February 15, 2007

REPORT TO ACCESS COPYRIGHT ON DISTRIBUTION OF ROYALTIES

Martin L. Friedland, C.C., Q.C.
Professor of Law Emeritus, University of Toronto

TABLE OF CONTENTS

PART A. INTRODUCTION

1. My Assignment.

In the spring of 2006, I was asked by the board of directors of Access Copyright to 'undertake a full review of the distribution policy and methodology currently in practice at Access Copyright' and to 'define an equitable distribution policy that will be transparent and based on a clear set of principles.' The principal impetus for the study was concern expressed by a number of creator organizations in 2005 that the present distribution system is unfair to creators and unduly favours publishers. 'If creators are to continue to support Access Copyright,' the organizations wrote in their submission to the board, 'then the licensing agency must distribute revenues in a fair and equitable way.' The four organizations involved in the submission were: the Writers' Union of Canada,

the Canadian Artists' Representation, the Professional Writers Association of Canada, and the League of Canadian Poets.

At the outset, I should state that I have a number of conflicts of interest. I am an author, but I am also closely associated with a publisher, the University of Toronto Press. For over 15 years I have been on the board of directors of the University of Toronto Press and for almost as long I have chaired the Press' manuscript review committee. Perhaps the Access Copyright board thought that these competing conflicts would enable me to be objective in my analysis.

My mandate stated that I was to consult with creator and publisher groups and to undertake comparative research. I have discussed the issues with all current members of the board, with a number of past board members, and with various organizations representing creators and publishers. I have also examined practices and procedures of other collectives in Canada and outside the country.

My study is concerned with the copying of printed material, often referred to as reprography, through photocopiers, fax machines, and printers. At present, the licensing of digital material in Canada by Access Copyright – even by scanning – is very limited. Digital delivery has, however, been identified as a key strategic direction for Access Copyright's future development. The distribution of royalties from digital sources is a question I have *not* addressed in this document. Different considerations may apply to the digital world, which may make some of the recommendations in this report inappropriate. I leave the task of devising an appropriate resolution of those issues to others.

A tentative draft of the report was given to members of the board for their feedback in mid January 2007, with this final draft to be given to Access Copyright on or before February 15, 2007. I received a number of responses to the draft report from individual creators and a single detailed response from the publisher board members, which combined the comments of the publishers. In addition, I participated in a lively session with the board on February 8th. This report takes into account those submissions.

I am grateful for all the assistance I received from the board and others, including Maureen Cavan, the executive director of Access Copyright, and the staff of the collective, both past and present. I was also assisted by former executive directors Fred Wardle and Andrew Martin, and by Marian Hebb, the counsel to Access Copyright. I met with knowledgeable individuals at Copibec, the comparable collective in Quebec, and at the organizations in the United Kingdom responsible for licensing and distributing funds for similar activities. Over the past summer, I had two excellent research assistants, Lianne Cihlar and Matthew Gourlay, now in their second year at the University of Toronto's Faculty of Law. To all of the above persons and the many other experts who offered advice, including my colleagues at the law school, I give my sincere thanks.

2. What is Access Copyright?

Access Copyright, formerly known as CANCOPY, is a collective which authorizes the reproduction by users of material that is subject to copyright protection. Its current web site (www.accesscopyright.ca) states: 'Access Copyright provides access to copyright protected works. Our licences provide users with immediate, legal and economic access to published works while ensuring that publishers and creators are fairly compensated.'

The collective – originally called the Canadian Reprography Collective – was formed in 1989 by publisher and creator organizations as a non-profit corporation under the Canada Corporations Act. The board is presently composed of nine directors representing publishers and nine representing creators, making a total of eighteen directors of the board. It collects a little over $30 million a year in royalties and interest and distributes about $20 million of that amount to publishers and creators in Canada and to reprography rights organizations in other countries.

There are many other types of copyright collectives in Canada, such as SOCAN which authorizes the performance of music, and the ACTRA Performers' Rights Society – two of the 34 copyright collectives operating in Canada, according to the Copyright Board's web site. SOCAN is the largest collective and distributed close to $200 million in 2005, divided about equally between publishers and creators. Although SOCAN was founded in 1990, one of its predecessors goes back to the 1920s, when the Canadian Performing Rights Society was formed. The legitimacy of dealing collectively with the performing right in musical works was officially recognized by the Canadian Copyright Act in the 1930s.

By contrast, legislation relating to collectives for printed material did not exist in Canada until the late 1980s. Technology has played a role in the creation of collectives – radio in the case of music and the photocopier in the case of printed works. Whereas in earlier years copyright holders of printed works could – to a considerable extent – police the pirating and selling of literary works, they could not easily do so after photocopy machines became more widely available in the 1960s. Home printers, fax machines, scanners, and the internet have increased the need for collective action.

Collectives provide users with a convenient and cost-effective way of obtaining the right to reproduce material. If users had to locate copyright holders for permission to use works, the inconvenience and transaction costs would be very high. There would therefore be a disincentive for users to seek permission to copy, and because of the costs of enforcement rights holders would tend to be reluctant to launch legal proceedings. Compliance and enforcement are therefore more effective if done by a collective. As a consequence, total royalties will normally be greater with a collective than they otherwise would be if there were not a collective representing both publishers and creators. Moreover, with a licence to copy, users feel protected from subsequent legal action.

Access Copyright grants licences for a set negotiated fee or tariff to copy material that is in Access Copyright's repertoire – to governments and other institutions, such as schools, universities and public libraries; to businesses and other organizations; and to individuals. Universities, for example, through the Association of Universities and Colleges of Canada, have licences to photocopy and fax printed material for the basic cost of a little over $3 per student per year. This is in addition to fees for full reporting. There are limits on how much can be copied under a licence. So, for example, normally only 10% of a book can be copied without special authorization.

The negotiated licence is filed with the Canadian Copyright Board. If the negotiating parties cannot agree on the fee, or if a collective society applies for a tariff to cover specified uses, the Copyright Board will hold a hearing to determine what the amount should be. At the present time, a proceeding to establish a tariff for the kindergarten to grade 12 (so-called Pan Canadian or K-12) publicly-funded sector is underway. Creators and publishers who are affiliated with Access Copyright give permission to the collective to authorize copying of their works, and royalties are collected by Access Copyright. It is the distribution of these royalties and interest on the money earned that is the subject of this inquiry.

3. Complexity and Transparency of the Present System of Distribution.

The present distribution scheme is extremely complicated and I found it surprisingly difficult to understand how the system worked. I have undertaken a number of other public policy studies over the years, including such reasonably complex topics as pension reform, securities regulation, and national security, and have never encountered anything quite as complex as the Access Copyright distribution system. It is far from transparent.

Very little is written down in a consolidated, cohesive, comprehensive, or comprehensible manner. There is no manual describing in detail how the distribution system operates. There is a one-page description on the web site, but it is less than the bare bones of the system. The policy that contracts between the publisher and the creator may override the splits established by the board is not mentioned in that description, but is mentioned in the affiliation agreement available through the web site. The staff has produced very brief descriptions of the models used for distributing the money, but they do not go into the type of detail that is necessary to develop a good understanding of the policies and procedures, and none of what is written is readily available to affiliates.

Many models specifying allocation of funds are based on studies done ten or twelve years ago. While much of the data used in these models is updated regularly, these models may nevertheless not be accurate, given the restructuring and consolidation of the industry and the widespread use of the internet – which will influence the type and extent of copying – since those studies were done. Moreover, some of the decisions made half a dozen years ago became embedded in the electronic rights management system and so continue to operate today without the staff knowing how those decisions affect the present reality. Several models, for example, continue to state that a company called Rowecom is used to decide how royalties for magazines and journals are distributed. But Rowecom went

bankrupt in 2003 and the company that took it over has refused to supply the data, which means the system continues to use the old Rowecom data.

The rights management system may be important to assist in keeping track of the repertoire and who is paid for its use, but I found that the system could not easily find some of the data that I was looking for to assist me in this study. It could not, for example, easily tell me how often the contract between the author and the publisher would override the general split between authors and publishers. Obtaining that information by looking at individual works would be extremely time-consuming and in any event would not tell what the splits were for creators who were not affiliates of Access Copyright.

Members of the present board are the first to admit that they do not have a good grasp of how the system operates. [redacted], told me that he has been asking some of the same questions I have been asking. Staff members know their specific area of expertise, but appear not to know the overall picture as well as I had expected. Part of the reason for this lack of understanding is a natural turnover in board members and at the same time a recent very large turnover in the senior staff of the organization. There is little institutional memory and very little has been properly documented either on paper or electronically.

The principal reason for this complexity is that the details for distribution have been worked out over the past 20 years or so as a series of compromises, accommodations and adjustments. It is not just publishers against creators, but also compromises, accommodations and adjustments within the creator community as well as within the group of publishers. There is not always uniformity of interest within each community. What might help one genre financially will ordinarily harm another.

Further, in some cases, such as the distribution of the money from the federal government, the results of usage studies undertaken as the basis for licence renewals have affected the distribution of the money collected. As we will see in a later section, power politics has also played a significant role in the development of the distribution scheme. Moreover, the publisher members of the board concern themselves with the distribution of the money going to publishers, and, similarly, the creators with the distribution to creators, and so the board tends not to have a good grasp of the overall pattern of distribution. Neither group, it seems, feels that it is its business to say how funds should be distributed to the other.

There are other reasons for the complexity. One is the level of confidentiality maintained to prevent publishers from knowing the details of the operations of other publishers – their competitors. I was not permitted to know such matters except as overall totals and, somewhat surprisingly, neither are staff members. This makes it difficult to get a grasp of how the system is operating in practice. When I kept pressing the staff, for example, to explain how it was decided what money under a particular licence was allocated to trade books and what to educational books, I could not get an answer as there were no historical files in the office related to this matter. I kept pressing and it was discovered

that it was the collective's auditor who had determined the breakdown in the year 1998 based on Statistics Canada figures that the publishers had given to Stats Can, but which Stats Can would not release. The publishers therefore agreed to send the same data on to the auditor, who would keep the figures confidential. So the present distribution to publishers for books is based on Stats Can figures from the year 1998 and has not been updated. The senior people at Access Copyright did not know about this method of deciding on the allocation which had been built into the rights management system.

Other collectives have much simpler systems of distribution. The Quebec agency Copibec, for example, which is the collective for reprography in Quebec, has a simpler distribution system than Access Copyright, basically distributing royalties equally between publishers and creators. The same is true in the United Kingdom and for the Canadian music collective SOCAN. When one gets into details, however, such as how Quebec distributes royalties from works that cannot be identified or how the creator organization in the UK distributes money from magazines and journals, the simplicity of their systems becomes less apparent.

Another organization which distributes funds to the cultural community is the Public Lending Rights scheme. About 15,000 creators receive cheques each year to compensate them for the borrowing of their books through libraries. Compared to Access Copyright it is a model of simplicity. While there are valid reasons why distribution systems of reproduction rights organizations are far more complex than those of a public lending rights organization that is not based on copyright, there are nevertheless valuable lessons to be learned. For example, unlike the distribution system for Access Copyright, most participants in the Public Lending Rights system understand how it works and how the distribution is made.

Whatever else comes out of my study, greater effort should be made by the board to simplify the system and make it more transparent. I will make a number of recommendations to that effect in a later section.

