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Copyright, Periodicals and the Internet: The Digital Rights Battle

by

Rosa Harris-Adler

A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Journalism

Carleton University

Ottawa, Ontario

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acceptance of the thesis

Copyright, Periodicals and the Internet: The Digital Rights Battle
submitted by Rosa Harris-Adler

in partial fulfilment of the requirements for
the degree of Master of Journalism

A handwritten signature in black ink, appearing to read 'Paris', followed by a long horizontal stroke.

Thesis supervisor

A handwritten signature in black ink, appearing to read 'Paris', followed by a long horizontal stroke.

Director, School of Journalism and Communications

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Abstract

The widespread use of the computer networking is causing a revolution in the field of intellectual property. Freelance writers and publishers find themselves at odds over who owns the right to commissioned material that finds its way onto the Internet.

This thesis explores the interplay between government policy, writers and publishers as everyone grapples to come to an acceptable compromise regarding the distribution of property rights on the Information Highway . It looks at some of the theoretical underpinnings of the notion of copyright and surveys some current approaches to finding a policy for intellectual property that can accommodate new technology.

For my beloved Erik, Ted and Ben.

Many thanks to my thesis adviser Christopher Dornan and to my dear friends Jan
Lounder, Bev McRae and Jacqueline Toupin.

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A Brief Overview of Copyright: Three Organizing Theories

Copyright and its origins must be set in a larger context, which encompasses the organization of cultural and economic life, the social attitude toward intellectual creations and their uses, and the position of the creator in society. Copyright has emerged as one method to cope with these issues and thus as a means of organizing and controlling the flow of information in society.¹

This chapter begins with a general discussion of Western copyright and proceeds to focus on how technology informs notions of intellectual property, as seen through the framework of three general organizing theories on the latter. The discussion here, confined to the Western tradition of copyright, examines the notion of intellectual property first within a liberal framework, second within the context of the critical discourse of political economy and finally within a framework, as it were, of postmodernity.

The first model, that of liberalism, provides a picture of the conditions, arguments and counter-arguments that, with the advent of the printing press and modernity circa 1500, prompted the West to conceive of intellectual property as an inalienable individual right. Indeed, the liberal sensibility developed interdependently with the first mass production of information.

The second framework, that of political economy, further informs any discussion of the relationship between digital technology and copyright because it provides a model in which intellectual property is seen as a shared right between individual and collective, a model that emerged against the backdrop of efficient new technologies of mass production of the Industrial Revolution in the 19th century.

The third model is relevant because theories of postmodernity coincide with the next wave of the mass production of information. A digital revolution has been upon us, arguably, since the 1980s, when the use of computers became relatively widespread in the West. This revolution is characterized by powerful information delivery systems capable not only of instantly transmitting words and images to multiple users around the world, but also by the ease with which the technically astute can manipulate those images and words seamlessly to produce mutant creations, as it were. Given these conditions, political, legal and communications theorists are trying to determine whether existing notions of intellectual property still apply, and, if not, how to replace them. The discourse of postmodernity may eventually help provide some direction.

Finally, the emphasis in this chapter is on the *interplay* between copyright, technology and these three models. As Freegard has remarked, “the underlying arguments in favour of copyright contain elements of thought which appeal to governments and legislators of almost every political complexion. Copyright can be seen as beneficial both to public policy and private profit; as a boon to individual freedom and as an aid to State intervention; either as an expression of natural justice or as an assertion of property rights.”² Arguments against copyright are equally flexible. The approach in this paper, therefore, is not to disqualify or champion any one political or theoretical model, but to mount arguments in support of, and against, all of them — in hopes of illuminating problematics for a future chapter on policy alternatives on intellectual property in specific relation to the magazine industry in Canada today.

1. The Liberal Position on Copyright

As suggested earlier, the notion of copyright took form, in the modern sense, with the advent of the printing press in the 15th century. Indeed, the new technology created the environment for the influences behind the concept.

Augustine Birrel³ recounted in his seminal law lectures on copyright how a revolution in ideas from reform-minded Christians began freely emanating from these new presses and enjoying wide distribution for the first time. Wincor⁴ has further recounted how authorities in 15th-century Europe regarded much of this material as heretical and dangerous and reacted with what they believed to be the most effective weapon at their disposal: decree. Rulers issued proclamations that only the Church — and by extension, the State — could grant licencess to publish, the first European laws regulating that right. These authorities in turn awarded “privileges” — or limited monopolies — to publishers, on the condition that they adhere to strict provisions of censorship. Accounts suggest the first printing privilege was granted to Aldus Manutius in Italy in the late 1400s, but other countries were quick to adopt similar systems and in France, the oldest privileges date back to the early 1500s.⁴

In Britain, the Stationers’ Company, consisting of printers, bookbinders and booksellers, was formed in 1557 and monopolized publishing for the next 150 years. In return for its privilege, the Stationers’ Company was bound by the regulations of the Star Chamber, the government body created in the late 1500s, which issued these licences.⁵

If, as some argue, privileges and regulations were the parents of author’s rights, the conception was accidental. Regulations allowed rulers a means of exercising political control; privileges provided publishers with a lucrative monopoly. The writer did not

figure into the equation. Instead, the true motivation for authors' rights was an outcome of technology: cheap copies. When new and inexpensive means of production allowed for the invention of the literary knock-off, organizations such as the Stationers' Company became the first to support author's copyright as a way of preventing piracy among members.

Still, in this era, while authors' claims to their works were never disputed, writers were expected to fully forfeit that largely informal claim when they sold their manuscripts to publishers on a more or less work-for-hire basis. The concept of royalties, or of authors maintaining copyright, had not yet developed.

By the beginning 17th century, however, during the early stirrings of an Enlightenment made possible by the printing press, widespread distribution of books and the literacy that followed, the liberal idea of proprietary authorship began to emerge. With it came the notion of the prevailing rights of authors. Playwright Ben Jonson of that era, for example, was among the first to advance the cult of the author, suggested by the very title of one of his folios, *The Works of Benjamin Jonson*. As an ardent disciple and supporter of Shakespeare, moreover, he eulogized his mentor in poetry:

Triumph, my *Britaine*, thou hast one to showe,
To whom all Scenes of *Europe* homage owe.
He was not of an age, but for all time!⁶

As Rose⁷ points out, thus was begun, under Jonson's influence, "the process in which Shakespeare was retrospectively refashioned into the quintessential author of the modern world."

