HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Canadian Heritage

CHPC • NUMBER 133 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, November 27, 2018

Chair

Ms. Julie Dabrusin

Standing Committee on Canadian Heritage

Tuesday, November 27, 2018

● (1135)

[*Translation*]

The Chair (Ms. Julie Dabrusin (Toronto—Danforth, Lib.)): Good morning, everyone. Welcome to the 133rd meeting of the Standing Committee on Canadian Heritage.

We're continuing our study of remuneration models for artists and creative industries.

We're joined by Dave Forget and Samuel Bischoff, from the Directors Guild of Canada, and, as individuals, Howard Knopf and Jessica Zagar, who are both lawyers.

[*English*]

We are going to start with your presentations and then go to a question-and-answer period. We'll go in the order in which you appear on the agenda.

We will begin with the Directors Guild of Canada.

Go ahead, please.

Mr. Dave Forget (National Executive Director, Directors Guild of Canada): Thank you, Madam Chair, Vice-Chairs and members of the committee.

My name is Dave Forget and I'm the national executive director of the Directors Guild of Canada. With me today is Samuel Bischoff, the Guild's public policy manager.

We appreciate the committee's invitation to discuss remuneration models for artists and creative industries. In a period of significant disruption and transition to digital platforms, authors are often forgotten and left behind, while they are at the heart of a robust, innovative and successful screen-based industry. We commend the Standing Committee on Canadian Heritage for having launched this review on remuneration models to ensure fair and equitable compensation for creators.

The Directors Guild of Canada is a national labour organization representing key creative and logistical professionals in the film, television and digital media industries. Today, we have approximately 5,000 members in 47 occupations covering all areas of direction, design, production, logistics and editing. Twenty years ago, in 1998, the Directors Guild founded the Directors Rights Collective of Canada, a collecting society that administers foreign royalty payments from copyright legislation in other jurisdictions and distributes those earnings to Canadian directors working in all genres. In 2017, the DRCC paid out $796,000 in foreign royalties to its membership of 1,349 Canadian directors. Since 2001, the DRCC has paid out over $10 million.

We understand that the committee's mandate is to review remuneration models and the opportunities from new access points for artists and creative industries in the context of the Copyright Act. The DGC is proposing a simple amendment to the act to confirm that the screenwriter and director are first copyright owners and presumed co-authors of audiovisual content. Recognition within the act is a fundamental step to ensuring fair remuneration for creators, and doing so would also provide greater economic clarity in the marketplace, including as we transition to new business models based on digital distribution systems.

● (1140)

[*Translation*]

Moreover, the current version of the act and the recent legal rulings and interpretations are consistent with this definition, which makes this change a natural extension of the existing text.

The DGC's proposed amendment would be simple to implement and wouldn’t require any further changes to more fundamental sections of the act. The modifications would be focused on section 34.1 of the act, which is responsible for the ambiguity regarding authorship. More importantly, this change wouldn't affect the status of the producer of a cinematographic or audiovisual work, wouldn't disrupt the existing economic framework, and wouldn't have an impact for other categories of authors.

Authorship is a central concept in the Copyright Act. Historically, writers and directors have been considered co-authors in Canada. This fact is supported by common industry practices and is reflected in our collective agreements with producers' organizations. These collective agreements were negotiated by the DGC and other organizations representing directors and screenwriters, such as the Writers Guild of Canada, the Association des réalisateurs et réalisatrices du Québec and the Société des auteurs de radio, télévision et cinéma, in order to outline the terms and conditions governing compensation for talent and the future use of their work. These agreements also provide for the transfer of moral rights in the productions and authorize commercial exploitation.

[*English*]

This transfer of rights implicitly recognizes the screenwriter and director status of co-authors and first copyright owners. Moreover, broadcasters, distributors and other investors would not finance a production without the certainty that they had secured the rights necessary to fully exploit the economic benefit.

This transfer also acknowledges that producers are disposing of existing rights and are the logical second holders. This “chain of rights“, as we call it, is not only in line with the existing interpretation of the courts but is the product of collective agreements and contracts in our industry.

Mr. Samuel Bischoff (Public Affairs Manager, Directors Guild of Canada): Producers organizations are unduly using an ambiguity present in the current Copyright Act, precisely the authorial status of a so-called “cinematographic work”, to claim they are the main author and creator, yet both the text and subsequent legal rulings give overwhelming support to the proposition that the screenwriter and director are co-authors of the audiovisual work.

Section 11.1 of the act defines a cinematographic work as a set of actions giving the work its “dramatic character”, providing a term of copyright, which now is the life of the author plus 70 years, only to those works where, “the arrangement or acting form or the combination of incidents represented give the work a dramatic character”.

A writer, of course, puts words on paper—the script. A director then directs the performers and conceives and arranges all of the various creative elements that will ultimately appear on screen, including the staging, camera frames and camera movements, conceiving the settings and selecting locations, determining the tone and interaction of the performers, arranging the final sequence of images in the edit, and determining the sound design and musical score.

Section 11.1, in essence, determines that the screenwriters and directors are at the core of the creative decisions. As defined in the act, the screenwriter and director are the originators and creators who provide the dramatic character to a cinematographic work, whether it is a feature film or a TV series.

The term of the copyright itself, set at the life of the author plus 70 years, constitutes further evidence that the author must be an individual and a physical person, someone who can be credited with authorship and natural ownership of moral rights, not a corporation or other legal entity. Again, contrary to producers' claims, this interpretation of the act is supported in all existing Canadian case law and in Quebec jurisprudence under the civil code, and also in everyday practices in the Canadian film and TV industry.

While it is true to say that a cinematographic work is the result of a collective vision, copyright protects the expression of ideas, not the ideas themselves. Producers are responsible for the financial and administrative facets of a production. They are defined in the current act as “makers”. While carrying out a project from concept to screen is an important responsibility, it is not creative in the artistic sense, and it does not make the producer an author. ln other words, producers aggregate the rights to later license them. This logically establishes that ownership of copyright and moral rights must belong solely to the originating author and that the author must be a physical person giving the work its original dramatic character.

● (1145)

Mr. Dave Forget: This is why we are requesting a clarification of the act to better align with the current industry practice. This minor adjustment would not cause any disruption to the existing business and economic model but would safeguard author rights and promote fair compensation for screenwriters and directors, acknowledging their moral rights as individuals and creators.

Furthermore, this adjustment will safeguard all directors working in Canada, not just those covered by labour organizations such as the Directors Guild. All directors and writers will be recognized as authors and have their work protected under copyright. Second, it will bring predictability to the system, particularly with regard to the exploitation on any future platform, to guarantee that those rights will continue to be respected.

Ultimately, this clarification will establish Canada as a jurisdiction with clearly defined rules, thereby enhancing our export potential and freeing distributors and production companies to fully exploit the economic value of audiovisual works.

Members of the committee, thank you for your attention. We'd be pleased to answer any questions you may have.

The Chair: Thank you very much.

We will now go to Howard Knopf, please.

Mr. Howard Knopf (Counsel, Macera & Jarzyna, LLP, As an Individual): Good morning, committee members.

I have about half a dozen points to make. I hope I am able to get through them before we turn to questions.

The late legendary Canadian economist John Kenneth Galbraith explained the aptly named trickle-down theory of economics as follows. He said that if you feed the horse enough oats, some will pass through to the road for the sparrows.

