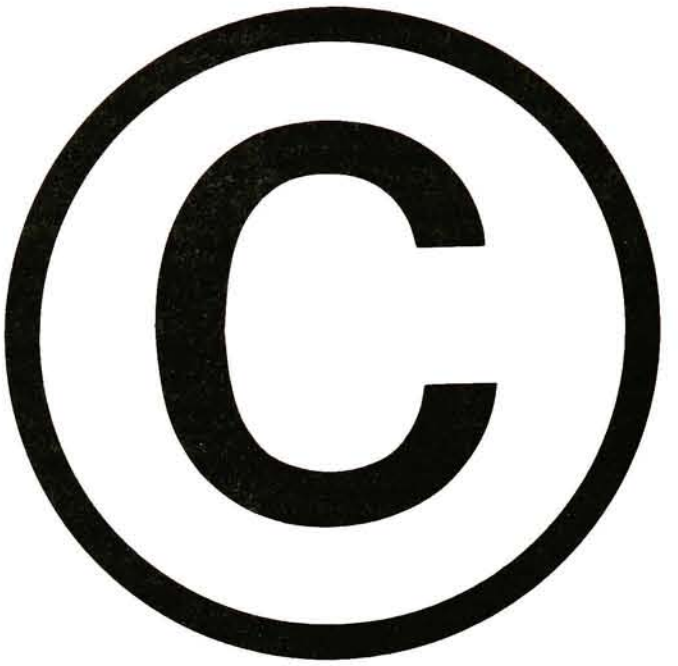
A charter of rights for creators

An analysis of the Subcommittee on the Revision of Copyright Report



by Michael Bergman

A Charter of Rights for Creators is the rather bold title of the recent report of the House of Commons Standing Committee on Communications and Culture's Sub-Committee on the revision of copyright. Copyright revision is one of those fuzzy imponderables that the Canadian government has been studying for the last 60 years, studies often consigned to the nether regions of commissions and other such groups who make imponderables less weighty or more ponderous.

And now that the sub-committee has delivered its 137 recommendations, what next? If followed through, the sub-committee's recommendations would return copyright to the center of cultural policy; that is, the primacy of economic reward for commercially viable units of creativity. These themes are evident in the primary assumption behind the recommendations – namely, that creators should create for money reward and must be rewarded in money for their creations.

To put the matter in some perspective, traditional copyright law deals with the creation of proprietary interests in certain kinds of manifestations of ideas. Its origins were remedial: the prevention of plagiarism of the works of others and the consequent loss of economic gain, creative integrity and reputation. This concern, more or less reflected in current Canadian copyright legislation, was defined by the scope and technology of creativity in the early 1920s when the legislation was passed. The centuries-old – and somewhat static technological forms of creativity such as writing, musical composition, theatre and the visual arts – lend themselves to easy manipulation when determining who has what kind of rights, how these rights may be used and the means by which they may be traded for money. The advent of media and equipment which cause or create infinite reproductions, reviewing and reuse in different formats, fits poorly with the originally protected copyright areas. When the last Canadian copyright statute was passed, radio and film were just developing, and other technologies were science-fiction; but, more crucially, the traditional copyright areas were more controllable and more manageable. Radio, television and computers in the modern context defy the traditional parameters since unauthorized individuals can appropriate and duplicate these media. These ungoverned intrusions deny the original creators any economic reward.

The sub-committee's prescription to remedy these problems focuses on three areas – the creations copyright protects, the creators copyright protects, and the means by which the creators protect their creations.

Currently copyright protects literary, musical, dramatic or artistic works. Film is considered a species of either dramatic or artistic work, neither of which is really exact. The sub-committee recognizes film as a distinct form of creativity to be classified as audio-visual works. In a similar vein, new categories are created for sound recordings, broadcasts and computer input. The new categories are uniquely different from the former ones. The copyright in the new categories protects physical objects created by machine or electronic technology. The old categories were the expression of the human mind and hand, three of the four being ideas expressed in writing.

The one new category the sub-committee advocates, which is not grounded in technology, is that of a copyright for performers' performances. This is the recognition that the performance of a work is itself an act of creation which is unique to the performer although the material performed is unique to someone else.

With all these copyrightable categories in mind, it is interesting to consider the possible copyrights involved in the broadcast of the TV 'movie of the week.' It would be composed of the copyright in the novel upon which the script is based; in the script on which the screenplay is based; in the actors' performances on which the audio-visual images are based; in the direction upon which the cinematography is based; in the musical composition and lyrics on which the music is based; in the sound-recording by which the music is transmitted; in the film on which the broadcast is based; and in the broadcast itself. The sub-committee recommends that each of these copyrights carry with it accessory rights depending on the category of the work. Films and records may not be performed in public without permission. Performers' performances may not be copied without permission and (presumably) compensation. Broadcasts may not be reproduced, transmitted or retransmitted without the broadcaster's permission.

There are two effects of these rights. First, in order for the various copyrights not to conflict, a proper organizational setting would have to be created by, for example, a film producer, where all persons having copyrightable rights (which would, under the recommendations, pretty much extend to all creative personnel) surrender or compromise their rights in the producer's favour. At the same time, though, there is no assurance that their compensation will be equivalent to the use and value of their creativity. The sub-committee's recommendations do not recognize the economic realities that force individual creators to accept a once-and-for-all payment or less than the real value of their creativity in order to secure the exhibition and use of it. The sub-committee emphasizes the rights and importance of organizations which can use several individuals' creativity to make an end-product. This concern with organizational economic utility is exemplified by the extent to which the sub-committee envisages the performers' rights in their performances. It is understood by this that not every use or reuse of a performer's performance gives a right to compensation. Rather, it presumes that by performing the performer consents to all reasonable uses of his performance. Therefore, an actor acting in a movie consents to the fact that his performance will be used indefinitely in all forms of movie exhibitions, subject only to a kind of contract he can negotiate. On the other hand, it is not assumed that every screening of a movie implies multiple screenings without compensation. Every screening is unique and does not necessarily give rise to other screenings without compensation.

