PART ONE:

Canadian Copyright Reform in Context

ONE

Copyright Talk:

Patterns and Pitfalls in Canadian Policy Discourses

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A. INTRODUCTION

1) Rhetoric's Role in Canadian Copyright

The current round of Canadian copyright consultation began officially in 2001 with the release of *A Framework for Copyright Reform* and the *Consultation Paper on Digital Copyright Issues*,[1] but this reform process could also be said to date to 1996, when the Canadian government signed the World Intellectual Property Organization's Copyright and Performance and Phonograms Treaties. Despite the eagerness of the House of Commons Standing Committee on Canadian Heritage and three succeeding Canadian Heritage Ministers to ratify the WIPO treaties and to offer rights-holders

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1 *A Framework for Copyright Reform* (Ottawa: Industry Canada and Canadian Heritage, 2001), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01101e.html> [*Framework*]; *Consultation Paper on Digital Copyright Issues* (Ottawa: Industry Canada and Canadian Heritage, 2001), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf>.

new means of protection and remuneration,[2] the wheels of copyright reform have turned slowly. Along the way, they have generated ample material for a discussion of the rhetoric, or rather competing discourses,[3] of copyright discussion.

Anatomizing the terms and patterns of copyright discourse — *how* people talk about copyright — is important because in copyright as in many other areas of law, impressions gleaned from media coverage and public discussion of the law *are* the law for most citizens. The most common source of information on copyright law is friends, not lawyers. And the friends often get their information from media sound-bites or Internet chats. Thus copyright discourse (or, in more popular terminology, rhetoric) makes itself felt not only through the legislation it may seek to generate or influence, but directly: it is not epiphenomenal but central to copyright as it is experienced by Canadians.[4] For many reasons, we can-

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2 The Heritage Department has not been reticent to declare that it seeks only to represent the rights-holder side of copyright: in the Canadian Heritage Performance Report for the period ending March 31, 2003, then-Minister Sheila Copps reported that "with Industry Canada, the Department is analyzing World Intellectual Property Organization (WIPO) treaty issues, and working with collective societies, industry associations and various creators' organizations to develop concrete proposals for copyright reform," *Canadian Heritage Performance Report: For the period ending March 31, 2003* (Ottawa: Treasury Board of Canada Secretariat, 2003), <www.tbs-sct.gc.ca/rma/dpr/02-03/CanHer-PC/CanHer-PC03D01_e.asp>. Similarly, on November 6, 2003, Minister Copps suggested to the Standing Committee on Canadian Heritage that given cabinet's reluctance to press forward with WIPO treaty ratification, "...the best course of action to achieve your objectives might be to hear from CRIA [the Canadian Recording Industry Association] to see what would be an acceptable wording," *Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (6 November 2003), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=67965#T1125>.

3 "Rhetoric" in its popular sense simply means persuasive language, and although I use it here as a loose synonym for "discourse," the latter term refers to a network of language, ideology, and power in which the speaker's intentions carry less force than rhetoricians might presume. At least two competing copyright discourses exist — broadly identified with copyright-owners and the public interest respectively — but they are not entirely independent from one another. For an introduction to "discourse analysis," in which my approach is grounded, see Robert de Beaugrande, "Discourse Analysis," *Johns Hopkins Guide to Literary Theory and Criticism*, ed. Michael Groden & Martin Kreiswirth (Baltimore: Johns Hopkins University Press, 1997).

4 Rosemary Coombe observes that "the law operates hegemonically ... not only when it is institutionally encountered, but when it is consciously and unconsciously apprehended," Rosemary Coombe, *The Cultural Life of Intellectual Prop-*

not draw a direct line from the hot air of press conferences and committee hearings to the details of legislation as passed: a particular minister's turn of phrase has little predictive value for the contents of legislation as passed. But whatever law is ultimately passed will be perceived — by Members of Parliament and judges as well as "ordinary Canadians" — through the discourse around it, which will in turn affect everyday cultural practice and future rounds of litigation, reform, and regulation.[5] In short, the copyright struggle is being waged not only *by means of* rhetoric, but *about* rhetoric.

The growing fervour of the Canadian copyright debate manifests the power of rights-holder lobbies and the vigour of Internet and consumer cultures, and the growing awareness of many stakeholders in between. As digital technology puts publication, republication, and dissemination of copyrighted materials in the hands of more and more citizens, many of whom may be inclined to question the legitimacy of copyright law, the struggle over the "spin" of copyright talk intensifies. In public statements on the subject, few words are careless: metaphors and buzzwords are strategically chosen. All parties try to reflect and manipulate citizens' or legislators' "common sense"; the middle ground is as common a goal of battle as the high ground. Nonetheless, the debate is highly polarized. Spokespeople for each side speak most often of "fair" laws and "balance" when they feel that their interests are being neglected. More persistently on the rights-holder side we hear demands for "respect," "control," "protection," "modernization," and "harmonization," while education and consumer advocates call for "innovation," "technology neutrality," and "access." Rights-holders seek to "… place creators at the very centre of the *Copyright Act* …," while others claim that "… the Canadian public and the health of the Canadian cultural community and the Canadian economy should be at the heart of the legislation."[6] Meanwhile, the majority of Canadians (and a

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erties: Authorship, Appropriation, and the Law (Durham: Duke University Press, 1988) at 9.

5 For an argument about how the metaphor of music file-sharing as a disease has been taken up by judges in the United States, see Alex Cameron, "Diagnosis Technoplague: Tracing Metaphors and their Implications in Digital Copyright" (2005) [unpublished, on file with author].

6 Remarks by Hélène Messier (Quebec Reproduction Rights Collective Administration Society, Droit d'auteur, Multimédia, Internet, Copyright (DAMIC)) and Don Butcher (Canadian Library Association), *Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (23 October 2003) <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=66568#T1245>.

majority of Members of Parliament) likely think copyright reform is largely about "cracking down" on the circulation of MP3s on the Internet: the media and the Ministers seem to agree that this is the issue and the tone most likely to engage the layperson.

2) General Characteristics of Government Discourses

This paper focuses on government-generated copyright discourse between 2001 and 2005. I have surveyed documents from the policy branches of the Departments of Industry and Canadian Heritage, speeches and statements from the Ministers of Industry and Canadian Heritage, and transcripts of meetings of the House of Commons Standing Committee on Canadian Heritage. While a series of reports co-authored by the Heritage and Industry Departments manifests some hybrid of perspectives of both departments, all committee discussion, public hearings, and the vast proportion of speeches and media statements so far have come from the Heritage side. The first observation to be made, then, is that in sheer quantity, Heritage's view of copyright as a tool to protect Canada's creators and cultural industries from digital technologies has been much more insistently articulated in Ottawa than Industry's perspective of copyright as a part of the government's declared "innovation strategy."[7]

Elsewhere, I have critiqued the way Heritage Ministers and the Heritage Committee have tended to conflate the interests of large cultural industries and collectives and the interests of creators, when in fact many creators are not well-served by their would-be champions.[8] There is a vast difference between setting up a policy environment that will "protect" stars and big industries and setting up a policy environment that will nurture the majority of Canadian creators, or Canadian creators of the future, and the Heritage Department has certainly leaned towards the former.[9] In

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7 See *Innovation in Canada,* <www.innovationstrategy.gc.ca/gol/innovation/site.nsf/en/in04113.html>; and see *Speech from the Throne to Open the First Session of the 37th Parliament of Canada,* (30 January 2001), <www.pco-bcp.gc.ca/printer.asp?Language=E&page=InformationResources&sub=sftddt&doc=sftddt2001_e.htm> [*Throne Speech*].

