Osgoode Hall Law School of York University
Osgoode Digital Commons

All Papers

Research Papers, Working Papers, Conference Papers

2020

Meanwhile, in Canada… A Surprisingly Sensible Copyright Review

Carys Craig

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/all_papers

Part of the Intellectual Property Law Commons

Meanwhile, in Canada… A Surprisingly Sensible Copyright Review

Dr. Carys J. Craig[*]
Osgoode Hall Law School

European Intellectual Property Review (Forthcoming, Feb 2020)

A Standing Committee of Canada's House of Commons recently conducted a statutorily mandated review of the Canadian Copyright Act, culminating in a final report that was released in June 2019. This Comment reviews the context, substance and significance of the report.

As anyone who has been following recent developments in Europe would surely attest, copyright policy-making these days is a rather fraught and frustrating affair. Readers may, however, have heard some refreshing rumblings about a new—and, "miraculously, an eminently sensible"[1]—copyright policy report coming out of Canada. The Report of the House of Commons Standing Committee on Industry, Science & Technology, released in June 2019 (**the Industry Report**),[2] was the culmination of a statutorily mandated parliamentary review of Canada's *Copyright Act*,[3] commenced five years after the coming into force of the *Copyright Modernization Act* 2012.[4] This short Comment will provide some context for understanding the background and substance of the Report, as well as a few of its more significant recommendations and potential implications. It may also persuade the reader that Canada, perhaps surprisingly, is beating a path towards balanced copyright reform in the digital age—a path that policymakers around the world, finding their domestic copyright concerns overgrown in a dense tangle of trade tensions and technological change, would do well to follow.

Background

But first, backing up a little, Canada's *Copyright Modernization Act* (**the 2012 Act**) was itself the result of a long consultative reform process aimed at ratifying the 1996 *WIPO Internet Treaties*[5] and bringing Canadian copyright law "up to date" with modern digital technologies (by which, it is usually meant, into line with the strongest international copyright laws). After a series of failed copyright reform bills spanning several years and successive governments, the 2012 Act was ultimately presented—and generally, if not uniformly, perceived—as a reasonable compromise in the face of trade and industry pressures, affording added protections to both

[*] (LL.B. (Hons), LL.M., S.J.D.), Associate Professor of Law, Director of the Osgoode Professional LL.M. Program in Intellectual Property Law.

[1] *Cory Doctorow, Editor's Note. In re Michael Geist, "The Canadian government has released the surprisingly sensible results of its extensive, year-long review of copyright law" (3 June 2019) Boing Boing,* https://boingboing.net/2019/06/03/peace-order-good-govt.html.

[2] Standing Committee on Industry, Science and Technology, "Statutory Review of the Copyright Act" (June 2019), https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf (**The Report**).

[3] R.S.C., 1985, c. C-42, https://laws-lois.justice.gc.ca/eng/acts/c-42/.

[4] S.C. 2012, c. 20, https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/fulltext.html (**the 2012 Act**).

[5] The WIPO Copyright Treaty (WCT), http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html; and the WIPO Performances and Phonograms Treaty (WPPT), http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

Electronic copy available at: https://ssrn.com/abstract=3494363

copyright owners and users in the online environment.[6] It brought into force, for the first time in Canada, controversial anti-circumvention measures to protect digital locks (similar in their breadth to those of the United States' *Digital Millennium Copyright Act 1998*);[7] a "Notice & Notice" system for Internet Service Providers (ISPs) (proffered as a more palatable alternative to the US Notice & Takedown model);[8] and a new cause of action for "enabling" infringement online (crafted to capture the kind of peer-to-peer services that had attracted liability elsewhere).[9]

On the other side of the copyright policy ledger, the 2012 Act also expanded the fair dealing defence to include new permitted purposes (parody, satire and education);[10] created new exceptions for common consumer practices in the digital era (backing-up copies, time- and format-shifting);[11] and established the world's first explicit "non-commercial user-generated content [UGC] exception" (colloquially known as the "YouTube exception").[12] These newly enacted limits and exceptions were intended to "legitimize Canadians' everyday activities" as part of a legislative reform package that offered "a fair, balanced, and common-sense approach, respecting the rights of creators and the interests of consumers in a modern marketplace."[13] (There was, admittedly, ample cause to quibble with this assessment, not least because of the primacy given to the protection of digital locks over users' rights to exercise the new exceptions; but this is a point to which we shall return.)

Section 92 of the 2012 Act provided that "[f]ive years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee…is to be designated or established for the purpose of reviewing this Act." The short window for review provided little opportunity for evidence-gathering or for the practical implications of these policy innovations to actually manifest. Nevertheless, it afforded an excellent opportunity for lobbyists, interest groups and stakeholders to mobilize once again, hoping to expand the good, rewind the bad, and reform whatever they found ugly about the 2012 amendments. (It is telling, no doubt, that the first recommendation in the resulting report is that section 92 be repealed "in order to remove the requirement to conduct a five-year review of this Act.")[14] While frequent review has the laudable goal of supporting ongoing consultations and swift, responsive reforms, it has the potential drawbacks of opening the democratic door to unabated industry lobbying while overtaxing public interest groups, institutions and actors, and producing a general copyright reform fatigue. Moreover, such regular review seems naturally conducive to generating technology-specific and knee-jerk legislative responses to emerging technological and market challenges. Principled, flexible and technology-neutral solutions are surely to be preferred.