That's essentially the basis of the copyright system as we know it in Canada. It's frankly a bit messy. We have about 38 collectives in Canada, which is about six times more than in the United States. We have the largest, most expensive, and slowest-moving copyright tribunal in the world.

Most of the sparrows get very little from this system. Take Access Copyright, for example. Based on its 2017 figures, 11,000 creators got $2,090,000 from Access Copyright and its publishers for an average of about $190 per annum each. That's less than the hourly billing rate of most junior lawyers these days.

The copyright system can be a disincentive to creation. A case in point is that of Giuseppe Verdi. For any of you who are opera fans, he was probably the greatest opera composer of all. This is documented in a wonderful book, which I urge you to look at or get your research staff to look at, by Professor F.M. Scherer, called *Quarter Notes and Bank Notes*. I'll post a link to it on my blog.

There is a recent important book and article by Professor Glynn Lunney on contemporary sound recording in the commercial music industry, and I'll also post that stuff.

Here are some facts I would ask you to keep in mind.

It's impossible to define who a professional writer, musician, composer, painter or other creator may be. I write a lot in my work and outside of my job. I certainly don't consider myself a professional writer; however, I did get a cheque the other day for just short of $85 from Access Copyright, which is more than a lot of other people I know get. It's always been incredibly easy to qualify as an Access Copyright creator or affiliate. Doubling my Access Copyright royalties would mean nothing to me other than maybe a nice lunch for two, but would cost the educational system in Canada hundreds of millions of dollars a year.

The composers whose works you might hear over at the National Arts Centre, the composers of so-called serious music or concerts, are lucky to make $500 or $1,000 a year from SOCAN. It's a good thing they get grants and commissions and maybe salaries, if they're fortunate enough to be a professor.

Virtually all professors are writers, and they get paid well for their writing by getting tenure and nice six-figure salaries these days. But only a very small handful, such as Jordan Peterson, make serious money publishing books.

In Canada, a trade book selling 5,000 copies is considered a great success. The writer will be lucky to get $15,000 from the publisher and a pittance from Access Copyright, so I hope they have a good day job.

My second point is on how digital technology can help artists get paid. While digital technology has a lot of potential, Justin Bieber was discovered by his talent manager and got a record deal because of his YouTube video covers 10 years ago, and the rest is history. Then there is the recent example of that wonderful 95-year-old gentleman, Harry Leslie Smith, who is suddenly a worldwide Internet sensation and sells books and whatever, and we wish him a speedy recovery. The Internet was his ticket to being known.

There is no doubt that artists will find a way, perhaps with the help of Google, Amazon, Shopify or other platforms yet to come, of selling directly online to their fans without having to sign away their rights and most of their revenues in exchange for recoupable advances and elusive dreams that almost never come true. But beware of digital delusions and vapourware. For example, I am frankly very skeptical about Access Copyright's latest announcement on something called “Prescient”, which promises the world. Once again, I am not holding my breath, based on its past failures to deliver.

Talking about blockchain and machine learning is easy to do. That's why everybody is doing it and talking. Everybody is talking about it, and hardly anybody is doing it.

Above all, please consider that we're looking at the cultural and knowledge sector of which copyright is only a component or tool and not the sector or the end in itself.

● (1150)

Think about the transportation sector, which evolved from horse and buggy to cars. More money got spent on transportation over the years, but it got spent differently. Things change and constantly evolve. Old business models and jobs are not guaranteed—just look at Oshawa. As Universities Canada pointed out the other day and in their brief filed with the INDU committee in June of this year, Canadian universities are spending more than ever before in purchasing content—more than one billion dollars in library content in the past three years combined. That's based on StatsCan data.

My third point is that increasing use of Public Lending Right and similar models would be a good idea. The Public Lending Right is an excellent program that rewards creators whose works are borrowed from public libraries. Because it's outside the copyright system, the payments can be restricted to Canadian writers. Unfortunately, the amount has fallen over the years from $4,000 to $3,000 as the maximum payment. Let's put more money into this system and consider Roy MacSkimming's excellent suggestion for broadening the system to include an educational lending right. That would enable payments to Canadian authors of school and college textbooks and educational materials, including scholarly works.

My fourth point is how can collectives best serve artists? Collectives have an inherent conflict of interest when it comes to serving creators. High salaries and high legal fees can only be justified in big organizations with annual revenues in the tens or hundreds of millions of dollars. Collectives can best serve artists by doing their best to put themselves out of business, or at least making themselves smaller and smarter, by embracing digital technology. It's simply unacceptable for a collective to spend 25% or 30% of its revenues on administration, lobbying and legal fees. That's the members' money.

The Copyright Board should allow a collective to operate only if it does so in the best interests of both creators and users. In all cases, it should require full disclosure of actual repertoire; average and median payments to individual creators; salaries of senior officers and in-house counsel; and amounts spent on outside lobbyists, lawyers, experts and other consultants, along with their names.

The next point is on levies and earmarked taxes. Since 1997, Canada has had a blank media levy system. On behalf of the Retail Council of Canada, I tried to get the Federal Court of Appeal to agree that it's an illegal tax, and I very nearly succeeded, but close is no cigar. However, a previous minister, the Honourable James Moore, agreed with me, and in 2010 called the proposed iPod levy a “tax”, and said: “this idea is really toxic and, frankly, really dumb.”

The Copyright Board is inexplicably keeping this zombie tax alive and allowing the music industry to use the small revenues of about $2 million a year, almost 30% of which goes for administration, lobbying and lawyers, to wait in zombie-like stealth for another day to pounce on smart phones, ISPs, the cloud, and whatever they persuade a gullible government to somehow tax.

The music industry is also now asking for a new “tax” on iPhones. They don't call it that.

● (1155)

The Chair: Mr. Knopf, I just want to give you a heads-up that you're already at eight minutes. Perhaps you can try to wrap it up.

Mr. Howard Knopf: I only need a small fraction of time. I thought my friends had more time.

They're asking for a $40-million per year taxpayer handout until an iPhone tax can be implemented, not to mention a recent proposal that would subject broadband data to a copyright tax.

It's more than time enough to kill off this levy scheme in part VIII of the act. There's no “value gap” in the copyright system. There is a “values gap”, however, in the fake news that's being disseminated these days about IP in general and copyright revision in particular.

My last point, which we might have to come back to in questions, is that the elephant in the room is whether copyright tariffs are mandatory. I say they're not. I convinced the Supreme Court of Canada three years ago that they're not, but there's a lot of denial and resistance to that ruling.

For example, a tariff that sets a maximum for a train ticket from Ottawa to Toronto is fine. We used to have tariffs such as that. However, even in those days, passengers were always free to take the plane or the bus, or drive their car, or ride their bicycle, or use any other legal and usually unregulated means. It should be no different with Copyright Board tariffs.

Thank you. I'll defer to questions.

The Chair: Thank you very much.

We will now go to Jessica Zagar, from Cassels Brock & Blackwell. Thanks.

Ms. Jessica Zagar (Lawyer, Cassels Brock & Blackwell LLP, As an Individual): Good morning.

My name is Jessica Zagar. I am a lawyer at Cassels Brock & Blackwell in Toronto. I am a corporate and commercial litigator, but I focus my practice on copyright matters.

I act for a wide variety of clients, including rights holders, copyright collectives and users of copyright-protected material. The views I express here today, though, are my own.

