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A brief presented to the Standing Committee on Industry, Science and Technology

as part of the five-year review of the *Copyright Act*

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Introduction

In 2012, the *Copyright Act* was substantially modified by the Canadian Parliament. For over five years now, the Canadian cultural environment has been dealing with the negative downfall of this "modernization" that introduced about forty new exceptions to the Act, many of which are not compensated and therefore jeopardize the normal exploitation of works. Creators are therefore deprived of revenues they had access to before, which is an unjustified prejudice to their legitimate interests.

Now that the Canadian government has announced the five-year review of the *Copyright Act*, it has become an absolute necessity to review it with extreme minutiae so that creators can regain their rightful place.

In this document, the Coalition for Culture and Media will outline three approaches in order for this review to set the stage for an economic and legal environment that guarantees creators the conditions they need to innovate and give us a rich national culture, as Canadian Heritage Minister Mélanie Joly called it during the presentation of her vision for a creative Canada[1].

I - THE IMPORTANCE OF THE PRIMACY OF COPYRIGHT IN THE 21ST CENTURY

The main purpose of the *Copyright Act* (the Law) is to protect the intellectual property of creators and to allow them to be paid for the use of their creative output. The underlying principle is very simple: using or exploiting—in part or in whole—of someone else's intellectual property is forbidden without the consent of the creator, whether or not in return for payment.

The right to compensation is fundamental to the proper function of an intellectual property system and to the development of a strong national culture. Every time this right is infringed upon, the very structure that protects creators and all rights holders is weakened. Yet that very structure is supposed to allow them to pursue their creative endeavours in decent economic conditions proper to the 21st century.

If our society wishes to maintain and encourage an innovative and strong cultural and creative model, it must preserve and promote the rights of creators the adequate financing of their work. Yet, in this digital era, the ease with which their work is distributed creates two phenomenons that are increasingly harmful to those creators. First, we cannot ignore the increasing number of players who give access to those cultural products (freely or not) or who use them as loss leaders—such as Internet access providers—without sharing with those creators the value thus added to their company. Second, in this so-called knowledge-based society,

[1]Canadian Heritage, *Creative Canada Policy Framework,* Ottawa, September 2017.

copyright is battered from being perceived as an obstacle to the free circulation of knowledge and therefore to innovation.

Certain royalties are obviously paid to rights holders by companies who grant access to content or educational institutions and research centres. Yet, the bona fide revenue sharing and true recognition of the value of cultural products and of the work of creators are still far from being a reality. On the contrary, the participation of creators in the economic life of their work is increasingly abated by certain users.

In their letter addressed to the president of the Standing Committee on Industry, Science and Technology on December 13, 2017, ministers Mélanie Joly and Navdeep Bains declared having heard over the last few months "that for many musicians, authors, developers and many other groups of creators, protecting copyright is the key to transforming their accomplishments into earnings, to be competitive on the market and to continue creating[2]".

For that to happen, **Parliament must absolutely recognize—through its decisions and actions—the economic value of culture and information. To this end, the *Copyright Act* has to become the figurehead of an ecosystem that is not only conducive to innovation, but also to creation.**

Without increased protection for rights holders, the ecosystem becomes lopsided, and innovation as well as creation are curbed. **The Parliament must take advantage of the five-year review of the *Copyright Act* to become the bona fide standard bearer for the defence and promotion of Canadian creators.**

[2] Freely translated from a letter by Nadveep Bains, Minister of Innovation, Science and Economic Development, and Mélanie Joly, Minister of Canadian Heritage, addressed to Dan Ruimy, MP and president of the Standing Committee on Industry, Science and Technology, on December 13, 2017.

II - COPYRIGHT CANNOT EXIST WHEN IT IS CRIPPLED WITH A PLETHORA OF EXCEPTIONS

When the Law was modernized in 2012, the legislator introduced a plethora of exceptions to copyright, many of which are not compensated.

Yet, the Berne Convention[3], the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS[4]) and the treaties of the World Intellectual Property Organization (WIPO) of 1996[5]—to which Canada is party to—all state that the legislator can allow certain limitations and exceptions to the rights of creators, but that they must respect what is called the three-step test. Therefore, they must:

1) Be limited to certain special cases;
2) Not conflict with a normal exploitation of the work or other object of the copyright, and;
3) not unreasonably prejudice the legitimate interests of the author.

A sizeable portion of the exceptions introduced in the *Copyright Act* in 2012 do not meet the requirements of this test. They are worded too widely and vaguely to be limited to special cases, do not provide for remuneration or compensation and therefore conflict with the normal exploitation of works. This deprives creators from their heretofore rightful gains, be they actual or reasonably expected.

As a matter of fact, the Association littéraire et artistique internationale (ALAI), during a meeting of its Executive Committee in Paris on February 18, 2017, and in Copenhagen on May 17, 2017, sounded the alarm with regards to these un-remunerated exceptions and expressed, “the wish that the parliamentary review that will take place this year in Canada becomes an opportunity to improve the economic well-being of authors and other rights holders protected by the Law through a reduction of the number of free exceptions contained within the Canadian law[6]”.

The Coalition for Culture and Media also maintains that in order for Canada to regain its standing as a country where creators benefit from their share of the wealth created by the exploitation of their works, the number of exceptions to the Law must be reduced. The remaining exceptions should also provide for compensation.

