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COPYRIGHT'S FACELIFT: An Analysis of the New Look of Copyright Following the Music Modernization Act and the United States-Mexico-Canada Agreement

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COPYRIGHT’S FACELIFT: An Analysis of the New Look of Copyright Following the Music Modernization Act and the United States-Mexico-Canada Agreement

Octavious A. Buiey, Jr.*

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I. INTRODUCTION

There is but one constant in the music industry, and that is the industry will change. The year is now 2005. What is your main method of consuming your music? If you are choosing a legal method of consumption, you likely are driving to your local record store or supermarket, purchasing a compact disk (CD) and then placing said CD into your CD player. Fast-forward five years, the year is now 2010. You want to listen to Rihanna’s most recent release. How do you go about doing it? We are now far removed from the days of portable CD players, so you sync your iPod Nano to your iTunes account, make the purchase, and you now have Ri-

hanna's latest album in your possession. However, not even iTunes could withstand the inevitability of change in music consumption. The year is now 2018. As you await the release of your favorite artist's newest project, you are likely not thinking about how you are going to pay specifically for that album. Rather, your only concern is whether the album will be on your streaming platform of choice, as you now access all of your music through your monthly subscription to a streaming platform. This tells us that while we are unsure of exactly where music consumption is headed next, history says that we will not be where we are right now for an extensive period of time.

While we have all but accepted the inevitability of change in music consumption, lawmakers in America and abroad have not been as willing to make changes to the copyright laws that govern the distribution and reproduction of one's creative rights in their artistic works. That is, until recently, when both the United States Senate and House passed the Music Modernization Act (MMA),¹ and when the United States, Mexico, and Canada entered into the United States-Mexico-Canada Agreement (USMCA), an updated version of the North America Free Trade Agreement (NAFTA).²

The MMA was the first of its kind in over two decades.³ It is being lauded as "the biggest attempt at a music copyright overhaul in decades."⁴ In short, the bill revamps Section 115 of the U.S. Copyright Act by combining three separate pieces of legislation into one.⁵ The three moving parts of the bill are as follows: (1) The MMA (Music Modernization Act), which streamlines the music licensing process, making it easier for right-holders to receive their compensation when their music is streamed on digital platforms; (2) The CLASSICS (Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society) Act, which sets

¹ Music Modernization Act, S. 2823, 115th Cong. (As passed by Senate, Sept. 19, 2018).

² United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Sep. 30, 2018.

³ Bill Rosenblatt, *The Loopholes Closed by the Music Modernization Act*, FORBES (Oct. 11, 2018, 3:26 PM), <https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/#2583578c7272>.

⁴ *Id.*

⁵ *Id.*

out to justly compensate artists for their pre-1972 recordings; and (3) The AMP (Allocation for Music Producers) Act, which improves royalty payouts for producers and engineers from SoundExchange when their recordings are used on satellite and online radio.⁶ Notably, this portion of the bill marks the first time that music producers have been mentioned in copyright law.⁷ The USMCA has commonly been referred to as “NAFTA 2.0.”⁸ As a whole, the purpose of the Act is to make North America more competitive in the global marketplace.⁹ Chapter twenty of the Act directly addresses the agreements that have been reached pertaining to intellectual property rights within the participating countries.¹⁰ The modifications made to the intellectual property provisions are notable as they will change the landscape for patent, trademark, and copyright owners.¹¹ While the United States was already in compliance with much of the Act, Canada will have to make drastic changes to its current laws governing copyright, which will undoubtedly impact Canada’s music market.¹²

While the copyright laws governing the United States and Canada have been written similarly, the enforcement of said laws is where the two countries differ. The music markets for both countries are also quite similar with regards to size, accessibility, and modes of consumption.¹³ This note will provide a historical look at the progression of copyright laws in each country, and it will also

⁶ Dani Deahl, *Senate Passes Music Modernization Act*, THE VERGE (Sept. 18, 2018, 7:08 PM), <https://www.theverge.com/2018/9/18/17876660/senate-passes-music-modernization-act>.

⁷ *Id.*

⁸ John D. Schulz, *United States-Mexico-Canada Agreement (USMCA): More cross-border “curveballs”*, LOGISTICS MANAGEMENT (June 5, 2019), https://www.logisticsmgmt.com/article/united_states_mexico_canada_agreement_usmca_more_cross_border_curveballs.

⁹ Jen Kirby, *USMCA, the new trade deal between the US, Canada, and Mexico, explained*, VOX (Oct. 2, 2018, 2:30 PM), <https://www.vox.com/2018/10/2/17923638/usmca-trump-nafta-trade-agreement>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Mark V. Campbell, *The Unsustainable Global Success of Canada’s Music Market*, THE GLOBE AND MAIL (Apr. 19, 2017), <https://www.theglobeandmail.com/arts/music/the-unsustainable-global-success-of-the-canadian-music-world/article34748882/>.

provide a comparative look at the music copyright landscape of the countries following the implementation of the MMA and the USMCA. The first part of the note will provide the procedural and historical background of copyright laws in both the United States and Canada. The note will then transition into a more in-depth historical analysis of the United States' copyright laws, including a discussion about the successes and shortcomings of America's laws and potential remedies for said shortcomings. The note then transition into a similar historical analysis of Canada's laws. The next part of the note will be an analysis of the music copyright landscape following the implementation of the MMA and USMCA. This analysis will look at the effectiveness of the Acts with regards to how they address the aforementioned shortcomings of America's copyright laws. I will then do the same for Canada with the USCMA. The note will conclude with an opinion on which country's current legal setup is most suitable for the digital era of music consumption; and which country's laws are most favorable to individuals who own a copyright in their musical creations. As both the MMA and USMCA are in their early stages of implementation, it is impossible to tell whether they will be effective. The goal of this note is to merely analyze the language of the legislation and then compare it to the past shortcomings of copyright.

II. BACKGROUND

A. *AMERICA'S ROAD TO THE MUSIC MODERNIZATION ACT*

Dating back to the time of colonialism, America has a long, storied history of copyright laws.¹⁴ The First Congress implemented the copyright provision of the U.S. Constitution in 1790.¹⁵ The Copyright Act of 1790, An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies, was modeled on the Statute

¹⁴ Ass'n of Research Library, *Copyright Timeline: A History of Copyright in the United States*, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.W8ONJBKjOQ> (last visited Oct. 14, 2018).

