

Fair Dealing – Passage to the Common Within

Abstract

On 20 June 2005 the Federal Government of Canada unveiled Bill C-60, *An Act to Amend the Copyright Act*, ostensibly necessary to modernize copyright for the digital age. The discourse that preceded the tabling of this bill showed a clear bias to extend the depth and breadth of copyright, at the expense of the public's right to access creative endeavour. In this paper I examine the issue of educational licensing of the Internet. A contentious matter, it was removed from Bill C-60 but appears poised* to return. As Canada sits at the policy crossroads, it would be prudent to draw attention to the environment of the proposal at its inception, rather than be critical after implementation.

Creative endeavor implicitly relies on cultural borrowings—as Northrop Frye wrote, “Poetry can only be made out of other poems, novels out of other novels” The source of these borrowings is often identified as an intellectual common—the public domain—where past copyrighted work lies available for public use. What lies unseen is the common within ourselves—our individual creative efforts provide fodder to others, while still protected by copyright. Passage to this common is granted by the current, legitimate, copyright exception of fair dealing. Fair dealing ensures that we reciprocate for our own cultural borrowings, and share accordingly.

Educational licensing, tantamount to commodifying passage to the common within, can only introduce unnecessary fiscal strain to education in Canada and will erode the meaning of fair dealing. A meaning which has been recognized for more than two hundred years; in 1802, in *Cary v. Kearsley*, Lord Ellenborough said, “[A] man may *fairly adopt* part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public.”

Meera Nair (Doctoral Student)
School of Communication, Simon Fraser University
June 2006

* At the time of submission of this paper to the Forum on Public Domain, the Council of Ministers of Education, Canada have repeated their insistence that an exemption to the current *Copyright Act* is necessary in order for students in Canada to legitimately utilize the Internet as it contributes to their studies. See endnotes four and five.

1.0 Introduction

1.1 Copyright – an instrument of public good

Our hope lay in the belief that on the northern half of this continent we could build a community which had a stronger sense of the common good and of public

order than was possible under the individualism of the American capitalist dream.
George Grant - Lament for a Nation (1970)

We were talking this week about the public right. Who's going to define that? Is this committee going to start defining what is a public good and a public right? We've heard in testimony earlier this week it's impossible to figure out what is a public good. If anyone has a definition for the common good, I'd like to hear it.
Sarmite Bulte – then-Chair of Standing Committee for Canadian Heritage (29 April 2004)

Ms. Bulte's frank admission disclosed a glimpse of the direction in which Canada is turning: a diminishing of the consciousness of the public good. Many Canadians may be equally unable to fashion a precise definition of public good. Yet, the purpose may be well served if a definition is derived from its effects. Public good then, is that which contributes to a wider circle of well-being. Such is, or perhaps was, part of the public consciousness of Canada by Canadians. The coupling of the nation state with compassion was a mark of civilized society and came to be genuinely appreciated (Berland, 1997, p.48). The same cannot be said today. "[O]ld fashioned notions of *citizenship*, *belonging* and *the public good* recede before a *laissez-faire*, essentially consumerist model of civic life," (Wright, 2004, p.19). I would add *sharing* to this list; the ritual of sharing being the means by which we cultivate our consciousness of others, and sharing itself as the means by which a public good is distributed. In this paper I argue that the impetus to share via copyright, namely the fair dealing component of the *Copyright Act*, is at risk of obsolescence. Such obsolescence will perpetuate the reduction of consciousness of the public good.

On 20 June 2005, Bill C-60, *An Act to Amend the Copyright Act*, was tabled for first reading in the House of Commons—ostensibly necessary to modernize the Copyright Act for the digital age.

As part of a longer-term plan for copyright revision, Bill C-60 marked an intermediary outcome

of years of consultation and negotiation among members of the Federal Government, and various rights holders groups. While a few advocacy groups endeavored to keep the issue of public rights within the frame of committee discussions, by and large the views of rights holders' representatives dominated the proceedings. They insisted that combating file-sharing and implementing appropriate financial compensation systems were the issues to be addressed. Some members of the mainstream media obligingly followed suit, paying short shrift to the Internet's rich potential for public engagement and creative endeavor; instead the Internet was alternately described as either a marketplace or a lawless medium where creative people fear to tread.

In this paper I examine a policy issue removed from Bill C-60—educational licensing of the Internet. The proposal intended to secure compensation for creators when materials are derived from the Internet for educational usage, but neglected to consider that utilizing Internet materials is lawful under the current *Copyright Act*. I scrutinized the discourse of the proposal by reviewing transcripts of meetings conducted by the then-Standing Committee on Canadian Heritage, and, past Canadian government policy documents regarding culture. This exploration revealed a growing desire to limit public access to creative endeavour by a more stringent application of copyright.

Controversial at the onset, the proposal was set aside for further discussion. While the current Federal Government of Canada has not openly advocated such a scheme, unfortunately, representatives of the educational community remain convinced that educational usage of the Internet is infringing use and have requested that the *Copyright Act* be amended to allow for

educational use of the Internet. Such a request is perplexing given the provisions available in the current *Copyright Act* to protect individuals and institutions in their usage of copyrighted materials. To ask for an exception invites dispute as to the worthiness of the exception; moreover, it will divide Canadian creators into those that create within the walls of an institution and those that labour beyond. This can only serve to undermine the balance pivotal to the principles of copyright, further erode Canadian sensibilities to the value of public good, and introduce unnecessary fiscal strain to the cost of education in Canada.

