

Coalition for the Diversity of Cultural Expressions - What Future for Copyright in Canada?

Introduction

Good morning everyone

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First, I would like to thank Nathalie Guay and the Coalition for the Diversity of Cultural Expressions for having thought of me for this presentation.

It's a pleasure to see so many familiar faces among you all.

I must say that the coalition and i have known each other for quite some time.

Of my 18 years at Heritage, I spent at least eight of them as the person in charge of the 2005 UNESCO convention file.

I have also had the pleasure of working closely with many of you on the international trade and creative export files, two files that I consider to be the greatest challenge of my career.

Since 2010, I have also been working in the wonderful world of copyright.

Wonderful is a strong word. Demanding, difficult, fascinating, at any rate.

Before jumping into the heart of the matter, let me take a step back to point out that as the VP of the Copyright Board, an administrative tribunal, I must show deference.

The observations that I will make this morning before you will therefore be in a personal capacity.

Observations

I would like to think that I am one of the few people in Canada who have been involved in both the diversity of cultural expressions and copyright files for more than a decade, at both the national and international levels, and concurrently in judicial administration, implementation and policy development.

So it is at this point of intersection among all these worlds where I stand today.

As I reflected last week on my contribution, the question that came to my mind was the following:

Do we have the tools to meet the challenges of copyright while also respecting our commitment toward the promotion of cultural diversity?

My first observation is a reminder that for the diversity of cultural expressions to manifest itself, it needs the support of an effective and sustainable creative marketplace.

A creative marketplace that allows these expressions to emerge and flourish. As well as to be monetized and to compensate those who work on it.

Copyright is therefore fundamental to the diversity of cultural expressions in its longevity.

And yet, there is little discussion on these two issues around the same table.

As such, I must congratulate the CDCE for its initiative and for organizing this conference.

I was recently reminded that the issue of copyright was absent from the last primetime, and even the last national summit on culture.

Why is copyright so absent from the cultural debates in Canada?

Is copyright like the weird uncle of the family? He's part of the family, we like him and we recognize his role in the family, but we're reluctant to really include him in the conversations at Christmas for fear that he will go off the rails, take us down some slippery slope, and ultimately ruin the party.

The answer probably lies in the governance of copyright in Canada, which does not facilitate its integration into the broader conversation about the creative marketplace.

Two departments, two departments to convince, two groups of stakeholders, including academics, two parallel conversations and very few common spaces for discussion.

In fact, everything seems to stem from a binary dynamic opposing cultural interests on the one hand, and business interests on the other.

- You are either a creator speaking to Canadian Heritage or a user speaking to Innovation, Science and Economic Development.
- You are either for or against creators or users
- You either support innovation or deny it. A good example is the debate over extending the term of protection in the Copyright Act. Both camps argue the same exact thing but in an opposite direction.

One immediate consequence to this policy-making in silos is the extreme polarization of the debate and a rather responsive public policy offer.

A tit-for-tat game, or should I say 'equivalent retaliation' : if you grant a right, you must grant an exception, and vice versa. The 2012 modernisation of the Copyright Act is a good example.

Faced with the controversial nature of any copyright initiative, it is therefore the search for fake compromises that prevails, rather than for common solutions that encompass all facets of the debate.

Above all, the goal is to do as little as possible on the legislative side, rather than putting the whole thing back on the drawing board.

The political appetite in Canada is indeed very mixed when it comes to major changes in copyright, and it is often because we are forced or pushed by our trading partners to act.

As the old saying goes, “qui s’y frotte s’y pique” [If you play with fire, you get burned].

Lastly, another possible reason why copyright is excluded from public policy debates on culture is that it is an uncomfortable topic for the cultural community itself.

Cultural commodification – the idea being that business driving decisions around culture is bad for cultural interests/ cultural diversity, makes some creators shiver.

But money and culture go hand-in-hand – it is cultural goods and services that carry cultural expressions – and what brings in money is what is most accessible, especially in a digital marketplace.

Yet another proof that creators should be talking to users.