¹⁵ *Id.*

of Anne (1710).¹⁶ It granted American authors the right to print, re-print, or publish their work for a period of fourteen years and to renew for another fourteen.¹⁷ The law provided an incentive to authors, artists, and scientists to create original works by providing creators with a monopoly.¹⁸ In 1831, the Copyright Act was revised, and the revisions extended copyright protections to twenty-eight years with the possibility of a fourteen-year extension.¹⁹

In 1909, the Copyright Act was once again revised.²⁰ This time the revision was made directly out of Congress' expressed desires to extend copyright protections to give musical composers an adequate return for the value of their composition.²¹ In passing this revision, Congress addressed the difficulties of providing just compensation for creators of music while also balancing the consequences of providing too many copyright protections, which could potentially lead to the creation of oppressive monopolies.²²

Following the revisions set forth in the 1909 Copyright Act, states were tasked with passing laws that adequately protected the rights that creators had in their sound recordings.²³ Throughout the twentieth century, states began to patch together laws governing sound recordings; however, those laws were not comprehensive and failed to adequately compensate artists whose works were published prior to 1972²⁴ These incomprehensive sets of laws had a specific impact on marginalized communities such as Black Americans, Hispanic Americans, and women, as these groups were, in many cases, not granted the protection they needed to prevent the unlawful and uncompensated dissemination of their creative

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Ass'n of Research Library, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

works.²⁵ These laws have also run into an issue of being antiquated, and not applicable to the digital era of music.²⁶

With streaming giants such as Spotify, Apple Music, and Tidal providing a global platform where artists make their creative works available for mass consumption, copyright offices and distributors are faced with the struggle of correctly licensing each piece of work and providing fair compensation to the deserving parties.²⁷ Copyright laws prior to the MMA failed to produce a system that could efficiently and effectively license sound recordings, which has led to many artists in the digital age not getting the credit or compensation that they deserve.²⁸ However, in 2017 the 115th Congress of the United States sought to remedy the aforementioned shortcomings of America's music copyright laws.²⁹ Led by Orrin Hatch, a Utah Senator and a musician in his own right, the bill grew out of bipartisan support from both sides of the aisle in the Senate and the House, as well as the outside support of music executives and musicians.³⁰ The coalition wanted a comprehensive, federal overhaul of the nation's copyright laws.³¹ Congress drafted this landmark piece of legislation to do just that.³² Later sections of this note will provide an in-depth analysis of the legislation, and will provide a well-founded opinion on whether the final legislation succeeded in its original purpose of being the overhaul that music creators, executives, and protectors of copyright desperately wanted.

B. *NAFTA AND ITS IMPLICATIONS ON INTELLECTUAL PROPERTY*

NAFTA, which was adopted into law by the United States, Mexico, and Canada in 1994, is widely recognized as the first international trade agreement that explicitly protected intellectual

²⁵ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. OF GENDER, SOC. POL'Y, & THE L., 365, 366 (2008).

²⁶ Rosenblatt, *supra* note 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Rosenblatt, *supra* note 3.

property rights.³³ Though subsequent agreements were reached with regard to specific areas of intellectual property, NAFTA was seen as the blueprint for intellectual property laws for the three participating nations and for the rights of intellectual property holders in these countries.³⁴ Many of the provisions of NAFTA echoed the foundational sentiments laid out in the Constitutions of the participating nations.³⁵ In drafting the trade agreement, the expressed wish of the involved parties was to “provide nationals of other NAFTA countries with adequate and effective measures to protect and enforce intellectual property rights while ensuring that such measures do not become barriers to legitimate trade.”³⁶ In specifically addressing copyright issues, Chapter Seventeen of NAFTA provides, in relevant part, holders of copyrights in sound recordings could prohibit the rental of their creations by others and provided a remedy for these types of violations.³⁷

NAFTA was significant in that it was the first of its kind. However, the broad language of the agreement left room for state actors to abuse the intellectual property rights of their citizens, which in turn has defeated the over-arching purpose of the agreement.³⁸ Canada, with its robust creative industries, has consistently found itself atop lists of the most significant abusers of copyright law.³⁹ While Canada is among the most developed nations in the world, it seemingly lacks adequate enforcement mechanisms for its IP laws. Furthermore, Canada has shown that its court system does not sufficiently provide its citizens with an appropriate arena for recourse.⁴⁰

³³ John Terry, Lou Ederer & Jennifer A. Orange, *NAFTA: The First Trade Treaty to Protect IP Rights*, TORYS LLP, http://www.buildingipvalue.com/05_XB/052_055.htm (last visited Oct. 14, 2018).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Phil Kerpen, *New NAFTA Must Stop Canada's Intellectual Property Abuses*, WASH. EXAMINER (Aug. 16, 2018, 12:00 AM), <https://www.washingtonexaminer.com/opinion/op-eds/new-nafta-must-stop-canadas-intellectual-property-abuses>.

³⁹ *Id.*

⁴⁰ *Id.*

Similar to the United States, the music industry of Canada has not been immune to the influx of digital retailers and streaming platforms. Thus, until the USMCA is fully implemented, the country will likely continue to struggle with creating an effective licensing mechanism that efficiently provides protections to those who own a copyright in their musical creations.⁴¹

With hopes of addressing the loopholes around intellectual property protection, as well as many of the other failures of the original NAFTA agreement, the United States, Mexico, and Canada signed and entered into the USMCA agreement on October 1, 2018.⁴² The specific provisions governing copyright are seen as a win for the digital music market of the United States, and afford heightened protections to copyright owners in Canada.⁴³ The lingering question is whether this treaty will be enough to address the myriad of complaints that Canada has received from its citizens and abroad. This note seeks to answer that question and provide insight as to what Canada can do in the future to continue to restructure its intellectual property landscape, so that it is able to adequately serve the profitable creative industries that are present in the country.

III. ANALYSIS

A. *THE LAW AND MISIMPLEMENTATION OF COPYRIGHT IN AMERICA*

In my opinion, there are two situations in which laws can go poorly: (1) when the law itself is written poorly; and (2) when the law is not properly effectuated. In examining the rise and fall of copyright laws, we will be dealing with both of these scenarios. The governing laws were written in a manner that allowed for the loopholes to be taken advantage of, and because the loopholes were so gaping, it resulted in a faulty implementation of the law on the ground. This paper will primarily focus on how these issues have been magnified in the current digital era of music and the internet. However, to properly understand the current state, it is im-

⁴¹ *Id.*

⁴² Kirby, *supra* note 9.