My submissions focus on site-blocking injunctions and de-indexing orders; and specifically amending the Copyright Act to authorize a court to grant one of these orders against an Internet intermediary, with worldwide effect and on a no-fault basis. This amendment would be an important step towards ensuring fair compensation to artists for uses of their works. Online piracy runs rampant, siphoning compensation out of their hands. Yet, artists do not have effective tools to enforce their rights on the Internet.

I understand that one of the arguments against amending the Copyright Act to specifically provide for these orders is that injunctive relief is already available through common law. As a litigator, I have participated in many litigation proceedings, including injunction proceedings. I have witnessed first-hand the challenges associated with obtaining these orders, including the significant time, cost and uncertainty associated with securing and enforcing them. I would like to share with the committee my observations about the actual steps required to seek and obtain these types of orders, because I think it will illustrate why they are not a particularly effective remedy for artists.

By way of example, an artist may discover that his music has been posted online without permission or compensation. The artist wants the content removed, but ultimately what the artist really wants is for the harm to stop. The artist wants the traffic to go to legitimate sources, not the infringing source. The artist likely cannot do that without a court order. The Copyright Act does not expressly permit site-blocking or de-indexing orders. As a result, the artist needs to seek injunctive relief through ordinary means. That means starting a claim in the courts against the infringer or the intermediary. Usually it will be the infringer, but both approaches pose significant challenges.

It is not easy to start an action and obtain relief against an infringer. They are often, not surprisingly, difficult to find. They hide their identity, location and address. Frequently they are not located in Canada. This creates complications for service of court materials and for enforcing any relief that might be granted against them. While an intermediary might be easier to find, their actions may not rise to a level of activity recognized under the Copyright Act. In their mere conduit roles, they may be, by extension, enabling infringement through their services, but that, in and of itself, is not an actionable cause of action. To prove infringement, the artist would need to show, for example, that the intermediary provides a service primarily for the purpose of enabling infringement and that an actual infringement has occurred.

The artist will likely start the claim against the infringer, and the artist will likely need to seek an interlocutory injunction to stop some or all of the harm pending trial. Depending on the nature of the relief sought, the artist must show that there is a serious issue to be tried or a strong prima facie case, that there will be irreparable harm if the relief is not granted, and that the balance of convenience favours the artist. This is not an easy test to meet. Interlocutory injunctive relief, by its very nature, is not something that courts are readily willing to dispense; after all, they are dispositions before a full hearing on the matter. These motions are expensive and risky.

While the proceeding is moving through the process, a defendant may at any point disappear. In Equustek, the defendants changed their business operations after the lawsuit started. They changed where they operated from. They started offering their product for sale through other websites and filled those orders from unknown locations. Those issues need to be dealt with to the extent possible to minimize the harm to the artist as the case proceeds.

Hopefully, the artist secures an interlocutory injunction. Also, at the end of the process, the artist hopefully secures a damages award and an order requiring the infringer to take down the infringing content. But it rarely stops there.

An award of damages is only as good as your ability to enforce it. Furthermore, an order for the infringer to take down the content nevertheless requires the infringer to comply. If the infringer does not comply, the artist, having gone to all of this time, effort and expense, either has no relief or has to seek more relief in the form of contempt proceedings. All of this comes at additional time and expense to the artist, without any certainty or assurance that the infringer will ultimately comply.

Nevertheless, with an order in hand, the artist may decide to approach an Internet intermediary and seek their voluntary assistance. The intermediary might or might not be willing to assist.

● (1200)

However, new offending sites may appear overnight, and it can become a whack-a-mole exercise. The infringer may simply move the objectionable content to other pages of their website, or they may create new websites from new locations altogether.

It is unlikely that the Internet intermediary will voluntarily take all of the steps needed to actually have the infringing content removed or effectively blocked or de-indexed. Often it needs to be compelled by the court order, because the only effective remedy is the more large-scale de-indexing or blocking order on a worldwide basis. The artist then needs to seek relief against the non-party intermediary to obtain that relief. As became evident in Equustek, this can be no easy feat. If the intermediary opposes the relief sought, it may raise any number of arguments. It may attack the court on jurisdictional grounds or form. There is no guarantee that the court will rule in the artist's favour—far from it—because the test for the relief, as I've just discussed, has a very high threshold. An order may be appealed. ln Equustek, it was appealed all the way to the Supreme Court of Canada, but it did not stop there. Google took the order to California and the matter ended up back in the British Columbia courts to deal with the U.S. ruling that the Canadian order was unenforceable.

Litigation presents many twists and turns, and no two cases are exactly the same. I hope I have been able to demonstrate that it is not easy for artists to enforce their rights in the existing regime. The artists face many time-consuming, expensive and uncertain hoops and hurdles before they are in a position to stop the harm.

The proposal to amend the Copyright Act is about efficiencies and giving rights holders a tool to enforce their rights—a leg-up to stop the harm, with fewer hoops. It will not eliminate all of the hoops. It will not make these orders easy to obtain or result in wide-scale, unhindered censorship on the Internet. lt will still take time, money and due process to secure them. However, it will eliminate some of the steps that artists need to take today, and it will help them get an effective result faster and at less expense.

ln closing, I will note that the proposal is not about blame or fault; it is quite the opposite. The proposal is about recognizing that Internet intermediaries, such as ISPs, hosting providers and search engines, are best placed to prevent or limit large-scale online copyright infringement. And it is about recognizing that rights holders need meaningful, effective tools to enforce their rights and ultimately receive fair remuneration for uses of their works.

Thank you. Those are my submissions.

The Chair: Thank you.

[*Translation*]

We started the meeting late because of the votes. I therefore propose that there be a five-minute question and answer period for each group. That way, we can ask questions before we hear from the other witnesses.

Ms. Dhillon, you have five minutes.

[*English*]

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): Thank you, Madam Chair.

My first questions will be for the Directors Guild of Canada.

Could you please comment on the challenges faced by the sector as a whole, not just from the perspective of directors and screenwriters?

● (1205)

Mr. Dave Forget: That's a big question.

I think one of the key challenges we're seeing as we're migrating from conventional content distribution systems to online is around how content gets made and how it gets the economic model for it. In our case, it's how artists and creators are being compensated for it. One of the big challenges we're seeing is that, as audiences are moving, revenue models are changing, and that's impacting the ecosystem in any number of ways.

We have a short window in which to answer, but I'd say that's the major challenge out there, that we're migrating from more a conventional system to an online world.

Ms. Anju Dhillon: Perfect.

Could you please elaborate on your relationship with producers?

Mr. Dave Forget: We work very closely. As I said in the introduction, our organization represents 47 different categories. This includes directors, sound and picture editors, location managers, and designers. Our members are working on productions right across Canada with television, digital media and feature film. For scripted content, the model in Canada is largely organized around an entrepreneurial model in which independent production companies are commissioned to create content, so those producers then bring together teams. Those include many of our members alongside writers, other professionals, and creators in the sector. We work very closely.

We negotiated a new collective agreement that kicks in on January 1 with the Canadian Media Producers Association. I'd say we have a very close working relationship with producers.

Ms. Anju Dhillon: That is perfect.

Should we be looking at other jurisdictions in the world where the role of directors and screenwriters is more valued, in the context of copyright and remuneration?