8 Laura J. Murray, "Protecting Ourselves to Death: Canada, Copyright, and the Internet," *First Monday* (October 2004) <www.firstmonday.org/issues/issue9_10/murray/index.html>.

9 Many musicians, filmmakers, and visual artists need to be able to excerpt or sample the work of others in order to produce their own work. If the copyright system leans too much towards protection of rights, their work is stymied or made unaffordable. See Siva Vaidhyanathan, *Copyrights and Copywrongs* (New

a speech to the Canadian Club in May 2005, Minister Liza Frulla declared that "if our creators and artists can't make money from their works — if their copyright is not respected — they won't be able to continue doing what they do best. They lose as individuals. We lose as a country."[10] While Ms. Frulla's words may sound like apple pie, and while indeed copyright is an important underpinning of most artists' careers, the claim that if copyright is only respected, Canada will have more artists making money and prolonging their work is, sadly, grossly exaggerated: copyright infringement is only one of artists' problems in a world of media concentration, chronic underfunding of arts institutions, shrinking grants, and rising education costs. Ms. Frulla's emphasis on "respect" for copyright conveniently places the blame for artists' low incomes on cheating consumers and absolves government and large media companies, who surely ought to shoulder some of it.

When government-funded galleries fight rises in artists' exhibition fees, granting agencies reduce young artists' access to resources, and media giants refuse artists permission to use material they control, or ask writers to sign away rights "throughout the universe, in perpituity," they present barriers to artists' ability to "continue doing what they do best" that will not be removed by copyright reform.[11] If the aim of the Canadian Heritage Department and Ministers is to support the production and dissemination of Canadian culture, copyright seems to be occupying a disproportionate place in the policy picture. The very prominence of copyright reform in the Canadian Heritage agenda indicates a debatable but undebated emphasis on the market as *the* major engine of cultural produc-

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York: New York University Press, 2001) at 117–48. Even for artists whose work is not appropriative or citational, affordability and availability of the work of others is arguably as important in early career as control over their own rights. See the proceedings of a conference on documentary filmmaking, *Framed!! How Law Constructs and Constrains Culture* (2004), <www.law.duke.edu/framed>.

10 "Speaking notes for The Honourable Liza Frulla, P.C., M.P. Minister of Canadian Heritage and Minister Responsible for Status of Women before the Canadian Club of Toronto," 9 May 2005 <www.canadianheritage.gc.ca/pc-ch/min/discours-speech/2005-05-09_e.cfm>.

11 See Clive Robertson, "Launching a new ARTSWORLD: Trusted? Connected? Canadian?" *Fuse Magazine* (February 2005) at 8–13; Kevin Temple, "Marketplace will dictate Canada Council funding, artists say," [*Toronto*] *Globe and Mail* (21 February 2005) R5; remarks by Karl Beveridge & John Greyson, "Victims or Pirates? A Discussion of Artists and Copyright," Ontario College of Art and Design (30 March 2005); Penney Kome, "Copyright Grabs: Writers Outraged by New CanWest Free-lancers' contract." *Straight Goods* (30 October 2004), <www.straightgoods.ca/ViewFeature3.cfm?REF=824>.

tion. It is important to note, too, that international obligations prohibit Canada from skewing its copyright law to aid its own creators and cultural industries. In fact, given that Canadians import most cultural products, rights-holder-slanted reforms will only send more money out of Canada. It is, therefore, more than a bit odd to hear urgent calls for Canada's compliance with the demands of the multinational and U.S. entertainment industries described as protection of Canadian culture[12] — but this is the pattern of copyright talk from Heritage.

Recently, Heritage Minister Liza Frulla has been weaving talk of investment, resource extraction, and protecting industry into more familiar cultural and economic nationalism — as if she is trying to second-guess or outdo what one might expect to hear from the Industry department. In November 2004, at a lunch-gathering of the Academy of Canadian Cinema and Television, she described artists as "the raw material of culture," rather brutally adding their persons to the pile of beaver pelts, lumber, and fish that have traditionally supported the Canadian economy.[13] A few weeks later, when addressing the Standing Committee on Canadian Heritage, she went on to elaborate on the commodity value of the arts:

> We know that each dollar invested in culture is a dollar that helps to stimulate creativity, enhance the quality of life and promote economic growth. Today, the cultural sector accounts for 740,000 jobs and 28 billion dollars in economic activity. Those are remarkable statistics, especially when we recall that the Government of Canada spends an average of only 3 billion dollars on culture. This is what is called money well invested. This is what is known as playing the role of a catalyst. I fully intend to do everything so that culture becomes a still more important pillar of economic activity and enhancement of the quality of life in our communities.[14]

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12 See Michael Geist, "Standing Canadian ground: U.S. trade pressures cloud intellectual property policy," *The Ottawa Citizen* (12 May 2005) F5; and "Why Canada Should Follow U.K., not U.S., on Copyright," *The Toronto Star* (4 October 2004) D2.

13 "Speaking Points for The Honourable Liza Frulla, P.C., M.P. Minister of Canadian Heritage and Minister Responsible for Status of Women at the lunch-gathering of the Academy of Canadian Cinema and Television," 9 November 2004 <www.canadianheritage.gc.ca/pc-ch/min/discours-speech/2004-11-09_e.cfm>.

14 "Speaking Points for The Honourable Liza Frulla, P.C., M.P. Minister of Canadian Heritage and Minister Responsible for Status of Women before the Standing Committee on Canadian Heritage," 24 November 2004 <www.canadianheritage.gc.ca/pc-ch/min/discours-speech/2004-11-24_e.cfm>.

Here, Ms. Frulla provides a perfect demonstration of George Yúdice's observation of neoliberal economies around the world that

> cultural institutions and funders are increasingly turning to the measurement of utility because there is no other accepted legitimation for social investment. In this context, the idea that the experience of *jouissance*, the unconcealment of truth, or deconstructive critique might be admissible criteria for investment in culture comes off as a conceit perhaps worthy of a Kafkaesque performance skit.[15]

In Ms. Frulla's view of cultural policy, copyright takes pride of place as a very visible marketplace solution that reaps social benefits while costing the federal government nothing.