⁴³ *Id.*

portant to also have an understanding of the historical trajectory of the laws, and issues that lawmakers have attempted to remedy in the past. Though the list is not exhaustive, I would like to focus on three distinct flaws with American copyright law that have seemingly bewildered both lawmakers and creators alike throughout time and have been magnified given the current state of technology: (1) copyright laws have not always served their intended purpose of furthering the interests of the public; (2) the broad manner with which the laws were written has stifled creativity among artists; and (3) the laws are so vague that in many cases the only route to receiving just compensation has been through litigation, which favors individuals and entities with disposable funds.⁴⁴

1. AMERICAN COPYRIGHT LAWS DO NOT FAVOR THE PUBLIC

The purpose of U.S. Copyright Law is to “stimulate artistic creativity for the general public good;” however, there is presently a problem where the want of the public to copy and reproduce artistic works conflicts with the media industries interest in limiting access to said work.⁴⁵ While some will argue that the public domain is already quite robust, The United States’ expansive copyright terms have played a critical part in stifling public accessibility to original works of authorship. For example, look no further than Disney. When the United States’ first copyright laws were enacted, authors of original works were only granted a fourteen-year term of ownership over the work.⁴⁶ Presently, an author can enjoy century-long ownership.⁴⁷ While Disney has played a crucial role in where we are today, which will be discussed later in this note, there was a shift towards more stringent laws in the century leading up to the creation of Mickey Mouse. In the Copyright Act of 1790, the original fourteen-year term was supplemented with an

⁴⁴ New Media Rights, *What are the major criticisms of the copyright laws in the US?*, https://www.newmediarights.org/business_models/artist/what_are_major_criticisms_copyright_laws_us (last modified Jun. 28, 2017, 4:46 PM).

⁴⁵ *Id.*

⁴⁶ Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, ART L. J. (Feb. 15, 2014), <https://alj.artpreneur.com/mickey-mouse-keeps-changing-copyright-law/>.

⁴⁷ *Id.*

option of renewal that granted the author another fourteen years.⁴⁸ By 1831, the law was changed to twenty-eight years with a fourteen-year renewal; and by 1909, authors had twenty-eight years in their original term and an additional twenty-eight years for a renewal.⁴⁹ Disney's first mascot, Steamboat Willy, was created in 1928.⁵⁰ Under the law, the character had a full term of fifty-six years with the renewal included, and Disney and its characters should have been in the public domain in 1984.⁵¹ That has clearly not happened. With the impending expiration of its original term, Disney, its money, and its powerful backing of lobbyists went to work.⁵² Eventually, Disney got Congress to enact substantial changes in 1976.⁵³

Pursuant to the 1976 Act, already published works now enjoyed tenure of seventy-five years rather than fifty-six years.⁵⁴ This extended Disney's copyright to 2003.⁵⁵ Once again, when the copyright was set to expire, Disney aligned its powerful lobbyists to convince Congress to extend copyright terms; once again, its lobbying efforts were successful. In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act of 1998.⁵⁶ This Act extended copyrights in corporate publication to ninety-five years from the year of first publication or 120 years from the year of creation, whichever expires first.⁵⁷ This extended Disney's protections to 2023.⁵⁸ While it is never best practice to predict the direction in which Congress will move, you can put your money on copyright moving in the direction in which Disney wants it to move.

This demonstrates two distinct points: (1) Copyright law currently is not serving out its intent of promoting a robust public domain; and (2) corporations and entities with money and power will always have more influence on the enactment of copyright than the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Schlackman, *supra* note.46

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

individual. The second point will be further discussed later. In essence, by constantly appeasing major corporations like Disney, we are denying ourselves the use of our own culture. One could only imagine the creative works that would result if the public had access to create works with Mickey Mouse without going through the hassle of receiving approval from Disney.

This paper is more directly concerned with the state of music copyright in America. However, the first shortcoming of copyright law is not solely the result of Disney. Music executives and labels are analogous to Disney, and you can think of the individual artist as the public domain. While individuals lack the monetary means to lobby for legislation that reflects their right, the top guns in the industry have been using their lobbyists in a manner that is similar to the way that Disney has used theirs, to further their corporate interest.

2. AMERICAN COPYRIGHT LAWS ARE OVERLY BROAD

There are relatively few defenses to proven copyright infringement. The most commonly used defense is “fair use.” The idea is that an infringing activity is relinquished of its obligation to compensate the owner of the copyrights in the underlying work if a court finds that the use falls under the guise of the fair use doctrine.⁵⁹ Fair use seems to diametrically oppose the concept of copyright protection. However, this is an inaccurate assessment that is only born into fruition if the fair use doctrine is enforced too broadly and beyond its intent.⁶⁰ It is not my opinion that fair use in itself is harmful, rather I believe that it is an important tool that allows the public to transform existing works into new creative pieces. In essence, fair use aligns with the intended purpose of American copyright—“to promote the progress of science and useful arts by limiting the exclusive rights that original creators have in their works.” If you believe in a rich, robust public domain, the fair use doctrine is your best friend.

While I do not take issue with the fair use doctrine in and of itself, the doctrine has undoubtedly become problematic in its appli-

⁵⁹ New Media Rights, *supra* note 44.

⁶⁰ *Id.*

cation. Pursuant to the Copyright Act, American courts have employed a four-factor test to determine whether an infringement is covered by the fair use doctrine.⁶¹ Courts look at the following: (1) the purpose of the new work; (2) the nature of the copyrighted work; (3) the amount and substantiality of what is taken from the copyrighted work; and (4) the effect the infringing work would have on the market of the underlying work.⁶² In practice, courts are examining how much of the copyrighted work is included in the new work, whether the new work has been substantially modified, whether the new work is meant to serve a commercial purpose, and whether the copyright owner is suffering a loss from the creation of the new work. The issue in application is not the weighted factors, rather the problem is the lack of a general consensus in how much of each factor is needed to constitute fair use.⁶³ Results under the fair use doctrine can vary from case to case, and as a result provide no sense of stability for potential creators. It is often pointed out that good law is predictable law, and the fair use doctrine perfectly depicts the contra-positive effect of the saying.

