Our own creative land

Cultural Monopoly & The Trouble With Copyright

MICHAEL GEIST

The Hart House Lecture 2006

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Foreword

The Hart House Lecture strives to inspire debate about visions of our place in the world, to create a public conversation with young people about issues related to personal and collective identity and to explore the meaning of active citizenship. The lecture topics have ranged from global to personal to local and to the intersection of all three perspectives, always seeking to understand our world, our place in it and how to make it better. This year's lecture by Michael Geist builds on our young tradition.

In the autumn of 2005, the students on the lecture committee identified copyright as a topic of great interest and current significance; however, as perhaps you can imagine, we were a little worried that the subject might be just a little too dry or boring for the Hart House Lecture. But that was before we encountered Michael Geist, the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa's Faculty of Law. I think you will find that Michael Geist's passionate articulation of the importance of visionary copyright policy for knowledge, education, creativity and the provision of access to these components of culture for all Canadians is fascinating.

With exquisite clarity, Geist gives us not only a primer in copyright and new technologies but also a critical analysis of the way forward for Canadian policy makers. Drawing on a deep well of stories about the development of the Internet and new technologies and the dynamics of users, Geist conveys their immense capacity to support cultural creativity if copyright laws are appropriately balanced to meet the interests of all Canadians.

Each year we try to take the lecture beyond itself, to make it meaningful for more people than those present on the evening of the lecture. This has led to broadcasting the lecture with CBC, TVO and CIUT, to publishing excerpts in national newspapers and to collaborations with local schools and community organizations engaged with the subject of the lecture. This year, given the virtual nature of the content, and admitting that a number of us are quite illiterate about all things to do with Creative Commons, downloading to iPods, blogs, etc., we have tried to show you how to use some of these astonishing tools. With images and music from the Internet, information about how to use

them, and the impetus of Michael Geist's lecture, we hope that you will be inspired to explore this new aspect of creativity and individual expression. We also hope that you will feel more prepared to engage in the public policy debate about copyright policy as a result of Michael Geist's Hart House Lecture, for he enables us to understand how essential making the right choice will be to the transformation of our precious cultural future.

— Margaret Hancock
Hart House Warden
March 2006

Introduction

Bulte, Blogs, and Balance

On December 22, 2005, as most politicians were preparing to take a holiday break from the lengthy winter election campaign, I received an email titled "Sam Bulte—Democracy in Action." Sarmite (Sam) Bulte was a Liberal Member of Parliament for the Toronto riding of Parkdale-High Park. First elected in 1997, by 2005 she had risen to the position of Parliamentary Secretary for Canadian Heritage. Bulte was closely aligned with cultural issues throughout her term in office, including chairing the Standing Committee on Canadian Heritage in 2004. That committee produced a report that came to be known as the "Bulte Report" which included a lengthy list of copyright reform proposals that attracted the ire of both the user and education communities, while eliciting much praise from the copyright lobby and copyright collectives. The government responded to the Bulte Report in March 2005 by outlining its plans for digital copyright reform. Those plans were ultimately incorporated several months later into Bill C-60, the first major piece of copyright reform introduced in Canada in eight years.

Although Bill C-60 and the Bulte Report died with the election call on November 29, 2005, its recommendations and impact on the user community was not forgotten. The Report, and the hearings that led to its creation, were viewed as dangerously one-sided by many observers. They feared that it would lead to a Canadian copyright system modeled after the United States with negative implications for creativity, privacy, security, and education.

The email I received on December 22nd included no text. There was only a single attachment that contained an invitation to a fundraiser for Ms. Bulte that was to be held on January 19, 2006—four days before the election—and was to be hosted by five people well known within the Canadian copyright community: Graham Henderson, the President of the Canadian Recording Industry Association; Douglas Frith, the President of the Canadian Motion Pictures Distributors Association; Jacquie Husion, the Executive Director of the Canadian Publishers' Council; Danielle LaBoissiere, the Executive Director of the Entertainment Software Alliance; and Stephen Stohn, the producer of Degrassi, the acclaimed Canadian television production. The invitation promised a special solo

performance by Margo Timmins, lead singer with the Cowboy Junkies and the wife of CRIA's Henderson. The event was to be held at the Drake Hotel, a trendy Toronto nightspot. The price of admission was a cool $250 per person and the invitation pledged that all funds raised would be directed to Ms. Bulte's re-election campaign.

While I was later to learn that this was the second such fundraiser of the campaign, I must admit that I was astonished. Fundraising is admittedly an accepted (some would say essential) part of the political process, yet I was struck by the dubious optics of holding a fundraiser hosted by the leading Canadian copyright lobbyists days before Canadians were set to go to the polls. Given how contentious copyright can be—it draws the interests of the copyright lobby, educators, librarians, archivists, and increasingly individual Canadians, holding such a fundraiser for a prospective Minister of Canadian Heritage sent a disturbing message to all those concerned with a process that must be fair and must be seen to be fair.

With that in mind, I posted an entry on my blog titled "That's What Friends Are For" in which I alerted readers to the event—adding a link to Ms. Bulte's campaign website which listed the fundraiser as the last event of the campaign. I commented that:

> Within the boundaries of the Election Act, MPs are of course free to fundraise any way they like and individual Canadians are free to contribute to those same MPs. However, with the public's cynicism about elected officials at an all-time high and Canadians increasingly frustrated by a copyright policy process that is seemingly solely about satisfying rights holder demands, is it possible to send a worse signal about the impartiality of the copyright reform process? At $250.00 a person, I have my doubts that many of the artists that Ms. Bulte claims to represent will be present. Instead, it will lobbyists and lobby groups, eagerly handing over their money with the expectation that the real value of the evening will come long after Margo Timmins has finished her set.

The posting attracted modest attention—several other blogs pointed to it—but the holidays soon intervened and I thought that the posting and the issue would simply die for lack of interest.

Nine days later, Cory Doctorow, a Toronto science fiction writer now based in London, returned from his holiday vacation and posted a flurry of entries on BoingBoing, a blog he co-edits. BoingBoing is among the world's most popular blogs, attracting 1.7 million visitors per day, ranking it ahead of most mainstream media websites. Doctorow pulled no punches, writing that Bulte was "hoovering up giant

corporate bucks while campaigning to deliver just the kind of copyright laws that will make crooks out of ordinary Canadians and line the pockets of massive, US-owned entertainment companies."

Several hours later, Pierre Bourque, an Ottawa radio host and author of the popular Bourque.com news aggregator that is closely watched by the Canadian political establishment, linked to my original posting on the fundraiser.

With BoingBoing and Bourque leading the way, the story was soon posted on dozens of blogs that cut across the political spectrum. The response was virtually unanimous—the fundraiser may have been lawful, but the optics were perceived to be terrible in an election campaign that was intensely focused on government accountability and allegations of misconduct.

Over the next two weeks, the story continued to gain momentum online, though the mainstream media was relatively slow to pick up the story. There were articles in the Hollywood Reporter and a large feature in the Toronto Star that granted Bulte significant space to defend the fundraiser and to question the motives of her critics.

If the mainstream media remained somewhat skeptical of the story, the blogosphere was not. Technorati, a blog search engine, was gathering new postings on Bulte on an hourly basis. The mainstream media blogs, maintained by the likes of Antonia Zerbisias at the *Toronto Star*, Dan Cook at the *Globe and Mail*, and Colby Cosh at *Maclean's* gravitated to the story with regular postings.

While the saga began with the fundraiser, it did not end there. I posted several follow-up stories that focused on Ms. Bulte's record of political contributions, which included funding from many copyright lobby groups. In many instances, Bulte was the only MP to receive such largesse. Moreover, my postings were not limited to Ms. Bulte. In fact, the funding history of Bev Oda, the Conservative Canadian Heritage critic, who would later be named Minister of Canadian Heritage, was also discussed given the significant support she received from the broadcasting community.

Had the controversy been confined to the blogosphere, I doubt I would be recounting it here. That is not what happened, however, as the copyright fundraising issue soon began to attract attention locally in the Parkdale-High Park riding. Ms. Bulte's canvassers were confronted with copyright questions when they campaigned in the riding, while the topic generated discussions in many coffee shops, community centers, and churches. In fact, constituents regularly raised the issue at all-candidates meetings, leading to a videotape of an angry Ms. Bulte proclaiming that she "would not let Michael Geist and his pro-user zealots and Electronic Frontier Foundation members silence me and try to intimidate me." In typical blogger fashion, that video was promptly posted to the Internet and downloaded thousands of times in a matter

of hours.

By the final week of the campaign, the Bulte story had finally attracted mainstream media attention, with much of the coverage, including stories in *Macleans*, the *National Post*, and *Globe and Mail*, focused on the impact bloggers had on the election. Ms. Bulte ultimately forged ahead with her fundraiser, though it was matched in the hotel's coffee shop by a grassroots meeting hosted by Online Rights Canada.

By election day, the damage was done. Peggy Nash, the NDP challenger, won the riding by 2201 votes, a swing of 5572 votes over the 2004 election campaign that featured the same contestants. Parkdale-High Park was one of only two Toronto ridings to change hands—Olivia Chow's was the other—and no other riding experienced as dramatic a shift in electoral support. While the true impact of the Bulte issue is difficult to gauge—people vote for a variety of reasons—many people believe that the issue cast some doubt in the minds of some of her supporters, while it galvanized large numbers of other people within the riding to get out and vote.

The Bulte episode, however, is about much more than just the growing impact of blogs. It is a story about copyright and the importance that the issue has assumed in the lives of millions of Canadians. It is a story about how technology and the Internet are providing new opportunities for creativity, public participation, and individual expression. It is a story that highlights why Canadian policy makers must rethink policies grounded in "the way it was" and instead chart a new vision in the broader public interest.

My goal this evening is to state the case for that new vision of culture and copyright in Canada. I will discuss the transformative power of the Internet and new technologies while illustrating that this is a good news story for industries new and old.

