

Putting Copyright in Its Place[1]

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Abstract

As copyright is asked to perform a greater role in governing creative activity, its focus on economic values above all others raises concerns. Interviews conducted by the author with Canadian independent music labels suggest that the law and the norms governing labels' operations are more diverse and include direct subsidies, or grants, from government and the private sector. These grants perform many of the functions expected from copyright. This study concludes that copyright law is often exotic, peripheral, and even irrelevant to those involved in the spheres of remunerative Canadian sound production considered here. This finding suggests a renewed focus on a Canadian narrative of copyright law that puts it in its place alongside other instruments regulating independent music production.

Keywords: intellectual property, copyright, music industry, indie, legal pluralism, regulation

Résumé

Alors que l'on demande au régime de droits d'auteur d'exécuter un rôle accru de gouvernance de l'activité créatrice, l'on s'inquiète notamment de son orientation excessive sur les simples valeurs économiques. Des entrevues menées par l'auteur auprès d'entreprises de production musicale indépendantes permettent de croire que les lois et normes gouvernant leurs activités sont plus diverses que prévu et incluent des subventions directes, ou contributions, des secteurs public et privé, et que ces contributions assurent un grand nombre de fonctions que l'on attendrait du régime de droit d'auteur. L'étude conclut que le régime de droit d'auteur est souvent étranger, secondaire, voire non pertinent aux yeux des intervenants du secteur de la production d'enregistrements rémunérée au Canada. Cette conclusion en appelle à une refonte du régime de droits d'auteur au Canada pour remettre celui-ci à sa juste place parmi d'autres outils de réglementation de production de musique indépendante.

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Mots clés : propriété intellectuelle, droits d'auteur, industrie de la musique, indépendants, pluralisme juridique, réglementation

Introduction

The preamble to the *Copyright Modernization Act*[2] describes the *Copyright Act* as an "important marketplace framework law and cultural policy instrument."[3] These amendments, in addition to substantially changing the *Copyright Act* for the first time since 1997, suggest an expanded role for copyright law in Canada's cultural policy framework. In this paper, I consider the "everyday life of intellectual property law"[4] or how copyright law is mediated, negotiated, and transformed in situ. Specifically, I explore how copyright law fits within the normative framework structuring the cultural production of independent music labels in Montreal. To do this, I first explore the formal sources of law governing record labels and the elements of Canada's cultural policy framework that might apply to their business. I then move inside the industry and consider the results of an interview-based study of what a group of Montreal independent music labels believe to be the intellectual property (IP) and other laws and norms governing how they conduct business. I conclude from these interviews that the independent labels I studied seem to find the grants regime more coercive and compelling than copyright law. Further, the grants regime seems to be fulfilling many of the roles expected from copyright law. Finally, I conclude that copyright law plays a secondary role in the cultural policy framework governing the independent music economy.

This paper enacts a conversation with recent scholarship from Canadian academics such as Laura Murray, Sara Bannerman, Konstantia Koutouki, Rosemary Coombe, Matthew Herder, and others who have shown the importance of considering IP rights in context.[5] These scholars' research and my own, dedicated to abandoning the "commitment to abstraction" in IP scholarship,[6] has suggested the following broad propositions: If IP law is considered to be the rules that govern the creative behaviour of groups and individuals, it often has a non-linear and unpredictable effect on that behaviour. While black-letter sources such as statute and case law may be readily available, when creators are asked to explain what they consider to be IP law, their responses often capture a range of sources including

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2 Bill C-11, *An Act to amend the Copyright Act*, 1st Sess, 41st Parl, 2012, online: Department of Justice Canada, http://laws-lois.justice.gc.ca/PDF/2012_20.pdf [Copyright Modernization Act].

3 Ibid. at preamble.

4 Laura Murray, Tina Piper, and Kirsty Robertson, *Putting Intellectual Property in its Place* (New York: Oxford University Press, 2013).

5 For example: Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1886–1971* (Vancouver: UBC Press, 2013); Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, NC: Duke University Press, 1998); Konstantia Koutouki, "A Legal Placebo: The Role of International Patent Law in the Protection of Indigenous Traditional Knowledge of Medicinal Plants," *Canadian Intellectual Property Review* 26 (2010): 19; Matthew Herder, "Emerging Academic Scientists' Exclusionary Encounters with Commercialization Law, Policy and Practice," in *Intellectual Property for the 21st Century: Interdisciplinary Perspectives on Intellectual Property Law*, ed. Courtney B. Doagoo, Mistrale Goudreau, Madelaine Saguinur, and Teresa Scassa (forthcoming), http://ssrn.com/abstract=2281609.

6 Julie E. Cohen, "Creativity and Culture in Copyright Theory," *UC Davis Law Review* 40 (2007): 1175.

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black-letter law and informal group norms. Individuals and groups often choose to understand IP law through a range of sources, which allows them to decide what is just or desired in a particular situation regardless of what formal sources have to say. These principles, familiar to scholars of legal pluralism, are starting to be fully explored in IP law, and they inform the investigation I undertook in this study.