---

[6] See *Michael Geist (ed.), From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010)*. https://www.irwinlaw.com/content_commons/from_radical_extremism_to_balanced_copyright.
[7] Copyright Act 1985 (n 3), s. 41-41.21; cf Digital Millennium Copyright Act, 112 Stat. 2860 (1998), s. 103; 17 U.S.C. §1201. *See Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32". In Geist (ed.) (n 6), pp. 177-203.*
[8] Copyright Act 1985 (n 3), s. 41.25; cf 17 U.S.C. §512(c).
[9] Copyright Act 1985 (n 3), s. 27(2.3-2.4); *cp*, e.g., *MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005); *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.* [2005] FCA 1242.
[10] Copyright Act 1985 (n 3), s. 29. These were in addition to research, private study, criticism and review, and news reporting.
[11] *Id.*, ss. 29.22-29.24.
[12] *Id.*, s. 29.21 permits an individual to use an existing work in the creation of a new work for non-commercial purposes, and to authorize its dissemination.
[13] "Balanced Copyright, *Copyright Modernization Act—Backgrounder*" (no longer available).
[14] The Industry Report (n 2), Recommendation 1, p. 24.

Electronic copy available at: https://ssrn.com/abstract=3494363

In December 2017 the House of Commons designated the first review solely to its Standing Committee on Industry, Science and Technology. During the review process, the Industry Committee invited the Standing Committee on Canadian Heritage to conduct "a study on remuneration models for artists and creative industries, including rights management and the challenges and opportunities of new access points for creative content."[15] It was intended that the Heritage Committee would present findings to the Industry Committee, but instead it conducted what was effectively a parallel consultation process and, controversially, presented its own report (**the Heritage Report**) directly to the House of Commons.[16]

The Heritage Committee Report

Released with a something of a thud a few weeks before the final Industry Report, the Heritage Report was, frankly, the kind of policy document that many copyright experts have come to both fear and expect: an utter and seemingly uncritical embrace, by ostensibly well-meaning and objective democratic representatives, of the transparently self-interested and profit-motivated urgings of the usual private actors and industry lobbyists. It immediately garnered well-deserved criticism, with Michael Geist describing it as "embarrassingly one-sided,…representing little more than stenography of lobbying positions from Canadian cultural groups";[17] Howard Knopf dubbing it the "Values Gap" report because it "so completely falls short of the values of balance, evidence-based analysis, and democratic responsibility that we would expect from a Canadian parliamentary committee;"[18] and the Canadian Association of University Teachers critiquing it for "focus[ing] entirely on the interests of big publishers and their lobby groups."[19]

Indeed, of the twenty-two recommendations made by the Heritage Committee, virtually every one proposed an expansion of owners' rights and increased enforcement powers. These included, notably, extending Canada's copyright term (currently the internationally required life-of-the-author plus fifty years) by an extra twenty years to life-plus-seventy.[20] The report cited witnesses' claims (unsubstantiated at best, nonsensical at worst) that the extension would allow "additional investment in the career development of Canadian songwriters," giving artists "the ability to leverage their success" and "ensur[ing] 'robust compensation' to creators and their families."[21] It was claimed that "no witnesses expressed outright opposition" to this term

[15] Copyright falls within the purview of two Canadian government departments: Industry, Science & Economic Development and Heritage. This has produced tensions over time, which arguably played out in this review process. *See Howard Knopf, "Duels, Dualities, and Destiny in Canadian Copyright (September 21, 2019)*, http://excesscopyright.blogspot.com/2019/09/duels-dualities-and-destiny-in-canadian.html.

[16] Standing Committee on Canadian Heritage, "Shifting Paradigms: Report of the Standing Committee on Canadian Heritage" (May 2019) https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/report-19/ (**the Heritage Report**).

[17] *Michael Geist, "The 'Bulte Report' Redux: Canadian Heritage Committee Releases Embarrassingly One-Sided Remuneration Models Report" (15 May 2019),* http://www.michaelgeist.ca/2019/05/the-bulte-report-redux-canadian-heritage-committee-releases-embarrassingly-one-sided-remuneration-models-study/.

[18] *Howard Knopf, ""The Canadian House of Commons Copyright 'Shifting Paradigms' Report – Let's Just Call it the "Values Gap" Report" (15 May 2019),* https://excesscopyright.blogspot.com/2019/05/the-canadian-house-of-commons-copyright.html?m=1.

[19] *Canadian Association of University Teachers, "CAUT Condemns Heritage Report on Copyright" (17 May 2019),* https://www.caut.ca/latest/2019/05/caut-condemns-heritage-report-copyright.

[20] The Heritage Report (n 16), Recommendation 7, p. 22.