With the cultural opportunities in hand, I will discuss copyright, demonstrating how copyright policy developed in Canada over the past two decades while few of us were paying attention. I will also assess how it might continue to unfold if more Canadians do not become engaged in the policy process.

I will conclude by illustrating how things could be different. Canada has a choice and our leaders have been vested with an unprecedented opportunity to articulate a cultural and copyright vision that brings access to knowledge for all Canadians from coast to coast to coast. One that unleashes the creative spirit in millions of Canadians. One that transforms our education system. One that respects our privacy and protects our security. One that preserves our heritage.

Yes, copyright can do all that. Let us look at how.

One

The Good News Story

While many in the mainstream media have been occupied focusing on the perceived ills of the Internet—including writing features on copyright infringement, spam, cybercrime, and online defamation—they have missed a far more compelling story. The Internet and new technologies have unleashed a remarkable array of new creativity, empowering millions of individuals to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it. That participation takes many forms—the results of which can be found on blogs, chat fora, content sharing sites, and citizen journalism outlets. This cultural renaissance is an incredible good news story that is transforming our society.

Alongside the rise of individual creativity—described by some as "amateur hour"—is the exceptional opportunities now open to conventional media businesses. Indeed, the good news story also extends to these businesses, many of which are poised to leverage new technologies to exploit new markets that dwarf traditional businesses.

A survey of the exciting online developments is admittedly almost instantly outdated since this area is truly moving at Internet speed. A snapshot perspective on the state of the Internet in March 2006 provides a glimpse at the energy present and offers ample reasons for optimism.

i. Blogs

The rise of the blogosphere has attracted increasing media attention. Supporters see a revolution in the style of reporting and commentary on news and public affairs, while critics see low-quality, poorly written repetitive postings that are scarcely worth anyone's attention. Both perspectives are correct—the blogosphere is all that and more.

Technorati, a blog search engine, now tracks nearly 30 million blogs (75,000 new blogs are created every day). Moreover, the popularity of blogs is not strictly a North American phenomenon as Technorati tracks more blog postings written in Japanese than in English.

With 30 million blogs the quality is obviously varied. What is undeniable is that the blogosphere is influencing the way we participate

with the news. News organizations have become increasingly "bloggy", offering up prominent columnists as in-house bloggers, inviting online comments and discussion much like many blogs, instituting RSS (really simple syndication) feeds to match the syndication technologies now readily available to millions, and even pointing to blogs as part of their regular news coverage.

While these changes are no doubt needed to keep pace with the evolving media culture, they may have the unintended consequence of rendering mainstream media websites and blogs virtually indistinguishable from one another. The days of Andrew Coyne of the National Post or Paul Wells of *Maclean's* being recognized primarily for their print contributions, rather than their blogs, may be numbered. As prominent print journalists gravitate to the blogosphere, their competition also expands as the choice is no longer one of Coyne vs. Wells vs. Jeffrey Simpson, but rather one that includes hundreds of well-informed bloggers who have succeeded in attracting sizable audiences (the size of the blog audiences have been overlooked by the mainstream media since the blog advertising market remains underdeveloped, yet several blogs attract daily traffic that exceeds all but the most popular mainstream media sites).

Incredibly, the rise of the blogosphere is seemingly only at its early stages. The combination of easy-to-use technology, tools to distribute personal content, improving methods of finding relevant blog content, and the exhilaration that comes with freedom of expression is likely to breed further growth of the blogopshere and a continued merging with mainstream media sources.

ii. Content Creation

Millions of people are doing far more than just posting blog entries -- they are also creating and distributing a remarkable array of new content and creativity. Podcasting, which allows users to distribute audio files on the Internet, has blossomed in recent years, with thousands creating homegrown audio content featuring both commentary and new music. Conventional radio stations have also jumped on the podcasting bandwagon, with many now offering podcasts of favourite shows bundled together with advertising.

The surge in new music is another important story of the Internet and new technologies. Aided by software that allows the proverbial garage band to compete with fully equipped music sound studios, the Internet is awash with hundreds of thousands of new musical acts. GarageBand has proven to be a popular site for new music distribution, featuring millions of new songs. Similarly, MySpace, a popular online social network site with tens of millions of users, has focused primarily on music, with several acts landing recording industry contracts after

generating a following online.

PostSecret, one of the Internet's most popular blogs, provides an excellent example of artistic content creation. The site encourages visitors to post personal secrets by creating a single original postcard. The results are at once funny and heartbreaking as thousands submit secrets, creatively revealing envy, happiness, and loneliness. New work is posted weekly and the collection of the best from the site's first year has become a best-selling book.

Another example of the individual creativity is the mushrooming popularity of fan fiction. Websites such as fanfiction.net host thousands of scripts based on popular (and not-so-popular) movies and television shows. While the scripts vary in quality, some offer full-length versions of potential episodes and others bring characters long forgotten back to life.

Just as fan fiction builds on the imagination of others, public broadcasters are increasingly offering their content to users to remix. Leading the way is the British Broadcasting Corporation, which has launched the Creative Archive as a mechanism to allow its users to download, use, and reuse original BBC content. The initiative is still in its early stages, but with hundreds of hours of content, it promises to connect a new generation to historical archives that were previously all but unavailable to the general public.

iii. Content Sharing

In addition to creating content, users are sharing that content in unprecedented numbers. While content sharing is often viewed as synonymous with file sharing of music or movies, the reality is that this is only one aspect of a much bigger phenomenon.

Photo sharing has emerged as an enormously popular past-time, leading to a genuine Canadian e-commerce success story. Flickr, the Internet's most popular photo sharing site, was launched by a Vancouver couple intent on allowing people to post their digital photographs and to easily share them with family and friends. Making it simple to categorize or "tag" the photographs, Flickr also allowed its users to integrate their photographs into their blogs and other sites.

Flickr is now home to tens of millions of photographs and is part of the Yahoo! corporate family. Many of the photographs are still meant for family or friends, yet thousands of others are professional quality, creating one of the Internet's most remarkable live art galleries.

One of Flickr's most interesting features is that it allows users to select a Creative Commons license for their work. Launched by Stanford University law professor Lawrence Lessig in 2001, Creative Commons is a U.S.-based organization that enables users to select copyright licenses that best reflect their needs. For example, rather than

the copyright law's default "all rights reserved", the Creative Commons licenses are typically "some rights reserved" with non-commercial uses of the work frequently permitted without the need to obtain prior permission.

Creative Commons has grown internationally with dozens of countries creating national versions of CC licenses to better reflect their local laws. Creative Commons Canada, based at the University of Ottawa, was one of the first to successfully complete the "porting" of the licenses to national law and is today used by thousands of Canadian creators.

Creative Commons content can be searched using commercial search engines such as Yahoo! and Google, both of which track more than 50 million works that are readily available under CC licenses. In fact, Flickr alone has posted nearly ten million photographs that can be freely used with appropriate attribution for non-commercial purposes.

iv. Knowledge Sharing

Knowledge sharing, typified by the willingness of millions of people to contribute to collaborative learning and information tools, is another exciting product of the Internet and new technologies. The best-known of these initiatives is Wikipedia, a collaborative online "encyclopedia" with more than two million entries in dozens of languages. Wikipedia has attracted some negative attention for the ease with which entries can be altered—the initiative is community edited with no editorial staff—yet it is one of the most popular websites on the Internet largely because many users find it to be an accessible and effective tool for obtaining reliable information on a seemingly unlimited number of subjects.

The Wikipedia project, which has recently expanded to WikiNews and WikiBooks, is updated in near-real time. Contributors are unpaid, participating primarily to fulfill a desire to contribute to a global initiative that brings new knowledge to millions who cannot afford pricier alternatives.

The Public Library of Science provides another example of how the Internet facilitates new knowledge sharing. Launched to a skeptical publisher community by scientists and researchers in 2000, PloS today stands as one of the leading sources of scientific publishing in the world with a roster of contributors that includes several Nobel Prize winners. What distinguishes PloS from its conventional publishing rivals is that its content is "open access"—made freely available to the entire world via the Internet.

There are also several initiatives focused on digitizing and archiving content so that it may be preserved and accessed by a global audience. Project Gutenberg, a grassroots initiative comprised strictly

of volunteers, has digitized more than 17,000 books that have entered the public domain. Those books are freely available to users to download and share.

The Internet Archive, maintained by maverick entrepreneur Brewster Kahle, is engaged in similar digitization initiatives. The Internet Archive hosts thousands of hours of video content, including many older films that have entered the public domain. The site has pledged to host video content for free and forever, provided the user makes the work available under a Creative Commons license.

The Google Book Search initiative is the most controversial of the global digitization projects. The search engine giant has joined forces with several leading libraries, including the New York Public Library and academic libraries at Oxford University, the University of Michigan, Harvard University, and Stanford University. The ambitious initiative plans to digitize millions of books, with Google underwriting the entire cost. Although the plan has generated a backlash from publishers and some authors, the benefits of digitizing millions of books is beyond doubt. The primary concern arises from differing interpretations of U.S. copyright law with Google relying on fair use rights to support its claim that it is entitled to digitize copies of books, though only small portions, or snippets, of works still subject to copyright will be made visible on its search results.

Conventional Businesses

Amid the hyper-growth of new online developments, it is easy to overlook conventional businesses such as print media, book publishers, television, radio, and the entertainment industries. Although there has been a tendency to characterize many of these businesses as dinosaurs unwilling to adapt to the online environment, the reality is that there are good news stories emanating from each of these industries as well.

i. Print Media

With the growing commoditization of the news, newspapers have recognized the need to embrace the Internet, yet they have struggled to identify a suitable business model. Some have adopted subscription models, while others have relied exclusively on Internet advertising. From a content perspective, some have replicated their print versions online, while others have supplemented their websites with multimedia content, blogs, RSS feeds, podcasts, and online discussion fora.

