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Study of Remuneration Models for Artists and Creative Industries in the Context of Copyright: Brief prepared by the Union des écrivaines et des écrivains québécois (UNEQ) for the Standing Committee on Canadian Heritage

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Preamble

The Union des écrivaines et des écrivains québécois (UNEQ) is a craft union founded in Montréal in 1977. Representing some 1,600 writers, the UNEQ works to promote and distribute Quebec literature in Quebec, Canada and other countries and to protect writers' socio-economic rights.

The UNEQ was recognized in 1990 as the most representative association of literary artists under the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (R.S.Q, c. S-32.01). Consequently, the UNEQ speaks on behalf of all Quebec writers.

The UNEQ was also accredited by the Canadian Artists and Producers Professional Relations Tribunal in 1996 to negotiate on an exclusive basis with producers that come under federal jurisdiction.

Introduction

A copyright law cannot come down to technicalities. It must be part of a broader policy with clear goals. The government must state its choices regarding the protection of creators and their works.

The study being carried out by the Standing Committee on Canadian Heritage is about the remuneration model for creators in Canada at a time when the number of access points that have to be monitored is soaring because of digital technology.

We will show the Committee how alarming the situation of professional writers in Quebec and Canada is, and we will cite many risks that digital technology presents in the absence of strong legislation to protect creators and their works.

The professional writer: An endangered species?

In Quebec, as in the rest of Canada, making a living from writing is now something that only 8% to 12% of writers can do.

In 1998, a writer in Canada earned an average of $12,879 from his or her creative writing. Twenty years later, surveys by the UNEQ in Quebec[1] and by the Writers' Union of Canada in the rest of the country[2] show that the average income derived from creative writing is now just over $9,000 ($9,169 in Quebec and $9,380 in the rest of Canada in 2017).

Those surveys also indicate that almost 30% of writers report engaging in more non-writing activities to earn a living than in 2014.

Those worrisome figures suggest to us that if the situation is not remedied soon, the writing profession may simply die out in Canada.

[1] https://www.uneq.qc.ca/2018/11/26/metier-ecrivain-en-voie-de-disparition/

[2] https://www.writersunion.ca/news/author-incomes-steep-decline

A fragile remuneration model under constant threat

How do Quebec writers earn a living?

Their primary source of income is book sales, i.e., the royalties they receive from their publishers (which make up between 35% and 45% of revenue from literary activity), according to our survey. The Public Lending Right Program and royalties from collective rights management societies make up between 20% and 25% of revenues; activities such as public readings, workshops and speaking engagements account for about 20%. Some writers do freelance editing work or publish in literary journals; others receive grants or awards.

In other words, writers' incomes are fragmented. By combining incomes from various sources, authors can hope to make a decent living.

In addition, writers are precarious self-employed workers who do not have minimum labour standards (only salaried employees have them). There is no collective or master agreement to protect them.

Piracy

Compounding that precarious employment situation is the fact that anyone can appropriate a writer's work without much difficulty, including in a commercial context. Here are a few examples:

- In Canada, teachers and educational institutions take advantage of the so-called "fair dealing" exception for instructional purposes in the 2012 *Copyright Act* to avoid paying royalties and make repeated use of writers' work. **Less income for creators!**

- The California-based websites archive.org and openlibrary.org allow users to "borrow" books for free; they contain many recent Canadian and Quebec titles that are not in the public domain. The websites claim to have reached agreements with many libraries for the distribution of those works without charge, but international observers (the U.S. National Writers Union, the International Federation of Reproduction Rights Organisations and the International Authors Forum) have demonstrated that that is not true. **Less income for creators!**

- International Facebook groups offer the exchange of digitized books as a "service" between members. **Less income for creators!**

- A website in France (discover.koober.com) is marketing summaries of books for people who do not have time to read. The website pays no copyright fees to the writers on the pretext that the summaries of their books encourage readers to discover new works. **Less income for creators!**

- There are tutorials on YouTube entitled "How To Download Any Paid Book For FREE (2018)". **Less income for creators!**

The case of controlled digital lending

Let's take a closer look at so-called "controlled" digital lending, a loophole supported by the vague exceptions in the 2012 *Copyright Act*.

The California-based Internet Archive (the above-mentioned websites archive.org and openlibrary.org) is currently trying to prove to Canadian public libraries and universities that its activity involving massive public lending without regard for copyright is legal. A presentation with the outrageous title "Make Canadian libraries great again!", given in Vancouver on May 31, 2018, suggested a method of exploiting the weaknesses in Canadian legislation. The Director of the University of Alberta Copyright Office, who contributed to the presentation, wrote, "A solid legal argument is a great starting point, but … this may be less about confidence that you would ultimately prevail in Court, and more about minimizing the likelihood of a lawsuit." [3]

Controlled digital lending, whose goal is universal access to any content even if it is not yet in the public domain, ignores the fundamental principles of moral right and equitable remuneration for works.

