

IT'S ABOUT TIME!
Terminating Copyright Assignments to Preserve Creator's Rights
A brief to the Standing Committee on Canadian Heritage
dealing with the remuneration models for artists and creative industries
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INTRODUCTION

Copyright-protected creations (song, painting, record, book, movie) are both cultural and commercial objects. Typically, creators ask professional intermediaries (record label, publisher) to monetize their creations' value. To do this, copyright must be transferable.

In the bargain between those two, the creator generally holds the short end of the stick. Creators deal with one or few intermediaries; they sign up creators all the time. Creators striking a first deal sign anything that is presented to them; an intermediary rarely needs to sign up *this* creator. So, creators often transfer too many rights, for too long, sometimes “in all media, throughout the universe and in perpetuity.”

Copyright law is about balance, a balance which was and remains at risk between creators and intermediaries. Copyright law works not so much for creators as for intermediaries; extending the duration of copyright will benefit them, not creators.

Parliament must do something about this imbalance. Currently, Canadian copyright reverts to a creator's heirs 25 years after her death. In the United States, creators can terminate a copyright assignment after 35 years. I have done so. I ask that Canada allow something similar.

The simplest solution would be to amend subsection 14(1) of the *Copyright Act* by changing the word "death" to "assignment". All copyright assignments would end after 25 years. This is what I proposed when I appeared before the Standing Committee on Canadian Heritage on September 18, 2018. Daniel Gervais, who appeared with me, suggested that three conditions attach to the right: that termination be at the creator's request, that the creator be required to give advance notice and that a public notice be made available. I agree with these conditions, especially the first one. This requires setting up some relatively simple mechanics concerning notices, their timing, their form, etc. It need not be as complicated as in the United States. I asked Mario Bouchard, former general counsel to the Copyright Board of Canada, to help paint a clearer, broader picture of how this could be done and why.

In this submission, I explain a creator's ability to transfer her copyrights must be curtailed, how this is done elsewhere and why each approach has limits. I mention countries that already impose or allow some form of termination of copyright assignments, explain why termination protects creators so well and comment on what opponents to termination have to say. I discuss what can be done to make termination on request run smoothly. Finally, I explain why allowing termination of copyright assignment is especially important as Canada plans to extend the life of copyright by 20 years.

Why limit creators' transfers of copyright to intermediaries

Throughout the world, copyright law imposes limits on what creators can transfer to intermediaries, for what purpose and for how long. There are many reasons for this. Here are three.

One is the *unfair bargaining imbalance* between creators and intermediaries. It is very easy to assign away the rights to a creation, and very difficult to get them back. Intermediaries have the upper hand. They sign talent deals all the time; the talent does not.

Intermediaries have better market information than creators; creators sign deals based on no information at all. Intermediaries are better equipped to predict market success. They spread risks over their whole pool of creators or catalogue and over the long run. Creators bargain away their catalogue long before the market has any chance to put a value on it, even before it is created.

Creators sell their rights cheaply. To a young composer, a modest advance may seem a fortune. Exaggerated expectations about future income streams and what they include can lead creators to view their percentage of the deal as more than what it is. Economists would say that heuristic biases and excessive discounting of future value lead creators to behave irrationally. This is not likely to change.

Sometimes, a creator licenses her rights for free, without knowing it, in standard form contracts attached to digital products. These intermediaries get the benefits from the value of user-submitted materials with no obligation to share them.

Copyright law also imposes limits on what creators can transfer or assign because *markets change*. Mechanical royalties, which used to be an important source of a composer's music income, have almost disappeared. Every change in technology or business model changes the balance of income set out in contracts written decades ago. Uncertainty about future sources of income increases as the pace of change accelerates. Yet Canadian copyright law and copyright markets expect inexperienced creators to strike long-term bargains that will produce fair outcomes for as long as 100 years.

Limits are also imposed on what creators can assign to *prevent a work from being under-exploited* or not exploited at all. The value of most non-tangible creations (song, play, movie, book) usually materializes in a short time frame; so, intermediaries tend to focus on recent creations. They view their back catalogue as a source of income that requires little or no effort to promote, leaving creators unable to optimize these income streams for themselves.