4. Brief Description of the Present Distribution Practices.

Access Copyright tries to identify what is copied and to distribute the money on that basis, but full records are not kept by the users of most of the actual photocopying that is done. An attempt to get this information would be very costly and many persons doing the photocopying would not comply with a request to record the copying. It is easier to gain compliance in the case of copy shops and educational institutions preparing course material for student use. Such shops and institutions cannot very easily hide what they are doing (i.e., copying and selling course packs) and risk court proceedings if they try to avoid payment to Access Copyright.

Nevertheless, only about one third of the amount distributed in 2006 was for full reporting or transactional licences. Thus about two thirds of the royalties available for distribution are distributed based on *estimates* of actual copying volume made through such techniques as sampling and modeling. Models differ according to the sector doing

the copying. A good example of an estimate is the model for universities and colleges that was done by Françoise Hébert in the mid 1990s to establish the breakdown for the distribution of royalties from the universities and colleges licences for incidental copying (i.e., non-course pack copying). The distribution chart states: 'The distribution model was determined from studies conducted by Françoise Hébert in 1995 and 1997 using data on faculty perception of their own copying and librarian perception of copying in libraries.' The model estimates typical copying volume by genre, rather than by specific titles. The Hébert estimates are still used today. Other models tend to be more up-to-date.

Modeling and sampling are done differently depending on which sector and which licence is at issue. Where full reporting is not possible or desirable, such as for incidental copying in post-secondary institutions or in government departments, copying is licensed under a 'blanket' licence which allows users to copy works (within certain volume limits) without keeping records of what works are copied. Licensees typically pay a flat fee per user (for instance, the total number of students).

Extensive bibliographic and volume sampling is done to determine the distribution of the K-12 royalties. The most recent sampling was done in connection with the K-12 tariff hearing that is about to take place. About 900 schools in Canada (outside Quebec) from about 12,000 possible schools were chosen for full reporting over a 10-day period between February 2005 and February 2006. The sampling was performed employing monitors for each school. This latest sampling was driven by the Copyright Board hearing and because of its high cost is intended as a one-time only process.

The money from the other licences – apart from full reporting – is distributed, as stated above, according to models that have been developed which estimate by genre the amount of copying done under that licence. The main genres are books, newspapers, and periodicals. Books and magazines are further broken down into categories, which have different splits between creators and publishers. Books are divided into trade books and educational books and periodicals into magazines and scholarly journals.

Payments from individual licences are made once a year – or in the case of full reporting, four times a year – to publishers and creators on material copied that is subject to copyright. This is in general distributed to creators and publishers according to the splits set out in Appendix C of the creators' and publishers' affiliation agreements. (The current affiliation agreements can be found on Access Copyright's web site: www.accesscopyright.ca) So, for example, the split for a trade book is 60% to the creator and 40% to the publisher and for a non-academic magazine article it is 65% to the creator and 35% to the publisher. But the present affiliation agreements provide that contracts between the publisher and the creator can override the default splits. A clause in Appendix C, the origins of which will be discussed later in this report, states: 'Nothing in this Appendix prevents creators and publishers from making different arrangements from those described.' The splits set out in Appendix C are therefore potentially only default splits. The publishers state in their submission that 'for the majority of distribution dollars it is the contracts that are primary.'

If the creator is an affiliate of Access Copyright and the creator is entitled to some payment through full reporting or sampling data, the payment is sent directly to the creator. The majority of creators whose works are copied are not affiliates, however, and so the royalty is sent to the publisher for the publisher to send the creator the amount the creator is entitled to receive, either under the default split or under the creator's contract with the publisher. Only about 7,000 creators are affiliates. This is a low percentage of possible affiliates, considering that about 15,000 persons (including persons in Quebec) receive payment from the Public Lending Right scheme, which applies only to books. (The PLR scheme was established in 1986, two years before the establishment of Access Copyright.) Moreover, there are about 14,000 authors served by the comparable Quebec collective, Copibec, which does not require that a person apply to become an affiliate, but sends a cheque directly to any creator entitled to receive payment.

Publishers, however, get payment from Access Copyright even if they are not affiliated, and a large number have not affiliated. Moreover, many major foreign collectives (e.g., the United States, the United Kingdom, and Australia) specifically license their repertoires to Access Copyright and other collectives. Foreign publishers and creators get payment through their own country's reprography rights organizations to which Access Copyright sends payment. The foreign collective distributes the money according to that organization's policies and with the assistance of bibliographic information provided by Access Copyright for any copying where works have been identified. About 20% of funds allocated for distribution by Access Copyright are sent to other collectives. About 60% of this amount is sent to the Copyright Clearance Center in the United States. In addition, the publishers' submission states, the Canadian subsidiaries of American firms send an even larger amount than Access Copyright sends to the Copyright Clearance Center to their US parent companies and its authors from the Access Copyright amounts the subsidiaries receive.

Access Copyright licenses do not specifically authorize copying of material that is not in its repertoire, but Access Copyright does collect for material outside its repertoire. However, Access Copyright saves its licensees harmless from any liability and takes the risk that the copyright holders will be content to receive royalties in such cases. The system helps persons photocopying under a licence to feel comfortable in copying material without having to check whether permission to copy has specifically been given to the collective. (Such persons cannot, however, be completely comfortable because publishers and creators who are affiliates of Access Copyright can and do exclude specific titles from their repertoire. There is an obligation to check the list of exclusions. Whether it is done regularly is another matter.)

Legislation in some countries specifically permits the collective to authorize copying of works of non-affiliates by providing that if the collective has in its repertoire a certain percentage of available domestic print material it can legally authorize the use of the rest. This makes good sense. Access Copyright has asked the federal government for similar power, but so far without success.

What happens to the royalties collected for the two thirds of the copying that is not subject to full reporting? Most models now provide that after administrative expenses, 5% of the amount collected from a licence is divided into separate pools for publishers and creators, the so-called repertoire pools. The remaining amount, as we have seen, is distributed differently, depending on the category of user. In the case of schools (the K-12 licences) most of the remainder is allocated according to sampling. Sampling is a survey technique designed to identify what material is likely to have been copied. The accuracy of the results of the sampling depends, of course, on how extensive and accurate the sampling is and what provinces are being sampled. In the past, for cost and compliance reasons, some provinces were sampled only every three years, although Ontario was sampled every year. Data collected was weighted nationally over three years to increase the accuracy of the sample. As stated earlier, extensive sampling was undertaken by independent consultants in preparation for the K-12 Copyright Board tariff hearing and the results of this survey are now being used for purposes of distribution of royalties, no doubt with the possibility of less extensive updates of the data in the future.

Funds derived from publications that turn up in the sampling are allocated to the publisher and creators according to the sample and the agreed splits or, if there is no agreement, according to the default splits in Appendix C of the affiliation agreements. There will, however, still be a large amount of material that turns up in the sample that cannot be properly identified – over 20% of the copyright material – and these funds (less the appropriate percentage allocated to foreign RROs) are equally divided between the publishers and creators and placed in their separate repertoire pools.

Other licences, such as that for incidental copying in universities and colleges, do not attempt to identify specific publications, except for course packs and document delivery systems for which there is full reporting. As a result, for the university and college incidental copying licences, for example, there is, in addition to the 5% that is shared equally between the publisher and creator repertoire pools, a large lump sum, which is equally allocated to publishers and creators.

In 2005, the entire fund, derived from all models and works for which the copyright owner could not be identified in full reporting or sampling amounted to a total of over $5½ million dollars. This is out of about $20 million dollars distributed to creators and publishers in Canada and abroad that year – about 25% of the total allocated. The repertoire fund for creators for 2005 was a little over $3 million and for publishers it was about $2½ million. How are repertoire payments allocated to affiliates? The method of doing so is not easy to describe because some of the funds allocated to the publishers are placed in a general repertoire fund for publishers and some are distributed to the publishers in other ways.

The publishers have agreed on a system for allocating the publishers' amounts within each genre: books, periodicals and newspapers. For books, amounts are distributed to publishers according to sales data from Statistics Canada (collected by Access Copyright's auditor several years ago) and for newspapers according to circulation data from the Canadian Almanac and Directory. Royalties for magazines, as we have seen, are

distributed according to the defunct Rowecon figures. These amounts are not placed in the publishers' general repertoire fund.

As stated above, the models allocate 5% of the amount for distribution to the repertoire fund, divided equally between publishers and creators. Other amounts that are placed in the publishers' general repertoire fund (as they are for creators) are the unidentified amounts in the K-12 sample, mentioned above, and all of the amounts given to the publishers in the federal government model and in several other models.

The present allocation for this separate publishers' repertoire fund is based on the following chart which sets out the points used in the allocation. The sales data is collected annually by Access Copyright from the publishers.

Publisher sales category (in dollars)			points
	up to	1,000	0
1,001	to	50,000	1
50,001	to	100,000	2
100,001	to	500,000	6
500,001	to	2,500,000	10
2,500,001	to	10,000,000	20
10,000,001	to	100,000,000	40
	over	100,000,000	55

In the 2005 distribution, one point was equal to about $750. This separate publishers' repertoire fund is different from the sums that were distributed according to sales figures in the case of books, and circulation figures in the case of periodicals and newspapers.

The $3 million a year in the creators' repertoire fund constitutes about 85% of the total distributed directly to creator affiliates by Access Copyright. All the funds allocated to creators that cannot be specifically identified by full reporting or sampling go into the creators' repertoire fund. The sum is then divided equally amongst all of the creator affiliates – each person receiving about $500 a year. There is no distinction between affiliates in different genres. There is also no distinction between persons who have a large repertoire available for photocopying and those with a very small repertoire. Similarly, no distinction is made between those whose work frequently shows up in full reporting or sampling and persons whose work never shows up. Each affiliate receives exactly the same amount. Moreover, the many creators in Canada who are not affiliated with Access Copyright do not share in the large repertoire payments. Most do not know about this automatic generous yearly payment and perhaps if they did know about this particular feature of the scheme many more creators would become affiliated with Access Copyright.

PART B. PRESENT DISTRIBUTION PATTERNS

1. Overall Distribution Patterns.

It is difficult to determine the overall distribution between publishers and creators. We do not know for certain how much is passed on by publishers to creators who are not affiliates of Access Copyright. Creators who are affiliates are paid directly by the collective and this amount is therefore known. For the past several years the breakdown has been about 75/25 in favour of publishers. In 2005, the creators who were affiliates received $3,789,278 (25.3%) and the publishers received $11,182,589 (74.7%) out of the total to the two groups of $14,971,867. Other RROs made up the balance, receiving $5,729,655 of the total sum for distribution that year of $20,701,522.

Access Copyright did a survey in 2002 of the amounts passed on by publishers to creators from the 2001 distribution. The survey was restricted to members of the Canadian Publishers' Council and the Association of Canadian Publishers. The firms who responded reported that in total they passed on 28 % of the money they received from Access Copyright. The publishers who reported, however, represented only about 40% of the money distributed to all publishers. The vast majority of the members of the Canadian Publishers' Council responded, but there were only nine responses from the members of the Association of Canadian Publishers out of well over 100 members. The ACP publishers represent the smaller Canadian publishers, some of whom admit that they do not have the administrative capacity to pass on payments.