Mr. Dave Forget: Yes, I'd say the models in place in Europe would serve you well, in terms of doing the research. Keep in mind that what we're proposing here is not a change to the system we have but just a clarification.

The act makes reference to an author of audiovisual content, but doesn't name the author. It's presumed to be—and this has been industry practice, and supported by the courts—writers and directors. We're simply saying that a small modification, to make it clearer who we're talking about when we talk about the author, would bring more clarity and predictability to the act.

Ms. Anju Dhillon: Thank you. I'll direct the same question to Mr. Knopf and Ms. Zagar.

Mr. Howard Knopf: Well, I was not speaking on behalf of any particular sector, and I should have indicated, of course, that I'm speaking in my personal capacity. I guess my remarks were focused on the educational sector, as I think about it now. That was not intentional. I did mention the music sector as well.

I meant it to be a general comment on the effectiveness of collectives, the Copyright Board, tariffs and that sort of thing. Thank you.

Ms. Anju Dhillon: Would you like to add anything, Ms. Zagar?

Ms. Jessica Zagar: I would. In response to Mr. Knopf on the collectives issue, I just want to say that my experience with collectives has been quite different from what Mr. Knopf has described. Artists rely on collectives to do the work that they would be unable to do on their own. Most of these collectives are not-for-profits that really exist only to benefit their members and provide a valuable service. They're dealing in micropayments, and with licensing disparate uses that those rights holders wouldn't be able to license on their own.

I wanted to raise that with the committee, because my understanding of the collectives has always been that they are really doing the work to benefit their rights holders, and taking their mandate from the work that rights holders want them to do. We should be strengthening and supporting collectives, not trying to tear them down through this process. They are providing an indispensable service to artists in their remuneration.

Ms. Anju Dhillon: That's perfect. Thank you.

[*Translation*]

The Chair: You have 15 seconds left.

Ms. Anju Dhillon: I'm finished, thank you.

[*English*]

The Chair: We will now be going to Mr. Yurdiga, please.

Mr. David Yurdiga (Fort McMurray—Cold Lake, CPC): Thank you, Madam Chair.

Thank you, witnesses, for your submissions.

I just want to focus on copyright at this moment. Even if we redo the Copyright Act to give it more teeth, who's responsible for the cost? Not only the cost, but when it's outside of Canadian jurisdiction, how is it enforceable? As was mentioned earlier, they're bouncing around. Once they change, do you have to start a new lawsuit? There are so many questions.

I'm not sure if the copyright actually has more teeth. Enforcement is another issue.

Ms. Zagar, could you please comment on that?

● (1210)

Ms. Jessica Zagar: You raise a good point, because no two litigations are the same, and you never really know what is going to happen in the context of that litigation. There are always going to be challenges presented. As you've said, even if the Copyright Act is amended to allow for de-indexing and blocking orders, there's still going to be an enforcement aspect of it.

The proposals are really about giving it some teeth so that artists have a chance of getting an effective remedy more quickly and before the harm becomes disparate. The Google and Equustek case went on for years, trying to stop the harm.

Amending the Copyright Act to allow for a rights holder or an artist to apply, within a due-process framework that clearly sets out the steps required to obtain that order, is really meant to give them that little push to get them over some of the initial hurdles, so that they can get to that relief more quickly.

I really think amending the Copyright Act would benefit that type of relief, because it takes some of the uncertainty out of the process, in terms of whether or not the court even has jurisdiction to grant that type of order. The Copyright Act will specifically provide for it, and that would be in line with what some of our international counterparts who have already taken steps to allow that type of relief have done.

Mr. David Yurdiga: Mr. Knopf.

Mr. Howard Knopf: I actually will be talking about this more tomorrow at the other committee, but Ms. Zagar made as good a case, I suppose, as can be made on this. The Equustek decision was extremely problematic but it does show that the existing law does work. It works maybe even too well in the case of Equustek, because hard facts make bad law. That was a silly little IP case that ended up having worldwide consequences.

I take issue with what Ms. Zagar said about characterizing this as being about artists. These lawsuits are brought by great big huge multinational record companies. Let's not fool ourselves. These are not about individual artists. Everybody always speaks for individual artists, but it's big multinationals—and those are now down to three big multinational record companies. These companies are worth hundreds of millions or billions of dollars. They are not impoverished, and they go after it when they think they can get money out of it. We're seeing a proliferation of troll-type activity in Canada now that is driving normal people crazy with demands for $5,000. The enforcement is getting out of hand actually. We're getting too much.

It's not just companies that enforce the law. In extreme circumstances there are criminal provisions even now. There have been forever in the Copyright Act, so if somebody starts selling counterfeit DVDs out of the back of a truck at a flea market, they can be arrested and charged criminally. That's been the law for a very long time, and there's nothing wrong with that. The criminal law has occasionally been pushed too hard too fast by our system, by overzealous police at the insistence of certain collectives, but by and large, with a few notable exceptions, it's been used appropriately and it's there for really bad situations.

If we're going to have more enforcement—I'll talk about it tomorrow—there are moderate models that can be looked at perhaps, such as the existing Australian model, not the new proposed one, that would make sure that proper judicial proceedings are undertaken by judges and that we don't have some kind of self-appointed tribunal making these decisions and invoking effectively industry-sponsored censorship. There are safeguards that need to be put in place to make sure it is all very judicial and that it follows the rule of law.

I don't think we have a big enforcement problem, and all the existing data shows that so-called piracy is vanishing. The industry finally figured out how to deliver movies and music very cheaply and easily to people, and people want to get things conveniently and easily and honestly, and so the kind of BitTorrent activity and other so-called pirating activity that we hear histrionics about is almost not an issue anymore.

● (1215)

The Chair: That brings your time to an end.

[*Translation*]

Mr. Nantel, you have five minutes.

Mr. Pierre Nantel (Longueuil—Saint-Hubert, NDP): Thank you, Madam Chair.

I want to thank you all for being here. I'm always surprised to hear such diametrically opposite views. I wish all the committee members good luck in shedding light on this issue and finding the best possible solution.

Mr. Forget and Mr. Bischoff, have the presumptions set out in section 34.1 of the Copyright Act always existed? Isn't this demand from directors and screenwriters exacerbated by the massive online distribution that we're seeing today?

[*English*]

Mr. Samuel Bischoff: I'm going to respond in French.

[*Translation*]

To some extent, the issue is indeed exacerbated by the proliferation of new content distribution platforms, and in some cases foreign platforms. This obviously shows the need for some certainty regarding the authors' identities, for the sake of their rights. In a market that's constantly shifting toward digital technology, the clear knowledge in advance that, for example, the screenwriters and directors are in fact the original authors of the work would ensure that these rights are respected, no matter what the future holds for us.

Mr. Pierre Nantel: I'm not a lawyer. Honestly, during some meetings I'm quite comfortable with the subject, but during other meetings, such as this one, I'm at a complete loss. The legal issues are far beyond my skill level. That's why I'm wondering about this.

Are we facing a situation that's somewhat similar to the situation that I experienced when I worked in music and the concept of neighbouring rights emerged? This is about moral rights, which may be compensated, and the need for structures to ensure that our creators receive their fair share.