[21] *Id.*, pp. 21-22.

Electronic copy available at: https://ssrn.com/abstract=3494363

extension—an assurance that, if true, speaks more to the bias cast of the witness list than to non-controversial nature of the proposal.[22]

The Heritage Report proceeded to recommend either clarifying or *removing* existing copyright exceptions in order to ensure compliance with the Berne Convention's "three-step test" (this in generous response to "[w]itnesses from the music industry [who] said that the Copyright Act contains too many exceptions, and that their application is unclear");[23] and recommended "clarifying" that the fair dealing defence should *not apply* to educational institutions in respect of commercially available works[24] (an effort to leapfrog ongoing litigation[25] and to unwind the addition of "education" as a statutory fair dealing purpose). The Heritage Report further recommended that the government take measures to promote a return to collective licensing,[26] increase efforts to combat piracy and enforce copyright,[27] and review safe harbors to ensure that ISPs "are accountable for their role in the distribution of content."[28]

Given the hue of these recommendations, it will come as no surprise that the Heritage Report included multiple mentions of the so-called "value gap" that creators are said to be suffering in the digital age, decrying "the decline of the artistic middle class" and "the negative impact of technology on creative industries," while noting that Internet service providers "greatly benefit from access to the music they give their clients."[29] This line of reasoning—which portrays the financial success of large digital intermediaries as being built directly on the backs of undercompensated creators—will be familiar to readers in Europe: it reproduces the rationale commonly proffered for the most controversial aspects of the EU Digital Single Market Directive (**DSM Directive**).[30] In particular, Article 17 of that Directive, which effectively requires online content-sharing service providers to either license or filter content uploaded by users, was pushed through rounds of fraught policy negotiations as a purported response to this "value gap" problem.[31] The concept has also emerged as a key narrative strategy for lobbyists and stakeholders in the United States seeking to restrict or dismantle the safe harbor immunities provided to online intermediaries under the DMCA.[32] Coined by the music industry, the "value gap" terminology is deployed to depict a "gross mismatch" between the value of creative content

---

[22] Cf *Geist, "The 'Bulte Report' Redux"* (n 16).

[23] Heritage Report (n 16), Recommendation 12, p. 30, referencing Art 9(2) *Berne Convention for the Protection of Literary and Artistic Works* (Paris Text 1971) (**Berne**).

[24] Heritage Report (n 16), Recommendation 18, p. 43.

[25] See *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 [*Access v. York*], https://reports.fja-cmf.gc.ca/fja-cmf/j/en/item/331683/index.do (currently on appeal to the Federal Court of Appeal).

[26] Heritage Report (n 16), Recommendation 19, pp. 41-43. Suggestions included making increased statutory damages available to collective organizations.

[27] *Id.*, Recommendation 6, p. 19.., citing e.g., more federal government action against counterfeiting, revisiting criminal law provisions, establishing a copyright enforcement office, and increasing statutory damages. See *id.*, pp. 17-18.

[28] *Id.*, Recommendation 5, pp. 18-19, citing proposals requiring ISPs to block access to services that allow piracy, imposing criminal penalties for profiting from illegal streaming services, and modifying safe harbours.

[29] See *id.*, pp. 6-8, identifying these observations as "major themes [that] emerged from the stories of Canadian artists."

[30] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (**DSM Directive**).

[31] See João Pedro Quintais, "The New Copyright in the Digital Single Market Directive: A Critical Look", E.I.P.R (forthcoming 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770.

[32] See Elkin-Koren, Yifat Nahmias, and Maayan Perel, "Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals", Stanford Law & Policy Review (forthcoming 2019). Available at SSRN: https://ssrn.com/abstract=3344213.

Electronic copy available at: https://ssrn.com/abstract=3494363

consumed online and the revenues that reach creators and creative industries.[33] In fact, the concept is not well defined or empirically substantiated, is premised on an array of mistaken assumptions about value and entitlement, and increasingly functions primarily as rhetorical device—a poor proxy for evidence-based policy making.[34] As Niva Elkin-Koren and her co-authors warn—and the Heritage Committee's recommendations attest—the use of such unchecked rhetoric can "cloud competent policy making."[35]

Overall, the Heritage Committee report was little more than a disheartening reminder of how copyright policy-making can go awry when powerful market incumbents and copyright collectives succeed in setting the reform agenda in an attempt to preserve (or restore) their own position in the cultural industry ecosystem. Also on full display was the worrying ease with which the rhetoric around fairness and artists' rights can resonate to obscure the private commercial interests lurking behind the trope of the deserving creator, concealing the logical gulf between protecting private profits and promoting copyright's public-policy objectives. So common is this tale that, had it been the end of the Canadian copyright review story, there would have been little surprising about it.