Moreover, newspaper and magazine publishers were not represented in the survey and most observers assume that they pass on far less to creators than book publishers do. One major newspaper publisher – and this may be true of other newspapers – does not pass on anything to full-time employees or freelancers. If newspapers pass on only 5% of the money (a percentage used in some models for distribution to creators of newspaper revenues), and magazines do so as well, assumptions that may or not be accurate, the overall distribution would still favour publishers, but the overall percentage in favour of publishers would not be as dramatic as the figures would at first suggest. This is because the funds going to the publishers would have to be decreased by the amount passed on to non-affiliate creators, and the total going to creators would have to be increased by the same amount.

So, for 2005 – assuming that 5% of the royalties given to newspaper and magazine publishers was passed on to creators and that 28% of the money given to book publishers was passed on – the creators would have received $5,891,605 ($3,789,278 + $2,102,327) and the publishers $9,080,262 ($11,182,589 - $2,102,327) out of the total of $14,971,867. This is about a 60/40 split, which, as we will see, is about the same as that for Copibec in Quebec and the Copyright Licensing Agency (CLA) in the United Kingdom. The problem is that this is based on questionable assumptions. There is no audit trail for the figures given by the publishers and therefore their accuracy can be and is questioned. Publishers do not provide any data to Access Copyright on what they pass on to creators. So, in the end, we cannot say with any certainty what the overall split is.

2. Top Ten Publisher and Creator Affiliates.

Access Copyright supplied me with a list, without specific names, of the top ten publisher and creator affiliates in terms of the amount of money received from the collective in 2005 (including repertoire payments). Payments to the top ten publishers (including payments owing to their unaffiliated creators) were (in dollars):

1. 1,688,649
2. 1,031,437
3. 439,977
4. 421,390
5. 396,458
6. 346,646
7. 273,811
8. 221,737
9. 205,703
10. 199,636

Total $5,225,444

The top ten creator affiliates for 2005 received (including repertoire payments) in dollars:

1. 7,356
2. 7,289
3. 6,234
4. 5,583
5. 4,660
6. 4,211
7. 3,866
8. 3,837
9. 3,684
10. 3,635

Total $50,355

3. Reasons for the Seemingly Uneven Distribution.

i. Creator Repertoire System.

The key reason that individual creators affiliated with Access Copyright get relatively little each year is because there is comparatively little identified full reporting (including document delivery and transactional licences) of creator affiliates' material. In 2005 such reporting for affiliated creators was under 10 percent of the total sum distributed for full reported copying. Funds for material that cannot be identified go into the creator repertoire pool and are divided equally amongst all of the affiliates. Everyone therefore gets the same amount from the repertoire pool, currently about $500 a year.

Recommendations on how the pool can be more equitably divided according to two proxies for the likelihood of copying – i.e., extent of one's repertoire and known copying – are made in a later section.

ii. Contract Override.

Another reason why there appears to be a lop-sided distribution in favour of publishers is because unlike many other collectives – in particular those in Quebec and the UK – individual contracts between publishers and creators may override the splits determined by the board. The history of how it came about that contracts would have this effect is discussed in a later section.

The override is not unreasonable when applied to employees or when work is done as a total buyout such that the creator has no subsidiary or other rights. This frequently occurs in the educational sector. As will be suggested in a later section, it is not desirable when applied in other cases.

Many publishers claim 100% on various works and one large educational publisher routinely changes the splits for books to a 90/10 split in its favour. Publishers and creators are entitled to change the default split on the system with respect to individual works. The creators are normally not consulted when the publisher changes the split – even if they are affiliates of Access Copyright. Moreover, if the split gives 100% to the publisher the creator affiliate would not receive a cheque from Access Copyright for that copying and therefore would not know that the work had been copied. It would be even more difficult to determine what the splits are for works in which the creator is not an affiliate because the publisher might not bother to change the split on Access Copyright's rights management system.

According to figures recently supplied to me by Access Copyright, the number of cases on the rights management system where the publisher specifically claims 100% is not as large as many persons believe it is. There are only a little over 4,000 works for which publishers specifically claim 100% and for some reason legal publishers constitute about 75% of that number.

With the permission of a number of creators, I examined how their works were treated by publishers. Some of the individuals are affiliates of Access Copyright and some are not. I engaged in this rough survey several months ago before I knew the extent to which legal publishers were claiming 100% and because some of my legal colleagues had been part of my small sample of cases, I found a surprising number in which the publishers claimed 100%. I found that publishers were claiming full rights to works in a large number of cases where, in my view, their right to do so was uncertain. When I examined the individual contracts I found that the publisher had been interpreting the contracts to give them full reprography rights in cases where it was not at all clear that they had these rights.

In many contracts drawn up before the collective came into existence, for example, and before anybody had thought about reprography rights, nothing would have been stated in the contract about those rights, yet I saw a number of cases where the publishers were interpreting the contracts to the effect that they had been given reprography rights. Copyright is licensed or granted to the publisher for various reasons, including the ease of administration of the various subsidiary rights that are mentioned in the contract, such as foreign rights, audio and movie rights, and book club rights. Many publishers, however, would seem to interpret the simple granting of copyright or the right to publish as giving them all reprography rights. I note that the publishers appear to agree with this position and state in their recent joint submission to me that 'copyright ownership should not drive splits, but specified transfers of rights should.' In my opinion this should be a question of the interpretation of the contract and contracts dealing with new rights are notoriously difficult to interpret. It does not seem fair to allow publishers to interpret contracts unilaterally – taking for themselves a larger percentage than the default split calls for – without input from the creator, and in many cases without the creator even being aware that the publisher has done so.

iii. Academic Journals.

Publishers presently get 100% of revenues collected by Access Copyright for so-called 'academic' journals. This can have a significant impact favouring publishers. Academic journals made up over 20% of the money distributed in 2005. In the distribution for 2005 under the federal government licence, for example, the publishers received $188,256 for scholarly journals and the creators received nothing. This is four times the amount distributed under that licence for magazines, which is divided 65/35 in favour of creators, with creators receiving only about $30,000 in total. A similar impact can be seen in the distributions under other licences, such as the universities licence, where in 2005 the publishers received almost $500,000 from periodicals (scholarly journals and magazines) and the creators received under $200,000. This is in addition to the sum received by publishers for full reporting of scholarly journals that were known to have been copied and for which creators received nothing. I will have more to say about academic journals in a later section.

iv. Newspapers.

Most of the money attributable to newspapers now goes to the publishers. This is because a high percentage of persons who write for newspapers are employees and do not expect any further payment through reprography rights.

v. Reworking the Models.

As the distribution models have been reworked over the years – in large part based on usage data – the changes have tended to benefit the publishers more than the creators. The effect of the changes may not be obvious unless the changes in the models are carefully studied. Here are two examples, one for the federal government model and one for the corporate model.

For ten years, royalties from the federal government model were divided equally between creators and publishers. The distribution model was based on a 1993 survey (Goss Gilroy) of federal government departments and libraries that measured volume of copying but did not identify individual works. In 2005, the model was changed as a result of a further survey carried out by Circum Networks, an independent research company, in connection with the renewal of the licence. Rather than a 50/50 historical division, two thirds of the money was directed to the publishers. This was because the new data revealed that journals and newspapers accounted for over 40 per cent of the copying and, as noted above, almost all the money for this type of copying goes to the publisher.

Similarly, changes in the corporate model have altered the distribution in favour of publishers. Until 2003, money from all genres except periodicals was split 50/50. But in that year the allocation for books, which was split 50/50, was decreased from 25% to 10%, and newspapers were increased from 1% to 50% – again based on new usage data collected. Because almost all of the money from newspapers goes to publishers, the effect was that under the corporate licences for 2003 publishers received over $230,000 and creators under $90,000.

Another change was to amend other models, which had previously allocated 20% of the distribution equally between the publishers' pool and the creators' repertoire pool, to a lower distribution of only 5%. This change was due to more current usage data which left a smaller amount of material unidentified, but this again hurt the creators.

How is it, one might ask, that the distribution in favour of the publishers is not higher than it is at present? It is likely that this is because a large percentage of the money collected that cannot be identified is now split 50/50, which appears to help the creators.

Having explored the present practices, let us look at the history of Access Copyright to understand how it arrived at its present position.

PART C. HISTORY OF ACCESS COPYRIGHT

1. Early Beginnings.

As stated earlier, from the early 1960s the widespread use of the photocopier made reproduction of printed works easier and there was therefore a growing need for a cooperative for printed material. Writers in Quebec had started their collective in the early 1980s.

A series of government reports in the 1980s recognized the need for the 'organized exercise of copyright' because of 'changing technological circumstances, which have greatly expanded opportunities for unauthorized reproduction and use of copyright-protected material' and 'the high costs of transactions, which may be so great as to make it impracticable for copyright owners to negotiate individually with users.' The

government produced a White Paper in 1984 (*From Gutenberg to Telidon*) which was supported by a later report by a parliamentary sub-committee (*A Charter of Rights for Creators*) in 1985. These reports encouraged the creation of cooperatives and pointed out that without legislative recognition the setting of tariffs by a collective might be in breach of and subject to prosecution under the Combines Investigation Act.

Legislation was therefore introduced in 1987 that permitted cooperatives such as Access Copyright to be established without fear of breaching the Combines Investigation Act. Licensing agreements and tariffs would be filed with an enhanced copyright board. Both the parliamentary committee that dealt with the legislation and the minister on second reading noted that the performing rights societies would provide a working model. The Minister of Communications, Flora MacDonald, stated: 'Under our present Bill, the practice which now pertains to those who provide musical performances would be expanded to other areas to be covered by copyright and would result in collectives of authors, visual artists and so forth.' She went on to say: 'a recognition of creators' rights stimulates creative activity and the flow of intellectual products to our cultural industries.'

The comparison with the music performing rights collectives is important because the practice in that area was and still is to divide the royalties equally between the publisher and the creator. Creators, it appears, were meant to benefit significantly from the legislation. As stated earlier, the revisions to the Act were based on a document entitled 'A Charter of Rights for Creators.' The amending legislation received Royal Assent in June 1988. Like the Public Lending Right scheme, it was meant to help preserve Canadian culture at about the same time that Canada was establishing free trade in the Americas. The origins of Access Copyright have generally been forgotten by most of those presently involved in the collective.

2. Stephenson Kellogg Report.

In October 1985, the Book and Periodical Development Council – a body formed in 1975 and composed of organizations interested in writing and publishing – received funds to study the development of a model of a reprography collective for English-speaking Canada. As stated earlier, there had been a collective in Quebec since 1982. The Council chose the management consultant firm of Stevenson Kellogg Ernst and Whinney to conduct the study. It presented its report, *Developing a Reprography Collective in Canada*, in October 1986.

The consultants concluded that a reprography collective should be established, but stated that 'there is no real consensus on revenue distribution, nor is there clear evidence of the best approach to follow. The greatest consensus seemed to be on a willingness to negotiate on how to distribute revenue at the time the collective is formed.' 'The approach of the performing rights societies,' they acknowledged, 'is a possible model for the collective to follow,' although they could not find 'that a consensus has emerged on this point.' In another section of the report dealing with the issue of how a collective obtains reprography rights, the authors again note that those who join the music

performing rights societies agree to divide the royalties 50/50 between publishers and authors, but stated that 'given the fact that so many authors or publishers have already decided the terms of the royalty splits in their agreements, it would be unfair to alter existing contract rights by arbitrarily imposing a 50/50 split.' If nothing was said in a given contract about royalty splits, however, then such an imposed split, they stated, would be reasonable.