Copyright, an enigmatic pact, is both an instrument of public good as well as private property. Authors, artists, musicians, to name a few of those protected under copyright, are granted time-limited rights of some control over the dissemination of their creations. Implicit to this policy is the assumption that only with a promise of security, will creative individuals practice their craft. With a nod to fostering future creators, the public receives meaningful access to the copyrighted work. Said another way, the creator is under some obligation to share with the public. The avenues to sharing occur by way of exceptions within the Copyright Act.

For instance, exceptions for libraries allow a public institution, which has rightfully acquired creative material, to share its collection with the public. Likewise, fair dealing is a means of sharing, where individuals enjoy limited use of creative material (without cost or need of permission) thereby nourishing their own creative aspirations. Fair dealing, in sections 29 and 29.1 of the *Copyright Act*, indicates that unauthorized copying for the purpose of research or private study does not infringe copyright. Furthermore, with attribution, unauthorized copying

for the purpose of criticism or review does not infringe copyright. But rights holders' representatives effectively portrayed such sharing as tantamount to expropriation or outright theft of private goods, and Committee members embraced the notion that only with enhanced protection of creative works could Canadian creators survive the digital age (Murray, 2004).

The adoption of copyright as a Federal responsibility occurred with the implementation of the British North America Act of 1867, and, while modeled at the outset upon British laws, later encompassed features adopted by the United States. Although absent of the fanfare of the English Statute of Anne in 1710, which ushered in copyright as “An Act for the Encouragement of Learning,” or the United States' constitutional enshrinement of copyright as a means of promoting the “Progress of Science and Useful Arts,” Canadian copyright has endeavoured to fulfill such objectives. As Northrop Frye said, “Poetry can only be made out of other poems, novels out of other novels,” (1957, p.96).

Creative endeavor both implicitly and explicitly relies on cultural borrowings. The source of these borrowings is often identified as an intellectual common—the public domain—where past copyrighted work lies available for public use. But an integral part of the intellectual commons, is unseen—the common within ourselves. Our individual creative efforts provide fodder to others, while still protected by copyright. Passage to this common is granted by the current, legitimate, copyright exception of fair dealing. Fair dealing ensures that we reciprocate for our own cultural borrowings, and share accordingly. While the courts in Canada have recognized the importance of fair dealing, this awareness is receding in the legislative and private realms.

Notably, in the wake of the ruling by the Supreme Court of Canada in *CCH Canadian v. The Law Society of Upper Canada*, the mood surrounding fair dealing became actively hostile.

1.2. Setting the stage

I am acutely aware that the Standing Committee on Canadian Heritage has changed in composition, and it is not my aim to tarnish the intentions of these Members of Parliament with a critical assessment of their predecessors' work. Nevertheless, the issue of educational licensing is returning; as Canada sits at the policy crossroads, it is prudent to draw attention to the environment of the proposal at its inception, rather than be critical after its implementation.

At the heart of the entire revision process of the *Copyright Act* was the premise that the Internet has changed all, and thus the rules governing the creation and flow of cultural content must change as well. The perception of the Internet itself framed individuals' policy stances. The following two excerpts illuminate the poles of discussion:

Harvey Weiner (then-Deputy Secretary General, Canadian Teachers' Federation):
We have to assume that the federal government, in providing the funds to wire schools from coast to coast to coast, was not simply doing so to create a commercial market for materials that creators do not wish to be remunerated for and that should be and are in fact in the public interest.

(Standing Committee on Canadian Heritage, 29 October 2003)

Wendy Lill (then-Member of Parliament):

I find it all pretty amazing to hear language about how the Internet was developed at public expense with no commercial intent. It all just sounds like it was all for the grand expansion of human knowledge. I actually don't buy that at all.... My understanding was that it was for military purposes and that it was not for the expansion of public knowledge at all. And to say, let's increase the pool of human knowledge...there are billions and billions of dollars being made on this thing called the Internet. So it is counterintuitive to hear ... talk like this about the fact that it's all about the public good ...

(Standing Committee on Canadian Heritage, 29 October 2003)

Both these views contain a measure of truth. In *A Canadian's Right to Communicate* (1998), William Birdsall described past Canadian telecommunications policy discussions, illustrating a pattern of repetition whereby policy decisions were influenced by the private sector. The implementation of the infrastructure for the Internet in Canada was no exception. The Information Highway Advisory Council (IHAC), established in 1994, expressly called upon the business community to rise to the challenge of connecting Canadians, promising that those who take the risks will reap the rewards (IHAC, 1995, p.13). Industry members formed the majority of the council and lost no time in imparting their message that increased access for Canadians, was, “a precondition for producing a healthy consumer market for commercial products and services and for sustaining the viability of business environment on the Internet (IHAC, 1997, 40).” While industry looked after the needs of the digital “haves” it fell to the Federal Government to look after the “have-nots.” Even this public benefit needed justification; quoting from the same report, Birdsall wrote:

...For those in the private sector who would be concerned about government intervention through such programs as SchoolNet, Library Net, and the Community Access Program (CAP), IHAC calmed their fears by noting that making connections to the Internet “provide the least distortion to the Internet marketplace...if anything, they stimulate the market by whetting the public for full Internet access...”