The Intellectual Property Law and Policy Framework for Sound Recording

The IP legal framework encompassing independent labels comprises both the statutory provisions as well as the political economy of IP rights, which I will consider, in turn, in this section. The statutory amendments affecting the sound recording industry have been the adoption of neighbouring rights, the private copying right and the blank recording levy, and the passage of modernized *Copyright Acts* in 1988 and 2012. In general, the purpose of the *Copyright Act*'s sound recording provisions, and of the Act overall, has been to remunerate and recognize creators, protect against unauthorized copying, and provide a legal regime that incentivizes creativity and innovation.[7]

Politically, IP law reform has been an increasing locus of government attention for two reasons. First, IP is critical to the government's focus on trading the products of the creative economy. Second, the Canadian government has been subject to extensive lobbying and pressure from the United States to reform its copyright law to protect US products. I will consider these two factors in the following paragraphs.

First, politically, the federal government is increasingly embracing a trade-oriented cultural policy that involves the cultural industries as a route to prosperity, and copyright is increasingly seen as playing a role as cultural policy.[8] Copyrights are the currency that aids the movement of Canadian units of cultural production through foreign markets. These units grow more prevalent daily. Automatic copyright protection and the Internet, which, as Larry Lessig puts it, "makes everything a copy,"[9] have made copyright ubiquitous. Encouraging copyright is also critical to the growing domestic policy focus on the creative economy; the creative economy represents a fundamental transformation in the nature of labour and capital, as they have moved away from industrial (modern) capitalist production to the present postmodern stage of information and services production.[10] This "imagination economy" relies on a shift from material to intellectual property,[11] and "creativity"

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7 Among other goals; *Copyright Modernization Act* at preamble.

8 Catherine Murray, "Wellsprings of Knowledge: Beyond the CBC Policy Trap," *Canadian Journal of Communication* 26, no. 1 (2001): 31–52; Richard Sutherland and Will Straw, "The Canadian Music Industry at a Crossroads," in *How Canadians Communicate II: Media, Globalization and Identity*, ed. David Taras, Maria Bakardjieva, and Frits Pannekoek (Calgary: University of Calgary Press, 2007).

9 Larry Lessig, "Free Culture" (keynote address delivered at the Open Source Convention, San Diego, California, July 24, 2002), excerpts available at http://en.wikiquote.org/wiki/Lawrence_Lessig, full text available at http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html.

10 Michael Hardt, "Affective Labor," *boundary 2* 26, no. 2 (1999): 89–100.

11 Lord Evans, "The Economy of the Imagination," *New Statesman*, July 2, 2001.

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transforms itself from a gift or an inspiration to a skill that anyone can acquire through technique.[12] As Angela McRobbie puts it, creativity means "having ideas."[13] The goal is a "creative economy," where creativity leads to innovation that drives technological change, boosting economic growth[14] and putting the arts to work for the economy.[15] IP law, and especially copyright, is the tool that commodifies creativity[16] and is, in this vision, "the most important postulate in the creative economy."[17]

Doctrinal developments have enabled Canadian copyright law to be a governance tool in the "having ideas" economy. Although the Supreme Court of Canada (SCC) has been assigning less and less docket space to other types of private economic law cases since 1970,[18] it has decided ten copyright cases since 2000. This veritable deluge of copyright cases (especially noteworthy considering that only three copyright cases were decided in the previous thirty years)[19] has been interpreted by one commentator as suggesting an area of law that is "important, and yet in a dynamic state."[20] In these cases, the SCC has adopted a standard of "skill and judgment" for original copyrighted works,[21] stating that the concept of an original work "includes, if not creativity per se, at least some sort of intellectual effort."[22] Thus, its interpretation of what constitutes protectable creativity would cover even the more utilitarian of the products produced by the creative economy.

Copyright scholars and others, however, have identified serious gaps in regimes governed by copyright law. Copyright law privileges economic over cultural values and has an individualist, market bias. As articulated in *Théberge*, Canadian copyright law has been "more concerned with economic than moral rights . . . [t]he economic rights are based on a conception of artistic and literary works essentially as articles of commerce."[23] Copyright law's governing notions of individualism, desert, exclusion, and action out of rational self-interest leave no space for

12 Thomas Osborne, "Against 'Creativity': A Philistine Rant," *Economy and Society* 32, no. 4 (2003): 507–25.

13 Angela McRobbie, "'Everyone is Creative': Artists as the Pioneers of the New Economy?," in *Contemporary Culture and Everyday Life*, ed. Elizabeth Silva and Tony Bennett (London: Routledge, 2004), 188.

14 David Throsby, *The Economics of Cultural Policy* (Cambridge: Cambridge University Press, 2010), 6.

15 Ibid.

16 Amanda Elizabeth Bill, "Creative Girls: Fashion Design Education and Governmentality" (PhD diss., University of Auckland, 2008).

17 Mirjam Gollmitzer and Catherine Murray, *From Economy to Ecology: A Policy Framework for Creative Labour*, report prepared for the Canadian Conference of the Arts, March 2008, 6, http://www.sfu.ca/cmns/faculty/murray_c/assets/documents/From-economy-to-ecology.pdf.

18 Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).

19 No copyright cases were decided between 1980 and1990, and one case on copyright (as opposed to breach of contracts involving copyright) was decided between January 1, 1970 and January 1, 1980: *Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357. Date: October 2, 1979.