Can the Government of Canada tolerate such abuses? Can the government countenance the fact that Canadian academics are members of a group of organizations that are trying to make the most of the exceptions in the Act? Will the government continue to allow corporations to impoverish creators?

The international situation

Canada cannot go on forever being the bad boy of Western countries in the copyright domain.

On March 7, 2018, the **International Authors Forum** (London), which represents some 700,000 authors worldwide, wrote a letter to the Chair of the House of Commons Standing Committee on Industry, Science and Technology (INDU) denouncing the so-called "fair dealing" exception for educational institutions in the Canadian law, which is detrimental to authors. The letter was signed by 63 authors organizations in countries around the world.[4]

In its May 18, 2018, brief to the INDU Committee, the **International Publishers Association** (Geneva) wrote the following about Canada: "In no other industrialized country is 'education', in the generic sense of the word, a legislated permitted purpose for a fair dealing exception (not even under the 'fair use' provisions in the United States)."[5]

In a study entitled *Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test* (2018), **Mihály J. Ficsor, former Assistant Director General of the World Intellectual**

[3] This document is available on the Simon Fraser University website: http://summit.sfu.ca/18093.

[4] https://www.internationalauthors.org/wp-content/uploads/2018/03/Letter-from-IAF-to-Canada-CIST-Committee-07-03-2018.pdf

[5] http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921768/br-external/InternationalPublishersAssociation-e.pdf

Property Organization (WIPO), points out that because of the so-called "fair dealing" exception, Canada is no longer fulfilling its international obligations arising from

- Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (administered by the WIPO);
- Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, annexed to the agreement establishing the World Trade Organization);
- Article 10 of the WIPO Copyright Treaty; and
- Article 16 of the WIPO Performances and Phonograms Treaty.

"The conflict has been aggravated by the extension of allowable fair use purposes to education without any specification," writes Mr. Ficsor.[6]

A number of countries have passed innovative legislation from which the Canadian government might take inspiration. The following are two examples:

- Last summer, the **European Union** adopted, with some difficulty, a directive whose general political orientation is worth noting: it encourages platforms such as YouTube (owned by Google) to provide more compensation to artists and content creators. The Members of the European Parliament had to face a phalanx of lobbyists demanding free and open access in the name of "innovation" and "freedom of expression," the very essence of the Internet, according to them. However, the Members from the 28 European countries stood their ground and ultimately adopted the directive, which is an unprecedented step forward in the observance of copyright in the digital age.

- In the **Netherlands**, the government and the public libraries reached an agreement to regulate digital lending by establishing equitable remuneration (shared equally between publishers and authors) based on a "one copy, one user" model: a digital book is lent to one user at a time. An embargo was also added to defer digital lending for 6 to 12 months after a book is published.

Canadian copyright law should provide more protections

The 2012 *Copyright Act*, with its numerous exceptions, has unfairly deprived creators of their income. In many cases, it also strips authors of their right to give or withhold permission to use their works, thereby undermining their moral right.

In the debates on the review of the *Copyright Act*, there appear to be two opposing visions in Canadian society. One vision advocates free access to content in the name of "innovation" and "education," while the other seeks to protect the fragile cultural ecosystem by arguing that equitable remuneration should be required for any use.

In the end, what we expect from the government is a clear statement of position on the purposes of the Act. The *Copyright Act* was conceived first and foremost to protect works and their authors. The exceptions introduced in 2012 have had a major impact on writers' incomes

[6] The study can be downloaded in Word format: http://www.copyrightseesaw.net/uploads/fajlok/conflict-of-the-canadian-law-with-with-the-three-step-test.doc.

and have undermined the practice of their craft, as we have shown. To maintain the status quo is to perpetuate injustice.

Recommendations

For all these reasons, the UNEQ recommends the following:

- Canadian Heritage should institute a mandatory equitable remuneration model for writers with respect to digital lending in libraries – "one copy, one user."
- The word "education" in section 29 of the Act should be more narrowly defined so that it does not allow the excessive use of works.
- Sections 29.21, 29.22, 30.04 and 30.06 should be repealed.
- The other exceptions should be defined and restricted in accordance with the following principle: exceptions should exist only for cases where there is no other way of accessing the works. An exception should be … exceptional.
- Royalties for private copying should be extended to cover new digital media.
- The Act should require online platforms to deploy a detection system to prevent the posting online of copyrighted content, as is done in the European system.