Print readership is flat in Canada and on the decline in the United States, forcing newspapers to identify new ways to attract readership. In the U.S., several leading newspapers, including the New York Times,

have online readerships that exceed their print circulation. Trend lines suggest that most papers will follow suit in the next year or two.

While no one can predict which print media business model is the best fit for the Internet, a comparison of the leading business publication websites provides some important insights. According to Comscore, a media monitoring service, in 2002, the four leading business publication websites -- the *Wall Street Journal*, *Financial Times*, *Fortune*, and *Forbes*—each attracted roughly an equivalent number of monthly visitors (one million for the WSJ, 1.3 million for FT, and 1.7 million for *Fortune* and *Forbes*).

Each site adopted a different business model and by 2005 the numbers were dramatically different. The *Wall Street Journal* embraced a paid subscription model, yet managed to grow to 3.3 million monthly visitors. The *Financial Times* adopted a mix of free and fee-based content, leaving visitors uncertain about what they would find. It grew to only 1.8 million monthly visitors. *Fortune*, which used its site primarily to promote subscriptions to its print edition, surprisingly saw its monthly visitor numbers decline to 1.3 million.

Forbes took the opposite approach, making all of its content freely available, including archived materials. The *Forbes* approach was tied to the growth of the Internet advertising market, which was still at in its infancy in 2002. Three years later, Google was one of the world's richest companies based on that Internet advertising market and *Forbes* was attracting 7.8 million monthly visitors to its site, more than the other three sites combined. The lesson from the *Forbes* experience is clear—the Internet has the potential to become an important revenue source for those that embrace its unique culture and adopt an open approach.

ii. Book Publishers

Book publishers are also struggling to come to grips with the impact of the Internet. Book sales in Canada have remained stable with Statistics Canada reporting sales of 2.554 million in 2000, rising to 2.740 million in 2004. Despite the limited increase, there is reason for optimism in this sector as well.

First, the Internet holds the promise of exporting Canadian literature to the world. According to "The Long Tail," a much-cited *Wired* magazine article, the average book superstore such as Barnes & Noble stocks 130,000 titles. By comparison, more than half of Amazon.com's sales are generated from books not ranked in its 130,000 top sellers, suggesting that the market for books not even sold in the average bookstore is larger than the market for those that are. In a Canadian context, many Canadian books no doubt currently fall below the top 130,000 threshold and thus never even make it onto store shelves. The

long tail theory suggests that the Internet will bring Canadian content into markets where it currently does not exist.

Second, innovative publishers are embracing alternative models to distribute and promote books. For example, in September 2005 I edited a collection of 19 essays on Canadian copyright reform called *In the Public Interest: The Future of Canadian Copyright Law*. Irwin Law, the Canadian publisher, agreed to make the entire book available under a Creative Commons license. The book is available in print form for $50, but each chapter can also be freely downloaded at no cost from the publisher's website.

While skeptics may argue that giving the book away for free will reduce sales, the book's contributors believe that it will have the opposite effect. Some readers may decide to save $50 by opting to download the 618 pages instead. At the same time, some book buyers may discover the book through downloading and ultimately decide to purchase it. If the number of new buyers exceeds the number of lost buyers, the publisher ends up ahead. This is a bet that more and more publishers will be willing to make as they recognize that it is obscurity, not piracy, that is the greatest threat to commercial success.

iii. Television

Television networks are another sector facing increased uncertainty. Television ratings are down, particularly among the much-coveted younger demographic groups (they are presumably on the Internet and playing video games). Moreover, the 600-channel universe has become a reality, thinly distributing those watching television to a growing number of channels.

Despite the challenges, the Internet again provides opportunities. Websites such as YouTube.com, which enables users to post video content, has blossomed almost overnight as one of the Internet's most popular websites. Although the site carries considerable original content, there is no shortage of clips from conventional television shows. Some television networks have demanded that the site remove the clips for copyright reasons, however, others are content to generate "buzz" about their shows in the hope that it will translate into more viewers.

If the experience with iTunes in the United States is any indication, television downloads do have a positive correlation with viewership. NBC, one of the main U.S. networks, began making several of its shows available for download for $1.99 in the fall of 2005. The most popular offering proved to be *The Office*, a critically acclaimed show that was languishing with low ratings. Soon after the show was made available on iTunes, ratings began to rise, with network executives acknowledging that the Internet downloads may have played a role in the positive change.

Television networks are also experimenting with podcast versions of their shows. For example, *The Guiding Light*, a popular daily soap opera, began as a radio show in 1937. It moved to television in 1952 and has been a staple ever since. In 2005, CBS, the network that broadcasts the show, returned it to its roots, by offering a daily free podcast of each televised episode.

iv. Radio

Much like television, radio has also suffered declining ratings, particularly among younger demographics (no surprise to anyone who walks around a university campus only to find everyone plugged into their own iPods). Notwithstanding the rating declines, embracing in the Internet again provides new opportunities.

While conventional radio may be in decline, webcast numbers have increased dramatically. In the U.S., popular webcasters such as AOL and Yahoo! attract millions of listeners each week, with more than one-third of the population listening to a webcast on a regular basis.

As discussed earlier, podcasts also offer potential for growth. Successful independent podcasters generate hundreds of thousands of downloads per podcast and some conventional radio stations are seeking to match that success. The Corus radio network, one of Canada's largest, offers several of its shows as podcasts, while KYOU radio, a San Francisco-based station owned by the Infinity Broadcasting Network, recently switched to an all-podcast format.

v. Video Games

One of the overlooked success stories in recent years has been the phenomenal growth of the video game market. In 2004, the Canadian video game market registered a 24 percent increase in the sale of video game consoles and a 17 percent increase in video game cartridges. Canadian households now have an average of 1.5 video game consoles, a figure that will soon rival television penetration. Moreover, as anyone who has visited a music store recently can attest, video game products, together with DVDs, have taken shelf space away from traditional music offerings. In fact, in 2004, video game sales exceeded CD sales in Canada for the first time.

Not only has the video game market developed into an important economic engine, but Canada is now home to dozens of video game developers. Foreign video game makers are increasingly establishing development divisions in Canada, demonstrating that well-trained talent, not tougher copyright laws, serve as a primary attraction to would-be investors.

vi. Motion Pictures

While 2005 proved to be a difficult year in the motion picture business, in recent years the industry has enjoyed an enviable string of successes. Statistics Canada reports that in 2002-03, the Canadian motion picture industry broke a 43-year old revenue record, despite a decline in the number of total screens. The growth of this industry is similarly grounded in technology, as DVDs have become a huge revenue source with consumers snapping up millions of copies of popular movies in DVD format. Moreover, the popularity of DVDs has allowed the industry to mine its back catalogues, generating new revenues from older movies that were gone but apparently not forgotten.

The industry has also begun to utilize the Internet as a distribution channel. For example, CineClix is a Canadian-based movie download site specializing in independent films. Without waiting for new copyright laws, the service offers dozens of indie films not readily available elsewhere for instant download.

vii. Music

More than any other industry, the music industry has become synonymous with risks and rewards of the Internet. The Canadian Recording Industry Association has emerged as the leading proponent of copyright reform, claiming that peer-to-peer file sharing has led to billions in lost sales in Canada.

The actual financial impact of music downloading has long been difficult to ascertain. In August 2003, CRIA issued a press release claiming $250 million in losses over the previous three years. Three months later, another press release claimed $425 million in losses. By 2004, CRIA General Counsel Richard Pfohl told a university audience that the figure was actually $450 million per year since 1999, totaling roughly $2 billion over the prior five years.

In fact, the guesswork surrounding record sales is unnecessary since CRIA posts its members' monthly record sales data directly on its website. According to CRIA, Canadian CD sales in 1999 generated $699.9 million. That figured declined annually to $690.3 million (2000), $645.8 million (2001), $609.5 million (2002), and $559.7 million (2003). In 2004, sales increased to $562.2 million. Using CRIA's own numbers and 1999 as a benchmark, the cumulative decline in CD sales revenue in Canada during that period was $431.7 million. Given that total CD sales revenues during the period totaled $3.7 billion, the percentage decline is a relatively modest 8.6 percent. While a $431.7 million decline over a six-year period may still hurt, the source of that decline must also be examined. The uncertainty associated with the

financial impact of file sharing comes about since the losses tied to file sharing are only those that displace a potential sale, not all downloads. Moreover, those losses must be offset against downloads of music that (i) involve sampling before purchasing, (ii) that are no longer for sale, (iii) that are in the public domain or available with the express permission of the copyright holder, and (iv) that are compensated in Canada through the private copying levy.

Although loath to discuss the matter publicly, according to an October 2004 Economist article, an internal music label study found that between 2/3 and 3/4 of recent sales declines had nothing to do with Internet music downloads. That view was echoed in a Ministry of Canadian Heritage commissioned report which concluded that "[t]he assumption by the recording industry that demand for CDs is fundamentally strong and that Internet piracy is to blame for falling sales is a simplistic reaction to a complex problem…to place the burden wholly or partly on illegal downloads from the Internet is to ignore a host of other reasons."

The "other reasons" include the growth of DVD sales, which accounted for zero revenue in 1999, but generated over C$170 million in new revenue from 2000—2004. The popularity of DVDs is surely related to the decline in CD sales and the shrinking shelf space allocated to CDs by music retailers.

Moreover, U.S. census data actually indicates that the number of hours people spend listening to music is declining. Its data suggests that people now spend increasing amounts of time talking on cellphones, playing videogames, watching movies or spending time on the Internet.

The shift in music retail merchandising and marketing has also had an enormous impact on CD sales. The Recording Industry Association of America, CRIA's U.S. counterpart, reports that the dominant retail chains are now big-box retailers such as Wal-Mart. In Canada, Wal-Mart and Costco now account for 25 percent of the music retail marketplace, while in the U.S., Wal-Mart, Target and BestBuy are responsible for over half of all CDs sold.

