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RESEARCH

Copyright's Role in Preserving and Ensuring Access to Culture: The Way Forward

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Copyright has traditionally been concerned with balancing economic incentives with creative opportunity and innovation. When purely economic interests are the primary or sole drivers in directing control over cultural works, culture itself is threatened. The danger to global culture is increased when a single culture is able to dominate both policy and regulation. What may be beneficial for a developed country may not be beneficial for a developing country, and in fact, what may be beneficial for a developed country may have disastrous effects on developing countries' ability to access or exploit their own Intellectual Property. Canada's experience in protecting its cultural heritage can be illustrative for other countries. Copyright has traditionally been supported with a strong commitment to fostering Canadian Culture through the Canadian Radio-television and Telecommunications Commission and Canadian content requirements. Access and nurturing culture must also be facilitated through the regulation of telecommunications, especially in an ever expanding global, digital environment. Canada's 2019 review of the Copyright Act must take into account the changing global landscape to ensure that Canadian voices can still be heard.

Keywords: Copyright; Culture; telecommunications; media; Internet

Traditionnellement, le domaine du copyright s'intéresse à l'équilibre entre des incitations économiques et l'opportunité créative et l'innovation. Lorsque les intérêts purement économiques sont les seuls ou les principaux facteurs dans la direction d'autorité sur les œuvres culturelles, la culture est menacée elle-même. Le risque pour la culture mondiale augmente quand une seule culture peut dominer à la fois la politique et la réglementation. Ce qui pourrait bénéficier à un pays développé pourrait s'avérer nuisible à un pays émergent et, en fait, ce qui bénéficie à un pays développé peut cependant produire des effets désastreux pour des pays émergents, ayant un effet sur leur capabilité d'accéder ou d'exploiter leur propre propriété intellectuelle. L'expérience vécue par le Canada concernant la protection de son héritage culturel peut servir d'exemple parlant pour d'autres pays.

Le Canada a toujours soutenu le copyright avec un engagement fort qui promeut la culture canadienne grâce au Conseil de la radiodiffusion et des télécommunications canadiennes et aux exigences de contenu canadien. Il faut aussi faciliter l'accès et l'encouragement de la culture à travers des règlements de télécommunications, surtout vu l'environnement numérique mondial en expansion permanente. L'examen de la Loi sur le droit d'auteur, entrepris par le Canada en 2019, doit tenir compte de la situation mondiale changeante afin de garantir que les voix canadiennes puissent encore être entendues.

Mots-clés: Culture; télécommunications; médias; Internet

Introduction

What happens when the formal cultural economy is at odds with the informal cultural economy? According to Jeremy de Beer, Kun Fu, and Sacha Wunsch-Vincent (2013), "[t]he informal economy [...] represents a significant share of output and employment in many middle- and low-income countries" (3). This article provides a lengthy definition of the informal economy, but for the purposes of this paper, informal economy refers to those cultural enterprises undertaken by those who participate on a part-time basis, often as amateurs, or through enterprises that are not incorporated in the same way that large content owners and distributors are. Very often the formal economy is fed by the informal economy. Small companies and single entrepreneurs who cannot yet compete in the formal economy, especially in lower income countries, benefit from a thriving informal economy. While Canada is a high-income country, in terms of its cultural economy, it shares many similarities with middle- and low-income countries due to its proximity to the United States and the dominant cultural economy of the US. Canada has an opportunity to become a leader in the increasingly global, digital cultural economy and a champion of cultural output and innovation, but faces two main challenges regarding the role copyright law will play in this future economy: legislative review of copyright legislation and global trade deals that include worrisome Intellectual Property (IP) protections.

A discussion of these challenges is particularly salient because they are being faced by Canada at this time. First, and perhaps foremost, the Canadian *Copyright Act* is undergoing a mandated review, and it is important that Canadians speak up