3. Distribution Rules in the Early Period.

The Canadian Reprography Collective – initially known as CANCOPY and later Access Copyright – was established in 1988 with an interim board of directors. During the collective's first year, the board struggled over what the split should be between publishers and creators for each genre of work. No agreement was reached. It was agreed, however, that it would be the board that would determine the split. The Board would have been aware from the Stephenson Kellogg Report that the Quebec, UK, and Norway collectives all determined the splits and were not bound by individual contracts between creators and publishers. Norway was often looked to in these early years as a possible model because it had loaned the new cooperative a substantial sum of money to get it on its feet. The Quebec collective was similarly important because it had also loaned money to the Canadian Reprography Collective.

Affiliation agreements were signed with publishers and creators that made it clear that it was the board that determined the split. Clause 8.02 of the publishers' affiliation agreement was similar to the creators' affiliation agreement, with appropriate changes, in stating:

> You agree to accept the division of revenues between authors and publishers determined (as a percentage) by the Board of Directors for the genre or genres of your publications, notwithstanding any agreement between yourself and any author on any publication or your entitlement to all revenues from any publication.

At an August 1988 meeting of the interim board the question was raised whether the contract between the publisher and creator would override the split that would be set by the collective, and [redacted], according to the minutes, explained, that 'the affiliate agreement overrides contracts.' By affiliating with the collective, both publishers and creators were agreeing to accept the splits decided by the board, notwithstanding anything different that might be in the contracts between them.

Creators in each genre claimed that they were entitled to a large share of the money that would eventually be coming in. The Writers' Union, for example, had wanted writers to receive 70% and the League of Canadian Poets 75% of any royalties relating to their genre. At a meeting in October 1988, 8 out of the 10 directors of the collective's board attending the meeting passed the following 'compromise' resolution:

> The Board notes the recommendation of [author [redacted] and [publisher [redacted] that the income should be shared 50/50 on educational publishing, and 65/35 on all other work, and that these splits be presented to the constituencies.

The 50/50 split for educational publishers was instituted because the board recognized the high development costs in educational publishing. The resolution was passed by the board with [redacted], who believed the creators should get more than 65%, voting against the motion, and [redacted], abstaining.

4. Contract Override.

Licensing revenues did not start coming into the collective until 1992, after the first licence was negotiated with the Ontario ministry of education, which agreed to pay the collective $2 million, representing $1.00 per student, for copying in the K-12 sector. The first royalties, totaling $265,000, were distributed that year. Costs were, however, using up a large amount of the income. The heaviest cost was for sampling to determine the distribution of the income from the schools licence. The company hired to do the sampling was using up over 50% of the income from that licence. Data collection, using new and untested technology, was described by the executive director as 'expensive and cumbersome' and it was feared that as much as 75% of the money from the school's licence would be swallowed up by data collection, although this would be reduced over time.

The early 1990s was a difficult time for the Canadian publishing industry, as it was for the country as a whole. School and library budgets were being cut throughout the country. Many publishers were seriously in debt. The first distribution from the collective was about to come up.

Publishers wanted a different arrangement. They noted that they were not receiving any funds from the Public Lending Rights (PLR) scheme, which had started in 1986. In September 1992, the [redacted] a very strong position stating that its members would not support the collective if affiliation meant that contracts were over-ridden. [redacted] conceded that this 'may be a move from their original position.' But he warned that if contracts were over-ridden by the collective then there was a risk that 'most firms won't affiliate and those that do will place large parts of their repertoire on the exclusions list. That in turn will weaken CANCOPY, especially with government and commercial licensees.' [redacted] was also concerned that creators would receive double payment – from Access Copyright as well as under their contracts with the publisher. This position in favour of overriding the collective's splits was shared by [redacted] through its nominee elected to the board from the [redacted].

The CANCOPY board caved in to this pressure and future affiliation agreements allowed individual contracts to override any splits determined by the board. As previously noted, Appendix C of the present affiliation agreements, which sets out the splits between

creators and publishers, contains a clause – clause 4 – which states: 'Nothing in this Appendix prevents creators and publishers from making different arrangements from those described' in the appendix.

Agreement on default splits then fell into place. The trade book default split became 60/40 in favour of the creator, rather than the previously suggested 65/35, but 100% of the royalties from out-of-print books were given to creators. The default split for educational books remained at 50/50. Here are the default splits, set out in Appendix C of the present affiliation agreements, that have been more or less in place since 1993:

1. Unless you advise us that you have an arrangement referred to in paragraph 4, we will distribute royalties according to the arrangements described in these guidelines.
2. When only the publisher of a Work is affiliated with us, the publisher may ask us to pay that publisher both the publisher's and the creator's share of the royalty for any specific Work. In accepting the creator's share, the publisher agrees to send that money to the creator as soon as reasonably practicable. If the publisher fails to do this, then we may deduct the relevant amount from any subsequent payment to the publisher.
3. Payments identified by us in respect of specific Works will otherwise be distributed as follows:
    (a) articles and other material copied from newspapers
        (i) if contributed by a freelance creator ----------100% to creator
        (ii) otherwise ----------100% to publisher
    (b) any material in scholarly periodicals in which the creator has assigned copyright to the periodical ----------100% to publisher
    (c) any other material copied from periodicals -------35% to publisher, 65% to creator
    (d) any material copied from trade books ----------40% to publisher, 60% to creator
    (e) any material copied from educational and technical books ----50% to publisher, 50% to creator
    (f) any material copied from out-of-print books ------100% to creator
    (g) any material copied from a Work that cannot be classified within (a) – (f) above ----------50% to publisher, 50% to creator

These splits are applicable to identified rightsholders affiliated or eligible for affiliation with Access Copyright. It should be noted that Access Copyright sends 100% of amounts collected for works of other identified rightsholders to Copibec or to the appropriate foreign collectives, which may disburse funds in accordance with their own rules.

The split negotiated often depended on who was at the board table to negotiate the arrangement. At the beginning, according to [redacted], there was a single split for periodicals, which would therefore have been applicable to royalties from scholarly periodicals as well as other periodicals. In 1993 the agreed default split became 100% to

the scholarly publishers, perhaps because academic writers were not at the table, except through their publishers.

5. Creators Become Concerned.

To a greater and greater extent, contract overrides were being used by publishers, and the creator community was concerned that they were not getting a fair and reasonable share of the money that was being distributed. Many freelance periodical and newspapers writers have told me that it is now the usual practice for the publishers of newspapers and periodicals to require that they obtain an overreaching wide-ranging swath of rights, although in most cases, it seems, this did not include reprography rights.

Various members of the board representing creators studied what was being done in other collectives. [redacted], prepared a document in August 2003 relating to several Canadian collectives and concluded that 'Access Copyright is (by far) the one with the largest difference between publisher and creator shares of revenue.'

[redacted], also from the creator community [redacted], produced a report on collectives and distribution in September 2003. [redacted] looked at a large number of collectives from other countries and considered a series of issues, such as whether private contracts overrode a collective's negotiated split, whether payments to creators are made directly or through publishers, and whether creators receive a specified minimum share of the collective's distributed revenue. On the last point [redacted] stated:

> Our negotiated splits might make it appear [that creators receive a specified minimum share of the collective's distributed revenues], since many of them provide for a generous share of revenues to go to creators. In reality, our splits are routinely overridden by private contract; almost 75% of our domestic distributions go to publishers. Even after applying our best estimates of the flow-through from publishers to creators, the net breakdown after the application of private contract terms that supersede the Access Copyright splits is probably close to 70% publishers, 30% creators. Our present policies, however, preclude us from being fully accountable in this area.

[redacted] international comparison showed, in [redacted] view, a split between what [redacted] called 'balanced' versus 'publisher-centered' collectives. [redacted] concluded that Access Copyright 'conforms to the model of the publisher-centered collective.'

As stated earlier, I could not determine what the present precise distribution of funds is between publishers and creators. If the figures given by the publishers are correct, then – as noted earlier – when added to what is given directly to creator affiliates the overall split is about 60/40 in favour of publishers. But one cannot confirm without a transparent audit trail that the figures are correct.

6. Distribution Working Group, 2003.

As a result of the concerns expressed by the creators, the collective set up a Distribution Working Group, co-chaired on the publishers' side [redacted] and [redacted] from the creators' group. The nine-person committee had several conference calls and, with the help of a professional facilitator, two all-day meetings.

The working group deadlocked on the core issues of direct distribution to non-affiliate creators and the contract override, but recommended a number of changes, such as changing the distribution between publishers and creators for the repertoire portion of each future licence category 'so that we can better reflect the true value that users place on contributions made by the creator community through the Access Copyright licence'. This would have increased the creator repertoire pool. The working group also wanted the creator members to revisit the method of distributing the creator repertoire, which, as we have seen, presently divides it equally amongst all creator affiliates of Access Copyright. 'The objective,' the working group stated, 'is to better reflect the true contribution made by individual creators in the distribution model.'

Other recommendations were to 'aggressively pursue initiatives which increase the amount of Access Copyright funds distributed directly to creator[s] (as opposed to via publisher[s])' and to 'increase transparency though improved clarity.' The report also recommended formal review of the principles underlying the default splits in Appendix C of the affiliation agreements.

The Distribution Working Group submitted its report to the board and then was dissolved. A motion dealing with some of the issues was passed by the Board in March 2004 approving the continuation of the distribution working group's attempt 'to improve the validity and fairness of Access Copyright's distribution policies and practices'. In particular, the Board wanted to update models in each licence category; committed Access Copyright to 'the principle of direct distribution to rights holders to the extent possible and devising a legitimate program to affiliate directly authors currently being paid through their publishers'; directed Access Copyright staff 'to work on a program for a direct affiliation campaign'; and directed the staff 'to gather information that will assist the Board in assessing its current distribution policies and practices, including information on the distribution policies and practices of other collective societies, and including allocation of some revenues for collective cultural purposes.'

Work was in progress on this motion when Access Copyright received the submission from the creators' organizations.

7. Creators' Submission, 2005.

In July 2005, four Access of the eighteen Copyright member organizations representing creators –Writers' Union of Canada, Canadian Artists' Representation, Professional Writers Association of Canada (at the time called the Periodical Writers Association of Canada), and League of Canadian Poets – presented a strongly-worded submission to the Access Copyright board, stating, in part:

> The controversy around the distribution of revenues by Access Copyright continues to rage in the creator communities. There is mounting evidence that the income of the agency is not being distributed according to the guidelines promised in the 'Affiliation Agreement' that every creator signs when they affiliate with the licensing agency.
>
> Many creators now feel that publishers have used their economic strength to impose terms in contracts that leave most of the revenues in their hands. As a consequence, the income share that creators receive from Access Copyright is much less than that received by publishers.
>
> This issue will not go away and we urge the Board of Access Copyright to address it or we fear that it will have dire consequences for the licensing agency. The creators and publishers who created Access Copyright did so in the spirit of united action and mutual support. That spirit has been eroded to the point that creators seriously wonder why they should lend their support to a system that mainly benefits publishers and does virtually nothing for creators.

PART D. OTHER COLLECTIVES

Reprography rights organizations (normally referred to as RROs) operate in close to 50 countries. There is a wide variation in the way they collect and distribute money. As then [redacted] wrote in a report to the board of Access Copyright in August 2003, making comparisons is 'difficult because of the many differences amongst societies, their repertoires, copyright regimes, licensing and goals.' The international organization of reprographic rights collectives, IFRRO, has recently produced an 88-page document on how to establish a collective, which amongst other things, discusses in some detail how various reprography organizations collect and disburse funds. Readers can turn to that document to get more information on individual RROs and to locate their websites (www.ifrro.org/upload/documents/ManualIfrrofinaljune15.pdf).