How copyright law protects creators from unfair bargains; limitations

There are many ways to account for a creator's unequal bargaining power and other factors.

Some countries make it difficult or impossible to transfer rights: in Germany, copyright can be licensed but not assigned. Belgium, France and Spain limit the possibility to transfer rights to future works or the right to exploit existing works in unknown markets. The scope of the transfer can be limited to certain territories or forms of exploitation, or to what is necessary for the reasonable performance of the expressly stated purpose of the contract. In France, ambiguous clauses tend to be interpreted in favour of the creator. Formalities can be imposed: in Canada, assignments must be in writing.

Some copyright laws require that creators share in the ongoing income generated by their creations; others impose some form of fair remuneration. In Germany and the Netherlands, creators are entitled to fair remuneration from the outset and to seek an adjustment later if justified by changed circumstances ("best-seller provision"). The *droit de suite* on resale provides creators with a share in the increase in value of their artistic works when they are resold.

"Use it or lose it" rules provide that the rights in an intermediary's back catalogue are returned to creators unless the creations are properly exploited. Similar provisions are found in some book publishing contracts. France does this for certain digital rights. In Germany, exclusive buyout licences are converted to non-exclusive licences after 10 years, allowing the creator to issue other non-exclusive licences to competitors (or to exploit the work herself).

Intermediaries can be required to comply with reporting and transparency obligations.

Finally, general rules of contract law (fairness, undue influence, unconscionability) can have a role to play.

These and other ways to protect a creator's contractual interests exist, short of termination. All have their advantages. *All have their limitations.*

Making it difficult to transfer rights may complicate bargains unnecessarily. Limiting transfers of future works does not help in respect of existing ones. Limiting transfers to existing forms of exploitation may create deadweight loss by requiring continuing renegotiations in fast-moving markets. Converting exclusive buyout licences to non-exclusive licences may make sense only if straightforward assignments are not allowed.

Decisions of the courts, with their attending costs and delays, may be needed to define: what is an existing market; what is necessary for the reasonable performance of the contract; what is a fair share of remuneration, and what is included in its calculation; when a bargain becomes unfair as a result of changed circumstances; when a back catalogue is being so underused as to justify its return to its creator. In all these cases, the law will remain uncertain until it settles.

Enforcing a fair remuneration rule requires going to court; apart from costs, there is no reason to think that a court is better equipped to determine what are fair shares in the long run. Such rules do not help if the intermediary stops exploiting a creator's portfolio: 100% of zero is zero.

The *droit de suite* is not made for the exploitation of non-tangible expression.

Rules converting exclusive buyout licences to non-exclusive licences can be circumvented by offering an advance coupled with a token ongoing royalty that is not expected to recoup the advance. Reporting requirements ensure transparency but not income.

Finally, in Canada, federal competence over copyright is limited; primary competence over contracts is provincial. Parliament can impose certain rules on copyright contracts. But what if the rules are too detailed or too vague (what is fairness; when is influence undue)?

Terminating an assignment or licence

Some countries have decided that letting an intermediary keep a creator's copyright for its entire duration makes little sense. I have already mentioned the Canadian rule of reversion 25 years after the creator's death and European rules that end or transform the intermediary's right to use a creation after a certain time or when certain events (non-exploitation) occur.