By 1644, when John Milton argued in *Areopagetica* against the licensing of publishing and for author's autonomy, it was in part on the basis that a writer would be at the mercy of a bureaucrat "perhaps inferior in his judgment who never knew the labour of book-writing."⁸ A side-effect was to further raise the writer in status. By 1689, when John Locke invoked the "natural law" of copyright in *Two Treatises on Civil Government*, the notion of proprietary authorship was truly ready to take hold. Locke gave additional weight to the concept with his position that an author's right was based on the labour expended in producing it. The specific passage in which he elaborates on this is worth repeating:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his body and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he has mixed his *Labour* wit, and joyned to it something that is his own and thereby makes it his *Property*.⁹

The natural-law right-to-property approach to copyright spelled out by Locke typified the liberal sentiment that began to flourish in England by the 17th century. An important aspect of Locke's contribution to the debate on author's ownership rights is the principle of originality in authorship that it defended. Inasmuch as a "cult of the author" was forming, so too was a concomitant "cult of originality." Liberalism began to place less value on the retellers of tales — the minstrels — and greater value on work that was deemed to have sprung, more or less fresh, from the mind of its "creator."¹⁰

Simultaneously, in the existing atmosphere of reform, the Church could no longer stem the flow of information through censorship, and the Stationers' Company was finding it increasingly difficult to stem the flow of competition through monopoly.¹¹ A

newly accountable Parliament abruptly revoked the Company's privileges, throwing the publishing industry into chaos and creating an immediate market for pirated copies. To fill the vacuum, the British passed the Statute of Queen Anne in 1709 — the first law on author's rights in the modern sense of the word. It permitted the British author to own the copyright to a work for a total of 28 years, after which time the work would pass into the public domain. Some version of this form of copyright prevails to this day throughout the West.¹²

The controversial Statute would undergo refinement and revision, but the ultimate import and impact of this legislation was significant. Its very proposal and acceptance, compounded with a constellation of similar social changes, signalled another nail in the coffin of absolutist rule. More specifically, however, it created a space for the notion of proprietary authorship to fully develop. The writer as alchemist, who mixed labour with the state of nature to create a work of art, was now deemed to be in possession of a commodity as fundamental as an acre of land. Yet what was newly possessed — the evident ability to conceive of and produce a unique ordering of words — was intangible, and only valuable insofar as those creations could be made flesh, as it were, and were perceived by a buying public as valuable commodities.

In the early modern era, as Dyson and others have described it,¹³ writers of popular, scholarly or religious works were financially supported mainly by influential patrons, who protected and nurtured their charges in recognition of their perceived talents. These patrons, usually members of the Church or court, could confer privileges and honours on their protégés. The writers, entirely dependent on their patrons, inevitably

shaped their work to please these benefactors — a condition, one might argue, which cannot comfortably co-exist with the notion of proprietary authorship. As Rose says: “The figure of the proprietary author depends on a conception of the individual as essentially independent and creative, a notion incompatible with the ideology of the absolutist state.” He further argues that it was only in direct opposition to an absolutist court “that a new form of political subject, the autonomous private man, came into being.”¹⁴

Throughout the 17th and 18th centuries, circumstance conspired to foster this opposition. Those who did have patrons noted their benefactors’ diminishing influence, along with that of the royal court in general: thus, there were fewer rewards patrons could offer their charges. Furthermore, as systems of distribution for popular works improved and the royalties provided for in new legislation began to pour in, reliance on the whims of patrons for income decreased. As well, there was the matter of supply and demand: there were simply not enough patrons to sponsor writers and artists.¹⁵

Thus, as the era of the patron waned, the era of social markets came into being and cultural brokers learned how to sell to a relatively large, geographically dispersed, anonymous market.

As Lury notes: “... it was precisely the internalization of the abstractness of the audience as an unknown market and the incorporation of the unpredictability of the orientation of that audience that emancipated the cultural producer. As the function of the cultural work in everyday life became much more indeterminate, or else variously determinable, so the cultural producer’s role became more abstract.”¹⁶

Thus, the project of modernity, covering the five decades from the 1500s to the present and launched largely by the printing press, created an atmosphere in which liberalism flourished. In this environment, the notion not only of authors' rights to their work arose, as did the cult of the author and of "originality."

This is not the forum for a full discussion of the commodification of culture, but the conditions outlined above do lay the groundwork for that concept, which would become influential within the framework of the second model, the critical approach to copyright.

2. The Critical Position on Copyright

In countries with a socialist system ... the principles underlying copyright legislation are based on a different conception of the interrelationship between the author and society. This approach has been expressed in terms of harmonizing the general interests and the special interests of the author. The creation of an original work depends on the original creativity of the author, but only within the given social framework which provides the sources of insight and experience expressed by the author. It is in the general interest to stimulate creative activity which contributes to the improvement of cultural life and the building of a socialist society. The relationship between author and society can therefore not be ruled by economic aspects only, but as much or even more by the cultural policies pursued by a socialist society. Copyright has thus been described as an instrument of the management of cultural processes.¹⁷

Because the management of cultural process is one manifestation of the way orthodox Marxism is interpreted, it is instructive to explore two factors which contributed to this aspect of Marxist theory at its inception. First, there was the impact of the cultural intermediaries who emerged following the demise of the patronage system. The intermediaries were another step along the continuum, starting, arguably, with publishing, that encouraged a severing of the direct link between cultural producer and

cultural consumer. The intermediary created capital for himself and his clients by performing distribution and promotion services which presumably added value to the cultural product. In employing the services of these intermediaries, authors were obliged to forfeit some aspect of their ownership to the former: thus, as Lury suggests, the growing role of these intermediaries in cultural production acting as representatives of capital “was gained at the expense of the privileges of the cultural producer as author.”¹⁸

Second, mass distribution informed the way these intermediaries did business. To make money, many books had to be sold, in many locations, inexpensively. It is simplistic to say that the intermediary’s profit needs, coinciding with the development of the cult of the author, created the notion of mass marketing and the resulting commodification of culture, but the new functions and roles of these parties were a major contributing influence.¹⁹

The developing technologies of the early 20th century helped create an additional new tension, in the cultural realm, between labour, capital and ownership. Using cinema as an example within the context of the copyright provisions of France in the late 1930s, Lury points out how the division of labour between scriptwriters, directors, producers and so on “was resistant to the equation of legal personality that had originally provided the ideological basis for French property law.”²⁰ Thus, definitions of copyright had to be revised to reflect a new set of circumstances, ones that favoured capital investment as a factor in determining definitions of art and ownership. Indeed, a 1939 decision by the Court of Paris articulated the notion that the producer deserved ownership of a film, because “it is under his creative direction, whether personal or delegated, that he

exercises his influence over hundreds of specialist assistants ... who are ... interchangeable with other employees with the same specialist skills, and who will proceed to the more or less mechanical task.”²¹

As Lury comments on the ruling:

... [T]he organising function (that of the producer) exercised on behalf of capital is classified under the sign of “art” (that is, it is aestheticised) in order to establish capital’s right to ownership of the image; the “original” moment here is that of investment. By contrast, the “creative” labour involved in the process of film production is proletarianised. (It is standardised to the point of interchangeability in order to deprive them of such right.) This ruling thus represented a legal legitimisation of the increasing significance of productive intermediaries in the organization of cultural reproduction while still, just, preserving the founding terms of creativity and originality.²²

Supporters of critical theory would argue that the shift in copyright ownership from “creative labour” to “aestheticised investors” was indicative of the ways in which culture was becoming commodified, as liberalism and the capitalism it gave rise to became prevalent in the West. Critical thinkers would further argue that copyright has become a tool for hegemony in the West: by using the principle of intellectual property to control the flow of information into and out of developing countries, for example, the West maintains its influence and domination across the globe.

Certainly, there is support for that position in many developing countries, particularly in those where the piracy of Western books, movies and records is widespread. There is a conventional wisdom, on the part of many of these “pirates”, that their countries have been victims of the cultural imperialism of the West, at the expense of their *own* cultures. When, for example, Lee Kwan Yew was named president of Singapore, he declared his intention to turn a blind eye to copyright arrangements,

criticizing international conventions as just a means to the West's end of colonial exploitation.²³

In describing circumstances in Malaysia, Chesterman and Lippman add:

Considering the vast back backlog of illiteracy ... left by the colonial powers, it is hardly surprising that the Malaysian Minister of Education should thank God for the photocopier and describe the pirates as "benefactors of humanity". It has even been argued that copying devices are a form of alternative or intermediate technology, that the tape-recorder is the cultural equivalent of the plough — a practical low-tech machine that can operate at village level and free poor countries from dependence on sophisticated technology.