In contrast with the view in Heritage that copyright is a quasi-natural right, the Industry Department tends to see it as a tool to promote innovation. Industry tends to adopt a position more attuned to the needs of emerging industries, which may come closer to representing the needs of small business, education, consumers, and, perhaps inadvertently, "small creators." Consider the press release accompanying the March 24 announcement of provisions to be included in copyright legislation, in which the Industry Minister's words follow those of the Heritage Minister:

> "We are pleased to have this opportunity to show Canadians how we intend to build a copyright framework for the 21st century," said Minister Frulla. "We must strengthen the hand of our creators and cultural industries against the unauthorized use of their works on the Internet."
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> "The Internet provides an incredibly powerful new means of communications, research, education, innovation and entertainment," said Minister Emerson. "A balanced copyright framework will help to support the use of the Internet to foster innovation and learning, while establishing stable and predictable marketplace rules."[16]

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15 George Yúdice, *The Expediency of Culture: Uses of Culture in the Global Era* (Durham: Duke University Press, 2003) at 16; see also Kate Taylor, "Arts funding might come with a price," *[Toronto] Globe and Mail* (5 January 2005) R3; and Kate Taylor, "The wrong reasons for supporting the arts," *[Toronto] Globe and Mail* (9 March 2005) R3.

16 *The Government of Canada Announces Upcoming Amendments to the Copyright Act* (Ottawa: Industry Canada 2005), <www.ic.gc.ca/cmb/welcomeic.nsf/o/85256a5d006b972085256fcd0078718c>.

While presenting a united front, the Ministers described the purpose of the same proposals in tellingly different ways. To Liza Frulla, the proposed reforms will give tools to rights-holders in the hostile environment of the Internet. While Frulla speaks of "*our* creators and cultural industries," a typical formulation in nationalist cultural policy rhetoric,[17] she (also typically) does not mention "our" students or consumers.[18] "Unauthorized use" is the threat to be fought, and the Internet is the battleground. Minister of Industry David Emerson, on the other hand, acknowledges the interests of students and consumers in his reference to "communications, research, education [and] innovation" which lead his list of the dynamic and economically productive dimensions of the Internet. For Emerson, the Internet is not a danger but a tool "to foster innovation and learning." Emerson lists "entertainment" (his word for what Frulla calls "creators and cultural industries") last in the long list of uses of the Internet: the approach here is pragmatic rather than romantic. In asserting the need for "balance" and "predictable marketplace rules," Emerson distances himself from the idea that the goal of reform is to "strengthen" anybody's "hand": rather, clarity and consistency are necessary for the market to work effectively.

3) The Prospects for "Balance"

As the copyright reform legislation tabled in June 2005 moves into committee, it will be interesting to watch the dialogue between the two Ministers and Ministries. The proposed legislation has steered away from some of the more egregious proposals in the Heritage Committee's Interim Report on Copyright Reform (May 2004),[19] whose extreme copyright-holder slant created a whipping-boy for public interest advocacy,[20] but it remains primarily driven by Canadian Heritage agendas. It might be noted that the

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17 See "Protection rhetoric: A critical survey," in Murray, note 8 above.

18 During her speech at the Canadian Club Frulla did speak of "our young people," and the entirely unnecessary possessive carried the same paternalism as it does when applied to artists: " I should add, we need to tell our young people to stop taking for free what they should be paying for," note 10 above.

19 *Interim Report on Copyright Reform* (Ottawa: Canadian Heritage, 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf> *[Interim Report]*.

20 See for example, "Bulletin Online: Federal Heritage Committee Proposes 'Tax' on Educational Use of Internet" *Canadian Association of University Teachers* (October 2004), <www.caut.ca/en/bulletin/issues/2004_oct/newsinternettax.asp>; *Petition for User's Rights,* <www.digital-copyright.ca/petition>; *The Truth About Copyright Revision,* <www.cippic.ca/en/projects-cases/copyright-law-re-

Conservative Party's policy on copyright opposes proposed licensing of educational use of the Internet and existing levies on private copying, and professes enthusiasm for life-long learning.[21] The New Democratic Party has switched positions since the preceding parliament and its representative on the Heritage Committee has become outspoken in his criticism of what he sees as the Liberal's corporate copyright agenda.[22] In a precarious minority government, these positions have some clout. Furthermore, while *Supporting Culture and Innovation*, a report on copyright from 2002, spoke of "... striking an appropriate balance between creators' *rights* and users' *needs*" (my italics),[23] a series of major court cases in these years[24] have given weight to the idea of what the Supreme Court of Canada has deemed "users' rights."[25] Both inside and outside the ranks of the Liberal government, then, there is a nascent sense of competing visions, reflected and promoted through particular ways of talking about copyright. Most participants in these discussions profess a commitment to "balance"; while the current environment of discussion in Canada may sometimes seem impossibly fraught, this multiplicity of voices offers more chance that we may attain that admirable goal than we had a couple of years ago.

However, in a discussion of copyright discourse, it must be noted that "balance" is a metaphor. As a metaphor, one of its limitations is its requirement that the materials in question be divided into two distinct brass bowls. It demands that we weigh the interests of "users" against the

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form/truth.html>; and blogs <www.faircopyright.ca>, <www.michaelgeist.ca>, and <http://ansuz.sooke.bc.ca/lawpoli/copyright>.

21 **"Conservative Party of Canada Policy Declaration"** *Conservative Party of Canada* (19 March 2005) <www.conservative.ca/media/20050319-POLICY%20DECLARATION.pdf>.

22 **Teviah Moro, "Change strikes wrong note: Local MP not impressed with** planned changes to the Copyright Act," *The Daily Press* [Timmins] (4 March 2005) A1.

23 **"Background,"** *Supporting Culture & Innovation Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00866e.html>.

24 **See** *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <www.canlii.org/ca/cas/scc/2002/2002scc34.html>, [2002] 2 S.C.R. 336 [*Théberge*]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <www.canlii.org/ca/cas/scc/2004/2004scc13.html>, [2004] 1 S.C.R. 339 [*CCH Canadian*]; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, <www.canlii.org/ca/cas/scc/2004/2004scc45.html>, [2004] 2 S.C.R. 427; *BMG Canada Inc. v. John Doe (F.C.),* [2004] FC 488, <www.canlii.org/ca/cas/fct/2004/2004fc488.html>, 239 D.L.R. (4th) 726.

25 *CCH Canadian*, note 24 above at para. 48.

interests of "creators." This sharp dichotomy is illusive. All creators are users, in the sense that they learn and draw from the culture already created — and of course in many cases they incorporate specific pieces of it in their own work. And technically at least all users are creators, in that all fixed expressions, no matter how private or modest, automatically gain copyright; in today's culture of mixtapes, Photoshop, and blogs, many Canadians are less passive in their use of culture than they may have been in the heyday of television and other one-way media. If calling all Canadians creators seems far-fetched, it will at least be acknowledged that there will be no works for users to access unless there are creators who produce such works. Each category depends on the other, and the line between them is a matter of judgment.

