau.ac.il/ojs/index.php/til/article/view/1426> [↑](#footnote-ref-10)
11. <http://www.michaelgeist.ca/> [↑](#footnote-ref-11)
12. <http://excesscopyright.blogspot.ca/> [↑](#footnote-ref-12)
13. <https://arielkatz.org/> [↑](#footnote-ref-13)
14. <https://fairduty.wordpress.com/> [↑](#footnote-ref-14)
15. <https://fairduty.wordpress.com/2017/06/13/a-plea-to-the-academics/> [↑](#footnote-ref-15)
16. Geist, <http://www7.tau.ac.il/ojs/index.php/til/article/view/1426> [↑](#footnote-ref-16)
17. <https://web.archive.org/web/20100104023101/http://copyright.econsultation.ca:80/topics-sujets/show-montrer/13> [↑](#footnote-ref-17)
18. <https://web.archive.org/web/20100104023101/http://www.ic.gc.ca/eic/site/008.nsf/eng/h_00031.html> [↑](#footnote-ref-18)
19. <https://web.archive.org/web/20091125101342/http://copyright.econsultation.ca:80/topics-sujets/show-montrer/18> [↑](#footnote-ref-19)
20. <http://www.michaelgeist.ca/2010/04/copycon-final-numbers/> [↑](#footnote-ref-20)
21. https://web.archive.org/web/20140617234803/http://www.ic.gc.ca/eic/site/008.nsf/eng/h\_00001.html [↑](#footnote-ref-21)
22. <http://www.michaelgeist.ca/2010/04/copycon-record-straight/> [↑](#footnote-ref-22)
23. <https://sites.google.com/a/ualberta.ca/wakaruk/fixcrowncopyright> [↑](#footnote-ref-23)
24. <https://www.canada.ca/en/canadian-heritage/campaigns/creative-canada/framework.html> [↑](#footnote-ref-24)
25. <https://blog.ualberta.ca/statutory-review-of-the-copyright-act-how-to-make-sure-your-voice-is-heard-218fb2cf7ea3> [↑](#footnote-ref-25)