CCC and DA*MI*© Research Project on
the Working Conditions of Creators in Quebec and Canada

Creators and Copyright in Canada

Prepared for the
Creators' Copyright Coalition
Bill Freeman, chair

by John Lorinc
November, 2004

Preface by
Bill Freeman

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COPYRIGHT, CONTRACTS AND CREATORS

Preface to John Lorinc's *Creators and Copyright in Canada*

Canadian creators are recognized as being among the most outstanding artists in the world. The audiences, both at home and abroad, for Canadian music, art, books, film and theatre have grown rapidly over the past two decades. Politicians regularly laud their work. Licensing collectives, like SOCAN and Access Copyright, distribute substantial revenues from the licensing of rights. The cultural industries have expanded and matured so that in 2001 some 131,000 artists spent the majority of their time working at their art, accounting for fully 4% of the Canadian GDP. Yet many creators reap little of the economic rewards of this success and most are forced to take other work in order to survive.

This report is an attempt to understand this problem. It began when the Creators' Copyright Coalition engaged John Lorinc, a journalist with extensive experience covering the arts, to do a sector-by-sector analysis of the way copyright legislation affects Canadian creators, but it quickly moved beyond this. One of the fundamental points that Lorinc makes is that, while copyright legislation is very important, creators are working within an economic system that gives little reward to their efforts. In this country there is more financial reward to distribute, or administer art, than there is to create it.

There are significant differences from sector-to-sector, but the overwhelming reason creators are doing poorly is that they are in a hopelessly weak bargaining position. Copyright legislation gives ownership to creators, but they must sign contracts with producers, art galleries or publishers in order to bring their work to the public. In the tough economics of the culture business, creators are in a weak position vis-à-vis the producers. Typically individual creators are presented with contracts on a take-it-or-leave-it basis that results in the lion's share of the rewards going to the corporations that publish or distribute the work. (Copyright was originally seen as a monopoly granted by the state to creators to encourage them to create again, but others have captured most of the financial rewards that flow from this system. In this sense, copyright is a failure in Canada.)

The consequences are disturbing. The works of Canadian creators result in billions of dollars of value, and yet artists live at the bottom of the income charts. Studies show that, while creators have higher levels of education than the average Canadian, their average incomes in 2001 were only $23,500. Creators' incomes rank in the lowest quarter of the average earnings of all occupational groups. Not only are incomes significantly lower than other workers, but creators are frequently forced to live without the social safety net taken for granted by other workers.

If this inequality is to be addressed, there must be fundamental changes in copyright and the way that creative works are delivered to the public.

(i) Strong copyright legislation is essential to protect creators' rights. Exemptions to the Copyright Act should not be used as a way to avoid payment to artists.

(ii) Copyright protection must be extended to the works of all creators. This includes performers and photographers.

(iii) The public domain must be protected so that the general public and creators have access to the storehouse of human knowledge.

(iv) Licensing collectives must be supported and developed to ensure the public has access to efficient and affordable clearance mechanisms for works under copyright.

(v) Moral rights must continue to be protected and enhanced so that the works of creators are not altered without permission and proper attribution is given.

(vi) A system of collective bargaining must be developed in all of the creator industries in order to protect and enhance the rights of creators so they can work collectively to improve their individual incomes.

(vii) Governments must respond to the demands of the public for more access to the works of Canadian creators by developing programs featuring those works, which can be delivered through the media and the educational system.

If the arts are to flourish in Canada there must be a system that is fair and equitable to all: the public, the producers *and* the creators. (It is time to return copyright to its rightful role of granting creators a financial incentive to create.) I urge you to read the Lorinc report. It is an important beginning to this fundamental debate.

June 2005
Bill Freeman, Chair,
Creators' Copyright Coalition

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Author's Note

The following report was commissioned by the Creators Copyright Coalition and DAMIC, an umbrella organization of national artists' groups. It will present a sector-by-sector description of the concerns of various categories of creators, including areas such as digital uses, contracts, and legislative gaps in existing copyright law. The report also presents the experiences of some individual working creators to illuminate a selection of the rights issues they face in their professional lives.

Obviously, this survey is not exhaustive. Nor is this document intended to be read as a policy brief, a legal opinion on existing collective agreements, or a quantitative analysis of creators' economic circumstances. And while most of the sponsoring organizations have formal positions on copyright reform issues, this report will not attempt to reconcile or harmonize these views, nor present a detailed parsing of the fine points of copyright law. Lastly, I do not pretend to depict the concerns of every category of creator -- for example, architects, computer games designers and storytellers, as well as the thousands of individuals who make art only for themselves or their friends.

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Part I: Introduction

The interests of creators and producers are neither identical nor even parallel.

Throughout history, human beings have felt compelled to express themselves by creating works of art – good, bad and indifferent. It is not within the scope of this report to examine the reasons for one of the defining qualities of the human condition. Suffice it to say that the expectation of financial gain is just one of many complex motivations for creators. Indeed, the vast majority of creative work never reaches "the market."

The commercial entities that deal in marketable creative works – publishers, music labels, media conglomerates, theatre companies, etc. – function in much more straightforward ways. With a few exceptions, these companies seek out creative works that can be expected to attract audiences, then, devise strategies for marketing and distributing them. Such firms often make a substantial creative contribution to the "finished product" (editing, sound mixing, etc.). And some have extremely high standards, a fact of corporate life that enhances our culture generally. But the overriding motive for these firms is to earn a profit for their shareholders. They achieve this goal the way companies in all sectors do: by maximizing their revenues, minimizing their expenses, and protecting their assets from rivals.

The foregoing distinction may seem obvious. Yet it bears noting because of the emergence of an unfortunate dynamic in the current global debate over copyright reform and the highly challenging issues posed by digital technology. In Canada, as in many other countries, the discussion has been largely cast in bi-polar terms, with "users" (everyone from libraries to file-swappers to "electronic frontier" activists) in one corner, and copyright owners in the other. Due to the nature of our policy/political process, the copyright owners camp has been dominated by the media and entertainment industries, which can afford to hire lawyers, lobbyists and experts to represent their interests to decision-makers. There's nothing wrong with self-interested advocacy per se. But as this debate has unfolded, the views of the creators themselves have been overwhelmed by

those of producers, publishers and media conglomerates, and assumed to always coincide. The Creators Rights Alliances in Canada and the U.K., and similar coalitions elsewhere, have attempted to open up the debate, and draw attention to areas and policies where creators' interests have not been fully articulated, or differentiated.

There are certainly issues where creators and producers' views overlap, but their interests do *not* coincide as a general rule. As many artists understand from professional experience, their own goals do not necessarily match those of companies such as publishers, film studios, etc. This is why we have book contracts, performers' guilds and negotiations over the allocation of royalties or other revenues generated by copyright works.

It should also be noted that creators and their producers or publishers have fundamentally different perspectives on the broader culture. A record label may see the universe of songwriters and musicians in the way that a mining company would regard a geographical region considered to be rich in, say, diamonds. They stake a claim and then attempt to extract the minerals in such as way as to maximize return on investment.

Creators, by contrast, exist *within* a culture, broadly defined, and their work is shaped by the way their own ideas interact with whatever they find in that ambient environment – be it the work of other artists, new technologies, political trends, etc. Creators draw on the culture in unpredictable ways, and so it is in their artistic interest to have as much access to that culture as possible. The cultural environment is healthiest when artistic work can be disseminated as broadly as possible without undermining the rights of creators to reap an economic benefit, as well as ensure that their moral rights are respected (i.e., that they receive credit and their works are not altered without permission).

If their works have a commercial existence, creators naturally want a fair share of the proceeds of copyright. Professional freelancers must maintain control of their intellectual property and their moral rights in order to earn a living. But other creators, because they do not generate a living wage from their work, will view these issues from a range of perspectives. Some teach, and rely on being able to use copyright work in an educational context. There are those who may deliberately use or transform the work of other artists (house music, collages, video art, documentaries, etc.) to produce new forms of art or speech, an approach that may involve collaboration with other artists, on one hand, or copyright or trademark infringement, on the other. And some artists will derive their primary creative income from other sources altogether, e.g., in the case of high profile musicians, ticket sales and merchandising revenues generated by tours.

All of these variations take on yet another layer of complexity when the discussion comes to include the Internet. For instance, a growing number of creators, especially younger artists, hold opinions about the Internet's capacity to distribute creative works that has put them sharply at odds with established artists' groups, and even some high-profile artists, in the debate over piracy, unauthorized copying and digital uses. This perspective places such artists in the rapidly growing "copyleft" movement, which promotes such ideas as "open-source" or free software and the advent of "creative commons" licenses that permit certain types of copying. Others have appropriated the aims of the copyleft movement to question the very future of copyright as a meaningful legal construction.

Stepping back, these are global issues in every way. Digital technology has altered so many creative forms. It respects no boundaries and few conventions. Meanwhile, the growth in the worldwide trade of cultural `goods' – fueled by the ever expanding influence of enormous media/entertainment conglomerates – situates basic questions about copyright and creators in an international corporate context. Still, Canadian creators must first attend to what's happening at home, and so the following report seeks to provide a domestic perspective in this difficult and dynamic debate.

The Political and Legal Context

As of the fall of 2004, Canada has arrived at a crucial moment in the evolution of its approach to copyright policy. Because of rapid advances in new digital technologies, these issues have a direct impact on a wide range of powerful media industries, as well as public institutions and the thousands of creative individuals who comprise this country's intellectual and cultural life. These challenging debates aren't merely about copyright technicalities such as royalty fees and permissions. Decisions made in Parliament and the courts affect both the public's ability to access creative works, as well as a creator's ability to control his or her intellectual property, and benefit from it economically. In other words, copyright law has a crucial role in determining the expression of ideas and the movement of information, broadly defined, within society.

To understand where we are at this moment, and how we got here, it's important to briefly review the recent history of copyright policy in Canada.

Canada's Copyright Act was enacted in 1924. According to the Department of Canadian Heritage, the law exists to provide "a legal framework within which creators of literary and artistic works, including films, books, sound recordings, information products and computer programs are entitled to payment for the use of their works. It establishes the economic and moral rights of creators to control the publication of their works, to receive remuneration and to protect the integrity of their endeavours."

The origins of Canada's copyright law can be traced to 1710, with the enactment of the Statute of Anne, when English legislators established copyright rules to regulate the book trade to mollify the concerns of booksellers and printers about unauthorized competition. The law also established statutory time limits governing the exclusive rights enjoyed by authors and hence by publishers/printers and booksellers, and thus introduced the concept of the public domain. In effect, the political motive behind copyright legislation was to constrain the commercial clout of the publishing industry, although early judicial decisions also recognized the rights of authors. The concept of a balance between creators and producers rights emerged from common law legal decisions involving contested rights to the publication of a poem composed in the mid-1700s.

As a judge at the time wrote, "It is just, that an author should reap the pecuniary profit of his own ingenuity and labour. It is just, that another should not use his name without his consent. It is just that he should judge when to publish, or whether he will publish…"

Canada's copyright laws, at the same time, are also rooted in the 18th century French liberal tradition of "moral rights." This formulation holds that creators are sovereign individuals and enjoy an inalienable right to have their authorship of a work

respected. Moral rights were first enshrined in international law at the Rome Congress of the Berne Convention, in 1928. Apart from their connection to human rights theory, moral rights address the principle of an author's need to protect his or her reputation: the right to be identified as the author of a work or to have his or her anonymity protected; the right not to be published without consent; and the right to have the integrity of the work respected. Copyright is the only sort of intellectual property right to be associated with such concepts.

A moral rights clause was added to Canada's copyright law in 1931 as part of the ratification of the Berne Convention, and such provisions exist in a handful of Quebec laws. The best known test of Canada's protection for moral rights occurred in 1988, when the Supreme Court of Canada ruled that artist Michael Snow's moral rights had been violated when red ribbons were tied around the necks of the Canada geese sculpture installed in the Toronto Eaton Centre. But two recent court rulings (see below), as well as mounting creator concerns about the ease with which digitized works can be altered without the author's permission, have led to calls for a strengthening of the moral rights provisions in the Copyright Act.

Early copyright statutory provisions focused on the printed word, and contained no provisions governing the *use* of copyright material, nor riders about broader public policy objectives linked to intellectual property. In 1924, the new Canadian law protected the authors of literary and artistic works from unauthorized copying. But it also included a "fair dealing" defense, which allowed individuals to make copies for private research or study without seeking permission from the rights holder. In the early 1930s, the law was amended to regulate the tariff appeal process for composers and music publishers, and to collect royalties from the public performance of musical works.

In 1988, the federal government enacted the first major set of amendments to the Act, and these illustrate how far copyright law has evolved. The changes included an exhibition right for artistic works displayed in museums or galleries; explicit protection for software programs; and measures to improve the collective administration of copyright, and to expand it to cover other works and uses beyond the performance of music.

A year later, following the approval of the Canada-U.S. free trade agreement, the law was again amended to require cable and satellite companies to pay for the retransmission of copyright works. In 1993, Parliament passed a further amendment to the Act to clarify the definition of musical work to include both acoustic and "graphic" (i.e., scores) representations of music, and to make all cable and satellite transmitters liable for royalties.

In 1994, after the North American Free Trade Agreement came into force, the Act was changed to allow a rental right for sound recordings and software (i.e. permitting the lending or rental of such works through libraries, rental chains, etc. or the prohibition of lending or rental) as well as increased protection against the importation of pirated works.

A year later, the members of the World Trade Organization established the "Trade Related Aspects of Intellectual Property Rights Agreement" (TRIPS) – a multilateral framework with an arbitration mechanism. The agreement exists not only to promote protection for intellectual property rights, but to encourage WTO nations to see these as a means to an end, which is the development and dissemination of new technologies "to the

mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare…" As a Creators Rights Alliance commentary on TRIPS notes, the agreement represented a change of intent with regard to copyright. "Historically, IPRs (intellectual property rights) have not been burdened with objectives other than the protection of creators' rights and the public interest in access to information and cultural heritage."

The second phase of Canada's copyright reforms were enacted in 1997. The amendments, contained in Bill C-32, included a broad range of reforms benefiting various industries as well as rights owners. Book publishers were granted a so-called "distribution right" allowing them to sue booksellers that circumnavigated exclusive distribution arrangements negotiated between Canadian and foreign firms. Performers and producers won the right to collect royalties on music broadcast by radio stations and other public performances – a "neighbouring right." Traditionally, only composers and song-writers were entitled to receive royalties for the public performance of their music.

The legislation, furthermore, established a levy on blank tapes, cassettes and disks sold in Canada, with those revenues divided up among music producers, composers and lyricists, and recording artists. This provision essentially recognized the *fact* of widespread unauthorized copying of recorded music, and established a compensatory – as opposed to legally punitive – solution designed to provide revenue to copyright owners for foregone record sales.

But the most historic component of C-32 involved the enactment of a series of "exceptions" to the provisions of the law. These covered a range of "uses" deemed to be in the public good: education institutions were granted exemption for the use of copyright materials for some instructional purposes, such as overheads and tests; and an exception allowing the reproduction and use of radio and TV and news commentary broadcasts for up to a year from the taping date without payment of royalties. Non-profit libraries, museums, libraries and archives were granted a "single copy exemption" in certain circumstances so they could make duplicates of rare or unpublished works to maintain collections or participate in an inter-library loan system; and the right to reproduce entire articles from newspapers or magazines that are at least 12 months old, for private study or research. These institutions were also given limited liability with respect to the use of self-serve photocopiers.

Lastly, individuals with perceptual disabilities, hearing loss and learning disabilities were included in the new legislation, through an exception that allows the copying of a literary, musical, dramatic or artistic work in an alternative format, such as a talking book or a Braille text. The proviso in the law is that the alternate version of the work is not already commercially available in Canada.