If we are to proceed within the constraints of the balance metaphor — which is a productive one in many ways — we must think of our task as something of a thought experiment, and accordingly take responsibility for putting the appropriate things on the scales. More clarity and self-consciousness will emerge from detailed analysis of particular clauses in the proposed legislation, undertaken in the later parts of this book, but it also needs to be encouraged at the level of rhetoric. I will focus here on two prominent terms of copyright debate: use and access. Education, high-tech, and consumer lobbies — "users" — generally plead for broad "access" to use copyrighted materials, while rights-holder lobbies claim or seek the power to authorize or control access and use. And yet in whichever hands they find themselves, these terms remain largely undefined and unanchored in law: neither access nor use are major terms in the *Copyright Act* itself.[26] But before addressing these specific terms, some further exploration of the climate of discussion is necessary.

B. "USE" AND "ACCESS" IN DOMINANT COPYRIGHT DISCOURSES

1) Panic-stricken Policy-making

Despite their different perspectives, the Ministers and Departments of Industry and Heritage appear to share the assumption that the Internet has changed everything, and that law must change to keep up with or discipline digital technology. The claim that the Internet gives its multitu-

26 On rare occasions the Act concerns itself with "use"; see *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42> *[Copyright Act]* ss. 45, 80.1.

dinous new abilities that must be regulated immediately is so widespread as to carry the weight of objective truth. There has been an air of panic in many ministerial comments on copyright; for example, newly-appointed-Heritage Minister Hélène Chalifour Scherrer emerged from meetings at the Juno Awards of 2004, just after a Federal Court pronounced that file-sharing was not illegal in Canada, breathless with assurances to the music industry: "We are going to make sure that downloading stays illegal. We will make it a priority so it is done as quickly as possible …." Noting that "[e]verybody [i.e., recording industry officials] was so worried," she assured them that "[n]ow I really know what the music industry is all about … I am going back to Ottawa with the will to do something."[27] In these few words, it is apparent that just as she claims, the Heritage Minister has learned the basics of the rights-holder rhetoric: that the Internet has changed everything, that copyright reform must happen quickly, that the Internet is a lawless place, and that government must appease the music industry.

All four of these assumptions are open to question. Amidst all the statements of urgency, neither lobbyists, ministers, nor MPs have mused publicly about *how* exactly the Internet and digital technologies are different from predecessor media and forms of cultural dissemination. We often hear the complaint that digital technologies allow ease and perfection of copying: this is generally represented as their most striking feature. However, rarely if ever have government reports or statements acknowledged that digital technologies also allow greater possibilities of rights-holder control past the point of sale. This may prove to be an even more powerful quality of the technologies, with unpleasant or dangerous ramifications for consumers and citizens, especially if buttressed by legal protection of rights-holders' technological protections. The net effect is likely not to be consumer empowerment, but rather consolidation of the power of large media corporations. But whatever prophecies we may make about how the "digital revolution" will look in hindsight, it is at least clear that the cultural and economic effects of digital technologies cannot be adequately captured by their ability to make perfect copies.

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27 Keith Damsell, "Heritage Minister Helene Scherrer vows to fight music file swapping," *Canadian Press NewsWire* [Toronto] (13 April 2004). In fact, many reports suggest that file-sharing cannot be blamed for the music industry's woes; see OECD "Report on Digital Music: Opportunities and Challenges" *Organization for Economic Co-operation and Development* (13 June 2005), <www.oecd.org/dataoecd/13/2/34995041.pdf> at 78 and "Cold White Peas," Editorial, *New York Times* (7 June 2005) A22.

Nowhere in government or media discussion has anyone acknowledged the near-perfect match between the rhetoric of wonder and panic at digital technologies and the hyperbole and hysteria that greeted the telegraph, the telephone, the television, and the photocopier. Historical examples are highly illuminating. They suggest, for example, that our ideas about what technologies can do change with time — we are probably no more able than Thomas Edison to grasp the effects or possibilities of recent innovations.[28] Historical precedents may also suggest that delay or moderation in implementing new laws can actually be a good thing. Jessica Litman points out that new technologies with immense economic power often arise in "out of date" or loophole-ridden legal regimes:

> [p]honograph records supplanted both piano rolls and sheet music with the aid of the compulsory license for mechanical reproduction; the juke box industry was created to exploit the1909 act's copyright exemption accorded to the "reproduction or rendition of a musical composition by or upon coin-operated machines." Radio broadcasting invaded everyone's living rooms before it was clear whether unauthorized broadcasts were copyright infringement; television took over our lives while it still seemed unlikely that most television programs could be protected by copyright... .[29]

In these and other moments of emergence of new media, laws written before the new technologies appeared are best understood not as inadequate to the new situation but as constitutive of it. Preexisting laws *did* provide a framework for development of new technology. Similarly, laws and cultural practices currently govern the Internet: they may need adjustment, but they are there. History suggests that if we take a cautious approach to legal reform, we are more likely to craft laws that will match the needs of new markets, new generations, and still newer technologies.

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28 **Lisa Gitelman's work on the phonograph is particularly striking in this regard:** see *Scripts, Grooves, and Writing Machines: Representing Technology in the Edison Era*. (Palo Alto: Stanford University Press, 1999); see also Eva Hemmungs Wirtén's chapter on the photocopier in *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: University of Toronto Press, 2004) at 57–75. For other examples of the interface of law, culture, and new technologies, see Lisa Gitelman & Geoffrey B. Pingree, eds., *New Media, 1740–1915* (Cambridge: MIT Press, 2003), and (concerning copyright specifically) Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (NY: Random House, 2001).

29 **Jessica Litman,** *Digital Copyright* (Amherst: Prometheus Books, 2001) at 173.

It might also be noted that in all the anxiety manifested in the Ministry of Canadian Heritage about the Internet there seems to be little awareness of the contents of this domain beyond "pirated" music files. The massive quantities and high quality of educational and cultural content made available by its creators for open or paid access appear to be unavailable on Parliament Hill. Similarly, the huge number of businesses small and large serving their customers on the Internet with the aid of easily available security measures does not quite seem to have registered. Ironically, the Canadian Heritage Department itself has devoted considerable resources to improving Canadian presence on and access to the Internet.[30] According to a report from one of the projects so initiated, Canadian Culture Online (CCO), "The cultural citizen, individually and/or by way of communities of practice and communities of interest, enjoys a sense of democratic ownership of public virtual spaces."[31] Within the "civil society" emphasis of the CCO, the Internet is a place of conversation as much as consumption, and from this viewpoint privacy rights are perhaps an even larger concern than property rights.[32] However, the citizen's or consumer's perception of the Internet has not been driving Canadian copyright policy or media coverage of it.

