

Brief presented by the
Fédération nationale des communications (FNC-CSN)

to the House of Commons Standing Committee on Industry, Science and
Technology

as part of its statutory review on the *Copyright Act*

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Introduction

Representing professional journalists, the Fédération nationale des communications (FNC-CSN) advocates for high-quality information of public interest meeting the highest standards of journalistic ethics. Journalists must have the means to research, investigate and analyze in order to report effectively to the Canadian public.

As part of the consultations on the review of the *Copyright Act*, the FNC-CSN recommends that the Act be amended as follows:

- Provide a definition of “journalistic work” that reflects current conceptions in the professional circles concerned;
- Provide for a right to remuneration in return for the reproduction and public communication on the Web of journalistic works;
- Limit the expert evidence required by the Copyright Board to certify a tariff concerning this right to remuneration;
- Tighten the definition of “information location tool”.

Until the Copyright Board sets these initial tariffs, the FNC-CSN calls on the government to financially support the creation and operation of one or more organizations to manage journalistic works that bring independent journalists and publishers together by region or by language.

1. Background

The major problems confronting the world of journalism can no longer be denied. The providers of information have reported this repeatedly: Web giants are capturing the revenues of mainstream media.¹ While some news companies are hiding their actual results,² the fact remains that iconic private media figures such as Rupert Murdoch are decrying the erosion of advertising revenues because of Google and Facebook.³ In Europe, legislative efforts to recognize related rights concerning the unauthorized reproduction of Web-based articles appear to meet the needs of publishers, but leave journalists on the sidelines.⁴ Calls for a redistribution of wealth from journalistic works by Web giants are multiplying.⁵ Copyright in Canada must be able to respond to it.

Copyright has historically been designed to adapt to the production and flow of information, ultimately benefiting increased public knowledge. It must continue to play this role by enabling journalists to earn a living from their production and to control its publication and integrity. We cannot wait until journalists have lost all hope of getting paid for their work, or for the mainstream media that employs them to be financially at the end of their rope.

2. Journalists' copyright

When they are independent, journalists are the original owners of the copyright for their work. They control, at least in theory, their rights of reproduction and public communication, including reproduction and communication on the Web.

Salaried journalists enjoy a special status, recognized in Canada since the

¹ Karim BENESSAIEH, *Conférence du CORIM: L'information est devenue un bien public*, La Presse, 10 April 2018, online: [www.lapresse.ca/affaires/economie/medias-et-telecoms/201804/10/01-5160446-conference-du-corim-linformation-est-devenue-un-bien-public.php] [in French only]

² Philippe ORFALI, *Les pertes s'accumulent depuis le lancement de La Presse+*, TVA Nouvelles, 8 April 2018, online: [www.tvanouvelles.ca/2018/04/08/les-pertes-saccumulent-depuis-le-lancement-de-la-presse] [in French only]

³ Agence France-Presse, *Rupert Murdoch réclame à Facebook et Google un partage des revenus*, La Presse, 22 January 2018, online: [www.lapresse.ca/affaires/economie/201801/22/01-5151019-rupert-murdoch-reclame-a-facebook-et-google-un-partage-des-revenus.php] [in French only]

⁴ Fédération internationale des journalistes, *Pas de droit voisin sans rémunération des journalistes, déclarent les fédérations de journalistes*, 14 March 2018, online: [www.ifj.org/nc/fr/news-single-view/browse/1/backpid/51/article/no-neighbouring-right-without-remuneration-for-journalists-say-federations-of-journalists] [in French only]

⁵ François BRETON-CHAMPIGNY, *Facebook devrait-il verser des millions de dollars aux médias québécois?*, Journal de Montréal, 24 March 2018, online: [www.journaldemontreal.com/2018/02/28/facebook-devrait-11-millions-de-dollars-aux-medias-quebecois] [in French only]

adoption of the Act in 1921. In the absence of a mutual agreement or collective agreement, they can forbid the reproduction of their works in a publication format other than the one for which they were created. We owe this special status to the fight by people such as the young journalist Winston Churchill, who had convinced the British Parliament in 1911. The bill that would lead to the recasting of English copyright laws provided that the employer was the owner of the rights to the works created by its employees. It was within this framework that Churchill and his fellow journalists argued that this principle was valid only for the original publication, thus reserving the right for journalists to prohibit any subsequent reproduction. At the same time, Parliament recognized that a journalistic work was sensitive to the point of deserving specific treatment.

But rights that cannot be exercised are not rights. Journalists, in reality, have no control over the exploitation of their works on the Web and derive no monetary reward. If the balance of power between journalists (freelancers and employees) and publishers is notoriously uneven, then it is a gulf that separates journalists and the multi-billionaire Web giants. The negotiation of mutual agreements is an illusion.