3. THE VAGUENESS OF LAWS FAVORS ENTITIES WITH MORE MONEY

Even when a creator has a clear right to take legal action against an infringer, it is often the case that the financial damage is so minimal or a case of copying is so difficult to prove that it is not worth taking any further action.⁶⁴ The lack of predictability in the law and the high cost of hiring a lawyer makes it all the more difficult to bring formal legal action against someone.⁶⁵

So, we come back to fair use. The broad nature of its interpretation generally disfavors a copyright owner whose pockets are not as deep as the infringer.⁶⁶ As previously mentioned, fair use is merely a defense. It is a defense that must be decided on a case-by-case basis.⁶⁷ Given this, both the uncertainty of the result at

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ New Media Rights, *supra* note 44.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

trial, and the expense of going to trial gives large companies significant advantages over the alleged infringer. This may result in the alleged infringer settling and stopping their use, even though their use may be legal.⁶⁸ Fair use can also result in an individual not bringing a claim against an alleged infringer even if the person believes that the use is unfair.⁶⁹

This dilemma is yet another example of how corporations can use copyright laws as a means to gain power over the individual. Given the high costs associated with litigation, there is very little stopping bigger companies and corporations from swiping the ideas off its smaller competitors and reaping the benefits without paying the appropriate amount to the smaller company. Speaking purely in terms of economics, this idea conflicts with America's ideals of supporting the development of small businesses and entrepreneurial ventures.

I have laid out three distinct issues with American copyright laws. The descriptions above were all general descriptions. However, each of those descriptions are directly applicable to music copyright and every other form of copyright law. Building off of these problems, the upcoming portions of this paper will analyze two pieces of legislation that could potentially resolve the aforementioned issues plaguing American copyright jurisprudence. Given that neither piece of legislation has fully taken effect, I will be analyzing the language of the law to see if they could potentially resolve the issues mentioned above.

B. THE LAW AND MISIMPLEMANTATION OF COPYRIGHT IN CANADA

Much of Canadian copyright law is quite similar to American copyright law. Essentially, the same things are protected under Canadian law that are protected under American law. The difference in American copyright law and Canadian law lies not in its substance but rather in its procedure.⁷⁰ In many cases, the issue that Canadian citizens have with the law derives from faulty pro-

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Copyright Laws, *8 Facts About Canadian Copyright Law*, (Oct. 12, 2018), <https://www.copyrightlaws.com/8-facts-about-canadian-copyright-law/>.

cedure.⁷¹ In the upcoming paragraphs, I will detail a few of the procedural issues that are seemingly viewed as recurring problems in Canadian copyright jurisprudence.

1. THERE IS NO REGISTRATION REQUIREMENT

A copyright of a work in Canada exists upon creation of the work.⁷² Given this, Canadian copyright law does not require the official registration of your work in order to have the work protected.⁷³ In the case of songwriting and literary works, unless there is a copyright assignment agreement assigning the copyright to someone else, the writer who created the work owns the copyright.⁷⁴

While this may make claiming ownership over your work easier, this relaxed registration requirement has been the source of many issues for Canada's creative community.⁷⁵ There are many perceived benefits to registering.⁷⁶ First, registration provides a public claim of ownership over a work. As there is no way to check to see if there is an owner of a work and no entity to provide confirmation, there is likely going to be a rise in infringing activity.⁷⁷ It follows that there could be increased litigation as a result of the lack of clarity in ownership, and who was the first to actually create the disputed work. As mentioned in my analysis of American copyright law, where there is a need for litigation, there is also an inherent class and wealth struggle. There will be cases where large corporations are able to take ideas from individuals merely because the individual does not have the resources to endure a potentially lengthy litigation bout. It is worth noting that while Canadian law does not require registration, it does provide the option of registration.⁷⁸ The issue with this optional registration is that there is no requirement to provide physical evidence of your work.⁷⁹ That's to say, the optional registration is just as ineffective as not

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *See generally id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See generally* Gov't of Can., *A Guide to Copyright*, https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02281.html.

registering your work at all. A third option provided by Canadian law is the option to register your copyrights with the United States Copyright Office.⁸⁰ In registering with the U.S. office, a physical copy is required.⁸¹ While this route may be the one that guarantees the most protection, many Canadians are reluctant to explore this option, as they believe American law will not provide them with the same protections that they would get through Canadian law.⁸² I am inclined to believe that the bad in the lack of registration greatly outweighs the benefits that come along with owning the rights to your work at the moment of creation.

2. THERE IS NO POLICING OF COPYRIGHT INFRINGEMENT

It is worth asking, “What is the purpose of a law if the law cannot be enforced in practice?” This question is directly applicable to Canadian copyright. The Canadian Intellectual Property Office is “not responsible for policing of registered works and how people use them.”⁸³ In effect, the Canadian Intellectual Property Office cannot guarantee that your copyright, registered or otherwise, will not ever be challenged, infringed, or questioned.⁸⁴ While much of Canadian law mirrors American law, this specific lack of enforcement mechanisms is more closely associated with intellectual property provisions in Colombia, Indonesia, Thailand, and Switzerland.⁸⁵ The problems that arise from this are very similar to those that arise from a lack of registration.⁸⁶ A lack of policing contributes to a rise in legal ambiguity, which in turn contributes to a rise in litigation, as litigation is the only means with which the proper method of enforcement can be clarified.⁸⁷

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Copyright Laws, *supra* note 70.

⁸³ Gov't of Can., *supra* note 79

⁸⁴ *Id.*

⁸⁵ See generally Brendan Burke, *Ineffective Laws Fueling Canada's Piracy Problem*, CBC NEWS, (Feb. 18, 2017), <https://www.cbc.ca/news/politics/copyright-online-piracy-canada-laws-infringement-rights-1.3986968>.

⁸⁶ *Id.*

⁸⁷ *Id.*

3. THERE IS NO “FAIR USE” PROVISION, BUT THE FUNCTIONAL EQUIVALENT IS OVERLY BROAD IN PRACTICE.

The issue with American fair use is that the law is overly broad. In practice, there is no predictability in the outcome of any given case, which deters creators from venturing with their ideas. It is worth noting that Canada does not have a fair use provision. However, Canada does have a fair dealing provision that explicitly spells out which types of infringement will be permitted under the law.⁸⁸

Inevitably, the goal of any piece of legislation is to address some perceived problems. Above, I have listed some of the critiques of American copyright law. In the upcoming paragraphs, I will lay out the many facets of the Music Modernization Act (MMA) and provide an analysis on whether the law sufficiently addresses the aforementioned problems. However, to fully understand the problems the legislation seeks to address, we must first view the legislation from a historical lens to see how the problems came about.

