

The copyright policy paradox: Overcoming competing agendas in the digital labour movement*

Samuel E. Trosow

abstract

This paper discusses the varying and often disparate approaches that Canadian associations representing intellectual and creative labourers have taken to copyright policy. Copyright policies are important to intellectual and creative workers as they set the framework for their rights and obligations with respect to the works and performances they create, and to the intellectual goods they utilize in their own production processes. Copyright is now in a state of transition as policymakers grapple with the effects that technological, cultural and economic changes have had on established business models and practices in education and in the entertainment and publishing industries. Although the relationship of creators to the fruits of their labour varies in different settings, it is increasingly tenuous. While resulting rights are retained in some situations, in many others the creator is alienated from their rights at the outset, and in yet others they are subsequently assigned away. In comparing the differences in approach to copyright issues taken by different intellectual and creative labour groups, the paper asks what accounts for these disparities, and how they might be ameliorated to the benefit of a progressive politics of digital labour.

Intellectual labour and the copyright paradox

Copyright policies are important to intellectual and creative labourers in all areas of work, whether they are teachers, performers, composers, artists, librarians or writers, because they provide the foundation for the rights and obligations in the works and performances they create. Just as importantly, they set the ground rules for intellectual labourers' capacity to draw on the works and performances of others that they utilize in their own production processes. Recently, copyright has become a much more visible and contested public policy issue. For groups representing the interests of intellectual and creative workers, copyright issues are particularly important not least because they have become a point of disunity and discord within the creative labour movement itself. This divergence of positions is treated in this paper as a paradox because, on the one hand, these groups have much in common and share similar values. They share a basic unity of purpose on many work-related and other social and policy issues ranging from

* The author would like to thank the editor, Jonathan Burston for his thoughtful comments and suggestions.

support for the arts to opposition to censorship, and within the realm of copyright policy, they generally share similar positions with respect to the rights of creators vis a vis their employers. That is to say, they agree that whatever rights flow from copyright in works and performances, they should primarily benefit the creator, not the employer or other contracting party. At this level, there is broad agreement that the ‘work for hire doctrine’, which generally assigns initial ownership rights to the employer, needs to be scaled back and limited, as do waivers of the authors’ moral rights in their creations.

On the other hand, their differences concerning the rights of end users regarding their works and performances is prominent. The groups fundamentally disagree on the scope of users’ rights and to the extent owners’ rights should be enforced in the digital environment. Two particular issues have emerged as especially divisive in this regard. The first issue that has divided intellectual and creative labour groups is ‘fair dealing’, largely due to its perceived relationship to the flow of licensing revenues. Fair dealing, which is discussed in more detail below, generally refers to the right to use portions of a work without permission from, or payment to, the copyright owner. It is analogous to ‘fair use’ in the US. The issue here is the extent to which owners’ rights should be limited or tempered by the doctrine of fair dealing. Educational, library and consumer interests generally favour expanding fair dealing (Canadian Association of University Teachers, 2008; Canadian Library Association, 2010) while the content industries (labour and management alike) and licensing collectives have seen it as a threat to their revenue streams (The Writers’ Union of Canada, 2010; Access Copyright, 2010).

The second issue that has generated significant disagreement among intellectual and creative labour groups in Canada involves the implementation of the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty, particularly its provisions on technological protection measures (TPMs). Rules protecting TPMs (or digital locks as they are commonly called) from acts of circumvention have been proposed in both Bill C-61 (An Act to Amend the Copyright Act, 2008) and again in the current Bill C-32 (the Copyright Modernization Act, 2010) in a form similar to those in the Digital Millennium Copyright Act (DMCA) (United States, 1998). While these provisions are supported both by industry and labour groups in the content industries (Canadian Recording Industry Association, 2010a; Creators’ Copyright Coalition, 2008)¹, they have been opposed by the education and library sectors (Association of Universities and Colleges of Canada, 2007: 6-7; Canadian Association of University Teachers, 2008: 5; Canadian Library Association, 2010: 4; Canadian Federation of Students, 2010: 2-3).

1 The Creators’ Copyright Coalition platform published in January 2008 was signed by: Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), American Federation of Musicians (AFM), Canadian Actors’ Equity Association (Equity), Canadian Artists Representation (CAR/FAC), Canadian Artists Representation Copyright Collective (CARCC), Canadian Music Centre, Canadian League of Composers, Guild of Canadian Film Composers (GCFC) League of Canadian Poets, Literary Translators Association of Canada, Playwrights Guild of Canada, Professional Writers Association of Canada (PWAC), Songwriters Association of Canada (SAC), Society of Composers, Authors and Music Publishers of Canada (SOCAN), Writers Guild of Canada (WGC) and The Writers’ Union of Canada (TWUC).

At least on these wedge issues, the copyright landscape seems to be host to two increasingly hostile and disparate camps. The Canadian Association of University Teachers (CAUT) explains the primary contradiction in copyright policy as ‘an intensified struggle over access and use of information’ (Canadian Association of University Teachers, 2008: 1).

On the one side are advocates of more restrictions on copyrighted material to protect the proprietary interests of rights owners. On the other side are those who want to ensure broader access and use. The intensity of this debate has been sharpened by the development of digital information technology that creates opportunities for both complete copyright control and, conversely, instantaneous illegal duplication. (*ibid*)

Yet for those engaged in intellectual labour, the problem should be more nuanced. For instance, CAUT characterizes creators as having ‘always been caught in the middle since they typically use other works as part of the creative process but also become rights-holders themselves’ (*ibid*). They characterize their own members in this dual capacity:

Academic staff occupy an important position in this debate, sharing the concerns of owners, creators and users. As creators and owners of copyright material, academic staff understand the importance of protecting their scholarly work. As users of copyright material in their teaching and research, academic staff are also aware of the importance of ensuring access to copyrighted works in order to advance knowledge. (Canadian Association of University Teachers, 2008: 1)

Students are in the same position:

As creators and owners of copyright material (essays, articles, theses and multi-media productions), students need to protect their work from unjust appropriation. But to study, research, write and create new knowledge, students also need ready access, at a reasonable cost, to the copyrighted works of others. This tri-part perspective – of use, creation and ownership of copyright – gives students special credibility in the struggle for fair and balanced copyright law. (Canadian Federation of Students, 2008: 1)

Freelance writers, artists and musicians are also similarly situated. As creators who rely on the existing works of others as part of their production processes, they benefit from rules that limit the reach of the copyright monopoly such as fair dealing and the public domain. Yet they often show the same hostility to users’ rights as their employers, industry trade groups, and licensing agencies such as Access Copyright and the Society of Composers, Authors and Music Publishers of Canada (SOCAN), whose board includes members affiliated with Sony/ATV Canada, Universal Music Publishing Canada, and various publishing trade groups. Access Copyright in particular provides an essential function besides licensing works and distributing funds to creators and publishers. It provides a stable and well-funded organizational forum for various creator groups to come together, to litigate, to lobby and generally to ‘circle the wagons’, so to speak. This function of holding together what otherwise could be a loosely coupled, unstable and fragile coalition is built into Access Copyright’s governance structure: ‘Operating as a ‘member guided’ organization, our elected board of directors (nine representing publisher member organizations and nine representing creator member organizations) is the driving force behind our organization’s policies’ (Access Copyright, 2009a: 4). The publisher representatives on the board include officers of

Penguin International, McGraw-Hill Ryerson Ltd., the Canadian Newspaper Association, and Magazines Canada.

What are the stakes for digital labour in seeking and achieving greater unity on copyright policy questions? Or to put the question another way, what are the costs if this effort is not made? While copyright issues were not central to the concerns of industrial labour, they become increasingly central in the digital environment. What is at stake here is not only the ultimate ownership and control of the output of information and knowledge production processes, but also the rules governing crucial aspects of the terms and conditions of the employment of intellectual and creative labour. While intellectual workers certainly vary in their levels of precarity, status, and compensation, they share a common, pivotal position with respect to their relationship to the object of their own labour and the labour of other creative workers.

Since an overarching objective of this paper is to seek greater unity within the intellectual and creative labour movement on the copyright issue, various stances taken need to be reviewed and assessed in order to identify issues where differences can be mitigated and agreements can be emphasized. Before turning to this analysis it would be useful to review some general copyright concepts, including works and other subject matter, moral rights, ownership allocation issues, licensing and infringement as well as fair dealing and technological protection measures.

Some copyright basics

Works and other subject matter

Copyright is a form of intellectual property that protects original expression that has been fixed in a tangible form. The traditional subject of copyright is ‘works’, which include original literary works, dramatic works, musical works and artistic works. In addition to the traditional forms of works, copyright now also extends to performers’ performances, sound recordings and broadcast signals. In Canada, copyright law is statutory and is part of the jurisdiction of the federal government. While the Copyright Act itself sets out the basic rules, the courts are often called on to interpret the meaning of the Act. Copyright protection in a work or other subject matter has a limited duration, and at the end of the term of protection, the work or other subject matter becomes a part of the public domain. The general rule in Canada is that copyright in a work lasts 50 years after the death of the author (Canadian Copyright Act, sec. 6; Murray and Trosow, 2007: 49-51).

Rights in works may be characterized as either economic rights or moral rights. Economic rights are transferable exclusive rights described in section 3 of the Act, and include the reproduction right, the public performance right, the first publication right; translation, and adaptation rights; the right to communicate the work to the public by telecommunication, exhibition rights for artistic works, rental rights for computer programs and musical works, and the right to authorize any of the preceding rights (Canadian Copyright Act, section 3; Murray and Trosow, 2007: 53-63).

These rights are sole and exclusive, meaning the owner may exclude others from doing any acts that implicate the particular right (e.g. making a photocopy in the case of the reproduction right or uploading the work in the case of the communication right). Each of these rights is severable from the others and may be individually transferred. The owner ‘may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof’ (Canadian Copyright Act, section 13(4); Murray and Trosow, 2007: 70-71).

In addition to rights in works, copyright also subsists in performers’ performances, sound recordings and broadcast signals, often referred to as non-traditional subject matter. A performer has a separate interest in their performance, the maker of a sound recording has a separate interest in the sound recording, and a broadcaster has a separate interest in the communication signals they broadcast. These multiple interests can become complex, where, for example, a performer performs a work which is fixed into a sound recording and then broadcast. Even if the work itself is in the public domain there are distinct copyrights in the performer’s performance of the work, its fixation in a sound recording and a broadcast signal that is transmitted to the public.

Moral rights in a work

In addition to the owner’s transferable economic rights, the author also holds moral rights in a work, which include the rights to integrity of the work, the right to be associated with the work by name or by pseudonym, and the right to remain anonymous. (Canadian Copyright Act, section 14.1(1)). Moral rights are considered an extension of the persona of the author, and unlike economic rights, they cannot be assigned to another person or entity. However, in Canada they can be waived (*ibid*, section 14.1(2); Murray and Trosow, 2007: 63-65; Rajan, 2010: 492-493).

The application of moral rights in Canada is best illustrated by the case brought by the visual artist Michael Snow against the Eaton Centre in Toronto. Snow was commissioned to create a set of 60 sculptured geese in flight. While the ownership of the pieces as well as the economic rights in the copyright were transferred to the Centre, there was no waiver of moral rights. When the management of the centre put red ribbons on the geese as part of a holiday promotion, Snow objected on the grounds that his moral rights, which he had obtained, had been violated. Accepting that the modification was prejudicial to the honour and reputation of the artist, the court ordered the ribbons removed (Snow v. The Eaton Centre Ltd, 1982; Rajan, 2010: 493).

The protection and extension of moral rights is an issue that unifies intellectual labour groups. While the provisions in Bill C-32 extending moral rights to performers (see Rajan, 2010) are not controversial, there is broad agreement within the labour community that they do not go far enough. It is not clear why creator groups have chosen not to make this a more visible issue.