All together, Canada's copyright legislation is considerably expanded from the original legislation. As amended, the law establishes a range of related rights that don't involve copying per se, various mechanisms for collecting royalties, legislated protections for both industries and individual rights holders, and provisions governing uses and users, both individual and institutional.

Where it fell silent, however, was on any special treatment for the realm of "digital uses." The federal government decided to deal with this matter in the next round of reforms, when (or so the reasoning went at the time) there was a greater sense of clarity

about the immensely complex copyright issues arising from the advent of the Internet. At the time, of course, the dominant digital medium was the Web, and technologies such as Napster, peer-to-peer (p2p) file-sharing, MP3, CD burning, and DVDs were in their infancy.

Since C-32 received royal assent, there have been numerous critical developments in the realm of policy directed at digital issues, as well as all rapid technological changes that are well known. In 1997, Canada signed two World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), both negotiated shortly after the TRIPS agreement came into force. Parliament has yet to make the legislative changes that would allow Canada to ratify either treaty. Both treaties came into effect in 2002. Canada's slow pace in making the necessary amendments has been increasingly noted abroad by its trading partners.

The WCT and the WPPT aim to curb unauthorized downloading of copyright works, such as music files. They clarified or established the so-called "making available right." In effect, this new exclusive right provides creators, producers and performers with the right to authorize others to make their work available to the public – for example, if someone uploads a commercially available song to a p2p server, the copyright owner would have the legal means to exercise this right to permit or prohibit that posting. The WIPO treaties also established the principle that it should be illegal to tamper with digital encryption systems ("technological protection mechanisms") installed to prevent unauthorized copying or with digital rights management systems.

(A 2003 study for Industry Canada, written by Marcel Boyer, of the Universite de Montreal, observed that a dearth of hard data makes it "extremely difficult" to predict the economic impact of these treaties on authors, photographers and publishers. But he concluded that strong and transparent copyright laws will "foster cultural development and diversity as well as contributing to the social well being of all.")

In the United States, in the meantime, several pieces of legislation – including the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension – were approved by Congress. The DMCA (1998) implements the WIPO treaties. The Sonny Bono law extends the term of copyright to "life of the artist plus seventy years", (the so-called Disney rule thereby protecting Mickey Mouse from falling into the public domain). There are also tougher legal mechanisms to fight unauthorized digital copying, such as a requirement that Internet Service Providers (ISPs) can be forced to disclose the names of individuals suspected of copyright infringement on the Internet. The European Union, meanwhile, adopted a handful of directives covering such issues, including extension of copyright to life plus 70 years, which is the new world standard.

The global scope of both the Internet and the media/entertainment industry, as well as the growing number of multi-lateral treaties governing IPRs, are now determining to a significant degree the broad parameters of copyright policy reform within Canada.

Still, in the past few years, much of the nuance in the domestic debate over copyright policy has come from a series of landmark Canadian court cases that have tested the definition of fair dealing; the ability of rights holders to prosecute those parties alleged to be involved in illegal downloading; the link between commercial online databases and copyright infringement; and the legal extent of the moral rights enshrined in Canadian copyright law and international covenants. These include:

* The fair dealing case involved a lawsuit launched in 1993 by three legal publishers against the Law Society of Upper Canada, in Toronto. The publishers alleged that the Society's Great Library infringed their copyrights by (i) authorization of copyright infringement by patrons using the library's photocopiers; and (ii) copying legal decisions and faxing them on a fee-for-service basis to lawyers without being licensed. In March, 2004, the Supreme Court overturned an appeal court decision and ruled that the LSUC was acting legally.

The decision, moreover, extends far beyond the world of legal publishing. The court effectively expanded the "fair dealing" defense, which had never before been tested at this level. The ruling also interpreted the definition of "originality" in the Act – a test that is of great concern to creators. And it established a significant precedent -- that an institution which provides the technical means for copying isn't, in turn, necessarily liable for any unauthorized copying that may take place. Supporters of the ruling have described it as establishing a code of user's rights. And the fact is that fair dealing also benefits creators (including academics, journalists, etc.) who rely on the use of material in library collections for professional purposes. Despite that, creator organizations and some legal experts feel the decision ultimately tilts the balance of copyright law away from rights holders.

* In 2002, the industry association representing the major record labels sued Canada's five largest ISPs, demanding the names and addresses of 29 people who, the record companies alleged, had posted hundreds of music files on the Internet. The action mirrored similar high-profile lawsuits launched by the Recording Industry Association of America (RIAA), citing provisions in the DMCA. The U.S. lawsuits -- which resulted in substantial fines imposed on individual file swappers, some as young as 12 -- provoked enormous controversy, and the accusation that the recording industry was waging a legal war against music fans. In Canada, by contrast, the Federal Court, in March, 2004, ruled that it would not compel the ISPs to disclose the names of alleged file sharers. The decision, regarded as a victory for file-swappers, is under appeal.

* In 1995, the Society of Composers, Authors and Publishers of Music of Canada (SOCAN), which is the leading music industry rights collective, filed an application with the Copyright Board to impose a levy, or tariff, on Internet Service Providers. The reasoning was similar to the case in favour of levies on blank media: because Internet users "communicated" music via computer networks, the owners of those networks should pay a royalty to compensate rights holders for unauthorized copying. The process took over six years considering the so-called Tariff 22 proposal, and, in 2002, SOCAN appealed its rejection of the levy to the Federal Court. The Federal Court ruled that in certain cases ISPs would be held liable if they cache copyright-protected works (i.e. temporarily store digital files containing copyright works).

But in June, 2004, the Supreme Court over-turned that decision in a 9-0 verdict, arguing that ISPs can not be held liable for the communication of copyright material over their networks even when they cache copyright works. Still, the court made a number of significant rulings that benefit copyright owners in general. One is that a communication takes place in Canada even if it comes from a source outside the country – i.e. that Canadian rights owners have the ability to license those kinds of transmissions. Secondly, ISPs will be held liable if they function as more than mere conduits for copyright work.

Lastly, the court implied that the federal government needed to modernize Canadian copyright law to ensure right owners' works are protected when they are used on a medium such as the Internet, which didn't exist when the law was drafted in the 1920s.

* In 1996, Toronto freelance writer Heather Robertson initiated a bid to launch a $100 million class action lawsuit against Thomson Corp. asserting copyright to articles written by freelancers in The Globe and Mail that were included on Thomson CD-ROMs and InfoGlobe, an electronic database available to subscribers. Robertson argued she had not authorized the republication of her articles on the database, and that the Globe owed her royalties for these uses. At issue is whether freelance writers, photographers and illustrators retain the rights in their works that would allow them to control their copyright after first publication, as per long-standing practice. As well, the question tested in this action is whether the database is merely an electronic version of the newspaper, or if it is a substantially different product, with discrete copyright requirements.

In October, 2004, the Court of Appeal of Ontario upheld a lower court ruling which found in favour of Robertson's copyright infringement claims and challenged a central pillar of the Globe's defense of its actions, i.e. that the database is merely an electronic version of the newspaper, and that perpetual re-publication of freelance articles is an implied element of the original contract between the writer and the newspaper. As a PWAC official noted in response to the ruling, "Unlicensed re-use of freelance writing has been a blight on the industry, making it harder and harder for writers in Canada to make a living at their profession. In many ways it's a shame the courts have had to rule on something as fundamental as a person's ownership of the work they have created."

This freelancers' class action against Thomson – which is still subject to further appeals -- mirrors another class action suit involving the Montreal Gazette, but also the famous Tasini case in the U.S., in which freelance writers sued the New York Times and two other publications for selling their articles to commercial databases (including Lexis/Nexis) without permission or compensation. The publishers defended their actions by arguing that including such articles in a database is merely a revision of the original work. But in a landmark 7-2 judgment handed down in 2001, the U.S. Supreme Court ultimately ruled in favour of the freelancers. According to the majority opinion, databases are not just altered versions of the original publications (by contrast to microfilms), and thus freelance contributors retain the right to authorize the republication of their articles in these kinds of electronic information products. As University of Ottawa associate law professor Daniel Gervais points out, the decision didn't prevent the publishers from using the material, but "forced" the two sides to negotiate terms that provided freelancers with suitable compensation.

* In the latter-1990s, the prominent Quebec painter Claude Théberge sued three Montreal commercial art galleries for copyright infringement arising, he said, from a process whereby the ink from paper posters of his paintings was mechanically transferred onto canvas; these "paintings" were then sold, even though Théberge had not authorized this kind of commercialized reproductions of his work. His case against the galleries was upheld by Quebec courts, but in March, 2002, the Supreme Court of Canada overturned those rulings on a 4-3 vote that split down linguistic lines.

Writing for the majority, Justice Ian Binnie argued that no infringement had occurred because no additional copies of his work had been produced from the ink

transfer process. He also stated that moral rights, while representing "a continuing restraint on what purchasers can do with a work once it passes from the author," can not masquerade as economic rights. The dissenting justices pointed out that the copyright law's provisions on reproduction make no mention of the number of copies produced, but rather the act of making a copy. "Fixation of the work in a new medium," wrote Justice Gonthier, is therefore the fundamental element of the act of 'reproduc[ing]…in any material former whatever' what already existed in a first, original material form. That type of conduct amounts to plagiarism and constitutes infringement…"

The other salient moral rights case is *Les editions Chouette (1987) inc. v Desputeaux*, handed down by the Supreme Court in March, 2003. It involved the authorship of a series of children's books by illustrator Helene Desputeaux. In that case, the illustrator was commissioned to produce the books, but the project led to a contractual dispute over whether or not the president of publishing house was a co-author of the works, which had spawned a television show and other commercial spin-offs. An arbitrator ruled that the illustrator was only a co-author without looking at the books to judge the nature of authorship. Desputeaux's appeal ended up in the Supreme Court. Its judgment upholding the arbitrator's decision overruled a Quebec Court of Appeal verdict, in which it was pointed out that the right to be credited with authorship, "just like the right to respect for the name [,] has a purely moral connotation connected to the dignity and honour of the creator of the work." As Desputeaux's lawyer Normand Tamaro observes, "Since Desputeaux, in Canada the status of an author can…rest on a vacuum. An author can also be deprived of his rights without the decision maker being concerned with seeing his works." Subsequent Supreme Court rulings have re-affirmed this verdict.

This brings us to the present day. Since 2001, the federal government has been moving, very slowly, towards the enactment of a new set of amendments to the copyright rules. The government has conducted extensive public consultations and issued discussion papers on digital issues and the adequacy of existing copyright rules.

Without question, the most contentious issue that has arisen involves the use of online material by schools, universities and colleges. Computers and Internet access are standard equipment in educational institutions, and the content on them ranges from subscriptions to online encyclopedias for elementary school libraries to university course websites and electronic course-packs. Moreover, students at all levels now rely on material found on the Internet for projects, assignments and presentations. Canada's copyright law exempts educational institutions from specified types of copyright infringement. It authorizes collectives such as Access Copyright to negotiate blanket licenses with school boards and universities. There is, however, no special treatment for educational users of copyright material on the Internet.

With the rapidly expanding use of the Internet for educational purposes, the Council of Ministers of Education of Canada began urging Ottawa to extend the existing exception to school use of the Internet. Groups representing copyright holders (publishers, authors, etc.) strongly disagreed with this proposal, warning that such a move could lead to widespread unauthorized electronic copying of textbooks and other copyright work that can be uploaded onto the Internet. They further argued that copyright

holders should not be expected to subsidize educational institutions, which must pay for all sorts of other resources and equipment, from desks to software licenses.

In the spring of 2004, shortly before the dissolution of Parliament, the House of Commons Standing Committee on Canadian Heritage released an "interim report" that represents the latest iteration of formal policy-making.

The report proposed a series of recommendations (to be discussed in more detail later in this report) to "modernize" Canada's copyright legislation. These included:

- formal ratification of the WIPO treaties;
- changes in the treatment of photographs and photographers under the Act;
- amendments that would make ISPs liable for copyright infringement of content transmitted on their networks, subject to some conditions;
- a set of rules establishing an "extended collective licensing" system that would allow copyright collectives to authorize and collect fees from educational institutions for the use of copyright works available over the Internet, but to also structure these licensing arrangements so users would not be charged when accessing online material that is clearly intended to be used without charge or in the public domain (all collectives have well-established administrative policies designed to exempt public domain material from licensing agreements).

As of this writing, the timetable for the adoption of these and other recommendations remains uncertain given the present minority Liberal government in Ottawa. But Canada is the only G-8 country that has yet to ratify the WIPO treaties – a process that involves harmonizing Canadian legislation with the provisions of the treaties – and the glacial pace of reform is quickly becoming a source of international embarrassment. Among other things, the WIPO treaties reaffirm the principle that exemptions in national copyright laws must be limited and minor, and not intended to damage the economic interests of rights holders.

Meanwhile, recent Canadian court rulings have prompted artists to call for additional legislated protection of their moral rights, and a re-consideration of the fundamental principles animating the moral rights provisions in the act. Creators also see the need for a critical re-examination of the impact of the Act's various exemptions on the livelihoods of the creators who produce work that has been, in effect, stripped of part of its economic value in the name of a public policy objective.

Part II: Sectoral Issues

Photography

There are approximately 14,000 photographers working in Canada today, many of them earning all or substantial portions of their income in this medium. Two organizations – the Canadian Association of Photographers and Illustrators in Communications, and the

more recently founded Canadian Photographers Coalition – represent the interests of the profession. Membership in these industry organizations is not mandatory, and, apart from photographers employed by unionized newspapers, there is no collective representation. Rather, Canadian photographers tend to be freelancers, and function as small businesses, contracting with individual or corporate clients.

Photographers function in a range of commercial and artistic environments, and, like many creative people, earn their incomes by keeping a foot in several worlds. It's not unusual for a photographer to have purely commercial clients (e.g. advertising agencies, consumer product manufacturers, private portrait commissions, etc.), as well as relationships with media organizations (magazines, wire services) and stock agencies, all of which may provide income to subsidize creative projects. These images may end up in galleries, monographs or private collections, or they may not find "a market" at all.

There are fine art photographers who derive a portion of their income from teaching, as well as those who are dedicated amateurs, in the sense that they regard their photographic pursuits primarily as a hobby which, on occasion, produces a sale.

CAPIC also represents professional illustrators. Besides working for book publishers, they are often commissioned by media organizations and advertisers to create images to be reproduced in some kind of published commercial medium. Images or characters they may create for a children's picture book, to take another example, can become highly valuable consumer commodities that turn into widely distributed brands, marketed as television shows, plush toys, electronic games, trademarks, etc. Such uses – e.g. Franklin the Turtle, etc. – are capable of generating revenues that the vast majority of visual artists rarely achieve. This kind of exploitation traces back to a highly-structured contractual relationship between an author/illustrator and a book publisher.

More typical is the case of the illustrator who works for magazines, newspapers or other corporate clients as a way of generating income to subsidize their non-commercial art. There is no "standard" contract between the illustrator and the client. Some commissioning clients will buy the illustration outright, while others may only purchase first print right or one-time reproduction rights. Whatever relationship exists is negotiated between the parties.

In some cases, the sale of an image can wind up depriving the creator of substantial earnings. A designer with a solid working relationship with an ad agency sold an image outright, but later discovered that the client had made extensive use of this work on billboards and other media, including an animated film. "She was horrified because she felt she'd sold something that was very lucrative for a pittance."