C. RACE AND MUSIC

The issue of copyright deprivation to black artists throughout history is a highly important topic given the massive contributions to American society from black artists, and the importance of black music to American culture as a whole.⁸⁹ To be clear, the music industry has been exploitive of artists of all races; however, it is undeniable that black artists have received the bulk of this exploitation.⁹⁰ As digital platforms expand and the creative works of these artists are more accessible than ever, it is important to explore this issue as the exploitation could be amplified if not addressed in a timely manner. It would be unfortunate for the creative community to have the inequality of the past persist into this new era of music consumption. In examining any new legislation that purports to change American copyright law, it is important that we

⁸⁸ Gov't of Can., *supra* note 79.

⁸⁹ K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM & ENT.L.J. 339, 340 (1998).

⁹⁰ *Id.*

analyze the legislation from a critical race perspective—as marginalized communities are usually the most prone to suffer losses from the shortcomings of the law.

Copyright law (and all forms of law for that matter) reflects culture. Theoretically, copyright law functions to protect the creative output of individuals regardless of social factors such as race and gender.⁹¹ Without copyright laws, the creative outputs of cultural communities would be unjustly protected, as non-marginalized communities would inevitably take credit for the works of others.⁹² Historically, however, the word of the law has not been the issue that has plagued these communities.⁹³ Rather, the issue stems from the inherent class struggle in the enforcement of laws and how proper enforcement requires knowledge of the laws the artist seeks to use.⁹⁴ Generally speaking, American jurisprudence is written to support the interests of the larger segments of society.⁹⁵ Additionally, while the explicit intention of copyright law is to protect the interests of the creator, in practice, the law serves the purpose of only protecting the rights of the perceived owner.⁹⁶ Copyright is rooted in property law, and from property courts have viewed copyright as a question of possession.⁹⁷ In effect, the law rewards the individual that can give permission for use of a creation, rather than the person that actually was the creator.⁹⁸ This understanding of the law has been the driving force behind the denial of just copyright compensation to Black artists.

In effect, Blacks received less protection for artistic musical works due to (1) inequalities of bargaining power; (2) the struggle between the structural elements of copyright law and the predicate of black culture; and (3) blatant discrimination, which devalued the works of black artists while simultaneously creating a greater vulnerability to exploitation and appropriation.⁹⁹ Many property law theories allow property owners to exclude groups from their prop-

⁹¹ *Id.* at 355.

⁹² *Id.* at 341.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 356.

⁹⁹ *Id.*

erty, essentially creating an “out” group.¹⁰⁰ Copyright mirrored this, and as a result of Blacks being the “out” group, many artists throughout history have been deprived of an unimaginable amount of royalties and revenue.¹⁰¹

Cultural appropriation is a phrase that is used regularly in today’s society. If you are looking for a clear example of cultural appropriation, look no further than the history of Black music in the United States. Much of the work of Black artists was appropriated by managers, publishers, and white artists.¹⁰² As a result, Black artists were not recognized as the owners of their work, and thus, did not receive compensation.¹⁰³ While it was possible that Black artists were aware that they were not being properly compensated, the price tag attached to any litigation to resolve the issue was as daunting as it is today. Furthermore, the court system on all levels were quite prejudicial, which would probably have led to an unfair enforcement even if the artist were able to make their case to a judge. If the goal of copyright laws was indeed to promote creative activity, it must logically follow that Blacks and other marginalized groups were not the intended creators. As a matter of fact, if you examine the history of Blues artists and Jazz artists, it is almost as if their works became part of the public domain at the moment that it was created, as their works were almost immediately taken and recreated to be distributed for the White masses.¹⁰⁴ The only people who had to sign off on this transmission of creative rights were the managers and publishers of the Black artist, as they were often times seen as the only lawful owners of the creation.¹⁰⁵ This understanding of music at the times should take your mind back to slavery, as Blacks worked tirelessly to contribute to society, but were not deemed worthy enough to own property.

This takes me back to the problem of copyright law not serving its intended purpose.¹⁰⁶ The historical journey of Blacks in music made this point clear; but, it has not been addressed since that time

¹⁰⁰ *Id.* at 357.

¹⁰¹ *Id.*

¹⁰² *Id.* at 358.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ New Media Rights, *supra* note 44.

period. And while Blacks are still the primary targeted group of the inefficiencies of copyright law, as the music industry has expanded, so has the exploitation. As a copyright is still viewed as owner-centric by the courts, musicians (in general) find themselves in a class struggle with music executives and publishers to prove their equity of ownership in the work that they create.¹⁰⁷ As the initial understanding of copyright puts emphasis on the creator rather than on the owner, it will take some form of legislation to right the years-worth of injustices that creative communities have faced as a result of the harmful implementation of the law. As I have previously mentioned, copyright law has changed through legislation throughout the years. However, I pointed out the story of Disney to show that the driving force behind the change has not been those that have been done a disservice, rather it has been corporations with disposable funds and with intentions to protect their brands. In order for an effective change to be made that justly compensates artists, the charge must be led by artists.¹⁰⁸ This is precisely why some view the MMA as one that can change the landscape of copyright law in America.¹⁰⁹ Many view the MMA as the first major piece of legislation where the charge was led by the artists.¹¹⁰ Thus, the assumption is that the legislation will address the concerns of artists.¹¹¹ However, nothing is ever as it seems, so the legislation is worth this analysis to see if it addresses the shortcomings of previous copyright laws.

D. LEGISLATIVE HISTORY OF MUSIC MODERNIZATION ACT

The MMA represents the realization of years of efforts on the part of lobbyists, policymakers, musicians, music executives, and the United States Copyright Office.¹¹² The United States Copyright Office lauded the legislation as “expectant to benefit the many

¹⁰⁷ *Id.*

¹⁰⁸ See generally *The Music Modernization Act*, SOUNDEXCHANGE, <https://www.soundexchange.com/advocacy/music-modernization-act/>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² U.S. Copyright Office, *The Music Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/> (last visited Feb 2, 2019).

stakeholders across all aspects of the music marketplace, including songwriters, publishers, artists, record labels, digital services, libraries, and the public at large.”¹¹³ Prior to introducing the legislation, Congress held a series of hearings Lawson the current state of music and music copyright laws to get a better understand of the problems that needed to be corrected.¹¹⁴ Specifically, the Copyright Office conducted a comprehensive study of the music licensing framework, which resulted in a report entitled, “Copyright and the Music Marketplace.”¹¹⁵