20 Margaret Ann Wilkinson, "The Context of the Supreme Court's Copyright Cases," in *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, ed. Michael Geist (Ottawa: University of Ottawa Press, 2013), 86.

21 *CCH Canadian Limited v Law Society of Upper Canada*, [2004] 1 SCR 339 at para 16.

22 Ibid. at para 18.

23 *Théberge v Galerie d'Art du Petit Champlain Inc*, [2002] 2 SCR 336 at para 12.

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community interest, inclusion, and altruism.[24] The author is envisioned as an individual, sole or joint, but never as truly collective or indebted to a tradition.[25] The public domain is limited to what copyright is not.[26] Copyright deals poorly with craft or other informal IP regulatory regimes whose participants are often female or marginalized.[27] Copyright rules ignore Aboriginal and other non-Western ways of knowing.[28] Copyright law also deals poorly (if at all) with non-market uses of works,[29] and copyright legislation and case law barely acknowledge broader social values like education, access, free expression, user creation, and audience engagement with copyrighted works.[30] The scope and seriousness of these concerns suggest the need for caution in considering copyright as part of a cultural policy framework.

Second, the government's increasing focus on IP law reform can be explained by extensive lobbying by the United States to strengthen Canadian copyright law to protect American products, especially music. The United States is both Canada's major trading partner and the largest exporter of IP in the world.[31] In the United States, IP rights, especially copyright and trademark, play a central role in remuneration for the cultural industries. US labels and their artists have survived without any direct subsidy or grants for creation since the late 1990s, and without any funding programs for the sound recording industry whatsoever.[32] US independent musicians and labels rely on selling copyrighted goods in markets to support themselves,[33] which has encouraged US cultural industries to continuously expand their markets. Canada has been a prime target.[34] United States-based, multinational major labels, operating in Canada and occupying 70% of its sound recording industry by sales, have brought their business model with them.

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24 Carys J. Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law," *American University Journal of Gender, Social Policy and the Law* 15 (2007): 208.

25 Craig, "Reconstructing the Author-Self," 208.

26 Carys J. Craig, "The Canadian Public Domain: What, Where and to What End?," *Canadian Journal of Law and Technology* 7 (2010): 221–41.

27 Kirsty Robertson, "Embroidery Pirates and Fashion Victims: Textiles, Craft and Copyright," *Textile: The Journal of Cloth and Culture* 8, no. 1 (2010): 86–111; Kal Raustiala and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," *Virginia Law Review* 92 (2006): 1687–1777,http://ssrn.com/abstract=878401.

28 Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2006), 38.

29 Laura J. Murray and Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007); Margaret Ann Wilkinson, "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries," in *In the Public Interest*, ed. Michael Geist (Toronto: Irwin, 2005), 331–74.

30 Laura J. Murray, "Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses," in Geist, *In the Public Interest*, 15–40; and Mira Sundara Rajan, "The 'New Listener' and the Virtual Performer: The Need for a New Approach to Performers' Rights," in Geist, *In the Public Interest*, 309–30.

31 Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver: Douglas & McIntyre, 2004).

32 Which has led to numerous creative business models and initiatives undertaken by US artists summarized by Kristin Thomson at the Future of Music Coalition, http://futureofmusic.org/article/article/new-business-models.

33 Tyler Cowen, *Good and Plenty: The Creative Successes of American Arts Funding* (Princeton, NJ: Princeton University Press, 2006). American artists often benefit from grants and direct subsidies in other countries (for example, when Canadian grants become available to Canadian labels that sign foreign artists); ibid., 92–93.

34 Ibid., 92.

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Understandably, they advocate for IP regulation that protects their products and profits and skew any discussion of cultural policy toward copyright law. Thus, recent Canadian copyright law reforms have been pursued largely to placate the United States and to update the Act for the digital era. Strengthening copyright for sound recordings has been a core focus of US lobbying efforts[35] and particularly those pursued through the Canadian Recording Industry Association (CRIA), which has initiated legal campaigns to prevent music uploading and downloading from peer-to-peer networks.[36] The Conservatives attempted copyright reform three times in five years and were finally successful in 2012. In implementing these treaties, the 2012 copyright reforms increased protection for imported, US-copyrighted goods, particularly sound recordings, and they did so, especially, by preventing circumvention of digital locks.[37] This paper demonstrates that the increasing focus of the law "on the books" and of the government on the importance of IP to sound recordings does not reflect the actual practices and commitments of Canadian independent music labels carrying on business in this area.

The Cultural-Policy Framework for Sound Recording

Canada's sound recording policy framework has developed out of a need to foster unique Canadian cultural industries, given, on the one hand, the proximity of the United States and its vast, low-priced English-language cultural output,[38] and, on the other, Canada's small population, large territory, and two major linguistic groups.[39] Unleashed on the market, US products dominate Canada's domestic markets for cultural goods, particularly in the area of music.[40] The peculiar economics of popular culture mean that the upfront costs of cultural products can be amortized over a much larger US audience.[41] Those products can then be reproduced at little or no cost and sold cheaply in secondary markets such as Canada and still make a large profit, since the costs of creation were likely recouped in the United States.[42] Goods produced primarily for Canadians cannot benefit from similar economies of scale.

