

Intelligence MEMOS



From: Marcel Boyer

To: François-Philippe Champagne, Minister of Innovation, Science and Industry and Steven Guilbeault, Minister of Canadian Heritage

Date: February 23, 2021

Re: **THE REVISION OF THE *COPYRIGHT ACT***

The 2012 *Copyright Modernization Act* requires Parliament to review the *Copyright Act* every five years. In December 2017, the Minister of Innovation, Science and Economic Development Canada and the Minister of Canadian Heritage announced plans for such a review. The House of Commons Standing Committee on Industry, Science and Technology was entrusted with the parliamentary review and the Standing Committee on Canadian Heritage was asked to report on remuneration models for artists and creative industries. The committees reported their recommendations in mid-2019 and they await a government response.

To provide increased compensation for creators, which both committees considered too low, and to comply with the Canada-United States-Mexico Agreement, they recommended a copyright term extension from life plus 50 to life plus 70 as well as creating an avenue for creators to regain copyright. The heritage committee recommended speeding the current “reversion right” (the return of copyright to an author or estate), originally intended for creators’ heirs, from 25 years after death to 25 years after transfer, but not earlier than 10 years after notification. The industry panel, meanwhile, recommended the introduction of a “termination right,” giving creators a non-assignable right to regain control of their copyright 25 years after the initial transfer, not earlier than five years after notification and extinguishing five years after becoming available. They also recommended that those new rights be conditional on registration of works and notifications.

Balancing proper incentives for creators and innovators while at the same time fostering the dissemination of creations and innovations is the policy objective. This requires an understanding of the sophisticated economics of copyright as well as evidence-based data on the components of the compensation pie.

Copyrighted works are information goods, which pose significant and difficult problems in economic analysis. An information good – be it a book, recording or software – is a product or service whose value arises from the information it contains. Once produced, at a relatively large fixed cost, it can be reproduced or consumed by all at a low to zero marginal cost.

I [argued](#) in a C.D. Howe Institute paper, and more extensively [elsewhere](#), that rights holders are significantly shortchanged by both the current *Copyright Act* provisions and the way they are implemented. The under-compensation of creators, as compared to the competitive market compensation benchmark, is a significant impediment to a more efficient and vibrant economy. This under-compensation totals today several hundred million dollars per year in Canada. In commercial radio alone, it reaches more than \$300 million each year.

I further argue that it would be more efficient economically if a broader set of beneficiaries – equipment manufacturers, ISPs, the public itself – should join primary users – radio stations, for example – in filling that gap.

The committees overlooked several major issues in their recommendations:

First, by superficially micromanaging the relationships between creators and creative businesses through legislation, the committees are likely to end up doing more harm than good and reduce the overall compensation of creators.

Second, both committees concentrated on the downstream game of sharing royalties rather than the upstream game of determining royalties, losing sight of the forest for the trees.

Third, the shortened reversion right and the new termination right will increase uncertainty even as new transaction costs from the proposed registration system are likely to depress the upfront value of copyrighted works.

Fourth, creators’ rights and users’ rights are on an equal footing in Canada. The competitive pricing of copyrights in such a context aims to achieve both balance and neutrality between those rights. Achieving such pricing requires moving away from traditional makeshift measurements toward sounder analytics, issues the committees did not address.

The most important and pressing copyright agenda today centres on two challenging tasks: the discovery of the competitive market value or fair and equitable value of copyrighted works, and the identification of compensation sources. In practice, the measures proposed by the committees are likely to reduce not only compensation to creators but also investments by creative businesses in developing artists.

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