The report was a comprehensive look at the state of copyright in America.¹¹⁶ The report yielded four key findings:

(1) Music creators should be fairly compensated for their contributions; (2) the licensing process should be more efficient; (3) market participants should have access to authoritative data to identify and license sound recordings and musical works; and (4) usage and payment information should be transparent and accessible to rights owners.¹¹⁷

In addition to the provisions above, the Office identified several additional provisions that legislators should keep in mind with any proposed legislation to affect change.¹¹⁸ These provisions are:

(1) Government licensing processes should aspire to treat like uses of music alike; (2) Government supervision should enable voluntary transactions while still supporting collective solutions; (3) Rate-setting and enforcement of antitrust laws should be separately managed and addressed; and (4) A sin-

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.S. Copyright Office, *Music Licensing Study*, COPYRIGHT.GOV, <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (last visited Feb 2, 2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

gle, market-oriented rate-setting standard should apply to all music uses under statutory licenses.¹¹⁹

This report followed an earlier report by the Copyright Office “Federal Copyright Protection for Pre-1972 Sound Recordings,” which examined “the desirability of and means for bringing sound recordings fixed before February 15, 1972 under federal jurisdiction.”¹²⁰ Many of the suggestions offered in both of those reports will be realized in enactment of the Music Modernization Act.¹²¹

E. THE MUSIC MODERNIZATION ACT

Authored by Orrin Hatch, the Music Modernization Act was signed into law on October 11, 2018.¹²² The Act addresses the concern of legislators that copyright law is not adequately equipped to govern the current consumer preferences and technological advances in the music marketplace.¹²³ The Act consists of three distinct parts: (1) The Modernization of Music Licensing; (2) The Protection of Pre-1972 Works; and (3) Allocation for Music Producers.¹²⁴

1. TITLE I- MUSIC MODERNIZATION ACT

The first part of legislation seeks to address the concern with music licensing. Music Licensing Modernization modifies the existing section 115 “mechanical” license for reproduction and distribution of musical works in phonorecords (which was previously obtained by licensees on a per-work, song-by-song basis) to establish a new blanket license for digital music providers to engage in specific covered activities (namely, permanent downloads, limited downloads, and interactive streaming).¹²⁵ Licensing of physical configurations (*e.g.*, CDs, vinyl) will still operate on a per-work basis.¹²⁶ Title I establishes a market-oriented “willing buyer, will-

¹¹⁹ *Id.*

¹²⁰ U.S. Copyright Office, *Pre-1972 Report*, COPYRIGHT.GOV, <https://www.copyright.gov/docs/sound/pre-72-report.pdf> (last visited Feb 2, 2019).

¹²¹ U.S. Copyright Office, *supra* note 112.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

ing seller” rate standard that will apply to all licensees of musical works under the section 115 mechanical license.¹²⁷ Pursuant to section 115(d)(3), as amended, the Register of Copyrights will designate an entity as the mechanical licensing collective to administer the blanket license and distribute collected royalties to songwriters and music publishers.¹²⁸ The newly created mechanical licensing collective will be tasked with developing and maintaining a database of musical works and sound recordings, which will be publicly available, and is expected to become the most comprehensive database in the music industry.¹²⁹ The blanket license will take time to implement. The transition period will allow digital music providers the ability to limit copyright infringement liability as long as the provider partakes in a good-faith effort to locate the rightful owner of the copyright.¹³⁰

In other words, the mechanical license of any sound recording (the lyrics and composition) will now be controlled by a non-profit agency. The agency will create a database that issues out blanket royalties to songwriters and artists when the sound recording is played off of a streaming platform. In addition to this, the database will issue royalties to songwriters whenever a sound recording is either reproduced physically or digitally.

The concern prior to this Act was that it was difficult to ensure that songwriters and artists were not only getting paid, but getting paid at a standard rate.¹³¹ The language of the Act seemingly addresses that concern; however, in analyzing the effectiveness of this portion of the Act, it is worth looking at whether it addresses one of the broader critiques of copyright law. In assuring that creators will get justly compensated in the world of digital streaming platforms, the Act is inherently furthering the stated purpose of the original Copyright Act, as it stimulates growth in the creative community. Additionally, the Act does seem to provide some sort of balance to the class struggle that has plagued musicians as a result of faulty implementation of copyright laws. It does not address the issue of music executives still seemingly owning the work of

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ U.S. Copyright Office, *supra* note 112.

their artists, but maybe that is a question for contractual jurisprudence rather than that of copyright.

2. TITLE II- THE COMPENSATING LEGACY ARTISTS FOR THEIR SONGS, SERVICE, AND IMPORTANT CONTRIBUTIONS TO SOCIETY (CLASSICS) ACT

Prior to the MMA, sound recordings made prior to February 15, 1972 were not protected under federal copyright law.¹³² As a result of this, the only protection artists enjoyed was the product of patched-together state law.¹³³ This caused inconsistency in how the law was applied from state to state.¹³⁴ This complex series of laws made proper copyright enforcement difficult, and it caused a delay in royalty payments; and in many cases there was no royalty payment made at all.¹³⁵ The CLASSICS Act established that sound recording before 1972 are covered by copyright until February 15, 2067, with additional language to grandfather older songs into the public domain at an earlier time.¹³⁶ Recordings prior to 1923 will enter the public domain three years from passage (January 1, 2022, as all U.S. copyright terms end on December 31), and with recordings between 1923 and 1956 being phased into the public domain over the next few decades.¹³⁷ This also applies statutory protection similar to post-1972 musical creations with regards to non-interactive digital platforms (internet radio, satellite radio, and cable TV music services).¹³⁸

Essentially, this section seeks to grant pre-1972 sound recordings the same federal statutory protection as recordings made after 1972. From here on, these artists will get compensated in the same way in which their contemporary counterparts are being compensated. However, this part of the legislation fails to address any sort of reparations for missed royalty payments from the times that

¹³² U.S. Copyright Office, *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, COPYRIGHT.GOV, <https://www.copyright.gov/docs/sound/> (last visited Oct. 15, 2019).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ U.S. Copyright Office, *supra* note 112.