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35 This influence is deeply rooted in policy discussions, see especially Michael Geist's blog entry of May 25, 2009, "The Conference Board of Canada's Deceptive, Plagiarized Digital Economy Report," http://www.michaelgeist.ca/content/view/4000/125/.

36 The Federal Court rejected CRIA's efforts to undertake a similar (to note 150) litigation campaign in Canada in *BMG Canada Inc v John Doe*, 2004 FC 488 (aff'd/rev'd 2005 FCA 193) by rejecting a motion to disclose the IP addresses of peer-to-peer network users.

37 See, e.g., *Copyright Modernization Act* ss 11–14; s 17; s 47.

38 Michael Dorland, ed., *The Cultural Industries in Canada: Problems, Policies and Prospects* (Toronto: James Lorimer, 1996), x.

39 Joseph Jackson and René Lemieux, *The Arts and Canada's Cultural Policy*, Library of Parliament, Parliamentary Information and Research Service, October 15, 1999, http://www.parl.gc.ca/content/lop/researchpublications/933-e.htm. See also Grant and Wood, *Blockbusters and Trade Wars*.

40 *Royal Commission on National Development in the Arts, Letters and Sciences 1949–1951* (Ottawa: Edmond Cloutier, C.M.G., O.A., D.S.P., Printer to the King's Most Excellent Majesty, 1951) ("Massey Commission").

41 Grant and Wood, *Blockbusters and Trade Wars*, 18.

42 Grant and Wood, *Blockbusters and Trade Wars*, 19. Grant and Wood note that these effects are largely independent of the quality of the work and the country of origin, so long as the appropriate conditions prevail.

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Recognizing these conditions and the need to support Canadian cultural production, the government has established structures to support Canadian creators, including musicians and labels, in developing "ideas and practices more in keeping with our own way of life."[43] These structures have included granting agencies and programs and content requirements. An initial step was the creation of the Canada Council for the Arts (CCA) in 1957. Then, in 1971, the Canadian Radio Television Commission (CRTC)[44] introduced Canadian content requirements as defined by the MAPL (or Maple) system,[45] and by 1991, the CRTC required that 35% of content be MAPL-approved.[46] The Canadian content regulations have demonstrably helped the Canadian sound recording industry grow.[47] Further, broadcasters have agreed to provide financial support to the sound recording industry in return for the privilege of using the public airwaves.[48] Until the Foundation Assisting Canadian Talent on Recordings (FACTOR, or Musicaction in Québec) was created in 1982, such support was haphazard.[49] Established in 1982 by CHUM Ltd., Moffat Communications Ltd., Rogers Broadcasting Ltd., the Canadian Independent Record Production Association (CIRPA), and the Canadian Media Production Association, FACTOR initially delivered private-sector money to artists as forgivable loans by jury.[50] Following the recommendations of the 1982 Applebaum-Hébert Commission,[51] and recognizing the success of FACTOR's disbursement mechanisms, the federal government decided in 1986 to use FACTOR to distribute money for its Sound Recording Development Program to Canada's sound recording industry.[52] Today, that funding remains a part of what many regard as a highly successful public-private funding model. In 2000, FACTOR's success inspired the Canadian Association of Broadcasters to create the Radio Starmaker fund, a grant system funded entirely by private broadcasters to support artists for commercial broadcasting.[53] Meanwhile, the Music Entrepreneur Component

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43 Massey Commission.

44 Name changed in 1976 to the Canadian Radio-Televisions and Telecommunications Commission: Ryan Edwardson, *Canadian Content: Culture and the Quest for Nationhood* (Toronto: University of Toronto Press, 2008), 200.

45 Which required a song meet two of four points: "the instrumentation or lyrics were principally performed by a Canadian"; "the **M**usic was composed by a Canadian"; "the **P**erformance was wholly recorded in Canada," and the "**L**yrics were written by a Canadian" (M=music, A=artist, P= producer, and L=lyrics): ibid.

46 Evaluation Services Directorate, Corporate Review Branch, *Summative Evaluation of the Canada Music Fund*, Canadian Heritage, October 2007, http://www.pch.gc.ca/pgm/em-cr/evaltn/2007/2007-04/index-eng.cfm, 21.

47 Edwardson, *Canadian Content*, 228.

48 Maurice Charland, "Technological Nationalism," in *Communication History in Canada*, 2nd ed., ed. Daniel J. Robinson (Don Mills: Oxford University Press, 2009), 56.

49 "A lot of [the initiatives] were sort of sops to the CRTC, like contests, contributions to school bands, marching bands, Sunday choirs from churches . . . There was just a real dog's breakfast of ways that we were essentially diluting whatever funds we had available." Eric Spalding, "Twice Born: The Origins of the Foundation Assisting Canadian Talent on Recordings (FACTOR), 1982–86," *Journal of Canadian Studies* 42, no. 2 (2008): 141, quoting interview with Duff Roman.

50 Ibid., 142–43.

51 *Report of the Federal Cultural Policy Review Committee* (Ottawa: Information Services, Department of Communications, Government of Canada, 1982), 352, recommendations 55 and 56.