There is a wide variety of methods of obtaining and distributing funds. Germany, for example, does not have licences as Access Copyright does, but collects funds based on fees levied on the purchase and operation of copiers. Actual copying is therefore not recorded. The money is distributed to publisher and creator organizations on a 50/50 split, although for certain genres it is higher for creators. Similarly, Belgium obtains 60% of its funds from an equipment levy and 40% from the operational levy. It also splits these fees on a 50/50 basis between authors and publishers.

Denmark, to give another example, has a copyright law very different from Canada's. In Denmark, initial ownership of copyright always resides with the author and there are restrictions on assignments. The funds for reprography are, however, shared equally between authors and publishers and distributed directly to individual authors and publishers. In Norway, the creator/publisher splits are even more favourable to creators,

no doubt because creators have a majority on the board of distribution and, as with Denmark, legislation provides that rights assignments by creators are restricted. Further, a number of foreign collectives handle public lending rights as well as reprography rights. Many foreign collectives distribute directly to creators and publishers, but many, such as the United Kingdom and Norway, distribute to creator and publisher organizations, which in turn make the distributions.

So, it is difficult to compare regimes. Further, many of the foreign web sites are not translated into English and many do not give extensive details about distribution. Moreover, as I found when I delved into the details of distribution of specific collectives, the system is typically not as simple as it might first appear to be.

In other studies that I have done, I have tended to concentrate for comparative purposes on major common-law jurisdictions, such as the United States, the United Kingdom, and Australia, along with examining what is done in Quebec. It is those jurisdictions which I will examine more carefully in the following sections.

1. The United States.

The Copyright Clearance Center (CCC) in the United States – which is not strictly speaking a collective – is the largest rights clearance organization in the world. It was formed as a non-profit company in 1978 and, according to its current web site, 'manages the rights to over 1.75 million works and represents more than 9,600 publishers and hundreds of thousands of authors and other creators.' Its board is composed of publishers and authors, as well as persons from the user communities, such as librarians. Nevertheless, many observers view it as a publisher-dominated organization. Congress had suggested that such a body be established to administer licences and royalties for copyright owners and users of copyrighted material. It distributes well over $100 million a year to publishers and creators and in 2006 exceeded more than $1 billion in cumulative revenues since its incorporation. It grants yearly licences as well as transactional licences for individual works within its repertoire of works.

The funds are distributed to copyright owners who register their work with CCC. It is left to the person who receives the funds to pass on what is due to the creator or publisher, as the case may be. The copyright regime in the US differs from that in Canada in that it provides a much wider right, under its 'fair use' provision, to copy material (without the copyright owner's permission) for use in educational institutions than exists in Canada. The US federal courts have, however, held that the 'fair use' defence or exemption does not apply nearly so liberally to commercial companies. [redacted] noted in [redacted] examination of CCC that 'only a small proportion of revenues are collected from schools and post-secondary institutions…Most of the licensing is corporate.'

The [redacted], informed me that the organization does not operate in the K-12 area, and that the various post-secondary educational licenses amount to about $18-20 million per year out of over $160 million collected – about 12% of the total received. This can be contrasted with the situation for Access Copyright

where, according to the publishers' recent submission to me 'close to 75% of Access revenue comes from educational licenses.' The difference in the percentages in the two organizations is because of the educational exemption in the United States.

The relationship between Access Copyright, CCC, and the publishers operating in Canada that are American owned is complex and one that would have to be carefully examined in the future if the recommendations set out in a later part of this report are adopted by Access Copyright. In the time available to me I did not examine those relationships with the care they deserve.

2. United Kingdom.

The Copyright Licensing Agency (CLA) was formed in 1982 as a non-profit corporation through an agreement between the publishers' organization, the Publishers Licensing Society (PLS), and the creators' body, the Authors' Licensing and Collecting Society (ALCS). The agreement was to share royalties for books equally between the two societies, who are each responsible for distributing the amounts to those entitled to payment. No exception is made for authors who are employees or whose work is bought out. Individual contracts between authors and publishers do not override the equal split determined by the two organizations. They do not distinguish between in-print and out-of-print books and they do not care who owns the copyright.

The United Kingdom seems to be able to track copying through sampling better than Canada does. They are able to sample institutions regularly and thoroughly, without overwhelming cost. CLA claims that its data collection operations cost less than 2% of UK licence revenue. How they are able to do this is not clear. Perhaps it is because the British are more willing to follow instructions than Canadians and because it is a unitary system in a smaller geographical area. In any event, they do not end up with a large pool of money that cannot be attributed to writers of books, as Access Copyright does, resulting in a large repertoire pool for authors.

Both the publishers' and the authors' organizations distribute directly to persons entitled to payment. Payment to authors does not go through the publisher. ALCS does not require formal affiliation to get direct payment, as Access Copyright does. The society is normally able to find authors.

Newspapers are not part of the CLA system. There is a separate organization, the Newspaper Licensing Agency (NLA), run by the publishers, which licenses copying and distributes the funds to the publishers. Magazines and journals are handled by CLA, but licensing revenues are not split equally. An agreement was reached in 2005 between the publishers' and authors' organizations to divide magazines and journals 85/15 in favour of publishers. Previously, the publisher would get 100% if the publisher could show that it had been given all rights to a particular periodical by 90% of the authors, but this was found to be difficult to administer.

CLA does not at this time keep a record of the authors of periodicals and so the ALCS has had to devise an alternative method of distributing the fund to authors. The ALCS is presently devising a system which will require writers to set out a claim for royalties based on what they have published in periodicals in the past year, with the money then distributed to authors based on their volume of publication and the size of the total fund.

One interesting arrangement is that the overall split between authors and publishers for books and periodicals together cannot be less favourable to authors than a 40/60 split. Any difference has to be made up by the publishers. The 40/60 split that applies this year becomes 41/59 next year and changes by a further percent in favour of authors the following year.

Visual artists are not members of ALCS. They receive 8 percent from the total amount for distribution, and the visual artist organization, the Design and Artists Copyright Society (DACS), distributes the sum to its members. There is a limit on how much any visual artist can claim, unlike the ACLS distribution that has no limit. One book author – no doubt a text-book author – received £38,000 last year in the ALCS distribution.

So it is difficult to compare the UK and Canada because newspapers are not part of the mix and because of the way that periodicals are handled.

3. Australia.

The Australian reprography system, run by Copyright Agency Limited (CAL), has two elements. There is a statutory licensing scheme which allows educational institutions and institutions assisting people with disabilities to reproduce works for educational purposes and which also allows governments to reproduce works for government purposes.

For other users there is a scheme for voluntary licences to permit copying of materials from works of participating members of CAL. For statutory licences, CAL allocates money for each work identified, including those of non-members as well as members, but for voluntary licences the money is allocated only to members.

The money is allocated to the author where the author of the work is a member of CAL, but to the publisher if only the publisher is a member or if neither are members. That person or company is responsible for passing on what the publisher or creator, respectively, should receive. CAL has recently introduced a scheme whereby CAL can be notified of contractual splits, with fees then paid directly to the publisher and author.

It is a large operation. The revenue collected is about three times that of Access Copyright. CAL licenses digital works to a greater extent than Access Copyright presently does as the statutory licences all permit digital copying. As in Canada, the schools and universities statutory licences account for a very large percentage of the revenues – about 75%. Publishers receive the major proportion of what is distributed, but I do not know how much is passed on to authors. In some respects the Australian scheme resembles that now used for Access Copyright, except that CAL is able to identify

through sampling a larger percentage of what is copied. It does not therefore have a large repertoire fund to distribute. Another significant difference is that for the past ten years CAL has used 1% of its revenue for cultural purposes as permitted under CAL's Constitution and contemplated in the Copyright Regulations applied to copyright societies. This fund will be discussed more fully below.

4. Quebec – Copibec.

Copibec, formally founded in 1997, but operating for many years before that, has a relatively simple system, although, again, as with the other collectives, not as simple as it first appears. It started operation as a collective as part of the Quebec writers' association (UNEQ) in 1982, which may help explain its sympathy for creators. Like Access Copyright, it licenses schools, universities, governments, and other institutions. Like the UK, it divides the income from all licences equally between publishers and creators. Again, as in the UK, individual contracts do not override Copibec's 50/50 split. As with Access Copyright, it has not always been smooth sailing, with publishers threatening to start their own collective in the mid 1990s. The split had been 65/35 in favour of authors, but was then reduced to the present 50/50 split. A publisher can theoretically claim more from a creator if the contract with the creator would have given the publisher a larger percentage, but Copibec does not know of such a case happening. It could also occur with respect to a creator seeking a further sum from the publisher because of the terms of the individual contract, but the extent to which this happens is not known.

There are, however, certain exceptions where the publishers get 100%. The first and most important is where the author is an employee of the publisher (see section 13(3) of the Copyright Act). The second, which apparently does not occur very often outside the academic journal sector, is where there is a total buyout of the creator's work, that is, where the author is paid a fee, assigns all royalties and other rights, including reprography rights, to the publisher, and gives up the right to royalties or further payment. Under federal law (see section 13(4) of the Copyright Act), no assignment of rights is valid unless in writing signed by the owner of the right. This is reinforced under Quebec law (see section 31 of the Quebec legislation popularly referred to as the Status of the Artist Act for the visual arts, arts and crafts, and literature), which requires rights in literary works to be specified in an agreement, in order to be effectively transferred or licensed to the publisher.

The 50/50 split applies to magazines and academic journals as well as to newspapers, although because of the number of employees and buy-outs in those sectors the publisher will end up with significantly more royalty money than the creators. Individual freelancers will get 100%, 50% or 0%, depending on the circumstances.

The split for all genres is either 50/50 or 100% to the publisher or to the author – never anything in between. It is 100% to the author in the case of the bankruptcy of the publisher and 100% if the author has kept all rights of copyright, but it appears that in almost all cases the publisher has been authorized by the author to administer the rights either by a licence or an assignment. It is also 100% to the creator if he or she has

formally taken back rights under the contract. The simplicity of the scheme probably helps contribute to a relatively low expense ratio compared to Access Copyright – 13% of royalties compared with about 21% for Access Copyright, not counting cost of proceedings before the Copyright Board.

The money collected is paid directly to the publishers and creators. It does not go through the publisher, which probably happens in most cases with Access Copyright. Affiliation with Copibec is not a requirement. If the creator should receive a cheque, then the money is paid directly to the creator. Copibec finds the addresses on its own or gets them from the publishers. The act of cashing a cheque establishes an implicit relationship with Copibec. More will be said about this aspect of Copibec's system below.

As in the UK, Copibec is able to identify through extensive sampling much of the material copied. Therefore it does not have a large pot of money to distribute in what Access Copyright calls repertoire payments. The money from that pool is divided every two years. One of the main components of the pool is interest accumulated by the collective. Once again, the system is complicated. The money is split into various pools and divided 50/50 between publishers and creators for each pool. For books, for example, payment is made to authors and publishers according to the number of titles, which provides an incentive to update repertoires. There are a number of specific rules on eligibility, such as excluding books over 15 years old as well as annual updates.