The piracy of Western material, according to this argument, is the first stage in developing their own distribution and publishing systems. It is seen as the only way they can challenge the hegemony of the great transnationals and avoid being sucked into their networks until they have the time to establish an "information environment" of their own.²⁴

Before the failure of the experiment of socialism and the fall of the Wall, the socialist response to copyright varied from Iron Curtain country to Iron Curtain country. In the former Soviet Union, to give a major example of that response, authorities originally treated copyright as a labour issue: at the time of the USSR's demise, however, copyright rules were governed by civil law. Copyright was seen as a blend of personal rights and social property — but not of personal property, a condition contrary to the socialist ethic. Thus, no permission was needed to reproduce a writer's work, although royalties were paid for use in radio, television or cinema. Similarly, published literary material could be used by composers of musical works with texts; artistic works and photographs could be used as a basis for industrial products.²⁵ The detailed and complex rules resulted in a kind of *de facto* licensing arrangement, not unlike the regulations of Britain's Star Chamber of the 16th century.

In fact, from the basic copyright equation that developed in the 1600s — on the one hand, the strict licensing of privileges; on the other, equally strict regulation over what could and could not be printed — liberal Western thinking in the ensuing centuries followed the trajectory of the former. As free market politics took over from absolute rule, the rise of the doctrine of individual rights proceeded apace. Governments of the liberal tradition, striving to find a compromise between a *laissez-faire* approach to copyright which would allow open access to a writer's work after an acceptable period of time, and the primacy of the natural-law notion of an author's right to perpetual ownership always inevitably came down on the side of individual rights. Critical thinking and the planned economies that evolved from socialist theory, for their part, tended to follow the trajectory of the other side of the equation — that of regulation.

At the turn of this millennium, however, the issue appears moot. Both sides of the equation may prove obsolete. Just as the printing press destroyed the Star Chamber's ability to regulate, so did the digital revolution confound the best efforts of the KGB to control the flow of information in and out of the Eastern bloc. As for the sanctity of author ownership propounded by the West, as we shall see in the following discussion on the postmodern "approach" to copyright, that sanctity may turn out to be an equally dated concept.

3. The Postmodern "Framework"

Two passages are worth quoting in full at the outset of a discussion on postmodernism, technology and copyright:

One of the transforming scientific revolutions of the 20th century has been [the ability] to capture words, sounds and images in digital form. Technologies exist today that can reduce a written or spoken line of

poetry, the subtlest shadings of a musical phrase, a fleeting image captured on film, to the crisp zeros and ones of digital code. By most accounts — some doubtless overblown — most of tomorrow's entertainment and information products will be recorded digitally, stored digitally, transmitted digitally and received digitally. The digital revolution promises both new strains and new opportunities for copyright law, domestically and worldwide.²⁶

It is instructive to contrast that passage with the following written by Alistair

Kelman:

Computers, when suitably programmed, can enhance detail in photographs, produce statistics from unsorted masses of data, turn shapes on a terminal with a light pen into musical notes, and animate drawings. Whether these new products are to be considered adaptations of existing copyright works, works of joint authorship with the creator of the computer program, or not protected by copyright at all, has still to be fully considered.²⁷

Although the first quotation was written almost a decade after the second, the latter accurately represents the current state of what I have been referring to throughout this chapter as the digital revolution. The first seems almost quaint, by comparison, with its emphasis on the digital delivery of pre-existing forms of creation. The second, I think, truly reflects the nature of the digital revolution and the dilemma it brings to bear on discussions of copyright and creativity in an atmosphere of postmodernity.

As Gitlin writes in *Cultural Politics in Contemporary America*: "Postmodernism usually refers to a certain constellation of styles and tones in cultural works: pastiche; blankness; a sense of exhaustion; a mixture of levels, forms, styles; a relish for copies and repetition; a knowingness that dissolves commitment into irony; acute self consciousness about the formal, constructed nature of the work; pleasure in the play of surfaces; a rejection of history."²⁸

In this context, then, digital technology can be understood as a perfect metaphor for postmodernism. It involves a fundamental breakdown and reordering of text, image and musical composition for delivery to a remote terminal. The consumer can then “order” the digits to reappear in their original form or alter them in any manner deemed fit.

Copyright scholar Paul Goldstein uses a colorful metaphor to express the means of delivering these digits: the celestial jukebox.²⁹ Whether the technology entails fiber optics, cable or satellite, computer, television or telephone, consumers effectively put a nickel in the slot, punch a button and select from an impossibly wide range of products. It is already a cliché to talk about downloading the Mona Lisa from the Net or about “sampling” (in all senses of the word) new music from popular rock groups.

However, the transformation of art into digits creates a series of unique problems for copyright. Digitized products can be dissolved and recombined to form new creations. Photos can be manipulated, words can be altered or reordered, black and white films can be colorized, songs can be “sampled”, that is, digitized, and incorporated into new songs. When one work is used to make another, where does creativity end and theft begin? A suitable analogy would be that of a collage. When an artist tears up a section of a magazine article and pastes it onto a canvas with other items to create an image, is she stealing a message or just using a medium — one that just happens to have words on it — to create a *new* message? When all is ephemera, how do we determine what remains copyrightable and what doesn’t? Will we measure it by the proportion of digits of the old art form used to create the new one?

There is a dawning realization that the concept of intellectual property must undergo a drastic reassessment, given the virtually infinite capability for the reordering of digital information delivered via cable, satellite or modem to monitors and printers. As Ed Cramer of the U.S. royalty collecting society has put it: “The concept of copyright law has been wrong. We were trying to fit the new technology into a preconceived scheme dealing with tangible things, with books and photocopies ... but none of the new means of dissemination of information really fall within the predefined categories. We are trying to squeeze the new technology into the old forms. And frankly, it doesn’t fit.”³⁰

There are certainly echoes of the liberal and critical positions to consider as we slouch toward some answers. Debates over the meaning of originality, raised at the time of Locke and Milton, can be effectively “re-ordered” and applied here, as can concerns over the hegemonic practices of the West and the globalization and commodification of culture. Yet as Chesterman and Lipman suggest in their prescient book, *The Electronic Pirates*,³¹ it is technology, rather than politics and religion, which has been controlling the agenda. Politics evolved as a means of deciding how the technology should be controlled and its benefits exploited. The Industrial Revolution gave rise to capitalism, not the other way around. Marxism was a response to the creation of a proletariat, but the proletariat were created as a by-product of machines.

How, then, to think about copyright in a postmodern era in the throes of a digital revolution? The following chapters will undertake a survey of legal, political and practical thinking about copyright with a view to describing policy alternatives.