The Creators’ Copyright Coalition (CCC) platform sought to strengthen moral rights by making them non-waivable as well as unassignable (Creators’ Copyright Coalition,

2008: 4). Along the same lines, CAUT argued that the Act be amended to make moral rights non-waivable or to at least impose further limitations and conditions on such waivers (Canadian Association of University Teachers, 2008: 7). The Canadian Federation of Students also argued for limitations on waivers of moral rights in order to protect students who often enter into contracts to write reports (Canadian Federation of Students, 2008: 4).

Allocating the initial ownership of the copyright

The threshold copyright issue that confronts all intellectual workers is the question of initial ownership. The general rule is that the creator is the first owner of the copyright. However, there is a significant exception to this general rule that results in the initial ownership falling to the employer in many cases:

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright... (Canadian Copyright Act, section 13(3))

In the U.S., the author is generally the first copyright owner (U.S. Copyright Act, section 201(a)), but this is subject to a similar employer-friendly exception where the work for hire is owned by the employer or person for whom it was prepared, absent an agreement to the contrary (id, section 201(b)).

It should be noted that ‘work for hire’ is further defined in section 101 of the U.S. Act and in the case of works that are specially ordered or commissioned; its scope is limited to defined categories of works. In other words, the exception favouring the employer is actually broader in Canada where all works done under contracts of service are owned by the employer. These Canadian and American provisions are ‘default rules’, that is, they can be altered by contractual agreement which typically favours parties with superior bargaining power.

The work for hire doctrine thereby ‘intervenes into the cultural workplace and divides authors from non-authors, primarily on the basis of the employment relationship and secondarily on the basis of the kind of intellectual property that is being produced’ (Stahl, 2009: 55). In addition to claiming ownership of the initial economic rights in a work, employers commonly demand waivers of whatever moral rights the creator would otherwise retain, even if they do not own the economic rights.

The end result is that intellectual workers often become alienated from the fruits of their labour with respect to the transferable economic rights. And with respect to the moral rights in Canada, the Canadian Labour Congress (CLC) claims that ‘[e]mployers often apply economic coercion in order to force workers to waive their moral rights’ (Canadian Labour Congress, 2009: 2). An example of this sort of coercion arose in 2007 when Canadian broadcaster, cablecaster and newspaper publisher CanWest presented a new contract to freelance writers at the Ottawa Citizen and other CanWest papers demanding they relinquish their moral as well as economic rights in their writings (Canadian Association of University Teachers, 2008a; Trosow, 2008).

At least with respect to the allocation of ownership issues arising out of the employment relationship, there is common ground among intellectual workers in all of the education, media, and cultural sectors. They agree that whatever rights flow from copyright in works and performances, they should primarily benefit the creator, not the employer or other contracting parties. This unity begins to dissolve, though, once we discuss the scope of those rights and how broadly they are enforced.

Infringement, fair dealing and collective licensing

'It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that only the owner of the copyright has the right to do under the Act' (Copyright Act, section 27(1)). So in the case of a work, if anyone does any of the acts listed in section 3 of the Act (e.g., reproduce, publicly perform, translate, etc.) without the consent of the owner, there is a technical infringement. However additional analysis is necessary in order to determine whether or not a particular act of infringement will result in liability because of fair dealing and other limitations and exceptions.

'Fair dealing for the purpose of research or private study does not infringe copyright'. (Copyright Act, Section 29). Section 29.1 similarly provides that fair dealing for the purposes of criticism or review does not infringe copyright if attribution is provided, as does section 29.2 for the purposes of news reporting.

CAUT characterizes fair dealing in broad terms as an important users' right:

Fair Dealing is the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners. (CAUT 2008: 1)

If the use can be characterized as being for one of the listed purposes (for example, research, private study, criticism, review or news reporting) then the particular facts are analyzed under the fair dealing criteria to determine if the dealing was, in fact, fair.²

The unanimous decision of the Supreme Court of Canada in *CCH v. Law Society of Upper Canada* in 2004 was a significant watershed in Canadian copyright law because it recognized fair dealing as a substantive user's right that should not be interpreted restrictively. However, the full implementation of the decision has been resisted (see Craig, 2005; Murray and Trosow, 2007: 74-85; Nair, 2010).

While the opposition to expanding fair dealing (indeed, even to just applying the principles of the CCH decision to current practices) has been overt from Access Copyright and other industry interests, fair dealing has also been covertly weakened by

2 While the *Copyright Act* is silent on the fairness criteria, the Supreme Court adopted six factors in the *CCH v Law Society of Upper Canada* (2004) case: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work (CCH: para 53). It is important to emphasize that just because the use qualifies as one of the enumerated purposes, that is no guarantee that the dealing will be considered fair under the factual analysis using the six criteria.

educational administrators through overly-conservative, risk-averse policies that avoid confronting the issue (Trosow, 2010; Nair, 2010).

While the fight against fair dealing in Canada has been largely driven by content industry trade associations, licensing collectives, and their lawyers/lobbyists, their efforts have been bolstered and significantly legitimated by creative labour groups. Licensing collectives have been central to the formation and maintenance of this bloc as they offer an organizational structure and corporate form that has the means to engage in sustained litigation and lobbying strategies. Access Copyright has been the most active in these efforts and its submission to the 2009 consultation stresses the negative effects of fair dealing on revenues flowing from collective licensing. They argue that broadening fair dealing would ‘undermine existing business models’, diminish compensation to copyright owners and ‘take money out of the Canadian creative community’ (Access Copyright, 2009: para. 3-B4). Their approach to fair dealing and other exceptions is that they should not interfere with existing or emerging business models. They call for the ‘elimination of those exceptions currently in Canada’s Copyright Act which are today better served through licensing arrangements’ (*ibid*: para. 3C). Since Bill C-32 was tabled, Access Copyright’s main emphasis has been on working to defeat the proposed addition of ‘education’ as a new fair dealing category, which it claims will ‘undermine the ability of creators and publishers to get paid for the use of their works’ (Access Copyright, 2010). Some of the creator groups have followed Access Copyright’s lead on this issue even though their members individually benefit from fair dealing insofar as they must utilize the works of others as part of their production processes.