Improvident? In such cases, yes. But on the other hand, some illustrators recognize the opportunity to negotiate trade-offs that work to their own benefit. A Toronto painter tells of working with a major magazine that insists on buying all rights on a permanent basis, and refuses to negotiate. But the illustrator enjoys working with this publication because they provide her with a high degree of artistic independence. Another example she cites: websites will seek to purchase her work, offering, typically, a small fee. She, in turn, grants digital rights provided that there's a link to her own self-promotional website – a trade-off that has proven to generate new business.

A painter and illustrator who also works as a cartoonist tells of an arrangement with a U.S. syndicate that places his work in U.S. publications. The relationship is

entirely verbal: the cartoonist regularly sends electronic images of his drawings to the syndicate, and they are sold to news organizations. The good news is that once a year, a cheque for a few thousand dollars arrives in the mail. The downside is that unauthorized copies of his images now routinely show up on websites. The exact form of the contract is secondary to the more fundamental question of whether there's an ongoing flow of royalties for repeat uses. That's the measure of whether copyright is being respected.

Like illustrators, many professional photographers deal with the media industry, and thus are affected by structural changes, such as consolidation and concentration. For example, some acquisition-oriented media companies, such as Transcontinental, now publish magazines in both the English and French markets. That means some magazines now buy both English and French rights as a package, whereas previously the photographer would have made separate sales. As with magazine writers, media organizations want digital rights, but still pay little more than a token amount to publish an image on a website. What's more, there is also a downward pressure on photographers' fees.

Technology, in recent years, has had a dramatic impact on many photographers, especially those working with or for media organizations. Rapid advances in digital photography have provided both benefits and added costs. Conventional film, for example, has always been a major expense, and the advent of digital imaging reduces those costs. At the same time, many photographers are facing growing pressure from their clients to invest in professional quality digital cameras and studio equipment – a substantial capital expenditure that can run as high as $60,000 to $70,000.

Increasingly, there's a growing supply of stock photographs available on the Internet and on CDs, and some professionals believe this development in their profession has turned images into commodities, with diminishing economic value. As one photographer puts it, digital film "democratizes creativity, but destroys specialization."

For photographers who subsidize their art by teaching, the advent of digital scanning technology raises another set of complexities – essentially, putting the copyright shoe on the other foot. Fine art teachers have long relied on the pedagogical technique of showing their students slides created by photographing works from art books. This practice is now authorized by exemptions. The making of photocopies of artistic works is covered by blanket licenses between such institutions and copyright collectives.

As one fine art photographer explains, he now scans images into a computer linked to a digital overhead projector, rather than going through the more cumbersome process of taking photographs. This approach to teaching the visual arts to future artists significantly reduces the instructor's budget – the cost of producing dozens of slides per lecture is typically an out-of-pocket expenses – and makes it possible to expose students to a wider range of images. But in so doing, as this artist explains, he has effectively created an electronic database of digital images, for which no permission has been obtained. The process of clearing the electronic rights for hundreds of photographs per lecture is beyond the ability of the individual instructor. In effect, artists who wish to control their own work have found themselves exploiting the works of others without permission.

Similarly, the Internet provides both opportunities and risks for photographers. Almost all professional photographers now have their own websites, which represent a highly efficient marketing tool for disseminating samples of their photography.

On the other hand, some photographers are growing increasingly anxious about the problem of having their images "swiped digitally," as one photographer puts it. Typically, photographers may send a computer file containing an image to a gallery or a commercial client. But these are often not returned to the photographer, raising questions about what happens to the image subsequently. Increasingly, photographers will find their images published without authorization on third party websites or without their name. Software, moreover, can be used to alter photographs without the permission of the photographer – a classic example of how technology can undermine moral rights.

One photographer relates the following conundrum: he will sell an image to a commercial client, such as an ad agency, and the agency, in turn, will allow the image to be used by another party on its website for one client, or in a brochure. There are legal difficulties arising from such transactions – for example, model waivers, which may apply to the first use of the photograph, but not necessarily a subsequent use. The photographer's dilemma is that if he or she questions this practice with his client, he may jeopardize an otherwise fruitful relationship upon which he depends. "You weigh the options: how much is this costing me, and is it worth the consequences?"

Such anecdotes underscore a lingering weakness in Canada's Copyright Act, which does not recognize photographers as "authors" of their own work when someone else owns the negative – a situation that confuses ownership and authorship. Also, photographs belong to the party – either an individual or a corporation -- that commissioned them, unless there is an agreement otherwise. Once an image has been acquired in this way, the photographer no longer has control over its use, nor the opportunity to derive royalties from the work.

Day-to-day relationships negotiated between photographers and their clients vary considerably. Some magazines, for instance, only buy first-publication rights, meaning that the photographer does, in fact, retain ownership. But they may also impose a moratorium on re-selling an image for a specified period of time. In other cases, the *quid pro quo* is that the client will offer to provide a lot of work in exchange for the right to use the images extensively. "There are ambiguously worded contracts," says one magazine photographer. "Publishers retain some rights, and may keep an electronic copy of the image and re-sell it, so everyone becomes a stock agency."

According to CAPIC and the Canadian Photographers Coalition, the state of Canada's treatment of photography puts it at odds with major industrialized countries, including the United Kingdom, the United States, France and Australia. Moreover, Canada can not ratify the WIPO Copyright Treaty unless it updates the provisions in the Act relating to the term of copyright in photographs. As the CAPIC brief puts it, "It is time to recognize that photography is a creative art form and that photographers are worthy of first copyright ownership."

Last year, a private member's bill proposing amendments to the Act was introduced in the Senate. And in its interim report on copyright reform, released in May, 2004, the Standing Committee on Canadian Heritage urged that the Act "be amended to grant photographers the same authorship right as other creators."

Explaining the rationale behind this recommendation, the report noted: "The Committee feels that photographers should be given copyright protection in their works equal to that enjoyed by other artists. Historically, photographs have been treated differently from other categories of works because they were perceived to be more mechanical and less creative than other forms. This idea is outmoded and inappropriately treats photographers differently from other artists."

Ratification by Parliament of the WIPO copyright treaty should also provide a boost for photographers, because it means an extension of the term of protection of all photographs from 50 years to "the life of the author plus fifty years." As Marcel Boyer, Ph.D. (CIRANO and Universite de Montreal) concluded in a 2003 report to Industry Canada on the economic impact of the WIPO treaties on creators, the extended term of protection (as well as other WIPO provisions) "can only benefit the publishers in Canada [and] it will increase the availability of the works of creators because they will be better protected against unreasonable exploitation."

Visual Arts

The Canada Council estimates that there are approximately 15,000 visual artists across the country. The organization that speaks for many Canadian visual artists – painters, sculptors, print makers, media artists, fine-art videographers, etc. – is known as Canadian Artists' Representation/Front des artistes canadiens (CAR/FAC). Founded in the 1960s, it has about 2,000 members nationally, and concerns itself with the issue of fees and payments paid to artists exhibiting their works in museums and galleries. A handful of other collective societies, mainly based in Quebec, also represent visual artists and crafts people, including SODRAC.

As with many creators, many visual artists supplement their incomes with more commercially-oriented contracts in order to subsidize their purely artistic work – projects that can raise tough personal questions about the balance between a creator's control over his or her work, bargaining power and financial remuneration.

In a practical sense, copyright law doesn't directly affect the work of certain categories of visual artists because they are, by definition, in the business of producing unique creations (installations, sculpture, etc.) that can not be reproduced in any meaningful way (except for being photographed or filmed).

Visual artists have some access to reprography royalties collected by Access Copyright, as well as royalties from the Public Lending Right, if they have illustrated books. Access Copyright has an arrangement with the CAR/FAC Collective to administer the reprography payments to visual artists. Such royalties derive from the copying of published fine art images by educational institutions, libraries, etc. According to CAR/FAC, about 25% of its members belong to this collective, earning an average of about $500 annually. CAR/FAC believes Access Copyright has tended to underestimate the share of licensing revenues owed to visual artists.

The greater concern, at present, has to do with the relationship between visual artists and museums or art galleries. More established or successful artists may gain exposure to broader audiences by showing their work in such institutions. Unlike commercial art dealers, most of these venues receive public funding from the various

levels of government. A 1988 amendment to the Copyright Act established an "exhibition right" for visual artists whose work is displayed in museums and galleries that are not selling art. The existence of this provision for visual artists is unique to Canada, although galleries and museums in other countries do pay fees. Canadian museums, through their association, were vehemently opposed to the 1988 measure in principle; during a Parliamentary review of the bill, some curators stated publicly that a work of art is not complete until it is curated, and therefore artists should share their copyright with curators. The museum sector has continued lobbying to have the exhibition right replaced or eliminated, citing budgetary pressures.

Visual artists enjoy the same rights of authorship as any other creator recognized under the Act. But the exhibition right requires museums and galleries to pay artists a minimum fee for displaying their works to the public. Prior to the introduction of the exhibition right, most museums and art galleries did provide a CAR/FAC fee to artists whose work was displayed on a voluntary basis, thanks to pressure from CAR/FAC. The introduction of the right, in 1988, did not result in a significant increase in those fees; it primarily codified existing practice. Indeed, the fee for a major museum exhibition is approximately $1,200 – an amount that barely covers framing expenses.

Where the issue of the exhibition right fees become contentious has to do with art acquired by museums or galleries for their permanent collections. Typically, galleries and museums have asked artists to waive their exhibition right, as well as their moral rights in some cases, when they purchase a work. And, citing budget constraints, they tend to ask the artist to waive exhibition fees for these works. It's not unusual for artists to be told that public exposure – and, implicitly, the prospect of future sales to individual collectors -- will compensate them for whatever income they lose in the form of upfront fees, in effect, all but forcing artists to participate in the undermining of their own rights. As artist John B. Boyle has remarked, "This is Canada. People die of exposure."

According to CAR/FAC, there's a generational divide in artists' attitudes towards such arrangements. Young artists are more willing to waive their reproduction rights in order to gain exposure and establish their reputations. Yet such a shift in thinking illustrates the gradual erosion of these principles over the long term, and indicates how the next generation has internalized assumptions about their rights, or lack thereof.

In terms of digital issues, many museums and galleries are moving to expand their websites to include images of all the works in their collections, which are typically far larger than their available display space. Such projects are undertaken both for marketing purposes, but also to make publicly-funded art collections more accessible to a broader audience. Yet visual artists whose work is thus displayed tend not to be paid for this use. In one infamous example, artists whose work was in the National Gallery collection were ordered to waive fees for the use of photographs of those works in a CD-ROM. Some artists were even told that they could receive a copy of the CD-ROM in lieu of a fee. "You can't pay the rent with a CD-ROM," countered one well-known visual artist, when presented with this `offer.'

There is one other substantial copyright issue confronting visual artists, which has to do with so-called "remix culture," or the use of copyright material in new works. It is well beyond the scope of this report to examine the techniques of the artistic process and the evolution of new forms. But suffice it to say that pop culture, consumerism and the

mass media are an integral part of our intellectual environment, and thus represent the raw material of the artistic process. Collages, video art, multi-media installations – all these approaches may involve, either deliberately or inadvertently, the unauthorized use of copyright works or trademarks.

A fine art photographer tells of coming across a poster montage, produced by another illustrator, which included a large reproduction of one of his own images, obtained, presumably, with the use of a scanner. There was no credit. He had never been approached for permission to use the picture in this context. This situation reveals how an author's economic rights are undermined by unauthorized copying, and illustrates how artists manipulate images from the ambient media environment to create a new works without giving the original creator appropriate attribution.

But there are many instances when the shoe is on the other foot, and artists face the erosion of their moral rights by virtue of emerging technologies, digital and otherwise, that can be used to alter works once they pass out of the control of the author. This was the issue at the heart of the Théberge case (see above). Critics of the Supreme Court ruling point out that the diminution of an artist's moral rights in the name of balance is tantamount to the loss of economic rights. In that case, the galleries had created a kind of fake version of his paintings by transferring the poster reproduction onto a canvas, and had done so without any approval from Théberge.

Because it deals with the question of the extent of an artist's control over his or her work, the Théberge case draws attention to the issue of whether copyright law should be amended to provide visual artists with a "droit de suite," or a right to receive a portion of the price paid upon subsequent re-sale of their work. The federal government's Section 92 report noted that a "droit de suite" may "discourage" the re-sale of artistic works, but pointed to two examples of other jurisdictions – California and the European Union -- that have recently implemented such measures. The reason is made explicit in the EU's directive setting out the justification for a resale right: "It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works."

Live Theatre

Playwrights Guild of Canada, with over 450 members, represents more than 90% of working Canadian playwrights. Full membership is available to any Canadian who has had at least one professional production of his or her work within the past decade. Associate membership is open to playwrights whose work has been presented in an advertised staged public reading by Equity actors, or has been produced at a community theatre or recognized theatre festival.

PGC was founded in 1984, a merger of two earlier playwrights associations. One of these predecessors was a co-operative that started in 1972, serving as a kind of clearing house for scripts at a time when theatres decided to begin mounting more Canadian plays, but discovered there was no central source of information. Eventually, the Guild developed into a broader members-based organization, working to protect the rights of Canadian playwrights and promote Canadian theatre. Through negotiations with the Professional Association of Canadian Theatres (PACT), PGC has developed a series of

standard contracts for use by playwrights presenting at PACT member theatres. On request, PGC will negotiate both Canadian and international professional contracts on behalf of its members. In addition, PGC administers members' "amateur rights" with respect to productions mounted in schools, community theatres and other non-professional venues. It continues to maintain a large archive of Canadian scripts that are available for purchase.

In recent years, PGC, working with l'association quebecoises des auteurs dramatiques (AQAD) and Access Copyright, with financial support from the Government of Canada through the Canadian Culture Online Program, has developed an electronic publishing service to distribute the scripts in its collection. The intent is to streamline the distribution of scripts and reduce expenses associated with copying and postage, and thus increase the royalty revenues to the author and the availability of the work. Currently, PGC maintains a fully searchable online catalogue of more than 2,500 titles. Individual users can go online and read over 50 of these works (the others exist only in hard copy and can be ordered from PGC). The plays posted on the Guild's website are protected from `cutting and pasting.' However, users can purchase the right to print out copies.

The `market' for original Canadian plays is small by comparison to the more commercial end of the industry, which tends to feature classics, traveling Broadway shows and so on. There are about 20 to 40 professional English productions of new Canadian work per year. Very rarely are these plays re-mounted. The non-profit theatre world is responsible for well over half of these productions. In addition, there are approximately 200 to 250 amateur productions per year in Canada.

As with visual arts, it is extremely difficult for a playwright to earn their entire income from theatre work. Many playwrights will also work in film, television and radio, write novels, teach or do other sorts of freelancing. A few are hired as playwright-in-residence for a professional company or university.

The numbers tell the tale: a playwright may earn only a few hundred dollars a year from his or her theatre work or royalties from the sale of published scripts. The typical fee for an amateur production is under $100. For full-scale theatrical productions, the royalty is typically based on 10% of gross box office receipts, typically returning about $6,000 to $10,000 to the playwright. The Guild estimates that about half of its members belong to Access Copyright, which licenses the photocopying of published playscripts.

Unlike writing for television and film, the theatre world continues to be governed by some long-established norms that have an impact on the work of playwrights. For example, it is a well-established tradition that a playwright has the right to approve or reject any change to his or her script. In other words, artistic convention, in this art form, effectively protects moral rights, at least for the time being.

The contractual and financial relationship between the playwright and the theatre company, however, has become increasingly uncertain. In recent years, a growing number of theatre companies have sought to obtain "participation rights" from playwrights who have been commissioned to write an original work or where the theatre is mounting the premiere production of a work. A contract providing participation rights means that the theatre company is entitled to a share of that play's royalties over a specified period of time (typically five to ten years).