2) The Focus on File-Sharing

Instead, the view of the Canadian Recording Industry that "[f]or creators and right holders dealing in a rapidly expanding online environment, this [operating under the current *Copyright Act*] is tantamount to attempting to enter the express lanes of the Trans-Canada Highway in a horse and buggy"[33] has dominated discussion so far. Just as copyright has not had to justify its location at centre-stage of Canadian cultural policy, the music industry has not had to justify its location at centre-stage of copyright discussion. The recording industry lobby has been extraordinarily effective, such that music file-sharing is commonly taken to be the predominant

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30 See *Culture.ca*, <www.culture.ca>, and *Throne Speech* note 7 above.

31 *A Charter for the Cultural Citizen Online: Final Report of the Canadian Culture Online National Advisory Board* (Ottawa: Canadian Heritage, 2004), <www.pch.gc.ca/progs/pcce-ccop/pubs/CanadianCulture/2004Rapport_e.pdf> at 10.

32 See "CIPPIC Privacy Projects" Canadian Internet Policy and Public Interest Clinic, <www.cippic.ca/en/projects-cases/privacy>.

33 Remarks by Richard Pfohl, *Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (11 March 2004), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=74922>.

Internet activity and policy problem that sets the tone for or even trumps all others. Even citizens' advocacy has tended to focus on this issue disproportionately — not simply because it is a relatively accessible issue of popular concern but because it has been *made* a relatively accessible issue of popular concern by powerful rights-holder lobbies.

Music file-sharing is behind every tree for members of the Heritage Committee. In June 2003, during discussion of a Bill to amalgamate the National Library and National Archives, Heritage Committee Chair Sarmite Bulte became agitated about a provision that would permit the library to archive selected Canadian Internet content. In choosing the term "sampling" to describe archiving, the drafters of the Act set off all sorts of alarm bells for Ms. Bulte:

> I have a real concern here because at the same time I'm hearing the creators in SOCAN and BMG Canada saying that business is really bad, so please stop downloading from the Internet. Again, it's not just 14-year-olds that are doing it; adults are doing it, and it's stealing. How do we on one hand say it's stealing and we need to protect the rights of our creators, and at the same time allow sampling, which I would respectively [*sic*] submit is not defined properly? There's no definition. It's all subject to interpretation. You could almost end up downloading music and justifying it because of the public good.[34]

How do we differentiate between infringement and archiving? We talk about fair dealing for purposes of research or we talk about the responsibility of the National Library to archive Canadian public life, and if we want to be sure perhaps we specify the library's rights, as this bill did. The *Copyright Act*, after all, does not say that all copying is infringement, so this is really not such a difficult problem. To Ms. Bulte however, all copying is stealing, and the floor of the Internet is scattered with stolen goods that will be swept up by any unwitting archivist. This is simply not true: the National Library would have to subscribe to file-sharing services in order to obtain the material she is concerned about, and would have no reason to do so as that material is already well-archived. Ms. Bulte's comments manifest the all-too-common perception that the bulk of Internet material is unauthorized music.

Controlling Internet music circulation also seems to be Heritage Minister Liza Frulla's main goal in copyright reform. In a speech to the Canadian

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34 **Remarks by Sarmite Bulte,** *Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (3 June 2003), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=35536#T1005>.

Club in Toronto in May 2005, she spoke of several cultural policy issues, but the entire copyright section of the talk concerned file-sharing. "In March," she concluded, "the Minister of Industry and I announced how the government plans to update the *Copyright Act* to reflect the new world of the Internet. The bill is now being drafted, and we plan to table it in June. The bill will make it crystal clear that unauthorized file-sharing is illegal in Canada."[35]

The emphasis on music file-sharing both intensifies and trivializes public discussion of copyright reform. Language of wars and pirates does make copyright exciting. Reporting on the March 2005 announcement of directions for impending legislation, a headline in *Le Devoir* declared, "Ottawa tente de civilizer Internet," and the Montreal *Gazette*'s story the same day was headlined "Proposed amendments to Canada's Copyright Act would crack down on file sharing." The next day the *Victoria Times Colonist* announced, "Ottawa closes in on illegal downloads."[36] These headlines focused on a small selection from some fifteen specific proposals released by the government, thus accepting and promoting the premise that the Internet is a lawless space.

As Siva Vaidhyanathan points out, "[t]he metaphors we use to discuss controls in cyberspace always appear clumsily lifted from our more familiar transactions: locks, gates, firewalls, crowbars, vandals, and shoplifters."[37] One could go further and say that file-sharing tends to be discussed with the same language applied to child pornography or the drug trade, and hence the implied policy prescription is hardly nuanced: shut 'em down. The desire for control is fostered by the prevailing terms for the stakeholders in copyright: "owners" (respectable, propertied), and "users" (addicted, or at least greedy). It is rhetoric that allows the specific problems of the music industry to merge with larger middle-class fears; copyright is conventionally represented not as an ordinary matter of business and arts policy but as a major social crisis. (One might hope that as with other social crises, the solutions may become less panicked and more nuanced as time goes by: if the Liberals can follow public opinion on gay marriage and the legalization of marijuana, perhaps they might get used to file-sharing.) If educational Internet use, privacy rights, or notice and takedown were

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35 **See note 10 above.**

36 **Stéphane Baillargeon, "Ottawa tente de civilizer Internet,"** *Le Devoir [de Montreal]* (25 March 2005) B2; Canadian Press, "Proposed amendments to Canada's Copyright Act would crack down on file sharing," *The [Montreal] Gazette* (25 March 2005) D6; "Ottawa closes in on illegal downloads." *[Victoria] Times Colonist* 26 March 2005 C10.

37 **Siva Vaidhyanathan,** *The Anarchist in the Library* (New York: Basic Books, 2004) at xi.

more prominent in public discussion, the expansionist impulse would not have taken hold of "common sense" so strongly. On the other hand, the emphasis on music file-sharing may also make copyright reform seem less than earth-shaking: Members of Parliament might well wonder how important a bunch of teenagers ripping off music can be in the grand scheme of pressing government issues. This trivialization is unfortunate given the serious repercussions of the numerous details of copyright legislation for a growing range of economic and educational sectors.

3) The Vilification of Unauthorized Use

A more specific effect of the focus on file-sharing is the spreading habit of condemning all uses of copyrighted materials not expressly authorized by the copyright owner. Through a careless or deliberate obfuscation of the scope of copyright owners' rights under the *Copyright Act*, an untenably broad idea of the appropriate scope of such rights has been presented as "copyright common sense." For example, when Heritage Minister Frulla declares that "we must strengthen the hand of our creators and cultural industries against the unauthorized use of their works on the Internet," she is actually making a very radical claim. The *Copyright Act* was never intended to give the copyright owner the legal right to control the uses to which his/her work was put. Section 3.1 of the Act, which defines "copyright," grants the copyright owner a limited set of exclusive rights. He or she alone can make or authorize material copies of any substantial part of a work (including copies in derivative forms such as dramatizations and translations), and make or authorize immaterial or ephemeral copies (performances) of a work provided that such ephemeral copies are transmitted to the public.

