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A Copyright Board for Canada at 150

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A well-funded Copyright Board with a clear mandate and a regulated process for public input should be central to Canada's copyright regime.

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by Margaret Ann Wilkinson June 26, 2017

Recognition and protection of the role of copyright in Canadian society goes back as far as Confederation. But just as the need to pursue the appropriate balances among competing values is a constant part of our nation-building, so too is the need to occasionally re-examine and rebalance interests related to copyright.

Since 1867, the business landscape in Canada has been transformed from one where individual Canadians plied their trades and callings in largely a pre-industrial context — one where information "greased the wheels" of commerce — to the current landscape, where information *is* the wheel of commerce. Information is now the core and essence of the Canadian economy and society, and these are part of a global economy in which virtually all the leading global enterprises are information-based. It is no accident that, on the world stage, the issue of copyright is present not only in the public international sphere (especially the United Nations), but that it has now migrated into the sphere of international trade (e.g., NAFTA and the Agreement on Trade-Related Aspects of Intellectual Property Rights).

In simpler times, it was appropriate to conceive of the "public interest" in copyright as a balancing of two distinct interests: on the one hand, the authors, dramatists, composers and artists (who produce information), and on the other, their audiences (who consume information). The public interest in copyright today is much more complex. The interests of individual creators of works must be regarded as being largely separate from those of the corporations that dominate the information economy. We cannot continue to see the "public" as simply users of information — individuals occupy many roles in the new information society; for example, they might be shareholders in information-focused corporations. Thus the "public interest" must be conceptualized as embracing individuals as well as corporations.

Individuals are the authors of the literary, dramatic, musical and artistic works protected under the *Copyright Act*, as well as the owners of the rights created under the *Copyright Act* in other subject matter (makers of sound recordings, performers of performances, and broadcasters of communication signals). Individuals need to be considered and protected in their own right, separate from the corporate interests that are part of the economy and society that surround works and other subject matter in copyright. Individuals who are creators of works and other subject matter routinely assign all their rights to corporations, and the *Copyright Act*, in section 13(3), transfers the economic interest in copyrights held by individuals who are employees over to their employers (most often corporations). While it is true that since 1928 the *Copyright Act* has provided for moral rights, which can only be owned by individuals and never by corporations, these rights can be and routinely are waived by individuals at the behest of corporations. In any event, these moral rights are not regarded as of the same importance in the current economy and in society as the economic rights in copyright.

Individuals who are not creators (as well as those who are) need to be considered as consumers of information, and also as potential investors in the information economy. Individuals may also be subjects in creative works or other media (for instance, they could be featured in photographs, interviewees in articles, or have submitted information about their backgrounds for a database).

Recognizing the complexity and diversity of interests in Canadian economy since the Second World War, Canadian governments over the years created boards and tribunals to deal with these complex and diverse interests. Specialized boards and tribunals, subject to oversight by the courts, regulate many aspects of the Canadian economy and society, including broadcasting and telecommunications. While a board has regulated the copyright system since 1925 (currently the Copyright Board of Canada), no board created under the *Copyright Act* has had either the scope or the resources of other boards and tribunals in Canada.

In anticipation of the statutory review of the *Copyright Act*, the Senate Committee on Banking, Trade and Commerce, which includes the Canadian Intellectual Property Office and the Financial Consumer Agency of Canada in its purview, recently released a report. This report focuses specifically on the lack of resources provided to the Copyright Board, and calls on the government to give the board priority consideration in its upcoming review.

In this review, it is clear that recognizing and giving voice to the multiplicity of interests involved in the modern copyright economy must be a key guiding principle, as Canada, in this 150th anniversary year, considers its *Copyright Act.* Among other things, the role of the Copyright Board needs to be enlarged. It is evident that despite its current limited scope and resources, the board has become an important locus of decision-making in the new information economy: roughly two-thirds of the copyright cases that have come before the Supreme Court of Canada since 2000 have involved the work of the board.

As information becomes the key driver of the Canadian economy, the Copyright Board should be given statutory, regulatory and resourcing attention commensurate with its role. Just as the Competition Bureau is central to the maintenance of Canada's competitive economy, the Copyright Board should be made central to the operation of Canada's copyright regime.

In addition to enlarging the Copyright Board's role, and in order to better support it, government should create a clear legislated process for public input into its proceedings. It is also in the public interest that diverse voices representing the public be heard by the board.

When a collective of rights holders applies to the board for a tariff, it is the board's job to decide what is the fair price that is to be paid as royalties for uses by the class of users targeted in the tariff (for example, colleges and universities), or other subject matter that the applicant collective represents. The board is aware that interveners representing other interests in tariff applications can provide information that can help inform its decision.

Recently the board adopted internal rules allowing for some interveners in tariff proceedings, but these have no specific legislative mandate or clear regulatory authority. The intervener processes in other boards and tribunals are often clearly governed by statutes and regulations (see, for example, section 9(3) of the *Competition Act*). According to these statutes and regulations, not

only are the intervener processes clearly legislated, but often governments have provided that these interveners are able to apply for funding to cover or contribute to the expenses involved in intervening (see, as federal government examples of such funding programs, the provisions made for funding interveners at the National Energy Board and Canadian Environmental Assessment Agency). In its review of the *Copyright Act*, the government should consider legislation to provide for funding interveners who present before the Copyright Board.

A Copyright Board that is well funded, with a clear and comprehensive mandate, and a regulated and supported process for public input, should be made central to the operation of Canada's copyright regime.