52 Will Straw, "Sound Recording," in Dorland, *The Cultural Industries in Canada*, 107.

53 Spalding, "Twice Born," 153.

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(MEC) of the Canada Music Fund,[54] which includes the Aid to Canadian Sound Recording Firms fund, was created to support established independent labels that, upon receiving MEC support, become ineligible for FACTOR funding.[55] MEC also places support for Canadian independent labels more directly under the control of the federal government.[56]

The grants (also called direct subsidies) that support independent music labels intervene at various stages in the creative process. The CCA provides grants to artists principally for the creation and production of music, as well as for professional development through workshops, residencies, and travel. FACTOR, the most significant source of funds for Canadian independent artists and labels, supports all stages of the process, offering not only a demo program that funds artists' first high quality recordings but also support for domestic and international touring.[57] Starmaker supports domestic and international touring and marketing by musical artists with "star potential." It is the primary source of funding for bands that wish to tour Canada and abroad.[58]

The various granting bodies allocate funds at different stages of a label's development and may fund "business" or "creative" aspects of a label. Creative decisions tend to be made by a jury of peers, whereas business decisions are made based on documented facts and figures. The CCA is concerned more with the "creative": its carefully balanced[59] peer review committees identify "outstanding ability and artistic merit in the arts," and commercial success is not a criterion.[60] FACTOR's process is hybrid in nature. Some of its grants are peer reviewed by juries while others, like Direct Board Approval for Sound Recordings, are not. Juries assess the "creative presentation" and marketing plan of a project, whereas Board Approval merely considers the financial viability and track record of an applicant.[61] Starmaker subscribes to a venture capitalist model: a decision to award a grant is not based on the artistic quality or even the commercial merit of a project, once the project has passed a threshold number of "units" sold.[62] Starmaker is successful when it is able to fund a large number of meritorious applicants while weeding out obvious non-contenders.

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54 Established when the federal government revisited its Sound Recording Development Program in 2001.

55 Sutherland and Straw, "The Canadian Music Industry at a Crossroads," 154.

56 While there are Québec-based funding agencies, some distinct (e.g., SODEC) and some Québec partners of Anglophone grantors (e.g., Musicaction, Québec's FACTOR; FondsRadioStar, Québec's Starmaker), interview respondents overwhelmingly referred to Anglophone funders, as the majority were Anglophones. That is why these granting agencies are surveyed here.

57 "Direct Board Approval for Sound Recordings" and the "Label, Manager and Distributor Business Development" program: FACTOR, accessed July 27, 2013, https://www.factor.ca/ourprograms#.UfQ9hbtaOKE.

58 "Frequently Asked Questions," Starmaker, accessed July 27, 2013, https://www.starmaker.ca/about/faq/#question32.

59 By professional specialization, language, cultural diversity, Aboriginal background, geography, gender, and age.

60 "Peer Assessment: How the Council Makes its Decisions," Canada Council for the Arts, accessed July 27, 2013, http://www.canadacouncil.ca/en/council/grants-and-prizes/how-the-council-makes-its-decisions.

61 FACTOR, *2009–2010 Activity Report*, 45, available on request via http://old.factor.ca/AnnualReport.aspx.

62 "Funding Rules," Starmaker, accessed July 27, 2013, https://www.starmaker.ca/about/funding.

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Each of the granting bodies takes into account a range of non-economic values in its selection criteria. The three major grantors to independent labels encourage and support collaborative, in addition to individual, projects. All three grantors prioritize values such as Canadian creation; sonic (Starmaker), ethnic (Starmaker), linguistic (FACTOR, CCA), or regional (FACTOR, CCA) diversity; financial need (Starmaker); and professional development, at both an emerging (Starmaker, FACTOR, CCA) and a more established (CCA) stage. Collectively, FACTOR, Starmaker, the CCA, and other granting agencies not considered here support both the business and the creative functions of a label. In contrast to copyright law, cultural, economic, and social values are deeply integrated into their decision-making processes and outcomes.

Introduction to the Study

The music produced by independent labels is governed by a matrix of laws deriving from statute, government policy, and support provided by Canada's sound recording policy apparatus. The purpose of the study that follows was to investigate the IP laws and norms governing how independent music labels conduct business. I chose the independent music sector, as it is one of Canada's most vibrant scenes both culturally and economically. In a 2012 report to Music Canada, Pricewaterhouse Coopers (PwC) estimated that independent labels are responsible for 30% of music sales in Canada's $400 million industry.[63] An independent report conducted by the Canadian Independent Music Association (CIMA, formerly CIRPA) in 2011, which considered the economic impact of the independent music industry for the first time, found that its total GDP impact was $303 million and that it employed over 13,000 people that year. CIMA's report also highlights that those labels are making more than they get from government: $1.22 for every dollar in public funding.[64] The Nielsen Music Year End Music Industry Reports for Canada show that the independent music sector occupies the market share of one of the largest of the four major record multinationals.[65] Montreal-based independent record labels exist in a milieu where 95% of albums released by Québécois artists are produced locally (up from 10% in the 1980s).[66] I focused on Montreal, because Montreal-based artists with roots in independent labels or music scenes have a strong presence at Canada's major music awards, such as the Junos and the Polaris Prize, and they have gained an international reputation for

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63 PricewaterhouseCoopers LLP (PwC), *Economic Impact Analysis of the Sound Recording Industry in Canada*, Music Canada, April 12, 2012, available at http://www.musiccanada.com/research.aspx.