Technological protection measures and the anti-circumvention rules

The other significant wedge issue that separates the groups discussed in the next section is the implementation of the anti-circumvention rules modelled on the DMCA in the U.S. The government’s previous Bill C-61 and the current Bill C-32 prohibit not only acts of circumvention of technological protection measures, but also the distribution or provision of devices or services which could aid in such circumvention. The negative effect of these rules on innovation and research has been noted in the United States (Electronic Frontier Foundation, 2010; Samuelson, 1999) and these provisions have proven to be the most controversial parts of Bill C-61 and now C-32. The main point of contention is whether the anti-circumvention rules and device prohibitions will override the legitimate rights of users of copyrighted materials. In neither Bills C-61 nor C-32 is the prohibition on acts of circumvention limited to actions that would otherwise be infringing. In other words, even if the ultimate use does not constitute actionable infringement, the circumvention of TPMs to accomplish that otherwise legitimate purpose is still prohibited, as would be the provision of services or devices to aid in such activities. For example, the distribution of code that helps consumers disable country codes in a device, to enable the usage of lawfully purchased works, would violate these device prohibitions (see Electronic Frontier Foundation, 2010 and Samuelson, 1999 for additional examples).

The alignment on this issue is similar to fair dealing, pitting educational and consumer interests against the content industries and licensing collectives. Retailers, Internet

service providers, broadcasters, and electronic equipment manufacturers have also expressed opposition to these anti-circumvention measures, arguing that Canadians must not be prohibited from engaging in non-infringing activities. They also pointed to the risk of harm to emerging Canadian industries if the measures are not properly limited (Business Coalition for Balanced Copyright, 2008: 1).³

The justification for enacting the digital locks provisions is largely based on the 1996 WIPO Internet Treaties, which Canada has signed but not implemented through domestic legislation. The Writers Guild, which represents writers for screen, radio and Internet in Canada, has stated that ‘Canadian copyright law must be brought up to international standards. Canada must live up to its international obligations. The Canadian government must immediately ratify the WIPO Treaty’ (Writers Guild of Canada, 2009: 194).

Labour’s competing copyright agendas

As suggested above, the copyright policy advocacy work of Canadian labour groups reflects significant divisions between academic staff on the one hand and other artistic, musical and literary creators on the other. While there are some issues in which there are no direct conflicts, and agreement even exists on certain issues, agendas have frequently clashed. An underlying question is whether this clash is inevitable, or whether it can be mediated. This section identifies a number of groups in English speaking Canada that represent different segments of intellectual and creative labour in Canada and briefly describes their recent copyright stances.

Alliance of Canadian Cinema Television and Radio Artists (ACTRA)

ACTRA claims a membership of 21,000 self-employed performers working in film, TV, radio, digital media, corporate videos and commercials (ACTRA, 2010). They are certified under the Status of the Artist Act to negotiate collective agreements in this sector. ACTRA also engages in political advocacy on behalf of its members on a number of policy issues including copyright. At the 2009 Toronto Roundtable (which was part of the government’s consultation process that resulted in Bill C-32) their Executive Director said:

With respect to protecting the integrity of performers’ own performances, which are known as moral rights, every performer, whether an international star or just starting out, needs moral rights to ensure that their performances are not modified or distorted without their consent. Without moral rights, we risk not only our international reputation with our trading partners, but also we may do irreparable harm to our arts and culture industries. (Waddell, 2009)

While ACTRA signed the 2008 Creators Copyright Coalition platform, they were not among the signers of the joint submission to the 2009 consultation (Sookman and

3 The Coalition includes the Canadian Association of Broadcasters, Canadian Association of Internet Providers, Canadian Cable Systems Alliance, Canadian Wireless and Telecommunications Association, Computer and Communications Industry Association, Retail Council of Canada, Google, Third Brigade, Tucows, Yahoo! Canada,Cogeco Cable, EastLink, MTS Allstream, Rogers Communications, SaskTel and TELUS.

Glover, 2009). They were also instrumental in crafting the important Canadian Labour Congress (2009) document (see below) and their recent statements seem to downplay their opposition to fair dealing and their support for digital locks. As they represent the interests of performers, and therefore have less of a concern with the reproduction of works, ACTRA is not affiliated with Access Copyright.

American Federation of Musicians – Canadian office

The Canadian branch of the American Federation of Musicians (AFM) claims 1,700 members and has been instrumental in lobbying for the inclusion of performers' rights in the Copyright Act and for the passage of the Status of the Artist Act (American Federation of Musicians – Canada, 2009), under which they are a certified representative.

AFM's consultation submission strongly opposed broadening fair dealing and they are also in favor of enacting strong versions of the TPM measures. While copyright owners are under varying contractual obligations to share revenues with its members, it is not clear why an association presumably representing the interests of performers places so much emphasis on copyright owner's rights. Strong TPMs and weak fair dealing do not advance the position of performers struggling to make a living in an industry that has already marginalized the importance of live performances.

Canadian Artists' Representation / le Front des artistes canadiens (CARFAC)

CARFAC represents professional visual and media artists and has been certified to negotiate with national organizations on behalf of visual artists in Canada. They have advocated for a new resale right (*droit de suite*) that would give visual artists a percentage royalty from the subsequent resale of their work, and have expressed disappointment that this position was not included in the Bill. This proposal is an example of an issue where there is no conflict with users' rights advocates, some of whom have even endorsed this concept of *droit de suite* (Murray and Trosow, 2007: 206).

But CARFAC has been opposed to expanding fair dealing and has been in favour of the digital locks provisions, and it signed both the 2008 CCC platform and the 2009 joint submission. While in a more recent statement made after Bill C-32 was tabled, they indicated support for adding 'parody and satire' to fair dealing, they oppose adding 'education' because:

adding a fair dealing exception for education purposes could jeopardize small but important income sources for visual artists. The lack of clarity about what is considered "fair" means that artists may need to go to court to determine what their rights are – something that many can not afford. (CARFAC, 2010)

While CARFAC continues to oppose the expansion of fair dealing for educational purposes, their overall approach seems geared towards protecting their members from large rights holders as much as from end users:

While the public debate about copyright has centred on the fight between heavy handed corporate rights holders and users, copyright was originally designed to encourage creativity by providing a

source of income for creators. As such, CARFAC . . . encourage[s] their members not to sign their rights away to galleries or corporations. (CARFAC, 2010)

The Writers' Groups

Various groups represent different segments of the writers' community in Canada including The Professional Writers Association of Canada (PWAC), The Writers Guild and The Writers' Union of Canada (TWUC). The positions of all three groups are closely aligned with Access Copyright, and they have all signed both the 2008 Creators' Copyright Coalition platform and the joint submission to the 2009 consultation.