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[3] See paragraph 9 (2) of the *Berne Convention for the Protection of Literary and Artistic Works:* http://www.wipo.int/treaties/en/text.jsp?file_id=283699#P140_25350,

[4] See article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights :* https://www.wto.org/french/tratop_f/trips_f/t_agm3_f.htm#droit ,

[5] See article 10 of the *WIPO Treaty* on Copyright (WCT) : http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295168 and article 16 of the *WIPO Treaty* on Performances and Phonograms (WPPT) : http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295479

[6] http://www.alai.org/assets/files/resolutions/170517-v%C5%93u-gouvernement-canada.pdf

III - NEUTRALITY AND BALANCE IN AN ESSENTIALLY DIGITAL WORLD

"...What is illegal offline is also illegal online[7]."

The Supreme Court recently confirmed that technological neutrality was a principle of statutory interpretation encased in the *Copyright Act*[8]. In essence, this means that the Law should apply the same way for traditional mediums and more technologically advanced mediums. As a matter of fact, the law has always protected the exclusive right of the author to produce and reproduce their work "in any material form[9]". The Act should therefore "not be interpreted or applied to favour or discriminate against any particular form of technology[10]".

Yet, the principles put forth by the Supreme Court are not reflected in the daily application of the law since 2012. On the contrary, the "modernization" of the Act and countless exceptions have excluded creators from the benefits of the digital economy in which they participate by setting forth the idea that intellectual property rights hinder innovation and technological efficiency.

How, then, do we accommodate the necessity to fairly compensate the rights holders for the financial fallout that stems from the exploitation of their works on digital platforms and allow "creators to leverage the value of their creative work[11]", as is the wish of Canadian Heritage Minister Mélanie Joly. The Canadian Parliament must fix the nefarious effects of the 2012 "modernization" that led to the expropriation of legitimate right of Canadian rights holders. Danger looms, because this imbalance introduced by the legislator has deeply weakened a whole sector of its economy, bearing in mind that the culture and communications sector accounts for nearly 3% of the Canadian GDP[12].

Canada must achieve a bona fide balance between creators and users. How can we go on tolerating that online platforms, which are the broadcasters of Canadian cultural content, can unaccountably profit from a generous system of non-responsibility towards creators? How can we ignore the impact on rights holders of the new exploitation practises introduced by the digital realm? The *Copyright Act* must be amended in a way that will ensure creators see revenues from the sustainable exploitation of their works over all devices, networks and platforms of the digital economy.

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[7] Antoine Guilmain, Karl Delwaide, Antoine Aylwin, *La responsabilité des plateformes en ligne, un enjeu peu présent au Québec*, Fasken Martineau, Bulletin sur la Protection de l'information et de la vie privée, October 23, 2017.

[8] *Entertainment Software Association* v. *Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 (*ESA*).

[9] *Copyright Act* (…) and *Robertson* v. *Thomson Corp.*, 2006 SCC 43, [2006] 2 R.C.S. 363 (*Robertson*).

[10] *Canadian Broadcasting Corporation* v. *SODRAC 2003 inc.*, 2015 SCC 57, [2015] 3 R.C.S. 615, par. 66.

[11] Canadian Heritage, *Creative Canada Policy Framework*, Ottawa, September 2017, chapter 1.5: https://www.canada.ca/en/canadian-heritage/campaigns/creative-canada/framework.html#a55.

[12] Statistics Canada, *Provincial and Territorial Culture Indicators, 2016,* February 27, 2018.

Why do we allow the reproduction of protected Canadian works by foreign online services serving the Canadian population to be, under certain conditions, exempted from the application of the *Copyright Law*? Such an aberration must be fixed by simply identifying the final user and country of destination as factors for being attached to our Law. This way, the Law will apply, without a doubt, to situations which occur in Canada and will truly protect copyrights.

The increasing use of cloud-based technology—namely accessing remote servers via the Internet and the increasing use of social networks where protected content is shared—should not mean that copyright is considered non-existent in Canada when it actually is at the very core of national and international businesses and of the practices of the educational institutions of this country. Instead, the legislator must recognize the existence of these new digital dissemination methods and account for them to ensure that the Canadian law is applied—no matter where the servers are located—when Canadian works are offered to a Canadian audience.

Conclusion

At the outset of its five-year review, the Standing Committee on Industry, Science and Technology must propose to Parliament amendments to the *Copyright Law* that will account for the three approaches presented herein.

It is necessary to modify the statutory provisions that will allow artists, creators, producers and rights holders to live decently. To this end, we must:

- reduce and tighten the number of exceptions in the Act and introduce a principle of compensation when such exceptions respecting the three-step test—notably in education—are implemented;
- adapt the existing statutory provisions to the technological realities of the market by including, for example, digital audio records, electronic tablets and smartphones in the private copying system;
- regulate actions aimed to Canadians—such as the digital reproduction of protected works—even when such actions are provided by foreign online services, and;
- obligate Internet service providers to play a greater role in the remuneration of rights holders.

These are but the most urgent of the modifications the *Copyright Act* must address so that Canada can truly boast to recognize the primacy of copyright in the 21st century and give itself the means to maintain and foster a strong and diversified cultural economy.

The current digital nature of cultural industries and global business models require a legal and regulatory copyright framework that can adapt in real time to global

realities. Other industrialized countries have reached the same conclusion and are putting forth solutions that protect creators[13]. The proceedings of the Standing Committee on Industry, Science and Technology during its review of the *Copyright Act* must achieve the same finality.

Coalition for Culture and Media

The Coalition for Culture and Media is a group of organizations active in the cultural and media sector representing thousands of individuals in Canada. In its *Declaration for the sustainability and the vitality of national culture and media in the digital era*, the coalition asks that the governments re-establish fiscal and regulatory fairness, the continuity of government interventions and the implementation of efficient support measures for culture and national media.

[13]Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. (…) It is therefore necessary to guarantee that authors and right holders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of right-holders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content." Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, SWD (2016) 301, page 3.