and protect the users' rights contained within it that they have fought so hard to enshrine. Copyright grants the owner of a work the sole right to produce or reproduce a work for a limited time (Copyright Act, RSC 1985, c. C-42 s 3). Make no mistake: those rights, enunciated in the Fair Dealing provision (Copyright Act, RSC 1985, c. C-42, s 29), are under attack—as are the other provisions within the *Act* that seek to protect users' rights and encourage creativity and innovation. Second, Canadian copyright in its present form is threatened by current trade deals: most recently by the United States Mexico Canada Agreement (USMCA – called the Canada United States Mexico Agreement, or CUSMA, in Canada) which has proven to be just as disastrous as the Trans-Pacific Partnership (TPP) threatened to be. The agreement to extend the duration of copyright to life of the author plus 70 years in the CUSMA will stifle access to culture and educational materials, materials that are vital within the informal economy to develop expertise to allow entry into the formal economy. At a time when the knowledge economy and innovation are seen as the way forward both nationally and internationally, it is more important than ever to make sure that access to information and cultural content remains a protected right and is not stifled by protectionism. There are better ways to encourage and support Canadian culture than through a more restrictive copyright regime. Canada must now work to rebalance the *Copyright Act* and ensure that all members of Canadian society are equally served by the *Act*. Copyright law must respect both private and public mandates.

User rights in Canadian copyright: relevant provisions and comparison to US

Fair dealing and the notice and notice provisions of the *Copyright Act* are two elements that distinguish Canadian copyright. Fair dealing is a list of user exceptions that do not infringe copyright: "research, private study, parody, or satire" (Copyright Act 1985, s 29). In addition, section 29.1 allows for criticism and review and 29.2 covers news reporting. There are also provisions for private use and time-shifting (the right to tape material to watch at a later time). The US equivalent of fair dealing is fair use (17 U.S. Code § 107). Fair use is considered more flexible because the phrasing of the relevant legal provision contains the nonlimiting phrase "such as" preceding the examples of what can be considered fair use. However, in practice,

fair use is more often the target of litigation than Canada's fair dealing, resulting in a chilling effect on users' rights. Because they may fear litigation, users may not exercise their rights. Research and criticism based on these rights are necessary for the public to be able to inform themselves to make educated decisions about society. In terms of online disputes over copyright infringement, the Canadian notice and notice system differs from the US system of notice and takedown (17 U.S. Code § 512, as outlined in the *Digital Millennium Copyright Act* [DMCA], the 1998 revisions to the US *Copyright Act*). In the US system, when an Internet Service Provider (ISP) is notified that material uploaded to a hosted site is infringing copyright, the ISP must immediately ensure the material is removed in order to avoid liability. In order for the person who uploaded the allegedly infringing material to have it restored, he or she must engage in a costly legal battle to prove the material is non-infringing. In Canada, ISPs are responsible for notifying the uploader that his or her material has been identified as infringing. The uploader can then choose to leave the material up or take it down, and the onus on and cost of taking the matter further then lies with the accuser.

Balancing rights in copyright law

Copyright has traditionally been concerned with balancing access to and the potential economic benefits resulting from creating original work. The Supreme Court of Canada clearly stated in *Théberge* (2002) that "[t]he *Copyright Act* is usually presented as 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" (par. 30). The monetary benefits are the private benefits side of the equation. On the public side is the promotion and preservation of culture, in this case Canadian culture, and ensuring that an educated public is able to participate knowledgeably in our democracy. Bita Amani (2007) points out that "liberal access to knowledge as a public good will have proportionately greater gains for the granting society and government policies should, accordingly, promote laws, networks or systems that can efficiently distribute knowledge and remain impervious to external (corporate) pressure for its containment through the conferral of intellectual property rights" (4). What happens when proponents of one side of the equation are

able to put their foot on the scale? When purely economic interests are the primary or sole drivers in directing control over the (re)use of cultural works, culture itself is threatened. Not only is culture threatened, but also expressive speech and freedom of speech, which are important elements of users' rights and should not be impinged by property rights.

A brief history of copyright's purpose: Balancing economic and social benefits

It is important to understand the history of copyright in order to better understand how it can best be used going forward. Copyright can be traced back to Britain, where the Crown granted the Stationers' Company a monopoly on printing to prevent the spread of seditious materials. The Company was comprised of "a group of London printers and booksellers who could be relied upon to censor works in exchange for large profits" (Murray and Trosow 2013, 17)—profits which accrued because they were given the exclusive right to publish print material. Copyright, then, began as a form of protectionism to limit freedom of speech but also to serve the public good of maintaining the peace, but economics also played a key role from the beginning. During the English Civil War (1642–1651), the Stationers lost control of their monopoly when printing presses started to spring up outside of London, creating competition, much as the Internet has done today for the publishing industry. In response, the Stationers petitioned for more regulation from government. (The modern equivalent of the Stationers Company is seen in the entertainment industry–the distributors and owners of content–being challenged by digital distribution and seeking increasingly greater protection through regulations).