PWAC counts approximately 600 freelance writers as its members and is the certified representative for professional freelance writers who are authors of works in a language other than French. PWAC has also been a strong advocate for the rights of freelancers with respect to ownership and waiver issues in the media industry.

The Writers Guild is certified to represent screenwriters of independent English language film, television, radio and multimedia productions in Canada, and they administer several collective agreements on behalf of their 2,000 members. In their 2009 consultation submission, they stressed the need to expand collective licensing.

It also seems unfair to us that the current Private Copying Levy applies to only sound recordings and to limited forms of storage media. There is no legal principle that restricts private copying to only sound recording. . . The WGC proposes that the Copyright Act be amended to allow common consumer uses of copyright works and in return use the current Private Copying levy as a model for a more expanded collective licensing scheme. (The Writers Guild of Canada, 2009: 189)

TWUC has, in its own words 'opposed the expansion of fair dealing consistently and vociferously' (Paris, 2010), and they especially do not want it to be used where a license is available:

The government should not expand it further. Nor should fair dealing be used to avoid the effort and cost of licensing copyright works. Both the educational sector and documentary producers have argued that it is too difficult to license excerpts from copyright works and therefore fair dealing should be expanded. The WGC has great difficulty with an argument for changing law that is based on 'ease of use.' Laws should be amended because it would be just and fair to do so – not to make life easier for one group of people (users) at the expense of another (creators). (The Writers Guild of Canada, 2009: 192)

The Writers' Union of Canada (TWUC) claims a membership of over 1,800 members, who must have published at least one book with a trade or university press or the equivalent in another medium. They have provided one of the strongest responses in opposition to the educational fair dealing provisions of Bill C-32. Stating that they 'are outraged by the inclusion of a new provision for educational uses in Bill C-32' the Writers Union claims '[t]his new "fair dealing" for the purpose of education is a wholesale expropriation of writers' rights and opens the door for the education sector to copy freely from books and other copyright material without paying writers' (The Writer's Union of Canada, 2010). In addition to vowing to lobby against the provision, they add that 'if we are unsuccessful, we will consider litigation on behalf of writers for the loss of rights and income resulting from this serious removal of copyright protection' (*ibid*).

In addition to their advocacy on copyright issues, TWUC has been an outspoken opponent of censorship and a strong proponent of extending Status of the Artist legislation, which would effectively broaden the bargaining rights not only for its own members, but for intellectual and creative labour across the board. While TWUC has been certified under the federal Status of the Artists Act, this certification does not extend to negotiating with most book publishers who are outside of the scope of the federal act. This is because they are considered provincial producers. Consequently, TWUC has been working towards stronger Provincial Acts especially in Ontario where there is a large base of publishers (The Writer's Union of Canada, 2010).

Songwriters Association of Canada and the Canadian Music Creators Coalition

The Songwriters Association of Canada's (SAC) main advocacy focus has been to seek a new right to remuneration for Canadian songwriters. SAC President Eddie Schwartz recently stated:

[SAC] has proposed that Bill C-32 be amended to legalize music file-sharing in conjunction with a remuneration system for creators and rights-holders. Consumers who wish to file-share would be asked to pay a reasonable monthly licence fee. The revenue received could be distributed to performers, songwriters, and rights-holders on a transparent, pro-rata basis... [this proposal] would not only go a long way toward eliminating the need for 'locks and lawsuits', but would create a new business model that would be fair to consumers and creators alike. (Schwartz, 2010)

While this proposal is opposed by the music industry (Canadian Recording Industry Association, 2010; Sookman, 2008), other pro-users' rights groups have not opposed it, and it represents a potential avenue of compromise that is less objectionable than the strict digital locks provisions. But notwithstanding SAC's claim that they are not pushing for the digital locks provisions, they did sign on to the 2009 joint consultation submission, which stressed the adoption of strong digital locks provisions and vehemently opposed the open-ended fair dealing provision that was being sought by the educational sector and others. However, given SAC's current emphasis on their equitable remuneration proposal, these other positions seem secondary at best:

Regarding WIPO implementation, we are not opposed to the legal protection of Technical Protection Measures (TPM) or "digital locks", however we believe the obvious economic benefits of our model make such protection measures obsolete. Given the consumer aversion to TPM's, we believe their use will inhibit the success of recordings in which they are embedded, and they will simply fall out of use. (Songwriters Association of Canada, 2009: at item 11).

SAC's proposal has been supported by the Canadian Music Creators Coalition (CMCC), a group of musicians that has also been asserting more independence from the record labels, whose spokesman, Andrew Cash, has stated:

This is the first progressive proposal we've seen in Canada to address file-sharing,... It's telling that creators, the people who actually make the music being shared, are the people showing leadership and pushing for a made- in-Canada approach to file-sharing. We can only hope that the Canadian government will follow the Songwriters' lead and begin exploring alternatives to the failed 'locks, lawsuits and lobbying' strategy of the major labels'. (Canadian Music Creators Coalition, 2007)

Taking a stronger position against the digital locks provisions, than against SAC, the CMCC explicitly opposed Bill C-61:

Rather than building a made-in-Canada proposal to help musicians get paid, the government has chosen to import American-style legislation that says the solution to the music industry's problems is suing our fans . . . Suing fans won't make it 1992 again. It's a new world for the music business and this is an old approach. (CMCC, 2008)

More recently, they have opposed the digital locks provisions in Bill C-32:

CMCC is concerned that the interests and voice of multinational corporations are being allowed to trump even those of the Canadian government. For example, the bill purports to allow format and time shifting. However, by putting [digital rights management] on their media, corporations are able to trump this approach and criminalize the actions of users. (CMCC, 2010)

Canadian Association of University Teachers (CAUT)

CAUT has played an important role in the development of copyright policy within the intellectual and, by association, the creative labour movement. Within the post-secondary education sector, the CAUT has been the primary advocate of copyright reform from a users' rights perspective. CAUT has been an advocate of broader users' rights, including the expansion of fair dealing and opposition to the digital locks positions. In 2003 CAUT stated that it:

...has consistently articulated a plea for balance. Unfortunately, the voices for balance from organizations such as CAUT have too often been drowned out by those arguing for ever greater owner rights. The mostly non-government and non-profit groups defending the public interest in access have not been a match for the private, commercial voices arguing their own economic cause. (CAUT, 2003: 2)

For many years, CAUT's positions on copyright policy matters were virtually indistinguishable from the Association of Universities and Colleges of Canada (AUCC), which represents university administrations. Indeed, throughout the 1990's, the educational and library associations worked through an umbrella of a broader coalition. During the 2001 copyright consultations, CAUT continued to support special exemptions that would only be available to specified institutions. These included the request for a special exemption for the use of publicly available Internet materials on the premises of educational institutions. As late as 2003, CAUT concurred with the AUCC's proposal for this special Internet exemption.

But after the landmark 2004 Supreme Court decision in *CCH v Law Society of Upper Canada*, which gave fair dealing a much broader interpretation than had previously been the case, CAUT moved away from this position in favour of a broader implementation of fair dealing. By 2007, they formally disassociated themselves from seeking further special institution-based exemptions because they felt the new special exceptions unnecessary and because fair dealing was a better way to achieve the goal of balance (CAUT, 2007).

The special educational amendment, however, is still supported by AUCC, CMEC, the Canadian School Boards Association, the Canadian Teachers' Federation and the Canadian Association of Research Libraries (CMEC, 2008: 2), and it has become an increasingly controversial point of contention within the educational and library sector. In its 2009 consultation submission, CAUT provided further reasoning for why they had

rejected the approach of seeking special exemptions in favour of working towards a broader application of fair dealing:

This open-ended approach would serve the interests of educators, researchers, librarians, students and other life-long learners not currently affiliated with an institution, and would avoid a situation where the educational sector is seeking exemptions not available to the general public. (CAUT, 2009: 5)

While the purpose of this paper is not to detail specific differences within the educational sector (on which see Trosow, 2010), this issue is relevant to our broader concern with the copyright positions of labour groups as it is important to evaluate the extent to which they have taken stands that are independent from, or even in conflict with, those of their employers. Labour organizations often adopt the positions of their employers or industry trade group with respect to copyright issues. In the primary educational K-12 sector, the Canadian Teachers Federation continues to support the special educational Internet exemption (Canadian Teachers Federation, 2008; Donnelley, 2009), placing it at odds with CAUT and in alignment with their employers on this issue.

Canadian Labour Congress: Seeking a common position

What is at stake for digital labour, and is it even possible to think of digital labour as a coherent force when it comes to copyright reform? Despite all of the differences that have been outlined in this paper, the CLC thinks this remains a possibility. Their Policy Statement on Copyright and Net Neutrality (2009) is an example of how labour groups with diverging positions can work towards a cooperative solution on copyright issues. The Congress is an umbrella organization for affiliated unions claiming over three million affiliated workers (Canadian Labour Congress, 2010).

In February 2009, the CLC was set to consider a resolution that would have reversed their previously balanced approach to copyright (Geist, 2009). In response to concerns raised by members, a working group was established to craft a broader copyright policy for the organization. While the process began with major differences on the table, in the end a compromise document was prepared which stressed areas of common ground. Michael Geist noted that ‘the results much better reflect the diversity of interests within Canada’s largest labour organization. In fact, the policy combines both copyright and net neutrality, adopting a broader approach to digital policy’ (Geist, 2009a). In the long run, the efforts that went into crafting this document may be more significant than the text of the document itself, as they may foreshadow new efforts on the part of labour groups to begin a discussion on how to ameliorate some of the existing differences in copyright policy, all the while stressing the areas of agreements that already exist.

Breaking with management’s copyright policy and forging our own

Many of the copyright policy positions taken by the artists’, musicians’ and writers’ groups discussed here reflect and reinforce the stances taken by their employers, industry groups and the licensing collectives. What accounts for this paradoxical

alignment, given some of the contradictions inherent in the labour processes in these sectors? For example, why has the struggle to eliminate or at least scale back the scope of moral rights waivers not taken on more prominence, while at the same time, many of the independent creator groups seem more concerned in joining their employers in the battle against fair dealing? A parallel alignment between labour and management groups had traditionally been present in the educational and library sector, although in recent years CAUT has broken from some of the positions taken by AUCC.

In stressing their proposal for equitable remuneration for music file sharing, the Canadian Association of Songwriters is taking a similar step towards independence from the music industry, and the CMCC has done so even more directly. ACTRA is similarly positioned to become more of an independent voice. The AFM and the writers' groups, however seem less likely to break away from their respective industry groups on wedge issues such as fair dealing and TPMs. The writers' groups in particular are closely aligned with Access Copyright, whose influence in the overall constellation of copyright policy cannot be overestimated.

How best to grapple with the copyright paradox? First and foremost, we need to show how contradictions in the labour process have an underlying unity – even when they present themselves in different manners in different sectors. Such a unity could be based on the similar positions that intellectual labour finds itself holding with respect to the ultimate ownership and control of the fruits of creative labour processes.