Participation rights are, in effect, a tax imposed on the playwright's earnings, ostensibly to recognize the originating theatre's contribution. The pressure for playwrights to assign participation rights has tended to come from larger commercial theatres, and follows a U.S. model. However, the very existence of participation rights should be called into question because a majority of theatres already receive funding from the Canadian government to develop and produce new Canadian works.

A related development, according to the Guild, is that other individuals associated with the mounting of a play – directors, dramaturges, choreographers, etc. – are also beginning to demand participation rights, citing their contribution to the creative process. As one playwright puts it, "Peripheral people are asking for a piece of the pie from what was traditionally considered the playwright's intellectual property."

Digital reproduction issues are not yet a major concern for playwrights, but this situation could change, depending on the direction of copyright reform. The Guild is concerned about the combination of an educational exemption with provisions that allow certain users to circumvent technological protection mechanisms. In effect, these two exemptions potentially would allow educational institutions to find ways of downloading electronic versions of scripts that are housed on the Guild's website, and also to transmit an exempted school production to other educational institutions or to students participating in a distance education course.

Such a development underscores an apparent contradiction in Canadian policy. On one hand, the Department of Canadian Heritage has identified as a funding priority the digitization of Canadian culture as a means of broadening access to the work of Canadian artists – in this case, play scripts. On the other hand, exemptions have the potential to deprive playwrights -- along with all other creators -- of even more royalty income, above and beyond the ongoing decline in revenues from the production of Canadian plays in schools because of existing performance exemptions enacted in 1997. Beyond the economic implications, additional exemptions have the potential to deprive the author of the ability to control unauthorized electronic copying and performance of his or her plays.

Film/Television

For many years, the lion's share of creative film and television work in Canada came from public institutions such as the CBC and the National Film Board. The sector has grown in the last twenty years due to a sharp increase in foreign film shoots in Canada, new funding from private and public sources, tax incentives, Canadian-content rules for new cable channels, co-production treaties, and so on. Much of this activity can be attributed to U.S. film companies coming to Canadian cities and rural areas to shoot on location, taking advantage of new studio facilities and highly-trained technicians and so generating post-production work. The low Canadian dollar has contributed heavily to the proliferation of so-called runaway productions from south of the border. The combination of these factors has spawned a broad range of Canadian players, from small independent outfits to large diversified media conglomerates like Alliance Atlantis.

More recently, however, the sector has experienced a downturn. "Canadian content productions", productions written, directed and performed by Canadians, have sharply declined as a result of the Canadian Radio and Telecommunications Commission (CRTC) 1999 "television policy" which removed expenditure and exhibition requirements from broadcasters for Canadian dramatic programming. During the same period, shrinking export markets, reduced distribution advances and decreased government support for domestic shows has also contributed to the decline of the indigenous production industry.

There has also been a drop in the amount of foreign production in Canada due to the soaring dollar, the SARS scare in 2003, and the increases in U.S. state tax credits and incentives to keep those productions at home. As a result, there are far fewer opportunities for creators who work in these fields. In response, screenwriters, performers, directors and technicians have united to form the Coalition of Canadian Audiovisual Unions (CCAU) to advocate for more government support for the home grown production and reinstatement of spending and broadcast requirements on networks to develop, produce and air Canadian dramatic programming.

Copyright has always been a contentious subject in film and television production, especially the former. By long-standing convention, "shell" companies, created by large studios to provide a legal framework for the production itself, are dissolved once a film is finished and released, with the ownership rights reverting to a distributor. This practice makes it extremely difficult to track royalties and any other rights negotiated between the producer and members of their creative teams, or to enforce payments. In Canada, with the exception of cable retransmission, there are no authors' levies established because the Copyright Act doesn't define the author of the audiovisual work. Where rights are established, it is easy to track them because the terms are laid out explicitly in negotiated agreements.

There are three categories of off stage creators who work within the television and film production industries: directors, screenwriters and composers, all of whom are represented by well-organized unions or collectives empowered by negotiated collective agreements or tariffs with production companies, studios, broadcasters, etc. (Actors will be discussed in a separate section.)

The Directors Guild of Canada has several categories of members, including assistant directors, editors and production managers – all of whom play a part in the creative process. Across Canada, there are about 500 directors in the guild, which has three standard agreements for productions, depending on the location of the shoot. These agreements are structured so that producers or distributors can sell the work.

The legal status of a director's authorship in cinematographic or audiovisual work is the focal point of most discussions about copyright in film and television production. In the United States, the industry, supported by legislation, has long adopted the so-called "work for hire" doctrine, which means that directors, screenwriters and composers are considered to be employees who have no copyright in the final product. In Europe, by contrast, authorship is formally vested in the director, or a director-writer team. To counter pressure from the powerful American film industry to export the work-for-hire doctrine (as was the case when the U.S. negotiated a free trade agreement with Chile), the

Guild has sought an amendment to Canada's copyright legislation to define directors as co-authors of audiovisual works.

The Writers Guild of Canada (WGC), in turn, is the national association representing more than 1700 screenwriters working in English-language film, television, radio and multi-media production in Canada. Along with its Quebec counterpart SARTEC, the WGC is one of the only writers' unions to be certified and thus empowered to negotiate collective agreements. About half of its members are active, and most do not rely exclusively on screenwriting to earn a living. Many are also novelists, playwrights, speech writers and teachers.

Of all the creators working in film and television, Canadian screenwriters enjoy the greatest degree of protection for their intellectual property. Unlike colleagues in the U.S. and other countries, Canadian screenwriters retain copyright in their scripts and license their work to producers according to the rules set out in the WGC's negotiated agreements. All other rights rest with the screenwriter as per the collective agreements; this includes the use of the work for stage plays, merchandizing or 'novelization.' This arrangement also exists in France, while in the U.S., Australia and the U.K., by contrast, producers have copyright and screenwriters are treated as if they were employees.

In terms of the non-fee revenues flowing to screenwriters, however, there is an interesting contrast between what exists in Canada and the arrangement negotiated by the Writers Guild of America (WGA). Under WGA rules, American screenwriters are not entitled to copyright royalties (which are based on production revenues). But they do receive "residuals" based on their upfront fees (in most cases). These contractual payments are made by broadcasters and distributors when audiovisual works are aired in secondary markets. As well, the Digital Millennium Copyright Act provides for the "automatic assumption" of contractual agreements for writers, directors and actors when the rights for a film are transferred (i.e., sold to another company). That provision, in effect, ensures that the residual payment schedules entrenched in the various guilds' collective agreements survive. No such legal mechanism exists in Canada, although it is covered for Canadian screenwriters in the WGC Independent Production Agreement.

Though in possession of copyright, Canadian screenwriters generally collect little royalty income, which only begins to flow after certain revenue thresholds are met. Downstream revenues can be difficult to collect. Most screenwriters, indeed, see nothing beyond the up front fees, unless the show or film is a huge hit. "Even though we're retaining copyright, which is very important" says one screenwriter, "we don't see a great benefit from it. The fact that we don't get residuals or see much in the way of royalties has to do with our lack of power in negotiation as well as the poor economics of our industry."

In recent years, however, Canadian screenwriters have begun to access secondary use monies collected by the Canadian Screenwriters Collective Society (CSCS). To date, the CSCS has collected between $300,000 and $500,000, to be divided up among its members.

Set up in 2000, the CSCS exists to recoup monies collected by similar societies in Europe, where copyright rules impose fees and levies on broadcasters, video rentals and blank media. (The CSCS also collects retransmission royalties from Canadian cable companies.) In other words, if a Canadian audiovisual work is shown in a European

country, a "secondary use" payment will be generated. The difficulty, for Canadian screenwriters and producers generally, has been accessing these funds and negotiating reciprocal agreements between the CSCS and European collective societies. In Canada, where levies are not in place, there are also issues regarding how the revenues are to be divided up among the creators, because, as one screenwriter puts it, "producers, writers and directors are all claiming authorship of audiovisual works." Again, the problem comes down to a lack of definition in the existing language of the Copyright Act.

Canadians working in film and television, of course, are not immune to the unpredictable economic impact of the Internet on their respective sectors. Although the courts shut down third-party streaming of television signals some years ago, the illegal downloading of DVDs is theoretically just as serious an issue for Canadian film as for Hollywood, although Canadian films are considerably less exposed to the problem of mass unauthorized copying or downloading of "blockbusters." On balance, however, it could be argued that the domestic film industry's most serious distribution challenge remains the traditional one: its long-standing lack of access to Canadian screens.

Quite apart from these macro issues, Canadian screenwriters and directors face a range of other copyright-related issues that affect both their professional lives and their creative control. Screenwriters, for example, have encountered increasing pressure by producers to write additional copy for program websites, without adequate compensation. (This kind of writing is now covered by the WGC collective agreement.) Typically, when screenwriters decline to provide copy for websites, the producer or their webmaster will hire writers to work exclusively for the site. This practice is not considered to be a violation of the collective agreement, and has not generated grievances.

Disputes with broadcasters over the unauthorized use of material, such as audio files of radio dramas posted to websites without payment of royalties to the author are grieved by the WGC. This illustrates how creators can rely on a structured contractual relationship with a producer or broadcaster to address a copyright matter.

Directors who have made films for the National Film Board face a variation on this problem. Under an agreement with ACTRA, the NFB is digitizing its extensive catalogue of film, and providing free downloads from its website as part of an attempt to make Canadian productions available to Canadians. The NFB's long-term plan is to create a subscription-driven site, and would be equipped with a so-called "digital rights management" system that could provide secure downloads, collect revenues and monitor royalties. ACTRA has negotiated an agreement so that its members will receive a portion of the proceeds. But NFB directors don't always own copyright or control digital rights. And because Canada has yet to ratify the WIPO treaties, there's no penalty for the act of tampering with technological protection mechanisms designed to prevent unauthorized copying. In fact, this shortcoming has discouraged Canadian movie distributors from converting to digital projectors, a technology now coming into use in the U.S. With such equipment, the studios can distribute secure digital versions of films directly to theatres, thus eliminating the substantial cost of printing and shipping film. But without anti-tampering law, theatrical distributors will not make the necessary capital investment.

Performers

In Canada, professional and part-time actors are represented by ACTRA and Canadian Actors Equity Association (CAEA).

ACTRA members work in the full spectrum of fixed performance media, from commercials to television series, film, radio dramas, video games and various digital platforms including the Internet. On audio recordings, ACTRA contracts cover musical and spoken word performances, digital voice clips on toys and telephony recorded messages, even recorded museum tours.

CAEA is an association representing performers, directors, choreographers and stage managers in English Canada engaged in live performance in theatre, opera and dance. (Its sister organization in Quebec is the Union des Artistes.) The association traces its origins to actors' unions established in the U.S. in the 1920s, but came into its own as a full-fledged Canadian union in the 1960s. CAEA collective agreements, such as the Canadian Theatre Agreement, cover a range of issues relating to the workplace and working conditions, and the organization also administers benefits, handles disputes, etc.

ACTRA's members rely primarily on their collective agreement, but this allows performers to negotiate additional terms beyond those set out in the contract. Although an audio performer has copyright in his or her performance, an actor ceases to have any copyright ownership rights in a performance once it is "fixed" with the performer's authorization and used for the agreed purpose. The provisions and protections inherent in the collective agreement, therefore, help to compensate for the fact that performers are not entitled to any form of copyright royalty when authorized copies of an audiovisual work are sold, communicated to the public in a broadcast, on the Internet or in a movie theatre.

ACTRA, however, is part of a growing international campaign by actors' guilds to have performers' rights recognized under copyright law as being equivalent to those of the screenwriters and directors of audiovisual works. This debate is taking place within multi-lateral fora, such as WIPO, with performers organizations seeking an international treaty as a starting point. In Canada, under the present Copyright Act, audiovisual performers do not have the benefit of a full catalogue of economic rights in a performance, as authors have traditionally enjoyed. Although the 1997 amendments to the law enshrined the concept of neighbouring rights for sound performances, which provides a right to remuneration for the broadcast of recorded performances, these rights are not exclusive rights that would allow a performer to negotiate the use of his or her performances. Since those changes were enacted, performers have begun to receive royalties from radio and TV stations that broadcast their music, and sound performers share in private copying royalties.

ACTRA and CAEA contracts are highly detailed and include a grid for many categories of performances. It is not within the scope of this report to provide a detailed description of these contracts. But in general, an ACTRA performer is paid a fee and the producer obtains a limited right to use the performance in order to promote and distribute the work. There are options in the agreement that provide actors with enhanced rates with

secondary distribution deals, as well as compensation or additional fees for spin-offs, such as merchandise rights.

As with many creators working within the film industry, ACTRA members are generally affected by unauthorized copying of digitized movies – either pirated DVDs or downloaded versions. But ACTRA members are also confronting the advent of digital technology in more specific ways. These include video-game versions of films which require actors to produce voice-overs and performance capture for the digital versions of their characters; the growth of entertainment-related websites with voice-overs; and the next generation of online advertising which is interactive or adopts a broadcast style, and therefore makes use of actors in an online environment. ACTRA's fee grid has been amended to address these new types of performances.

A more challenging issue has to do with the growing popularity of low-cost digital filmmaking. There's nothing new about low-budget 'indie' films. But with the advent of affordable digital cameras and editing suites, there's been a sharp increase in this kind of filmmaking in recent years. But as production budgets decrease as a result of digital technology, there's a downward pressure on actors' fees in such projects, and thus an increased risk that producers of such films will use non-unionized talent. ACTRA has traditionally offered discounted rates for low-budget productions, and these typically entitled performers to a larger share of the profits, should they materialize. ACTRA has also addressed the growing presence of digital filmmaking within the movie industry.

Writing

The Canadian writing community is perhaps the most diverse of all the creator groups, and encompasses novelists, non-fiction writers, academics, children's authors, journalists, and poets (playwrights and screenwriters have been discussed above). In the latter category, contracts come from a range of sources: magazines, newspapers, websites, corporate and government communications contracts, speech-writing, ghost-writing, newsletters, and in-house publications. Another set of published work is produced by teachers or instructors who write – either on their own or in collaboration – textbooks or teaching materials. As with most other creator communities, there's great diversity in the amount of income generated from writing – from poets who earn tiny stipends from literary publishers to those freelancers who generate lucrative fees from steady corporate contracts.

In addition to the above-mentioned guilds, freelance writers may (or may not) belong to a range of organizations, some of which are certified by CAPPRT, and some of which aren't. In most (although not all) large media organizations, writers and editors belong to a union (e.g., Southern Ontario Newspaper Guild, the Communication Energy and Paperworkers).

Academics who publish books or journal articles belong to formally constituted faculty associations, and draw their salaries from universities or colleges. Similarly, teachers who write textbooks may belong to their own professional unions. But these organizations tend not to be oriented towards copyright issues or creators' rights; indeed, faculty unions have a history of participating in anti-copyright activism by universities.

Several membership-driven organizations exist to represent the much larger non-unionized segment of the writing community, although they focus on a range of activities from political advocacy to professional development. The Writers' Union of Canada is predominantly comprised of book writers.

The Periodical Writers Association of Canada represents some, but not all, magazine and newspaper writers, and a large number of writers making their livelihood from specialized corporate, government and non-fiction book writing. There's also the League of Canadian Poets, the Canadian Science Writers Association, the Canadian Association of Journalists, the Canadian Author's Association, provincial writers' organizations, and CANSCAIP, a networking organization for individuals who write and illustrate children's books. PEN Canada, part of the international Poets, Essayists and Novelists network, represents published authors concerned about domestic freedom of expression issues, refugee writers and the persecution of international writers. Canadian Journalists for Freedom of Expression (CJFE) plays a similar role.