But since the copyright pertains only to acts of making copies — either material or publicly disseminated immaterial copies (performances) — it has always been the case that most *use* of copyrighted material is beyond copyright control. A writer has never been able to stop a buyer of her book from reading it in the bath, selling it, or wallpapering a room with it. A movie studio can't stop a DVD-viewer from muting the movie, misinterpreting the movie, or hanging the DVD in the garden to scare crows. A TV station doesn't know who is watching. In a doctor's office, a magazine might be read by a hundred different people, and its editor and publisher will never know. Creators' anxiety about the uses to which their works might be put is nothing new. In Plato's *Phaedrus*, Socrates complained that "… when they [words] have been once written down they are tumbled

about anywhere among those who may or may not understand them … and, if they are maltreated or abused, they have no parent to protect them; and they cannot protect or defend themselves."[38] What Socrates did not see was that this is precisely the power of recorded words: as they move through space and time, they can be meaningful to more people in more ways than their originator could ever imagine. After publication, they are public. They are not public domain — making copies or publicly performing substantial parts are the exclusive rights of the copyright-holder for the term of copyright — but they are public in the sense of available for most ordinary uses.

The dangerous and muddled idea that copyright owners have, or ought to have, the right to authorize uses of their works is entrenched within Heritage Department thinking. In the *Framework for Copyright Reform,* for example, released by the Departments of Industry and Heritage in 2001, copyright is defined in largely accurate terms as the legal framework which "establishes the … rights of creators and other rights holders to control the publication and commercial exploitation of their works, protect the integrity of their endeavours, and ensure that they are properly remunerated." However, the document risks error in adopting the over-broad "use" language: "The law provides creators and other rights holders with a number of legal rights to authorize the use of works." It then gravely compounds the risk of error by wrongly implying that the starting point in copyright is that the owner has the right to control all uses of her work and that only "some uses of works are permitted without the rights holder's consent or without the payment of royalties. These are called 'exceptions.' In other cases, authorization is not required but creators and other rights holders are entitled to remuneration."[39]

It must be noted that even educational organizations have been buying into expansive use-based copyright, likely to their cost and the cost of the public interest. Access Copyright, the collective which collects reprogra-

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38 Plato, *Phaedrus*, trans. by Benjamin Jowett, <www.classicallibrary.org/plato/dialogues/7_Phaedrus.htm>.

39 The Framework document claims later that, "[t]he Copyright Act provides protection to creators and other rights holders in the form of exclusive rights over the communication, reproduction and other uses of their works. It is *therefore* seen as the foundation for creative endeavour" (my italics). See *Framework*, note 1 above. The idea that only protection — and not balance through limited term, fair dealing, and so on — is the only foundation of creative endeavour is highly problematic. For further critique of the Framework document's rhetoric, see Murray, note 17 above.

phy royalties for publishers and writers, is promoting extended licensing of the Internet for "educational use." Educational organizations oppose this move and seek instead a specific exception in law for educational Internet use. Access and the educational organizations seem to agree that current use is infringing.[40] But surely most use of the Internet, in school or out, is mere browsing, and thus not subject to anybody's limited "exclusive rights." Or it would be covered by implied license or fair dealing (for purposes of research). An existing exception for "off-air taping" covers projection of Internet pages to a class. Student reproduction of digital material for projects is surely fair dealing for the purpose of research. Still other educational use of Internet material is not under copyright jurisdiction because it involves the gathering of facts and ideas rather than the reproduction of expressions. Or Internet-accessible material is already licensed by private contract with the provider. And so on: the point is that there has been no public accounting by the stakeholders or the government of what sort of "use" needs to be licensed or excepted. One would expect educational organizations, at least, to assert that all uses are not equal under copyright law, which in fact regulates very few of them.

4) The Normalization of Control

The words of Bruce Stockfish, Director General in the Department of Canadian Heritage, at an appearance at the Canadian Heritage Committee on June 11, 2002, provide an instance where the *Copyright Act*'s language of authorizing use is ratcheted up a notch into the language of control:[41]

> Copyright, of course, is a matter of exclusive rights for creators of works. The nature of copyright is such that there is exclusivity; there is control over works. In order for users to have access to creators' works, there needs to be clearance of those works.
>
> There are exceptions, however, in the Copyright Act that are not so much in the interest of users, but in the interest of public policy, the overall interest of the public. We have recognized exceptions with regard to fair dealing and educational use, and these exceptions have been accepted by rights holders, as a general rule. Of course they

40 See "Protection and Copyright Policy," in Murray, note 8 above.

41 The term "control" appears in the Act only in connection with crown copyright and the administration of the copyright office. See *Copyright Act,* note 26 above, ss. 12 & 52.

> don't like them, and we understand that. Nevertheless, copyright is about balancing interests between rights holders and users.[42]

Stockfish is correct here about "exclusive rights" — but the sole rights granted by the *Copyright Act* concern only the making, with respect to any substantial part of a work, material copies or immaterial copies (performances) disseminated to the public. The list of exclusive rights does not actually grant "control over works." Neither is it true, especially on the Internet, that clearance always precedes, or ought to precede, access. Rights need to be cleared only when the proposed use would otherwise be infringing. The model suggested here is that one ought to be paying "per use" rather than "per copy," and we have not, in Canada, agreed that we wish to make such a revolutionary change to our law. Stockfish's obeisance to the idea of balance does not mitigate the radical nature of his initial claims.

Nonetheless, Stockfish's slide into the language of control, implicitly over all use, is common practice. Certainly, it is now possible to regulate use very closely, and many forms of regulation go beyond simple authorization towards ongoing control. Software can charge "per use" of a text, a video game, or a computer program. It can prevent a database or a text from being reinstalled on a new computer, require a password before enabling use, limit the number of copies that can be made, or send information back to the copyright-holder about who is using the material. It could even put a virus into a computer of an unauthorized user. In U.S. law, it is a criminal offence to tamper with or disable any such "digital rights management" mechanisms.

And yet, I would identify a widespread confusion between what rights-holders can do with new technologies, and what it is in the public interest for them to be empowered to do. From the time of Britain's *Statute of Anne*, copyright has been a statutory right granted to authors to serve society's purposes in advancing learning.[43] Copyright extends only so far as to advance such purposes and no further. However, the idea that copyright-holders ought to have more rights in law to preserve quasi-natural rights

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42 **Remarks by Bruce Stockfish,** *Standing Committee on Canadian Heritage, 37th Parliament, 1st Session, Evidence* (11 June 2002), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=6610#To910>.