64 CIMA, *Sound Analysis: An Examination of the Canadian Independent Music Industry* (February 2013), prepared by Nordicity, available at http://www.cirpa.ca/Page.asp?PageID=122&ContentID=3319.

65 The big four are EMI Music, Universal Music, Sony BMG Music, and Warner Music: *The Nielsen Company and Billboard's 2012 Canadian Industry Report*.

66 L'Association québécoise de l'industrie du disque, *Mémoire de l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) soumis au ministère des Finances dans le cadre des consultations prébudgétaires effectuées par le ministère des Finances en vue de la préparation du budget 2004–2005* (January 16, 2004), 40, http://www.adisq.com/pdf/memoire-ADISQ-quebec.pdf.

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the quality of their music and the music produced in Montreal.[67] Most recently, Arcade Fire won the 2011 Grammy for Best Album of the Year, a victory that the City of Montreal was quick to share. These facts and numbers do not even begin to account for the impact of local music festivals either specializing in or including independent artists (in Montreal, these festivals include PopMontreal, Osheaga, Mutek, suoni per il popolo, and JazzFest), which contribute millions of dollars to the local economy.

Principles and practicalities underpinned the structure of this study and particularly the choice of participants. I interviewed labels, as opposed to artists or bands, because labels are business-like enterprises that manage the creative work of artists. Thus, they have a direct interest in copyright-like rights and must have encountered them at some point. I interviewed independent, as opposed to multinational major, labels, because the major labels' legal practices related to IP are well represented in laws, policies, and documentation from their advocacy groups like CRIA. The practices of the large and heterogeneous group of independent labels have been underexplored and underrepresented. This is due, in part, to the fact that independent labels are often sole proprietorships with no easily identifiable group representative or advocacy position.[68] This study serves as a starting point by investigating a small segment of the independent music scene in Canada. Interviewees were drawn from across the label spectrum, from hobby or artisanal labels to professional high-profile labels, and conducted business principally in Montreal. I interviewed twenty people representing thirteen labels and two festivals between November 2009 and August 2010. I found interviewees by asking subjects for recommendations as well as by contacting a list my research assistant and I had compiled of Montreal-based independent labels. I interviewed additional labels until interviews yielded no new information. I developed and used a standard set of interview questions that was informed by colleagues who had conducted structured interviews on the topic of copyright and revenue streams.[69] These colleagues peer reviewed the questionnaire, and I modified the questions based on their advice. Interviews were scheduled for an hour but often lasted longer, in some cases up to two hours; the longer interviews were often those involving two subjects who were joint proprietors of a label.[70] A research assistant transcribed and coded the interviews for twelve themes that emerged from the

67 Rodrigo Perez, "The Next Big Scene: Montréal," *Spin*, February 2005.

68 In *Sound Analysis*, iv, CIMA provides an overview of the characteristics of independent music labels and finds that 46% of independent music labels are sole proprietorships.

69 Kirsty Robertson and Laura Murray's study "Copyright and Communication Rights in Canada" aided in developing the interview questions for this study (in Marc Raboy and Jeremy Shtern, *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press, 2010) 196–218) as did Kristin Thomson at the Future of Music Coalition, whose *Artist Revenue Streams* project was a touchstone, available at http://futureofmusic.org/article/research/artist-revenue-streams.

70 Interviews were conducted in English and French, although mostly in English. I was accompanied by one research assistant at each interview. Interviews were recorded and subjects were granted permission for that recording and for the use of their anonymized or non-anonymized (their preference, reflected in the footnotes) information in this study. McGill University's Research Ethics Board granted ethics approval for the study (REB File #: 72-0809).

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interviews.[71] An earlier piece discusses all the results of the study.[72] In this paper, I focus on the most surprising theme that arose in the labels' accounts: the importance of grants as compared with copyright. Grants, as opposed to copyright, formed the key normative framework governing labels' business decisions. In the next two sections, I summarize the results of the study and conclude by reflecting on the implications of this study for copyright law and norms scholarship.

The Relationship between Copyright and Grants

The concept of copyright plays a supporting role in the operations of independent music labels in Montreal. A number of labels retain the publishing rights of their artists, most adopt a fifty-fifty split-type royalty sharing agreement, and a few do not express what they do in terms of "copyright," "rights," "royalty-sharing," or otherwise. The overwhelming sense gained from interviewees is that exploiting copyright is something separate and "legal," something that labels do to create a diversified, low-maintenance income stream that provides a financial buffer, and to create a back catalogue of publishing rights that serves as a type of memory of the label's past cultural production. Only one label (Archipel) signalled any interest in copyright policy reform: "I think Harper was trying to pass a bill about copyright or something . . . it really scared me," and one interviewee rejected the importance of copyright reform to independent music: "Copyright [reform] maybe works for Nickelback and Sarah McLachlan, but has nothing to do with us." None of the interviewees indicated that copyright played a role in determining the kind of music the labels promoted or developed. Grants, in contrast, seemed to have a significant influence in the decisions and life of the label.