The Industry Committee Report

And yet this all too predictable policy report—the one that simply endorsed content industry pleas to expand copyright, reduce exceptions, and close safe harbors in the name of fixing the unexamined value gap—was *not* the end of the story. Indeed, what followed in the final and authoritative Industry Committee report was, remarkably, a "*near total repudiation*" of the one-sided Heritage Committee report.[36] Those who had lamented the latter, quickly celebrated the final Industry Report as "progressive" and "forward-looking,"[37] and "applaud[ed] its reasoned analysis and balanced conclusions."[38] Somehow, Canada's copyright review process culminated instead in a carefully reasoned and cautiously articulated report that could potentially pave the way for measured, public-interest oriented copyright reform. Imagine that!

It is worth pausing here to acknowledge that the Industry Report was not universally applauded. Predictable forces immediately coalesced to criticize the Industry Committee for failing to adequately consider the views of artists and creative industries or the recommendations of the Heritage Committee. Quebec's Union des Écrivaines et Écrivains, for example, in a post unambiguously entitled "The Copyright Act Review Committee Despises Creators," denounced the Report as "an act of contempt, not only for creators, but also for the Department of Canadian Heritage."[39] The Canadian Music Publishers Association declared it to be "disappointing for not

[33] See the International Federation of the Phonographic Industry (IFPI) Global Music Report 2016 https://www.ifpi.org/downloads/GMR2016.pdf. See also *Martin Husovec, "EC Proposes Stay-down & Expanded Obligation to License UGC Services" (1 September 2016)*, http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html.
[34] See Elkin-Koren et al. (n 32).
[35] Id., p. 50.
[36] *See Geist, "The Authoritative Canadian Copyright Review: Industry Committee Issues Balanced, Forward Looking Report on the Future of Canadian Copyright Law" (June 3, 2019),* http://www.michaelgeist.ca/2019/06/the-authoritative-canadian-copyright-review-report-industry-committee/.
[37] See, e.g., Geist, *id*. See also *"CAUT welcomes balanced, progressive copyright report from Industry Committee" (6 June 2019),* https://www.caut.ca/latest/2019/06/caut-welcomes-balanced-progressive-copyright-report-industry-committee.
[38] Canadian Association of Research Libraries Statement on the INDU Report of the Copyright Act (11 June 2019), http://www.carl-abrc.ca/news/carl-issues-statement-indu-report-copyright-review/.
[39] See "Translation of a press release issued on 5 June 2019," https://www.uneq.qc.ca/2019/06/06/copyright-act-review-committee-despises-creators/.

Electronic copy available at: https://ssrn.com/abstract=3494363

recognizing the important contribution that music publishers…have in the Canadian creative industries."[40] One member of the Heritage Committee, suggesting that "people from the cultural community are outraged," moved a motion to have the Heritage Committee "express its dismay" that the Industry Committee "chose to ignore" its report.[41] Such criticism was, however, brusquely dismissed in an unprecedented statement from the Industry Committee: "Reviewing the Act was [this Committee's] sole responsibility," it unflinchingly observed, and the resulting Report "recognized every perspective expressed during the statutory review, notably on the remuneration of artists and creative industries.… [It] fully stands by the report… It is now up to the Government of Canada to respond to its recommendations."[42]

Let us turn, then, to the recommendations, many of which directly contradict those of the Heritage Committee, and several of which merit special attention as running against the rising international tide of copyright expansion. One striking example is the approach taken to copyright term extension. Setting out nuanced data comparing copyright duration amongst Canada's trading partners, the Report describes testimony of witnesses both favouring and opposing term extension. Noting that the Canada-US-Mexico Agreement (CUSMA), if ratified, will require an extension from 50 to 70 years after death,[43] the Committee proceeds to entertain pragmatic approaches to mitigating the disadvantages of this extension. Ultimately, it recommends extending term only if required by the CUSMA, and providing that copyright "cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work."[44] A registration requirement, it is presumed, would not contravene Berne's principle of automatic protection if it takes effect only *after* Berne's required term. This exemplifies the Committee's refreshing reticence in response to pick-a-side propositions, preferring pragmatism and principled compromise in the face of international and industry pressures.

Also interesting, in this respect, is the recommendation regarding copyright reversion and termination. Taking seriously those witnesses who supported term extension as increasing revenues to authors' heirs, the Report recommends, first, retaining Canada's rights reversion mechanism (whereby copyright reverts to the author's estate twenty-five years after death) but increasing predictability by requiring registration of notification to exercise the reversion.[45] More significant still is the recommendation that creators be granted a "non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer."[46] Again, with a view to mitigating possible harms, the Report recommends a registered notice requirement and a limited time frame (5 years) within which to exercise the right. This

[40] See "Canadian Music Publishers Association statement on INDU Committee's report on its Copyright Act review" (10 June 2019), http://www.musicpublisher.ca/canadian-music-publishers-association-statement-on-indu-committees-report-on-its-copyright-act-review/.

[41] See CHPC-162 (June 4, 2019), comments by Mr. Pierre Nantal, p. 1720, https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-162/evidence.

[42] "News Release on *Shifting Paradigns*" (18 June 2019), https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/news-release/10581857.

[43] CUSMA (aka USMCA) Art. 20.63(a), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng.

[44] Industry Report (n 2), Recommendation 6, p. 38.

