Terminating Copyright Assignments to Preserve Creator's Rights
Brief to the Standing Committee on Industry
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Copyright-protected creations are commercial objects. Creators ask professional intermediaries (record label, publisher) to monetize their creations. So, copyright must be transferable.

Creators generally hold the short end of the stick in these transfers. Intermediaries sign up creators continuously. Creators sign anything they are presented, transferring too many rights, for too long, sometimes "in all media, throughout the universe and in perpetuity."

Copyright law works mostly for intermediaries; extending copyright duration benefits them, not creators. Something should be done. Canadian copyright reverts to creators' heirs 25 years after death. In the US, creators can terminate copyright assignments after 35 years, as I have done. I propose something similar.

The simplest solution is to amend subsection 14(1) of the *Copyright Act* by changing "death" to "assignment". Assignments would end after 25 years. I proposed this to the Standing Committee on Canadian Heritage, on three conditions: termination on request, advance notice and publication of notice. This requires some rules concerning notices, their timing, their form, etc., something less complicated than in the US. Mario Bouchard, former general counsel to the Copyright Board, helped me prepare a brief for the Heritage Committee painting a clearer, broader picture of how this could be done. This is a shorter version.

Copyright law imposes limits on what creators can transfer to intermediaries for many reasons, including these.

First, the *unfair bargaining imbalance* between creators and intermediaries. It is easy to assign rights, difficult to get them back. Intermediaries have the upper hand. They have better market information; creators sign deals based on no information. Intermediaries spread risks over their catalogue and over the long run. Creators bargain away works before the market puts a value on it, before they are created.

Creators sell rights cheaply. Exaggerated expectations about future income streams and what they include lead creators to view their cut as more than what it is. Heuristic biases lead creators to behave irrationally.

Creator license rights for free, unknowingly, in standard form contracts attached to digital products. Websites extract value from user-submitted materials with no obligation to share.

Second, *markets change*. Mechanical royalties no longer are an important source of a composer's income. Changes in technology or business model change income flows from decades-old

contracts. Uncertainty about future income sources increases as change accelerates. Yet Canadian law and markets expect inexperienced creators to strike long-term bargains producing fair outcomes for as long as 100 years.

Third, limits are imposed to *prevent under-exploitation of works*. Most non-tangible creations (song) are monetized over a short time; so, intermediaries focus on recent creations. The back catalogue is an income source requiring little promotion, leaving creators unable to optimize their income.

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: allowing licences but not assignments (Germany); limiting transfer of future works or for unknown markets (Belgium, France, Spain); limiting transfers to precise territories or forms of exploitation, or to what is necessary to perform the stated purpose of the contract; interpreting ambiguous clauses against the intermediary (France); imposing formalities (Canada).

Some laws require that creators share in the ongoing revenue generated by their creations. 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* provides creators with income when their artistic works are resold.

Sometimes, rights to a back catalogue are returned to creators unless works are properly exploited (France, for 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.

There can be reporting and transparency obligations. Finally, general rules of contract law can have a role to play.

All these forms of protection have their advantages and *limitations.*

Making it difficult to transfer rights may complicate bargains unnecessarily. Limiting transfers of future works does not help for existing ones. Limiting transfers to existing forms of exploitation requires continuing renegotiations in fast-moving markets.

Courts decision (and costs) may be needed to define: "existing market"; "necessary for the performance of the contract"; "fair share"; "changed circumstances"; "underuse" justifying contract cancellation. The law remains uncertain until it settles.

Enforcing fair remuneration requires going to court. It does not help if the creator's portfolio is unexploited: 100% of zero is zero.

The *droit de suite* is not suited to non-tangible creations. Rules converting exclusive buyout licences to non-exclusive licences can be circumvented. Reporting requirements ensure transparency but not income.

Finally, in Canada, *federal competence over copyright is limited*; primary competence over contracts is provincial.

Providing a right to terminate after a reasonable amount of time (35 years in the US) *comes with several advantages*:

– deals between creators and intermediaries last a set period that ordinary people understand. You cannot expect creators to grasp the consequences of assigning rights irrevocably and forever to songs to be created in a decade when most people find it difficult to understand that a mortgage lasts 35 years.