This shift affects the music industry in two ways. First, while traditional record stores carry 60,000 or more titles, Wal-Mart stores focus primarily on new releases, featuring an average of 5,000 titles. The decreasing availability of older titles hurts an industry that traditionally depends upon catalogue sales for about 40 percent of its retail music revenue.

Second, Wal-Mart has placed new price pressures on the retail pricing of CDs -- capping retail pricing in the United States at US$9.72 per CD. The pricing pressure has had a dramatic impact on the revenue generated from each CD sale. According to CRIA's own numbers, revenue from the average CD in 2004 was C$10.95, down 8.8 percent from C$12.00 per CD in 1999. The bottom line impact has been to shave

C$53.9 million in revenue for sales in 2004 when compared with the same unit sales in 1999.

Additional factors behind the decreased revenues include a significant decline in the number of new releases issued over the past six years (less product presumably results in fewer sales) and the view that the CD sales decline simply reflects broader economic conditions. For example, during the 1991 economic recession, CD sales growth in the United States dropped by 11 percent, a sharper drop than the most recent downturn.

While the industry has undoubtedly gone through a difficult economic stretch, it has begun to offer consumers fee-based alternatives. Unfortunately, the Canadian online music market has been slow to develop, with services such as iTunes taking months to establish a Canadian version.

Growing pains continued in 2005 as the Canadian iTunes offered half as much music as its U.S. counterpart with a paltry Canadian content selection virtually devoid of French language music. In the broader online music market, the industry's own website lists six Canadian services offering 1.2 million songs. In the U.S., there are 38 services offering 22.1 million songs, leaving Canadian consumers with much less choice and correspondingly fewer sales.

Two

Copyright: While Canadians Slept

While the Bulte story demonstrates how the Internet and new technologies place new political participatory power into the hands of individuals, it also importantly highlights the growing interest in copyright issues. Copyright resonates most strongly with active Internet users, since the law can be used to curtail online activities and cultural expression. The concerns over Bulte's position on copyright stem in large measure from years of copyright reform enacted at the behest of the copyright lobby. Before articulating a forward-looking vision of Canadian copyright law reform, it is useful to place the current era of reform in its proper context.

Legislative Reform

Early Canadian copyright laws were relatively modest by today's standards, with the term of protection starting out at just 28 years. In 1921 the term of protection rose to the life of the author plus an additional fifty years after their death. Over the next 66 years, most reforms were relatively minor, with the exception of the establishment of moral rights (which protects an artist's legal right to maintain the integrity of their works) and the creation of the Copyright Appeal Board, which reviewed tariffs for public performances.

In 1987, the pace of copyright reform in Canada accelerated dramatically. That year, statutory reforms addressed the "grey market", rendering it unlawful to import works created outside the country that would infringe Canadian copyright. The next year, the government completed "Phase One" of a new copyright reform process, which (among other things) expanded the definitions of musical works, performances, and films while implementing a specific offence for secondary infringement. A few years later, rental rights for computer programs and sound recordings were added, thereby eliminating the rental market for those works. In 1997, the completion of "Phase Two" established measures such as statutory damages for copyright infringement, protection for exclusive book distribution arrangements, and a levy on blank media to compensate for private copying.

The Courts

While the government has been busy reforming copyright law, Canada's Supreme Court has also entered the copyright debate. Its most important decision to date came in 2002's Théberge v. Galerie d'Art du Petit Champlain Inc., a case which involved a challenge by Claude Théberge, a Quebec painter with an international reputation, against an art gallery that purchased posters of Théberge's work and then proceeded to transfer the images found on the posters from paper to canvas. The gallery's technology was state of the art—it used a process that literally lifted the ink off the poster and transferred it to the canvas. The gallery did not actually create any new images or reproductions of the work since the poster paper was left blank after the process was complete. Théberge was nevertheless outraged—he believed he had sold paper posters, not canvas-based reproductions—and he proceeded to sue in Quebec court, requesting an injunction to stop the transfers as well as the seizure of the existing canvas-backed images.

Although the Quebec Court of Appeal ruled in favour of the seizure, the majority of the Supreme Court overturned that decision, finding that the images were merely transferred from one medium to another and not reproduced contrary to the Copyright Act. Writing for the majority of the Court, Justice Ian Binnie stated that "the proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature…Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it."

Justice Binnie also emphasized the dangers inherent in copyright that veers too far toward copyright creators at the expense of both the public and the innovation process. He noted that "excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."

The full impact of the Theberge case was felt two years later, in another Supreme Court of Canada case. The Law Society of Upper Canada v. CCH Canadian, a 2004 unanimous decision, instantly ranked as one of the strongest pro-user rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright.

The case involved a dispute between the Law Society—the body that governs the legal profession in Ontario—and several leading legal publishers. Unlike today's high profile cases that typically involve the Internet, this case centered on the use of a distinctly old-fashioned copying technology—photocopiers.

The Law Society, which maintains the Great Library, a leading law library in Toronto, provided the profession with two methods of copying cases and other legal materials. First, it ran a service whereby lawyers could request a copy of a particular case or article. Second, it maintained several stand-alone photocopiers that could be used by library patrons.

The legal publishers objected to the Law Society's copying practices and sued for copyright infringement. They maintained that the materials being copied were subject to copyright protection and that the Law Society was authorizing others to infringe on their copyright.

It is worth examining the outcome of the case as well as the court's analysis from three perspectives, each of which is progressively more significant.

First, the case can be examined from the perspective of the litigants. The Law Society emerged victorious on most counts in this regard as the court ruled that it had neither infringed the publishers' copyright nor authorized others to do so.

Second, the case can be considered from the perspective of the court's interpretation of several important aspects of copyright law. The court provided a detailed discussion of the fair dealing exception (the Canadian counterpart to the U.S. fair use doctrine), concluding that the exception should be granted a large and liberal interpretation. In fact, the court remarkably fashioned exceptions to copyright infringement as new copyright rights—users' rights—that must be balanced against the rights of copyright owners and creators.

The court also adopted an important new standard for authorization, which has long been used by copyright owners to hold parties to account for allowing others to infringe copyright. On this issue, the court ruled that authorization should be interpreted as "sanction, approve or countenance" and it concluded that "a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright."

Third, the case can be assessed from the court's broader perspective on copyright law. Just two years earlier, the Supreme Court's view on copyright law was that it was there solely to benefit creators. With Theberge and CCH, the court shifted to speak openly of users' rights and of the need to rigorously balance the interests of both creators and users.

For example, in arriving at its interpretation of authorization, the court concluded that the "mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law" since taking the opposite approach "shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole." Similarly, its liberal interpretation of fair

dealing is based on the analysis that "it is a user's right [and] in order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."

The Process

Not only has Canadian copyright law undergone dramatic legislative and judicial change over the past two decades, so too has the process of Canadian copyright law reform. Where copyright was once an issue of concern to a small group of specialists, today it has captured the interest of many Canadians.

The Bulte controversy illustrates the change as it highlighted both the broad interest in copyright issues and shone the spotlight on the close connection between Canada's former Parliamentary Secretary for Canadian Heritage and the largely U.S.-backed copyright lobby. Moreover, lobbyist registration records, campaign finance returns, and documents obtained under the Access to Information Act reveal a process that is badly skewed toward lobby interests and in serious need of reform.

Industry Canada's Lobbyist Registration Database includes dozens of registered lobbyists for copyright interests. For example, CRIA currently has six registered lobbyists on its payroll, while Access Copyright's similarly sized contingent of five registered lobbyists even includes former MP Paul Bonwick, a Bulte contributor who worked closely with her on a 2004 copyright report while both served on the Standing Committee on Canadian Heritage.

Financial contributions to political parties and MPs are commonplace, which helps to explain Canadian Motion Pictures Distributors Association President Douglas Frith's response to the furor over the Bulte fundraiser. Frith argued that the process was balanced by virtue of his organization's financial support for both Liberal and Conservative candidates.

According to Elections Canada, in the decade from 1993 to 2003, CRIA provided campaign contributions to the Liberal party in every year with the exception of 2001. While during many years only modest amounts were donated, by far the largest contribution was made in 1998, which came immediately after the passage of copyright reform. That reform bill included the establishment of the private copying levy that has since generated more than $140 million in revenue for the industry and artists.

While the impact of lobbyists occasionally comes into public view through the presence of MPs at industry-sponsored events, most of it remains hidden behind closed doors.

Greater access to Ministers and government officials is certainly one of the most important consequences of the copyright lobby's activi-

ties. A March 2002 letter from then CRIA President Brian Robertson to newly appointed Industry Minister Allan Rock, obtained under the Access to Information Act, provides a classic illustration of this phenomenon.

The CRIA letter congratulates Rock on his new position and urges him to support ratification of the World Intellectual Property Organization's Internet treaties. Rock is advised that CRIA has enjoyed a very productive dialogue with Canadian Heritage Minister Sheila Copps "persuasive enough to have the Minister of Heritage publicly state… that it was now the government's intention to ratify the Treaties."

The copyright lobby has also proven successful in obtaining greater representation before parliamentary committees as well as in securing meetings with government officials. During Bulte's tenure as chair of the Standing Committee on Canadian Heritage in 2004, the committee was perceived to be decidedly pro-copyright lobby with panels stacked against user interests.

That perception is borne out by internal government documents which verify that Bulte shot down a proposal to allow Industry Committee MPs, who are generally perceived to provide a technology-focused balance to the debate, to attend copyright hearings. Bulte's terse response indicated that "the chair of the heritage committee is not open to the suggestion of inviting industry committee members."

The copyright lobby also meets regularly with government officials. A document obtained under the Access to Information Act titled "List of meetings between Canadian Heritage's Copyright Policy Branch and its stakeholders in copyright reform" indicates that in the nearly thirteen months between April 1, 2004 and April 25, 2005, government and policy officials from that department met or held teleconferences 15 times with Access Copyright, 14 times with music collectives, seven times with CRIA, and five times with publisher associations. Meanwhile, the document lists only one meeting with education groups, two meetings with public interest groups, and two meetings with technology groups.