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Copyright Reform: Running the Policy Gauntlet

... [T]he Charter asserted the remarkable proposition, presumably intended to be normative rather than descriptive, that “ownership is ownership is ownership.” The copyright owner owns the intellectual works in the same sense as a landowner owns land. From this assertion of the triumph of individual property rights, the Charter proceeded to recognize the major importance of cultural enterprises: corporate “creators” should be treated the same as individual authors. Despite its emphasis on individual rights, the Charter did not explicitly recognize that there might be *conflicts* between individual authors and the “creators” that process and disseminate their work: the Charter envisaged one big happy family.¹

The participants may never make the Jerry Springer Show, but the “one big happy family” suggested by the 1985 *Charter of Rights For Creators* has turned out to be as dysfunctional as any on tabloid TV. The Charter, the product of the Department of Communications (DOC) and a newly and decisively elected Conservative government, was a seminal document that would serve as the basis for copyright reform over the next 12 years.² By law, corporate “creators,” who anthologize the work of others, have always owned copyright in the overall collections they produce, while each author holds copyright in his individual contribution.³ Copyright lawyer and scholar Vaver contends, however, that in broaching the importance of the former, the Charter inadvertently may have encouraged an adversarial relationship between the two interests — and fostered an atmosphere today that favours the corporate “creators.”⁴

In defense of Charter authors, Vaver points out that a principal reason for the document's failure to resolve or even consider the issue of potential conflict between owners and entrepreneurs is because of a complex federal-provincial division of powers. Although the federal government has jurisdiction over copyright, the provinces are responsible for contract law, which governs most agreements between periodical writers and those who purchase their work. Certainly, the Charter authors could not presume to issue policy in areas in the provincial domain.⁶

At the very least, however, the Charter did nothing to address or reconcile legal problems resulting from the potentially conflicting or overlapping rights of creators and entrepreneurs. That has led to an abhorrent vacuum in the periodical industry today, which lawyers naturally have rushed to fill. The result is a pitched battle between freelance writers and publishers soon to be played out in class action suits in courtrooms in Quebec and Ontario — cases shaping up to be custody fights of the first order.⁶ At issue is whether the First Canadian Serial Rights traditionally and tacitly bought from writers under copyright law — that is, the licence to publish an article one time nationally extend to electronic versions of the periodicals on the Internet. And at stake is what writers perceive of as a potentially income-restricting “grab” of electronic rights⁷ — and what publishers prefer to call a benign, albeit new, form of archiving.⁸ (For a complete discussion of each side of the argument, see Chapters III and IV.)

“There is a serious issue that the Charter buried — the inevitability of problems between creators and entrepreneurs,” Vaver says. “The Charter basically said: ‘leave the

question of exploitation of copyright to the provinces. Let the free market govern relationships between creators and entrepreneurs. We should keep out of it.’

“[The Charter authors] were quite uninterested in looking at any question involving market failure or inequalities in the marketplace itself. They didn’t recognize that there could be severe disparities in bargaining power within the market. If you want to deal with a publisher, you deal on the publisher’s terms or you become a publisher yourself. There aren’t too many other options. In the end, *The Charter of Rights For Creators* proved to be a catchy title, but the content doesn’t live up to the name.”⁹

The unresolved creator-entrepreneur dilemma occurred in part because of the government’s long-standing sensitivity to the competing imperatives that have dogged copyright legislation in Canada since day one. The history of copyright reform in Canada, in fact, is a history of clashing special interests, whether at the micro level of intra-governmental squabbling or at the macro level of international trade negotiations. The resulting legislation reflects Canada’s unwavering dedication to compromise — sometimes at the expense of workable or cohesive policy. To a certain extent, the quarrel between writers and publishers is the collateral damage of these relentless concessions.

The first example of such squabbling — this one between Britain and Canada — occurred not long after Canada was formed in 1867. Section 91(23) of the Constitution Act gave exclusive jurisdiction over copyright law to the federal government, and initially the new nation adopted British copyright law more or less wholesale, enacting it as one federal statute, the Copyright Act.¹⁰

Over the next two decades, however, Canada tried to assert itself on the copyright front. As Ottawa lawyer and copyright specialist Howard Knopf describes it, “Canada was consumed with constitutional self-consciousness: we wanted to pass our own laws independently of Britain. The issue of copyright became something of a bellwether case, because it encompassed questions of culture, trade and sovereignty — all key to a newly formed country. It also involved the rights of authors and artists, so it had a certain cachet.”¹¹

The fight materialized in the realm of international trade negotiations. In a move meant to counteract an influx into the market of cheap, American-produced versions of books that had caused havoc in the domestic publishing industry, Canada tried to pass autonomous copyright legislation for the first time in 1889. The proposed new legislation would have obliged foreign publishers — including those from the U.K. — to republish their books in Canada within a month of initial release in order to qualify for Canadian copyright protection.¹²

“Britain was not amused,” says Knopf. “The draft law was seen as inconsistent with legislation in the U.K. and was pronounced antagonistic, retrograde and deliberately protectionist. A certain U.K. statute called the Colonial Laws Validity Act of 1865 entitled Britain to disallow any Canadian legislation in conflict with imperial laws, so Britain put a stop to the new Canadian copyright proposals.”¹³

Knopf describes the incident as “particularly telling.” It revealed, he says, how interested parties can manipulate intellectual property to achieve ends entirely unrelated to the original purpose of ensuring an orderly, fair and nurturing marketplace for the

expression of original ideas. The 1889 incident, he argues, was the first attempt “to enlist copyright law to the cause of cultural and trade protectionism — a policy tradition sustained to this day.”¹⁴

The Canadian government finally did enact an independent copyright law in 1921. Similar in language and intent to its British counterpart, the United Kingdom Copyright Act of 1911, the Canadian Copyright Act came into force in 1924 and remains the template to this day upon which revisions and new definitions are imposed.¹⁵

A summary follows of those aspects of the 1921 Copyright Act pertinent to an understanding of the present battleground where the fight is taking place over issues of intellectual property and digital delivery systems. Under the Act, copyright exists in “works” which have some corporeal existence, “works” being defined under four headings: literary, dramatic, musical and artistic. The law deems the initial owner of the copyright in a work to be its author, subject to Canadian citizenship and residency requirements and to international treaties. Under the legislation, owners can assign or license all or part of their copyright either generally, or with territorial or use limitations.¹⁶

The legislation enacted in 1924 appears to have been effective and equitable enough to address copyright issues for nearly 64 years. Between 1924 and 1988, Canada made just three changes to the basic law. In 1928, following a revision of the original 1886 agreement, Canada became a signator of the Berne Convention, regarded as the most significant international copyright treaty to this day. (Canada also became a member of the less notable Universal Copyright Convention in Geneva in 1952.)¹⁷ In

keeping with the Berne Convention, Canada amended the Copyright Act in 1931 to include moral rights. To protect authors' honor and reputation, under the 1931 law owners of works now held the right to claim authorship and the right to restrain distortion of their work. Authors could waive these moral rights, but they could not assign them to another party. Another amendment in 1935 allowed for the collective administration of performing rights and in 1971, Canada put an additional amendment in place preventing the enforcement of performing rights in sound recordings.¹⁸

But could the basically intact 1924 copyright law withstand the test of time over the longer haul? The first in-depth attempt to explore the question occurred in 1954, when the federal government formed the Royal Commission on Patents, Copyright and Industrial Design chaired by Chief Justice James Lorimer Ilseley, a prominent jurist and politician of the era. The Ilseley Commission, spurred on in part by newly commonplace technologies such as television and cable and in part by a concurrent British initiative to revise its own copyright law, completed its work in 1960. Charged with determining whether existing copyright legislation afforded "reasonable incentive to invention and research, to the development of literary and artistic talents," and "to creativeness...", the commission for the first time articulated the importance of "striking a balance between the rights of creators and the needs of users."¹⁹ Its recommendations were never put into effect, but the work of the Ilseley Commission has had a significant impact on the discourse of copyright in Canada up to the present, outlining a framework for a policy of equilibrium that continues to this day.²⁰