¹³⁷ *Id.*

¹³⁸ *Id.*

these songs were released to now. Thus, it corrects future harm but seemingly fails in addressing past harm, which is of little help to legacy artists who would have made the majority of the royalties in their work in past years. Nonetheless, proponents of the legislation are taking the approach that something is better than nothing. The difficulty in addressing past harm would be the problems presented in quantifying how much in royalties the artists actually missed. You would have to examine the amount that the artists received (if any) under state law and then somehow create a metric to measure how much the artist would have received under a properly enforced federal protection. If there is an accurate way of making this happen, the parties involved in creating this legislation were unaware, and thus neglected to address the issue.

3. TITLE III- ALLOCATION FOR MUSIC PRODUCERS ACT

Allocation for Music Producers will allow music producers to be compensated from royalties collected through SoundExchange under the section 114 statutory license.¹³⁹

In other words, this portion of the bill designates SoundExchange as the entity charged with distributing royalties on sound recordings, to also distribute part of those royalties to “a producer, mixer, or sound engineer who was part of the creative process that created [the] sound recording.”¹⁴⁰ Similar to my critique of the second portion, while this piece prevents future harm to producers, it lacks any attempt to address past harm caused by a lack of royalty payments. However, the lack of payments to producers has nothing to do with the ineffectiveness of state law, rather it is the direct result of producers simply not being mentioned in the original and subsequent copyright acts.¹⁴¹ In fact, the MMA is the first time that producers are mentioned in copyright legislation and the first time that producers are recognized as creators in the sound recording process.¹⁴² Similarly to Title II, there is no accurate metric of determining the correct royalty payment to be

¹³⁹ U.S. Copyright Office, *supra* note 112 (Title III).

¹⁴⁰ *Id.*

¹⁴¹ SOUND EXCHANGE, *supra* note 108.

¹⁴² *Id.*

made out to producers for past work.¹⁴³ Prior to this legislation, SoundExchange was how producers were paid; however, the payment was the result of contract law rather than copyright law.¹⁴⁴

In summation, there is much to praise about the legislation. The authors thoroughly researched problems that will be exacerbated in the digital age of music and laid out an effective framework to address those issues. As there will likely be unforeseen problems that arise with the constantly changing state of music, the true test of the legislation will be its flexibility in being able to address those problems. The final verdict is still out; however, the rest of this note will provide an in-depth analysis of whether the legislation effectively addresses the broad issues ridded in American copyright law, as these are issues of the past, present, and future.

F. THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA)

On November 30, 2018, the United States, Mexico, and Canada entered into an agreement (the “Agreement”) that was purported to be an updated version of the North American Free Trade Agreement.¹⁴⁵ In my opinion, the agreement was a mutual win for farmers, ranchers, entrepreneurs, and businesses from all represented nations. As a whole, the agreement sought to create more balanced, reciprocal trade that supports high-paying jobs for Americans and growth in the North American economy.¹⁴⁶

Agreement highlights include:

- Creating a more level playing field for American workers, including improved rules of origin for automobiles, trucks, other products, and disciplines on currency manipulation.¹⁴⁷

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ U.S. Trade Representative, *United States-Mexico-Canada Agreement*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Feb. 2, 2019).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

- Benefiting American farmers, ranchers, and agribusinesses by modernizing and strengthening food and agriculture trade in North America.¹⁴⁸
- Supporting a twenty-first century economy through new protections for U.S. intellectual property and ensuring opportunities for trade in U.S. services.¹⁴⁹
- New chapters covering Digital Trade, Anticorruption, and Good Regulatory Practices, as well as a chapter devoted to ensuring that Small and Medium Sized Enterprises benefit from the Agreement.¹⁵⁰

For the purposes of this article, I will only be focusing on the third point: intellectual property protections. Specifically, I will be looking at how this Agreement affected change to copyright laws in Canada, and how this treaty addresses the problems that have plagued creators in Canada. I will also briefly talk about the effect the treaty may have on American copyright, but I expect there to be little to no effect as many of the requirements of the treaty mirror policy that is already in place in America. As with the MMA, the only way to truly understand now is to get a picture of where we started. In this case, we started at NAFTA.

1. NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

The history of NAFTA began well before the document was drafted and ratified by the participating nations.¹⁵¹ NAFTA began with the stated purpose of reducing trade costs, increasing business investment, and making North America more competitive in the global marketplace.¹⁵²

In his 1980 presidential campaign, Ronald Regan advocated for a common North America Marketplace, similar to that in Europe,

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See generally Kimberly Amadeo, *NAFTA's Purpose and Its History*, THE BALANCE (Jan. 26, 2019), <https://www.thebalance.com/history-of-nafta-3306272>.

¹⁵² *Id.*

which was codified by the Treaty of Rome.¹⁵³ In 1985, Canadian Prime Minister Mulroney initiated discussions for the Canada-U.S. Free Trade Agreement.¹⁵⁴ While the negotiations began in 1986, the agreement was not officially signed until 1988.¹⁵⁵ The agreement went into effect on January 1, 1989, and was the law of the land until NAFTA came along.¹⁵⁶

In 1990, Mexican President Carlos Salinas de Gortari expressed interest in engaging in a trade agreement with the United States.¹⁵⁷ These negotiations began in 1991 under the leadership of George H.W. Bush. Mexico sought a more liberalized trade agreement between the two nations, as prior to NAFTA, Mexican tariffs on U.S. imports were much higher than U.S. tariffs on Mexican imports.¹⁵⁸ Canada also joined these discussions.¹⁵⁹ In 1992, the same year that the European Union was created, NAFTA was signed by outgoing-President George H.W. Bush, Mexican President Carlos Salinas de Gortari, and Canadian Prime Minister Brian Mulroney.¹⁶⁰ NAFTA was ratified by the three participating countries in 1993.¹⁶¹

Article 102 of NAFTA outlines its purpose.¹⁶² There are seven specific goals: (1) grant the signatories most-favored-nation status; (2) eliminate the barriers of trade and facilitate the cross-border movement of goods and services; (3) promote conditions of fair competition; (4) increase investment opportunities; (5) provide protection and enforcement of intellectual property rights; (6) create procedures for the regulation of trade disputes; and (7) establish a framework trilateral, regional, and multilateral cooperation to expand the mutually agreed upon benefits of the trade agreement.¹⁶³

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Amadeo, *supra* note 151.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