[45] *Id.*, Recommendation 7, p. 37 (requiring notification at least 10 years prior to exercise of the reversion). Reversion applies only if the author was the first owner: *Copyright Act* (n 3), s. 14(1).

[46] *Id.*, Recommendation 8, p. 38. This, too, would be subject to prior registered notification by the creator of their intent to exercise the right—in this case, five years prior to exercising the right.

Electronic copy available at: https://ssrn.com/abstract=3494363

recommendation reflects the submissions of well-known Canadian musician Bryan Adams, who appeared in person before the Committee. Music Industry representatives, on the other hand, tended not to favour a termination right, arguing that it would deter investment and hinder economic exploitation of works. Pointing to an imbalance in bargaining power between creators and industry actors (e.g., record labels), the Committee declares itself unconvinced by the arguments against termination rights, and expresses confidence in the entrepreneurialism of creators (re)armed with their own rights.[47]

The tone here is consistent with a more general shift in copyright policy discourse away from the traditional bundling of creators and creative industries into one unified set of stakeholders, recognizing instead that their respective interests may—and frequently do—diverge, while the benefits of copyright typically flow in the direction of more powerful (industry) parties.[48] The disintermediation enabled by digital technologies has shifted the sands under these old alliances, revealing new paths towards more directly rewarding and empowering creators. It seems that this idea, which takes seriously (but strategically repurposes) the usual industry rhetoric around creators' rights, appealed to the committee's sense of the appropriate copyright balance.

Turning now to users' rights, on the other side of this notional balance, the Industry Committee proposes amending the Copyright Act to "make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one."[49] Canada, like the United Kingdom and other commonwealth jurisdictions, currently has a fair dealing provision that restricts the defence to uses for a limited number of enumerated purposes.[50] While these purposes have recently enjoyed a relatively "large and liberal" interpretation by virtue of Supreme Court jurisprudence emphasizing the importance of "user rights" in the copyright balance,[51] they continue to constrain the reach of fair dealing. It has long been a matter of debate whether Canada should move to an open, general and flexible "fair use" defence like that of the United States.[52] The Committee notes several proposals from witnesses to add permitted purposes ("quotation," "pastiche and caricature," "transformation," "non-expressive" uses), but ultimately agrees that the problem could be solved simply by adding the phrase "such as" to the fair dealing provision. As the Committee observes, this:

> "…would increase the flexibility of the Act by allowing a broader range of admissible purposes to emerge from existing ones under the guidance and supervision of the courts—for example, from criticism to quotation, from parody to pastiche, and from research to informational analysis. [This] could allow new

[47] *Id.*, p. 39 (quoting—somewhat cheekily—the CEO of *Music Canada*, which generally touts creators' rights but failed to support the termination right).
[48] See, e.g., *Rebecca Giblin, "Fat Horses and Starving Sparrows: On Bullshit in Copyright Debates" Overland (232 Spring 2018)*, pp. 33-38, https://overland.org.au/previous-issues/issue-232/feature-fat-horses-starving-sparrows/.
[49] Industry Report (n 2), Recommendation 18, p. 69.
[50] *Copyright Act* (n 3), ss. 29-29.2.
[51] *CCH v. Law Society of Upper Canada*, 2004 SCC 13[*CCH*]; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta*]; *SOCAN v. Bell Canada*, 2012 SCC 36.
[52] Cf US Copyright Act §107. *See e.g., Carys J. Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform". In Michael Geist (ed.), In the Public Interest: The Future of Canadian Copyright Law (Irwin, 2005), pp. 437-461.* This is consistent with my statements before the Committee, cited in the Industry Report (n 2) pp. 67-68.

Electronic copy available at: https://ssrn.com/abstract=3494363

> practices to fall under fair dealing, such as "reaction videos" and "video game streaming."[53]

"Such as" may be only two small words, but it is hard to overstate their potential significance. They allow for copyright limits and exceptions to evolve in a pragmatic but principled way as technologies change, replacing a system in which "every tiny exception to the grasp of copyright monopoly has…to be fought hard for, prized out of the unwilling hand of the legislature."[54] The Supreme Court of Canada recently described fair dealing as "emblematic" in the sense that it "presents a clear snapshot of the general approach to copyright law in Canada—an approach which balances the rights of creators of works and their users."[55] In the context of the Industry Report, the Committee's fair dealing recommendation is indeed "emblematic:" it signals a commitment to maintaining that balance by creating space for user rights to evolve in step with changing technologies and cultural practices.