Copibec, like most collectives I have examined, is constantly adjusting and negotiating how distribution operates. The bottom line is that in most years the split is about 60/40 in favour of publishers and in some years the difference is less than that. Because newspaper publishers get 100% for the work of employees, the split will always tend to be higher than 50% in favour of publishers. This is much like the overall split in the UK.

5. SOCAN.

SOCAN (Society of Composers, Authors and Music Publishers of Canada), which was discussed in Parliament as a possible model for the new collectives that would be authorized by the 1988 amendments to the Copyright Act, was formed in 1990, amalgamating two other collectives. SOCAN administers the public performance and telecommunication rights of musical works within its repertoire. SOCAN collects payment when its works are performed in public by a 'music user', including performances on radio and television. The distribution rules are approved by the board of directors, consisting of composers, songwriters and music publishers. The collective receives over $200 million dollars a year from various types of tariffs and licences. Most fees are set out in tariffs – there are more than 20 – that pertain to different uses of music. It is a large operation. There are over 250 employees in five offices across the country. About 20,000 writer/composer (author) members received payments in 2005 and the average distribution per writer/composer member for performing rights only was over $2,500.

The revenue generated is allocated to five distribution pools (television, cable, cinema, radio, and concert) from which payments are made. Use is monitored through complete programming information received in the case of the major television networks and certain other broadcasters, and from sampling, which SOCAN calls surveying, from local and commercial radio. Credit for each work is given according to the duration of the work, the type of use, and a weighting depending on the payment by the station and for cable the audience data for each station.

The distribution of the funds is complex, but for the purpose of this report the important point is that the collective never gives the publisher more than the share that is given to the author, whether the author is an employee or not. Members can notify SOCAN about special splits between composers, writers (lyricists) and publishers, which will be respected by SOCAN, but the publisher's share will always be the same or less than the author's share.

PART E. WHAT SHOULD BE DONE?

I believe that something should be done to give greater clarity and transparency to Access Copyright's system of distribution and to provide a fairer method of distributing funds amongst creators and amongst publishers. It may be that the overall distribution between publishers and creators is also unfair. We do not know for certain how much of the money given to the publishers is being passed on to the creators. Some of the data show that the overall split may be 60/40 in favour of publishers. If that is so, then Access Copyright is in line with other collectives. But we have to take the publishers' word that payments are properly being passed on. We know, however, that some publishers, large and small, are not passing on payments and so there is understandably concern in the creator community. If the system is not changed then creators will likely continue to have doubts about whether they should support the collective.

The history of Access Copyright, the expectations of those responsible for the legislation authorizing the establishment of the collective, and the experience in other countries, all point to a way out which will ensure that the system appears fair to all, particularly to creators. If this can be done, trust in the distribution system can be reestablished.

What follows is what I believe will result in a better system and a stronger collective. The struggle between creators and publishers over the past dozen years has taken up much of the time and energy of the organization to the neglect of what will prove to be more important concerns, such as digital rights. There is at present a high level of mistrust between publishers and creators, and amongst creators in different genres as well as amongst publishers within those genres.

I was impressed with the apparent fairness of the Quebec system and believe that important aspects of it should be adopted by Access Copyright. The overall split for Access Copyright may well be about the same as that for Copibec, but the appearance of unfairness for creators in the rest of Canada is much higher than in Quebec.

1. Make the System More Transparent.

The distribution system has to be more transparent. As I stated earlier in this report, very little is written down. There is no manual for the staff describing in detail how the distribution system operates. The information given to affiliates is even sparser. There is a one-page description on the web site, but it contains very little information. In contrast, SOCAN makes available to its members on its web site an up-to-date 32-page document on distribution rules.

2. Simplify the System.

The present distribution system should be simplified. Even if it were more transparent, it would still be difficult for affiliates to grasp the details. It is far too complex. As stated earlier, part of the reason for this complexity is because the details for distribution have been worked out over the past 20 years as a series of compromises, accommodations and adjustments. It is not just publishers against creators, but also compromises, accommodations and adjustments within the creator community and amongst the different types of publishers.

3. Eliminate Most Contract Overrides.

One way to simplify the system is to eliminate the present ability to override by contract the splits determined by Access Copyright. In the early days of the collective, individual contracts could not be used to override the splits determined by the collective. Contracts cannot override the agreed splits in the UK and Quebec and in many other jurisdictions. SOCAN only allows the contracts to override the 50/50 split if it is in favour of the creator.

Publishers, in general, have the economic power to extract terms from creators. The collective, which was designed to assist both creators and publishers, should not facilitate the misuse of that power, except under clear and well-defined circumstances, as discussed below. The reader will recall the statement made by the then minister of communications, Flora MacDonald, who expected that ‘the practice which now pertains to those who provide musical performances would be expanded to other areas to be covered by copyright and would result in collectives of authors, visual artists and so forth.’ She went on to say: ‘a recognition of creators’ rights stimulates creative activity and the flow of intellectual products to our cultural industries.’ The Liberal opposition critic, Sheila Finestone, took a similar approach, stating that the aspect of the bill relating to collectives was designed ‘to improve the economic opportunities of the creators.’ Moreover, the parliamentary sub-committee report of 1985 on which the legislation was based was entitled ‘A Charter of Rights for Creators.’

The money raised by Access Copyright is raised by collective action and should not be governed by private contracts between publishers and creators. These are funds that could not as easily be raised by either publishers or creators on their own. The collective should determine how the funds are distributed.

As stated earlier, some publishers provide for the same percentage for reprography funds as for royalties. Although this might not be unreasonable if the publisher itself administers the reprography rights – as it is entitled to do – it is less justifiable when it is the collective that incurs the costs and the expense of collecting and enforcing the rights. Moreover, reprography rights are closer to other subsidiary rights, such as foreign rights and book club rights, where the split is normally at the very least 50/50 between publisher and creator and often considerably higher, especially in trade publishing, in favour of the author.

Contract overrides add complexity to the system. They also introduce an element of unfairness because it is the publisher that is interpreting the contract to determine what the contract means. Is it really a contract override? As stated earlier, in my cursory examination of the repertoires of a number of individuals, I found that many publishers thought that if they had been assigned copyright, then they had the right to 100% of reprography payments – even if the contract was executed before reprography rights were thought of as a potential source of income. For many authors, either copyright (either all or part of it, because copyright is a bundle of rights) or an exclusive licence is assigned or granted to the publisher for the ease of administering the rights. The true legal position on who should receive reprography funds is far more complex than simply stating that the owner of the copyright should be entitled to all the funds, but instead will depend on a number of factors in interpreting the contract. Authors, it should be pointed out, do not receive 100% of reprography funds from Access Copyright just because they own copyright in the work.

As stated earlier, some publishers do not pass on to unaffiliated authors the author's share of reprography royalties that the publisher receives from Access Copyright. Included in this category is one very major newspaper which takes the position that as it does not acquire authors' reprographic rights under its contracts, none of the income that it receives from Access Copyright can be for authors. The company maintains that it is up to the authors to join Access Copyright and claim it themselves.

The contract between a publisher and author would still be operative if it is the publisher who administers the reprography rights which the publisher is entitled to do because Access Copyright does not have an exclusive licence for authorizing copying. But if the authorization is administered by Access Copyright, the rights holders should be required to abide by the splits determined by the collective. In any event, it appears to me likely that a court would not permit a person, whether creator or publisher, who takes advantage of being part of the collective to bring an action against the other party to the contract for a greater share than is provided under the rules of the collective.

In my view, Access Copyright should not be concerned with interpreting contracts, but rather with distributing money based on the collectively determined splits.

4. Choose a 50/50 Split for All Genres.

Another way to simplify the process is to have a simple 50/50 split between publishers and creators, as most collectives have. The present system with various percentages is confusing and harder to administer. The current 60/40 creator/publisher split for trade books with a possible contract override provision likely gives less overall to authors than a straight 50/50 split with no override.

5. Exclude Employees of the Publisher.

Quebec provides that a publisher's employee is not entitled to share in reprography rights for works produced for the publisher. This makes sense. Salary negotiations should take into account the value of the employee's overall benefit to the publisher. I would recommend that in such cases the publishers receive 100% of the reprography payments. If they decide to share them with their employees, that is, of course, their decision.

6. Exclude Total Buyouts.

A more difficult issue is whether the publisher should get 100% if it is a total buy-out of all rights, including royalties and reprography rights. Again, Quebec gives the publisher 100% in such cases. This seems reasonable, provided that a carefully defined meaning is given to the concept of a total buyout. If the creator has given up all royalties he or she does not suffer in any way from copying. I would limit the exception to cases where all royalties and other subsidiary rights have specifically been given to the publisher, including reprography rights, and where the creator does not retain any right to receive royalties or to reproduce the work. Many ghost or other commissioned writers should therefore not expect any reprography rights, nor should I expect any further payment for the future photocopying of this report.

This might be considered unfair by some newspaper and magazine freelancers, but the answer might be to individually or collectively withhold their work if such stringent terms are demanded without adequate recompense. This is, of course, easier said than done. The consolidation of the industry gives publishers greater bargaining power than they formerly had and at the same time provides fewer outlets for authors to seek alternative publications. On balance, however, I think that this should be an exception to the proposed 50/50 split. How it can be demonstrated that there is a total buyout would have to be explored. Perhaps the publisher should have to produce a signed statement by the author giving up all future royalties and other rights or a signed contract in which the buyout language is unambiguous.

7. Publisher Bankruptcy.

One sensible provision adopted by Copibec in Quebec that assists creators is to give creators 100% of the reprography rights in the case of a publisher's bankruptcy (although this may be affected by stature). Such a rule should also apply to other defaults such as receiverships and liquidations.

8. Out-of-print Books.

Reprography rights for out-of-print books should in general be divided 50/50. At present it is 100% in favour of authors. It sounds generous, but in practice it does not add much to the creators' wallets. Most books go out of print within a few years. The publisher does not reprint until there is sufficient demand to do so and does not always immediately revert rights to the creator, and the creator does not usually take back rights where he or she is entitled to do so, hoping that the publisher will reprint the book in the future. There are cases, however, where the creator takes steps under the contract to take back all the rights and gets another publisher to publish or where the publisher declares a book to be out-of-print such that the rights revert to the author. But why should the author get 100% for the earlier edition? The publisher of those earlier editions invested in the production of that book and if that edition is copied that publisher should share the funds with the creator. So a 50/50 split makes sense for all out-of-print books. A study was made by Access Copyright at my request of the number of cases in which the system indicated that the creator would receive 100%. There were only about 6,000 such works listed and in close to half of them the publisher had gone bankrupt or out of business and so there would have been a strong incentive for the creator to take back rights. Payment of 100% to the creator would have been automatic if the recommendation of the previous section on Publisher Bankruptcy was in force.

9. Periodicals.

Revenue from periodicals should also be shared 50/50 between publishers and creators, whether the periodicals are magazines or academic journals. There is no reason why copying of academic journals should automatically result in 100% to the publisher given that copyright ownership should not necessarily govern reprography royalty shares. When the collective was first formed it was thought that academic journals would be treated the same as other periodicals. This subsequently changed. Perhaps it was understandable in the late 1980s to give 100% to the publishers for academic journals when many publishers were in serious financial trouble and this was a way of helping the smaller publishers who published most of the Canadian academic journals. Today, however, many, if not most, of the so-called academic journals – particularly for professionals – are published by the large multi-national firms, whose balance sheets are not suffering as were those of the small academic presses in Canada in the 1980s.