In 1994, the channels of communication were held in subordination to market objectives. With copyright as the means of allowing the passage of intellectual endeavour through these channels, that same commercial inclination became evident.

Part of the difficulty in overcoming such an inclination is the vagueness of value attributable to mechanisms of public good. Copyright, in its incarnation as a market mechanism lends itself well to discussions of investment and production of commodities. Yet, discussion of its public good component is hampered by the lack of numeric representation that can be attached to the benefit. Instead, the value of public good is misconstrued by emotional representations, an example being some remarks by then-Minister of Canadian Heritage, Liza Frulla, regarding strengthening copyright in educational institutions, “[C]hildren are going to become ... researchers, authors, composers; ... they will have the right to be compensated for their intellectual property. This is what Canada is all about.”

Such appeals are not new to discussions of copyright (Murray, 2004). Culture itself has long been touted as necessary to maintain Canadian sovereignty—although some cultural artists have shown ambivalence towards to the mission heaped upon their shoulders (Wright 2004, p.57-97)—but it is neither necessary nor sufficient to link Canadian culture with compensation. With the aim of clarifying the public good aspect of copyright, it is essential to identify more precisely what *is* the connection between copyright and living, breathing culture?

The system of copyright helps set in place the market forces “which determine what music is heard, what records are made, what films are seen, what books are published, and what programs are seen on television.” Therefore, copyright touches upon much that gives society its flavour, shape and direction. (Babe, 1981, p.3)

The public policy objectives of remuneration and control for rights holders, and the dissemination and access to their works are the fundamental principles underlying the Canadian copyright policy. From such principles flow the economic and moral rights that benefit creators and rights holders and enrich the Canadian cultural fabric. (*Supporting Culture and Innovation*, 2002, p. iv)

Both quotations link the market nature of copyright with cultural effect, yet in the former, Robert Babe explicitly identified copyright as a filtering process, driven by the market, where society will evolve influenced by what the market allows through. In contrast, in the latter document, copyright is described in more glowing terms, setting aside any indication that copyright may be restrictive to the evolution of a society. The peculiar conflation of public policy to benefits for rights holders is indicative of ongoing encroachment of individual benefit upon public good, articulated as *seemingly for the benefit of public good*. If this trend continues, access to the intellectual commons will be curtailed.

Further reading of *Supporting Culture and Innovation* reveals that in terms of copyright, “value” was linked to gross domestic product (GDP), retail sales, and legal assets. While lauding on page one that the *Copyright Act* has remained faithful to “Canadians’ values and priorities,” the report failed to identify what Canadian values are. Even the term “culture” remained largely undefined, left instead to the implication that cultural products represent our culture. But, as Laura Murray wrote in *Protecting Ourselves To Death* (2004):

[C]ultural commodities should not be mistaken for culture, which consists at base of food traditions, local stories, ideas about appropriate behaviour, songs our mothers sang, language and dialect, connection to place, sense of humour, and so on, all of which develop outside copyright protection and usually without government funding or commercial distribution.

These components of our culture rely on the existence of a community with its attendant underlying commitment to cooperation. The ritual of cooperation is fostered within the obligation of a relationship—both contribute in forming the structural framework of a

community. While the reciprocal relationship between an individual and community may be an imperfect one, such imperfection is recognized as vital to maintaining the wellbeing of a community. Said another way, cultural development rests on the consciousness of one's place as part of a greater, cooperative entity. But, the increased dialogue of individual benefit is eclipsing community wellbeing—as such, it appears increasingly attractive to take what we can from the intellectual commons and hold it as our own.

With respect to copyright, evidence of such an eclipse can be detected in the remarks of Bruce Stockfish (then-Director General of Copyright Policy of Canadian Heritage):

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

(Standing Committee on Canadian Heritage, 11 June 2002)

The objective, of course, is to again find the right balance in terms of the overall public interest. It's only when the market doesn't work, when it's impossible for rights holders to apply their licensing abilities, that we talk about an exception approach, again with a view to meeting the overall public interest.

(Standing Committee on Canadian Heritage, 25 March 2004)

The inference here is that while exceptions were tolerable in 2002, by 2004 such tolerance had diminished in favour of market management. Notably, the latter use of “exception” could leave the impression (intentional or otherwise) that fair dealing is nothing more than a response to market failure. The timing of Mr. Stockfish's latter remarks was puzzling in light of a decision by the Supreme Court of Canada, a mere three weeks earlier. On 4 March 2004, in *CCH Canadian Ltd. v. Law Society of Upper Canada* the Justices described fair dealing as an integral part of the *Copyright Act* and said, “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."

2.0 Fair dealing v. Potential Commodities

2.1 CCH Canadian

While representatives of users' rights rejoiced at the decision of the Canadian Supreme Court, the timing of the *CCH Canadian* decision may have negatively impacted the position of users' rights.

During Canadian Heritage Committee meetings in March and April of 2004, rights holders' representatives invoked the decision as signaling open season upon Canadian creators. In their ruling, the justices took pains to detail that judgments of fair dealing must take into account the purpose, character, amount, and effect of the dealing, but the rights holders' representatives omitted such nuances from their remarks, and instead warned that fair dealing signaled great unfairness to their clientele. [emphasis added throughout, mine]:

Michel Beauchemin (Coordinator, Droit d'auteur, Multimédia, Internet, Copyright: ... [Y]ou are of course aware that the Supreme Court of Canada, in its ruling on the *Law Society of Upper Canada vs. Thompson Canada Limited*, considerably broadened the concept, or scope, of exceptions by establishing these exceptions—*which were previously considered privileges*—as users' rights.

