

Statutory Review of the Copyright Act: Challenges and Pitfalls

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THE CONFLICT BETWEEN CREATORS AND USERS

Creators want to benefit from the value their creations (music and books) generate for users

Users want to minimize payments for such inputs in order to channel savings towards other means to reach their goals/objectives/missions (Examples: replacing copyright payments with scholarships or other services for students, or investments in broadcasting facilities in smaller communities)

A standard conflict between buyers and sellers? Yes and No.

WHAT DOES ECONOMIC EFFICIENCY OR OPTIMALITY TELL US ABOUT THIS CONFLICT?

COPYRIGHTED WORKS (MUSIC AND BOOKS) ARE “INFORMATION GOODS/ASSETS”

Once produced or fixed, their use or consumption do not destroy such goods/assets, which remain available now and in the future (different from usual public goods like national defense or security).

DIGITAL TECHNOLOGIES REDUCE TO “ZERO” THE COST OF REPRODUCING AND DISSEMINATING COPYRIGHTED WORKS SUCH AS MUSIC AND BOOKS

Maximal dissemination is possible. Digitization challenges the delicate balance of creators' and users' rights. The excludability level favored by copyright may have become too severe for the digital world.

ANALYTICAL SOLUTIONS

- 1) First-best (optimal) allocation: $p = 0$, but how to compensate creators?
- 2) Second-best (constrained optimal) allocation: $p > 0$ to ensure compensation of rightsholders (fair and equitable)
- 3) A combination of the above

THE DISCOVERY OF VALUE

What is the (competitive market) value of copyrighted works given

- a) their “information good / asset” characteristic and
- b) the digital technologies,

which make the emergence of competitive markets (WBWS) almost impossible?

How to do it? Through **FOUR** key changes:

- 1. Move away from the current circular heuristics in favor direct inferences of competitive market value from the behaviour and choices of users. It can be done.**
- Rightsholders are significantly shortchanged by the current Copyright Act provisions (including exceptions of many kinds) and the way they are implemented.
- The under-compensation of creators (as compared to the competitive market benchmarks) is a significant impediment to a more efficient and vibrant economy.
- This under-compensation totals several hundred million dollars per year.

2. Avoid the stigmatization of creators as the culprits in public policies towards both a digital economy and maximal dissemination through copyright exceptions, including fair dealing.

Who, besides creators, should pay for such public policies?

- Example 1: In October 2012, the Canadian Government issued a regulation aimed to exclude microSD cards and similar cards from the definition of “audio recording medium” and therefore prevent the Copyright Board from setting a levy on such cards to compensate rightsholders for the private copying of music on those recording media and devices.

The Government’s argument: “Such a levy would increase the costs to manufacturers and importers of these cards, resulting in these costs indirectly being passed on to retailers and consumers ... thereby negatively impacting e-commerce businesses and Canada’s participation in the digital economy [sic!].”

Cost for creators/rightsholders: \$40 million per year.

- Example 2: The education exception under fair dealing
It may be right, but who, besides rightholders, should pay for it?

3. Bring to the table all major groups of beneficiaries and make them jointly and severally responsible/liable to ensure the proper (fair, equitable, competitive) compensation of creators. It can be done.

- Among such beneficiaries: users, Internet service providers, equipment manufacturers, consumers and governments.
- It is a sound extension of the willing buyer willing seller principle in the context of “information goods/assets” and “digital technologies”.
- Add to the SCC “balance” and “technological neutrality” principles, the “socio-economic efficiency” principle (combining characteristics of first-best or unconstrained and second-best or constrained optimal allocations) and the “cooperative game” principle (all beneficiaries at the negotiation table).
- Allow the Copyright Board to impose tariffs on an extended list of direct and indirect (value chain) beneficiaries in order to achieve a competitive market compensation of creators and therefore a more efficient and innovative economy.
Methodologies to do it are available.

4. The current sequential determination of royalties makes it difficult to implement significant adjustments and reforms

- Sequential hearings favor the status quo by interlocking royalties determined in different hearings.
- Require the Board to regroup related hearings and invite all stakeholder parties to participate. For instance, in the commercial radio case, regroup together the currently separated hearings involving SOCAN, Re:Sound, CMRRA-SODRAC (CSI), and other Collectives, and invite, besides the CAB, other significant beneficiaries such as equipment manufacturers and distributors, service providers, advertisers, governments as consumers' collective organizations, and others. And similarly for other cases.
- This regrouping of hearings
 - a) would favor the necessary reassessments of the level playing field imposed by technological changes, as “all boats are similarly affected when sea level changes”
 - b) would likely avoid “losing sight of the forest for the trees”, a major drawback of the current sequential hearing system.

The principles at the forefront of the copyright pricing challenge:

- **The level playing field or technological neutrality principle:**
All uses/users/technologies of copyrighted works (music and books) should compete for customers' ears on a level playing field.
Those deriving similar value should pay similar royalties and those deriving large value should pay higher royalties.
- **The competitive market value or balance principle:**
the compensation of rightsholders should achieve **fairness** and **equity** for both users and rightsholders.
- **The socio-economic efficiency principle:**
Given the “information goods/assets” character of copyrighted works and the “digital technologies”, users should have access to if not use/consume virtually all works as those are not expended in consumption.
- **The separation principle:**
It is neither necessary nor optimal that primary users' royalty payments be equal to the competitive market compensation of creators/rightsholders.

Economics of Cultural Public Policy

- **The Elephant in the room**, alongside rightsholders and users.
 - *** Tariffs (what users pay) versus the proper compensation of creators
 - *** In Education: there is a **separation** between what consumers (students and their parents) pay and what the providers of education services/content (teachers, school personnel) receive as compensation
 - *** In Healthcare: there is a **separation** between what consumers (patients) pay and what the providers of healthcare services/content (doctors, nurses, health personnel) are receiving as compensation

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