There are two opposing sides in viewing the success of the agreement. Proponents of the agreement argue that it met its seven intended goals.¹⁶⁴ They argue that it established the region as the world's largest free trade zone in terms of GDP, increased investment into all three participating nations, and, most importantly, it increased the competitiveness of the countries in the global market place.¹⁶⁵ However, the purported success of the agreement did not stop critics from attacking it. Opponents of the agreement found six major problems with its results: "(1) loss of US jobs; (2) suppression of US wages; (3) Mexican farmers were put out of business; (4) not enough environmental protections in Mexico; (5) free U.S. access for Mexican trucks; and (6) lack of enforcement on intellectual property agreement in Canada."¹⁶⁶ As the years passed, leaders in America and Mexico began to lose sight of the benefits and the problems became a mainstream topic. In the 2008 United States presidential election, Barack Obama and Hillary Clinton both levied attacks at the agreement and cited it as the cause of America's job losses and declining wages.¹⁶⁷ After his win in 2008, Barack Obama decided to stay in the agreement though there were still concerns on the ground about the effect that it was having on American jobs.¹⁶⁸ Though Obama did not leave the agreement, his administration began discussions of creating a more effective agreement that would resolve the problems of NAFTA.¹⁶⁹ These discussions came to fruition under President Donald Trump.¹⁷⁰

In August of 2018, President Trump and Mexico reached a bilateral trade deal to replace NAFTA, threatening to leave out Canada. Canada joined on September 30, 2018.¹⁷¹ The new deal was to be called the United States-Mexico-Canada Agreement.¹⁷²

¹⁶⁴ *Id.*

¹⁶⁵ Amadeo, *supra* note 151.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

2. INTELLECTUAL PROPERTY IN USMCA

As previously mentioned, the goal of the legislation was to right the wrongs of the NAFTA agreement. In doing so, the USMCA includes changes to laws pertaining to labor, tariffs, farming and dairy markets, and (most importantly for the purposes of this article) intellectual property.¹⁷³ The treaty provided broad changes to intellectual property laws in the participating countries.¹⁷⁴ The deal extends the terms of copyright to seventy years beyond the life of the author (up from fifty).¹⁷⁵ It also extends the period that a pharmaceutical drug can be protected from generic competition.¹⁷⁶ Moreover, the deal incorporates provisions to deal with the digital economy, including prohibiting duties on things like music and e-books, and protections for internet companies so they're not liable for content their users produce.¹⁷⁷ In effect, the treaty hopes to provide stricter enforcement of intellectual property laws with the end goal of stimulating growth in each country's creative communities.¹⁷⁸ As the Agreement has not yet been ratified, it is hard to predict the changes that it will lead to on the ground. However, for the purposes of this paper, I will examine the words of the legislation to see if they adequately address the concerns of creators in participating countries.

In examining the stated purpose of the intellectual property clause, one thing is readily clear: America proposed the changes. This is evident in that all the proposed changes in the agreement are already federal law in America. In effect, once ratified, the agreement will likely result in changes to Canadian intellectual property laws. As intellectual property law and enforcement of the law has been a concern for Canadian citizens, this could be quite

¹⁷³ See generally Alex Boutilier, *Canada Capitulates on Copyright in New USMCA Deal*, THE STAR (Oct. 1, 2018), <https://www.thestar.com/news/canada/2018/10/01/canada-capitulates-on-copyright-in-new-usmca-deal.html>.

¹⁷⁴ Burke, *supra* note 85.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ U.S. Trade Representative, *supra* note 141.

beneficial if the agreement properly addresses the concerns and also has the teeth to enforce the proposed the solutions.¹⁷⁹

3. FINAL THOUGHTS ON USMCA IN CANADA

The changes to Canadian intellectual property laws sets up a dichotomy of the “CopyRight” versus the “CopyLeft.” “CopyRight” refers to those who believe in stronger, stricter laws that protect the original creator of content, whereas “CopyLeft” refers to those who believe in a more robust, accessible public domain. Your view of the proposed changes will likely be dictated by where you fall on the spectrum.

The primary change to IP laws will be the extension of a copyright term from the life of the author plus fifty additional years to the life of the author plus seventy years.¹⁸⁰ Those who identify with being a CopyRightist will likely applaud such a change. However, CopyLeftists have already begun levying attacks at the legislation. An Ottawa newspaper commented on the change:

We’ll find that Canadian culture and heritage is locked down, out of the public domain for an extra two decades. Canada had resisted those reforms despite U.S. pressure for a long time [It] means that works that might otherwise make their way to schools under the public domain won’t for a couple of decades, which could increase education costs.¹⁸¹

While the copyright extension may be a victory for those on the CopyRight, I am inclined to believe that they will also have concerns with a few problems that the agreement neglects to address: the registration requirements and the lack of policing.

If properly executed, registration requirements can provide creators with a sense of relief as they know that a higher office is tracking their content and comparing it to new artistic works that are created. In essence, a registration requirement would deter any form of unlawful copying as the registering organization would not grant authorization for the infringing work. The problem that Ca-

¹⁷⁹ See generally Burke, *supra* note 85.

¹⁸⁰ Boulter, *supra* note 173.

¹⁸¹ *Id.*

nadians have—which seemingly is not laid out in the agreement—is that there is no requirement to register, and even if there were, there is no policing entity to track registrations.

Given these shortcomings, it is yet to be seen how the agreement will change the creative environment in Canada. It is possible that the extension of a copyright term will have unforeseen effects on other markets causing Canadian legislators to make a shift back in favor of those on the CopyLeft. On the other hand, it is also possible that the extended term will stimulate creative growth in Canada that will benefit markets outside of the intellectual property realm. This is simply a case where time will be the only truth-teller. However, one thing is for sure, intellectual property laws in Canada are no longer stagnant.

IV. CONCLUSION

So, what is the takeaway here? For much of the twentieth century, America was complacent with the failures regarding the state of intellectual property laws at home and abroad. This complacency led us to a place where class and race determined your value under the law. This complacency also promoted capitalist ideas that placed corporations ahead of individual creators.

The Music Modernization Act and the United States-Mexico-Canada Agreement sought to create a landscape where class and race were not dispositive in determining whether or not your rights to your creations were protected. As the MMA has just been signed into law and the USMCA has yet to be ratified, I cannot give a straightforward answer as to the effectiveness of the laws on the ground. The purpose of this paper was not to provide an answer, rather it was merely to lay out the problems and to discuss the proposed solutions. If we are unaware of our history, then we create the space for history to repeat itself. My hope is that this article will be used as a tool to hold legislators in America and abroad accountable to ensure that the inequity that our creative community has been plagued with in the past will no longer exist in the future.