The idea of copyright as functioning as a mechanism for rewarding author/creators was formally introduced in 1710 with Britain's Statute of Anne. The Statute bestowed copyright ownership on the author for fourteen years. The author was free to license the work to a publisher, and at the end of the fourteen years, if the author was still alive, the licensed work reverted to the author, who could then relicense the work for an additional fourteen years. After this, the work then entered the public domain. The Statute was a significant change in the philosophical conceptualization of copyright. The Statute's subtitle is "An Act for

the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned" (For the text of the Act, visit http://www.copyrighthistory.com/anne6.html). There are provisions within the Act for ensuring that a certain number of copies of each work are allotted for various libraries free of charge and for ensuring that the price of works is reasonable. The Statute foregrounds users' rights and authors' rights and exceptions such as those granted to libraries to lend out books.

Some of the key aspects of Copyright are highlighted here. *Copyright Act*s bestow rights upon owners *and* users (at least historically and in Canada)–although even the Fair Dealing provision in the Canadian *Copyright Act* makes no mention of users *per se*. The Supreme Court, however, has clearly stated its position on users' rights: "The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively" (CCH 2004, par. 48; see also Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, [2012] 2 SCR 326, 2012 SCC 36 at par. 11). The only reference to users' rights in the *Copyright Act* is in the 2012 User-Generated Content (UGC) exception: "It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work…" (Copyright Act 1985, s 29.21[1]). The UGC provision has often been referred to as the "YouTube exception," as YouTube represents one of the burgeoning digital creative platforms on which users can hone their craft or simply create for enjoyment. The concept of creation and innovation that builds upon what has come before is not a new idea. Under today's restrictive copyright regimes, Shakespeare would no doubt have found himself frequently in Court for copyright infringement, as plays such as *Romeo and Juliet* and *Othello* rely on prior published sources. The other provisions of fair dealing, "research, private study, education" (Copyright Act 1985, s 29), are also in place to facilitate the creation of new work that has been informed by previously created work.

When so much importance is placed on the economic interests of copyright holders, the social benefits of creation and access to information can be forgotten or repressed. The economic truth is that those with the least financial clout will have the greatest need to access information and use materials for free or at a very affordable cost. Creators just starting out fall into this category, as do students. Those with the financial clout, the loudest voices, access to the legal system, and the ability to influence policy on both a national and international level are most often owners of enormous libraries of copyrighted material. Rights management is performed by collection societies that issue licenses and collect royalties on behalf of copyright owners and then distribute those royalties to owners for a fee. Collection societies like Access Copyright and the Society of Composer, Authors, and Music Publishers of Canada (SOCAN) fall into this category. Artists who rely on these giant institutions have little input into the lobbying and legal pursuits of these entities. Those artists rarely have the time or expertise to critically examine whether copyright is actually benefitting them or lining the pockets of those funneling royalties to them.

Copyright duration: International conventions and trade agreements

One of the ways for copyright owners with large and valuable libraries to maximize the return on their investment is to lobby for longer copyright terms. As previously mentioned, the Statute of Anne granted a term of 14 years with the option for an additional 14 years if the author was still living (28 years in total). Landes and Posner (2003) recommend that the optimal duration of copyright today should be 20 to 25 years (70). The current term in Canada is the life of the author plus 50 years, which will change to the US standard once the CUSMA completes the ratification process. In the United States, it is the life of the author plus 70 years. In 2013, Maria A. Pallante, then Register for the US Copyright Office, suggested that the life plus 70 years was too long and proposed that after 50 years the burden of observing copyright should shift from the user to the owner, with the owner being required to license the work "to assert their continued interest in exploiting their work" (23). Michael Geist (2016a), a Canadian scholar of copyright law and policy, concurs, suggesting

that "Canada could conceivably treat the term beyond [50 years] as a supplementary regime that falls outside of the Berne Standard" (9); The *Berne Convention for the Protection of Literary and Artistic Works* is the international standard adhered to by 170 signatories. This World Intellectual Property Organization (WIPO) treaty also contains specific special provisions for developing countries [see also Summary of the Berne Convention for the Protection of Literary and Artistic Works 1886]). This would allow Canada to sidestep any international term longer than that or apply it only in certain circumstances on certain works.