I told you that I wasn't a lawyer. Could we have the most specific examples possible? If you don't have them this morning, could you send them later to all the committee members through the clerk? Have any other countries already studied the issue? Regarding the example of neighbouring rights, we all know that these rights exist in Canada, but unless I'm mistaken, they don't exist yet in the United States. This means that money is being accumulated for performers and producers. However, in our country, performers and producers end up being paid. Is this the case elsewhere when it comes to moral rights and the rights of screenwriters and directors?

Mr. Dave Forget: Yes, there are other examples. We'll be happy to provide them later. However, I want to point that the reason we're seeking to clarify the current text is twofold.

First, take the example of the Directors Rights Collective of Canada, which has 1,300 members. The DGC is made up of 700 directors. As a result, the collective includes directors who aren't covered by the DGC's collective agreement. This shows that, outside the framework of the collective agreement, content is being produced and directors need their rights protected.

We're seeing a second risk. Each time a new distribution platform appears, it again raises issues regarding compensation and remuneration.

We think that a clarification such as the one we're proposing would make it possible to avoid these situations in the future, including the examples you just provided. We don't have any specific requests in this regard, but this could set the stage for the future and ensure that directors and screenwriters are well compensated.

● (1220)

The Chair: That concludes your five minutes, Mr. Nantel.

[*English*]

I'd really like to thank all the panellists for their presentations today.

I apologize for the delay. There were votes. I appreciate your patience in coming and in waiting for us until we all got here.

We are going to suspend briefly while we set up for our next set of panellists.

Thank you.

● (1220)

(Pause)

● (1220)

The Chair: Again, I'm trying to keep us clicking along, because we did start a bit late.

We have with us, as part of our second panel, Professor Jeremy de Beer from the faculty of law at the University of Ottawa.

By video conference, we have Michael Geist, Canada research chair in Internet and e-commerce law, faculty of law, University of Ottawa.

We also have with us Scott Robertson, president of the Indigenous Bar Association.

I would like to begin with the video conference in case we run into any technological issues.

We'll begin with you, Michael Geist, and then we will go to the panellists here.

Dr. Michael Geist (Canada Research Chair in Internet and E-Commerce Law, Faculty of Law, University of Ottawa, As an Individual): Thank you, Chair.

Good afternoon. My name is Michael Geist. I'm a law professor at the University of Ottawa, where I hold the Canada research chair in Internet and e-commerce law. I am a member of the Centre for Law, Technology and Society. I appear in a personal capacity as an independent academic representing only my own views. I'm sorry that I'm unable to appear in person today, but I'm grateful for the opportunity to participate via video conference in your study on remuneration models.

I have been closely following the committee's work on this issue, which will undoubtedly provide valuable input to the industry committee's copyright review. Last week I was dismayed to hear witnesses claim that Canada's teachers, students and educational institutions are engaged in illegal activity. I believe this claim is wrong and should be called out as such.

I'd like to address several of the allegations regarding educational copying practices, reconcile the increased spending on licensing with claims of reduced revenues, and conclude by providing the committee with some recommendations for action.

First, notwithstanding the oft-heard claim that the 2012 reforms are to blame for current educational practices, the reality is that the current situation has little to do with the inclusion of education as a fair dealing purpose. You don't need to take my word for it. Access Copyright was asked in 2016 by the Copyright Board to describe the impact of the legal change. It told the board that the legal reform did not change the effect of the law. Rather, it said, it merely codified existing law as interpreted by the Supreme Court.

While I think the addition of education must have meant something more than what was already found in the law, its inclusion as a fair dealing purpose is better viewed as evolutionary rather than revolutionary.

Second, the claim of 600 million uncompensated copies—which lies at the heart of allegations of unfair copying—is the result of outdated guesswork using decades-old data and deeply suspect assumptions. The majority of the 600 million—380 million—involves kindergarten-to-grade 12 copying that dates back to 2005. The Copyright Board warned years ago that the survey data is so old that it may not be representative. Indeed, it's so old that there are now cabinet ministers who could have been the actual students in the K-to-12 classes at the time they were last surveyed on copying practices.

Of that outdated 380 million, 150 million involves copies that were overcompensated by tens of millions of dollars as determined by the Copyright Board and as upheld by the Federal Court of Appeal. Education has had to file a lawsuit to get a refund of those public dollars. I can only imagine the public response if the federal government was found to have overpaid for services by tens of millions of dollars and failed to take action to recoup that money.

The remaining 220 million comes from a York University study, much of which is as old as the K-to-12 study. Regardless of its age, however, extrapolating some dated copying data from a single university to the entire country is not credible. It would be akin to sampling a few streets in the chair's or Mr. Nantel's ridings and concluding that they are representative of the entire country.

Third, the committee has heard suggestions that the shift from print course packs to electronic course materials, or CMSs, is irrelevant from a copying perspective. I believe this is wrong. The data is in fact unequivocal. Printed course packs have largely disappeared in favour of digital access. For example, the University of Calgary reports that there are only 53 courses that now use printed course packs, for a student population of 30,000.

Why does this matter? There are three reasons.

First, as universities and colleges shift to CMSs, the content changes too. For example, an Access Copyright study at Canadian colleges found that books comprised only 35% of the materials. The majority was journals and newspapers, much of which is available under open access licences or licences through other means.

Second, the amount of copying in a CMS is far lower than with print. While Access Copyright argues that there should be a 1:1 ratio—for every registered student the assumption is that every page is accessed, even for optional readings posted on the site—the data and, frankly, common sense tell us that this is unlikely.

Third, a CMS allows for incorporation of licensed e-books. At the University of Ottawa there are now 1.4 million licensed e-books, many of which involve perpetual licences that require no further payment and can be used for course instruction. Tens of thousands of those e-books are from Canadian publishers, and in many instances universities have licensed virtually everything that's offered by Canadian publishers.

● (1225)

This means the shift from the Access Copyright licence is not grounded in fair dealing. Rather, it reflects the adoption of licences that provide both access and reproduction. The licences get universities access to the content and the ability to use it in their courses. The Access Copyright licence offers far less, granting only copying rights for the materials you already have. With increased spending—and everybody agrees there has been increased spending since 2012—why do some copyright collectives report reduced revenues? There may be several reasons.

First, as I mentioned, some of the licensing is perpetual, which means that payment comes once rather than on an annual basis.

Second, many of the works aren't being used or copied. For example, UBC has reported that 69% of their physical items have not be used since 2004.

Third, despite the shift to digital, Access Copyright's payback system excludes digital works. In terms of eligibility, its rules exclude blogs, websites, e-books, online articles and other similar publications. Only print editions can be claimed. Moreover, the payback system also excludes all works that are more than 20 years old on the grounds that they are rarely copied.

Fourth, Access Copyright has refused to adopt transactional licences, thereby sending licensing money elsewhere. Education is spending millions each year on transactional licences, which permit specific copying for courses, yet Access Copyright hasn't entered that market.

Fifth, consistent with what this committee heard from Bryan Adams, it may be that part of the problem lies with the relationship between authors and publishers, with authors undercompensated for digital revenues.

Let me conclude with a few thoughts on solutions to remuneration.

First, efforts to force the Access Copyright licence on educational institutions through statutory damages reforms should be rejected. Education institutions, like anyone else, should be free to pursue the best licences the market offers, an approach that is in the best interests of both education and authors. At the moment I believe that comes directly from publishers and other aggregators, not the collected.

Second, the government should work with Canadian publishers—

● (1230)

The Chair: Mr. Geist, I just wanted to give you the heads-up that you're in your final minute. I can see that you have a little to cross through.