43 **The preamble of the** *Statute of Anne* (1710) calls it "An act for the encouragement of learning, by vesting the copies [copyright] of printed books in the authors or purchasers of such copies [copyright] ...." The same perspective is evident in the US Constitution, s. 8, cl. 8 which enables the Congress to enact copyright: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings ..."

they deserve is spreading, despite much skepticism by citizens and scholars around the world. It is spread by simple repetition. Commenting on music file-sharing, for example, the *Globe and Mail* editorialized on April 25, 2005 that "… the passage of stronger legislation would put wind in its [the music industry's] sails, and would be in the interest of everyone who cares about letting copyright holders control their intellectual property."[44] "Everyone" might, or might not, want to let copyright holders control intellectual property more than they can now. As Jessica Litman has written about the American context, "We as a society never actually sat down and discussed in policy terms whether … we wanted to recreate copyright as a more expansive sort of control."[45] Similarly, Lawrence Lessig notes that "Just because control is possible, it doesn't follow that it is justified. Instead, in a free society, the burden of justification should fall on him who would defend systems of control."[46] Or in the words of Canada's own Supreme Court:

> Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long–term interests of society as a whole, or create practical obstacles to proper utilization.[47]

One can perhaps make the same point in reverse: in no country have legislators concluded that because digital technologies make infinite perfect copying of copyrighted material possible, the law must enable and defend such copying. So why should a government presume that just because digital technologies make more total control of the use of works possible, such total control is a positive policy goal? This would be a grave error. Fortunately, by moving relatively slowly on copyright reform, Canada has a chance to avoid it.[48]

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44 **"The Net's sour note,"** *[Toronto] Globe and Mail* (25 April 2005) A12.

45 **See Litman, note 29 above at 86.**

46 **Lawrence Lessig,** *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books) at 14.

47 *Théberge*, note 24 above at paras. 31–32.

48 Another approach to achieving balance between rights-holders and users would be to consider whether members of the public might need more "control" over information about them harvested from the Internet. **Julie Cohen reminds us** that "[i]n disputes involving noncopyrightable information, courts have eagerly developed new theories to bar the 'unauthorized' extraction of information

5) The Appropriation of "Access"

The counterpoint to the calls for control over use is a demand for "access" to digital materials. In the conventional geometry of copyright balance, authorization and control are at one pole, and access is at the other: according to the *Framework for Copyright Reform* of 2001, "[i]t is imperative that we ensure an appropriate balance between copyright protection and access to works in the new technological environment." Access is also a goal of general cultural policy in Canada. Thus the January 2001 Speech from the Throne declared that "[t]he focus of our cultural policies for the future must be on excellence in the creative process, diverse Canadian content, and access to the arts and heritage for all Canadians."[49] Access "for all Canadians" implies not only availability but affordability — giving Canadians access to the arts and heritage is good for Canada. And yet, through the efforts of rights-holder organizations and the lack of vision of educational organizations, the term "access" in copyright discussion has largely come to mean simply "access to consumer goods." It does not currently constitute a robust balance to authorization and control at all.

Outside the government, there are two competing strains of use of the word "access." For many academics, artists, and software designers, "Open Access" is the great hope enabled by digital technology: by reducing costs associated with publication and distribution, the Internet can allow many users to use the same material, and even contribute to it, with little incremental cost.[50] Suddenly it has become affordable for universities, for example, to digitize and share their archival collections to people around the world. In a similar spirit, Open Source software is collaboratively developed by many contributors who are paid only in prestige, satisfaction, and the

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from online repositories. At the same time, access to most personal information about individuals is presumptively uncontrolled, and courts have decreed that the new theories of unauthorized access that protect online commercial ventures do not bar the use of Web-based technologies to gather information about individual Internet users," see Julie E. Cohen, "Normal Discipline in the Age of Crisis," (*Georgetown Public Law Research Paper No. 572486, 4 August 2004),* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=572486>.

49 See *Throne Speech,* note 7 above.

50 See *Budapest Open Access Initiative* <www.soros.org/openaccess>, and for a history with links to projects, see Open Access *Wikipedia* http://en.wikipedia.org/wiki/Open_access; note also that the Social Sciences and Humanities Research Council of Canada has endorsed Open Access principles, see "Council News: Highlights from the March 2005 Council meeting" *SSHRC* (24 April 2005), <www.sshrc.ca/web/about/council_reports/news_e.asp#3>.

uses to which they can put the improved software. The now-international Creative Commons movement has developed contracts by which creators can license some uses and adaptations of their work for free, and others for a fee, giving both creators and users more choices.[51] The Internet has in general fostered a conception of participatory access very different from the way television executives or book publishers may have imagined "audience": in this interactive world, as the Canadian Culture Online Advisory Board puts it, "… individual Canadians … are at once creators and consumers, performer and audience."[52] In the context of such activities and discussions, "access" means not only ability to see or hear, but ability to manipulate and participate. Access becomes part of the creative process. However, this is not the weight of the term within the dominant Canadian copyright discourse.

Given their commitment to the language of control, one might expect that copyright-holder groups would abjure the term "access" or condemn it as a front for piracy and infringement. In fact they have taken up the word themselves with great success. In 2002, the Canadian Copyright Licensing Agency changed its name from Cancopy to Access Copyright. The new name represented "a declaration of new purpose." "Now representing many electronic rights uses, and with online service and sophisticated new rights databases," Access removed "copy" from its name to avoid association with an old technology and a model of copyright the organization sought to displace. With its "new service portal dedicated to providing access to Canadian works and those of creators everywhere," Access promises "… enlightened licensing solutions …" [53] to permit (and control) not just copying, but access (or use) itself.

The offer to provide access is more than a little ironic given that Access's new initiative is a response to what it views as consumers' excessive ease of access to information and culture via the Internet. According to the Access vision, digital technology's greatest lure is its capacity to track and charge for access that was formerly unmonitored and unpaid. At the Heritage Committee, Access Director of Legal Affairs and Government Relations Roanie Levy explained that "[p]hotographers and freelance writers will have websites that they will use to expose their works. They want it to be publicly accessed as widely as possible. They don't want to put TPM,

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51 See *Creative Commons*, <www.creativecommons.org>.

52 See note 31 above at12.

53 Access Copyright, *Annual Report 2002: Providing Access* (March 2003), <www.accesscopyright.ca/pdfs/annualreports/Access%20Copyright%20Annual%20Report%202002.pdf> at 3.

they don't want to put password protection, because that would limit access and that is not what they want."[54] Licensing would allow them to charge for such access. And yet limited free access has always been a part of ordinary merchandising, and it is not clear why the Internet changes the rules. Just as clothing shops allow customers to try on clothes, or software vendors offer test versions, photographers already have the ability to put low resolution images online to promote their work, only sending high resolution photographs to those who pay, and short extracts of books, articles, and songs can sell copies, as iTunes and Amazon have shown.