While the study was qualitative and made no attempt to systematically collect financial information, anecdotally, the labels that earned profits or were profit-seeking enterprises attributed a significant proportion of their income to grants. The grants, however, were not necessarily experienced directly as income, and their effect depended on the nature of the grant and its terms. As one label remarked, "It's funny to say, but we probably at the end of the year would have no profit if it wasn't for the grants. But—big but—we probably wouldn't have spent any of that money if it wasn't for the grants." The uncertain relationship of grants to profits suggests that a subtle measure of grants' importance may be necessary in order to judge their influence. Revenue streams were generally divided among physical products, digital rights, and synchronization rights, with a surprisingly significant role played by physical vinyl sales.[73] While acting as the representative organization for independent labels, CIMA regards "effective efficient, relevant modern and updated copyright legislation as vital to the rights of its members" and the

[71] These themes were: grants; making money; alternative business models and distribution; corporate structure; copyright and rights management; property; contracts; role/purpose of the label and artist management; label philosophy and branding; what is indie; community; interviewee background.

[72] Tina Piper, "An 'Independent' View of Bill C-32's Copyright Reform," in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*, ed. Michael Geist (Toronto: Irwin, 2010), 423–46.

[73] In the case of one established label, it represented 60% of income.

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"slow pace" of copyright reform as a cause of the "decline in our businesses and the lack of progress in digital distribution."[74] This account was countered by the self-reporting of the labels. Only three interviewees were members of CIMA, and none of them mentioned CIMA during the interviews or shared its views on copyright reform. Perhaps some of the labels interviewed are more indie than an indie association.

Label Accounts of Grants

Label interviewees' responses suggested that, in contrast to copyright, grants from federal, provincial, and private agencies were a significant predictor of or influence on the creative and business choices of the labels. There was a prevailing sense among the interviewees that the real potential for income came from grants (and from the sale of tangible products). I identified three principal types of relationship between grantor and grantee, with overlaps among them. First, the relationship between grantor and grantee was, in some cases, seen as reciprocal as opposed to unidirectional, a type of partnership between the granting agencies and the label (" . . . FACTOR was great to us. I also like to think that we were good to them, in that they were able to plant their flag in [respondent]'s product, records, and success story and claim it as proof that . . . funding works"). In other cases, the relationship was regarded as one of dependence, a relationship from which labels could ideally gain independence at any stage, since they are businesses and not "not-for-profit" organizations. Finally, in a third type of relationship, grants were seen as cementing a type of gift exchange or network of patronage or support ("[I]t is like a mentoring aspect . . . you can kind of share the money in your community"). From a less positive perspective, grants were also perceived as "mysterious," with obscure criteria, so that "right now, the best support I've seen is just VISA and Mastercard, they've been doing wonders for me." The relationship between grantor and grantee was often personal, and interviewees frequently spoke of their dealings with individuals at granting agencies. Grant getting was also a way to maintain the divide between commercial production (or sponsorship) and creative work. Some interviewees distinguished among grants that were arts-based (e.g., those for CCA), those that were more industry-based (e.g., FACTOR grants), and those related to agencies (e.g., SODEC) that fell between these two categories. There was a perception that grants were growing on "the industry side. And there's less and less on the arts side."

The types of issues and questions influenced by grants included: what nationality of artists to sign; when albums would be released; where to set up residency; whether to enter into partnerships with international collaborators wanting to "take advantage of the grants"; how to structure the business; whether labels would make a profit, continue, or survive; what type of, and how much, promotion to pursue ("we probably wouldn't have spent any of that money if it wasn't for the

[74] CIRPA (now CIMA), "Comments on Copyright Reform Submitted by the Canadian Independent Record Production Association (CIRPA)," Copyright Consultations, Government of Canada, September 13, 2009, http://www.ic.gc.ca/eic/site/008.nsf/eng/02665.html.

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grants"); what types of sales targets to pursue; and where to focus energy (e.g., on grant writing)—what one interviewee referred to as jumping through the "flaming hoops." The significance of grants is represented visually on the CD cases produced by the labels where, in addition to a sign asserting the label's copyright, equivalent physical space is devoted to acknowledging the contributions of various granting agencies. This information, however, may be read differently by different readers as suggested by the following comments: "Maybe these people are just putting this out so they can get the grant funding," or "Maybe they're not very good and no one [wants to support them]."

Among interviewees, there was a sense that grants, like the copyright system, could be gamed. In fact, one label executive admitted that the corporate structure of his label had been established in its particular form to take advantage of grants ("we probably got the best track record of grabbing money of any company"). These so-called "grant labels" excited great emotion among interviewees. In particular, one respondent argued that there might be "a responsibility that once you don't really need the grants, you just shouldn't apply for them." Another respondent expressed concern that a grant might lead to parochialism, or to a focus on distribution and promotion within Canada as opposed to outside the country's borders.

Respondents perceived the grants-system as generating rent-seeking behaviour exemplified by the need to get "a grant to fund the fact that you spent the last year writing grants." As one respondent put it: "Everyone is surviving by contorting themselves around the existing system and essentially has a vision of what they want to do. And then, in order to get the resources to do what they want to do, they use the system . . . not quite any way they can, but as much as they can to access resources without totally compromising their values." The interviews suggested that a grant culture privileges specific attributes such as post-secondary education, planning, managerial, and grant-writing skills, and—particularly if a process of peer review is involved—adeptness at networking.