While the United States was a leading holdout to signing the Berne Convention when it was a developing country, as a leading exporter of Intellectual Property in the present, it now leads the push for ever longer terms. The impetus for increasing the term of copyright can trace its roots directly to Mickey Mouse. Every time the famous mouse has neared the end of its copyright life, there has been another copyright term extension granted (Schlackman 2017). Canada has resisted the push from the United States to extend copyright terms, but one of the ways the US is able to advance its own agenda is through trade agreements. Had the TPP been signed, life plus 70 would have been one of the amendments that would have gone through in order for Canada to comply with its international commitments. When the United States dropped out of the deal and it became the CPTPP, Canada was able to have the Intellectual Property provisions of the agreement frozen. There is a great deal of pressure for countries to become signatories to these trade agreements to compete in the global market. The inclusion of IP in these comprehensive trade agreements begs the question of whether it is advisable to equate goods such as pork or cars with products that, while they have economic value, "should be considered as commodities of a unique kind, understood as vectors of identity, values and meaning, and not only as mere commodities" (Bidault 2016, 21). Canada was late to join the negotiations for the TPP and was required to agree to copyright provisions that had been settled when they joined the negotiations. Canada was able to protect notice and notice by having it included as a side agreement. When the agreement transitioned to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Canada successfully had most of the problematic IP issues suspended (Geist 2017a).

There are numerous problems with including Intellectual Property provisions in trade agreements. Agreements such as the TPP, the Transatlantic Trade and Investment Partnership (TTIP), and CUSMA are negotiated in secret, containing provisions for extending copyright duration past the limits set by the Berne Convention, and containing increased digital rights management provisions. It is clear that powerful lobbyists with deep pockets, such as those from the entertainment industry, are able to influence the negotiations with no representation from other interveners, such as users' rights interest groups and Intellectual Property experts. While Canada was able to maintain its notice and notice provisions in the CUSMA, the negotiating team agreed to extend the copyright term to life of the author plus 70 years. In addition, while the negotiators were able to include language excluding Canadian cultural policy, there are provisions for extremely restrictive anti-circumvention measures that prevent users from breaking digital locks on books or DVDs that they have already purchased. Providing so many benefits to owners at the expense of users' rights will require Canada to try to address this new imbalance in other ways.

The dangers of extending copyright terms

The danger to global culture is increased when a single culture is able to dominate both policy and regulation. There is little doubt that the United States wields such power as a global economic leader. What may be beneficial for a developed country may not be beneficial for a developing country, and in fact, what may be beneficial for a developed country may have disastrous effects on developing countries' ability to access or exploit their own Intellectual Property. The threat to and importance of culture, art, and access to information may not be immediately obvious when negotiating a trade deal. William Landes and Richard Posner (2003), leading American economists and Intellectual Property authorities, are referring to art dealers and connoisseurs when they point out how they make money: "they buy from owners who do not realize the full value of their art" (27). The entertainment industry of the United States certainly knows the value of global cultural markets. As the largest and one of the few exporters of Intellectual Property, the United States exerts an undue global influence on, control over and access to all cultural materials, and they do so fully cognizant of the value of those materials.

Katz and Kandinov (2015) argue that "[t]he harms to expressive activities, to innovation, research, education, and cultural preservation, resulting from the forgone opportunities to use works under excessive copyright terms could be" very high. They argue that the extension of copyright rises to the level of being unconstitutional because it limits free speech. Similarly, Graeme Austin (2011) points out that "[c]opyright laws have the potential to implicate rights to freedom of expression and education" (Helfer and Austin, 3). In a report submitted to the United Nations Human Rights Council in December 2014, Farida Shaheed, the Special Rapporteur in the field of cultural rights, proposed "expanding copyright exceptions and limitations to empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works" (1). A publisher may own the copyright to a work that they do not deem financially worth keeping in print, and if the work is allowed to languish under copyright and remain unreproduced, it will be unused or underused and indeed may be lost. However, if the work enters the public domain, it allows for the possibility that an innovative publisher could produce a marketable edition (for example, by adding value through new editorial material and commentary) because, in part, the publisher does not have to pay to license the work for reproduction. The more access new creators have to the reuse of older works with which to educate themselves and generate new work, the more likely innovation can take place. Frequently, works that have remained licensed to full term are no longer benefiting either the creators or their heirs or the public but are simply benefiting the distributor/publisher who exploits those rights and whose charges often severely limit the public's access to these works (Bond 2015). Copyright maximalists, like Access Copyright, an entity that exists solely to collect and distribute royalties, continue to push for longer durations. While collections societies perform a valuable function for creators, they have a vested interest in maintaining an economic model despite the wealth of evidence that demonstrates that longer terms do not mean greater economic gain or benefit for the creators themselves (Griffin, 2012). Sean Flynn, Margot E. Kaminski, Brook K. Baker, and