(Standing Committee on Canadian Heritage, 27 April 2004)

Susan Peacock (Vice-President, Canadian Motion Picture Distributors Association): The Supreme Court has decided that under the existing fair dealing exemption, lawyers can copy legal writings and others can provide a reproduction and distribution service for them *without the consent of the copyright owner*.

(Standing Committee on Canadian Heritage, 27 April 2004)

Marian Hebb (Legal Counsel, Playwrights Guild of Canada): The courts and the Supreme Court of Canada actually picked up their language and their concepts in these cases from David Vaver's book. I consider that book to be a rather popular

book, a rather jocular and amusing book, but that is where those ideas have been crystallized and picked up by the court. *I do implore you that you as legislators should not be looking at how the court has interpreted the law we now have. Please give us the law we need.*

(Standing Committee on Canadian Heritage, 28 April 2004)

Grace Westcott (Executive Secretary, Canadian Copyright Institute): Since the Supreme Court came down with its ruling on the CCH case, many of us have been wondering what the impact of the court's *expanded definition of fair dealing* will be ... The court has clearly taken some broad policy positions on copyright issues, but this government should not hesitate to seize back the momentum in defining that policy.

(Standing Committee on Canadian Heritage, 29 April 2004)

Hélène Messier (Executive Director, Quebec Reproduction Rights Collective Administration Society): ... The most recent Supreme Court judgment on copyright—and it has been discussed a great deal—exacerbated this imbalance, by allowing a generous interpretation of exceptions for users, and *by making simple exceptions into rights for users*, rights that are to be incorporated broadly and liberally.

(Standing Committee on Canadian Heritage, 29 April 2004)

The Law Society maintains and operates the Great Library at Osgoode Hall in Toronto, which contains one of the largest collections of legal materials in Canada, and is available to lawyers, law students, members of the judiciary or authorized researchers. The original dispute of the case arose from the practice of the Great Library in providing copies (by request) of legal materials. A pertinent aspect of the Justices' consideration was the access policy of the Great Library:

As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

This measured application of fair dealing bears little resemblance to the assessments of the ruling,

as illustrated in the remarks above. Ms. Peacock’s reference to consent also came to bear in the Justices’ ruling:

Under s. 27(1) of the Copyright Act, a person infringes copyright if he or she does something that only the owner of the copyright has the right to do without the owner's consent. On appeal to this Court, the Law Society submits that six of the items that the respondent publishers have claimed were copied in infringement of copyright were copied at the request of Jean Cummings, a lawyer who had been asked by Canada Law Book's Vice-President to obtain copies of these works from the Law Society. As such, the Law Society contends that the copies were made with the consent of Canada Law Book and therefore were not an infringement of copyright.

With respect to Ms. Hebb’s assessment of David Vaver’s book, it appears a calculated move to cast negative aspersions on the acumen of our Supreme Court justices—to an uninformed listener, hearing that the interpretation of the law was based on a “jocular” book, the *CCH Canadian* ruling is immediately suspect.

Such views on the part of the private sector are hardly surprising but the sentiments were echoed within the Department of Canadian Heritage. With language similar to that used by rights holders, Danielle Bouvet (then-Director, Legislative and International Projects, Copyright Policy Branch, Department of Canadian Heritage) stated, “An exemption is difficult to interpret. According to the Supreme Court of Canada, an exemption, more specifically in the CCH case, has become a right in Canadian law,” (Standing Committee on Canadian Heritage, 30 March 2004). Ms. Bouvet’s passive voice subtly implies that users’ rights are a recent phenomenon, conveniently glossing over more than 200 years of custom—in 1802, in *Cary v. Kearsley*, Lord Ellenborough said, “[A] man may *fairly adopt* part of the work of another: he may so make use of another's

labours for the promotion of science, and the benefit of the public,” (Loren 1997).

With the predisposition of the Committee as staunch supporter of creators’ rights, dragging fair dealing through the mud proved successful. Judging from the remarks of Member of Parliament, Christiane Gagnon, the impression left was that creators are no longer safe in Canada:

... I too have heard about the court ruling, and as a consumer of creative works, I was somewhat shocked to see that we are being taken further and further away from the concept of the creator... I think this sends out the wrong message to people. Now, people think that works are free of charge, that they can download compact discs from the Internet, that there is no charge with on-line downloading, and the same applies to written works.

(Standing Committee on Canadian Heritage, 29 April 2004)

2.2 Educational licensing

This atmosphere enveloped discussions pertaining to educational use of the Internet. Two options jointly proposed by the Department of Canadian Heritage and the Department of Industry were the expansion of fair dealing, or, the introduction of educational licensing:

Option 1: Amend the definition of fair dealing as it relates to copyrighted material available online, expanding its scope to encompass teaching and study by educational institutions using such material. Currently, the Act's fair dealing provisions enable use of portions of copyright material for limited purposes without infringing copyright (research, private study, criticism, review and news reporting - but not specifically for educational purposes)...

Option 2: Amend the Act to require that educational institutions have a blanket licence to use copyright material on the Internet. Given the enormous amount of material that is available on the Internet, voluntary licensing models are inadequate to enable authorization and facilitate access. This licence would therefore take the form of either a compulsory licence or an extended licence (allowing a copyright collective society claiming to represent a "substantial" repertoire of certain types of material to be recognized as representing the entire international repertoire of such types of material)...