In fact, the close connection between the copyright lobby and government even extends to contracts. The Canadian Publishers' Council, whose executive director was one of the hosts of the Bulte fundraiser, obtained a $20,000 contract in 2005 for a "copyright awareness initiative" whose goal was to develop an Internet-based social awareness campaign to "engage young people in a new conversation about copyright."

The cumulative effect of the lobbyist influence has left many stakeholders concerned that there is little room for either the interests of the public or the balanced approach supported by the Supreme Court of Canada. Exacerbating that concern is what the future of Canadian copyright law might look like.

Three

What Might Lie Ahead

Unlike other law and policy areas, where future reform is shrouded in the mystery of consultations and internal processes, the Canadian government has released a veritable "road map" of future copyright reform initiatives. The 1997 reforms, referred to earlier as "Phase Two", mandated a review of Canadian copyright law within five years. While this review was expected to examine how well the copyright system was functioning, the 49-page document, known as the Section 92 report, actually focused primarily on identifying and prioritizing new policy issues. The issues identified in the report included a plethora of new rights, database protection, term of copyright, and legislation to support technological protection measures. Moreover, Sam Bulte telegraphed her views on future copyright reform in the May 2004 Bulte report.

While a detailed discussion of the Section 92 report, the Bulte report and Bill C-60, the June 2005 copyright reform bill that died on the order paper, is beyond the scope of this lecture, it is worth highlighting three controversial reforms that may lie on the horizon.

i. Copyright Term Extension

Canada is considering launching a consultation on whether to extend the term of copyright from the current international standard of the author's life plus 50 years to the author's life plus 70 years. The term of copyright has been extended in some other jurisdictions, most notably the United States, however, the international "standard" remains as is and the vast majority of the world's population lives in countries that have not extended the term.

Some of Canada's best-known writers have stressed the importance of the public domain and the ability to build upon prior work. Northrop Frye criticized many of copyright's underlying assumptions with his wry comment on "a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others; Shakespeare, whose plays sometimes follow the sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible."

Canadian authors have a long history of what Margaret Atwood once referred to as acts of literary "reclamation." In a recent example, Stéphane Jorisch won the 2004 Governor General Literary Award for Children's Literature (Illustration) for his interpretation of Lewis Carroll's Jabberwocky, which is now in the public domain. The review committee noted that Jorisch had extended "this familiar text to create a haunting, surreal vision."

A robust public domain does more than just provide creators with source material for future work -- it also has the potential to support Canada's commercial publishing interests. For example, consider that the 2005 winner of CBC's Canada Reads contest was Frank Parker Day's Rockbound, a book published in 1928 by an author who died in 1950. Rockbound is now in the public domain, freely available to all, yet the University of Toronto Press stands to generate substantial new income with it that will be used to support other authors.

The public domain also plays a crucial role in historical research. Leading Canadian historians such as J.L. Granatstein have been vocal in cautioning against proposals that harm access to our collective culture. For example, a 2003 copyright reform proposal that was dubbed the Lucy Maud Montgomery Copyright Term Extension Act owing to the extension of copyright for a series of unpublished works by the much-celebrated P.E.I. author, would also have locked up the works of dozens of prominent Canadians including former Prime Ministers R.B. Bennett and Sir Robert Borden.

The majority of the world has recognized that an extension is unsupportable from a policy perspective. It will not foster further creative activity, it is not required under international intellectual property law, and it effectively constitutes a massive transfer of wealth from the public to the heirs of a select group of copyright holders such as Disney, which actively lobbied for the U.S. term extension to keep Mickey Mouse out of the public domain. Given the economic and societal dangers associated with a copyright term extension, even moving forward with a consultation constitutes an embarrassing case of putting the interests of a select few ahead of the public interest.

ii. Anti-Circumvention Legislation

One issue that has moved past the consultation stage—it appeared in the ill-fated Bill C-60—is legal protection for digital locks, known as anti-circumvention provisions. Owners of online databases and other digital content deploy technical protection measures (TPMs) to establish a layer of technical protection that is designed to provide greater control over content. For example, DVDs contain a content scramble system that limits the ability to copy even a small portion of a lawfully purchased DVD. Similarly, purchasers of electronic books often find

that their e-books contain limitations restricting its copying, playback, or use on multiple systems. In fact, e-books are frequently saddled with far more restrictions than are found in their paper-based equivalents. While TPMs do not offer absolute protection—research suggests all TPMs can eventually be broken—companies continue to actively search for inventive new uses for their digital locks.

These applications sometimes extend far beyond protecting content, however, to subtly manipulating markets—to the detriment of consumers. For example, DVDs typically contain codes that limit their use to a specific region. Consumers are often unaware of this regional coding until they purchase a DVD while on vacation abroad, only to find that they cannot watch the disc on their home player. TPMs can also compromise a user's privacy, reporting consumer activity and personal information back to parent companies—not to mention recent media reports of hackers exploiting them to invade computer systems.

Given the flawed protection that TPMs provide, content owners, represented by the powerful U.S. music and movie associations have nonetheless lobbied for legal protections to support them. Although characterized as defending copyright, this type of legislation does not directly address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn provides protection for the underlying copyrighted content.

Experience with legal protection of TPMs in the United States, which enacted anti-circumvention legislation as part of the Digital Millennium Copyright Act in 1998, demonstrates the detrimental impact of this policy approach. Consistent with fears expressed by the Act's critics, Americans have since suffered numerous abuses that compromise not only security and fair competition but also free speech and user rights under copyright.

From a free speech perspective, the threat of potential lawsuits has chilled research. For example, several years ago Princeton computer scientist Edward Felten sought to release an important study on encryption that included TPM circumvention information. When his plans became known, he was served with a warning from the Recording Industry Association of America that he faced potential legal liability if he publicly disclosed his findings, since the mere release of circumvention information might violate U.S. law.

Anti-circumvention legislation has also combined with TPMs to steadily eviscerate fair use rights such as the ability to copy portions of a work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying - even that which copyright law currently permits. TPMs likewise have the potential to limit the size of the public domain, since in the future work may enter public domain as its copyright expires, yet remain practically inaccessible as it sits locked behind a TPM.

In light of experience elsewhere, where TPMs have had negative consequences, it is evident that Canada does not need protection for TPMs, but rather protection from them. While the ideal approach would be to simply drop incorporating anti-circumvention measures into Canadian law, Bill C-60 proposed the next best alternative by refusing to criminalize devices that could be used to circumvent TPMs and by only targeting circumvention of TPMs where the purpose is linked to copyright infringement. This approach deserves support since it avoids some of the more disturbing consequences experienced in the United States.

iii. Educational Use of Internet Materials

The use of Internet-based materials by the Canadian education community is another contentious issue that has been the subject of both legislative proposals and broader consultations. Bill C-60 contained provisions that were ostensibly designed to facilitate technology-based education and the digital delivery of library materials. Unfortunately, they fell far short of their goal by hobbling any new rights with suffocating restrictions that render the provisions practically useless.

For example, the bill purported to promote Internet-based learning by permitting schools to communicate lessons featuring copyrighted materials via telecommunication. That new right was quickly restricted, however, when it forced schools to destroy the lesson within 30 days of the conclusion of the course. Moreover, schools were required to retain, for three years, records that identified the lesson as well as the dates it was placed on a tangible medium and ultimately destroyed.

The library provisions were even more onerous, turning librarians in digital locksmiths, who were ironically compelled to restrict access to knowledge in order to provide it. The bill did allow libraries and archives to provide digital copies of materials, however, in order to do so they were required to limit further communication or copying of the digital files and ensure that the files could not be used for more than seven days.

Another issue on the education copyright agenda is the issue of Internet licensing. The 2004 Bulte report set off a firestorm within the education community by proposing a new license to cover Internet-based works. This new license would require schools to pay yet another fee (the education community already hands over millions in license fees each year for content) for works found on the Internet.

Although the committee acknowledged that some work on the Internet is intended to be freely available, it recommended the adoption of the narrowest possible definition of “publicly available”. Its vision of publicly available included only those works that were not either technologically nor password-protected and contained an explicit notice

that the material could be used without prior payment or permission.

Rather than adopt an approach that facilitated the use of the Internet, the committee called for the creation of a restrictive regime in which nothing was allowed unless expressly permitted. The result would have been an Internet in which schools would be required to pay to use Internet materials contrary to the expectations of many creators.

Canadian universities, colleges, and schools, which are struggling with 20th century budgets to provide a 21st century education, responded by arguing instead for a limited educational user right to publicly available work on the Internet. In keeping with longstanding and widely accepted practices on the Internet, publicly available work would include materials that are neither technologically or password protected—*i.e.* information that the author would appear to want to make widely available.

Faced with competing proposals, the Liberal government chose neither, instead committing to a public consultation that was pre-empted by the election. Bev Oda, the new Conservative Minister of Canadian Heritage, has hinted that she is sympathetic to the concerns expressed by the education community.

Four

Our Own Creative Land: Charting a New Course for Copyright and Creativity in Canada

While the roadmap for Canadian copyright reform seemingly heads toward a continuation of the special interest copyright reform that has dominated Canadian legislative action over the past twenty years, there is an alternative. The good news story described earlier illustrates that the Internet and new technologies represent opportunities to be embraced rather than threats to be contained. The copyright policies of the 1990s, which form the foundation of current legislative proposals, are based on a vision of the public as consumers. The policies had little regard for the explosive growth of creativity that has turned millions of people into creators.

The outcry against Sam Bulte's close connections to the copyright lobby concerned more than just a desire for new political accountability. It was also about policy accountability and the growing desire for policy visions that represent the needs of all Canadians. We stand at the threshold of a remarkable opportunity that could bring greater access to knowledge for millions of Canadians and increase the availability and popularity of Canadian culture at home and abroad. We have the chance to propel Canada into a leading global policy role on copyright and culture, a role that eschews the deal broker position of the past which led to virtual silence by Canadian officials on the global stage to one that positions Canada as a model for countries throughout the developed and developing world to follow.