Jimmy H. Koo (2011) assert that "[t]hese views are supported by numerous academic studies finding no public benefit, but great public cost, from extending copyright terms to the current U.S. levels" (15).

Cultural industries and copyright

Entertainment industries have struggled to control the digital reproduction of their works and to re-monetize in the new reality of streaming services and other non-traditional delivery streams. New platforms and technical capabilities make it easier than ever for creators and innovators to disseminate their work, but it may still be difficult for them to make a living wage. Users have more choice than ever. Vertical integration of media and telecommunications companies has further complicated the access to and affordability of culture. The media and entertainment industry in the United States, somewhat ironically, pose perhaps the greatest threat to creativity and to global culture in their position on copyright. This industry is poised to wield the greatest influence on copyright globally as one of the driving forces behind Intellectual Property provisions in recent US trade deals. They were also the force pushing for a notice and takedown provision in the 2012 *Copyright Modernization Act* (S.C. 2012, c. 20). There is plenty of evidence that a longer term hurts developing countries and helps to stifle culture. Michael Geist (2016a) points out that "term extension restricts access but does not enhance creativity. This has been confirmed by many economists, including a study by Industry Canada (now the Department of Innovation, Science, and Economic Development)" (6–7). Taking into consideration an extension of 20 years, those are 20 years in which numerous works will not fall into the public domain. Many of these works may not be economically attractive to a publisher in the US because they would only merit small print runs (by US standards) but they might be of particular interest to, say, a publisher operating in a much smaller market in the home country of the work. In addition, university and other scholarly presses will not be able to offer more academic books—which have a higher editorial cost—if that cost must be added to paying for copyright (McCutcheon 2016, 24–5). New Zealand conducted a study that calculated the cost of the extra 20 years to their own life-plus-fifty regime to the economy at $55 million per year. Howard Knopf (2015) did some comparative statistics and came up with the following:

> The average present value of the cost of 20 year copyright for recorded music and books term extension (which included an estimate for film and television) was estimated by NZ is [sic] NZ $505 million, which is CDN $434 million, which adjusted by GDP ratio, would work out to about CDN $4.176 billion. The average annual cost for NZ is NZ $55 million, which is $CDN 47.3, which adjusted by GDP ratio, would work out to about CDN $454 million.

Clearly, film and television make up a huge portion of these figures, and of course, the International Intellectual Property Alliance (IIPA), the lead lobby group for the movie, music, and software industry and the Motion Picture Association of America (MPAA) work hard to protect their investments. Lobbyists, such as the MPAA, can afford to push the American government to sign trade deals like the TPP and CUSMA to extend copyright terms world-wide, thus locking up content and restricting access to it. The MPAA and other large content owners rarely have the individual creator's interests in mind when lobbying for changes to copyright, and individual creators therefore lack a voice in these negotiations. Canadian singer Bryan Adams, a globally recognized artist, appeared before the Parliamentary Copyright review panel to lobby for rolling back reversion rights for musicians. Currently, rights that have been licensed for the duration of copyright revert to heirs 25 years after the death of the creator. Adams suggested that those rights should revert to the creator after 25 years from assignment in order to benefit the artist within his or her lifetime. As a hugely successful artist, Adams does not stand to gain substantially himself if this change was implemented, but it would be a huge boon to many less successful artists. In Canada, "Ontario is the largest film and production jurisdiction in Canada by volume, and the third-largest film production location in North America (next to California and New York)" (Ontario Ministry of Tourism, Culture and Sport 2016), but there needs to be a proactive effort to ensure that everyone's voices are being heard in these discussions. Litigation is expensive and requires deep pockets to finance it—something that most users or even creators do not have.

