

March 24, 2010

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

- and -

The Honourable James Moore, P.C., M.P.  
Minister of Canadian Heritage and  
Official Languages  
15 Eddy Street  
Gatineau, Quebec, K1A 0M5

Dear Ministers Clement and Moore,

**Re: Fair's Fair – Fix Fair Dealing**

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

***Summary of Position***

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

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

Three truths counsel the wisdom of this amendment:

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

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

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

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

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

## ***2. Advancing Canadian Values***

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

Flexible fair dealing also resonates with Canadian values in a second way: it is consistent with the fundamental values of free expression embodied in our Constitution. Flexible fair dealing recognizes that legitimate and fair forms of speech are not confined to

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

Finally, it deserves to be emphasized that flexible fair dealing will remain a Canadian solution to the conflicts inherent in copyright law. It does not simply jettison Canadian law in favour of the American standard of fair use, as some misleadingly claim. Instead, it is an incremental change to Canada's existing fair dealing standard. Under the present law, consideration of the fairness of any contested dealing is a fundamental element of fair dealing analysis. A flexible fair dealing standard would simply keep the focus of this analysis on the extent to which a dealing's purpose is fair. The Canadian definition of 'fair', which has been developed by our courts over the years, will remain central to any inquiry under a flexible fair dealing standard.

## ***2. International Law and Trade Considerations***

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

### ***Conclusion***

No single change to Canada's Copyright Act could do more to improve the objectives embodied in that Act.

We ask that you expand fair dealing to incorporate Canadian values of fairness so they apply to not just limited categories, but to all fair dealings that increase our cultural and economic wealth.

Sincerely,

The Fair's Fair Coalition  
(list of signatories attached)