Canadian political parties from all sides of the political spectrum are feverishly working toward identifying a vision for the future. Effective copyright law provides one piece of that puzzle. Rather than enacting decade old copyright reform proposals, Canada can chart a course for a new vision that embraces the possibilities presented by the Internet and new technologies. A vision of digital copyright reform that meets the public interest, a copyright balance that addresses the needs of both creators and users, and a cultural policy that presents the very best of Canada to the world. A vision that reflects our own creative land.

Our Digital Copyright Reform

For the past six years, digital copyright reform has remained at the top of policy makers' agendas. In 2001, Industry Canada and Canadian Heritage jointly launched a public consultation on a narrow set of issues including WIPO implementation and Internet service provider liability. The consultation generated hundreds of responses, the majority of which came from individuals concerned that Canada might follow the U.S. approach to these issues.

While the results of that consultation played a role in the crafting of the ill-fated Bill C-60, it is time to acknowledge that a refresh is now needed. The limited nature of the consultation, along with the extraordinary technological changes of the past five years, would be reason enough to go back to the public. When combined with the shift toward a copyright balance at the Supreme Court of Canada, the growing interest in these issues from various sectors that did not participate in the 2001 consultation, and the installation of a new Conservative government, it is clear that rushing headlong toward another copyright reform bill is a prescription for disaster. It would be far more prudent to re-examine these issues—starting with WIPO implementation, TPM legislation, and Internet service provider issues.

i. WIPO Implementation

The WIPO Internet Treaties, which Canada signed in 1997, are frequently cited as a prime reason for Canadian digital copyright reform. Several of our trading partners, most notably the United States, are aggressive proponents of the treaties, which mandate new legal protections for technological protection measures.

While the treaties are indeed an important consideration in the policy process, it is important that Canadians separate fact from fiction. The myths associated with the treaties frequently focus on Canada's place in the international copyright world and the impact of WIPO Internet treaty ratification on Canadian creators and consumers.

The arguments surrounding Canada's place in the international copyright world often imply that Canada has failed to meet its international copyright obligations, that signing the treaty in 1997 now compels Canada to ratify it, and that Canada has fallen behind the rest of the world by moving slowly on ratification.

None of these claims are true. Canada has not failed to meet its international obligations since it has no obligations under the WIPO Internet Treaties -- under international law obligations only arise once a country has ratified a treaty not merely signed it.

Moreover, Canada's decision to sign the WIPO Internet Treaties was simply a sign of support, not a legal obligation to ratify. In fact,

according to government documents obtained under an Access to Information request, at the time Canada considered signing the treaties, then-Canadian Heritage Minister Sheila Copps was advised that "international convention is such that signing in no way binds Canada to ratify the treaties. It is a symbolic gesture."

Finally, to hear supporters of the treaties tell the story, it would appear that Canada is the last country in the world to move toward treaty ratification. The reality is actually quite different -- of the countries that comprise the G-20, only six have formally ratified the WCT. Far from playing catch-up, Canada finds itself in the majority of G-20 countries who have adopted a wait-and-see approach.

The WIPO Internet Treaties' impact has been similarly exaggerated. Supporters argue that failure to ratify will result in diminished protection for Canadian artists outside the country and that ratification will not have an adverse impact on Canadian consumers.

Once again, neither of these claims prove to be accurate under close scrutiny. Concerns about the protection of Canadian artists outside the country is based on the premise that Canadians will only enjoy stronger protections elsewhere if foreign artists benefit from equivalent protections in Canada.

In reality, ratification of the WIPO Internet treaties won't provide Canadian artists with any additional protections in countries such as the United States and Japan since these countries already extend equal protection—known as national treatment - to local and foreign artists under existing trade agreements.

While WIPO Internet treaty ratification will not benefit Canadian artists in foreign jurisdictions, foreign artists will enjoy great benefits from ratification to the detriment of Canadian consumers, since formal ratification of one of the WIPO treaties would require additional changes to Canadian copyright law, most notably providing national treatment for the controversial private copying levy.

Despite its shortcomings, Canada may ultimately decide to implement the WIPO Internet treaties. In reaching that determination, policy makers should be guided by the Canadian national public interest, not a series of myths that inaccurately imply that Canada has little choice in the matter.

ii. TPMs

As discussed earlier, TPMs are the most contentious aspect of the WIPO Internet treaties and legislative proposals such as Bill C-60. While there is considerable pressure to establish TPM legislative protections, experience suggests that the public needs legislative protections from TPMs.

This is best highlighted by Sony BMG's embarrassing experience

in the fall 2005 with copy-control TPMs. The Sony case started out innocently enough with a Halloween-day blog posting by Mark Russinovich, an intrepid computer security researcher. Russinovich was caught in his own web of horror -- Sony was using a copy-protection TPM on some of its CDs that quietly installed a software program known as a "rootkit" on users' computers.

The use of the rootkit set off danger signals for Russinovich. He immediately identified it as a potential security risk since hackers and virus writers frequently exploit such programs to turn personal computers into "zombies" that can send millions of spam messages, steal personal information, or launch denial of service attacks. Moreover, attempts to uninstall the program proved difficult, as either his CD-Rom drive was rendered unrecognizable or his computer crashed.

Although users were presented with a series of terms and conditions that referred to software installation before launching the CD, it is safe to assume that few, if any, realized that they were creating both a security and potential privacy risk as well as setting themselves up for a "Hotel California" type program that checks in but never leaves.

While Sony and the recording industry associations stood largely silent—a company executive dismissed the concerns stating that "most people don't even know what a rootkit is, so why should they care about it"—the repercussions escalated daily. One group identified at least 20 affected CDs, including releases from Canadian artists Celine Dion and Our Lady Peace. Class action lawsuits were launched in the United States and Canada, a criminal investigation began in Italy, and anti-spyware companies gradually updated their programs to include the Sony rootkit.

Nearly two weeks after the initial disclosure, Sony finally issued a half-hearted apology, indicating that it was suspending use of the TPM and issuing a software patch to remove the rootkit.

About the same time things went from bad to worse. It was soon discovered that Sony's patch created its own security risk—potentially leaving personal computers even more vulnerable than with the initial rootkit—and was pulled from its website.

The company also recalled millions of CDs, losing tens of millions in revenue and effectively acknowledging that the CD was a hazardous product. The recall was even bigger than anticipated as Sony disclosed that there were at least 52 affected CDs. Moreover, researchers estimated that the damaging program had infected at least 500,000 computers in 165 countries.

Finally, just when it appeared that Sony had hit bottom, analysis of the rootkit revealed that it included open source software code contrary to its applicable license. In other words, Sony itself may have infringed the copyright of a group of software programmers and would be on the hook for significant copyright infringement damages.

Sony faced dozens of class action lawsuits in the U.S. alone, which it settled by agreeing to a series of restrictions and conditions on the use of TPMs. These restrictions and conditions could provide the starting point for Canadian policy makers crafting a future statute that protects against the misuse of such technologies.

The settlement compensated consumers for the harm they suffered from the Sony CDs and placed limits on Sony's future use of TPMs. It compensated most purchasers with a copy-protection free replacement CD as well as the choice of either (i) US$7.50 plus one free album download or (ii) three free album downloads. Sony selected at least 200 eligible titles for download.

The most notable feature of this portion of the settlement was that Sony undertook to provide the free downloads from at least three music download services including rival Apple iTunes. This aspect of the settlement was laced with irony since one of Sony's prime reasons for using the copy-protection software was to preclude its customers from copying the songs into MP3 format for playback on Apple iPods (the CDs could be easily copied into a format compatible with Sony digital audio players).

Sony also agreed to comply with at least ten new limitations on its future use of TPMs. These limitations, which run until 2008, focused on improved disclosure requirements, security precautions, and privacy safeguards.

The disclosure requirements included a commitment to fully inform purchasers on its outer packaging when a CD contains copy-protection software, to ensure that its license agreements, which must be pre-approved by an independent oversight party, accurately disclose in plain language the nature and function of the copy-protection software, and to promptly reveal any updates or changes to the copy-protection software. The settlement also included a prohibition on the installation of any copy-protection software before the user accepts the Sony license agreement.

New security precautions played an important role in the settlement agreement. Sony agreed to stop using the technologies that caused the harm; to ensure that an uninstaller program was made readily available to consumers for any future TPM; to obtain an expert opinion to ensure that the use of any other copy-protection software does not create security risks; and to fix any software vulnerabilities that may arise from the use of the copy-protection software.

The privacy safeguards are noteworthy since they extended beyond the obligations typically found in privacy legislation. While privacy laws do not set limits on the use of TPMs (they merely require disclosure of the data collection and appropriate consents), the Sony settlement included express limitations on the collection and use of personal information.

Canada may yet decide to provide legal protection for TPMs. In doing so, Bill C-60 provides a starting point for discussion by adopting a minimalist approach that does not criminalize new technologies and at the same time seeking to preserve most existing copyright user rights. While that approach is far better than the more draconian provisions adopted in the United States, it is not enough. To preserve the copyright balance, Canada needs legal protections that guard against TPM abuse. The model provided by the industry's own settlement terms is the right place to start.

iii. Internet Service Providers

A critical aspect of digital copyright reform is the role of Internet service providers (ISPs), who serve as intermediaries for online activities. The copyright lobby has aggressively pursued the establishment of a "notice and takedown" system. Under notice and takedown, copyright holders have the right to notify ISPs that one of their subscribers has posted copyright infringing content (the notice). Depending on the system, ISPs respond to the notice by either notifying the subscriber (who may voluntarily take down the content), taking down the content themselves, or awaiting a court order (the takedown). In return for taking action, ISPs qualify for a safe harbour from liability.