Labels that did not apply for grants generally did not think of themselves as legitimate businesses. A common sentiment among those at labels not seeking grant funds was that, in order to apply for grants, they would have to keep better accounts, stick to timelines, and file reports, requirements antithetical to their idea of music curation and enjoyment. Some stated that they did not want to be "making music in the service of the state," since "[w]hen you're an artist, whoever pays you is your audience . . . there's always going to be some element of control or reaction."[75] Government involvement, however, might be less problematic in the reproduction and performance of music already created. Some labels objected to the culture of dependency (referred to as "trust funds") created by grant funding and demonstrated when grants are given and then withdrawn in later stages of the creative process (e.g., touring). Exiting the granting cycle may require "taking a hit" for one year when no funding is sought. None of the labels, however, objected

[75] Note that many labels tend to associate "government" with grant making, even though FACTOR and Starmaker are both administered largely by private entities.

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to grants seen as playing an integral role in fostering artists' careers and arts institutions.

Thus, the interviews suggested that copyright was much less important than the personal, repeated, and sometimes-collaborative relationships between labels and granting agencies. These relationships might also explain why many respondents chose to speak anonymously. In fact, the interviews suggested that the grants regime plays a more central role in shaping the business models and creative decisions of independent music labels in Canada than does copyright.

Conclusions

While copyrights remain a source of potential future revenue and important in realizing online sales revenue streams, grants profoundly shape the business and artistic choices of labels. Considered functionally, if copyright law seeks to incentivize creative activity, generate revenue, attract and nurture businesses, and move goods through markets, grants seem to perform some or all of the roles of copyright law. In fact, the independent labels interviewed seem to find the grants regime more coercive and compelling than copyright. This has important implications. To talk about copyright and music in Canada without considering the integral role played by grants regimes is to tell only a part of the story. Leaving the major-label narrative of copyright law's importance unexamined has the potential to overinflate and misconstrue the role of copyright law and the importance of copyright reform to Canada's creative sub-economy of indigenous independent music. While enhanced copyright protection is significant to a multinational label that imports or curates popular music with high-volume sales, and often does so for export or repackaging for movies, commercials, ringtones, and other uses, Canada's other major labels, the independents, pay scant attention to copyright law and its reform.

From the perspective of the law as experienced by labels, reading the copyright and grants regimes together rather than considering copyright law in isolation results in a different story. For starters, doing so provides insight into why there is no common view on copyright law reform among Canada's independent labels. For these labels, copyright law reform may just not matter enough for them to devote any of their limited resources to it. Perhaps reforming grant-making regimes would influence these labels more than amending copyright laws would. Reading the two regimes together may mitigate some of the concerns directed at a creative economy that is governed exclusively by copyright law. Canada's granting regime is diverse, and it pursues a range of economic and cultural objectives. These complement copyright law's blunt economic objective of aiding the transition of Canadian and foreign "units" of cultural production through markets. A key concern about copyright law, as discussed above, is that it does not support non-economic values. Grants fill this role and support values that are not strictly economic—for example, they select for geographic, ethnic, and gender diversity and consider the artist as a professional. Grants, through intervention at various stages of the creative process (from creation to touring), their range of decision-making criteria, and the diverse values they embrace, compensate for many of the shortcomings of copyright law.

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These findings have implications beyond their impact on independent labels. First, the economic bias of Canadian copyright law may not be as stark as critics portray it to be if copyright law is considered in concert with other regulatory instruments. Second, if copyright is expected to serve as an aspect of cultural policy, it can do so effectively only if other mechanisms, like grants, account for important cultural and social values that simply are not a part of copyright law. Putting copyright in a larger context suggests that the importance and role of copyright in the creation and distribution of independent music in Canada can only be understood in relation to Canada's grants regimes. Third, while economists of cultural policy implicitly recognize many of these conclusions in their work,[76] legal scholars and cultural economists have yet to collaborate to delineate and explain the economic and cultural objectives that copyright law seeks to achieve.[77]

Putting copyright in its place could lead to better copyright policymaking, since doing so would help to distinguish the Canadian "copyright as one component of cultural policy" narrative from the US "copyright = cultural policy" account. Properly delimiting copyright's role in the Canadian creative economy would demonstrate that the Canadian narrative of copyright is one that draws from, but does not depend on, US accounts of copyright, and that it considers copyright's place within a matrix of subsidies and other cultural-policy initiatives. Considering copyright law within the normative framework of independent labels suggests that copyright reform is neither a priority nor a particularly significant growth factor for that part of the creative economy. History has shown that market mechanisms, used alone, are poor tools for regulating the creation and distribution of Canadian independent music. Copyright will probably only ever play backup to the popular subsidy frontman in the Canadian independent music scene.

[76] Throsby, *The Economics of Cultural Policy*; Ruth Towse, "Why Has Cultural Economics Ignored Copyright?," *Journal of Cultural Economics* 32 (2008): 243–59.

[77] Towse, "Why Has Cultural Economics Ignored Copyright?," ibid.

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