(Status Report on Copyright Reform, 24 March 2004).

In the face of these two prospects, the Copyright Consortium of the Council of Ministers of Education, Canada (CMEC) added a third:

Roger Doucet (then-Deputy Minister, Department of Education (New Brunswick), Copyright Consortium of the CMEC):

We are proposing an amendment to permit the educational use of publicly available Internet materials, one that is intended to address educational needs and ultimately clarify and enhance respect for copyright ownership on the Internet.

(Standing Committee on Canadian Heritage, 27 April 2004)

Mr. Doucet's benign request was hindered by his premising assumption that under the current *Copyright Act*, students and teachers routinely conduct infringing use of copyrighted materials obtained via the Internet. Murray (2004) offers greater details of the incongruity of CMEC's stance; let it suffice to say it was only one possible interpretation of educational activity. But with his assertion of illegality and the prevailing mistrust of fair dealing, a frequent theme of discussion was that manufacturers of tables, chairs, and software are not asked to give away their work for free, so why should creators be requested to do so? Lost in the argument was the fact that no-one had asked creators to make their work available for free, instead, free work was asked to be made available—that existing free rights of access to copyrighted work should be respected and protected.

Throughout the discussion it was evident that neither side considered that the *Copyright Act* as it exists negated any risks of infringement. When introducing the two options Bruce Stockfish began his remarks with, "Students are often asked to use the Internet to find content for their school projects... In most cases, the students do not ask the authors of the works for permission to use what they have found on the Internet." With such language, 'students do not ask the

authors ... for permission,' the implication is that students should be asking for permission. Mr. Stockfish's assessment may be explained by the self-stated bias of the Heritage Department towards creators' rights. But the studied avoidance of this perspective by members of educational institutions is disconcerting. Alleged claims of infringement would first rest on the question of whether a *substantial* portion of the work was copied. However, even setting this aspect of the law apart, there are legitimate avenues within the *Copyright Act* to confirm the legality of conduct by students and teachers.

The limitation on fair dealing as written in Option One (that it does not apply "specifically to educational purposes") is not language found in the *Copyright Act*. Instead, Section 29 enumerates individual rights of research, private study *etc.* as fair dealing, and, describes additional rights for educational institutions. Section 29.4(1) describes two specific measures of reproduction for instruction as non-infringing:

It is not an infringement of copyright for an educational institution or a person acting under its authority

(a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or

(b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device

for the purposes of education or training on the premises of an educational institution.

The only restriction falls from Section 29.4(3) which indicates that 29.4(1)(b) is not applicable if the work is commercially available in a medium appropriate for the purpose. Said another way, the right applies when the work is not a commercial offering. Given the wealth of non-commercial material available upon the Internet, there is greater potential for law-abiding conduct

than has existed with prior forms of media.

Further measures allow educational institutions, “for educational or training purposes,” to copy news-related material that was communicated to the public, and, hold such material for a period of time ranging from thirty days to one year (Section 29.6 and 29.7 of the *Copyright Act*). Ms. Peacock concurred with this reading of the *Copyright Act*, and extended this measure to encompass material found on the Internet:

Ms. Susan Peacock:

May I just say something about the exemption that exists already? I think I said sections 29.6 and 29.7. It's an exemption that's been there for a few years, and it allows educational institutions to make a copy of any work at the time it is communicated to the public. It doesn't say “when it's broadcast”. Originally that's what we thought it meant, and we called it the off-air taping exemption. As it turns out, because of the broad, technologically neutral language of the exemption, it includes material that's made available on the Internet. So we already have an exemption that allows educational institutions to copy that, put it on a slide, project it, and let the whole class see it at one time; that sort of thing is there already.

(Standing Committee on Canadian Heritage, 27 April 2004)

If educational institutions are still concerned that they would be held liable for the conduct of their students, they could take some comfort from an observation by the Supreme Court justices, who noted that an institution can stand in the shoes of its patrons:

In 1999, amendments to the Copyright Act came into force allowing libraries, archives and museums to qualify for exemptions against copyright infringement: S.C. 1997, c. 24. Under s. 30.2(1), a library or persons acting under its authority may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement.

Students using library facilities are sheltered within fair dealing, and this shelter extends to the library. With the range of permissible activity available to teachers, the shelter for institutions,

and the right of fair dealing for students, the belief that widespread infringement occurs is without foundation.

2.3 Remaking the Internet

And finally, blanket pronouncements of infringement should first take into account the desires of the creator of the material. One would presume that individuals who wish to sell their material through the Internet would indicate so. But rights holders' representatives balked at the notion that material for sale would be identified as such, and instead insisted that, while a website may be easily accessible, it cannot be assumed that content derived from such a site was intended to be shared. Instead, representatives argued that any and all content should be financially compensated for. The underlying premise was that the Internet is solely a marketplace, as illustrated during the Committee meeting on 27 April 2004 [emphasis added throughout, mine]:

Roanie Levy (Access Copyright):

As you correctly point out, there are different reasons people put things out on the Internet. At this point in the development of the Internet and e-commerce, a lot of the things that are out there are out there for adverting [sic], for marketing. But that may not be why people put things out there tomorrow. *The business models will evolve and there will be mechanisms for people to be paid for the use of what they put out there.* Part of the reason it's only advertising today is that there aren't efficient mechanisms, so we've heard a lot of discussions about different business models, being able to pay one cent at a time, micro-payments, etc.

