OPINION CANADIAN COPYRIGHT REFORM

Industry Minister Navdeep Bains, pictured at the Public Policy Forum's Canada Growth Summit in Ottawa on Oct. 12, 2016, with Business Council of Canada president John Manley. *The Hill Times photograph by Andrew Meade*

Time to fix the 'value gap'

There is no need to reopen the copyright TPM provisions. There is a need, however, to address the value gap.

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In his *Hill Times* op-ed ("Canadian copyright reform requires a fix on the fair dealing gap," Dec. 5, 2016) Michael Geist takes issue with the need to address the "value gap" that is hurting Canadian artists, writers, and other members of the creative class. He argues instead that Canada faces a need to address a "fair dealing gap" in our copyright laws. There is no such need and his arguments don't withstand scrutiny.

More than 2,000 Canadian creators have signed a joint letter to Heritage Minister Mélanie Joly as part of a Focus On Creators coalition campaign lamenting a condition that has come to be recognized widely as a "value gap" and demanding that it be addressed.

The creators are concerned about what was recently described by Jonathan Taplin in an article in *The New York Times* as the "enormous reallocation of revenue" which "has taken place, with economic value moving from creators of content to owners of monopoly platforms" such as Google and Facebook which have "built their advertising businesses as 'free riders' on content made by others."

Geist did not deny that there is a value gap. However, he summarily concluded that "the 'value gap' has nothing to do with legislative change." This is clearly wrong. Online providers of services such as YouTube and Facebook would unquestionably be liable for substantial copyright infringements but for the safe harbours established around the world including in the U.S. under the DMCA. These legislative exceptions—which were pushed for by technology companies precisely to limit their liabilities—have enabled technology companies to avoid paying licensing fees for which they would otherwise have been liable.

Calls for the value gap to be addressed are coming from many quarters internationally. The U.S., for example, has been holding Congressional hearings on whether the safe harbours in the DMCA need to be changed. The drafters of the DMCA safe harbours law did not anticipate that technology platforms would build their businesses free riding on unlicensed content or the overly broad interpretation the U.S. courts have given the safe harbours that enabled this to happen.

In the EU, the European Commission has a proposal for a directive on copyright. It includes provisions to make hosting providers like YouTube pay their fair share of royalties for music they make available. There is also a proposal for a new right for press publishers to authorize the uses of their publications to facilitate online licensing. The European Commission made it clear that rights holders under current law "face difficulties when seeking to license their rights and be remunerated for the online distribution of their works." It "is therefore necessary to guarantee that authors and rights holders receive a fair share of the value that is generated by the use of their works and other subject-matter."

Calls to address the value gap in Canada came recently in a speech by Music Canada president Graham Henderson, entitled "The Broken Promise of a Golden Age." Geist claimed that this speech criticized the WIPO internet treaties. However, there was no claim that the treaties or their implementation in Canada was unbalanced. The speech explained that the problem was with the *quid pro quo* for implementing the treaties. It started in the U.S. where technology companies insisted on the enactment of safe harbours from liability in return for implementation of the WIPO treaties. This became a template implemented around the world—including in Canada— and "led to an unfair balance favouring technology companies" which in turn resulted in a "value gap"—a gross mismatch between the volume of content enjoyed by consumers and the revenues being returned to the creative community.

Geist claims that "the Canadian and U.S. digital copyright experiences … are very different." He says "Canada did not implement the U.S. DMCA notice-and-takedown system nor grant safe harbours from liability in 1998." "Rather, it ultimately gave the industry what it asked for."

It is true that we didn't modernize our copyright laws until 2012. But, when we did, the 2012 amendments included the same categories of safe harbours for network providers, hosting providers and search engines as exist under the DMCA, although the wording and conditions associated with each differ. The amendments resulted in the creation of new, broad exceptions, some without precedent anywhere.

Geist doesn't say *what* "industry" got what "it asked for" in Canada. But, contrary to what Geist asserts, artists, writers, performers, publishers, copyright collectives, and others in the creative class consistently opposed the broad exceptions enacted in 2012 as part of the *quid pro quo* for implementing the rights needed to ratify the treaties.

Geist used his inaccurate claim about imbalances in the treaties to argue for a change in Canada's copyright protection for technological protection measures (TPMs), measures that were enacted in order to ratify the treaties and to support innovative digital business models. Geist says they are "among the most restrictive in the world and badly undermine the traditional copyright balance in the digital world." He says there is a need for a fair dealing exception to address an imbalance.

Geist is wrong. The anti-circumvention prohibitions in our copyright law for TPMs are in line with those of our trading partners. In fact, they are less protective than the laws in many other countries, including the member states of the European Union. Under EU law, member states must prohibit the circumvention of *access and copy* control TPMs. Our law only prohibits circumvention of *access* control TPMs. Thus, it is permissible in Canada to circumvent a copy control TPM for fair dealing purposes, contrary to what Geist suggests.

Geist also neglects to point out that Canadian law provides two safeguards unique in international law to ensure balance in our TPM laws. First, it permits the government to establish exceptions by regulation where a TPM could adversely affect the use of a work including where a TPM could adversely affect a fair dealing. Second, the government has the power by regulation to require the owner of a copyright to provide access to a work to a person who is entitled to the benefit of an exception where the copyright owner is not making it possible to exercise the exception.

These powers under our copyright laws are broader and more flexible than what exists anywhere else in the world. Thus, even if there was a problem, there would be no need for any legislative change to address it.

There is no need to reopen the copyright TPM provisions. There is a need, however, to address the value gap.

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