The argument is often made that it is academics that have secure positions and are well paid who would be getting the money, but if there is to be a means test then very little money would be going to the large multi-national firms. Moreover, it is often the graduate student or the post-doc or the private scholar that publishes in the academic journals. Creators who wish to do so can easily donate their royalties to the publishers or instruct Access Copyright to give the funds directly to the publisher.

Issues relating to foreign authors would have to be addressed if non-affiliates are included in the distribution. The UK has devised a system – described in an earlier section – that could be examined.

10. Distribution of the Creator Repertoire Pool.

The present system of distributing the creators' repertoire pool, which accounts for about 85% of all of the funds distributed directly to creator affiliates, is to divide the amount equally amongst all of the creator affiliates. In 2005, $3,212,468 out of an overall $3,789,278 distributed to creator affiliates was divided in this way. Equal division cannot be right. A person who has one published letter to the editor – to give an extreme example – now receives the same amount as a person with a substantial body of work. Each gets about $500 a year from the fund. No other collective that I am aware of operates in this way.

The idea of paying creators a small 'reward' for making their repertoire available for copying was first discussed in the early 1990s. The sum of $50 was proposed. McCarthy Tétrault gave an opinion in 1992 that 'the arbitrary payment of $50 per affiliate regardless of volume of copying is not in the best interests of any affiliate whose works are regularly copied.' Nevertheless, the concept of payment of the repertoire fund gained ground. A study by Ernst and Young in the early 1990s expressed concern that too high a payout would attract people to the collective whose work is never copied. [redacted] recommended that it be limited to 5% of licensing money, but the pot for repertoire purposes kept growing.

I believe – as have other consultants in the past – that as much as possible royalties should be distributed in accordance with data reflecting potential use, if not actual copying. Such an approach influenced the board to reduce the amount allocated directly to the repertoire fund through some of the models from 20% to 5%. However, a large proportion of revenue continued to be allocated to the repertoire pool from the many licences which do not identify works copied. Revenue for unidentified rightsholders were also allocated to the publishers' pool as well as to foreign RROs for distribution to foreign creators and publishers. The affiliated publishers, as we saw, devised a system to distribute their share of the funds according to data such as sales, but the creators continued to distribute it per capita. Over the past few years, attempt after attempt was made to devise a workable and sensible way of distributing the funds from the creators' repertoire pool. Many persons, including [redacted], tried their hand at a workable scheme. A report by consultant Benoît Gauthier suggested the compromise

position that half of the fund be distributed per capita and half based on the size of the creators' repertoires.

Here is my proposal. The payment from the repertoire fund should be based on two proxies for actual copying. One is the size of the affiliate's repertoire and the other is the amount of money paid to the creator by Access Copyright based on full reporting in the past. I would exclude payments made by sampling because that would give too great an advantage to sampling done in certain sectors, further accentuating the lottery-like effect of sampling.

The system could work as follows:

a. Every affiliate who has any published material that is included on the rights management system would get 1 point.

b. A person with *either* three hundred published pages *or* who has received at least a $25 payment – currently the minimum payment by Access Copyright – for full reporting over the past three years would receive 4 points.

c. A person who has three hundred published pages *and* has received a $25 payment for full reporting over the past three years would receive 8 points.

d. A person who has 1000 published pages *or* has received $100 for full reporting over the past three years would receive 12 points.

e. A person who has 1000 published pages *and* has received $100 for full reporting would receive 16 points.

And so on, with the next two levels being 5,000 pages or/and $500 (20 and 24 points) and the top two levels being 10,000 pages or/and $1,000 (28 and 32 points). The maximum payment would therefore be based on 32 points. The amount would vary each year depending on the amount of money in the creators' repertoire pool. This proposal will not, of course, meet with universal acceptance. Persons who have a small repertoire and do not receive anything from Access Copyright except the repertoire payment would, understandably, probably like to keep the present system.

There would therefore be nine categories. I did a quick calculation, arbitrarily assuming for the purpose of this analysis that there were 1,500 creator affiliates in each of the first two categories, 1,000 in the next two, 500 in the next, 400 in the next, and so on with 100 persons in the highest category. The value of a point would therefore be about $50. So persons with 300 published pages who have also received $25 over the past three years would be in about the same position as they are now, receiving $400 a year, whereas persons in the highest category with the most substantial body of work and who have received $1,000 in full reporting would receive $1,600 a year from the repertoire pool. A person who has fewer than 300 published pages and who has not received any full-reporting funds would receive only $50. Because the extent of a person's repertoire is not

presently known, Access Copyright cannot determine how many would be in each category. If the repertoire pool were extended to persons who were non affiliates, the payments would, of course, be less than those estimated above.

11. Measuring the Extent of a Creator's Work.

How would the scheme measure the extent of a creator's work? In my view, it should be according to the total number of pages, whatever the genre. A page of a novel would be equal to a page of a non-fiction work or a page in a magazine or a scholarly journal or an article in a newspaper or a poem or a visual image. Who can say what is worth more in effort? A three page note in a scientific journal may be the culmination of five years of work. Some novels are written in a month, some take years.

The simplicity – although with rough edges – of calling a page a page is an attraction. Another is that many writers work in a number of genres and the number of pages can be added together. They are now not separated in the rights management system. All that would be required is to enter the number of pages for each item.

There will be a tendency to want to break down the page counts into different genres, particularly in the light of the recent study filed with the Copyright Board by Paul Audley and Douglas Hyatt showing that different genres have different values per page copied in the K-12 sector. In my view this would add an unnecessary level of complexity to the distribution of the repertoire payments. It is better to keep the distribution relatively simple.

Rules would have to be established on what should count in the total. Material that is in the public domain and is not subject to copyright should not, for example, be counted. Government reports should in general not be counted, just as they are not under the Public Lending Right scheme. There could be a limit on the age of the publication if it is to be counted for purposes of repertoire distribution. Quebec has a limit of 15 years, which favours the more active authors. Perhaps it should be a longer period, say, 30 years. Of course, the work would be eligible for reprography payments for full reporting or based on sampling, whether or not it was eligible for repertoire payments because of its age. As in Quebec, annual or periodic updates of a work should not be counted as a separate work. Perhaps only articles of, say, two pages or more need to be listed in the rights management system, but estimates of, say, a total of 150 pages of shorter items might be accepted, subject to the possibility of later requiring details.

A difficult question is whether material in which the publisher has 100% of the rights should be counted in the total – this report, for example, or work done by an employee. I do not think it should be because in such a case the writer would in theory have been compensated for giving up reprography rights, whereas many freelance writers would not have been.

Obviously, considerable work would be required to refine this aspect of the system.

12. Should the Distribution of the Repertoire Payments be Restricted to Creator Affiliates?

I believe that limiting the distribution to creators that are affiliated with Access Copyright is not desirable. The system should assist all creators in Canada. It is likely that only a minority of creators are affiliates of Access Copyright. There are only about 7,000 creator affiliates, whereas about 14,000 creators receive payment from Copibec in Quebec each year.

Why creators do not affiliate with Access Copyright is a mystery. I suspect that most creators are not aware of the present benefit of affiliation – a no-questions-asked benefit of about $500 a year – whether there is a record that one's work is copied or not. I do not believe, as one consultant to Access Copyright asserted in his report, that they have 'willfully chosen' to remain outside of Access Copyright. The various writers' organizations in Canada know the value of affiliation and urge their members to sign up, so their members are probably well represented in the total number of current affiliates.

In my view, Canadian non-affiliates creators should be eligible for repertoire payments. Access Copyright keeps a record of the publications of creators whether they are affiliates or not, but non-affiliates cannot enter the non-public section of the web site and therefore cannot change the details of their repertoire, as affiliates can. If they were eligible for direct repertoire payments there would be an incentive for them to become associated with Access Copyright in order to add titles and the number of pages in a work, assuming the repertoire system suggested above was adopted.

I would not extend the publishers' repertoire payments to non-affiliates. Publishers tend to be more aware of the business implications of becoming affiliated than do creators.

13. Should there be Direct Payment to Non-Affiliates?

I agree with Access Copyright that there should be direct payments to non-affiliates in Canada, just as there are now direct payments to affiliates. They should receive payment for full reporting and, in the case of creators, from the repertoire fund.

The Quebec collective, Copibec, as we have seen, distributes directly to all persons who are eligible to receive funds. The funds for creators do not go through the publisher. Copibec considers all recipients of these cheques to be associated with Copibec. It does not use the word 'affiliation' and does not require a special application by the creators, as Access Copyright does. That collective claims that it represents persons who receive and cash cheques. The UK collective distributes the royalty pool equally between the publishers' and the creators' organizations, each of which distributes directly to the persons or companies that should receive the royalties.

The advantage of the Copibec and UK system is that there is greater transparency and more trust in the system by creators. Creators are not left wondering whether royalties collected by the publisher have been passed on to them.

14. Are there privacy concerns?

Some argue that the publisher cannot give addresses of creators because of privacy concerns under PIPEDA, the Personal Information Protection and Electronic Documents Act, which was enacted by the federal government in 2000. Access Copyright had an opinion to this effect five years ago, which stated baldly: 'A Canadian publisher needs to obtain the consent of the creator before disclosing to Access Copyright the creators' contact information.' I am not an expert on the Act, but I am not convinced that this is a reasonable interpretation of the Act, although it is certainly a possible one. Access Copyright needs the business address only to be able to send the creator a cheque. Section 5(3) of the act says that 'an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.' Would not a reasonable person consider it 'appropriate in the circumstances' to disclose to Access Copyright the business address of the creator for the purpose of payment? Recent interpretations of PIPEDA seem to broaden the Act by looking at 'what a reasonable person would consider appropriate' (see *Turner v. Telus* 2005 FC 1601). Access Copyright might consider asking the Privacy Commissioner for her opinion on this matter.

It should be noted that publishers in Quebec give Copibec the addresses of their creators. Another technique for getting the addresses – used by Copibec when the publisher is not willing to give the addresses for privacy or other reasons – is not to give the publisher its cheque until the publisher gets the consent of its creators to supply the creators' business addresses or, I would add, statements by the creators that they wish their payment to be paid to the publisher. If Copibec does not have a creator's address, it does not send the publisher its cheque, saying that 'the file is incomplete.' This technique certainly speeds up the process of getting addresses.

Access Copyright could adopt the Copibec technique and refuse to pay the publisher for the publisher's and creator's share for the work in question until either the creator consents to providing the required information or informs Access Copyright that he or she wishes to have the publisher administer the funds. A further technique would be to send to the publisher the creator's cheque payable only to the creator. Still another is that Access Copyright informs both creator and publisher that royalties will be retained until distribution instructions have been received.

Another approach – one that is used in France – is to inform the creator that money has been sent to the publisher, but this faces the same issue of getting the creators' addresses. Still another technique – used in Sweden – is to put on the collective's web site all works that have been copied, but this seems to be an even greater invasion of privacy than

getting addresses from the publisher, resulting in broadcasting the information to the world.

Sending cheques would add to the administrative costs of Access Copyright, but if direct deposit of cheques were done, as is now being studied by the collective, and if explanatory communication were by e-mail, the overall cost might not be very much greater than at present. Non-affiliates would be expected to acknowledge and satisfy Access Copyright that they are the persons entitled to payment. Moreover, it could be made clear that cashing the cheque authorizes Access Copyright to make the person's repertoire available to foreign collectives, unless that person indicates otherwise.