In terms of copyright, there's a spectrum of practices. In Canada, reporters, except in specific cases, are salaried employees (these include those who write for media web sites) who cede copyright to their employers as part of the employment contract, except in very specific circumstances (e.g., authorship of a major series). Similarly, text book publishers are only willing to pay academics and teachers who contribute to textbooks on a piece-work basis, and they hold no rights in the overall work. (Teachers who write entire textbooks do receive royalties, of course.) For the most part, academics and teachers who write earn their living from their day jobs.

For trade book authors, copyright conditions are subject to long-standing and fairly stable practices in the book industry, and these are enshrined within contracts negotiated between writer and publisher. The publisher buys exclusive book rights based on an advance against earnings. Then the two sides negotiate a royalty scale and a range of secondary rights that depend heavily on the project and the bargaining power of the author. Rights usually revert to the author when the book goes out of print, and authors are rarely entitled to any royalties from the sale of remaindered copies. Authors don't benefit from the sale of used books. Some writers will retain international rights, while others will have these included in the initial contract. There are also rights related to adapting a work into audiovisual format and merchandise spin-offs. These are usually retained by the author. It is impossible to generalize about what authors earn from their books, as the combination of advances and royalty income runs the gamut from a few hundred dollars for a small print-run chap book to millions for a mass market bestseller.

The contrast between textbooks and trade books is worth noting. For the latter, creators' earnings reflect market conditions. Because copyrights are respected, the more successful a work is, the larger the creator's income is. With textbooks, there's no direct connection between a creator's contribution and the commercial viability of a given title, which raises a key point: if textbook publishers operating in Canada actually heeded the copyrights of their authors (which is what they are demanding of consumers when these firms pursue legal action against copyshops, etc.), there would be a thriving freelance textbook writing community, and perhaps better quality texts as a result.

Magazine freelancers generally sell first publication rights, although in some cases (e.g., with assignments for some professional associations, corporations, government),

they surrender copyright entirely. But in general, freelancers have been able to reserve secondary publication rights, allowing them to re-sell their work to other publications or organizations that wish to re-print articles for some internal purpose. As is well-known, freelance rates have remained largely stagnant for many years, typically ranging from about 40-cents to $2 per word in Canada. Reprint fees vary: the benchmark rate is about a third to one half of the original fee, but the final payment depends heavily on the freelancer's negotiating skills, the intended circulation of the reprint, and their motivation to extract a fee. Non-profit groups commonly seek permission to re-print articles for advocacy purposes, but they frequently refuse to pay, citing lack of resources.

Lastly, Canadian writers have access to two other income sources deriving from their work. One is the Public Lending Right, a federally-administered program which makes payments to Canadian writers who have published at least one book. It exists as a program of the federal government to compensate authors for the circulation of their works in public libraries, but isn't a benefit of copyright per se. The second is Access Copyright, a much broader collective society that negotiates blanket reprography licenses with educational institutions, libraries, governments and other organizations. Using rates based for the most part on sampling and to a lesser extent on record keeping by licensees, Access Copyright distributes revenue from licensing among both creators and publishers based on formulas negotiated by the creators and publishers associations represented on its board.

The rapid evolution of digital media have had a complex impact on writers, and this impact depends heavily on what they write, and the media in which they publish.

Magazines and Newspapers

In the mid-1990s, freelance writers experienced what can best be described as a wave of panic among magazine publishers concerned about the prospect of creating parallel publications online. Reacting to both the advent of media websites and the Heather Robertson class action against Thomson Corp., almost all publishers asked their freelance contributors to sign contracts which required them to waive electronic rights to their articles in perpetuity, often for little or no compensation (5% of the original fee is typical, and this formula fails to recognize the added value inherent in the electronic rights). These contracts stood in sharp contrast to highly informal relationships between writers and magazines that had customarily acquired only first publication rights. As has been widely reported, lawyers for some large media companies drew up contracts demanding that freelancers hand over a wide assortment of rights, and then presented them to writers on a take-it-or-leave basis.

In some cases, writers who refused to sign are blacklisted. One Alberta freelancer recalls pitching a column to the Globe and Mail. She was sent a contract that stipulated that her article can be archived indefinitely. The writer struck out the clause, signed the contract and returned it, only to be told she couldn't do the column. Such experiences underscore the point that certain types of creators – freelance writers in this instance – lack bargaining power and are therefore forced to accept disadvantageous deals.

"There was a sense that you didn't work for the Globe unless you signed this contract," says a former Globe magazine editor, now a writer. Initially, the editorial staff

adopted a casual attitude, and some resented forcing their contributors to accept these agreements. Eventually, the newspaper's management made it clear that no one could contribute without a signed contract. While a number of freelancers opted to boycott the Globe, many other didn't. "Most writers didn't have an issue, because the Globe was paying well enough that [the contract] made sense." In any case, they couldn't afford to turn down the opportunity to write for one of Canada's pre-eminent publications.

For PWAC and many freelancers, this "rights grab" has several dimensions. One involved moral rights: because the contracts were so broad, freelancers would lose the ability to control changes to their work. Another involved the retention of rights. These contracts shifted the rules by forcing writers to surrender various rights that they could exploit by re-selling articles into other markets. Lastly, those contracts – because they entailed such a nominal fee for web use – didn't allow freelancers to share in the advertising and e-commerce revenue generated by the content on media websites. Moreover, the contracts appeared to pave the way for media firms with several mastheads to "re-purpose" articles without paying the author for these re-uses. As a 1996 PWAC income survey of its members showed, the average freelancer earned $26,000, with only $16,000 derived from the Canadian periodical market. Fees paid by mainstream Canadian magazines haven't risen appreciably since the 1970s.

Nearly a decade later, the controversy over these contracts has subsided to some extent with some notable exceptions of large media companies continuing to test the industry's tolerance for rights-grabbing contracts (e.g., a 2004 version of the CanWest freelance contract, which included a provision that the "Freelancer hereby irrevocably grants and assigns to CanWest all rights of every kind in and to the Content (including copyright), and agrees that CanWest shall have the right to exclusively use and exploit the Content in any manner and in any and all media, whether now known or hereafter devised, throughout the universe, in perpetuity."

Some writers have discovered that, with the passage of time, publishers are somewhat more willing to negotiate terms. What's more, the magazine industry, though highly concentrated and vulnerable to newsstand competition from U.S. publications, has proven to be resilient, with the arrival of many new periodicals expanding the market for freelancers. Moreover, the anticipated mass migration of magazine readers to the Internet did not occur. Many, but not all, magazines now publish some kind of an online version of their content or are tied to a portal or business-to-business site. These sites generate some revenue through advertising, subscriptions or e-commerce, and, as with music, provide consumers with a sample that may translate into hardcopy sales or subscriptions. In the general interest sector, the websites appear not to have undermined the paper versions.

The Internet has, however, facilitated a tremendous amount of unauthorized digital copying of magazine and newspaper articles written both by freelancers (who usually hold copyright) and staff reporters (who, in most cases, don't). HTML or PDF files of relevant articles -- or links to them -- can be found on a proliferation of websites maintained by corporations, advocacy organizations, government institutions, even politicians. In other cases, writers have discovered other articles posted online which contain lengthy segments of their own work included without credit.

The sheer magnitude of this practice of unauthorized postings – presents further proof that many Internet users, including those working for government agencies, regard online material as free for the taking. Of course, magazine and newspaper articles are routinely photocopied for various purposes – sometimes with authorization, sometimes not. In the past, it was not uncommon for companies or organizations to contact writers to seek permission to reproduce an article for marketing, education or advocacy purposes. Such inquiries often generated some kind of reprint fee, depending on the organization's wherewithal and the negotiating skills of the writer.

Although there's no hard data, it would appear that such reprint requests to the writer are in decline, while website postings are very much on the rise. With paper reproductions, of course, it was nearly impossible for writers to determine whether copies of their articles were being made by an organization for the various purposes cited above. Some groups are diligent about obtaining permissions, and others don't bother.

In the era of "ego-surfing," it's become far easier for writers to determine whether organizations or companies are posting their material on websites without permission. But this 'trackability' doesn't necessarily translate into extra revenue. Occasionally, an organization or a company, when contacted, will agree to pay a reprint fee, thus recognizing copyright. The more typical response is the removal of the article. This reaction is also an implicit recognition of the writer's copyright. It remains to be seen whether copyright collectives can develop systems to track unauthorized Internet posting on behalf of writers who assign such organizations the right to authorize digital reproductions of their work.

Databases

The related issue has to do with proprietary electronic databases, which may include a great deal of material produced by freelancers. The ultimate outcome of the Robertson case will provide a crucial judicial ruling regarding the issue of whether companies that create and sell databases are liable for unpaid royalties due to freelance – and even staff -- writers whose work has been included in their products. And even though many publications have altered their contracts with writers to include sweeping rights to re-publish material in such databases, there are still many cases where magazine publishers sell articles by freelance contributors who have not agreed to assign their rights to third-party database companies, which, in turn, license their products to companies, governments, libraries, educational institutions, etc.

Canadian copyright law affords protection to "original" databases – i.e. where the selection and arrangement of the underlying work is distinctive in some way -- but the Federal Court has ruled that it does not extend to "non-original" databases. The line between original and non-original is fuzzy. Different jurisdictions have taken various approaches – the European Union and Australia have more explicit protections for both sorts of databases, whereas in the U.S., the law remains limited to original databases. While the database issue was raised in the federal government's Section 92 report, released in 2002, there has been no subsequent mention of database protection in the context of the next set of copyright reforms.

The federal government's policy pronouncements on the issue of databases, moreover, are directed entirely towards the needs of the companies and institutions

compiling those databases, as opposed to the rights of those who have contributed to them. That omission is addressed directly by a wide-ranging study on database law commissioned in 2002 by the federal government, written by Robert Howell, a professor of law at the University of Victoria. (His conclusions do not reflect federal policy)

Under existing copyright law, Prof. Howell says, the copyright in a database has no bearing on the copyright of the underlying materials, which remain intact. But, he adds, "[c]ase law would suggest that copyright should be denied" if the database is a compilation of infringing works that have been included without the consent of the original owner. "The inclusion of illegal material in a compilation or database," he writes, "may enhance the distribution of such material so that protecting the database might further the purpose or consequence of illegality." The policy implications are obvious. As Prof. Howell asks, "To what extent might the operator of a database or compilation be liable for contributing to, or `authorizing', copyright infringement by users of the database, with respect to unauthorized subject matter included in the database?" Unfortunately, the federal government's latest policy documents are silent on the issue.

Books

Book publishers increasingly ask for electronic rights, but these are often not defined properly. They can mean a verbatim digitization of the author's text, but they can also provide the rights foundation for a multi-media project that alters and enhances the original work. Moreover, the as-yet-unrealized potential of print-on-demand technology has the potential to alter the well-established tradition of rights reverting to the author after a book goes out of print. There's some concern among writers and their representatives that publishers might attempt to retain exclusive rights in perpetuity if print-on-demand becomes viable. The Writers Union of Canada has sought to include a standard clause in book contracts which provides that a title goes "out of print" and rights revert when the publishers' sales fall below a fixed number of copies of the text. It has also recommended against contracts with blanket prior permissions for electronic adaptations, because of the near impossibility of predicting the market value of such subsequent uses. TWUC prefers licensing of electronic rights as the opportunities arise.

The practical reality, however, is that books have yet to establish a parallel existence on the Internet or in digital format. It still appears that most people still prefer to read a "hard copy," despite the advent of CD-ROMs, electronic books and tablet readers, and the availability of web-based texts.

Poetry

Many poets have grave concerns about the Internet. A publisher of fiction or non-fiction may post a few pages of a book on the corporate website for promotional purposes without undermining hardcopy sales. But a literary publisher, using precisely the same technique, can inadvertently end up putting a significant portion of a poet's collection onto the Internet, sometimes without seeking permission. Poems, as one poet points out, are short, easily copied and often find their way onto the Internet stripped of the author's name. Indeed, apparently "anonymous" poems are becoming an increasingly common sight on some teachers' websites. (Similarly, poetry is routinely photocopied for

classroom use, simply because it's so easy to do. It is unknown whether sufficient compensation for this use reaches those poets who are registered with Access Copyright.)

As with some musicians, there are poets who regard the Internet – and specifically their own websites -- as a potentially attractive way to reach audiences, especially since it is so tough to get published. Not surprisingly, younger poets are more receptive to this approach – generating "psychic income," as it were – while older or more established poets fear the prospect of losing their works to unauthorized digital copying.

Textbooks

The other exception is textbook publishing, a market that has long been the target of unauthorized copying. This is a field quite unlike the rest of the book industry. As mentioned above, many textbook authors are paid flat up-front fees, rather than with a combination of advances and royalties, as is the case for trade book authors. Thus built on a foundation of low-cost "content," the textbook industry has become exceptionally concentrated, and directs its sales and marketing efforts not at the end-user, but rather to the education bureaucrats overseeing curriculum and professors responsible for preparing reading lists. In other words, it is a highly mediated industrial sector that does not function according to the traditional economic laws of supply and demand. Though in the business of conveying ideas to students, the textbook industry has little structural regard for the rights of the individuals who are responsible for formulating those ideas into text.

For almost two decades, the textbook industry has been fighting a guerilla war to maintain its market share in the face of unauthorized copying. In the 1980s, copy shops set up on the outskirts of most campuses and offered to make illegal reproductions for students. Campus bookstores increasingly promoted the sale of used textbooks. And instructors, in recent years, have taken to creating "course packs" – essentially home-made anthologies comprised of excerpts from various sources. With heavy use of computers and the Internet among university and college students, scanned versions of textbooks and other readings are now readily available on some p2p file-sharing sites.

From the perspective of creators, the textbook sector's hard-fought battle to curb illegal copying must be carefully analyzed, because it has had a disproportionate impact on the policy debate over the educational use of Internet. This is an area where there's been a deliberate blurring of producer and creator interests.

Publishers fail to respect their author's rights to participate in the spoils of a successful title. But unauthorized textbook copying, in turn, is a market response to the textbook industry's cynical marketing, copyright and pricing strategies. Students do not have a lot of money, yet they are compelled once or twice a year to spend significant sums on new textbooks – at least some of which are written by their own professors. Over time, many students have also come to understand some of the tricks of the trade. Many publishers will issue marginally updated "editions" of existing texts in an attempt to keep their customers away from the used book market. Similarly, most students now recognize that they may be forced to buy an extremely expensive textbook, but will only use a fraction of its content, and do so for a very short period of time. In response, they will buy one textbook or course pack, scan it and make many copies for their colleagues.

In spite of its mistreatment of its authors, the textbook industry has succeeded in asserting its own commercial interests to policy-makers. Through a combination of legal

tactics against copyright abuse and the use of reprography licenses negotiated by Access Copyright with universities and copy shops, textbook publishers have managed to recoup some foregone revenues due to photocopying and course-packs by offering legitimate and convenient access to photocopying.

Increasingly, large academic publishers are seeking to create, package and sell digital versions of their material, both in recognition of the high level of computer use among students in post-secondary institutions, but also to cut production costs associated with printing, paper and shipping large texts. Academic publishers are still experimenting with ways of distributing this content (CD-ROMs, password-protected websites, etc.). But there is already a lot of activity in the so-called "distance education" field, where students can take courses outside the classroom and access learning materials electronically, for example, from secure websites. Proponents of distance education argue that it would be more convenient if such technological processes were exempt from copyright, even though they expect publishers and creators to continue producing educational materials to disseminate to the ever growing ranks of students studying in remote locations.