The concept of “related right” comes into play when the collection of revenues from the exercise of copyright is impractical or impossible. The FNC-CSN welcomes European initiatives to force Web giants to hand over part of the income they derive from the dissemination of journalistic works without the permission of the rights holders.

The FNC-CSN therefore recommends that the Act be amended to provide, like the remuneration rights already recognized under section 15 et seq. of the Act, a right to remuneration in return for the reproduction and public communication of journalistic works on the Web. Such an amendment would have the effect of collectivizing the management of remuneration rights.

In order to emphasize the substantial contribution of journalistic work to democracy, the Act should also provide for a definition of “journalistic work” inspired in part by the definition already provided for in the *Journalistic Sources Protection Act*:⁶

“journalistic work: any work resulting from the work of a journalist and consisting of the collection, writing or production of information for dissemination to the media in accordance with recognized ethical standards”

⁶ SC 2017, c. 22.

3. Collective management

A sound and realistic exploitation of rights in journalistic works requires collective management, the only way to restore balance between actors in the journalistic field, whose most powerful group is currently Web giants. That is why the FNC-CSN intends to help create organizations to manage journalistic works, bringing together journalists and employers/publishers, which could realistically be up and running by the time Parliament establishes the new right to remuneration that is called for above.

However, other changes to the Act are needed to enable these companies to fulfill their role. Even in the case of decades-old tariffs, still today interested parties clash before the Copyright Board, producing a multitude of ever more expensive and ever more complex expertise. Filing a tariff with the Board requires the financial means to navigate a process that has become excessively cumbersome: financial means that a new management company would not have.

The proliferation of evidence by experts is not inevitable, however. Quebec has imposed limits on litigants in matters of expertise, under the aegis of the new *Code of Civil Procedure*.⁷ Parliament must follow suit and limit the number of experts presented to the Board. The Board's functioning would be greatly enhanced by the introduction of such a solution. Moreover, a management company could, without this procedural burden, operate at a lower cost.

An organization that manages journalistic works can only see the light of day if the government and Parliament promote its creation and operation. That is why the FNC-CSN recommends that the Act be amended to provide that, when certifying tariffs concerning the reproduction and public communication of journalistic works on the Web, the Copyright Board limit expertise, admitting either an expertise produced for the Board or a joint expertise, under the Board's authority, each party proportionately defraying its share of the costs.

Until the Copyright Board sets these initial tariffs, the FNC-CSN calls on the government to financially support the creation and operation of one or more organizations to manage journalistic works that bring independent journalists and publishers together by region or by language.

The combined effect of the measures described above would simplify the mechanism for remunerating rights holders. While it is true that the owners would lose some individual control over their works – given the requirement to join a management organization to demand rights – they could more easily be

⁷ CQLR, c. C-25.01, ss. 231-234.

compensated for the dissemination of their works on the Internet. For their part, the Web giants would enjoy the advantage of operating on a daily basis with “balanced” costs to be paid to the rights holders of journalistic works, without having to negotiate mutual agreements with everyone. Social, economic and judicial peace would be ensured.

4. Tightening the “information location tool” exception

Since 2012, providers of information location tools have had an advantage over other users. In the event of copyright infringement by an information location tool provider, no remedy other than an injunction is available.

This exception opens the door to copyright infringement, which is the case when the information location tool, in addition to providing addresses, provides direct access to journalistic works. It is unacceptable that in 2018 the owners of sites on which the journalistic works are originally published derive no advertising revenues, yet the providers do.

Only one court decision has been made to date on the relevant provisions of the Act,⁸ but it does not clearly establish whether an information location tool provider is within the meaning of the law if it also provides direct access to content covered by the Act on its own sites.

At a time when media revenues are falling, compromising the public’s right to quality information, Canadians cannot wait the decades needed to give the courts an opportunity to test the Act’s new provisions case by case. Parliament must act now and narrow the exception on information location tools. The survival of journalism depends on it.

The FNC-CSN recommends that the definition of information location tools be narrowed to read as follows:

41.27(5) In this section, information location tool means any tool that makes it possible solely to locate information that is available through the Internet or another digital network without endorsing or encouraging access to copyright material. [our emphasis]

Conclusion

Information is a public good and a pillar of democracy, and the whole of society

⁸ *Trader v. CarGurus*, 2017 ONSC 1841.

undoubtedly benefits from its broad dissemination on the Web. However, the diversion of advertising revenues by digital platforms weakens publishers and creators to the point of seriously compromising the production of information. While the amendments proposed here do not alone ensure the sustainability of the Canadian journalistic industry, the FNC-CSN believes that they are likely to support its financial health, for the benefit of all Canadians. The copyright regime must rebalance power in the media environment and allow the press, its journalists and publishers, to prosper.