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Re: Statutory Review of the Copyright Act

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To the members of the Standing Committee on Canadian Heritage,

I am a bestselling Canadian science fiction author whose work has been published around the world in many languages and adapted for audio, stage, audiovisual and other formats. I am the author of dozens of books, including novels for adults, novels for young adults, middle grades books, picture books, collections of essays, and book-length nonfiction books, including "Information Doesn't Want to Be Free," (McSweeney's), a book about artistic business models in the internet age.

I am also very involved in copyright debates. I served as an NGO delegate to WIPO; helped found an internet policy nonprofit in the UK called the Open Rights Group; and work on copyright in several academic capacities: as a Visiting Professor of Practice at

the University of North Carolina's Library and Information Science School; as a Visiting Professor of Computer Science at the UK's Open University; and as a Research Affiliate at MIT's Media Lab. I was also the inaugural Canada-US Fulbright Chair in Public Diplomacy at the Annenberg Centre at the University of Southern California.

I write today to discuss author compensation. Much of the ideological debate over authors' incomes in the internet era has focused on whether a certain business model produces gains or losses for authors. This frame leads policymakers and creators astray.

Anyone who has ever pursued a career in the arts, in any era, can tell you that it is a long-shot. Most people who set out to write never earn a cent, and of those who do have some earnings, the vast majority earn paltry sums. When I sold my first novel in 2000 to Tor Books, it was for \$7,500, the high end of a typical first-novel advance from a major New York publisher at the time. Today, my writing students who've broken into the field tell me that they're getting the same advance -- \$7,500, in inflation-eroded 2018 dollars. If you spend years writing a novel that you sell for \$7,500, you are not earning a full-time wage.

And yet we all know the success stories of the industry: the writers and other artists who are overnight sensations, or who break out after paying their dues. Every successful

creator I know worked very hard to get where they are – and got incredibly lucky. I count myself among them.

I believe that the default outcome for attempt to earn a living in the creative fields is failure, at an incredible rate, something like 99%. The success stories we meet in the field are the 1% who slip through the cracks. The incredible "oversupply" of artistic hopefuls mean that any opportunity, no matter how fleeting or slender, will likely have someone whose work and proclivities are well-suited to it. With so many seeds floating around, every crack in every sidewalk has a dandelion growing out of it.

When I am mentoring young writers, I think of my job as helping them figure out how to find cracks where they can flourish. But when I'm thinking about copyright policy – the industrial policy of the entertainment industry – I focus on **how to ensure that the money that flows into the industry stays in the hands of creators.**

The corollary of the idea that there is a vast oversupply of artists of diverse talents and priorities, relative to the opportunities available for artists, is that whatever business opportunities exist will always be seized. Copyright's job shouldn't be to decide what media we'll enjoy, or which artists will produce it.

Where copyright can help is in rebalancing the wildly uneven negotiating leverage implied by the glut of would-be artists: where you have many, many artists who want to earn a living, and only a few companies who act as gatekeeper to the audiences that will supply that living, the companies can negotiate deals that allow them to move nearly all the income generated by artists to their side of the balance sheets.

A few artists will have leverage – because they've sparked one of the rare bidding wars among the highly concentrated firms for a work by an artist early in their career, or because they have established themselves as a distinct "product" that can be readily substituted for in the market by another artist who'll take worse terms.

But for the majority of artists, the likelihood is that they're going to get a deal that comes on something like "take it or leave it" terms and that shifts much of the risk to them while shifting the rewards to the firms with whom they are negotiating.

Here are some concrete ways that copyright law can even out this negotiating imbalance:

1. Allow artists to claim back their rights from entertainment companies after a short interval; the US Framers had an initial term of 14 years, renewable after 14 years (but

only by the author, making this functionally equivalent to a reversion process, since a publisher who couldn't tempt a writer into renewing lost the work anyway); Bryan Adams has briefed for a 25 year period. I can live with Adams' figure: chances are a work that is still earning after 25 years was a surprise hit that the corporate intermediary got for a bargain price – give us the power to renegotiate and we'll get a much better deal.

