

COPYRIGHT REFORM SUBMISSION

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INTRODUCTION

I would like to commend the Canadian government for addressing the urgent need for copyright reform in Canada. Given the speed and scope of technological change and the domestic, global, commercial and legal implications, this is a crucial undertaking.

As a creator, copyright holder and owner and manager of my own business in the music industry for more than 25 years, I encourage this government to strengthen and protect the intellectual property of creators and innovators. In many cases, we have built careers and generated income for our livelihoods based on our unique and distinct creations. Many of us have then gone on to propel and sustain numerous businesses based on a system that recognizes (through permissions, payments and royalties) the ongoing value of our original work.

My comments are grouped under several headings that touch on points of concern to me and I provide some examples from my own business experience for you to consider.

HISTORICAL OVERVIEW

Over the years, many artists, creators and innovators from varying disciplines have been discouraged from learning about or managing their own business and thus have opted out from important matters related to the protection of their work.

This has created a vacuum in which other interested parties have been able to claim vital business related territory, sometimes at the creator's detriment. This does not mean however, that in the absence of involvement from the creators themselves that their interests should not be protected.

To dismantle, dilute or deny the copyright mechanism for fair return on one's creativity is to render most past, present and future creations and innovations valueless and thereby deny these creators the very means by which they earn a living.

NEEDS & RIGHTS

It is important, at the onset, to make the distinction between rights and needs. Presently, the rights of original, creative expression reside with the creator and the needs of the user are asked to be taken into consideration with respect to commerce as well as the common good.

In the present business model, **almost all forms of reproduction are a license to participate in the listening/viewing/reading or use of the work: not ownership of the work itself.** This is a license to use the creation, not own the copyright inherent in it.

Regrettably, some of the rhetoric in the copyright reform debate has referred to the *rights of users*. In most cases, there is no such thing. In my view, it is a deliberate and self-serving communication strategy to attempt to frame previously illegal activity as a cultural imperative and a revolution brought on by technological change. This has succeeded in large part because rights holders, representative organizations and government agencies were slow off the mark to respond to it.

Therefore, one must take into careful consideration the various goals, vested interests and maneuvering for position currently taking place in the copyright debate.

BUSINESS MODELS

Copyright law, like patent law, has provided the protective parameters of a significant and universally accepted business model in which intellectual products of various kinds compete fairly in the marketplace and for which there can be true and reliable compensation. This business model, of course, can include a wide variety of consumer products and services, such as a la carte, subscription and ad-based offerings.

In the new world of digitized content (such as music, books, photographs, movies or computer software), the mere absence of a 'physical' nature makes creators particularly vulnerable to abuse. A general misunderstanding of the economic structure of creative businesses (or a knowing desire to usurp it for easy profits) has, I believe, distorted the current debate about the future of copyright.

A close analysis of the individuals who are promoting a dismantling of the present business model to propel copyrights into a 'free domain' reveals some well-meaning but naïve academics who have neither run their own businesses nor relied upon their intellectual creative endeavors for their economic survival. The academic business model is predicated upon salaried teaching and research, with tenure depending upon published output in supported academic journals. Others are disingenuously calling for 'an economics of free' approach for existing content, while at the same time using that 'free' content (which actually belongs to someone else) as the very material to attract and retain advertising for their own commercial enterprises.

In most cases online, the 'free' content is functioning as a 'loss leader' to establish a name and audience, capture a dominant market share and eliminate the competition by waiting them (or buying them) out. While this sounds like the fair market system with which we are familiar, sadly, the products they are disseminating are not theirs to give. Further, if these individuals or companies had to actually create (or pay to create) the content themselves, we can be sure that it would not be long before they were exercising their own copyright. This can be observed in the recent acknowledgement that the free days are over in the plans of major newspaper and media groups to stop giving away their content.

Many of the concerns expressed with respect to educational or charitable users (in addition to commercial ones) can be addressed with one simple step: that of seeking permission and making arrangements suitable for the circumstance.

INTERNATIONAL AGREEMENTS

Although the proposed reforms may be framed as “a ‘made in Canada’ approach;” because this is truly a trans-border issue, it is essential to ensure that any law or amendments harmonize with international principals and agreements. Canadian and international creators and innovators have come to rely upon clear and predictable parameters in which to conduct their international businesses. Canada must not find itself acting alone or being in isolation on this issue.

In my own situation, I have distribution arrangements in over 30 countries, and a website with content in 14 languages. It would impossible to conduct business outside of the country were there not internationally recognized reciprocal agreements.

COMMERCIAL USE

It is essential to be clear on how the present business model works on a commercial basis in comparison to the proposed business models of those entities who seek to access copyrighted/creative material for free.

Presently in my business, because I am not only the creator and copyright holder but also owner of the masters of the recordings on which I have performed my own material, my revenue streams are as follows: CD sales, digital downloads, DVD sales, music licensing (to film, theatre, dance, advertising) and direct public performance.

Historically, of the over 14 million recordings sold, more than 80 % of the revenue of my company Quinlan Road has been derived from non-performance sales. With a dismantling of copyright protection for these creations, most of my income would disappear, along with that of my distributors. My ability to self-invest and make another recording or underwrite a tour would be severely compromised and I would no longer be able to sustain the numerous staff and sub-contractors who support my business. (sound engineers, musicians, studios, travel agents, graphic designers, printing and pressing companies, photographers, performance crews, trucking companies, equipment companies, etc.)

Presently, whenever a commercial undertaking, such as a film, advertiser, theatre or dance group seeks to use my music, we assess the merits and various parameters of the request and decline or grant permission based on certain agreed upon conditions which involve association, length of time, formats, territories for release or performance, etc.