Building an effective counterpart to the forces of digital enclosure, one that can function independently from industry employers, their trade associations and licensing collectives, is a crucial task for the intellectual and creative labour movements. While considerable work still needs to be done, some strong and laudable efforts have already been made to build bridges between different labour groups. Despite differences that sometimes appear irreconcilable (especially, perhaps, when legislation is on the table), striving for a higher degree of solidarity remains imperative if digital workers, both intellectual and creative, are to continue to possess any sensible degree of affiliation with the fruits of their labour, and if a thriving digital commons is to emerge any time soon. Those organizations who have, to date, shown some understanding of the gains that a greater solidarity on copyright may well muster, ought to be encouraged to continue thinking and acting along collaborative lines. Such admirable work was done under the auspices of the CLC. It must be taken up again and emulated in other venues both in Canada and abroad.

references

- Access Copyright (2009) ‘Submission to the copyright consultations’, *Government of Canada*, September 13, 2009 [<http://www.ic.gc.ca/eic/site/008.nsf/eng/02603.html>].
- Access Copyright (2009a) *Annual report 2009*. [http://www.accesscopyright.ca/docs/AnnualReports/Annual_Report_2009_Final.pdf]
- Access Copyright (2010) *Access copyright is deeply concerned by the government’s lack of support for the remuneration of creators through collective licensing*, June 3, 2010. [<http://www.marketwire.com/press-release/Access-Copyright-Is-Deeply-Concerned-Governments-Lack-Support-Remuneration-Creators-1270887.htm>]

- Alliance of Canadian Cinema Television and Radio Artists (2010) *What is ACTRA?* [http://www.actra.ca/actra/control/insideActra_what?menu_id=2]
- Alliance of Canadian Cinema Television and Radio Artists (2009) *Reforming Canada's Copyright Act to protect performing artists in the digital world*, September 2009. [http://www.actra.ca/actra/images/documents/2009.09.11_ACTRA_Copyright_Position.pdf]
- American Federation of Musicians – Canada (2009) ‘Submission on Copyright Reform’, *Government of Canada* [<http://www.ic.gc.ca/eic/site/008.nsf/eng/02201.html>].
- Association of Universities and Colleges of Canada (2007). *AUCC Submission to the Ministers of Industry and Canadian Heritage Concerning Copyright Law Reform*, December 2007 [www.aucc.ca/_pdf/english/reports/2007/copyright_12_04_e.pdf].
- Business Coalition for Balanced Copyright (2008) *A balanced “package” approach for a strong Canadian copyright regime*, February 12, 2008. [https://services.google.com/blog_resources/google_bcbc_position_paper.pdf]
- Business Coalition for Balanced Copyright (2010) ‘The business coalition for balanced copyright welcomes the introduction of the Copyright Modernization Act’, *CNW Group*, media release, June 3, 2010. [<http://www.cnw.ca/en/releases/archive/June2010/03/c9749.html>]
- Canada. *Copyright Act*, Chapter c-42. [<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/>]
- Canada. *Status of the Artists Act*, Chapter S-19.6 [1992, c. 33]. [<http://www.canlii.org/en/ca/laws/stat/sc-1992-c-33/>]
- CARFAC Canadian Artists’ Representation / Le Front des artistes canadiens (2010) ‘Copyright changes a mixed bag for visual artists’, June 8, 2010. [<http://www.carfac.ca/2010/06/bill-c32/>]
- Canadian Association of University Teachers (2003). *Submission to The House of Commons Standing Committee on Canadian Heritage on Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act*, September 2003. [<http://caut.ca/uploads/2003CopyrightSubmission.pdf>]
- Canadian Association of University Teachers (2008) ‘The copyright act and academic staff’, *CAUT Education Review* 10(1), February 2008. [<http://caut.ca/uploads/EducationReviewvol10no1-en.pdf>]
- Canadian Association of University Teachers (2008a) *Letter to Graham Greene, Publisher Ottawa Citizen*, March 3, 2008 [http://www.caution.ca/uploads/Green%20re%20Freelance%20Writer%20Agreement%20_2008-03-03_.pdf].
- Canadian Federation of Students (2008) *Statement on copyright reform*, April 2008 [<http://www.cfs-fcee.ca/html/english/research/submissions/copyright2008.pdf>].
- Canadian Federation of Students (2010) ‘Copyright Modernization Act: Bill C-32’, *Membership Advisory*, May 2010. [http://www.cfs-fcee.ca/html/english/campaigns/Mem_Advisory-C_32-CFS.pdf].
- Canadian Labour Congress (2009) *Canadian labour congress policy statement on copyright and net neutrality* [<http://www.canadianlabour.ca/sites/default/files/pdfs/Copyright-Policy-Statement-2009-10-26-EN.pdf>].
- Canadian Labour Congress (2010) *About the CLC*. [<http://www.canadianlabour.ca/about-clc>]
- Canadian Library Association (2010) ‘Protecting the public interest in the digital world: The views of the Canadian Library Association / Association canadienne des bibliothèques on Bill C-32’, *An Act to Amend the Copyright Act*, July 29, 2010. [http://www.cla.ca/Content/ContentFolders/NewsReleases/2010/Bill_C-32_CLA_Brief_final.pdf]
- Canadian Music Creators Coalition (2007) *CMCC applauds songwriters’ approach to filesharing*, December 6, 2007. [<http://www.musiccreators.ca/wp/?p=239>].
- Canadian Music Creators Coalition (2008) *Copyright reform bill doesn’t help Canadian artists: Government Opt to Parrot US Legislation in lieu of a real Made-in-Canada Approach*, December 8, 2008 [<http://www.musiccreators.ca/wp/?p=264>]
- Canadian Music Creators Coalition (2010) *Time to invest in supporting artists instead of focusing on punishing fans*, June 8, 2010. [<http://www.musiccreators.ca/wp/?p=279>]
- Canadian Recording Industry Association (2010) *Statement of Private Copying Levies*, April 23, 2010. [<http://www.cria.ca/205.pdf>]

