Copyright Board, Copyright Collectives, and the myth that "Fair use decimated educational publishing in Canada"

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Copyright Board Consultations

I would like to thank David McGuinty for forwarding the September 8, 2017 letter from Minister Joly. This was a response to my May 1, 2017 letter titled "Myth: Fair use decimated educational publishing in Canada". My letter highlighting some of what might colloquially be referred to as "fake news" being spread globally, primarily sourced from Access Copyright, a Canadian Collective Society. The National Copyright Unit of Australia felt this myth spreading required a response[1].

As this myth primarily relates to an ongoing dispute between a collective society and provincially funded educational institutions, it ties in directly with the current consultation on the Copyright Board of Canada[2].

The consultation paper recognises that there has been an "explosive growth of media and related technologies worldwide". This specific incarnation of the of the Copyright Board was created in 1989, the same year that development of HTTP, one of the key technologies underlying the World Wide Web, was initiated by Tim Berners-Lee at CERN.

We live in a world where advanced content recognition, search and online media distribution enables audiences to find and access any content that they want. Sometimes, when copyright owners allow, we are offered a variety of competing access and licensing services to choose from. Modern information and communications technologies have made redundant a sizeable portion of what the Copyright Board was historically envisioned to accomplish.

While the discussion paper suggests we can speed up processes at the board by "Reducing the Number of Matters Coming Before the Board Annually", the paper does not discuss the need to reverse the historical proliferation of collective societies. At a time when many collectives should be recognised as decreasing in relevance, they continue to increase in political and economic influence.

I will use a few specific problematic areas to illustrate.

Orphaned Works

The incentives behind the current "Unlocatable Copyright Owners" regime administered by the copyright board are counterproductive. The purpose of the regime should be both to encourage

copyright holders to be discoverable and negotiate licenses, as well as to provide copyright users protection from a previously hidden copyright holder who later surfaces. Creators, copyright holders, copyright intermediaries and commercial copyright users should all have economic incentives to make copyright holders discoverable.

Modern ICT has caused some technology vendors and governments to declare “privacy is dead”, so it is inconceivable that a copyright holder who wants to be found is unable to be found. Some responsibility should be presumed on anyone who wishes to harness the privileges which copyright offers.

- * Creators, copyright owners, collective societies, or other intermediaries should never receive proceeds from the unlocatable copyright owners regime. Fees should be kept with the board to fund its own operations and support services to increase discoverability, with any surplus returned to general revenue. There should be a clear economic incentive for these groups to make all copyright holders more easily discoverable.

* Fees levied against commercial copyright users should be sufficiently higher than what would normally be offered by a copyright holder, to further encourage commercial users to help make copyright holders more easily discoverable.

* Fair Dealings should be clearly expanded to cover non-commercial uses of works for which licenses cannot be easily obtained, including for reasons of unlocatable copyright holders. There can’t be a negative impact on the market for a work when no such market exists.

* If a copyright owner is unlocatable, but the creator is locatable, then copyright should revert to the creator.

* Fees previously distributed to collective societies, but were never disbursed to later-located creators or copyright owners, should be returned to the copyright board.

It has been claimed that the “no formalities” requirement of the Berne convention prohibits mandating registration for exercise of any copyright related rights. The reality is that if a copyright owner wishes to get paid they must make themselves known to someone, so it is illogical to suggest that requiring copyright owners do something to make themselves discoverable is a “formality”.

What this failed regime has allowed is for entities like the Access Copyright Foundation to take money from the orphan works regime as well as other fees extracted from authors as excessive transaction fees by Access Copyright, and create their own unaccountable arts funding program[3]. With this entity perceived as doing “good works”, the incentive to make copyright holders easily discoverable and able

to receive greater direct payments for their works is diminished. This is a net-reduction in funding for authors, marketed as if it were a benefit to authors.

Educational use of copyrighted works

Nearly all uses of copyrighted works by provincially funded educational institutions is licensed with copyright owners, and not through collective societies. This includes the global growth of Open Access, as well as online databases offering subscription and/or transaction fees.

