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BRIEF
INDU Committee of the House of Commons
Revision of the Copyright Act

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There is currently an important debate among both academics and professional practitioners on the proper definition, coverage and characterization of intellectual property rights (IPR) of all kinds, including copyrights and patents. At the center of this debate one finds arguments on the costs and benefits of protecting and enforcing intellectual property rights. The balance of costs and benefits is seen differently by different actors. Some see the costs of such IPR protection, in terms of a lower dissemination of creations and innovations and therefore a loss of socio-economic value due to impediments to further creations and innovations, as larger than benefits. Others see those benefits, in terms of an adequate IPR protection allowing proper compensation of creators and innovators thereby inducing them to increase their valuable but risky investments in further creations and innovations, as overshadowing costs.

Clearly, IPR should not be an undue impediment to further creations and innovations and therefore, should be properly defined and restricted in time and scope. As clearly, creations and innovations do not fall from heaven but are the results of significant incentives for creators and innovators to engage into proper efforts and risk-taking.

The balancing act here is to provide proper incentives for creators and innovators while at the same time foster the dissemination of creations and innovations: proper incentives and proper dissemination rest fundamentally on the competitive market evaluations of value, costs and benefits.

Market and market-like institutions for transactions on IPR, including fair dealing exceptions, compulsory licensing, as well as administrative boards and tribunals (such as the Copyright Board) with their role and mission as social welfare maximizers or market surrogates, can play a major role in achieving this programme.

The recorded music and publishing industries (understood as the different ways of making information available to the general public, hence books as well as news/information reporting) are particularly important in the digital economy. They are in a sense leading the digital

transition and fueling the Internet. First, recorded music and publishing are activities prone to digitization. Second, new technologies used to sell and distribute music and publications on the Internet (webcasting and on-demand streaming, e-books, e-journals) raise the possibility of valuable large-scale dissemination and customization at relatively low marginal costs. Third, those technologies open music and publishing markets to increased intensity of competition due to the lower costs of entry of creators (authors, composers, performers, writers) of all time periods on a world-wide scale. The digital revolution comes at a time when the value of copyrighted works appears to be both significantly underestimated and continuously eroded by new copyright exceptions.

Pricing copyrighted works so that creators are competitively compensated has always been a difficult task given the "information good" character of such works: once produced or fixed, their use or consumption do not destroy such goods/assets, which remain available for consumption now and in the future. In that regard, copyrighted works are different from usual public goods like national defense or security which must be produced in each and every period. Doing it in the digital era is even more challenging as digital technologies reduce to "zero" the cost of reproducing and disseminating copyrighted works such as music and books, making possible a maximal dissemination of works and thereby challenging the delicate balance between the respective rights of creators and users.

The determination of the competitive market value of copyrighted works is the major challenge confronting us. The good news is that the Gordian knot of balancing creators/rightsholders' rights to a fair and equitable hence competitive compensation and the users' right to the benefits of digitization can be untied.

Let me concentrate hereinafter on copyright in musical works.

The competitive market value(s) of copyrights in music and the implementation of such value can and must be properly grounded in the economics of efficient allocation of resources, efficient negotiation/mediation, and cooperative game theory.

I argue in M. Boyer, "The Three-Legged Stool of Music Value: Hertzian Radio, SiriusXM, Spotify (The Working Paper Version v2)", CIRANO 2018s-32 https://cirano.qc.ca/files/publications/2018s-32.pdf that rightsholders are significantly shortchanged by both the current Copyright Act provisions and the way they are implemented. The under-compensation of creators, as compared to the competitive market compensation benchmark, is a significant impediment to a more efficient and vibrant economy.

This under-compensation totals today several hundred millions dollars per year in Canada. In commercial radio alone, it reaches more than three hundred millions per year. I further argue that, for economic efficiency reasons, this gap should not be filled by primary users alone (such as radio station owners and operators) but by a broader set of beneficiaries, including equipment manufacturers, content and service providers, and other stakeholders, as well as the general public and governments.

I argue also in M. Boyer, "The Economics of Private Copying", Toulouse School of Economics and Institute of Advanced Study in Toulouse policy paper 2017-08 (https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJJL/PolicyPapers/pp_the_economics_of_private_copying_marcel_boyer_31_august_2017.pdf) that public policies towards the development of a digital economy and the maximal dissemination of copyrighted works through copyright exceptions, including fair dealing, must avoid stigmatizing creators, implicitly if not explicitly, as the squeaky wheel of the cart. Two examples will illustrate this stigmatization.

In October 2012, the Canadian Government issued a regulation aimed to exclude microSD cards from the definition of "audio recording medium" (used in smartphones, tablets, hard disks, etc.) and therefore prevent the Copyright Board from setting a levy on such cards to compensate rightsholders for the private copying of music on those music recording media and devices. The Government's sole argument: "Such a levy would increase the costs to manufacturers and importers of these cards, resulting in these costs indirectly being passed on to retailers and consumers … thereby negatively impacting e-commerce businesses and Canada's participation in the digital economy [sic!]." Whenever I mention this regulation in my public conferences in the US, Canada and Europe, the attendance starts laughing. What is less funny is that this regulation costs creators/rightsholders more than $40 million per year. Suffice it to mention that private copying levies aimed at protecting creators' rights generate over $300 million per year in France and in Germany compared to $3 million in Canada. Those countries do not fear or consider that such levies are "negatively impacting e-commerce businesses and their participation in the digital economy", quite the contrary.