The momentum for copyright reform then seemed to wane until the Trudeau era of the 1970s, a moment of staunch and optimistic Canadian nationalism. Two studies of the time took up the mantle on copyright issues. The first, *Report on Intellectual Property*, completed in 1971 by the now-defunct Economic Council of Canada, recommended that intellectual property be given full consideration in any economic policy, signaling the beginning of a period of consumer-based analysis of copyright.²¹ The second, *Copyright in Canada -- Proposals for Revision of the Law*, undertaken by Frank Keyes and Claude Brunet in 1977, was “unabashedly pro-creator and emphasize[ed] the legal aspects of copyright.”²² While the Keyes and Brunet paper took into some account the global economics of copyright reform discussed in the 1971 report, it focused, primarily, on creators’ rights affected by the international conventions.²³

These initiatives reflected the tenor of the times, which called for an enhancement of Canada’s cultural and economic sovereignty. And this mood fueled a fresh drive to review and strengthen intellectual property laws. Signaling the importance of the issue, the Trudeau government assigned responsibility for the copyright portfolio to two government departments. Consumer and Corporate Affairs (CCAC) — now Industry Canada — assumed the authority for exploring the repercussions of copyright reform on industry, while Communications (DOC) — now Heritage — would review the cultural aspects and implications.²⁴

The division would set the scene in the next decade for ongoing intragovernmental bickering. “There’s been a perennial struggle since Trudeau gave both departments joint responsibility,” Vaver argues. “They operate on different philosophies.

So the resulting legislation is a compromise all the way down the road. There isn't much grand, sweeping policy criteria in it. There's a reconciliation or brokering of interests more than anything else.”²⁵

The 1980s were also marked by the advent of personal computers and their subsequent widespread use in industry. These and other new devices for reproducing and disseminating information helped sustain the push for copyright reform, as interest groups jockeyed for position in the new technological environment. For example, when freelance writers began submitting their work to their editors on computer diskettes, they soon learned their articles entered huge electronic archives. Periodical publishers such as Southam and CB Media, owner of *Canadian Business* magazine, began assembling databases of this material, making it available for a fee to clients without offering additional reimbursement to writers.²⁶ (A full description of the ensuing battle between the Periodical Writers Association of Canada [PWAC] and the publishers in question appears in Chapter III.)

In response to this and other conflicts of the early 1980s, the Department of Corporate and Consumer Affairs commissioned more than a dozen papers on various aspects of copyright. Published as a series of Copyright Revision Studies, they covered such topics as “fair dealing” (including how much of an article, story or book may be reproduced without permission or penalty) audio and video home taping, competition and Canadian culture, collective agencies for copyright administration and copyright and the computer.²⁷ Out of these came *From Gutenberg to Telidon — A White Paper on Copyright*, a 1984 report jointly signed by Francis Fox and Judy Erola, respectively

ministers of Consumer and Corporate Affairs and Communications at the time.²⁸ The White Paper, which reiterated the centuries-old notion that copyright is private property, recommended that any revisions respond promptly to technological change and address the advisability of new rights and subject matters.²⁹ Specifically, it identified as major areas for further study such issues as cable retransmission rights and the determination of ownership in employment situations.³⁰

At the same time, the Department of Communications (DOC) introduced its own paper, *Copyright and the Cultural Community*. The document purportedly addressed the White Paper proposals from its own perspective, but some argue it really afforded an opportunity for DOC to posture at the expense of rivals over at Corporate Affairs.”³¹

“The DOC paper marked the beginning of the end for some time of a reasonably harmonious relationship between Consumer and Corporate Affairs and itself that had lasted for about four years,” says copyright expert Knopf. “It sent a signal that DOC was eager to take the lead on copyright reform. I am unaware of any other government that has systematically and deliberately encouraged the bifurcation of responsibility on copyright to the extent that Canada has done. Whether, in the long run, the result of this systemic duopoly has been positive or not remains to be seen.”³¹

To further complicate matters, *From Gutenberg to Telidon*, produced while the Liberals were in power, was briefly shelved when the Conservatives won a majority in 1984.³² It soon re-emerged, however, to form the basis of another study undertaken by the government’s freshly minted Copyright Subcommittee, a work, according to Knopf,

strongly influenced by the DOC's ascendancy over Consumer and Corporate Affairs at this juncture.³³

The Subcommittee's efforts led to the *Charter of Rights for Creators*, which supported the earlier White Paper notion that new technology demanded timely changes in copyright legislation. Given its genesis, the Charter also tipped the balance of copyright policy in favor of cultural concerns, leaving gaps or inadvertently creating problems on the industry side of the equation, such as the creator-entrepreneur conflict cited at the beginning of this chapter. Nonetheless, the government adopted the Charter as official policy in February 1986.

The result was a long-term plan to revise copyright, divided into phases. Phase I of the present copyright reform process, introduced into the House as Bill C-60 in May 1987 and enacted in June the following year, covered a number of important issues.³⁴ For example, it afforded explicit protection of computer programs (newly defined in the bill as 'literary works'); it attempted (arguably unsuccessfully)³⁵ to strengthen moral rights protection by clarifying that they are an integral — rather than separate — part of copyright; it mandated the establishment of a Copyright Board to oversee collection and administration of rights and it instituted harsher penalties for copyright infringement. The more contentious parts of the Charter — some new definitions and categories of works, new rights, and 'fair dealing' — were left optimistically for future phases of reform.³⁶ Phase II would deal in particular with a number of political issues, some of them emerging from Canada's international obligations to the Berne Convention and covering such areas as importation rules for books.³⁷ No one initially anticipated, however, that it

would take a full 10 years — until March 1997, to be precise — before Parliament would enact Phase II reforms as Bill C-32.³⁸

“Phase II wasn’t designed to address the technology of the 1990s,” says Lesley Ellen Harris, author of *Canadian Copyright Law*, “because C-32 was supposed to have been enacted in 1988. There was no legitimate excuse for it taking so long. What delayed it were territorial battles between the two departments, as well as staff and ministerial turnovers. There’s very little corporate memory in the departments, so they re-invent the wheel many times. Plus it’s a no-win situation. No one’s ever happy [with the necessary compromises] so it’s tough to get revisions through. The upshot is, though, that C-32 was never adapted to deal with new technology. It deals with technology from the mid-eighties.”³⁹

Even as attempts to pass Phase II lumbered along in the early 1990s, the impact of the computer network known as the Internet was entering public consciousness. Industry Canada responded by launching an Information Highway Advisory Council (IHAC). Formed in 1994, the Council had a one-year commission to study the issues and make recommendations on strategies for putting in place the necessary technology and structure to allow Canadians to take advantage of digitally delivered information. Among the five working groups the Council established was one on Canadian Content and Culture, which itself created a Copyright Subcommittee in August, 1994.⁴⁰ Because of the traditionally slow pace of copyright reform, however, no one was under the illusion that the Subcommittee’s proposals would find their way into Bill C-32. Today, there is talk of incorporating some of them into Phase III — and considerable skepticism among

professionals who follow copyright reform as to when Phase-III discussions will begin, not to mention when legislation will result.⁴¹