Gerry McIntyre (Executive Director, Canadian Educational Resources Council):

The point is that, to me, to go in a direction that does not respect the opportunity to bring to the marketplace ... the materials that several of the people who have spoken this morning have said represent investment--that's investment of personal time, and of money in the case of companies--and *to destabilize that marketplace by introducing the notion of exception is to go in a very perilous direction.*

Liz Warwick (Vice-President, Periodical Writers Association of Canada):

Right now, for an individual writer to put a piece up and say this is protected, either through password or some sort of encryption, is costly just in terms of

technology. I consider myself fairly technologically savvy, but it would be difficult for me to know, or I would have to do a great deal of research if I wanted to find out what the best ways are for me to put my material up there and ensure that it is protected and that it cannot be used by anyone who wants to do it. *I think that puts a huge burden on individual creators--financial costs both in terms of time and in terms of keeping up with the technology.*

Michel Beauchemin (Coordinator, Droit d'auteur, Multimédia, Internet, Copyright (DAMIC)):

We can't ask a small publisher or a small creator to use such heavy and technologically complex measures [read only and encrypting mechanisms] that you then have to defend and adapt because hackers regularly try to break in.

Perhaps this desire to shield creators from the onerous tasks of advertising their wares and collecting payment is to ensure that the sanctity of creation is not sullied by the day-to-day realities of business transactions. A prosaic “For Sale” sign would detract from the nobility of nation-binding, and may be detrimental not only to creative, but also public, sensibilities.

Debasing an exalted craft to mere commodity production could reduce its product appeal. It brings to mind a passage by W. Somerset Maugham:

It is dangerous to let the public behind the scenes. They are easily disillusioned and then they are angry with you for it was the illusion they loved. ... Anthony Trollope ceased to be read for thirty years because he confessed that he wrote at regular hours and took care to get the best price he could for his work (1976, p.55).

One can feel some sympathy for Members of Parliament charged with the task of improving the lot of creators within an increasingly rigid and dysfunctional system. Their consciousness of the poverty-stricken Canadian creator was evident, yet this state (however pitiful) is not a recent development:

No novelist, poet, short story writer, historian, biographer, or other writer of non-technical books can make even a modestly comfortable living by selling his work in Canada.

No composer of music can live at all on what Canada pays him for his

compositions.

Apart from radio drama, no playwright, and only a few actors and producers, can live by working in the theatres in Canada.

Few painters and sculptors, outside the fields of commercial art and teaching, can live by sale of their work in Canada.

(Report of the Royal Commission on National Development in the Arts, Letters and Sciences, 1951, p.182)

But sympathy is replaced with frustration, when it is evident that Members of Parliament were willing to engage in policy making decisions detrimental to the overall public wellbeing, *with* the knowledge that their actions may not benefit Canadian creators at all. The following exchange, between then-Member of Parliament John Harvard and Roger Doucet, at the same Committee meeting on 27 April 2004, was quite revealing:

John Harvard:

I am worried for the creators. I'm worried that if we don't have any exemptions at all--and that's really the way I want to go--if we go into that kind of environment and leave it to the marketplace, you can be almost sure that over time it will be the creators who will find themselves screwed quite often. It will be the distributors and the publishers, the middlemen and women, who will somehow take control of the environment for their own advantage. ... But getting back to you, Mr. Doucet, why should you have any exemption at all?

Roger Doucet:

... because in the content of the Internet there is much that is free, intended not to be paid for, we don't think that should be part of a market when it's not a market product.... The only exception we want is to recognize that some of the content on the Internet is there free, with no intent to charge ...

John Harvard:

But isn't that really the concern of the creators? Creators may put material out there in the public domain, and they may not care that Clifford Lincoln uses it for whatever purpose, right? Yet they see you, you know, not necessarily with deep pockets, but you do have some pockets, and you have students, and the supplier, the creator, says there's a part of the market that can pay something. So they're going to get you. They're going to let Lincoln off, but they're not going to let Doucet off. That happens pretty well all the time in the marketplace in one way or the other. What's wrong with that, Mr. Doucet?

Roger Doucet:

My concern is in the case of free material. I don't think we should be paying a licence to a middleman or middle organization collecting fees on what should be free. That's our only concern. The rest, as I said, we'll abide with, we'll find a solution, we'll come in there. But why should there be a licence for free material, and paid to a middle body?

Mr. Harvard's assessment that the educational sector represents an unused portion of the market, an unused capacity for proprietary exchange, unmasked the underlying objective of these meetings. If educational activities are framed as infringing use, rights holders' representatives can enter into discussions to commercialize, that which has been non-commercial, obligatory sharing between rights holders and users. Any regime of licensing would merely be a means of tapping this, previously untapped, market.

The entire discussion had a surreal-like quality given that, less than an hour earlier, Ms. Peacock gave evidence that, in her opinion, licensing in fact would be detrimental for creators with small repertoires:

Susan Peacock:

With respect to the superficially attractive solutions of compulsory licensing, and to a degree extended licensing, I'd like to say a bit from my experience of managing a copyright collective for 15 years.... Whether we're talking about a compulsory licence or an extended licence, owners of small repertoires will be difficult for the collective to find, and those that can't be found won't be paid. Extremely large repertoires require the use of sampling for the collective to effect royalty distribution. This tends to give an advantage to owners of large repertoires, whose works are much more likely to be in the sample.