Aware of the music industry's unhappy experience with the Internet and file-sharing, academic publishers are eager to foster a legal environment that allows them to protect their content from unauthorized copying. The major players are multi-nationals, and will point to various recent laws in the U.S. required by the WIPO treaty that provide such protection, including penalties for tampering with encryption systems. Canada has yet to enact such legislation, and so the Canadian divisions of academic publishers are not producing digital learning material, out of a fear that these files will turn up on p2p sites accessible to any university or college student.

The bottom line is that publishers are failing to win creator support for the cause of copyright in the educational field because they themselves so systematically disregard creator copyright.

Educational Use of the Internet

This is the background context for the battle over the so-called educational exemption for use of the Internet – a contentious issue that has held up the Canadian copyright reform process. Material reproduced for education is subject to copyright law, with some exceptions (performances in classrooms, displays, etc.). Educators pay a licensing fee to copyright collectives for such material photocopied for use in classrooms or assignments. The revenues are distributed to copyright holders.

When the federal government published its first consultation paper on digital copyright issues, in 2001, the question of educational uses didn't warrant a mention. After a year of discussions, Ottawa issued the so-called "Section 92" report – the commencement of a mandated five-year review of the 1997 Copyright Act amendments. With regard to the educational uses controversy, the report observed that "[c]oncerns with respect to access were raised by many stakeholders during the Government of Canada's recent consultations on digital issues. These concerns reflect the fact that the traditional environment for teaching and education is evolving rapidly with the introduction and use of new information and communication technologies. Ensuring appropriate access could

include expanding existing exceptions, introducing new exceptions or clarifying and streamlining existing rights clearance approaches."

The education lobby – colleges, universities, provincial ministries, teachers' federations, student groups, school boards – want Ottawa to pass legislation that exempts educational uses of the Internet from the provisions of copyright law, citing a public interest justification. They were seeking an extension of the "fair dealing" rules.

The education coalition's position was an attempt to fill what its members considered to be a legal void. Internet use in educational institutions is ubiquitous. Students and teachers download a tremendous amount of accessible material, some of which is in the public domain – e.g., government information -- and not subject to any kind of reserved rights, or is material which the owners want to make available without any fee. But there's also a great deal of content on the Internet that is copyright protected, not just files on p2p servers, but material on commercial websites (e.g., media sites). As the Heritage Committee's Interim Report put it, "These Internet materials frequently reside outside the repertoire of copyright collectives."

A coalition of groups coalesced on the other side, including writers' organizations concerned about various issues, especially the potential loss of royalty revenue and the problem of electronic versions of their work being altered without authorization. The creator grouping, however, was spearheaded in large measure by industry lobby groups representing the Canadian arms of the multinational textbook publishers and the major record labels. They advocated measures, modeled on U.S. legislation, that would make educational institutions responsible for controlling the use of online digital materials.

The Standing Committee summarized the dynamic this way:

"Copyright holders wish to encourage use of the Internet for educational purposes, and see the Internet as an important medium through which their works can be disseminated to the educational community. Copyright holders argue, however, that users of the Internet cannot assume that the material posted on the Internet is meant to be 'free', in the sense of being both publicly accessible and available without cost. Copyright owners argue that merely making works available for the public to access through the Internet does not amount to a waiver of copyright. In addition, authors raised the issue that moral rights are not adequately protected on the Internet." It is clear from the committee's summary that creator issues – e.g. moral rights and the low income of writers – are secondary to the larger interests of "copyright holders" in the debate over the educational exemptions.

Education groups and rights holders were locked in a political stand-off for almost two years, thus delaying the rest of Ottawa's copyright reform agenda. "The education side wants to make all Internet materials free except that which is locked up," an educational textbook publisher told a reporter. "We'd rather make the free content the exception."

A creative solution, advanced by Access Copyright and adopted last spring by the Committee, represents a middle position that creators can comfortably support. It calls for amendments to the Act that would allow Access Copyright – which currently earns about $20 million a year in revenues from educational institutions -- to negotiate blanket licenses with school boards to cover copyright materials found on the Internet. A similar approach has been proposed for distance learning. "This licensing regime would /

ecognize that certain types of copyright material may be posted or accessed on the Internet without expectation of payment," the Committee added.

Music

In terms of popularity, economic viability and critical acclaim, the Canadian music sector is one of this country's great cultural success stories. In the last forty years, Canada has produced a large and vibrant music industry with a broad range of talent and many international stars. While the particular evolution of Canadian music has many ingredients, there's little question that Canadian content rules governing broadcasters have played a critical role, by comparison to the various categories of policies geared to other cultural industries (e.g., tax incentives, block grants, postal subsidies, etc.).

As in other creator sectors, Canadian musicians and composers earn their income from various sources: commissioning fees, royalties based on CD sales, royalties from the broadcast of their music on the radio, television or other media; levies on blank media, and, in the case of performers, from revenues generated by "neighbouring rights" (i.e., a performer's right to a fixed version of their performance, which is remitted by broadcasters).

A range of organizations, unions and collectives represent all or some of the commercial interests of this broad category of creators.

The most prominent of these is SOCAN, the Society of Composers, Authors and Music Publishers of Canada, which has approximately 70,000 members, of whom about 25,000 are active. Formed in 1990 following the merger of two predecessor organizations whose roots go back to 1925, SOCAN collects licensing fees from anyone playing or broadcasting live or recorded music. It grants music users permissions in the form of licenses based on tariffs set by the Copyright Board. These rates apply to a broad range of users, including radio and television stations, educational institutions, theatres, adult entertainment clubs, karaoke bars, skating rinks, theme parks, planes and ships. SOCAN also manages reciprocal agreements with international performing rights societies.

The other leading music collectives include SODRAC, which tends to be more active in Quebec (although not exclusively so), and the Canadian Musical Reproduction Rights Agency (CMRRA). The Canadian Private Copying Collective, in turn, collects and distributes the blank media levy established under the 1997 Copyright Act amendments. (The CPCC has collected $59 million since 1999, with the proceeds split between producers of sound recordings, performers and authors, i.e. lyricists and composers.) This collective represents a compensatory solution to the music industry's concerns over previous copying technologies, such as cassettes and, more recently, write-able CDs.

The Songwriters Association of Canada, with 1,200 members, represents a broad range of songwriters, from novices to stars like Sarah McLaughlin, working in all categories of contemporary music. SAC maintains a song depository (which currently contains over 10,000 works) that serves to provide proof of copyright ownership. The organization also involves itself in negotiations intended to improve the contractual arrangements between songwriter-performers, publishers and record labels – a relationship that has witnessed a long and troubled history since the birth of recorded

music (e.g., folk musicians whose songs were popularized by rock groups, with little or no financial compensation). It is not within the scope of this report to examine the precise state of these contractual arrangements as they currently exist in Canada.

The Guild of Canadian Film Composers was founded in 1980 in order to develop a formal contractual agreement between producers and musicians commissioned to write scores for audiovisual works. It took almost two decades to accomplish this task, however. In 1999, CAPPRT ruled that the Guild could negotiate a standard contract with producers; it was formally certified as an artists' collective bargaining entity in 2003. (Under the provisions of their collective agreement, most film composers working in Canada within territory specified by the Status of the Artist Act – including U.S. composers hired by runaway U.S. productions – are subject to the terms of the contract.

As with directors, film composers continue to strive to have their creative work formally recognized at the level of public policy. Under the terms of various tax incentive mechanisms designed to encourage the industry to hire Canadian talent, the work of composers is treated as an business expense, rather an intellectual property asset, with underlying rights.

The Canadian Music Centre, founded 45 years ago, is a repository of scores, primarily but not exclusively, written by contemporary classical composers. It holds the works of 635 composers, and comprises about 16,000 pieces of music. When a composer joins, he or she permits the Centre to promote the work, which includes an authorization to make copies of scores in the repository in order to respond to rental or purchase requests from orchestras and other musicians seeking to perform the composition. (This model is similar to what the Playwrights Guild of Canada has established.)

For the past few years, the Centre has been making digital copies of the scores in its collection, and is now about half way through its repertoire. The Centre's intention is to be able to make its database of digital scores available electronically, via a website, to further promote its members' music. At the moment, however, they have not taken this step because there's no way to guarantee that the scores will not be copied. Existing encryption technologies and other anti-copying measures are inadequate. The situation is yet another vivid illustration of how the public can be denied access to creative work because there's no mechanism for paying creators and respecting their rights.

Still, the main financial issue facing contemporary classical composers is the fact that there are so few performances of their work. Classical composers derive their music income from commissions, and earn the lion's share of their revenues up-front. Most also teach in a private or university setting; only a handful are successful enough to survive exclusively on commissions. Shoring up copyright protections is but one step in addressing the larger problem, which is that artists are entitled to be paid for their work, not just the ancillary activities that allow them to make ends meet.

Rounding out this list is the Canadian chapter of the American Federation of Musicians, which has a membership roster of about 17,000 artists, three-quarters of whom are freelancers (its full membership is 130,000). The AFM is a 108-year-old trade union in the U.S., but has the status of a professional association in Canada. It represents all musicians hired to work for the CBC, for example. For musicians who play in clubs or at events such as weddings, the AFM provides services such as contract protection, immigration assistance, etc. Though typically not recording artists, such musicians often

have their work recorded or broadcast without their permission, through live-to-air simulcasts on radio or cable stations. Often, the broadcasters ask the bands for a waiver, which essentially takes away the musicians' right to collect any future royalty revenue that may be generated by such uses.

Among its other duties representing the interests of its session musician members, the AFM negotiates and administers special payments which incude a pro-rata share of industry profit as well as royalties for "new use" arising from the subsequent use of existing recordings in advertising jingles, films, television series, international television deals, and so on. For professional session players, such special payments can account for an extremely significant source of income, representing as much as 60% of annual income for prominent U.S. musicians.

The relationship between recorded music and technology is a vast topic. Sound recording and mixing technology have revolutionized all forms of music. Musicians and songwriters have used a range of musical technologies to invent new styles. And successive generations of consumer electronics -- some successful, others not -- have made recorded music universally accessible.

As with television, the combination of broadcast technology and home recording devices have produced significant challenges to the music industry. But as radio survived television, the music industry, in the past, learned to co-exist with private copying on media such as cassettes, in the way that Hollywood, though initially threatened by home copying, discovered how to capitalize on the mass consumer acceptance of VCRs.

The music industry's confrontation with the dilemma posed by Internet copying is a well-publicized story, and one that is not limited to the Canadian context. In recent years, retail sales of CDs have plunged, from 67.3 million in 1999 to 55.2 million in 2002 (projected), according to a study conducted for Industry Canada. Over the same period, sales of blank CDs has jumped from 45.5 million unit to 155 million, while sales of CDR/RW writers has seen a comparable increase. The reasons cited include high price points and consumer downloading from file-sharing sites, as well as the rapid adoption of the technologies that enable such copying – CD burning, MP3, high-speed network access. Another explanation for the declining sales is the production of fewer CD titles.

Most observers note the generational aspect of this trend, with younger listeners being far more willing to make unauthorized digital copies than an older generation of consumers. But there is also a strong measure of inconsistency in attitudes towards unauthorized copying. Young consumers accept technology-driven economic trends, such as the rapid obsolescence of computers, and the $1 royalty cell phone users readily pay for ring tones (ring tones, as a consequence, now bring in billions in royalty revenues each year). But they balk at paying for recorded music found on the Internet.

One well-known Canadian recording artist cites the apparent, and difficult to comprehend, disconnect among many music consumers. "My fans come up to me at concerts with their burned CDs and ask me to sign them," she says. "They don't get it. They are just helping themselves…The temptation is just too great."

To counter this practice, the major record labels have enlisted the support of internationally known recording artists, shut down Internet radio, and launched enormous lawsuits against file-swappers, making use of new anti-piracy laws in the U.S. The

Canadian Recording Industry Association attempted to pursue a similar legal action, seeking to force ISPs to disclose the names of subscribers suspected of swapping large numbers of music files; the claim was rejected by the Supreme Court of Canada.

As is well known, there's no consensus within the music world about such hard-ball legal tactics. Many musician/songwriters hope these legal actions will serve as a deterrent. But groups like SAC and SOCAN distanced themselves from the CRIA case and many critics condemned the music labels' strategy as an attack on its own fans.

Moreover, there is no agreement on the precise nature of the threat posed by Internet copying, which is now extensive (one estimate from the U.S. is that 40 million people downloaded music in 2002.) Those who defend file-sharing point out that Top-40-style downloading represents only a portion of this activity, as many Internet users are looking for music that is either in the public domain or no longer commercially available.

Lastly, there are some songwriters, artists and musicians who believe that posting music on the Internet represents an online promotional/marketing tool that can lead to sales of their albums and therefore compensation for their creative work. Some small independent labels have pursued this approach to circumnavigate structural impediments in the industry – e.g., increasingly Top-40-oriented radio play lists centrally programmed by huge broadcast conglomerates, and lack of exposure in retail music chains where shelf space is increasingly dominated by the artists represented by the major labels.

One Canadian songwriter tells the story of trying to persuade her record company, one of the majors, to take a more innovative approach to marketing her latest album as a way of countering sales lost to the Internet. Her strategy involved a combination of value-added packaging, sales through non-traditional retailers, Google-based advertising links, e-commerce sales from her own website, and lifestyle marketing through consumer magazines. But her label rejected this approach as too "outside the box," so she released the CD independently. The move has "absolutely" paid off, but it also means that she's had to take a much more hand's-on role in the business end of her craft, she says. "The days of being able to sit at home and write songs are over, for everybody."

The most recent piece of the Internet music puzzle has to do with the advent of fee-based download sites, such as I-tunes, where consumers can buy songs for 99-cents. In that case, the record companies negotiated the rate directly with Apple, leaving the creators out of the discussion. Two-thirds of the fee goes to the label and one-third goes to Apple. Songwriters and publishers receive a small fraction of the fee remitted to the record label – an amount similar to the approximately 8 cents received as a mechanical royalty for a song contained on an actual CD sold. This amount is administered by the publisher, 50% of which is remitted to the songwriter or applied to the songwriter's account in the event of an un-recouped advanced.

In Canada, songwriters see a greater opportunity to influence the economic structure of these new music distribution sites. At present, Puretracks.com has been established as a domestic fee-based downloading site. As of the fall of 2004, there's no agreement in place over the fee structure, and songwriters hope to have greater input into the licensing agreement Puretracks negotiates with CRIA and the Canadian Music Publishers Association, which is also representing songwriter interests. In the meantime, the Canadian Music Publishers Assocation have filed for a tariff with the Copyright Board to have a percentage of the download pie set, so that they would be paid directly

from Puretracks or similar businesses and not be bundled with the record companies share of royalties to then be subsequently accounted from the record companies to the publishers.

What remains to be seen is whether these kinds of sites will become economically viable for the music industry, and also accepted among consumers, especially with the advent of legislation intended to promulgate the making available right that is designed to limit file-sharing. The broader point is that the legitimacy of such arrangements rests on respect for creator rights; if the deals negotiated between these filing-sharing services and the music labels fails on this score, the whole system will collapse.

In terms of the federal government's copyright policy moves in this area, Ottawa has been promising to ratify the WIPO treaties for several years. Based on the Status Report on Copyright Reform submitted in March 2004 by the ministers of Canadian Heritage and Industry, WIPO and other related legislative changes now being discussed include the implementation of an exclusive making available right for producers and performers; measures to discourage tampering with technological protection measures and rights management information that identifies copyright material; the introduction of exclusive distribution rights for audio performers (these already exist for producers and authors); and a legislated recognition of moral rights for audio performers.