The proposed opposing model somehow envisions all music played (recorded or shared) as purely promotional. The position that no revenue (or control) would be due for the copyright holder (whether creator or performer) is a dubious one at best. Very few musical entities (including my own) could be sustained by touring revenues and t-shirt sales alone. Indeed, most genres of music do not lend themselves to such devices.

In another example, an Internet radio station that occasionally plays a piece of music might appear to be good promotion of an artist to a prospective audience, but when that musician's music is played all of the time one must consider the content as having value to attract customers and advertisers. If the station accepts advertising money,

donations or membership fees then it is the non-creators who are being compensated, not those who gave the site value in the first place.

FAIR USE

Fair use can best be accommodated by reference to permission and license and the principle of personal, non-commercial and not-for-profit use. This is a practice my company deals with every week. Rational and discretionary prosecution here and in the cases of file and format sharing should reduce abuses and the extreme absurd examples proffered by those who oppose a copyright regime.

CHARITABLE USE

To paraphrase Margaret Atwood, the creator should not be denied the right to be charitable (or educational) when, where and with whom it suits them.

IMPROPER USE

Nor in my view, should anyone else determine what commercial, political or artistic use the creator's intellectual property and personal artistic endeavour is to be associated. For example, I would refuse permission for any use that would see my music associated with violence, pornography, etc.

As an example, when a poster to YouTube uses a song from their individual music collection to accompany or illustrate a video clip or series of images (which may themselves be copyrighted) and that posting is completely at odds with the intent of the song, or presents a political position or endorses a product, person or regime, then the creator/copyright holder should continue to be able to request its removal. If there is an infringement, a copyright holder (when ownership is properly identified) should be able to find out who or where that entity is operating from and have recourse (recognized internationally) to have the ISP respond promptly to a request to take down the content.

If the use invades privacy, commits libel or goes beyond fair dealing in reproducing copyright material, then the ISP should cooperate with identification so that court proceedings can take place. If an ISP refuses, they too are complicit in the legal ramifications.

PHOTOGRAPHY & VIDEOGRAPHY

It must also be acknowledged that the arts of photography (and videography) have their own special considerations and it is important to consider how photographic rights will be interpreted.

As a performer, I have been the subject of professional photography, as well as having been photographed by private audience members and news media in performance and elsewhere.

As a label owner, I have commissioned photographic work and purchased photographic rights. In this role, as a creator of CD and DVD covers, interior booklets and marketing and promotional material (including ads, posters and websites), some of my own

photographs are also used to illustrate my travels and influences. These are part of the creative and marketing process that have a crucial value which, if not protected, cannot be commodified and harnessed into an income. These elements of an artists' influence and expression (whether intellectual, creative or image rights) should not be available for someone else to sweep up 'freely' and disseminate how they see fit.

This is particularly true when one takes into account the legally important step of seeking the permission of anyone who might appear in a photograph or moving picture footage that is to be distributed. Implicit in this principle is not simply respect for privacy, but also that one's own image has a rights dimension to it for which permission must be sought

Again, recognizing that there are some purposes of an archival nature and indeed instances where an artistic 'reference' or 're-working' or 're-mixing' has its own creative, cultural or historical value, a proper permissions or royalty structure should continue to be in place so that this activity can occur without damaging the value of the original creation.

CONVENTIONS REGARDING LOCKS AND PROTECTION

The fact that a generation of Internet users has been allowed to form an illusion of entitlement buttressed by myths and exaggerations must be seen for what it is. Many of these folk thrive on their image as pirates and many vested interests (small and large) are happy to cultivate this culture for their own gain.

Many of society's conventions, regulations and locks have always depended on the goodwill and co-operation of citizens to function. The inability to universally enforce a rule does not make it a bad rule for most. It is still commonly accepted that just because a closed door is unlocked (or a glass or screen window easily breeched) it does not mean that strangers can walk in and avail themselves of the facilities. Even if a friend or neighbour has permission to pass 'the threshold', it does not make it lawful or acceptable for them to throw a party or pass out the silverware as favours to passers-by.

The suggestion that the toothpaste cannot be returned to the tube simply cannot be reconciled with the reality that many mainstream law-abiding Canadians (and millions of people around the world) are increasingly embracing the legal purchase of digital music, books, videos and software and actively participate in legal sharing where the copyright holders have contemplated, permitted and made available such material.

SUMMARY

Given the present state of the music industry, (struggling with rampant file sharing, illegal downloading and piracy,) I can unequivocally say that were I to start out in the business today, I would not survive for long. Nor would I be able to achieve the level of success I have enjoyed, including providing employment (directly and indirectly), supporting local business and sub-contractors, and enabling a variety of philanthropic projects.

Canada's international reputation for excellence in arts, music, literature (both intellectual and entertainment) and science (including technology and medicine),

would not have occurred without the legal and economic constructs of copyrights and patents. This vast accomplishment, which forms part of the collective wealth of Canadians is, in my view, already in danger from the delay in implementing copyright reform and complying with our international agreements. Copyright reform should protect the current internationally respected business model which values the copyright of the creator and which also allows each creator the flexibility to monetize or give away their creations as and when and with whom they should so desire.

Copyright reform should protect businesses of all sizes; both online and in bricks and mortar establishments so that there is balance, choice, diversity, predictability, accountability and fundamental strength in the industry of science, music, publishing, theatre and art. This will ensure that jobs and money flow directly into local economies and into the service industries that reside there.

I urge the Canadian Government to not be swayed by a vocal minority who wish in essence to distort and dissolve ownership of intellectual property. I ask you to proceed confidently with well-considered copyright reform that confirms existing conventions and builds upon successful business models that will carry us into the future.

Thank you for your consideration.

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