Regardless, the IHAC Copyright Subcommittee soldiered on. Perhaps sensing an opportunity to reassert the dominance of Industry Canada in the area of copyright, it took as its mandate an examination of policy, cultural and administrative issues, as well as of contemporary industry practices. Making a bid for submissions, the Subcommittee heard from more than 50 interest groups and individuals before issuing its final report.⁴²

In formulating their recommendations, Subcommittee members, echoing the Ilesley Commission, agreed:

... that a balance should be struck between the needs of creators and users. On the one hand, creators are concerned about the unauthorized use, reproduction and alteration of their works in a digital medium and feel there are currently no effective means by which to ensure fair remuneration and adequate protection of their rights. On the other hand, users should have reasonable access to new products and services in order to ensure that a viable and healthy commercial marketplace continues to exist.⁴³

Addressing the issue of balance, the Subcommittee posed two fundamental questions at its outset: 1) What might be the barriers encountered by creators in making protected works available in a digital environment? 2) What might be the barriers to users in gaining access to such works on the Information Highway?⁴⁴ To try to answer these questions, the group isolated several general areas of study.

The first of these, categories of works, looked at the nature and definition of a copyrighted "work" in the context of digital delivery. The Subcommittee specifically questioned whether there were categories of works communicated electronically that

were not subject to the current Copyright Act yet accessible on the Information Highway due to a lack of protection. The group further looked at whether digitized works should be defined separately, or whether a technology-neutral stance was more appropriate. The Subcommittee also investigated multimedia works to determine if these were covered adequately by the definition ‘work of compilation,’ and, if not, how to define them.

In the end, the Subcommittee determined that there were no new categories necessary for works produced and used digitally that failed to fit within the existing legal definitions of ‘literary’, ‘artistic’, ‘dramatic’ and ‘musical’ work. The Subcommittee also concluded that the standing copyright legislation offered sufficient protection for multimedia work, under that law’s definition of ‘compilation.’⁴⁵

Another issue the Subcommittee examined was moral rights, phrasing the following questions: Can the moral rights of the author/creator be enforced on the Information Highway? If so, how? Given the ease of manipulation of works in a digital environment, what might be the impact on the right of integrity? Should that right be made subject to a waiver? Were there categories of works that should be covered by moral rights but exempt from economic rights?⁴⁶

Ultimately, it recommended that moral right of integrity should stand as written and that the presumption of prejudice should remain with the party seen to have modified an original. It encouraged a legal framework governing copyright that would “ensure rather than curtail”⁴⁷ the development of systems to monitor the uses of copyrighted works on the Information Highway. The group saw no reason to afford any work a regime of protection limited only to moral rights.

In its examination of the use of works, the Subcommittee pondered whether the nature of copyright protection should change to take into account digital forms of transmission. It wanted to determine if there were any barriers that prevented or impeded reasonable access to, and use of, protected works, as well as if there were categories of over-protected works. Among other questions it posed: Were there activities or uses of works on the Information Highway not covered by the Copyright Act?

The group also sought to determine how existing rights apply. For example, does the electronic dissemination of a work to a user constitute a publication? If so, at what point is a work electronically reproduced? Should there be an electronic distribution right to cover the transmission of digital works? Should 'browsing' be permitted on the Information Highway and at what point would it be considered a Public Display? What forms of browsing should be allowed? What could be covered by the fair dealing provisions?

The Subcommittee concluded that copyrighted material is copyrighted whether users come to it on line or in a book. The group suggested that if there was ever any future confusion over the validity of copyright in telecommunicated works "the Copyright Act should be amended to provide clearly that [they are] ... subject to the authorization of the copyright owner."⁴⁸ Critical to this discussion, the group also expressed the view that the act of browsing a work in a digital environment was an act of reproduction.

Under the rubric of administration, the Subcommittee looked at enforcement of copyright, rights clearance and regulations. Recognizing that “creators of works in a digital medium are concerned about the use, reproduction and manipulation of their works on the Information Highway and feel that there are currently no effective means by which to ensure remuneration,” the group sought mechanisms (technological, policy, legislative) to resolve the problem. It set out to re-establish the parameters of “fair dealing,” for the use of works in a digital environment, and sought answers about the scope of such remedies. The Subcommittee questioned how the use of works could be tracked to determine pay owed copyright holders and how to compensate for the use of a portion of a work. It also explored whether enforcing such rights would impede or prevent users from reasonable access to protected works, making copyright an unreasonable burden.

Based on the current state of technology, the Subcommittee was of the view that the fair dealing provisions are capable of offering sufficient protection to users of copyrighted material on the Information Highway. However, given the growing concern regarding the future of technology, the group urged the federal government to review the situation on a regular basis to ensure that the fair dealing provisions remain appropriate in each new context.

The Subcommittee raised a number of possible scenarios for the clearance of rights for use of works on the Information Highway. Among the possibilities it raised: enhanced collectives, a copyright clearance centre with a voluntary registration system and compulsory licensing and contractual arrangements. It further questioned whether

infringement might apply only in the case of works that have some form of prevention mechanism (e.g. as is currently the case with encrypted satellite signals).

On this subject, the Subcommittee concluded that the federal government should assist in the development and standardization of user-acceptable ways to track use of protected works. As well, it recommended that the federal government assist in the development and use of 'identifiers' to be included in the distribution of protected works in a digital format to make it easier to trace copyright ownership and unauthorized use of protected materials.

The Subcommittee also recommended that the federal government take an active role, along with industry and the creator- and user-communities, in an education campaign to better inform the public about copyright. As well, the Subcommittee said that the federal government must consider the full range of policy instruments at its disposal to ensure effective copyright protection in order to support the creation of new Canadian works. The group suggested that tampering or bypassing, for the purposes of infringement, of any kind of encryption or copyguards should be made a criminal offense under the Copyright Act.

As for rights clearance, the Subcommittee advised that the federal government encourage the industry and creator- and user-communities in the development of administrative systems to streamline the clearance of rights for use of works in a digital medium but stopped short of suggesting compulsory licensing in the commercial marketplace.

Internationally, the Subcommittee questioned if the federal government needed to re-examine how Canadian copyright is defined in relation to other models being developed in other countries (e.g. U.S., Europe, Japan). It also questioned the ways in which Canada might harmonize its copyright regime with international developments along the Information Highway. For example, how might fair dealing be handled in an international context? How might neighboring rights be handled? How might importation issues be addressed? In examining how the Copyright Act should be revised to meet the needs of creators and users on the Information Highway, what considerations should Canada give to the foreign balance of payments in respect of royalties?

It concluded that Canada should stay abreast of international developments in regard to copyright and the Information Highway but that there was no need for immediate action toward harmonization.

The Subcommittee also concluded that Canada should ensure that the definition of 'broadcasting' in the Broadcasting Act continues to apply to films, music, radio and television programs and other similar audiovisual programming services offered to the public on the Internet, while text-based services should not be included in the definition. As for multimedia services that fall between these two extremes, the Subcommittee recommended they be categorized as 'broadcasting' and/or exempted from regulation.