Finally, copyright is complicated and copyright policy-making mostly involves lawyers talking lawyers about legal stuff, not marketplace stuff.

I have nothing against lawyers, but it always dumbfounded me that my colleagues at Canadian Heritage responsible for music policy, book policy, or film policy would be talking to CEOs while I only spoke to legal counsels.

As a result perhaps, it has been increasingly difficult for government to come up with legislative or regulatory solutions to copyright inefficiencies that yielded the results it was looking for.

This may be in part because we have yet to fully unpack and grasp the complexities of the copyright marketplace.

It is indeed a complicated and ever-changing marketplace.

The scope of copyright is no longer confined to traditional cultural industries, it covers now video games, computer software, etc.

Even the definitions of some types of works referred to in the Copyright Act are outdated due to changes in how we create and consume creative content.

The definition of who the players are has also changed:

- Users can be creators can be users, and rights owners can be either or none;
- There is an increasing blurring of lines between cultural goods and services (content) owners and owners of content-carrying technology (platforms, subscription-based service technology, etc)
- Copyright, like IP in general, in itself has become a commodity and a key element of competition and trade strategy.
- And domestic royalty levels are now being used as baselines in a global market.

The copyright marketplace is also all about data, and access to data.

And despite good efforts from some players, scarcity of data and lack of transparency continue to hinder the capacity of creators to “follow the money” and hence “follow their rights”, which puts them at a disadvantage when trying to negotiate, especially with big companies such as digital platforms.

This is of course a huge problem for the Copyright Board which relies heavily of good data to be able to assess Willing Buyer/Willing Seller standards and public interest, two criteria it is required by law to consider when setting fair and equitable tariffs.

So if I go back to my initial question : do we have the tools to meet the challenges of copyright while respecting our commitment toward the promotion of cultural diversity?

On the basis of what I have just discussed, I would say : not sure

Innovative thinking and effective public policy-making will only emerge if conversation spaces are created for better integration of copyright, cultural, and industry interests, and if new people are brought to the table.

In short, we need to make the circle bigger.

People to invite of course include creators, rights owners, and users, but also public institutions such as the Canadian Intellectual Property Office, the Competition Bureau and, yes, the Copyright Board, who all have the deep and practical expertise required to inform conversations on copyright management in the marketplace.

We should also think about whether our current binary governance structure facilitates or hinders broader and more inclusive conversations, and also whether our institutions have the right tools to deliver on their mandate, in particular in terms of data acquisition and enforcement of the Act.

Another issue, is copyright education.

Better education about copyright is key to ensure that all players, especially smaller players, either on the creator, creator-user, or user side, can play effectively in the marketplace.

Several organizations have taken over out of necessity. I am thinking in particular of the ADISQ, which regularly organizes workshops to help creators find their way through the maze of managing rights, but in my opinion, more and better work needs to be done, particularly at the government level.

Lastly, a fundamental reflection on the notion of public interest in copyright is needed.

In a context of slow deregulation of the copyright marketplace, what role should public interest play?

Who will be responsible for defining the public interest, for implementing it, for ensuring it is applied?

This is an essential question, especially in the wake of the York decision.

Conclusion

My objective in this short presentation was to alert you of the need to think about copyright and culture from a cross-cutting, integrated, and systemic public policy perspective and the ways to achieve that.

I don't know if I succeeded.

You tell me.

In the meantime, I encourage you to invite the weird uncle to the diversity of cultural expressions table more often.

After all, he's often the one holding the purse strings.

Responsive only

York – significance of this decision along with 2019 changes –

Impact can only be appreciated if one takes into consideration the changes that were made to the *Copyright Act* in 2019, notably

- End of mandatory music regime
- Agreements taking precedence over tariff

York decision shines spotlight on the fact that regulation of this marketplace is voluntary – not just for users but also for collectives (who can choose whether to file proposed tariffs or not).

However, a tariff approval process may not have enough value to market players to motivate participation much longer.

For me, the key question is about the public interest in the context of progressive deregulation of the market,