Canada's cultural strategy and copyright

Canada's basic strategy to protect and nurture culture has traditionally relied on a protectionist model that restricted access to American content and encouraged the dissemination of Canadian content through the Canadian Radio-television and Telecommunications Commission (CRTC)'s administration of the Canadian Content rules as set out in the Broadcasting Act (1991). A number of initiatives have sought to provide users with more accessibility to the content that they want, where and when they want it. Specifically, the CRTC declared in December 2016 that broadband internet access is a basic service for all Canadians (CRTC 2016). The CRTC also conducted lengthy consultations under the umbrella of Let's Talk TV, which led to cable companies being mandated to unbundle offerings and reduce telecommunication contracts from three years to a maximum of two (CRTC 2014). The CRTC has taken a strong stance in defending the principle of net neutrality, ensuring that vertical integration does not mean that any one content provider can gain cheaper access to broadband delivery systems. In his blog from May 23, 2017, Michael Geist (2017b) succinctly summed up the work that CRTC's Jean-Pierre Blais had accomplished as Chair of the CRTC as jumping "on the digital bandwagon, gradually removing the safeguards and creating a regulatory environment premised on competition at all levels – creators, broadcasters, and broadcast distributors." The subsequent Chair of the CRTC, Ian Scott, however, appeared to be less of a champion of this approach. Under Scott's leadership, the CRTC's 2018 report on the state of the broadcasting industry in Canada, *Harnessing Change: The Future of Programming Distribution in Canada*, was widely criticized. Former vice-chair of the CRTC Peter Menzies (2018) stated that the "CRTC, through the recommendations in its *Harnessing Change* report released last Thursday, has risked setting back communications regulation by at least a decade and likely made an error in approach that will define the remainder of its current leadership's term in office." Michael Geist (2018a) was also vocal in condemning the report as doing anything but harnessing change, stating that: "Rather than adopting a forward-looking approach, this proposed framework has

the feel of something out of the 1980s, in which the interests of consumers are barely addressed, the production of Canadian content is assessed primarily through the prism of regulated support mechanisms, and the CRTC views its regulatory power as virtually limitless." The report recommends increasing regulation of the Internet and even taxing its use. Both initiatives would chill freedom of speech and creativity by increasing barriers to accessing content and distribution channels. This would be especially problematic for informal cultural producers such as entry-level podcasters, as only one example.

The CRTC is not the only government agency that has been shining a light on Canada's cultural industries. The Ministry of Canadian Heritage released a report in 2017, *What we heard across Canada: Canadian Culture in a Digital World*, that addresses many of the challenges facing Canadian creators. The dichotomy at the heart of copyright arises in the very administration of it in Canada. The Ministry of Canadian Heritage–responsible for culture–shares administration of the *Copyright Act* with what is now the Ministry of Innovation, Science, and Economic Development. In fact, the Ministry of Innovation, Science, and Economic Development is responsible for the CRTC, the Copyright Board of Canada, and the Canadian Intellectual Property Office. Once again, it would seem there is a foot on the economic side of the copyright scale.

Through its consultation, the Ministry of Canadian Heritage "sought to gain insights from a wide range of creators, cultural stakeholders and citizens in order to identify what needs to be done to continue to support Canada's creative economy" (Ipsos Public Affairs 2017, 4). In addition to feedback obtained through many public forums, hundreds of written submissions were made to the Minister, the longest and most well-produced submissions coming, not surprisingly, from those entities with the resources to compile them. Once again, the deepest pockets have the loudest voices. Although the report itself says very little about copyright—an issue that was never a part of the report's mandate—a number of the submissions[1] contain

[1] An incomplete list of such submissions would include those from the Canadian Arts Coalition, the Canadian Research Knowledge Network, Community Media Policy Working Group, Open Media, and Universities Canada. All submissions can be found here: https://www.canadiancontentconsultations.ca/other-ideas.

direct comments on the role that they would like to see copyright play in protecting Canadian cultural products in a digital world, even while acknowledging that such information would be more appropriate in the discussion surrounding the actual copyright review currently under way.