In the United States, creators have the right to terminate a copyright assignment after 35 years. Providing a right to terminate after a reasonable amount of time comes with several advantages:

- deals between creators and intermediaries last a set period that ordinary people understand. Creators are not actuaries. Most of us already find it difficult enough to understand that a mortgage lasts 25 to 35 years. How can creators be expected to understand the consequences of assigning rights irrevocably and forever to creations that will exist only in a decade, or two, or more?
- it reduces the presumptive unfairness of bargains between creators and intermediaries by mitigating the imbalance of power between the two. By the time the right can be exercised, creators probably know better what their business is about and how to surround themselves with competent advisors. They can free themselves from agreements that do not account for market changes since the deal was signed. They can decide, based on their experience, whether they wish to continue with the same intermediary, to redefine that relationship or to deal with someone else.
- it provides a bright line which other forms of protection requiring judicial interpretation do not. Its timing is linked to the life of the contract, not to an uncertain future date such as the death of the author.
- it maintains the incentive to create. The creator knows that what she creates 20 years into a 25-year contract will be hers to do as she pleases within 5 years.
- it addresses the consequences of excessive demands made in standard form contracts.
- it encourages intermediaries to make better use of their back catalogue, to the benefit of creators. If not, creators can reanimate shelved creations, sometimes in niche markets that are better exploited by someone other than the initial intermediary, by themselves or with the help of a new intermediary.
- it allows creators who started young and do not die prematurely to gain further potential financial benefit from their work during their lifetime.
- it does not prevent creators and intermediaries from deciding on their own to replace an earlier contract by one which suits them better, thereby re-starting the clock if it is in their interest.
- it achieves both efficiency and equity.
- it recognizes that copyright is a right that exists to benefit creators, while ensuring that intermediaries get a fair chance to a fair return.
- it is within the constitutional power of Parliament.
- it is the single and probably the most efficient subsidy to Canadian creators at no additional cost at all to the taxpayers.

Is there a case against termination?

I find the arguments against the right of termination unconvincing.

Is the measure paternalistic? No more than consumer protection legislation, and a budding composer is more in need of protection than an informed consumer. I do not propose to end all assignments automatically, just to give creators the right to terminate assignments. They decide whether to exercise that option. That is not paternalistic.

Is it economically efficient? American intermediaries still sign contracts with creators even though the right of termination has existed for 40 years. Is their copyright market less efficient than ours? The fear that advances will shrink will prove true only if current advances account for royalties to be collected in 50, 75, 100 years; was that ever the case? Are intermediaries less inclined to exploit their back catalogue? Has their trade become unnecessarily complicated? Are they ignoring the fact that creators and intermediaries can replace an earlier contract by one which suits them better?

More importantly, I think that the right to terminate is just as much a matter of equity as it is a matter of efficiency. Where is the harm in allowing creators to regain their copyright after intermediaries have had a reasonable opportunity to recover costs and make a profit?

Issues to be addressed

Canada could implement termination of assignments simply by removing the word “death” from subsection 14(1) of the *Copyright Act* and replacing it by “assignment”. All copyright assignments would end after 25 years. I propose that termination be at the creator’s request. This requires some relatively simple mechanics concerning notices, their timing, their form, etc. It need not be as complicated as in the United States.

Here are some issues that need to be addressed in order to implement the right of termination on request. There are quite a few, all of which are relatively easy to deal with.

A non-waivable, non-assignable right

The right cannot be effective if it can be waived or assigned. The ability to assign in advance the second term of copyright what that led to the US Congress in 1976 to create the new, non-assignable termination right.

Which creations are subject to termination

As in the United States, the right should apply only to creations whose first copyright owner is the creator. Works created in the course of employment should be excluded. The right would concern grants made by creators and their heirs. The issue of commissioned works may deserve separate attention.

The American right of termination is granted to all creators, for all creations, for all assignments throughout the world, irrespective of any “choice of law” stated in the contract, but only for the purposes of US copyright law. I propose that these rules apply in Canada.

Who can terminate grants

American copyright law specifies who (author, heirs, successor in title, family) can exercise the right. It overrides (for example) who may have inherited from a dead creator: the person who can exercise right and the person who benefits from it may not be the same.

Clearly stating who can exercise the right irrespective of local laws probably avoids lengthy debates about which law should apply; it makes especially sense in the context of a federation where the power to create the right is federal and the power to determine who benefits from it is local.

Assignees should not have the right to terminate sub-assignments.