– 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 know their business better and have better advisors. They can cancel agreements that do not account for market changes. They can decide, based on experience, whether they wish to continue as before, to redefine that relationship or to deal with someone else.

– it provides a bright timing line, without judicial interpretation, linked to the life of the contract, not to an uncertain future date (author's death).

– it maintains the incentive to create, since creations made 20 years into a 25-year contract can return to the creator within 5 years.

– it addresses the consequences of excessive demands in standard form contracts.

– it encourages intermediaries to make better use of their back catalogue, to the benefit of creators, sometimes in niche markets better exploited by creators themselves.

– it allows young creators to gain further financial benefit from their work during their lifetime.

– it allows creators and intermediaries 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 must 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 most efficient subsidy to Canadian creators at no additional cost to taxpayers.

I find the *arguments against the right of termination* unconvincing. Giving creators the option to terminate assignments is not paternalistic, certainly no more so than consumer protection legislation; a budding composer needs protection more than an informed consumer. American intermediaries still sign contracts with creators despite the termination right. Their copyright market is as efficient as ours. Advances do not appear to have shrunk. Intermediaries exploit their back catalogue. Creators and intermediaries can replace an earlier contract by one which suits them better. Importantly, the right to terminate is about equity as much as 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?

Termination at the creator's request requires some relatively simple mechanics concerning notices, their timing, their form, etc. Some issues need to be addressed in order to implement it. All are relatively easy to deal with.

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

As in the US, *the right should apply only to creations whose first copyright owner is the creator*. Works created in the course of employment should be excluded. 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 this approach.

American law specifies *who* (author, heirs, successor in title, family) *can exercise the right*. Who can exercise right and who benefits from it may be different persons. Clearly stating who can exercise the right avoids lengthy debates about which law should apply.

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

Joint authors could be allowed to terminate an assignment for their share and to let others to do as they wish, or a prescribed majority could be allowed to exercise the right to the benefit of all; requiring unanimity would encourage hold offs. Joint copyright owners can be addressed in a similar way.

The *timing of termination* should be linked to the life of the contract, and late enough to allow intermediaries to recoup costs and make a fair profit. In the US, termination generally occurs between 35 and 40 years from the date of grant. I propose 25 years: the time frame to exploit most creations is much shorter. In the US, the right is limited to a 5-year window. It could be a continuing right, exercisable any time after 25 years, if a sufficiently long notice of intention is provided.

If the right to terminate is on demand, *intermediaries must be notified of its exercise* early enough that a creator's catalogue continues to be marketed as the window of termination gets closer. The US requires a notice of 2 to 10 years to the original assignee, to downstream intermediaries who can be identified after a "reasonable investigation" and to the Registry of Copyright. The requirement to directly notify downstream intermediaries may have caused unnecessary difficulties. Notice to the original assignee and to a public repository (Copyright Board) would be simpler.

To be effective, *the right to terminate must include sub-assignments*. Fairness then requires some form of notice.

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?

Such matters as *when the notice takes* effect should be set in the law. Others (listing the creations involved, form the notice takes) could be left to regulations. A balance is needed between ensuring certainty and not requiring excessive detail.

The termination right should apply to existing grants. The application could be phased in for agreements 20 years or older, to allow intermediaries to adjust to new rules. Financial consequences could be addressed as sections 32.4 to 33.2 of the *Copyright Act* already provide.

Granting the right of termination is an interesting and effective way to balance copyright duration with creators' continued remuneration. It would help to ensure that real world copyright law works in favour of creators. *It would also help reduce some of the unintended effects of the upcoming extension of copyright.* This extension essentially enriches large firms of intermediaries, without providing money to creators. Unless copyright is a law for distributors and not creators and the rhetoric about creators merely helps intermediaries to gain strong exploitation rights, Parliament should ensure that more of the benefits from copyright extension flow to creators.

SINGLE RECOMMENDATION

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