The consultation itself yielded some interesting conclusions that point to a number of important areas of concern. Funding is a central issue in relation to supporting creators and innovators. More funding is especially needed for those working on digital platforms, as current funding models often exclude these. Education is another concern, both the education of creators and educating the public on the importance and value of Canadian cultural works. Making cultural works available to and discoverable by the public is also a central concern.

A central and age-old question in the report centred around what makes culture Canadian. Must the creator be Canadian, live in Canada, tell a 'Canadian' story? What was clear was that all voices were not being heard. This is a situation that is mirrored globally, and of course, more exposure globally for Canadian culture is a concern. Part of what makes Canada unique is its commitment to multiculturalism, so there are many small groups that share a unique vision in Canada that may also have share that vision with communities outside of Canada. Within Canada, Indigenous voices face particular problems. Access to the Internet lags behind in many Indigenous communities, and the *Copyright Act* is also failing these communities. This is one area on which the copyright review should focus. The consultation points out that "Inuit and Indigenous northern knowledge is primarily oral, passed on through generations; knowledge keepers now require their knowledge to be documented or risk losing it through attrition" (Ipsos Public Affairs, 2017, 42). In order for the *Copyright Act* to cover this knowledge, there is the requirement that the work be fixed in a tangible medium. There are further divergences between copyright law and Indigenous culture: "Copyright reform is necessary to help protect/support northern artistic commodities and the artists and creators who live there. However, there are specific challenges around in [sic] communities with shared oral culture – who has the 'right' to share these stories?" (Ipsos Public Affairs 2017, 42). Canada's *Copyright Act* and those around the world need to allow for special provisions to be sensitive to

culturally different attitudes to intellectual property. The balance turns once again to culture versus economics.

The report asserts that it wants to "[e]nsure that funding criteria strike the right balance between profitability and cultural value" (Ipsos Public Affairs 2017, 11). Much of the report focuses on various forms of funding that would challenge current funding models. It is important to remember that in the context of media generation and innovation, remuneration through copyright happens after creation and dissemination. In passing, the report, states that the *Copyright Act* needs to be revisited in light of "the shifting digital environment" (Ipsos Public Affairs 2017, 10). In addition, the report states:

> The foundation of the problem for most is that certain tenets of current intellectual property (IP) legislation are viewed as outdated and ineffective. Several participants spoke specifically of the mandated five-year review of the *Copyright Act* in 2017, saying that this was a vital opportunity for Canada to "stand up for creators." Most agreed that **changes to IP legislation that divert the flow of revenue back to the hands of the idea generators is essential to the future of the cultural ecosystem in Canada.** In addition to redirecting the flow of profit generated by cultural content, many also called for measures that ensured that IP could be kept in the hands of Canadians. Many said that, all too often, to get access to international markets (particularly the U.S.) they must forfeit their ownership of their IP. (Ipsos Public Affairs 2017, 21–22; bold emphasis added by author)

The discussion of copyright within the report demonstrates a lack of knowledge on the part of the authors of the report on the basic nuances of the issues surrounding copyright. Their views on copyright have clearly been informed by the voices of those reports that have been amplified through lobbying and other channels. Who made the submissions upon which these comments and the unbalanced definition of copyright within the report were based? The answer is clearly those with the greatest economic clout, such as the collection societies and entertainment conglomerates.

Because students are the innovation and economic leaders of the future, and their access to knowledge and training is an important foundation for them to take a place on the global stage, it should not be surprising that calls for a continued commitment to fair dealing came primarily from the education sector while strong support for increased enforcement came from large entertainment and publishing conglomerates. This fully mirrors the balance between encouraging creation, through education and access, and incentivizing creation, through monetary remuneration. Michael Geist (2016b) encouraged the Canadian Heritage consultation not to engage with copyright, as the full *Copyright Act* review would be better positioned to look thoroughly at the issues. Geist (2016b) does point out in his submission that "[w]ith global companies such as Netflix investing heavily in Canadian productions and providing an international platform for Canadian content, focusing on how to better compete in a global marketplace is the right strategy" (1). Members of the Making Media Public and the Communications Policy Working Group from York and Ryerson Universities urged that any reform "should reflect a coherent strategy for digital content and an associated innovation policy that promotes the production and dissemination of Canadian content and digital technology services" (Community Media Policy Working Group 2016, 3). In their submission, Google Canada (2016) also emphasized the necessity of maximizing access to allow for the greatest variety and diversity of content. While their concern was that platforms remain technologically agnostic and net neutrality is maintained, these issues also speak to maintaining copyright provisions that also enable access. Universities Canada (2016) underscored the need for access in the digital environment to "reliable, accurate information given its role in promoting sound democracy" (14). In addition, they underscored the support for fair dealing from both the legislature and the Supreme Court to maintain a balance between owners and users. Both the Federation of the Humanities and Social Sciences (2016) and the Canadian Research Knowledge Network (2016) pointed to the benefits and success of open access publishing models. Other initiatives in this vein, like Creative Commons licenses, were also sprinkled throughout the IPSOS consultation report. If Canada is looking to become a global leader in these spaces, Canada needs to think beyond old models and embrace at least some of these new ones.