Another issue that affects the practical availability of fair dealing is the "para-copyright" protection afforded to technological protection measures (**TPMs**). The primary controversy around the 2012 anti-circumvention provisions was the absence of adequate limits and exceptions, effectively privileging private ordering over user rights and the public interest.[56] The Industry Committee explains the problem, quoting at length from submissions of the *Canadian Intellectual Property and Public Interest Clinic*:

> "Currently, restrictions on digital lock circumvention are nearly all-encompassing, thereby preventing even legitimate copying activities. Archivists and librarians cannot preserve locked content without breaking the law; filmmakers, news reporters, and other innovative creators cannot legally access the content they need. These restrictions undermine Canadian innovation and the public domain."[57]

In its observations, while recognizing the importance of TPMs in the digital marketplace and Canada's international obligations to protect them, the Committee expressly agrees that "*the circumvention of TPMs should be allowed for non-infringing purposes*…. In other words, they should generally not prevent someone from committing an act otherwise authorized under the Act."[58] The resulting recommendation specifically identifies the need "to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes." More broadly, however, it recommends that the government "examine measures to modernize copyright policy with digital technologies…, including the relevance of [TPMs] within copyright law."[59] In light of the Committee's observations, this should be read as a general endorsement of tailored anti-circumvention provisions that align with the limits of copyright protection—with TPM protection properly ending where user rights and the public domain begin.

---

[53] Industry Report (n 2), p. 69. Notably, the committee also recommended amending the Copyright Act "to facilitate the user of a work or other subject-matter for the purpose of informational analysis": Recommendation 23, p. 87.

[54] Justice Laddie, "Copyright: Over-Strength, Over-Regulated, Over-Rated" E.I.P.R. 1996, 18(5), p. 259.

[55] *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, at [46].

[56] *See Craig, "Locking Out Lawful Users" (n 7)*; See also Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of 'Prescriptive Parallelism'" 13 JWIP 503 (2010).

[57] CIPPIC, *Brief Submitted to INDU* (14 December 2018); quoted in Industry Report (n 3), p. 69.

[58] Industry Report (n 2), p. 72 (emphasis added).

[59] *Id.*, Recommendation 19, p. 72.

Electronic copy available at: https://ssrn.com/abstract=3494363

Continuing with the theme of user rights, some submissions to the Committee had suggested revisiting Canada's innovative UGC exception on the basis that it was overbroad, undermines creators' moral rights, or unduly shields online service providers' who benefit commercially from UGC. The Committee agrees that the provision is designed to shield only individual users, but recommends that it be revised to ensure that UGC creators cannot become liable for any "unintended infringement"—presumably to clarify that the exception applies even if or when content is monetized by a hosting platform or "goes viral." Rather than reining in this new UGC user right, then, the Committee seeks to shore it up. It is worth emphasizing that certain witnesses had proposed converting UGC into a realm for collective licensing.[60] The Committee's decision to approach the non-commercial UGC defence as a liability shield that is not subject to authorization or collective management sends another important message. The whole point of a user right, as the Supreme Court has made clear,[61] is that its exercise involves an activity beyond the scope of the copyright owner's control—one for which no authorization is needed nor license fee owed. Whereas the Heritage report pushed for collective management of rights as a preferred approach for achieving balance, the Industry Committee declines to endorse collective management as an appropriate alternative to the free exercise of this user right.

The significance of the interaction of user rights and collective licensing becomes clear when we turn to the matter of fair dealing and education. As noted, there is ongoing litigation in Canada between a major copyright collective, *Access Copyright*, and York University, which has thrown into doubt the lawfulness of university fair dealing guidelines in relation to classroom copies.[62] Rather than weigh in on the case, the Committee opts to recommend that the government "consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada."[63] Many fair dealing proponents, myself included, would have preferred to see a strong statement in support of fair dealing by educational institutions, and some confirmation that collective licensing by educational institutions is optional and not mandatory. This would have been perfectly consistent with existing Supreme Court jurisprudence.[64] Instead the Committee concedes points on both sides, acknowledging that "the decline of collective licensing in education has arguably more to do with technological change than it does with fair dealing;" but also suggesting that courts were "appropriately sceptic[al]" of claims by educational institutions that their uses fall within fair dealing.[65] Nonetheless, the refusal to limit the availability of fair dealing for educational institutions or to insist upon blanket licensing solutions—as recommended by the Heritage

[60] See, e.g., *Submission of Artists and Lawyers for the Advancement of Creativity* (November 21, 2018), https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10205586/br-external/ArtistsAndLawyersForTheAdvancementOfCreativity-e.pdf.

[61] *CCH* (n 51) at [70]: "The availability of a licence is not relevant to deciding whether a dealing has been fair…[T]his would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance…."

[62] *Access v. York* (n 25).

[63] Industry Report (n 2), Recommendation 16, p. 65.

[64] See *Alberta* (n 51); *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at [107], [113]. See also Sarah Wilkinson, "Justifying the Unjustifiable: Canadian Copyright Licensing Agency ('Access Copyright') v. York University" 31 I.P.J. 187 (2019); *Ariel Katz, "Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss" (26 July 2017)*, https://arielkatz.org/access-copyright-v-york-university-anatomy-predictable-avoidable-loss/#post-3762.

[65] *Industry Report* (n 3), p. 64.

Electronic copy available at: https://ssrn.com/abstract=3494363

Committee and lobbied for by various actors[66]—draws another important line in defence of user rights.