But an economic impact report recently commissioned for Industry Canada casts some doubts about the benefits of the WIPO treaty for domestic performers. "Performers and sound recording makers share interests in common in creating and supplying recorded music, though the economic position of the former is mostly considerably weaker than that of the sound recording makers, who often have the superior bargaining position," concluded Ruth Towse, associate professor of cultural studies at Erasmus University in Rotterdam. "The underlying motive of the WIPO Treaties is the promotion of international trade in copyright material. The likely effect is that implementation could increase revenues to performers and sound recording makers, but the revenues are likely to accrue mainly to non-Canadians."

Part III

As the federal government moves towards the next round of copyright policy reforms intended to modernize domestic legislation, Canadians need to scrutinize the impact of the previous set of amendments, which are now seven years old. The question is whether these legislative changes have undermined creators' economic and moral rights in their intellectual property, and therefore impoverished the public realm. Such an analysis can be broken down into four parts: the consequences of the exceptions included in the 1997 amendments; the effectiveness of copyright collectives in compensating creators for foregone income due to legislative exemptions; the state of moral rights in Canada in the wake of the Théberge and Desputeaux rulings; and, finally, the issue of whether labour relations legislation directed at artists can be regarded as a means of providing creators with additional control over their works.

Exemptions

"The single copy exemption," says a former chair of The Writers' Union of Canada, "is a 30 million copy exemption." That verdict sums up how many writers have come to view the long-term impact of the menu of exceptions appended to the Copyright Act in the 1997 reform package, and then buttressed by the precedent created in the Law Society's Great Library case (which involved the making and distributing of copies of law reports by the library). Those exemptions were promulgated to achieve a variety of public policy objectives: enabling research and access to materials at libraries and museums; facilitating certain types of teaching practices; and providing support for individuals with various disabilities, to name a few. Such changes are also mandated in the name of maintaining a balance between copyright owners and users.

It is worth noting that the exemptions in the Act are overwhelmingly directed towards the written word -- articles, plays, tests -- although the list does include performances of live or recorded music in educational institutions and the recording of radio and TV broadcasts under certain conditions. The Section 92 review even raised the question of whether the exemptions should be extended to allow for the showing of films and videos in school settings. But the list of categories of copyright works *not* included under the 1997 exemptions is revealing: software, films and videos, database products such as CD-ROMs, etc.

The malleability of the stated policy principles can be illustrated by the fact that there may well be a defensible public interest in allowing, for example, the copying of computer programs for research or private study within a library. Moreover, many software companies now use so-called "shrink wrap" licenses – when the user unwraps the cover, they are deemed to have agreed to the conditions of the license, and these may even override any statutory exceptions. It remains unclear whether shrink-wrap licenses nullify the fair dealing rules. But the broader point is that clever technical measures ought not to be allowed to trump a practice as fundamental to the dissemination of knowledge as fair dealing.

It's probably not a coincidence that the software industry, dating back to the early days of Microsoft, has been zealous about protecting its own copyright in order to counter the erosion of its economic franchise because of illegal duplication. Individual writers, who are most adversely affected by the new exemptions, simply don't have the wherewithal to defend their intellectual property with the same kind of vehemence.

Some authors point out that the proliferation of exemptions has thwarted a more market-oriented negotiation process that should evolve organically between copyright owners (via rights collectives) and users or user groups, as has been the case with SOCAN and the broadcast industry. "Once you start adding specific exceptions for specific purposes into the legislation, there is a natural tendency for users to resort to exemptions, which puts the onus on creators to prove their work shouldn't be exempted," says one journalist and historian. "Access Copyright has major relationships with educational institutions because of course packs, but receives very little revenue from libraries because they fall under the single copy exemption." As this writer points out, there's nothing to preclude collectives and users who require some kind of `discount' –

e.g., those with perceptual disabilities – to work out an accommodation that achieves the same result, i.e., a voluntary license with little or no fee.

A journalist and critic cites her strange experience with that particular exemption. She discovered one of her books had been made into a "talking book" when she heard the recorded version had been nominated for a literary award offered by the Canadian National Institute for the Blind. It was the first she'd heard of the translation into audio form. No one had asked her for permission, nor consulted with her on editorial issues such as the choice of narrator, biographical details, etc. In fact, she was told she needed the assent of the publisher to obtain a copy. This anecdote illustrates that an exemption – even a well-intentioned one -- comes to be treated as more than just an economic benefit, and so encourages certain assumptions about what can be done with, and to, those copyright works subject to user-oriented provisions. "An exemption is not a license to take," says the author, who is aware of other such cases.

Quite apart from the way exemptions encourage users to disregard broader intellectual property rights, creators must confront the question of the actual economic impact exemptions have had on both copyright owners and users. Can educational institutions, libraries, museums and archives demonstrate that they've been able to deliver the public policy goals set out in the 1997 reforms? And on the other side of the divide, what has been the economic impact, in terms of foregone royalty revenue, on those individuals whose work has been copied on the strength of an exemption? It is striking that the federal government didn't bother to address either of these questions in its Section 92 review of the Copyright Act. This analytic gap would appear to be a grave error in both directions, because Canadians, at this point, can not say for certain whether the exemptions are providing the desired policy benefit, or, as some observers suspect, if they have inflicted hardship on creators by expropriating part of the value of their work.

It is interesting to note, in light of such criticisms, that the federal government's earlier enthusiasm for the use of exemptions has, in fact, waned slightly in one particular area: inter-library loans of journal articles. Under the 1997 reforms, research libraries were given the authority to make electronic copies of journal articles and email these to other libraries as part of their inter-library loan service. The rider on the exemption, however, was that the article could only be delivered to the library patron in hard copy form, not electronically – a logistical detail designed to prevent unauthorized electronic copying, but one that irritates many academics, especially those from the U.S., where electronic delivery is allowed.

During the consultations in the latest chapter of the reform process, researchers and libraries lobbied to have the exemption extended to electronic delivery. But in the March, 2004 interim report on copyright reform, issued by the Standing Committee on Canadian Heritage, the committee members opted to side with journal publishers and authors by recommending that the solution lies in an extended collective licensing regime, not an enhancement of an existing exemption.

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The State of Canadian Collective Management

A collective society, according to University of Ottawa associate law professor Daniel Gervais, "is an organization that administers the rights of several copyright

owners. It can grant permission to use their works and set the conditions for that use." More generally, though, collectives are a means of creating markets where they would otherwise not exist, because authors and publishers, individually, could not license uses in response to countless demands for reproductions.

These operate under a handful of legal models and governance structures, and are subject to competition laws designed to prevent monopolistic behaviour. They collect royalty revenue through a range of methods, from tariffs set by the Copyright Board to voluntary fees, negotiations with users, and so on. Canadian collectives now deal with a wide variety of copyright situations, including photocopying, public performance of recorded music and representations of works of visual art. There's also considerable variety in the ways in which collectives secure permission to represent the rights of creators; some, as has been described above, have little visibility, while others – especially those that deal with broadcast media -- are well known and represent a very large proportion of the creators and copyright owners operating in a given media.

The fundamental question creators have with respect to collectives is whether they are successful at distributing royalty revenues to individual artists. A report prepared for the Department of Canadian Heritage in 2001 by Prof. Gervais offered a snapshot of the economic clout of selected Canadian collectives relative to other jurisdictions. In 1998, SOCAN's revenue per capita stood at $2.53, compared with $2.50, $3.66 and $4.20 for musicians/songwriters' rights collectives in the U.S., France and Germany, respectively. With reprography collectives, Canada's per capita ranking was slightly closer to the middle of the pack, standing at 52 cents, compared with 28-cents and 34-cents for the U.S. and Germany. The Scandinavians, however, achieved per capita rates from 92-cents to $5 (all figures in U.S. dollars).

The following list itemizes creator collectives' that have disclosed financial data:

- Canadian Private Copying Collective, formed in 1999 to distribute revenues from levies on blank media to songwriters, recording artists, publishers and record companies. Between 2000 to 2003, CPCC has made distribution payments of $26.4 million, and has generated $24 million and $26 million in revenue in 2002 and 2003. Over the same period, however, its expense/revenue ratio has almost tripled, due to high legal costs.
- Neighbouring Rights Collective of Canada is an umbrella organization established in 1998, and overseen by ACTRA, the AFM and other creator groups. Its distributions to publisher and performer collectives grew respectively from $1.1 million in 1998 to $3.7 million in 2001 – more than three-fold increase in four years.
- Access Copyright, formed in 1988 (as CanCopy) by publishers and creators to collect reprography royalties. Its membership now includes over 6,000 writers, photographers, illustrators, as well as 550 newspaper, book and magazine publishers in English Canada. In 2003, Access Copyright collected $26.9 million, up slightly from 2002. Distribution grew from $18.9 million, in 2002, to $20.5 million. The expense/revenue ratio jumped significantly over this period, from 16.7% to 22.9% (due to the costs of designing and implementing a new rights management system). Last year, creators received about 26% of

Access Copyright distributions in Canada (publishers did share some of their 74% share with creators through private arrangements, with the gross creator share at just over 30% of all distributions).

- Copibec, the Quebec sister collective to Access Copyright. It maintains a simple 50/50 distribution formula between publishers and creators in almost all cases.
- ACTRA Performers' Rights Society, founded in 1983, collects and distributes fees, royalties, residuals and other revenues owed to about 5,000 ACTRA members. Its collections have risen steadily, from over $2 million in 1998/99 to more than $7 million in 2002/2003. A 5% service charge was recently applied to payments, to assist with payments, collections, and overhead.
- Society of Composers, Authors and Music Publishers of Canada (SOCAN) was founded in 1990 from the merger of two predecessor collectives. Its 70,000 members include composers, songwriters, lyricists, and publishers. Revenues for 2003 equaled $180.7 million, up 8.9% from 2002. Of that, $129.6 million came from domestic sources. Distributions are divided equally between music publishers and authors (composers and lyricists), with figures published annually. Its expense/revenue ratio is 15.9%, which is slightly less than 2002. Overall, SOCAN distributed $150.2 million in royalty payments in 2003, an 18.6% increase over the previous year. The growth is partly due to new revenues sources, including those from private copying. The average distribution per lyricist/composer was $2,783 in 2003, compared to $2,442 in 2002.

On the surface, it would appear that collective revenue is increasing at a healthy pace in Canada. But the gross figures don't tell the full story because there's some evidence that a significant proportion of the money for some collectives isn't filtering down to creators. Access Copyright is a particularly vivid example: when CanCopy was initially set up, writers and publishers negotiated a 65-35 split in the collective's revenues for magazines, and a 60-40 split for trade books, with a roughly equal sharing of revenues anticipated. Over time, the ratio has shifted: individual writers affiliated with Access Copyright receive at least 50% of the total payment allocated to the copying of a particular book or publication. However, payments to most unaffiliated creators (including most textbook authors) reach them through their publishers, who are obligated to pay in accordance with their contracts with those creators. In recent years, splits may have been roughly 70-30, although Access Copyright does not collect precise data.

A related issue has to do with the financial structure of the collective 'sector' itself. While collectives have generated new sources of income for creators, the revenue/expense ratios indicated above show that several of these organizations struggle to control their administrative costs – an operational issue that obviously has a direct bearing on creator royalty incomes. Since the 1997 reforms to the Copyright Act, there has been a significant expansion of collective management in Canada; today, some 36 copyright collectives operate in Canada, including several pairings of French and English-language collectives serving the same "market" (e.g., music, reprography, etc.). "Canada

has by far the largest number of CMOs, especially in relation to the country's population," Gervais writes. "The number of collectives is probably too high and it seems unlikely that all can survive in a limited market." The federal government, in its Section 92 report, contends that it has undertaken "concrete measures" to streamline the collective sector.

This is the backdrop to the pressing question – a "critical juncture" in Gervais' words -- of how collectives can adapt themselves to provide digital licensing as a means of controlling the transmission of copyright works over the Internet.

Some collectives already offer limited licensing for digital material. For instance, in March, 2004, the Playwrights Guild launched a "virtual library and bookstore" as an online source of English Canadian drama delivered to the public through Access Copyright. Users can browse unpublished plays and purchase licenses via the Access Copyright website. And while it does not yet authorize digital use or storage in its comprehensive or blanket licenses that cover its repertoire, Access Copyright does offer digital licenses on a "transactional basis" for activities such as scanning works under license.

Ottawa, meanwhile, has established a $3 million Electronic Copyright Fund to "simplify the licensing process" on the part of collectives and provide resources for the digitization of Canadian culture. And the government, in a status report on copyright reform presented by the ministers of Heritage and Industry in March, 2004, identified the need to protect electronic "rights management information" from tampering as a means of identifying copyright material in digital form -- an important step in helping collectives administer royalties from authorized digital uses.

In Gervais' view, Ottawa's key move in this direction would be to pass legislation that allows collectives to introduce "extended licensing" – i.e., a measure that allows a collective to extend its licensing authority to all national and foreign rights holders in a given category when it reaches a certain threshold of voluntary members. Effectively, Gervais argues in a paper commissioned by Canadian Heritage in 2003, such a rule "accelerates" the acquisition of rights and thus the granting of permissions. Such a move would benefit newer and smaller collectives, he states, but also rights holders. "[They] have the advantage of better protection of their rights, and by presenting a unified front they increase their clout in negotiations with users. Finally, non-represented rights holders also have their rights protected and can benefit from the remuneration they deserve, since their works are being used for the benefit of the general public."

Despite that, the federal government's latest pronouncement on copyright reform – the Interim Status report issued in March, 2004 – is silent on the evolving role of collectives and the use of extended licensing.

Moral Rights

As indicated earlier, Canadian copyright law draws on two sets of legal and political traditions – English and French – and for this reason has accorded legislative recognition to moral rights, albeit in a watered down form. The current Copyright Act includes 13 clauses which set out Canada's policy on moral rights. Under the provisions of the law, these provide authors with the right to use their name or a pseudonym or to

remain anonymous. The law also states that distortions, mutilations or unauthorized modifications represent an infringement of moral rights where done without the author's permission and, with certain exceptions, in a way that prejudices the author's reputation. Finally, the Act establishes the same penalties that are provided for copyright infringement.

In keeping with their philosophical origins, moral rights may not be assigned under Canadian law, but, strangely enough, they can be waived. In other words, though a creator is considered under international human rights covenants to have an indivisible connection to their work, Canadian law allows authors to actually surrender their very authorship, possibly for financial compensation (France and Germany do not permit the waiver of moral rights.) Similarly, moral rights expire when copyright does, which is another apparent contradiction between Canadian law and the fundamental construction of the concept of moral rights.

One of the pivotal questions is the relationship between moral rights and the economic rights arising from copyright. Reputation, according to Normand Tamaro, is the link between the two. In myriad ways – a reporter's presumed credibility, the authenticity of an artist's paintings, etc. – reputation is inextricably bound to the earning power of a creator. Rightly or wrongly, reputation opens doors, paves the way for new commissions, attracts serious consideration from critics, and so on. In both the Théberge and Desputeaux rulings, however, the commercial interests on the part of gallery owners and the publisher, respectively, were afforded sufficient legal recognition as to significantly dilute the creators' moral rights.

During the current copyright reform process, there has been some debate within the government and among stakeholder groups about the need to shore up some of the Act's moral rights provisions, for example, by extending such protection to performers. But some creators and intellectual property experts question this approach, arguing that the federal government, in the wake of the Théberge and Desputeaux decisions, desperately needs to look at the big picture before further tinkering with the Act's moral rights provisions. As Tamaro asks, "We may wonder how important the author's reputation is after the Théberge and Desputeaux decisions."