A second example is the education exception under fair dealing. Universities in particular (or provincial governments as their financiers) hide under fair dealing in refusing to make royalty payments for their reproduction of copyrighted material, claiming that those budgets can be used to fund scholarships and activities for students and administrative copyright defense policies (sic!). As if creators were responsible for the underperformance, if any, of our universities.

The question is not whether copyright exceptions, including fair dealing provisions, are desirable or not. They may very well be, in the context of what numerous lawyers consider as "a grand social contract" between creators and society. The real question is: Who, besides creators, should pay for such contract, fair dealing, and public policies?

The most important and pressing copyright agenda today centers on two challenging tasks: the discovery of value and the identification of sources of compensation. What is the competitive market value (compensation) of copyrighted works given their "information good" characteristic and the impact of digital technologies, which make the emergence of competitive markets (willing buyer willing seller) almost impossible? And given this competitive market compensation of rightsholders, who should be called to foot the bill?

To answer those questions, one must start by thinking out of the box. Here are five recommendations.

First, move away from the current circular heuristics in favor direct inferences of competitive market value from the behaviour and choices of users. Although difficult and challenging, it can be done (See M. Boyer, CIRANO 2018s-32, cited above).

Second, bring to the table all major groups of beneficiaries and make them jointly and severally responsible/liable to ensure the proper (fair, equitable, competitive) compensation of creators. Among such beneficiaries: direct or primary users, Internet service providers, equipment manufacturers, other industry stakeholders, consumers and governments. Not only is this approach a sound extension of the willing buyer willing seller principle in the context of "information goods/assets" and "digital technologies", but it also can be done. See M. Boyer, "The Competitive Market Value of Copyright in Music: A Digital Gordian Knot," *Canadian Public Policy*, forthcoming Dec. 2018 (see the working paper version, CIRANO 2018s-30 https://cirano.qc.ca/files/publications/2018s-30.pdf)

Third, add to the Supreme Court of Canada (2012) "balance" and "technological neutrality" principles, the following two principles: the "socio-economic efficiency" principle combining characteristics of a first-best or unconstrained optimal resource allocation and a second-best or constrained optimal allocation, and the "cooperative game" principle (all beneficiaries at the compensation table).

Fourth, allow the Copyright Board to impose tariffs on an extended list of direct and indirect (value chain) beneficiaries in order to achieve a competitive market compensation of creators together with a dissemination of works as close as possible to a maximal one.

Fifth, require the Copyright Board to regroup related hearings and to invite all stakeholder parties to participate. The current sequential determination of royalties in related cases makes it difficult to implement significant adjustments and reforms as sequential hearings favor the status quo by interlocking royalties determined in different hearings. For instance, in the commercial radio case, require the Board to regroup together the currently separated hearings involving SOCAN, Re:Sound, CMRRA-SODRAC (CSI), and other Collectives, and invite, besides the CAB, other significant beneficiaries such as equipment manufacturers and distributors, service providers, advertisers, governments as consumers' collective organizations, and others. This regrouping of hearings would favor the necessary reassessments of the level playing field imposed by technological changes and would avoid "losing sight of the forest for the trees," a major drawback of the current sequential hearing system.

In summary, the revised Copyright Act should stress the following principles in addressing the copyright pricing challenge:

1. The level playing field or technological neutrality principle: All uses/users/technologies of copyrighted works (music and books) should compete for customers' ears on a level

playing field. Those deriving similar value should pay similar royalties and those deriving larger value should pay higher royalties (technological neutrality).

2. The competitive market value (balance) principle: the compensation of rightsholders should achieve fairness and equity for both users/stakeholders and rightsholders, hence correspond to an extended properly grounded willing buyer willing seller transaction.

3. The socio-economic efficiency principle: Given the "information goods/assets" character of copyrighted works and the significant impact of "digital technologies", users should have access to, if not use/consume, virtually all works as those are not destroyed in consumption.

4. The separation principle: It is neither necessary nor optimal that primary users' royalty payments be equal to, hence be the only source of, the competitive market compensation of creators/rightsholders. This is the elephant in the room. In Education: there is a separation between what consumers (students and their parents) pay and what the providers of education services/content (teachers, school personnel) receive as compensation In Healthcare: there is a separation between what consumers (patients) pay and what the providers of healthcare services/content (doctors, nurses, health personnel) are receiving as compensation.

5. The balanced fair dealing principle: If it is deemed desirable for social efficiency reasons, as characterized in the Supreme Court (2014) decision in CCH and the Copyright Act (2012), to limit the expression of copyright, the ensuing fair dealing and other exceptions provisions should come, in conjunction with the above separation principle, with a discussion of who, besides rightsholders, should pay for such public policies.

Hence, the sought-after untying the above Gordian knot would involve the design of tariffs or contributions imposed at different stages of the value chain between creators and end consumers, hence on different beneficiaries of copyrighted assets. Implementing such a program is urgently needed.