Moreover, the Committee highlights concerns around the operations of collective societies in Canada given their "monopolistic or quasi-monopolistic position," observing:

> Parliament will be much more inclined to increase the means of collective societies—including the remedies available to them—if the content of their repertoire, their licensing practices, and their distribution schemes are transparent to users, rights-holders, and policymakers alike.[67]

It is important to appreciate the extent to which the dynamics around collective management of reproduction rights in Canada's education sector, and in particular the mobilization by post-secondary institutions opting out of licensing arrangements in favour of transactional licensing and fair dealing, have been shaped by the practices of *Access Copyright*—not only in light of complaints about overreaching and restrictive licenses, but also a lack of transparency regarding its repertoire and royalty distribution model. Against this backdrop, the Committee recommendation reads like an admonition of sorts: "the Government of Canada [should] consider the benefits and mechanisms for increasing the transparency of collective societies."[68]

A final issue that may be of heightened interest these days is that of platform liability and the move towards responsibilization of online service providers in the name of addressing the "value gap." We saw above that the Heritage Committee readily embraced this basis for reform. In contrast, the final Industry Report resists arguments that Canada should follow the European Union's lead by adopting, as "an effective way to handle OSPs," something akin to the controversial Article 17 of the DSM Directive. The Committee cautions that we are "yet to see…how EU members will implement the Directive and what results different approaches will yield. The Government should take the time to learn from the successes and failures of these initiatives to determine whether they serve the long-term interests of all Canadians."[69] The Report also recommends ensuring that any content management system employed by OSPs and subject to safe harbors "must reflect the rights of rights-holders *and users alike*."[70] The Committee observes that any additional regulation of OSPs "should also reflect a balanced approach," and should not, for example, require the take down of content "before giving its uploader the opportunity to respond to allegations of…infringement."[71] This stands in marked contrast to the kinds of front-end restrictions likely to be put in place in Europe to ensure the unavailability of allegedly infringing works in keeping with Article 17(4)(b) and (c) of the DSM Directive.[72] Acknowledging a problematic imbalance of power between creators and "large intermediaries," the Committee points not only to OSPs (the digital platforms and tech companies that bore the brunt of critique in Europe), but complicates this narrative by pointing also to the traditional intermediaries—the "large record labels and publishers"—that are often the parties pushing this value gap story. The Committee endorses the idea that this creator-

[66] See *id.* (n 3), p. 57, nn. 157-160.
[67] *Id.* (n 3), p. 119.
[68] Industry Report (n2), Recommendation 36, p. 120.
[69] *Id.*, p. 83.
[70] *Id.*, Recommendation 22, p. 83.
[71] *Id.*, p. 82.
[72] DSM Directive (n 30).

Electronic copy available at: https://ssrn.com/abstract=3494363

intermediary imbalance cannot be solved simply by imposing liabilities on OSPs, but rather requires a "diversified approach that includes competition and contract law, as well as facilitating the emergence of different models for the management of copyright…."[73]

Perhaps most refreshing of all, then, is the Committee's recognition that many of the problems reasonably identified by creators and creative industries, while valid causes of concern, cannot be effectively addressed by the "limited tools" of copyright law: the Copyright Act alone, we are told, "cannot suffice to ensure that Canadian creators and creative industries receive fair compensation."[74] If this seems obvious, it is worth emphasizing how rarely it is acknowledged, while the positive implications of expanding copyright control (in particular, the notion that it puts money in the pockets of creators) are simply assumed. Perhaps my greatest frustration with the copyright debates is the persistent fallacy that copyright law is either responsible for—or remotely capable of solving—the inequities and unfairness experienced by authors, or the dismal underfunding of culture and the arts, within our capitalist economic system. (Rather than relying on ever stronger copyright enforcement, surely what is really in order, after all, is a radical reassessment of the neoliberalization of the arts, the instrumentalization of culture, and the rise of the entrepreneurial ideal.[75] But that is best left for another day!)

For now, it suffices to see Industry Report's critical engagement with the pleas and provocations of a variety of stakeholders, and nuanced appreciation of the tensions inherent in the task of copyright law: rewarding authors while encouraging both the creation and dissemination of works, balancing the rights of owners and users, and ensuring the preservation of a vibrant public domain. This reflects the principle of copyright balance repeatedly articulated by Canada's Supreme Court[76]—a principle that has grounded the judicial recognition of "user rights" in Canada, as well as ensuring carefully circumscribed rights in respect of intermediary liability and communication to the public, and an overarching commitment to technological neutrality (thereby preventing the proliferation of rights and double-dipping by collectives and rights-holders in digital environments).[77] It has, in other words, been instrumental in preventing the rapid escalation of exclusive rights and onerous liabilities that we have, unfortunately, witnessed recently in European copyright law.