Dr. Michael Geist: I'm good.

You should work with publishers to ensure that their works are available for digital licensing in either bundles or through transactional licences. Indeed, sometimes digital licences are the only source of revenue, since I mentioned that payback doesn't compensate for older works. Often there are no sales of some of those older books, so those digital opportunities provide an opportunity.

Third, government should continue to work to pursue alternative publishing approaches that improve both access and compensation. For example, last week's economic update announcement of funding for Creative Commons-licensed local news should be emulated with funding for open educational resources that pay creators up front and give education flexibility in usage.

Finally, non-copyright policies should be examined. For example, how is it that Canadian content rules for film and television production still treat Canadian book authors as irrelevant for CanCon qualification?

I look forward to your questions.

The Chair: Thank you.

We will now go to Mr. de Beer, please.

Professor Jeremy de Beer (Full Professor, Faculty of Law, University of Ottawa, As an Individual): Thank you very much to the honourable members of the committee for providing me the opportunity to speak here today about remuneration models for artists and creative industries.

My name is Jeremy de Beer. I'm a full professor at the University of Ottawa Faculty of Law and a member of the University of Ottawa's Centre for Law, Technology and Society. Before becoming a law professor, I was legal counsel at the Copyright Board where I saw first-hand how remuneration models are applied in practice. For the last 15 years, I've taught courses covering copyright in the creative industries. I've advised collecting societies, user groups, numerous government departments and international organizations on copyright law and policy. Of particular note to this committee, I'm an author. I've written five books and more than 50 articles and book chapters and dozens of other works. Based on that, I have three main points to submit to the committee today.

First, the root cause of many artists' problems is not copyright; it's unfair contracts. Second, any copyright reforms that this committee considers or recommends should rebalance Canadian law following the term extension of copyright in the United States-Mexico-Canada Agreement. Third, I urge this committee to recognize the unique rights of indigenous artists by clearly stating that nothing in the Copyright Act or this committee's work derogates from existing and treaty rights of the aboriginal peoples of Canada.

The problem is contracts, not copyrights. Based on my experience as a teacher, an adviser, or a researcher and a writer, I can tell you that one of the biggest problems facing authors and many artists is not piracy by Internet downloaders or educational institutions. The biggest problem for many creators is with the publishers, producers and other powerful intermediaries who siphon much of the market value of copyrighted works.

While arguing in the name of authors and artists about value gaps or freeloading teachers, many intermediaries conveniently ignore the power imbalances and the unfair contracts that harm real creators.

Doctor Rebecca Giblin, an Australian professor who advocates for the interests of artists, calls out the core problem as, and I quote: “a manifestation of trickledown economics, that theory of horses and sparrows: feed the horses enough oats and some will fall through to feed the birds.”

As a result of this approach, she explains, what we have are fat horses and starving sparrows. I suggest to committee members that they read Dr. Giblin's work to better understand why it's dangerous to conflate the interests of artists with those of investors and how we can secure for artists a fair share without compromising incentives.

Many of the solutions to the problems facing artists are outside of copyright, contracts being one example.

My second point is about rebalancing copyright after the USMCA. As you know, the United States-Mexico-Canada Agreement requires Canada to extend the term of copyright protection by 20 years. The windfall will cost Canadian consumers and taxpayers tens and possibly hundreds of millions of dollars per year, most of which will flow to foreign publishers, record companies and other investors.

While the terms of copyright protection in Canada and the United States will soon be aligned, other aspects of our law are out of sync. Most importantly while the United States has a flexible fair use system to protect the interest of all stakeholders, including artists, who create new works by building on what's come before, Canadian copyright law contains no such safety valve. Rather, Canadian creators are at a disadvantage in having to rely on a closed list of limited exceptions.

While you've been asked by some groups to whittle away at these flexibilities even further, the smarter move is to shift to a similar fair use system that will balance American copyright. At an absolute minimum, given the expansion of copyright protection in the USMCA, Canada must preserve the flexibilities already in place in our copyright law.

● (1235)

On the topic of recognizing indigenous rights, my final point to the committee is an emphatic endorsement of what I believe you will hear from Mr. Robertson, on behalf of the Indigenous Bar Association. The time is now to ensure that Canadian law is fully consistent with the rights of aboriginal peoples of Canada.

The way to do so is not through paternalistic measures that purport to tell aboriginal peoples how to protect and grow their cultural and creative industries. The appropriate measure is at minimum a non-derogation clause, an explicit statement acknowledging that nothing in the Copyright Act derogates from the rights of aboriginal peoples of Canada to determine for themselves, based on indigenous or Canadian laws, how to govern traditional knowledge, cultural expression and creative works.

Thank you very much.

The Chair: Thank you.

We will now go to Scott Robertson, from the Indigenous Bar Association,

Go ahead, please.

Mr. Scott Robertson (President, Indigenous Bar Association): Thank you, Madam Chair and members of the committee, for the opportunity to speak with you today.

I would like to begin by acknowledging the Algonquins' unceded territory, on which we gather today, and call upon their laws and teachings to guide us in our discussions.

My name is Scott Robertson, and I am a Haudenosaunee from Six Nations of the Grand River. I'm a practising lawyer and the president of the Indigenous Bar Association.

The IBA represents a membership of indigenous lawyers, scholars, law clerks, judges and elders from across Canada. Our mandate is to promote the advancement of legal and social justice for indigenous peoples in Canada, in addition to promoting the reform of policies and laws affecting indigenous peoples. It is on this basis that I will address the remuneration of artists, specifically those issues relevant to indigenous artists.

One of the overarching principles of the Canadian Copyright Act is to ensure that creators receive a just reward for the use of their works. Many of the intervenors who have appeared before your committee have eloquently expressed the need to fairly compensate artists for their efforts. As we have heard, there are many good reasons for doing so, and Canada has much to learn from the rest of the world to assist in accomplishing this goal.

Copyright emphasizes a western legal tradition of protecting individual property rights, and frames those rights as artistic endeavours. Not all indigenous nations share in this fundamental concept of intellectual property rights.

It is important to be clear that indigenous artists and creators are entitled to the same protections as all other artists. However, there is a further complexity to be considered when examining the endeavours of indigenous artists.

What may seem to be a purely indigenous artistic endeavour may actually be a form of medicine, astronomy, ecology or even geography. These essential teachings are sometimes recorded in stories, dance, painting and other so-called creative forms. Canada's laws need to create a space to ensure that these teachings are protected, not just for the creative and artistic pursuits and purposes but also for the knowledge and laws that are passed on.

Canada was founded on three legal traditions—common law, civil law and indigenous law. Despite this multi-juridical founding, indigenous legal traditions have been largely ignored in many Canadian laws, and in some cases indigenous peoples have been prosecuted for living their laws.

Missionaries, government agents, anthropologists, art historians, art collectors and others have all played a role in defining, subjugating and then appropriating the tangible and intangible cultural heritage of indigenous peoples.

As set out by Robin R.R. Gray, while some form of appropriation between cultures occurs at a basic level:

> appropriation of Indigenous cultural heritage in the context of settler colonialism has almost always been about power—the power to produce knowledge about Indigenous cultures, the power to control the means of knowledge production and the power to set the terms of its use-value within society.