At the end of the day, then, the IHAC Subcommittee chose essentially to dismiss in most instances the concept that copyright law required a massive overhaul in light of new technology. Generally, it endorsed the status quo — that is, legislation originally

passed in 1924 and revised to an extent in 1988. There is some debate among copyright experts whether this position reflects the strength of the original legislation — or the temerity of the Subcommittee in the face of needed changes and the usual gang of competing-interest suspects.⁴⁹

Harris, for one, supports the notion that the mark of truly workable statutes is that the times adapt to them rather than vice versa. “The 1921 law is absolutely good legislation because it’s basically technology-neutral,” she says. “It speaks about rights reproduction, adaptation and all that — and it applies whether people make the reproductions by hand as was the case in 1924, or whether they use a photocopier or scan [an original] into a computer or copy it off a disk. It has to do with the rights — not the medium.”⁵¹

Hayes concurs. “If you look at what’s happened in the United States with their copyright code, they’ve tended to be very specific,” he argues. “Their copyright act has a lot of provisions that deal with very specific industry sectors, but industry changes, technology changes and all of a sudden they may find themselves with a problem, always chasing something they can never quite catch up to. At Canada’s pace of copyright reform, we’d always be 10 years behind so we’ve tended to deal with actions generically, without being very industry-specific. At any rate, I think that a 1921 act that has not been revised specifically for the information age and the Internet can react quite admirably. Our courts are reasonably good at being able to adapt and analogize. I have some confidence that even without any wholesale changes in the act to take Internet issues into

account, the courts will be able to handle any problems that come up in the copyright area.⁵²

Vaver is less certain. “You can legislate general principals,” he concedes, “but you want to be able to adapt them as new technology emerges, because the general principal may not have foreseen the particular spin that the new technology takes. When something new comes along, you may be able to apply the old law literally — but you may not want to for practical reasons. I don’t think the test of a good law is how long it lasts. I think you have to be responsive to events.”⁵³

At any rate, because Phase III negotiations have not yet begun, the Subcommittee’s recommendations and the arguments surrounding them are moot for the moment. In the interim, meanwhile, Industry Canada commissioned yet another study, *Liability for Internet Copyright Infringement* 52, which distinguished itself from the IHAC report because it took a hardnosed look at present legal issues. It was released in February 1997. The new paper recommended a series of practices to minimize the legal exposure of publishers and providers — ensuring written contracts, for example, or acting swiftly to respond to their inadvertent use of illegal materials when brought to their attention. But a section of the study concludes with an almost poignant plea.

What is required now is a dialogue between copyright owners and responsible Internet participants to clarify areas of uncertainty and assist in determining future revisions to both the Copyright Act and international copyright conventions ... The failure to engage in this dialogue will leave the field open for the courts to define copyright liability on the Internet on a case by case basis, which may or may not produce sensible policy. The Internet and its potential for global communication seems too important to leave solely to judges and individual litigants who may not have any interest or understanding of the wide-ranging policy issues surrounding the Internet.⁵⁴

The entreaty for fruitful dialogue may seem somewhat naive given the fractious way in which Canada's copyright policy has evolved and the way in which interested parties have often worked at cross purposes. Nonetheless, they are words worth heeding. Certainly, as periodical writers and their publishers go to court to fight over the use of copyrighted work on the Internet, the stakes are high. If publishers lose, their incentive to make use of the Internet may sustain a serious blow. And if they then choose not to mount the work of their writers, access to an important part of Canadian culture could be curtailed. If the writers lose, on the other hand, their fundamental faith in the copyright described by the Charter — "ownership is ownership is ownership" — is likely to suffer severely, along with their motivation to continue in their craft. That, too would be a major loss for Canadian letters. Yet, after 12 years of copyright studies and negotiations, one of those outcomes is likely. To prevent further divisive litigation, policy-makers may wish to consider the plea by the authors of the *Internet Liability Study* -- and undertake Phase III decisively, with appropriate dispatch and minimal rancor.

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“Forced Philanthropy”: The Writer’s Concerns

In 1995, the Periodical Writers Association of Canada (PWAC) a feisty, pragmatic coalition representing about 400¹ of the estimated 3,000 professional freelance periodical writers across the country,² conducted a revealing study. The purpose was to determine the extent to which members’ magazine and newspaper articles were appearing without their approval in commercial databases and, by extension, on the Internet. To conduct the study, the organization searched 24 databases for the articles of a random sample of 21 writers.³

The findings were instructive. PWAC learned that a total of 1,714 freelance articles by the 21 writers were readily available through 14 of the 24 commercial on-line databases the organization searched. The 14 databases were those run by the following: The Calgary Herald; CARL Uncover; The Chicago Tribune; Computer Database; Financial Post; Financial Times of Canada; Info Globe- Information Access Company; The London Free Press; Maclean’s Magazine; The Montreal Gazette; The Ottawa Citizen; The Toronto Star; and The Windsor Star. PWAC further learned that while 354 of those articles, 21 per cent appeared with the permission of the authors, 322 were the work of one writer who had assigned what are now referred to as electronic rights to a publisher as a condition of receiving future assignments. The remaining 79 per cent appeared on line without the permission of the copyright holder ⁴— that is, usually the author of the work in question.

The studies confirmed PWAC's worst fears. Copyright had been of primary concern to Canada's largest organization of periodical writers⁵ (and thus, a major focus of this chapter) since its founding in 1976. Never a formal trade union but rather an alliance of small-business people, the group's principal mandate at its formation was to establish professional practices within the periodical field. It wanted a vehicle through which members could exchange information about industry policies, offset the isolation of the profession and rally for higher and more-or-less uniform freelance rates and standards.⁶

Self-described as "a pack of lone wolves,"⁷ the early PWAC typically attracted strong individualists who recognized the importance of exchanging valuable intelligence about their profession, as well as the need for some form of alliance. "It wasn't uncommon in those days," says Eve Drobot, a founding member of PWAC, "for magazines to pay wildly disparate rates to freelancers with the same level of experience and ability. We organized in part to get the word out about who was paying what to whom — and to find out which publishers were taking advantage of the fact that we were working in isolation."⁸ To establish the group's professionalism, PWAC required that those seeking membership had a significant body of work published in a variety of periodicals of high and notable standard.⁹

Before PWAC was formed (and to this date, among those who are not members), Canada's periodical writers relied on their individual relationships with editors. Often, assignment contracts between editors and writers were verbal — and as long as an atmosphere of good will prevailed, this arrangement worked well. Too frequently,

however, there were disagreements between the two parties.¹⁰ If a story took a turn that neither writer nor editor had foreseen, for example, there was no industry norm for resolving how to pay the writer if the work therefore no longer suited the editor or the publication. As well, if an editor performed a particularly heavy-handed edit on an bylined article without showing the final version to the writer for approval before publication, the writer had no recourse.

Conversely, if a writer's information proved erroneous, if he delivered an article past deadline, didn't perform the necessary rewrites or in some other way behaved unprofessionally, there was no forum to which an editor could turn for mediation.

Before PWAC members organized, they often complained that they were "at the mercy of editors who could decide quite cavalierly not to use writers they felt were troublesome or uncooperative."¹¹ Writers who negotiated individually with editors often found themselves at a disadvantage — being careful to curtail their criticism of editing they found questionable, for example, or agreeing to payment and terms they felt were less than acceptable.

One of PWAC's first efforts, therefore, was to encourage the use of a written contract which the group had designed — a simple document outlining the fee, focus, approximate length and the deadline agreed upon between writer and publication. Another was to establish a Code of Ethics, detailing writers' and publishers' responsibilities regarding payment, rewrites, expenses and story rights.