2. Expand fair dealing to allow artists to create novel works without the transaction costs and licensing fees associated with clearance. In her memoir, my mentor, the great Canadian science fiction writer Judith Merrill, recounts how the pioneers of our field joyously pilfered each others' ideas to make new works, creating a fecund, feverish environment in which new ideas were quickly spun out into a myriad of possibilities, each imagined by a different writer. Early hip-hop – prior to the current licensing regime – enjoyed a similar efflorescence. In addition to generous fair dealing provisions, authors also benefit from well-defined *de minimis* thresholds below which no permission need be sought. Licensing for minor borrowings generates massive amounts of revenue to intermediaries who negotiate and paper over these deals, but precious little finds its way into artists' hands. Licensing is also a supercharger of market concentration: when you need to be signed to a major label to license a sample from another major label, the labels gain the whip-hand in negotiating with you, because they have something you

need, meaning they can shift more of the money your work generates into their side of the ledger.

3. Allow copyright owners to authorise circumventions of TPMs that have been placed on their works by intermediaries. The Big Tech giants have made a practice of non-negotiably locking creators' works with their proprietary TPMs, tying the creators' customers to the intermediaries' platforms. For example, the market-dominating audiobook company Audible will not allow creators to specify that their works must not be distributed with Audible's TPM, a proprietary technology controlled by Audible's parent company Amazon; likewise Apple will not let app creators opt to distribute their software through the App Store without Apple's TPM, and Apple will not allow iPhone owners to buy software from any store except its App Store. That means that every dollar a creator's copyrighted work generates is a dollar of locked in switching cost for customers that the platform can use to tilt future negotiations to its benefit – for example, Apple's original App Store terms gave it 30% commissions on the initial sale price of an app, but once Apple had lured a critical mass of app authors and users to its two-sided market, it unilaterally renegotiated the deal to give it 30% of the *lifetime revenue* from the user's activities within the app. Allowing rightsholders to authorize TPM circumvention will end the practice of market-dominating tech intermediaries holding audiences to ransom.

Finally, Heritage must work with Industry to end 40 years of antitrust enforcement based on the "consumer harm" standard of the Chicago School. This malpractice has led to massive concentration in the entertainment sector – as well as most other sectors – meaning that creators are sellers in a buyer's market, with precious few bidders for their creative output. It is elementary economics that sellers in a supply chain with few buyers clear less than they would if they had a larger pool of buyers to play off against one another.

The long-run practice of allowing mergers and acquisitions in the media sector has produced so much concentration, both horizontal and vertical, that creators who succeed are still doomed to take home a smaller and smaller share of the revenues generated by their creative work.

To that end, Canada should reject any copyright liability regimes that create high compliance costs that would leave Big Tech as the only possible places where our works can be discovered, shared, enjoyed, and sold.

For example, Article 13 of the EU's proposed Copyright in the Digital Single Market would lead to large platforms to establish crowdsourced databases of "copyrighted

works" (in reality, there is no requirement to confirm that these works were copyrighted, nor that they were owned by the people who claimed them in these databases) and thereafter block users from posting anything that seemed to match the works in the database.

It's not clear what these will cost, but given that Google spent a reported US\$100,000,000 on Contentid (a system that compares the soundtracks of Youtube videos to a small database of copyrighted works submitted by a handpicked group of trusted rightsholders), US\$300m-\$500m is not unreasonable.

For the US Big Tech companies, Article 13 constitutes a low-cost permanent internet domination license: even if smaller firms are exempted from spending a half-billion dollars on compliance, they will never be able to grow to big firms without facing a \$500m sticker-shock, meaning that the big internet platforms need never fear European competitors growing to rival them.

With fewer intermediaries, the deal that artists – and the corporations that sometimes represent us – can command will only get worse.

As an alternative, we could create voluntary blanket licenses, administered by efficient, digital-first collecting societies that were as transparent and accountable as a good open source project. These licenses could set equitable compensation rates, with shares earmarked for creators without regard to their contractual arrangements with corporations, ensuring that the gains realised through such a scheme were not simply harvested by the concentrated entertainment sector, replacing the bad deal we get from Big Tech with an equally bad deal from Big Content.

Thank you,

Cory Doctorow