So we have two entirely different visions embodied in one word: (open) access and (paid) access. In order to minimize their difference from the perceived middle ground, advocates for all camps habitually avoid clarifying adjectives in favour of obfuscation. Thus a spokesman for the educational sector pleads for "reasonable legal access" because he doesn't want to draw attention to the hope that it will be free, while the Director of Legal Affairs and Government Relations for Access Copyright promises "easy and affordable" access in order to undermine the legitimacy of critiques of increased control over use through licensing.[55]

It is disturbing that government seems to be caught up in this wave of confusion as well. The term "access" appears in every minister's speech and government document on copyright, but the onus is on the receiver to make it mean anything. For example, a performance report of the Heritage Department for the period ending March 31, 2001 states: "Copyright allows creators to be fairly compensated for their works and provides a mechanism through which Canada's rich cultural heritage is disseminated and made more accessible."[56] What kind of "access" is being celebrated here? Copyright is an economic incentive for publishers to disseminate works, so it would appear that we are talking about paid access — but the word "accessible" paired with "rich cultural heritage" carries a strong resonance of free or subsidized access. In fact, many of the projects to dis-

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54 **Remarks by Roanie Levy, S***tanding Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (29 October 2003), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=67135>.

55 **Remarks by Roger Doucet, Council of Ministers of Education of Canada, and** Roanie Levy, *Standing Committee on Canadian Heritage, 37th Parliament, 3d Session, Evidence* (27 April 2004), <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81053>.

56 *Canadian Heritage Performance Report: For the period ending March 31, 2001* (Ottawa: Treasury Board of Canada Secretariat, 2001), <www.tbs-sct.gc.ca/rma/dpr/00-01/canheroodpr/CanHeroodpro1_e.asp>.

seminate "Canada's rich cultural heritage" funded by Canadian Heritage are only possible because the material is no longer in copyright. It is also possible that in this sentence "copyright" is meant expansively as a system of owners' rights and users' rights — in this sense it makes heritage accessible through fair dealing, limited copyright duration, other exceptions, and so on. And copyright is presented only as *"a* mechanism"—among others perhaps. The point is that there are several senses in which the statement can be true, and the pleasing word "accessible" means everything and nothing.

Things are clearer in the 2001 "Framework" document:

> The Government is committed to ensuring that copyright law promotes both the creation and the dissemination of works. The objective of the *Copyright Act* is also to ensure appropriate access for all Canadians to works that enhance the cultural experience and enrich the Canadian social fabric. Access is assured through various means: by establishing simple rights clearance mechanisms; by devising alternate schemes that recognize copyright, e.g. the private copying regime; by allowing specific exemptions to aid users such as libraries, schools and archives to fulfill their vital institutional roles in Canadian society; and by other means that favour the circulation of information and cultural content for and by Canadians. Access is therefore an important public policy objective to consider when reviewing the copyright framework.[57]

In this document, "appropriate access" is something to be grudgingly arranged through bureaucratic channels. There is no acknowledgement of the limited framing of copyrights in Section 3.1. Unless it is silently included under "other means," there is no acknowledgment of fair dealing, which in the *Copyright Act* permits some unauthorized copying for the purposes of research, private study, and with citation, criticism, review, or news reporting.[58] Instead, we see recognition only of "specific exemptions."[59] Access may be "an important public policy objective to consider," it seems, but not to recognize or embrace.

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57 See *Framework,* note 1 above.

58 See *Copyright Act*, note 26 above, ss. 29–29.2.

59 The Interim Report on Copyright Reform also speaks of "exemptions": "Material used for public education is generally subject to copyright law. There are, however, limited exemptions for certain activities such as the display of copyright materials, performances or exams in the classroom." see *Interim Report,* note 19

C. CONCLUSION

1) Legitimizing and Anchoring Access and Use

The implications of both conceptions of access must be seriously explored and thoroughly understood if Canada is to achieve a true balance in copyright law. Access has come to be thought of as a constrained privilege at the fringes of the copyright system, or a freedom available to those who purchase it, but there is a strong argument for its centrality to the copyright system, and indeed its status as a foundation of democratic culture. It is not sufficient to understand access only as a justification of more rights for owners, or as the antithesis of copyright. I have argued too that "use" must not be allowed to be silently added to the exclusive rights of copyright-owners. One of the principles of copyright reform articulated in the 2001 "Framework" document and cited in other policy papers since is that the rules "should be clear and allow easy, transparent access and use." Access means little without flexibility of use. When most copyrighted works came in material form, access may have been more difficult, but freedoms of use were quite unconstrained. Now that many copyright works come in digital form, access is much easier for many, but it will be an entirely empty promise if attendant rights of use are prevented by technology and law.

One reason that "use" has been so easily linked to the rhetoric of control is that, along with the term "user," it has negative connotations. Compared to terms such as "reader" or "audiophile," the term "user" reduces the specificity and skill level of the receiver of cultural objects, and I have already suggested that the term carries a resonance of drug addiction. As a foil to "creator," Canadian Heritage's mystical term for those who in the *Copyright Act* go by the name of authors, broadcasters, and performers, "user" evokes the parasitical and the grasping. On the other hand, "use" can mean not only "use up" but also "manipulate," "implement," or "take into hand for a purpose." In this sense, applying the term "user" to a person who browses the Internet or listens to music could evoke engagement and creativity. This is a connotation the term bears in computer circles, where "user groups" are practical and co-operative ventures to share knowledge freely and increase people's confidence and comfort with technologies. If we don't talk about television or radio "users," it may be because those technologies, relatively speaking, simply didn't permit the kinds of inter-

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above at 11. In this formulation, "exemptions" are not even a part of copyright law — a view clearly overturned in *CCH Canadian Ltd,* note 24 above.

action and participation that digital technologies can. Rather than thinking of people's "use" of material only in terms of lost income for specific copyright-owners, we might consider the personal, social, cultural, and economic gains such use, in its dynamic sense, may permit.

The term "user" has recently been dignified by the Supreme Court, which stated in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) that "Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. … The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act." The present essay submits a broader version of such a claim, in that it attends to possibilities for "access" and "use" in the interstices of the Act, not only in its stated exceptions. But the important point in *CCH* is the assertion of the existence of "rights *and obligations* of both copyright owners *and users*" (my emphasis). The Court insisted that "the fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[60] The idea that copyright law ought to represent a balance between control and authorization on one side of the scales and access and use on the other is crucial to its history and future. I have argued here that the spirit of balance will only be served if each of its terms is understood in a robust form. Otherwise, many of the cultural and economic functions we seek to promote will be left in a heap beside the scales, and other activities will be put on the scales that have earned no place there. As we move forward into the next phase of copyright reform discussion, we can aim for ample contextualization and critical mobilization of the familiar terms of debate.

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60 *CCH Canadian,* note 24 above, at paras. 11–12.