Not surprisingly, it was those struggling to monetize in the new digital environment using old models who most loudly called for more restrictive Copyright reforms. The Motion Picture Association of Canada (2016) was most concerned about "piracy" and has voiced its support elsewhere for increasing the notice and notice provision to a notice and takedown regime like that of the United States (13). Notice and takedown requires a far greater legal and monetary commitment from the user, who may or may not have infringed. The Canadian Arts Coalition (2016), as an advocate for collection societies, supported stronger enforcement and criticized the Copyright Board's decisions on tariffs. The Association of Canadian Publishers (2016) submission could almost be interpreted as a return to the Stationers monopoly. They accused educators and educational institutions of interpreting the "new fair dealing provisions very broadly, and [ceasing to make] payment for the copyright protected materials they rely on to deliver curriculum and courses to Canadian students" (Association of Canadian Publishers 2016, 10). This is a mischaracterization in two ways. First, the Supreme Court has interpreted the fair dealing provisions broadly, most recently and pertinently in *Alberta (Education) v. Canadian Copyright Licensing Agency* (Access Copyright) (2012, SCC 37). Second, publishers repeatedly overlook the books that have been assigned as texts to be purchased by students in addition to the books that have been purchased by libraries and perhaps most importantly the licensing agreements to access published content that libraries have purchased. Fair dealing may be the most important *Copyright Act* provision by which to educate both the public and creators of Canadian culture. In addition, the ability of educational and research provisions to help both creators and users to understand the law and their rights should not be underestimated.

Education forms one of the pillars of Canada's *Intellectual Property Strategy* (2018) spearheaded by the Ministry of Innovation, Science, and Economic Development. This document, much more than recent CRTC reports, seems to foreground innovation. In addition to a pillar that addresses IP awareness,

education, and advice, one thrust of the strategy emphasizes strategic tools for growth and another strategy emphasizes IP legislation as a focus. In addition to supporting education, the awareness pillar also urges more attention to Indigenous intellectual property issues. There is also support for clarification of the notice and notice system under the legislation pillar. By proposing that 'consumers' be better educated about notice letters and, more importantly, that notice letters do not contain threatening demands, the proposal supports users' rights (Government of Canada 2018). Michael Geist (2018b) praises the policy for rejecting the theory that "if IP is good, more IP must surely be better" and for taking a more nuanced, holistic approach.

Going forward, it is vital that anyone with a love of or stake in Canadian culture voice their support for accessible information and content. Canada can be a leader globally by maintaining a firm stance on copyright duration and fair dealing. It is more important than ever for creators and users to think outside of the box as the way forward to preserve the past. Having dealt with the American cultural threat perhaps more than any other nation, Canada's experience in protecting its cultural heritage can be illustrative for other countries. Copyright has traditionally been supported with a strong commitment to fostering Canadian culture through the Canadian Content requirements. Access to and nurturing of culture must also be facilitated through the regulation of telecommunications, especially in an ever-expanding global, digital environment. Copyright is only one part of the puzzle, though a vital piece. Canada's review of the *Copyright Act* must take into account the changing global landscape to ensure that Canadian voices can still be heard. In addition, Canada must continue to stand strong in the face of trade deals which will erode not only our own *Copyright Act* but will also set up a domino effect globally as countries sign ever-more inter-related trade deals.

Competing Interests

The author has no competing interests to declare.

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