(Standing Committee on Canadian Heritage, 27 April 2004)

One would have expected Ms. Peacock's remarks to trigger some anxiety, or at least curiosity, about the financial prospects for licensing of Canadian content. Given the committee's passionate commitment to ensure financial compensation to creators, their open deferral to the judgment of

the rights holders representatives, and, the United States' penetration of the Canadian book, television, and film markets (all well documented by the Department of Canadian Heritage) this would seem an appropriate avenue of investigation. Instead, discussions continued in the vein of debating public availability. While both sides operated at cross-purposes, they shared the common belief that it was difficult to discern which websites were meant to be publicly available. A meaningless debate if one is truly interested in enhancing conditions for Canadian creators—rather than fixating on which Internet sites are available, Members of Parliament could recognize that all material is available for (the limited purposes of) fair dealing.

The continued insistence of licensing through collective societies will only serve to entrench the dependency upon middlemen; authors, musicians, artists, *etc.* will be robbed of what the Internet should be celebrated for: the ability to engage directly with both consumers and fellow artisans, on terms *chosen by* the originating creator. Albeit aware that “middle men” usually thrived at the expense of creators, the Committee appeared all too willing to engage in a policy which would add unnecessary expenditure to the education in Canada, and, undermine the ability of all creators to access the intellectual commons. In addition, replacing an obligation (fair dealing) with a market transaction will further fragment relationships in and amongst our community of creators and users, and continue to erode the consciousness of the public good.

3.0 Conclusion

In his seminal publication in the field of communication, *The Bias of Communication* (1951),

Harold Adams Innis indicated that the outcome of the adoption of a communication technology was shaped by the influence of social forces within each time. Technology may carry a predisposition to usage, but this alone could not dictate social outcome. The sentiments of rights holders' representatives during educational licensing discussions clearly delineated their opinion of the role of the Internet. One could argue that the representatives were not tampering with the Internet as a whole; instead, they merely wished to secure their holdings within it. My response to that argument is to say those representatives were seeking holdings where none existed, and were unwilling to utilize the Internet as they found it—a medium where individualized efforts of creation and distribution can be accommodated. Creators may choose to place their work behind a commercial exchange account—such is their prerogative—but the proposal of educational licensing assumed that all material, absent public notification, should be compensated for (*Interim Report on Copyright Reform*, p. 14). This assumption does not follow from the principles of intellectual property where user rights walk hand-in-hand with copyright. A partnership clearly articulated by the Supreme Court of Canada, during this period of copyright revision negotiations.

The past debate over educational licensing suggests that the wilful imposition of market policies upon the Internet will undermine fair dealing as a means of ensuring a sense of obligation to share creative effort. “Access” is being eclipsed by “paid access,” (Murray, 2005); soon the ritual of sharing will seem naïve and irrelevant beyond elementary school. Said another way, in the name of Canadian cultural policy, we will see the continued erosion of the awareness of a common, or public, good. This has implications for our future creative potential; if the intellectual commons

is transformed into an entrance-by-toll gated enclave, its ability to serve as creative fodder will recede.

Others may ask, “so what of it?” How critical is this notion of public good to our wellbeing? A worthy question which can only be answered by raising others—how do creativity and innovation come to fruition? What are the consequences of extending copyright’s depth and breadth into our educational sector? Admittedly, these are all difficult questions to address. However, one answer should be clear—curtailing the prior means by which many facets of knowledge have blossomed will not encourage their continued growth.

Returning to Innis, and his warnings of the price system, he alerted us to the insidious nature of exchange. As the means of transacting an exchange becomes available, individuals will seize the opportunity to sell instead of share, to invest instead of endow, and to erect boundaries over existing creation instead of creating anew. This behavioural shift undermines community sustaining relationships, replacing them with disinterested commodity exchanges, contributing to the absence of consciousness beyond ourselves. This absence of consciousness appears to be growing in strength, as people disavow the collaborative nature of creation, and see intellectual property as only private property. A new bias has emerged—left unchecked, it will stultify the capacity for future creative endeavor.

Notes

References

Babe, Robert. E. and Winn, Conrad. (1981). *Broadcasting Policy and Copyright Law – An Analysis of a Cable Rediffusion Right*, Ottawa: Department of Communication.

Berland, Jody. (1997). Politics after Nationalism, Culture after “Culture.” *Canadian Review of American Studies*. 27 (3), 35-50.

Bill C-60, An Act to Amend the Copyright Act of Canada. Ottawa: Ministry of Canadian Heritage and Ministry of Industry. [Online] last accessed 31 August 2005 from http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html.

Birdsall, William F. (1998). A Canadian Right to Communicate? *Government Information in Canada/Information gouvernementale au Canada*. 15. [Online] last accessed 8 June 2005 from <http://www.usask.ca/library/gic/15/birdsall.html>.

Canada. *Interim Report on Copyright Reform*, (Ottawa: Canadian Heritage, 2004) [online] <http://www.parl.gc.ca/infocomdoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf> last accessed 9 June 2005.

Canadian Broadcasting Corporation. *Interview of the Minister of Canadian Heritage, Liza Frulla, by Don Newman*. 22 June 2005.

Canadian Broadcasting Corporation. *Interview with Harvey Weiner, by David Gray*. 23 September 2004.