There is then a thin layer between where the use of a work is already licensed, and where the use of the work does not require a license, that is under dispute between collective societies and educational institutions. This is the dispute underlying the myth that fair dealings decimated educational publishing in Canada.

In this case the relevant parties are not educational institutions or collective societies, but provincial taxpayers and authors. I believe if provincial taxpayers were asked if they were willing to help fund creativity used in the classroom in this thin disputed area they would agree, as long as the funding was accountable and efficiently distributed. Unfortunately, with all the middle-men taking their cut (Access Copyright is said to take 30% for itself), the current regime is inappropriate.

We already have a model for a far more efficient regime active in Canada. The Public Lending Right (PLR)[4] program funds authors directly for the lending of their works in libraries. This funding program is far superior to having this activity covered by the Copyright Act. It is better for taxpayers as the money more efficiently funds authors, rather than all the unnecessary intermediaries and all their lawyers. If applied to educational uses this would not only provide considerably more funds to authors, it would end the expensive decades-long disputes launched by unnecessary intermediaries in front of the copyright board.

The PLR is an example of using the right tool for the right job. There is a harmful misconception held by some policy makers that copyright is a valid substitute for stable arts funding. Arts funding can be accountably targeted at creators, where the benefit of copyright tends to goes to unnecessary intermediaries -- or leaves the country entirely.

As well as initiating a Public Education Right (PER) funding program, copyright law should be amended to clarify as fair dealings the current thin disputed layer of uses.

This clarity should, however, have responsibilities attached to it. Some education institutions want to have their cake and eat ours too by having exceptions to copyright on their inputs, but royalty bearing on their outputs. The ability of institutions to use any institutional exceptions to copyright, as well as what has been clarified under the PER regime, should be conditioned on the institution adopting an Open Access publishing regime at least on par with the Tri-Agency Open Access Policy on Publications[5].

Lobbying by Collective Societies

Collective societies provide a specific financial service to copyright holders and copyright users. As noted by Copyright Board expert Howard Knopf, "Collectives are an exception from the basic antitrust and competition law abhorrence of price fixing and conspiracies"[6]. As such, they are not optional to copyright holders who want to get paid for some specific uses of their works. Given this, collectives should not ever be able to claim to politically "represent" repertoire members any more than a bank should be able to claim to politically "represent" me simply because I have a bank account.

Collectives have been allowed to present themselves as proxies for the interests of creators -- even when they are lobbying government for policies which benefit collectives at the expense of creators.

The operation of collectives should be scrutinised far more closely by government. This should include disallowing collectives from disbursing funds for purposes other than payment to creators for uses of their works. They should not be allowed to directly lobby government or fund foundations. It should never be seen as their money to spend: if authors wish to fund such activities they can voluntarily do so with their own money, including through optional member funded associations. They should never essentially have their money be "taxed" by a collective society intermediary.

More money to authors, more efficient copyright board

With Access Copyright no longer initiating disputes, resource constraints on the Copyright Board will decrease considerably at the same time as we will see increased funding for authors.

While I used Access Copyright as an example, the same will be true of several other collective societies. Better harnessing of modern ICT and modernising the outdated thinking in our Copyright Act will greatly reduce the number of collective societies still in operation.

There will always be a need for some small number of collective societies, and a need for the copyright board to impose rates when normal commercial negotiations fail, but we should be providing legal and economic incentives to ensure these exceptions become rare.

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[1] Myth: Fair use decimated educational publishing in Canada http://www.smartcopying.edu.au/copyright-law-reform/fair-use/myth-fair-use-decimated-educational-publishing-in-canada

[2] https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations_launchedonreformingcopyrightboardofcanada.html

[3] http://acfoundation.ca/about-us/

[4] Public Lending Right program http://www.plr-dpp.ca/PLR/

[5] Tri-Agency Open Access Policy on Publications http://www.science.gc.ca/eic/site/063.nsf/eng/h_F6765465.html?OpenDocument

[6] Canadian Copyright Collectives and the Copyright Board: a snap shot in 2008 http://www.macerajarzyna.com/pages/publications/Knopf_Canadian_Copyright_Collectives_Copyright_Board_Feb2008.pdf

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