Termination with joint authors

The situation of joint authors can be addressed in two ways. One is to allow authors to terminate an assignment for their share and to let others to do as they wish. The other is to allow a prescribed majority to exercise the right to the benefit of all; requiring unanimity would encourage hold offs. The situation of joint owners of copyright can be addressed in a similar way.

It should be kept in mind that often, co-authors assign rights to separate assignees through separate contracts at separate times, so that the window of termination may not be the same for all joint authors of a single creation.

Timing of termination; duration of window

The timing of termination should be linked to an event known to both the creator and the intermediary: the life of the contract.

Intermediaries need time to use the creations they acquire. Investing to develop new creators involves risk, as does producing new works from existing ones. Costs and uncertainty would increase unnecessarily without some form of protection from a creator holding up on decisions subsequent to the acquisition of the original creation (movie rights to a novel).

How long do intermediaries need to recoup sunk investments and to make a reasonable return? In the United States, termination generally can occur after between 35 and 40 years from the date of grant (it can be different if the grant covers the right of publication). I propose that termination be allowed 25 years from the date of grant: the time frame to exploit most forms of creation is much shorter.

In the United States, the right is limited to a 5-year window, arguably to reduce uncertainty. It could be a continuing right, exercisable any time after 25 years, if a sufficiently long notice of intention is provided.

Timing of the notice to terminate

If the right to terminate is on demand, intermediaries must be notified of its exercise. The notice should be given early enough so that intermediaries do not stop exploiting a creator's catalogue as the window of termination gets closer. In the United States, the notice must be given between 2 and 10 years before it becomes effective.

Notice to whom?

In the United States, the notice to terminate must be sent to the person who received the original transfer as well as to downstream intermediaries and users who can be identified after a "reasonable investigation". The notice must also be sent to the Registry of Copyright. The American requirement to directly notify downstream intermediaries may have caused unnecessary difficulties. Some form of public notice, with the Copyright Board or the Copyright Office acting as public repository, could help simplify the process.

Ambit of termination: downstream transfers; collective and derivative works

Intermediaries licence others to use their catalogue. To be effective, the right to terminate must include those sub-assignments. Fairness then requires some form of notice, as I just noted.

The issue of collective, derivative and other works deserves special attention: should it be possible to stop the exploitation of a movie based on a novel?

Form, content and manner of notice

Such matters as when the notice takes effect should be set in the law. Others (listing the creations involved, form the notice takes) may be better left to regulations. A balance will need to be found between ensuring certainty and not requiring so much detail that it could be argued that a 546-page-long notice concerning is insufficiently detailed (Superman case).

Dealing with transfers that occurred before termination was possible

The termination right should apply to all existing grants, reflecting the fact that 25 years is more than enough time for an intermediary to recoup their investment and make a decent profit. The application could be phased in, over 5 years, for agreements 20 years or older, to allow intermediaries some time to adjust to the new rules.

Applying the new law to existing agreements may have financial consequences that would have to be addressed. Sections 32.4 to 33.2 and 78 of the *Copyright Act* already provide a mechanism to compensate for acts done before the recognition of certain copyrights which become copyright infringement as a result of this recognition. Something similar could be designed here.

CONCLUSION

Including a termination right in Canadian copyright law would help to ensure that real world copyright law works more in favour of creators. It would also help reduce some of the unintended effects of the upcoming extension of copyright.

Canada is now more or less duty-bound to increase copyright protection by 20 years, to “life + 70”. Extending the duration of copyright essentially enriches large firms of intermediaries. It does not to put money in the pockets of most creators.

Economists argue that copyright already lasts too long. Canada should respect its treaty obligations. However, unless Parliament intends copyright to be a law for distributors and not creators and wishes that the rhetoric about creators merely help intermediaries to gain strong exploitation rights with little or no benefit for creators, it should do something to ensure that more of the benefits from copyright extension flow to creators.

Granting the right of termination is an interesting and effective way to balance copyright duration with creators’ continued remuneration.

SINGLE RECOMMENDATION

Amend the *Copyright Act* to allow creators to terminate all copyright transfers 25 years after the date of transfer.