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13. [Online] last accessed 31 August 2005 from <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>.

Copyright Act, R.S.C. 1985, c. C-42. [Online] last accessed 31 August 2005 from <http://laws.justice.gc.ca/en/C-42/>.

Connecting Canadians through Canada’s Stories—Our Story in Pictures. [Online] last accessed 18 September 2005 from <http://www.pch.gc.ca/pc-ch/mindep/misc/culture/htm/3.htm>.

Council of Ministers of Education, *Copyright in Education*. [Online] last accessed 3 June 2006 from <http://www.cmec.ca/copyright/copyInternet.en.stm>.

Council of Ministers of Education, Press Releases, [Online] last accessed 10 June 2006 from

<http://www.cmec.ca/releases/index.en.stm>.

Ministers of Education Follow Up on National Postsecondary Education and Skills Development Summit, 8 March 2006. [Online] last accessed 3 June 2006 from <http://www.cmec.ca/releases/press.en.stm?id=43>

Council of Ministers of Education, Education Ministers Want Amendment in Federal Copyright Legislation 30 May 2006. [Online] last accessed 3 June 2006 from <http://www.cmec.ca/releases/press.en.stm?id=45>

Frye, Northrop. (1957). *Anatomy of Criticism—Four Essays*. Princeton: Princeton University Press.

Grant, George. (1970). *Lament For A Nation – The Defeat of Canadian Nationalism*. Toronto: McClelland and Stewart Ltd.

Information Highway Advisory Council. (1995). *Connection Community Content: The Challenge of the Information Highway*. Ottawa: Ministry of Supply and Services.

——— (1997). *Preparing Canada for a Digital World*. Ottawa: Industry Canada. [Online] last accessed 31 August 2005 from http://www.iigr.ca/pdf/documents/768_Preparing_Canada_for_a_D.pdf

Innis, Harold. (1946). “Penetrative Powers of the Price System,” in *Political Economy in the Modern State*. Toronto: The Ryerson Press.

——— (1951). *Bias of Communication*. Toronto: University of Toronto Press.

Interim Report on Copyright Reform, (Ottawa: Canadian Heritage, 2004) [online] <http://www.parl.gc.ca/infocomdoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf> last accessed 10 June 2005.

Loren, Lydia Pallas. (1997). *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*. [Online] last accessed 3 September 2005 from http://www.lclark.edu/~loren/articles/fairuse.htm#N_56.

Maugham, W. Somerset. (1976). *The Summing Up*. London: Pan Books Ltd.

Moro, Teviah. Change strikes wrong note: Local MP not impressed with planned changes to the Copyright Act. *The Daily Press* (Timmins), 4 March 2005, pA1.

Murray, Laura J. (2004) Protecting Ourselves to Death. *First Monday*. [Online] last accessed 9

- June 2005 from http://www.firstmonday.org/issues/issue9_10/murray/index.html.
- (2005). "Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses," in *In the Public Interest: The Future of Canadian Copyright Law*. Ed. Michael Geist. Toronto: Irwin Law.
- Our Cultural Sovereignty, The Second Century of Canadian Broadcasting*. Ottawa: Communication Canada. 2003.
- Overview of the Book Publishing Industry in Canada*. [Online] last accessed 18 September 2005 from http://www.pch.gc.ca/progs/ac-ca/progs/padie-bpidp/pubs/2000_2001/sec3_e.htm.
- Report of the Royal Commission on National Development in the Arts, Letters and Sciences, 1949-1951*. Ottawa: Edmond Cloutier. 1951.
- Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (11 June 2002). [Online] last accessed August 18, 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=6610>.
- Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence* (29 October 2003). [Online] last accessed 18 August 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=67135>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (25 March 2004). [Online] last accessed August 18, 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=82123>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (30 March 2004). [Online] last accessed 31 August 31, 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=77052>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (20 April 2004). [Online] last accessed 31 August 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=79234>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (21 April 2004). [Online] last accessed 31 August 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=80458>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (27 April 2004). [Online] last accessed August 18, 2005 from <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81053>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3rd Session, Evidence* (28 April

- 2004). [Online] last accessed August 18, 2005 from
<http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81312>.
- Standing Committee on Canadian Heritage, 37th Parliament, 3^d Session, Evidence* (29 April 2004). [Online] last accessed August 18, 2005 from
<http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81318>.
- Status Report on Copyright Reform* (24 March 2004). Ottawa: Ministry of Canadian Heritage and Ministry of Industry. [Online] last accessed 31 August 2005 from
http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/status_e.cfm.
- Supporting Culture & Innovation, Report on the Provisions and Operation of the Copyright Act*. (2002). Ottawa: Industry Canada. [Online] last accessed 31 August 2005 from
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00866e.html>.
- The Government of Canada Announces Upcoming Amendments to the Copyright Act* (24 March 2005). [Online] last accessed 9 May 2005 from
<http://www.ic.gc.ca/cmb/welcomeic.nsf/0/85256a5d006b972085256fcd0078718c?OpenDocument>.
- The Net's sour note, *Globe and Mail* (Toronto), 25 April 2005, pA12.
- Vaver, David. (2000). *Copyright Law*, Toronto: Irwin Law.
- Wright, Robert. (2004). *Virtual Sovereignty: Nationalism, Culture, and the Canadian Question*. Toronto: Canadian Scholars' Press.