It is now the board's policy to encourage publishers to get consent to disclose this information in all new contracts. This, however, would take many, many years before direct payment could be done as a matter of course for most contracts.

15. Should Creators have to apply to become an Affiliate of Access Copyright?

In the early stages of the history of Access Copyright, requiring affiliation was a good way of building up the collective's repertoire and convincing licensees that the collective had something substantial to offer. But today the repertoire has been built up and money is now going to creators who are not affiliates, via the publishers. Copies are being made by users of works created by non-affiliates and money is now sent to them via the publisher. As stated earlier, one of the problems with the present system is that it is the publisher who interprets the contract and has an interest in interpreting it in the publisher's favour.

Formal affiliation should no longer be necessary for creators, just as it is not necessary in Quebec and in the UK. If cheques were sent directly to the creators then it could be expressly stated that the cashing of the cheque recognizes a relationship with Access Copyright. Perhaps the category of 'participant' should be substituted for the term 'affiliate'. If the 'participant' gives the further information required by Access Copyright, the person would have the right to manage his or her repertoire on the rights management system.

Making all creators who are entitled to direct payment participants helps solve the transparency issue. They will have access to knowledge about what is happening to works in which they have an interest. It will also tell them whether the publisher is claiming 100% of the amount.

As stated earlier, publishers tend to be more aware of the business implications of becoming affiliated than do creators and so I would require formal affiliation for publishers to receive repertoire payments, although they should continue to receive direct payment for works copied.

16. Rethink the Distribution to Publishers from the Repertoire Fund.

The publisher's repertoire fund is now distributed according to annual sales of publications, as disclosed by the publishers, and divided according to a point rating system. In 2005, about $2,500,000 was divided amongst the affiliated publishers. The categories were as follows:

Sales category		Points
Up to	$1,000	0
1,001	$50,000	1
50,001	$100,000	2
100,001	$500,000	6
500,001	$2,500,000	10
2,500,001	$10,000,000	20
10,000,001	$100,000,000	40
Over	$100,000,000	55

There are eight categories. Publishers who declared sales of up to $1000 are given a flat payment of $25. All others are given points according to annual sales income (excluding grants) as indicated above. All points are totalled and divided into the balance of money available for distribution. Each point was worth about $750 in 2005. So a publisher in the highest category would receive slightly over $40,000 a year from the publishers' repertoire fund. Eleven publishers were in the top category in 2005.

I did not hear widespread concern expressed amongst the publishers in the system, although there was some grumbling from some publishers. I am concerned that it does not favour the smaller independent publishers as much as it should. When the system was devised, a representative on the board from a small publisher had recommended that there be only four divisions, rather than the present eight. A small publisher with just under $100,000 in sales in 2005 received only $1,500 a year from the repertoire pool, but a large publisher received about $40,000.

Although there is presently considerable adjustment for size as the firms get larger, in my view there should be even greater compression and perhaps a cap on the amount received from the repertoire pool so that the funds can be spread more widely. The large publishers are in many cases the multinational firms, compared to the small Canadian-owned firms in the lower categories. In my opinion, the smaller firms should be weighted more heavily than they are now. One of the purposes of the copyright legislation that permitted the establishment of collectives in the literary field was to assist the creative community. The smaller publishers play a very important role – perhaps a disproportionate role – in fostering Canadian culture.

Why not place the cap at the level of those with sales of, say, over $10 million a year? This would result in the firms with the largest share receiving $15,000 from the repertoire

pool, not counting any other amounts for affiliated firms who also receive repertoire payments. Moreover, four of the eleven in the highest category in 2005 were newspapers and newspapers are not copied to the same extent as other genres, so the strict sales category is not a true reflection of copying. This impression is confirmed by the recent study by Paul Audley and Douglas Hyatt filed in the tariff hearing before the Copyright Board, indicating that newspapers made up only a very small proportion of the extent and value of copying in the K-12 sector.

There is already considerable 'progressive taxation' in the distribution to publishers from the repertoire fund. In my view, it should be even greater.

17. Review the Models Every Few Years.

I believe that all members of the board agree that more attention should be paid to periodically reviewing the models, which are the basis for distribution. Each model should be looked at every few years on a rotational basis.

The recent Audley and Hyatt study of the value of copying in the K-12 sector sheds new light on distribution issues and will have to be taken into account in formulating the percentages allocated to different genres in the various models. Whether the analysis is applicable to other licences is a question I leave to others to debate. Moreover, decisions on this issue should wait until it is known how the Copyright Board deals with the study.

18. Visual Artists.

Distribution to visual artists has been a matter of controversy over the years at Access Copyright and at Copibec. How does one compensate visual artists for the reprography of their works? How does one value the copying of a picture compared to a page of text? How do you identify whether the work of a visual artist has been copied? Copibec recently spent several years going through magazines published in Quebec and identifying works by visual artist. They allocated 3% of their distribution funds (including monies received from foreign RROs on behalf of visual artists) for visual artists, dividing them into three bands: persons with one publication; two to six publications; and more than six publications. Artists from across Canada were invited to register for receipt of these royalties. The UK's Copyright Licensing Agency (CLA) sends a percentage – currently 8% – of their distribution funds to another body, the Design and Artists Copyright Society (DACS) to distribute.

I understand that one of the problems with adopting the UK approach is that although there are a number of associations in Canada dealing specifically with visual arts there is not at present a national organization for visual artists that could handle such a distribution to visual artists. If the funds were made available, however, it may be that the visual artists and their organizations would be able to set up a body to administer the funds. Beyond the agreement currently being formalized with CARCC (Canadian Artists

Representation Copyright Collective), some professional photographers and other individual artists at present do claim repertoire payments from Access Copyright. Perhaps many more should do so. This would require raising awareness amongst visual artists who are not members of the existing visual artist collectives and inviting them to participate in Access Copyright. Many more would, of course, receive payments under the repertoire scheme suggested for creators in this report. This is clearly an area which requires further study.

19. Using Funds for Social and Cultural Purposes.

Some collectives use a percentage of funds for social and culture purposes. At present, Access Copyright supports various endeavours such as conferences relating to copyright, but does so on an ad hoc, case-by-case basis.

Neither Copibec in Quebec nor the UK collectives provide a set amount for social and cultural purposes, but CAL and many other collectives do. I am impressed with the Australian system. Only 1% of CAL's annual revenues go into its cultural fund, but it appears to be used to do excellent work and garners positive publicity for the collective. In the most recent annual report, the chair of the board of the agency (CAL) devoted a third of his comments to the fund, stating:

> In 2006 we heralded the 10th anniversary of CAL's Cultural Fund – the philanthropy fund established in 1996 to support research, education and cultural development projects…
>
> We believe the Fund will always have a leadership role in collaboration with new Australian creative projects that might otherwise struggle for support.
>
> This year we were proud to support three innovative Centre for Youth Literature's Insideadog website; overseas internships for journalism students at Charles Sturt University; and the Artists in the Black Indigenous Education Project for the Arts Law Centre of Australia.
>
> Many other worthy projects received Cultural Fund backing, with the total number of grants around $745,000. I am particularly proud of our new scheme the Professional Development fund, providing funds to creators wanting to improve their skills and expertise.
>
> Recognition that individuals, wherever they live and work, should be able to apply for simple and practical grants is another indicator of how CAL relates to members on a very real level.

It is a fund that deserves to be studied and –in my view – copied by Access Copyright.

20. Changing the Governance Structure.

Access Copyright has been seriously considering changing its governance structure. I believe that it is desirable for it to do so. The board is too large. It has eighteen board members – more than most similar non-profit boards, including several with which I am associated.

Although the governing structure may not be directly within my terms of reference, I believe that its structure has contributed to the present problems. It potentially pits 9 creators against 9 publishers. The present distribution system, which I have had trouble understanding, results from the many compromises and adjustments that have been made over the years. Although the Access Copyright board follows the SOCAN model which also has 9 composers and writers and 9 publishers as directors, the Copyright Licensing Agency in the UK has only 13 directors and Copibec in Quebec has only 10.

I am impressed with the Australian collective CAL, which has only 9 members in all, 3 representing writers, 3 publishers, and in addition there are 3 independent directors chosen by the board. The non-profit board for the Mutual Fund Dealers Association of Canada has 6 independent directors on a 12-person board. The independent directors – I am one of them – hold the balance between the small and large dealers and chair the major committees.

The smaller the board, the more that board members will have to represent broader interests and not just the special interests of their own constituency. I believe that a smaller board would be desirable, but it is of greater importance that some independent persons be added to the board.

My recommendation is that the Access Copyright board be composed of 4 persons representing the publishers, 4 representing the creators, and 4 independent directors, making a board of 12 persons, plus the executive director, making a total of 13 members. I believe that it would be desirable to include the executive director as a member of the board, as is the practice in many other non-profit bodies. A similar board composed of 16 persons would also be a decided improvement over the composition of the present board. Even a 19 person board which included six independent directors would, I believe, be better than the present structure.

Perhaps at a later time – if it becomes apparent that the present system cannot bring about necessary changes in the manner in which funds are distributed – a more drastic restructuring will have to be considered. This could include adopting the UK model, whereby Access Copyright allocates funds to publishers' and a creators' organizations, which in turn distributes the funds to publishers and creators.

PART F. CONCLUSION

The above recommendations should not be seen as cast in stone. Nevertheless, they have been designed to be considered as a package which will make the system simpler to understand and administer, more transparent, perhaps more cost efficient, and fairer to all of the participants.

The changes will not dramatically increase the funds going to creators as a whole – indeed, creators might not do as well under my recommendations as they do now – but the proposed changes will improve the present system. Distributing the creators' repertoire pool beyond the present affiliates and basing it on the likelihood of being copied will, of course, decrease the payments to many affiliates who now get an equal payment. But the collective should not be considered a private club – rather, it should operate to assist the entire creative community.

The current affiliation agreements, as have earlier versions, clearly state that the rules respecting distribution can be changed by the board. Paragraph 3.1 of the publishers' agreement states: 'All payments that The Canadian Copyright Licensing Agency makes to you will follow the Revenue Distribution Guidelines. The current version of these guidelines is contained in Appendix C, but they may be changed by our Board of Directors.' Paragraph 9.4 adds: 'Our Board of Directors may amend Appendices B and C.' It is, of course, possible to make any new rules prospective only, but that would only add to the present confusion, making some of a publishers' and a creators' works subject to one set of rules and other works subject to another set of rules.

All members of the board should examine carefully the distribution rules that affect other groups apart from their own. The publishers should be concerned about the distribution to creators, and creators should have an interest in the distribution to the publishers.

Members of the board – I hope – will keep an open mind on the issues that I have discussed and not take a categorical, non-negotiable position before they have carefully considered the recommendations as a whole. I believe that the entire system should be rethought, rather than continuing to engage in piecemeal tinkering, which will continue to make the system unduly complex and lacking in transparency. If a reasonable position is not accepted by the board, then there is a danger of the collective coming apart – to the disadvantage of all of the participants.

I have found this to be a very difficult assignment, but I have found the task challenging and interesting because of the many factors that influence the system of distribution. As I told the members of the distribution committee at the last regular board meeting, I hope that a future historian of Access Copyright will say that I have produced a set of sensible recommendations. I hope that the writer will not say, 'but it is a shame that they were not implemented.'