The United States implemented a notice and takedown system several years ago. Canada has moved slowly on this issue, however, due in large measure to concerns arising from the U.S. experience. Under the U.S. system, computer generated notices have become the standard, with errors becoming the norm. For example, notices have been sent to take down a child's Harry Potter book report, a sound recording by a university professor mistakenly identified as a song by a well-known recording artist, and an archive of public domain films.

In fact, one study of the U.S. experience found that some ISPs receive tens of thousands of notices every month with only a handful actually relating to materials found on their networks. Moreover, notices have also been used to suppress free speech and criticism. Diebold, an electronic voting equipment maker used the system to attempt to remove company memos detailing problems with its e-voting machines, while the Church of Scientology has used it to remove web sites critical of its activities.

Canadian policy makers and parliamentarians should respond to this issue by adopting a system that respects the rights of copyright holders, the privacy rights of users, the fairness of court review, and the need to appropriately limit the burden placed on ISPs. Indeed, Bill C-60 proposed just such a system with the development of a "notice and notice" approach.

Notice and notice is comprised of a four-step process. First, a

copyright holder, having exercised appropriate due diligence in confirming an alleged infringement, sends a notice to the ISP. Second, the ISP promptly notifies its customer of the allegation and leaves it to the customer to voluntarily take down the content. Third, if the customer refuses to take down the content, the copyright holder applies to a Canadian court to order its removal. The ISP serves as a conduit to ensure that the subscriber is aware of the court proceeding and can challenge if desired. Fourth, if the court issues an order, the ISP responds to the order by taking down the content.

This approach would provide copyright holders with an efficient mechanism for removing infringing content, while also ensuring respect for subscriber privacy and free speech rights as well as granting ISPs limited liability. Moreover, a notice and notice system would match the current Canadian approach used for the removal of illegal content such as child pornography. Under Canada's Criminal Code, ISPs are only required to remove alleged child pornography under a court order, not on the basis of a mere private claim. Given that notice and notice is good enough for harmful content such as child pornography, surely it is suitable for claims pertaining to an allegedly infringing song.

Our Copyright Balance

The focus on digital copyright reform in recent years has had the unfortunate effect of crowding out other important copyright issues. With the Supreme Court of Canada's insistence on balance, a renewed copyright consultation would begin to address critically important issues that have been ignored for far too long. At the very top of this list would be the shift toward a fair use approach from the current, more limited fair dealing standard along with firm commitments to reject copyright term extension and the creation of *sui generis* database right.

i. Adopt Fair Use

As discussed earlier, one of the most important long-term effects of the Supreme Court of Canada's CCH decision was the court's strong support for the fair dealing provision, which it characterized as a user right. The Court emphasized the importance of a broad and liberal interpretation to fair dealing, which covers a series of prescribed uses including research, private study, criticism, and news reporting.

Unfortunately, the relatively rigid categorization of exceptions runs counter to the very notion of a broad and liberal approach. On this issue, the United States provides the ideal model since its fair use provision does not include such limiting language, thereby encouraging innovative, fair uses of existing work.

A full fair use provision—one that would amend the current Copyright Act so that the list of fair dealing rights would be illustrative rather than exhaustive—would help solve many difficult issues. These include the facilitation of a national digital library, discussed in further detail below, which is currently hampered by the limitations of fair dealing.

Similarly, a shift to fair use would help bridge the gap on the use of the Internet in Canadian schools by rejecting both the blanket Internet exception for school use proposed by some education groups and the comprehensive Internet licensing scheme advocated by Access Copyright. The change would clear the way for fair uses that are not currently covered by the private study or research fair dealing rights, but also ensure that creators are compensated for uses that extend beyond what might reasonably be viewed as fair use.

Fair use would help address the current mess found in Canada's private copying system, which establishes a levy on recording media such as blank CDs in return for the right to make personal, non-commercial copies of music. Consumers dislike paying what resembles a tax, retailers complain that it drives business out of the country, and artists doubt its effectiveness in light of the inexcusably slow rate of royalty distributions.

Private copying was added to the Copyright Act in the late 1990s following 15 years of lobbying by CRIA. It argued that home taping resulted in millions of dollars in lost revenue each year. After several policy studies and task force reports, the levy eventually made its way into Canadian law.

The levy, however, ran into criticism from the moment of its inception. The Copyright Board of Canada was faced with the unenviable task of setting the rate of the levy. That process left virtually everyone unhappy. Some argued that the levy was too high and that it encouraged consumers to avoid it by buying blank media outside the country. Others maintained it was too low and therefore failed to provide adequate compensation. Moreover, consumers and businesses that purchased blank media for purposes other than copying music plausibly argued that they were effectively subsidizing those that did copy music.

As blank media prices have dropped, the levy now represents a significant percentage of the retail price. Consider the purchase of 100 blank Maxell CDs. Future Shop, a leading Canadian retailer, sells the 100 CDs for $69.99. The breakdown of the cost is $48.99 for the CDs and $21.00 for the levy. This results in a huge distortion in retail pricing when compared to the U.S. market that does not have a levy system. For example, the same Maxell CDs retail for US$34.99 at CompUSA. When the currency exchange is added, the cost in Canadian dollars is just over $40.00.

There are two options open to dealing with the inadequacies of private copying. One approach would be to expand the levy so that it bet-

ter reflects current copying practices. Using the model of several European countries, the levy would grow in size, but so too would the rights of consumers to copy both audio and video for personal purposes. In fact, such an approach would provide the music industry with multiple revenue streams since it would collect the levy for peer-to-peer music file sharing, while also enjoying the benefits of a thriving commercial download market.

However, given the opposition to the levy system, the better alternative might be to simply drop it completely. In its place, Canada could adopt a fair use provision that would allow consumers to copy their own CD collection onto another device. Rather than collecting on the levy, the industry would incorporate into the selling price of the product the value of private copying. In fact, the Australian Attorney General proposed such an approach for his country in late 2005.

Canada recognized the benefits of a fair use system in a landmark policy paper in the 1980s, yet failed to introduce legislation to implement the recommendation. With both Australia and the United Kingdom openly considering shifting their laws from fair dealing to fair use, this is the one issue on which Canada can ill-afford to be left behind.

ii. Copyright Term Extension

As discussed earlier, Canadian policy makers are contemplating launching a public consultation to discuss the prospect for extending the term of copyright from the current life of the author plus fifty years to life of the author plus seventy years. There is no need for a consultation—the government should simply undertake to meet the international standard of life plus fifty years eliminating any consideration of unnecessary extensions. Indeed, if Canada wanted to lead on this issue, it might consider, as has Professor David Lametti of McGill University, the prospect of scaling back the length of the term of copyright for certain works. For example, the term of copyright for a software program, which is frequently outdated only months after its release, is the same as a novel or musical composition. Reconsidering copyright terms could yield varying terms depending on the type of work to provide more suitable terms of protection.

The most recent Canadian experience with copyright term extension provides a helpful lesson on the political minefield that awaits any party seeking to extend the term of protection. In 2003, a small provision was inserted into a bill dealing with the Library of Canada archives. The provision called for the extension of the term of copyright for unpublished works of deceased authors. Ten years ago, the topic would have generated scarcely an acknowledgement, much less a major policy debate. In the current environment, hundreds of individuals caught wind of the proposal and quickly mobilized into action.

Dubbed the Lucy Maud Montgomery Copyright Term Extension Act, the Canadian bill arose at the request of the heirs of author Lucy Maud Montgomery of Anne of Green Gables fame, who wrote ten volumes of diaries during her lifetime that were not published until after her death. When it became clear that those works would enter into the public domain in 2004, the heirs sought a copyright extension from the government to maintain exclusive control over her works until 2018.

Any hope that the bill would sail through under the public's radar screen quickly vanished. Historians, copyright fairness advocates, and individuals all spoke out against the extension, noting that it did little more than transfer the value of the work from the general public to Ms. Montgomery's heirs while failing to create any new work or providing society with any tangible benefit. In addition, opponents feared that this legislation would be the start of something ominous, foreshadowing a U.S.-style copyright term extension.

The bill ultimately failed to secure passage before the works at issue entered the public domain. The episode will not be soon forgotten, however, since it demonstrates the serious opposition to copyright term extension. Canadian leaders should do the right thing - stop the debate before it begins.

iii. Database Rights

As the use of databases to store and disseminate information has grown, so too has interest in the protection afforded to the data contained therein. Canadian copyright law already provides protection for databases through legal protection for compilations. In such instances, the copyright holder is rewarded for overall selection and arrangement of the work. The copyright protection for a compilation is independent of the copyright afforded to the underlying individual work that has been compiled. Whether a database would enjoy copyright protection as a compilation would also turn on the degree to which the selection and arrangement required skill and judgment. For example, that standard would suggest that a database consisting of an alphabetical listing of names, addresses, and phone numbers would not rise to a sufficient level of originality to enjoy protection, while encyclopedias or dictionaries likely would be entitled to copyright protection as compilations.

While the U.S. has mirrored the Canadian approach, the European Union has established sui generis protection for databases. The protection for the database's data or contents rests with the creator of the database. Since the creator need only prove a qualitative or quantitative effort in creating the database, protection is granted for the effort without reference to any underlying creativity. EU law grants an initial 15 year term of protection with the prospect for 15 year extensions for every substantial renewal of the data within the database, thereby

enabling virtually perpetual protection.

With the enactment of a European sui generis database right, international and national pressure to establish similar rights in other jurisdictions has been growing. At the international level, WIPO worked for several years to develop a draft treaty on database protection. That treaty has failed to gain widespread acceptance. In the United States, Congress has debated several bills that would create new database protection. The U.S. proposals, which have also failed to generate sufficient interest to pass into legislation, focus on creating new rights in databases and limitations on extraction of data from databases in a manner that might be viewed as anti-competitive.