The case for undertaking such a high level review of basic principles is made that much more pressing because of the advent of digital technology. Given that so much creative work can be now replicated in malleable electronic formats, the risk of unauthorized alteration has never been greater. Take the case of an illustrator who "sells" a painting to a publisher, who maintains the image in a JPG file. At some point, an ad agency approaches the publisher, seeking permission to reproduce the painting in an advertisement. The publisher agrees, and passes along the JPG file, whereupon the agency's designers electronically alter the file by inserting in it an image of a consumer product. Even if the author freely sold the image and waived moral rights to it, has his or her reputation been affected by this modification? "Common sense," in Tamaro's words, would say the answer is clearly yes. But Canadian law, in its present condition, suggests otherwise.

Status of the Artist Legislation

As is clear from the foregoing sections, there's a great deal of variation in the type of representation creators and artists enjoy – ranging from actors supported by an active and well-organized union, to freelancers who consider themselves small businesses and belong to no organizations at all. Some creators' unions are quite new. Other creator groups enjoyed more clout in the past, and have seen their influence diminish over time, for various reasons. Lastly, many creators belong to other collective or professional organizations – e.g. teachers' unions – because they need to have "day jobs" to subsidize their creative work.

The challenge of creating effective labour legislation specifically tailored for independent artists is not new, and the issues remain fundamentally unchanged. Many creators are self-employed, maintain one-to-one relationships with a range of clients, and function as small businesses. The traditional concepts of labour law – a physical workplace, occupational safety, bargaining units, a formal salary-based employee-employer relationship, seniority, etc. – do not apply to the way many independent creators conduct their professional lives (the long-established exceptions, as noted above, are those involved in theatre, television and film). Rather, they work in studios, home offices, and coffee shops. And they may place a high value on their independence.

In the past, various attempts have been made to create an improved labour relations environment for different types of creators. During the 1980s, the Writers' Union of Canada attempted to negotiate standard contract provisions – a.k.a. minimum terms agreements -- with the Association of Canadian Publishers. But the ACP pulled out at the last moment, saying it had been advised that such a move constituted a breach of the provisions of Canada's competition act that restrict monopolies. Instead, the ACP offered up only a voluntary code of practice, which TWUC declined to endorse. Subsequent attempts to negotiate minimum terms agreements with individual publishers have also failed. Similarly, at various times, the Periodical Writers Association of Canada has attempted to gain acceptance for the establishment a standard freelancer contract, but with little success in having it adopted and used by publications.

In 1995, the House of Commons gave royal assent to the Status of the Artist Act. At the time, the latest national census had estimated that artists accounted for about a quarter of the cultural labour force, and represented the fast-growing occupational category in the overall labour force. Canada's official recognition of the problem of low artist incomes dates back to the 1951 Royal Commission on the National Development of Arts, Letters and Sciences (the so-called Massey Commission). But the Status of the Artist legislation per se traces its origins to a 1980 UNESCO declaration, which led, in Canada, to a series of taskforces recommending various solutions, including favourable tax treatment, stronger copyright protection and collective bargaining for artists' groups (as proposed in 1990 by the Standing Committee on Communications and Culture).

The 1995 legislation had two parts: the Act established a (short-lived) council comprised of individual artists, and its mandate was to advise the government on how to improve working conditions for creators. But the council lacked strong links to established arts groups, and was eventually disbanded.

The second part of the Act allows artists organizations to apply for certification to the Canadian Artists and Producers Professional Tribunal. In theory, artists' organizations that obtain certification have the legal right to negotiate so-called "minimum terms agreements" for independent artists *working within federal jurisdiction* (e.g., broadcasters, National Arts Centre, government departments, Canadian museums, etc). Such contracts apply to all creators, whether they are full or part-time, and whether or not they belong to the certified organization.

According to a recent consultant's review of the legislation conducted for the Department of Canadian Heritage, 15 artists' organizations had been certified by the Tribunal as of March 2001, seven of which had negotiated a total of ten first agreements between them. These fifteen included Canadian Actors Equity, Canadian Association of Photographers and Illustrators in Communications, PWAC, the Writers Guild, ACTRA, Playwrights Guild, the American Federation of Musicians, TWUC, and Canadian Artists Representation.

One of the latest is the Guild of Canadian Film Composers, which obtained certification under the Act in May, 2003, allowing it to negotiate collective agreements with producers such as the NFB, the CBC and television broadcasters in all parts of Canada except French Quebec. The certification covers all composers, arrangers, orchestrators, and music editors, whether or not they belong to the GCFC.

The consultant's review identified the Act's limited scope as its key weakness, a point made by most critics of the legislation. Creators work mostly under provincial jurisdiction, and thus the producers they usually deal with, are beyond the reach of the Act. The Canadian Conference of the Arts, in a submission, noted that the law doesn't propose solutions to broader economic issues facing artists – e.g. favourable tax treatment for copyright income. In Ireland, according to the report, all artist income is tax exempt, while Quebec exempts the first $30,000 of income from royalties earned on copyright material.

More significantly, the Act covers only a "modest" amount of cultural activity, and the Tribunal has turned down attempts to extend the law's coverage. For example, PWAC sought, unsuccessfully, to have newspapers included – in effect, to establish PWAC as the bargaining agent for freelance writers selling electronic rights to daily publications for use in databases.

In some sectors, like television production, private broadcasters like CTV and CanWest Global, as well as independent producers that provide programming from the CBC, have argued that they are provincial entities, beyond the reach of the federal statute. A loophole? The AFM believes so, arguing that private broadcasters, airing the work of independent producers, come under the jurisdiction of the CRTC and should therefore be subject to the federal status of the artist rules.

Ottawa has recognized the law's limitations, but hopes it will become a model for somewhat broader status of the artist legislation at the provincial level. To date, Quebec has enacted such a law, which pre-dates the federal Act, and Saskatchewan's version offers a more limited approach. The Liberal government of Dalton McGuinty, in Ontario, included Status of the Artist legislation in its 2003 election platform. Currently, arts groups, including Canadian Actors' Equity Association (CAEA), are participating in a working group to develop draft Status of the Artist legislation for Ontario.

There are many people in the arts world who feel that Status of the Artist legislation is an attractive solution to some of the most persistent problems facing creators -- poor earning capacity, loss of control over intellectual property, lack of clout with producers, etc., all of which could conceivably be addressed with minimum terms contracts. These would provide a floor, in terms of fees, moral rights, and so on. And by virtue of establishing minimum conditions, they would take some of the inherent inequity out of the negotiations between freelance creators and large organizations or companies.

And groups such as the CAEA have put a "high priority" on getting such laws in place because of the deleterious impact of Canadian Revenue Agency (CRA) rulings that deem some performers to be employees, for tax purposes, rather than independent contractors.

As an article in the September, 2004 CAEA newsletter put it, "In the past tax laws respected the principles of the Status of the Artist Act. Historical agreements with Revenue Canada and Human Resources Development Canada support arguments that the CRA had promised to treat performing artists as independent contractors – artists who have voluntarily walked away from benefits over the past 30 years in order to retain independent contractor status.

"In light of recent decisions by the CRA and the potential liabilities to artists, a strategy for dealing with this branch of the government must be developed, not just at Equity but with all arts organizations across the country."

It's obvious that Status legislation is most likely to succeed in sectors that generate large revenues, and have a limited number of producers. There are a finite number of theatres or television production companies. The same can be said of daily newspapers, almost all of which are accustomed to negotiating terms with unions representing their editorial employees. At the same time, the universe of organizations that commission freelance writing is vast, and a certain amount of it functions outside the logical parameters of copyright law (e.g., many freelancer write for newsletters or compose speeches, activities where the subsequent economic value of the copyright is negligible).

The issue at the heart of this discussion is whether a creator's ability to profit from the copying of their work is best enhanced by such legislation, or by a more comprehensive approach to collective rights management, or by some combination of the two sets of policy tools. Furthermore, the prospect of such legislation raises a host of important questions that need to be considered carefully:

- Should independent creators be required to join certified artists' associations and pay dues (either directly or through deductions)?
- How far should legislation extend, if it is to reach beyond federal jurisdiction – to producers that receive direct grants from some government body, to producers that enjoy other kinds of benefit (e.g. Canadian ownership rules), or to all producers?
- In terms of the political sustainability of such a law, what is the impact of wide-spread non-compliance, either deliberate or due to lack of knowledge?
- How will minimum terms agreements affect economically marginal producers – e.g. small circulation magazines or publishers – that often provide entry-

level creators with an opportunity to develop their craft, but little financial reward?

- What are the financial implications – in terms of added responsibilities, such as negotiating contracts, pursuing appeals and monitoring producers -- of certification for chronically-impoverished artists' organizations?
- Do such rules encourage or discourage established or new producers to hire young or less experienced creators, or creators working in emerging media?
- If such rules are to extend to the private sector, what would be the anticipated response of multi-national producers, in terms of their Canadian divisions?
- Can such laws be targeted so they apply only to producers whose overall revenues, from both sales and government grants, exceed a specified level?
- What impact would Status of the Artist legislation have on existing copyright collectives, if such a law would encourage creator unions to take over rights management for their members?
- Are there mechanisms – regulation, public education campaigns, etc. – that would boost artist membership in rights collectives, such as Access Copyright, in order to increase creator income from various categories of licensing fees?
- Given that many governments require collectives to give at least 50% of distributions to creators, is the current "balance of power" on the boards of Canadian copyright collectives adequate, or should the government re-jig the rules governing collectives in order to guarantee that a greater share of the licensing revenues finds its way into the hands of creators?

The Guild of Canadian Film Composers grappled with several of these questions as it moved towards certification as an artists' organization last year (2003). The members had traditionally "distanced" themselves from unionization, and the GCFC will not become a union, even though it now collects some dues and pension contributions from producers. It will move from promoting suggested model contracts to collective bargaining for minimum terms agreements. As for copyright, the GCFC has pursued what it considers to be a ground-breaking bargaining strategy. It negotiated agreements with SOCAN and SODRAC "that acknowledge the GCFC's right to represent composers' rights for works not represented by the other copyright collectives," according to Paul Hoffert. "If a broadcaster opts for a modified blanket license from SOCAN for a TV program, and SOCAN grants the performing rights back to the composer for the musical works in that program, the GCFC now represents those works for collective bargaining with the broadcaster."

Conclusion

If one had to summarize the current state of copyright in Canada, from a creators' perspective, the following over-arching observations emerge:

i. Canadian artists now function in a highly digitized global environment, which offers unprecedented creative opportunities, but also significant risks in terms of unauthorized copying and alteration of their works;
ii. Canadian legislators have been conspicuously slow in modernizing the Copyright Act to address the impact of new technology, and have failed to fully assess the long-range implications of previous reforms;
iii. The user-oriented exemptions added to the Act in 1997 have damaged the ability of creators to profit from their work, and may well contradict federal policies designed to encourage collective rights management;
iv. A series of recent Supreme Court judgments has undermined creators' rights, while providing additional legal heft to users' rights;
v. The proliferation since 1997 of Canadian copyright collectives has created a costly administrative burden on rights holders. What's more, due to legislative inaction, this sector still lacks the resources, both financial and legal, to extend its reach into digital licensing;
vi. Efforts to introduce labour relations laws for artists, with mechanisms to protect their intellectual property, have been half-hearted, and appear to be utterly disconnected from the copyright reform process.
vii. There's a corrosive disconnect in public attitudes: most Canadians believe artists deserve to be paid for their work, yet there's still widespread unauthorized copying – a contradiction that may be explained by the public's suspicion that current copyright laws ultimately fail to benefit creators.

Taken together, these conditions force us to ask whether Canada's copyright law is balanced in favour of creators or users. Are policy-makers attempting to attain some kind of equilibrium under the law or, alternatively, correct some perceived imbalance? "Balance," after all, is a concept that buttresses much official deliberation about copyright reform in Ottawa. One of the "overarching objectives," notes the Section 92 report, "[is] to recognize the balance between the legitimate interests of creators to be paid for the use of their works and the needs of users to have access to those works."

As a policy objective, balance is a slippery and perhaps unattainable goal. And it is very much in the eyes of the beholder, as the saying goes. The pursuit of balance, in fact, raises as many problems as it purports to solve. Is balance measured in purely economic terms, or by some other yardstick – e.g., improving access to copyright work for certain individuals and institutions. If balance is the stated goal, moreover, how does the government satisfy itself that balance has been achieved? And are there alternative policy levers, outside copyright law, that could be deployed to provide such balance?

Consider the last question in relation to legislated exemptions. Ostensibly, most of the exemptions now in the Act are designed to provide individuals or institutions with

some monetary and administrative relief in order to achieve a public good. Schools or institutions serving the blind need not pay royalties to make copies of certain works under certain circumstances, nor do they have to spend valuable time chasing after permissions. The stated goal is that such exemptions provide support for activities deemed to be valuable to society -- such as academic inquiry or the provision of materials for individuals with perceptual disabilities. Laudable ends, but the assumption that remains unexplored is why the onus is on individual creators to subsidize public policy? If the Canadian government determines that there is a national cultural benefit in, for example, providing drama teachers with free access to scripts for plays that can be performed in a classroom or school auditorium, should it not allocate funding directly to boards to offset the royalties owing the playwrights? Or put another way, should a Canadian playwright be held personally financially responsible for ensuring that Canadian school children have unfettered access to drama curriculum?

Such questions become increasingly bizarre if one tries to transpose these policy trade-offs onto other information technologies, such as software, or manufacturing sectors that rely on the exploitation of various categories of intellectual property. For instance, no health policy expert would dispute the assertion that the medical system would benefit if there were fewer cases of heart attacks and strokes. But do Canadian legislators seek to enact exemptions to the drug patent laws that would require pharmaceutical manufacturers to forego revenues on treatments that prevent such illnesses? The answer is obvious, as are the consequences of such logic.

There is one final dimension to the problem of balance, argues Normand Tamaro, and that has to do with the state of the "equilibrium" between creators and producers, who together comprise the copyright owners `faction' in the intellectual property debates. This report began with the observation that creator and publisher interests are not parallel, although they have come to be seen as a unified whole in the push and pull process of copyright reform. If creators and publishers both played on the proverbial level playing field, we might be more accepting of this reductive characterization of copyright politics. But as this report has shown, creators are at a significant disadvantage in the relationship, and thus the reform agenda on the copyright owner side is more driven by the corporate needs of media conglomerates, textbook publishers and the entertainment industry. There's no disputing that the digital issues which dominate the current agenda are critical to both creators and producers, but it's hard to ignore the reality that the policy problems of immediate concern to individual creators – i.e., the combined impact of exemptions, and pivotal court rulings about moral rights, fair dealing and the copyright status of databases – have been largely overlooked.

Tamaro further argues that the very notion of balance in Canadian copyright law is built on a false construct -- the product of a highly flawed Federal Court ruling from 1954, in which the presiding judge overlooked existing jurisprudence and relied on a possibly plagiarized argument to declare the nascent Canadian cable industry exempt from copyright rules designed to protect creators. In a brief prepared for the CCC and DAMIC, Tamaro shows that the legal DNA of this judgment can be found in subsequent judicial and policy decisions -- the combined effect of which makes Canada regrettably unique in its pursuit of balance *within* a law intended specifically to protect one class of intellectual property -- authors 'rights. As Tamaro points out, the Supreme Court of

Canada, no less, issued a decision in 2004 in which Justice Ian Binnie referred to the "limited nature" of intellectual property – a remarkable formulation, considering the central role of creativity and information in the development of Canadian society, and the lengths to which corporate copyright owners have gone to protect their intellectual property assets.

We are poised at a fleeting moment, between judicial decree and political edict. If Canadian artists, performers and writers wish to prevent Justice Binnie's words from becoming a self-fulfilling prophecy, they now need to forcefully assert the case for individual creator rights in the current debate over copyright reform.