As a final point of contrast, the Industry Committee demonstrates a preference for evidence-based policy-making over political posturing, identifying "a problematic lack of authoritative and impartial data and analysis on major issues," and a tendency amongst witnesses to overstate conclusions while failing to disclose the limits of their data.[78] The Report recommends concrete measures to improve objective and reliable data-gathering on the economic impacts of copyright legislation in Canada.[79] As João Pedro Quintais explains, "[t]he political compromise that led to the final text [of the DSM Directive] was shaped more by effective lobbying than sound

---

[73] Industry Report (n2), p. 82.
[74] *Id.*
[75] *See, e.g., Stephen Pritchard, "Neoliberalism and the Arts," Colouring In Culture Blog (February 8, 2019),* http://colouringinculture.org/blog/2019/2/8/neoliberalism-and-the-arts.
[76] *Théberge v. Galerie d'Art du Petit Champlain inc.,* 2002 SCC 34 at
[77] See *CCH* (n 51); and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.
[78] Industry Report (n 2), p. 25.
[79] These include recommending the establishment of a Research Chair on Remuneration and Business Models for Creatives and Creative Industries in the Digital Economy, and another on the Economics of Copyright: Industry Report (n 2), Recommendation 3, p. 25.

Electronic copy available at: https://ssrn.com/abstract=3494363

empirical evidence and expert advice."[80] Elkin-Koren *et al.* caution that "to justify changes in the law, it is vital to have sufficient academic and empirical evidence. Taking advantage of…misshapen rhetoric to enlist policy reform is wrong."[81] In this copyright climate, Canada's Industry Committee should be applauded for insisting on the need to "develop consistent indicators and authoritative data on the economic impacts of copyright legislation"[82]—and for being alert to the risks of relying on anything less.

Conclusion

There are surely features of this "living and grounded"[83] Canadian parliamentary review process that permitted such measured analysis, and from which other jurisdictions might therefore learn. The Report is the "culmination of hundreds of oral and written testimonies," produced through consultations with a broad range of stakeholders, beginning with witnesses representing specific industries and sectors, moving on to interest groups and Indigenous witnesses involved in multiple sectors, and concluding with academics and legal experts "who could speak broadly about the Act and comment [on] previous testimony."[84] In the furore that followed the rapid release of conflicting reports from two distinct committees, Michael Geist reviewed the witness lists of the Heritage and Industry Committees respectively, finding that latter heard from many more witnesses, but also had a much more balanced witness list (as between those representing rights holder/creator perspectives and user or neutral perspectives).[85] He concludes that "the quality of the consultation…is inextricably linked to their final recommendations." The Industry Committee's more comprehensive and inclusive approach produced "deeper analysis" throughout, illustrating that "better process generates better policy."[86] As the Industry Report notes, any stakeholder will have a preferred course of action, and of course "things get more complicated" when multiple viewpoints are taken into account; but "they also come closer to reality."[87]

The reality is that copyright regulation is a complex undertaking that requires an "ongoing and dynamic" conversation. It is true that "a parliamentary report of this nature must find a compromise between different perspectives"[88]—but as the Report demonstrates, this needn't entail a compromise of democratic values or the public interest. Rather, any compromise should reflect the delicate balance between protecting authors, users and the public domain that is essential to advancing the purposes of the copyright system amidst shifting cultural, technological and economic realities.

And so, for this eminently sensible copyright review, I think Canada should be commended. One might be forgiven for thinking that "sensible" is faint praise indeed; but we live in a world

[80] Quintais (n 31), p. 23.
[81] Elkin-Koren, Nahmias and Perel (n 32), p. 15.
[82] *Id.*, Recommendation 4 (that the Government mandate Statistics Canada to develop such indicators and data).
[83] *Id.*, p. xiii.
[84] *Id.*
[85] *Geist, "Unbalanced Witness List: Why the Copyright Review Was Right To Ignore the Canadian Heritage Committee Study: Part Three" (June 21, 2019)*, http://www.michaelgeist.ca/2019/06/unbalanced-witness-list-why-the-copyright-review-was-right-to-ignore-the-canadian-heritage-committee-study-part-three/.
[86] Geist, "Better Data, Better Results: Comparing the Gap Between the Copyright Review and Heritage Study on the Music Industry's Policy Proposals" (June 26, 2019), http://www.michaelgeist.ca/2019/06/better-datacopyright/.
[87] Industry Report (n 2), p. 121.
[88] *Id.*

Electronic copy available at: https://ssrn.com/abstract=3494363

in which common sense copyright policy is, alas, surprisingly far from common. As governments change, MPs shuffle roles,[89] and lobbyists regroup, the risk remains high that Canada's new path towards sensible copyright reform will simply be swept aside in favour of stronger protections and more pervasive enforcement, submerged by the rising tide of creators' rights and value gap rhetoric. Supporters of balanced copyright, genuinely consultative processes, and evidence-based policy-making should therefore be rallying around the example set by Canada's Copyright Act Review, for it reveals a possible route towards what is, unfortunately, an increasingly radical aspiration: a *reasonably sensible* copyright system!

[89] In Canada's October 2019 general election, Justin Trudeau's Liberal Party won a second term but lost its majority, raising the likelihood of another general election within the next two years, and reducing the likelihood of pushing through comprehensive copyright reform in the meantime. Notably, Dan Ruimy, who chaired the Industry Committee, was not re-elected.

Electronic copy available at: https://ssrn.com/abstract=3494363