The other great consequence of emphasizing economic reward is most evidenced in the broadcast industry, where most broadcast performances are of foreign material and foreign performances, and where foreign broadcasts themselves "leak" into Canada. Some substantial amount of money will flow out of the country in order to compensate these foreign broadcasters, performers and others for the use of their work in Canada. The sub-committee recognizes this possibility, although it does not believe that Canadian cultural industries will be harmed. The practical consequence will be that cable companies will pay for rebroadcasts of American programmes; users of satellite signals will pay for foreign signals; and foreign filmmakers and broadcasters will find a new source of revenue in Canada. While the sub-committee tempers this possibility by insisting on reciprocal rights for Canadian films and broadcasts exhibited outside of Canada, it is evident that the imbalance is striking. The sub-committee, to the extent that it considers copyright an element of cultural policy, does not consider this policy within the national context. Its emphasis on economic reward leads it to consider interests which are not

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necessarily national. By declaring that the airwaves are not to be used for free, it does not consider national boundaries as a factor that distinguishes broadcast rights.

While most of the rights the sub-committee advocates are economic, there is one which goes to artistic integrity – the so-called moral right. Moral rights have always been difficult to define. They tend to include the right of the creator to prevent the mutilation of his work, harm to his integrity and thereby to his reputation. The creator's moral right recognizes a distinct bond between creation and creator, that creation is the result of the desire to create and the love of creating, whether or not money reward is involved. Moral rights, though, are more easily maintained in the traditional arts fields. No painter or sculptor wants his creation retouched, rechiseled or placed in a context for which it was not intended, but how many times does the actor or film director find that the answer-print bears little relation to the intended performance because a producer has edited behind everybody's back? The sub-committee believes that moral rights and their enforcement do not transcend proprietary interests. These rights can be dealt away and, in their view, should be left to the individual to deal with in accordance with the best contract that can be obtained. It goes without saying that, in the vast majority of cases, the creator is not in a position to insist on his moral rights. All the standard film contracts expressly or by implication provide that these rights are dealt away. The sub-committee does not, then, see copyright as protecting the sanctity of creation. The bond between creation and creator is never indefinite or infinite.

This classifying of copyright as essentially a proprietary right subject to the usual proprietary uses has its severest consequences for employees. Under the current legislation, the copyright in employees' creations belongs exclusively to the employer. The sub-committee sees no reason to change this and, in fact, believes that any change will simply result in more complicated employment contracts which will transfer employees' copyrights to the employer anyway. Whether or not an employee should have any economic rights over his creations during the course of employment is hardly a reason to tamper with the right he should have over his creation as creator. The sub-committee felt that employees' rights were of no dispute since it had no real representations made to it in this area. In itself this demonstrates a certain ignorance of the functioning of much of the film, broadcast and related industries where most individuals in Canada are freelance or where most freelance contracts remove copyright from the freelancer. The sub-committee does not recognize that the absence of protection for employees and freelancers may have been a condition of developing cultural industries which is not necessarily appropriate for the future.

In principle, then, the creators and their creations are protected. In practice, it should be expected that, for creations caused or created by technology, organizational units capable of exploiting this creation will have the maximum use of protected rights.

Verifying that economic reward is forthcoming from every use of creation can be a difficult task, especially when uses are multiple and not confined to narrow geographic locations. The sub-committee, taking the example of musicians' Performing Rights Socities, recommends the creation of collectives or cooperatives to research out every use of copyrighted works and assure payment for same. The utility of this is found in the creation of an organization which is capable of monitoring the various media. The sub-committee assumes that the Performing Rights Society experiences translates to the benefit of other creators. It is a somewhat flawed assumption at best. The organization of collectives in different sectors (for example, film) assumes that all creators in that sector have similar interests. A collective of filmmakers may contain actors, directors, producers, editors, art directors and directors of photography. Surely their interests are not all the same. Furthermore, many of the group's interests are better protected by guilds and unions.

In fact, Canadian film guilds and unions are slowly moving into this area by extending their members' rights through the scope of their collective agreements and by going to bat for their members when their rights are violated, even their long-term artistic and economic ones. The creation of collectives or cooperatives will, to some extent, infringe on the territory of these unions.

Collectives cannot offer the same personal concern for artistic integrity as the artists themselves or organizations which represent their interests. Collectives tend to be impersonal collection agencies and nothing more.

The sub-committee's work may come to naught if no statute results. As a series of recommendations, they make interesting discussion and study. A statute, itself owing to the limitations of the written word, may not necessarily give effect to the intent of all of the recommendations. It is for this reason that the themes of such proposals are of significant importance. If legislation is to be drafted based on these proposals, it will promote legal interpretation and court decisions which will probably reflect the assumptions behind the written word. In this regard, a better balance must be established between pure economic interests and creation as creativity; between Canadian national interests and the rights of creators everywhere; between the individual creator and the organizations which exploit creativity. Rights should be immutable, especially those proclaimed in charters. The sub-committee may feel that they have recommended a Charter of Rights for creators but, for many, it will be a privilege to have these rights. And therein lies the weakness of the report. ●

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