Canadian policy makers raised the prospect of creating a sui generis database right in 2002 as part of the Section 92 report and it is reasonable to expect that Canadian policy makers will face ongoing pressure to mirror the E.U. approach. Canada has thus far rejected such a change and it should continue to do so. There is no evidence that the European approach has resulted in greater database creativity, yet the additional protection afforded to databases risks hampering scientific research by protecting data such as facts that are otherwise unprotectable under traditional copyright law. Much like proposals to extend the term of copyright, the correct approach is for Canada not to commit to change that will add new, unnecessary rights to national copyright law.

Our Cultural Heritage

Copyright policy is about far more than just tweaking legal rules to develop the optimal public policy. Copyright is also inextricably intertwined with cultural policy. The two issues have a symbiotic relationship—progressive copyright policy will have a positive impact on national culture, while restrictive policies can have the opposite effect. As policy makers grapple with cultural policy issues, the following four issues—which combine elements of both copyright and culture—should move to the fore.

i. A National Digital Library

Canada has the opportunity to provide global leadership by becoming the first country in the world to create a comprehensive public national digital library. Fully accessible online, the library would contain a digitally scanned copy of every book, government report, and legal decision ever published in Canada.

A national digital library would provide unparalleled access to Canadian content in English and French along with aboriginal and heritage languages. It would serve as a focal point for the Internet in

Canada, providing an invaluable resource to the education system and ensuring that access to knowledge is available to everyone, regardless of economic status or geographic location.

The general public would enjoy complete, full-text access to thousands of books that are now part of the public domain because the term of copyright associated with those books has expired. For books that remain subject to copyright, Canadians could still scan copies, but only be granted more modest access to the content, providing users with smaller excerpts of the work—a policy that is consistent with principles of fair dealing under copyright law.

From a cultural perspective, the library would provide an exceptional vehicle for promoting Canadian creativity to the world, leading to greater awareness of Canadian literature, science, and history. By extending the library to government documents and court decisions, the library would help meet the broader societal goal of providing all Canadians with open access to their laws and government policies. Moreover, since the government holds the copyright associated with its own reports and legal decisions, it is able to grant complete, unrestricted access to all such materials immediately alongside the approximately 100,000 Canadian books that are already part of the public domain.

While digitally scanning more than 10 million Canadian books and documents is a daunting task, Google is undertaking an even larger project at a cost of $10 per book. Assuming similar costs for a Canadian project and a five-year timeline, the $20 million annual price tag represents only a fraction of the total governmental commitment toward Canadian culture and Internet development. In fact, if Canada fails to move quickly on this initiative it may find itself seeking to catch up to European countries, which plan to digitize six million books by 2010.

ii. Crown Copyright

The government should also move quickly to eliminate crown copyright, which currently provides that it retains the copyright associated with any work that is prepared or published by or under governmental direction. The Canadian approach stands in sharp contrast to the situation in the U.S. where the federal government does not hold copyright over work created by an officer or employee as part of that person's official duties. Accordingly, government reports, court cases, and Congressional transcripts can be freely used and published.

The existence of crown copyright (or lack thereof) affects both the print and audio-visual worlds. For example, the 9-11 Commission's 2004 report was widely available for free download, yet it also became a commercial success story in the United States as the book quickly hit the best seller list once offered for purchase by W.W. Norton, a well-regarded book publisher.

By comparison, a Canadian publisher seeking to release the Gomery report as a commercial title would need permission from the government to do so. To obtain such permission, the publisher would be required to provide details on the intended use and format of the work, the precise website address if the work is to appear online, as well as the estimated number of hard copies if the work is to be reprinted. If there are plans to sell the work commercially, the publisher would be required to disclose the estimated selling price.

The difference between the Canadian and the U.S. approach is just as pronounced in the documentary film arena. Consider, for example, a Canadian creating a film about a controversial political issue such as same sex marriage or gun control. The filmmaker might want to include clips from politicians speaking to the issue in the House of Commons.

After obtaining the desired video from the House of Commons, the filmmaker would be presented with a series of legal terms and conditions limiting its use to school-based private study, research, criticism, or review as well as news reporting on television and radio outlets that are licensed by the CRTC. Everything else, including any commercial use of the video, would require the prior written approval from the Speaker of the House.

Contrast this situation with one found in the U.S. Michael Moore's controversial documentary Fahrenheit 9/11 featured a riveting scene in which a steady procession of members of the U.S. Congress rose to challenge the outcome of the 2000 U.S. Presidential election -- only to have then Vice-President Al Gore reject each in turn. While Moore faced challenges obtaining the necessary rights for some of the works that he included in his film, given the state of U.S. law, this segment was not one of them.

The Internet and new technologies provide millions of Canadians with the ability to create and distribute new culture, political speech, and entertainment. Canadians admittedly have access to government documents and audio-visual materials through government publishing and access to information requests, however, they still lack the unfettered right to use those materials.

iii. The CBC

Acclaimed by its supporters and vilified by its opponents, few Canadian institutions have been as polarizing as the CBC. Nevertheless, the public broadcaster has an opportunity to make itself uniquely relevant in the Internet age by granting Canadians the right to use its content in creative new ways. Following the lead of other public broadcasters, it should leverage the Internet to provide unparalleled access to content and grant Canadians the right to use its content in creative new ways.

The Norwegian Broadcasting Corporation provides a good illustra-

tion of how the Internet can be used to provide exceptional online access to content. It recently launched a new online portal that features more than 20,000 video clips and access to 12 radio channels. The portal includes three weeks of archives from its television broadcasts, creating the Internet equivalent of personal video recorder for the entire country. The CBC's online archives are respectable, but they are not nearly as comprehensive as those now found in Norway.

The British Broadcasting Corporation has emerged as the undisputed global leader in providing its users with rights to use and interact with its content. The BBC Creative Archive allows users to download clips of BBC factual programming for non-commercial use, where they can be stored, manipulated and shared. The initiative currently offers roughly 100 programming extracts, but the public broadcaster is also running a pilot study that offers hundreds of hours of television and radio content to a trial user group.

The BBC also maintains the BBC Backstage program, which provides data, resources, and support for users who want to build on BBC material. Sporting the motto "use our stuff to build your stuff", the program encourages people both inside and outside the BBC to share knowledge, ideas and prototypes with each other.

On the horizon lies the BBC's Digital Curriculum program, which is scheduled to launch in 2006. The program will be a free, curriculum-based, online service for 5 to 16 year olds, designed to stimulate learning both at home and through school.

Although Canadian funding of the CBC is not identical to the television license fee approach used for the BBC, there are clear similarities between the two public broadcasters. The BBC has recognized the need to interact with the public in ways that transcend the broadcast model. The CBC can do the same by returning its programming to the Canadian public who provide the majority of its funding through tax dollars.

iv. Publicly Funded Research

Canada must also begin to think about new ways to disseminate its publicly funded research that covers medicine, science, and the social sciences. While the previous Liberal government stressed the importance of focusing on commercializing Canadian research, this approach provides only a partial solution.

Under our current model, Canadians spend billions of dollars on university research through granting programs in the sciences, social sciences, and health fields. Those research results are typically made available to the public in one of two ways. If the results have commercial value, they are often brought to market, generating new revenues for the researchers and their institutions. Alternatively (or in addition),

researchers publish the results in expensive scientific journals, which often fetch thousands of dollars in annual subscription fees.

In other words, Canada spends billions of tax dollars on research only to "buy back" that funded research through the marketplace or by subsidizing universities, who are effectively forced to repurchase their own research through journal subscriptions.

The United States faces the same dilemma. A group of U.S. Nobel prize winners recently issued a public letter calling on their government to link public research funding with public dissemination of the results. Canada should jump at the chance to adopt a similar model that would tie free, public dissemination to publicly funded research. Such an approach would still leave room to commercialize the research results, while providing Canadians with both an unprecedented innovation opportunity and a more immediate return on its research granting investment.

Conclusion

Once viewed as technical, fringe public policy issue, copyright law is fast becoming a mainstream policy concern. With the growth of the Internet and new technologies, the importance of copyright has become increasingly clear to millions of Canadians, who understand that their ability to participate in our culture is premised on an appropriate copyright balance that protects both users and creators.

In recent years we have begun to see a more vocal rejection of policies crafted by a small cadre of lobby groups. From Sam Bulte to Sony, the public is calling for an end to cultural monopolies and unbalanced copyright policy.

Canada, led by its policy makers and political leaders, faces a choice. We can continue down the path of ever-stronger copyright laws that fail to meet the broader public interest. Alternatively, we can seize our own creative land by embracing copyright policies that look ahead rather than back. That is Canada's choice. We must choose wisely.

A NOTE ON THE TYPE

The text of *Our Own Creative Land* is set in Bitstream Vera Serif, published by Bitstream Inc, of Massachusetts, a software firm specializing in type for electronic interfaces. The Bitstream Vera family of fonts is one of very few complete typefaces released under the open-source General Public Licence (GPL). Under the GPL, Bitstream Vera may be freely used, distributed, copied, and modified, free of charge.

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The Hart House Lecture 2006

© opyright affects all Canadians in small ways and large, controlling what we do with the materials we buy, sell, share and create. The rapid advances of technology mean that Canada's copyright laws are under increasing strain from several sides.

In the 2006 Hart House Lecture, Michael Geist lays out the case for a new vision of culture and copyright in Canada. Exploring the evolving interaction between policy and technology, commercial interests and the public good, he shows how different stake-holders compete to move copyright reform towards their goals. His personal experience of the impact of blogging gives particular insight into the interplay between online information communities and the mainstream media. Industries and society face new challenges as customers and citizens increasingly interact online, but the internet revolution can be seen as a good news story for all concerned.

Michael Geist concludes with exciting proposals of what the future should hold for Canadian copyright. He shows how it can be used as a tool of policy, education and development to invigorate Canada's culture and let all Canadians benefit. This is a vision which shows how copyright can touch everyone, for the better.

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