On the west coast of Canada, the appropriation of totem poles in the market economy occurred at the same time that the government agents and others were confiscating indigenous cultural heritage. Between 1884 and 1951, the potlatch ban in Canada created the conditions to support the mass expropriation of indigenous cultural heritage.

While indigenous peoples were being prosecuted for practising their laws, non-indigenous peoples were commodifying their cultural heritage, like the totem pole, for monetary gain. In so doing, the totem pole has been taken out of context through displacement, through the western curatorial practice of preservation and through the misrepresentation of its image as a symbol of primitive and universal indigeneity or as an icon of Canadian identity.

Residential schools have also had a devastating impact by impairing the intergenerational transfer of cultural expression within indigenous communities, further reducing the power to produce knowledge.

Professor Heidi Bohaker, an ethnohistorian from the University of Toronto, often shares her experiences of Anishinabe women crying when they see for the first time the repatriated items of their ancestors and an acknowledgement of their diminished knowledge and skills.

All parliamentarians, and this committee in particular, have a role to play in ensuring that those laws that may potentially impact indigenous peoples and their cultural expressions are fully canvassed and resolved with a view to advancing reconciliation and further ensuring that the power balance to control the means of knowledge is restored.

There is a concern amongst some indigenous communities that intellectual property rights in themselves may cause harm to indigenous peoples.

● (1240)

In order to address these historical wrongs and to foster support for indigenous artists that respects and honours their laws and concepts of intellectual property, this committee should undertake a wide and meaningful consultation with indigenous peoples. Artists who generate creative work need to be consulted to determine the kinds of protections and amendments needed to ensure them the power to control their knowledge. Failing to do so may lead to untoward and inappropriate taking of knowledge under the guise of artistic reinterpretation.

In closing, I would like to draw upon the teachings of Professor John Borrows, who, in considering whether western intellectual property rights may actually provide protection of indigenous knowledge, stated the following. I quote:

> In the end, what may simplify the challenge is that the debate that must occur is not about the validity of the norms currently advanced by intellectual property law; it is about whether they should be the exclusive values brought to bear on the protection of Indigenous knowledge and cultural expression. In the context of the traditional knowledge protection debate, adopting a methodology that does not discount Indigenous values from the outset is surely the first step in avoiding procrustean outcomes that will neither avoid unfair appropriation nor help to protect Indigenous cultures.

There is much work to be done by this committee to reconcile indigenous laws and give voice and expression to those indigenous principles that protect the transfer of knowledge and art in a loving and respectful manner.

We have a path forward. We just need the courage to walk it.

The IBA would like to thank the committee for the opportunity to speak with you today, and I would be willing to take any questions.

Thank you.

● (1245)

The Chair: Thank you.

We're going to our question-and-answer period, but as some of you may have noticed, we have lost Mr. Geist. The technicians are still trying to connect. That's exactly why I like to try to start first with people who are away from us. I am hoping he will pop back into the conversation shortly.

On that note, we will be beginning with you, Mr. Long, for five minutes.

Mr. Wayne Long (Saint John—Rothesay, Lib.): Thank you, Madam Chair.

I will confess that all of my questions were written and designed for Mr. Geist.

Mr. de Beer and Mr. Robertson, these questions are for both of you.

What more can we do, beyond a non-derogation clause, to protect indigenous copyright holders?

Mr. de Beer, I'll start with you and then go to Mr. Robertson.

Prof. Jeremy de Beer: I think one of the first things we need to do is amend our stance on the international stage. I think Canada has been reluctant to do what needs to be done in forums like the World Intellectual Property Organization, the specialized agency of the United Nations responsible for intellectual property. There are negotiations that have been under way for far too long toward a treaty that would protect traditional cultural expressions and other forms of traditional knowledge. Canada has been an obstructor of progress by aligning ourselves with countries such as the United States in that particular context.

Mr. Wayne Long: Okay.

Prof. Jeremy de Beer: I think we need to amend our approach internationally and lead by example, respecting the rights of indigenous people.

Mr. Wayne Long: Thank you.

Mr. Robertson.

Mr. Scott Robertson: I don't mean to be glib, but I would say that we have all the tools at our disposal. We recognize aboriginal rights under section 35 of the Charter of Rights and Freedoms. We recognize indigenous nations as being self-governing bodies. They, themselves, control intellectual property within their own domain and have been doing it for thousands of years. It's just a matter of recognizing and acknowledging that through our own Copyright Act.

Mr. Wayne Long: Okay.

Mr. Scott Robertson: It's the willingness to accept what's already in front of us.

Mr. Wayne Long: Thank you.

Mr. de Beer, in your view, how will that clause affect the operation of the copyright system?

Prof. Jeremy de Beer: It will ensure that nothing in the Copyright Act is used to derogate from or infringe upon the rights of indigenous peoples, and essentially it will hand over sovereignty and determination matters around intellectual property to first nations, Métis and Inuit.

Mr. Wayne Long: Mr. Robertson.

Mr. Scott Robertson: I think that's a very broad question. What can the committee do?

In terms of making recommendations, you see it in other areas of law. You see in the criminal context how indigenous courts are being developed to deal specifically with indigenous issues at a criminal level. Why couldn't they do the same for a copyright tribunal that would be set up on indigenous principles with indigenous practices under the umbrella of the Canadian Copyright Act?

Mr. Wayne Long: Here is my last question.

Mr. de Beer, is it safe to say that you feel the Copyright Act as it currently stands is applied in a manner that detracts from indigenous rights? Would you say that?

Prof. Jeremy de Beer: In that it's a piece of complex legislation, I don't think you can say that the legislation as a whole detracts from indigenous rights, but the failure of the act to explicitly acknowledge pre-existing aboriginal and treaty rights is a problem.

● (1250)

Mr. Wayne Long: Okay.

Mr. Robertson.

The Chair: Mr. Long, let me jump in to let you know that Mr. Geist is now back with us, but with audio only, not video.

Mr. Wayne Long: I'm finishing up anyway.

The Chair: If you want to, take an extra minute, because I know you had questions for him.

Mr. Wayne Long: That's okay.

Mr. Scott Robertson: Thank you, Madam Chair.

To answer your question, I would say that if you look historically over the course of the last 100 years in which we've had a copyright act, the record speaks for itself.

Mr. Wayne Long: Thank you.

Mr. Geist.

Dr. Michael Geist: Hello, Mr. Long.

Mr. Wayne Long: How are you? It's good to see you again—or rather, talk to you again.

I have one quick question. Obviously, you write a lot; you have lots of published pieces. In one of the pieces you published on your website on the 22nd, you assert that tax incentives are a more effective means than is regulation or cross-subsidization to support Canadian journalists.

In your view, should tax incentives similar to those contained within the 2018 fall economic statement, which were intended to support journalists, be implemented to support artists and authors?

Dr. Michael Geist: That's an interesting question. I would start by noting that “cross-subsidization” to me would mean implementing some of the proposals along the lines of iPod taxes, device taxes, and Internet taxes, which are cross-subsidizations and are, I think, a problem.

What I took the government to be doing in that case, including with the money that I mentioned is going to Creative Commons licensing, was to say that journalism is a priority and that it will take money out of general revenues to find mechanisms to adequately support it.

I would say that the same applies in this context. If the committee concludes that the marketplace currently doesn't provide enough revenues going back to artists, there are mechanisms to consider in order to say that we want to put money back in.