- Canadian Recording Industry Association (2010a) *Copyright Bill Introduction Applauded by Canadian Record Labels: Record Labels Urge Passage of Robust Digital Copyright Protection*, June 2, 2010. [http://cria.ca/june0310_release.pdf]
- Canadian Teachers Federation (2008) ‘Education Issues in Bill C-61’, Government of Canada. [<http://www.ic.gc.ca/eic/site/008.nsf/eng/02925.html>]
- CCH v Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII). [<http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>]
- Council of Ministers of Education, Canada (CMEC) (2008) ‘Educational use of the Internet: Is there an Implied License?’ *Copyright Bulletin* #5. [<http://www.cmeec.ca/Publications/Lists/Publications/Attachments/112/bulletin-05.en.pdf>]
- Craig, C. (2005) ‘The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform’ in M. Geist, (ed.) *In the Public Interest: The Future of Canadian Copyright Law*. Toronto: Irwin Law.
- Creators’ Copyright Coalition (2008) *Platform on the revision of copyright*, January 2008. [<http://www.creatorscopyright.ca/documents/platform-jan08.pdf>]
- Electronic Frontier Foundation (2010) *Unintended consequences: Twelve years under the DMCA*. [<http://www.eff.org/wp/unintended-consequences-under-dmca>]
- Donnelley, M. (2009) ‘Submission letter to Hon. Tony Clement’, *Government of Canada*, September 2, 2009 [<http://www.ic.gc.ca/eic/site/008.nsf/eng/02925.html>]
- Geist, M. (2009) *Canadian labour congress considers major reversal on IP policy*, February 4, 2009. [<http://www.michaelgeist.ca/content/view/3661/125/>]
- Geist, M. (2009a) *Canadian labour congress adopts new copyright policy*, November 12, 2009. [<http://www.michaelgeist.ca/content/view/4529/>]
- Murray, L. and S.E. Trosow (2007) *Canadian copyright: A citizen’s guide*. Toronto: Between the Lines.
- Nair, M. (2010) ‘Fair dealing at a crossroads’, in M. Geist (eds.) *From ‘radical extremism’ to ‘balanced copyright’: Canadian copyright and the digital agenda*. Toronto: Irwin Law.
- Paris, E. (2010) ‘Letter to M.P. Charlie Angus from Erna Paris, chair writers’ union of Canada’, *The Writers’ Union of Canada*, March 23, 2010. [http://www.writersunion.ca/ht_angus_paris1.asp]
- Rajan, M.S. (2010) ‘Culture matters: Why Canada’s proposed amendments to its copyright law should revisit moral rights’, in M. Geist (eds.) *From ‘radical extremism’ to ‘balanced copyright’: Canadian copyright and the digital agenda*. Toronto: Irwin Law.
- Samuelson, P. (1999) ‘Intellectual property and the digital economy: why the anti-circumvention regulations need to be revised’, *Berkeley Technology Law Journal*, 14: 519.
- Schwartz, E. (2010) ‘Canadian copyright reform must be fair to music creators and consumers’, *straight.com*, July 30, 2010. [<http://www.straight.com/article-336634/vancouver/eddie-schwartz-canadian-copyright-reform-must-be-fair-music-creators-and-consumers>]
- Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105 (Ontario High Court of Justice).
- Songwriters Association of Canada (2009) *Our proposal: detailed*, updated March 2009. [<http://www.songwriters.ca/proposaldetailed.aspx>]
- Sookman, B. And D. Glover (2009) ‘Why Canada should not adopt fair use: A joint submission to the copyright consultations’, *Osgoode Hall Review of Law and Policy*, 2(2): 139-68.
- Sookman, B. (2008) ‘The SAC proposal for the monetization of the file sharing of music in Canada: Does it comply with Canada’s international treaty obligations related to copyright?’, *Osgoode Hall Review of Law and Policy*, 1(2): 101- 36.
- Stahl, M. (2009) ‘Privilege and distinction in production worlds’, in V. Mayer, M. J. Banks and J. T. Caldwell (eds.) *Production studies: cultural studies of media industries*, New York: Routledge, 54-67.
- Trosow, S. (2008) *CAUT urges copyright fairness for freelance writers*, March 6, 2008 [<http://samtrosow.ca/content/view/36/1/>].
- Trosow, S. E. (2009) ‘Copyright consultation submission’, *Osgoode Hall Review of Law and Policy*, 2(2): 169-83.

- Trosow, S.E. (2010) 'Bill C-32 and educational sector: overcoming impediments to fair dealing', in M. Geist (ed.) *From 'radical extremism' to 'balanced copyright': Canadian copyright and the digital agenda*, Toronto: Irwin Law.
- United States. *Copyright Act*, 17 U.S.C.
[http://www.law.cornell.edu/uscode/html/uscode17/usc_sup_01_17.html]
- United States. *Digital Millennium Copyright Act* (1998). Public Law No. 105-34, 112 Stat. 2860.
- Waddell, S. (2009) 'Statement at copyright consultation Toronto roundtable on behalf of alliance of Canadian cinema television and radio artists (ACTRA)' *Government of Canada*, August 28, 2009.
[http://www.ic.gc.ca/eic/site/008.nsf/eng/h_04034.html]
- WIPO Copyright Treaty, 20 December 1996, 2186 U.N.T.S. 121.
[www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html]
- WIPO Performances and Phonograms Treaty, 20 December 1996, 2186 U.N.T.S. 203.
[www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html]
- Writers Guild of Canada (2009) 'Copyright consultations submission', *Osgoode Hall Review of Law and Policy*, 2(2): 184-97.
- Writers' Union of Canada (2010) *Why writers need a strong status of the artist legislation in Ontario*
[http://www.writersunion.ca/av_campaignstatusartist.asp].

the author

Samuel E. Trosow is an Associate Professor at the University of Western Ontario in the Faculty of Information and Media Studies (FIMS) and the Faculty of Law. He primarily teaches courses at the law school in the area of intellectual property, and in FIMS in the area of information policy. His research focuses on different aspects of information law and policy in the digital environment and is a frequent speaker on copyright policy. Professor Trosow is currently a Network Investigator and Project Leader in the Graphics, Animation and New Media (GRAND) NCE which has provided support for this project. In 2007-08 he was the visiting scholar in residence at the Canadian Association of University Teachers (CAUT) and is currently a member of CAUT's Librarians' Committee, and the Copyright Committee of the Canadian Library Association. Professor Trosow is a member of the Digital Labour Group.
E-mail: strosow@uwo.ca