Some of the suggestions I tried to make off the top, including such things as funding open educational resources that pay creators up front and that give education flexibility in usage, are actually very similar to what the government has announced over the past year with respect to journalism. Similarly, providing support to ensure that Canadian publishers can make their works available through digital licensing would be another mechanism to provide funding into the system that ultimately helps support the market.

The Chair: That is all of Mr. Long's time.

We will now go to Mr. Shields, please.

Mr. Martin Shields (Bow River, CPC): Thank you, Madam Chair.

Mr. Geist, I'm glad to hear you're back.

Do you believe this committee should not be touching the educational sector, as I would suggest?

Dr. Michael Geist: I would suggest that I don't think they should be changing the current fair dealing provision. As I mentioned, I don't think it has had the impact that some have said it has. In some ways, furthermore, I think we can take a look at what has happened since 2012 and conclude that what the rules have done is help foster a digital market for the benefit of all stakeholders.

It's still early in the process, but what we have seen is a huge shift to digital, for both education and the publishing industry, which has meant hundreds of millions more being spent on digital licensing. Part of that is due to the changes in 2012 and the broad adoption of technology. It's quite clear that there is more money coming into the system from the publishing side through education since those 2012 reforms.

Mr. Martin Shields: Thank you.

Mr. Robertson, I appreciated your comments. One comment you made strongly was about consultation. Can you give me your definition of what consultation would mean? We hear the term used broadly. We hear lots of things, but sometimes results are quite varied.

How would you view consultation, with 600-plus indigenous nations in this country?

Mr. Scott Robertson: That's a great question and something I have had to argue in front of the Supreme Court, which is not easy to do.

I think consultation is basically defined by the parties who are involved in consultation. I don't think you have to put in an overarching definition, saying “this is consultation” and deciding whether or not you have met that standard. If you're in a consultation.... I use the old adage of asking my wife whether I can go golfing: when I've been properly consulted and she has been properly consulted, I either get to go golfing or not.

I don't think we need to find a definition but rather implement the process of opening up consultation to indigenous artists to actually hear them. As you pointedly asked, how do you ever conceive of having 633 first nations develop any kind of a unified approach?

The fact that you go through the motion, however.... Don't forget that part of consultation is accommodation as well. I think that listening to those stories, those ideas of how this could be applied across the regions from Atlantic Canada to the western provinces is extremely important.

To answer your question, then, there is no definition of consultation, but the act of listening, the act of engaging in those discussions, is the consultation.

● (1255)

Mr. Martin Shields: So the process is the part that's more critical to you when you look at that.

Mr. Scott Robertson: As long as the process isn't the procedure —meaning that we've checked the box; we've consulted; we're good to go.

If the process is meaningful and has an engagement tactic whereby people can express ideas and whereby there is some accommodation of what those ideas may be, that's consultation.

Mr. Martin Shields: So If you evaluated a process, then the outcomes would be...?

Mr. Scott Robertson: The outcomes may not be favourable. Consultation doesn't mean that you get to a decision. It's not a veto. It doesn't mean that you're....

Mr. Martin Shields: As you mentioned, with golf there is an outcome, but the evaluation of it would be the process to get to an outcome.

Mr. Scott Robertson: That's correct.

Mr. Martin Shields: Thank you.

Mr. de Beer, do you have a comment about copyright and education? You've heard our previous witness, Mr. Geist, talk about it.

Prof. Jeremy de Beer: I think much of what you've heard from educational publishers does not reflect the interests of the authors who contribute the works that are published.

As an author myself, I experience first-hand those power imbalances when I'm trying to negotiate with publishers for my own work. I think it's important to separate the interests of the commercial publishers from the interests of authors and artists themselves in the educational sector.

Mr. Martin Shields: Thank you.

The Chair: You still have a minute.

Mr. Martin Shields: Mrs. Boucher, do you have a question?

Mrs. Sylvie Boucher (Beauport—Côte-de-Beaupré—Île d'Orléans—Charlevoix, CPC): No.

Mr. Martin Shields: Okay.

It's very interesting when you talk about the power structures. We heard the other day about the one dollar that an author may get or the small percentage the author does get. Is that a world that we deal with in copyright as we look at it, that imbalance of power?

Prof. Jeremy de Beer: Absolutely. I'll give you an example in the context of educational publishing and academic publishing.

Academic authors earn virtually nothing from the work they do in terms of publishing. Oftentimes, academic research is funded by taxpayers through granting councils. Academics then write articles or books or anything else based on that taxpayer funding. The publishing industry typically asks or requires authors to assign our rights to the publisher. Not only that, but the academics are asked to do all of the work in the publication process, the peer reviewing, the editing. Then the publishers sell the work back to us as academics, academic institutions and research funders.

I think that when we're talking about what is and isn't happening in the education sector, and publishing in the education sector, we have to reflect the reality of what's really going on. Much of what you've heard from academic publishers doesn't reflect the reality for vast numbers of authors.

Mr. Martin Shields: I think we've heard that from both.

Thank you.

The Chair: That brings us to the end of your time, Mr. Shields.

[*Translation*]

We'll now move on to Mr. Nantel, who has five minutes.

Mr. Pierre Nantel: Thank you, Madam Chair.

I'm looking at the time. It's very late, and we all have meetings. At any rate, I have a meeting at 1:15 p.m.

[*English*]

Since I was expecting Mr. Geist not to be here, I have prepared a document to send to him. If I have the permission of the chair, I will send him the questions I'm going to read out now. I would like to have a written answer to these.

First, would you advise Canadian universities to submit to an audited count of their current copying? I'd like to see what your opinion is on this. If you can have some influence, we'd like to see that.

Second, have you ever drawn any benefit or funding from Google corporation or its subsidiaries, and if so, how much, when and for what?

Third, on October 15, 2013, you emailed the Department of Industry marketplace framework policy branch requesting a meeting. You wrote that you were acting on behalf of a company that asked some questions about the potential applicability of the notice and notice provisions to its operations. I was hoping for a chance to discuss those with you. This one is from an access to information request.

Fourth, what was the company? Was this lobbying? Do you consider yourself to be a users' rights advocate? If yes, who is paying you to do this advocacy? Do you consider it part of your work as a Canada research chair or as a law professor at the University of Ottawa?

Fifth, do you give legal advice to policy-makers or organizations engaged in copyright policy advocacy?

Finally, have you ever advised the Department of Justice on copyright litigation? Do you have a solicitor-client relationship with the Department of Justice?

I will send this in writing to the clerk and potentially to Mr. Geist, and I expect answers.

Thank you very much.

● (1300)

The Chair: You went through those very quickly, so I'll be reviewing some of the questions. I'll look at the list.

I'll review them also with the clerk just to make sure that they're in order.

Mr. Pierre Nantel: Thank you.

The Chair: Thank you.

[*Translation*]

That's all?

[*English*]

Sorry, I didn't hear you. Were you talking?

Dr. Michael Geist: If you want, I could try to answer a number of those questions. If you want to put them in writing—

The Chair: I believe that we are now out of time.

I apologize for the fact that we had a reduced amount of time today for our questions, but I am happy we were able to bring you back into the conversation, Mr. Geist.

For everyone here—all of the witnesses—thank you for appearing. It was really appreciated and helpful to our study.

[*Translation*]

This concludes the meeting.

The meeting is adjourned.