It was another matter, however, to get publications to accept the PWAC contract and Code of Ethics as a standard; the group lobbied hard with editors, but never managed

to get a significant portion to use the contract and code as a basis of negotiation; in 1983, only a handful of publications — among them, *Saturday Night and Toronto Life* — had agreed to adhere to these documents.¹²

“Many editors like myself are reluctant to adopt the code and contract,” said Bee MacGuire in 1981 when she was editor of *Montreal Calendar* magazine, “because we worry that it sets the tone for an adversary relationship between ourselves and the writers something none of us want.”¹³

PWAC saw as another of its fundamental services the setting up of a mediation procedure. The theory was that writers and editors could bring their particular complaints about professional conduct to the group, which had organized an arms-length committee, comprised of both editor- and writer-representatives, to hear them. The individual relationships many writers had taken pains to establish with their editors would be therefore less likely to suffer because third parties conducted the negotiations when problems occurred.

In practice, writers used this service more frequently than editors — not because editors had fewer complaints about writers than vice versa, but because editors had the option of never again using writers with whom they were in serious disagreement.

Problems with editors aside, PWAC was beginning to realize that it would have to conduct negotiations on the use of the contract and code at the publisher level. Noting that “many editors may not be authorized to accept the PWAC contract without approval from their publishers,”¹⁴ the group began to focus on the latter in its attempts to make the contract the accepted industry norm. The strategy was to use the contract as a means of

opening discussion with publishers on all aspects of the trade, from professional practices to rates of pay. As a 1983 PWAC report indicates, publishers responded politely to these initiatives — but acceptance of PWAC's push for higher rates and uniform professional practices was not forthcoming.

Publishers are hearing us — and many acknowledge the validity of our arguments — but there is no strong motivation for them to act rapidly to institute change. The status quo has, in their view, worked for decades. Unless an industry-wide change occurs that makes the use of the contract to be in their best interest, PWAC Will still have to approach each publisher on a case-by-case basis and hope for the best.¹⁵

For those seeking higher rates in particular, this was not good news. In the field, a common definition of the freelance writer is “someone with a keyboard and a working mate.” Certainly, statistics support the perception that there is an inevitable financial penalty when periodical writers work for themselves. Standard magazine practice is to pay writers on a per-assigned-word basis,¹⁶ and a magazine feature usually runs between 500 and 3,000 words.¹⁷ National consumer periodicals pay the best rates, which in 1997 is in the range of \$1 to \$2 a word. Included in this group are business, women's, special-interest (about gardening or cars, for example) and general-interest titles, which are sold at newsstands, by subscription or distributed free of charge to targetted consumers — so-called controlled circulation. Regional and city magazines, similarly distributed, pay about half that. Trade publications, aimed at specific professional or business markets such as doctors or grocers, are next on the scale, paying about one-third. Finally, newspapers, on average, pay about 25 cents per word.¹⁸ At present, there are approximately 400 Canadian consumer magazines, 400 trade magazines¹⁹ and 101 daily

newspapers.²⁰ A busy and successful freelance writer produces about 36 articles a year for these publications.²¹ In 1996, PWAC reported that 86 per cent of its membership held post-secondary degrees and that 25 per cent held post-graduate degrees. The average member had more than 11 years experience as a freelance writer, while more than one quarter had worked in the field longer than 15 years.

Yet, largely because of marketplace conditions, the average earned income of members in 1995 was \$26,000 for women and \$32,000 for men. Thirty-two per cent of women and 14 per cent of men reported earned incomes of less than \$12,000 for the same year. One quarter of the membership earned between \$12,000 and \$24,000 that year, while only 20 per cent earned more than \$48,000.²² A reporter at the five-year level at a unionized paper, on the other hand, could expect to earn about \$50,000 a year.²³

Because freelance writers are self-employed, they are not eligible for employment insurance or government pensions and must themselves pay for dental and disability insurance should they wish coverage. The cost of this kind of financial security for freelance writers, usually part of the benefits package of salaried employees, can be as much as 20 per cent of the formers' gross annual income.²⁴

It is not an easy way to make a living, although freelance writers produce a estimated 80 per cent of all work appearing in Canadian monthly magazines. One way these authors have traditionally augmented their income is to re-sell their previously published stories on which they have retained their copyright. "Many notable Canadian writers, such as Pierre Berton, made their start in this business by inventively and

persistently re-selling their work,” contends freelance author Lawrence Jackson. “Many still do. Low fees make it necessary and copyright law makes it possible.”²⁵

Thus, alarm bells went off in the early days of PWAC when several members reported their work had been directly translated into French and used in Quebec-based periodicals without authorization²⁶ or just lifted wholesale from one publication and used without permission elsewhere.²⁷ In the 1979 PWAC book *Words for Sale*, the association warned newcomers to the field that “even well-meaning editors,” who had bought first-time-rights only, had been known to pass articles on to colleagues at other magazines:

Some editors ... overlook the question of rights-ownership, blithely assuming that you will be pleased at the extra exposure for your story and that you will be glad to accept whatever unexpected fee is entailed.

If you take that attitude, you are probably cheating yourself. Chances are, any unnegotiated fee will amount to far less than what Publication B would actually be willing to pay. And even in negotiation, its first offer is unlikely to be its best offer. Sometimes, second-rights payments are downright insulting. PWAC has recorded one example, for instance, where a large U.S. publication paid a writer \$17.50 for second rights to an article.”²⁸

Reports of blatant copyright infringement troubled the association deeply. But the incidents were hard to track, making it difficult to inspire the membership into action over the copyright issue. At any rate, in 1979, most members said they regarded the fight on the intellectual property front as secondary in importance to pushing for increases in rates for first-time publications.²⁹

The opportunity for action on copyright did present itself to PWAC in the early 1980s. During this era, PWAC took a leadership role in the area of reprography licensing

rights — that is, it lobbied for the creation of what would ultimately become CanCopy, a federally incorporated, non-profit organization established by publishers and creators to administer photocopying rights.³⁰

CanCopy evolved as a direct result of arguably the first skirmish over electronic rights in Canada. It came about in this way. In 1983, *Canadian Business* magazine was placing material from its back issues on microfilm for non-profit, archival use in public and university libraries — standard industry practice for publications to this day.³¹ Under Canadian copyright law, libraries can lend all types of copyright work, even if they charge a fee, if there is “no motive of gain.”³²

Canadian Business, however, had licensed the right to microfilm its contents to a private company, which that year was sold to a larger, now-defunct U.S. conglomerate called MicroForm.³³

“It was the dawn of the computer era,” explains Michael Fay, a past-president of PWAC and an architect of CanCopy. “The conglomerate was among the first to form a database in hopes of making a profit, using, in part, *Canadian Business* material it had received to put on microfilm.”³⁴

MicroForm did so likely because it determined that as the age of the so-called knowledge economy dawned, there was a serious potential market for the information in the articles the company had on hand. It thus began selling what it chose to think of as its wares to business and private clients, who needed research in various areas of endeavour. For a set fee of \$15 per hour,³⁵ clients could buy the right to enter the database, peruse it at their leisure, copy to disk material they deemed important, and use it as they saw fit.

The originators of the *Canadian Business* material on MicroForm's database consisted of two groups — staff writers and freelance writers. While the former forfeit their copyright as a condition of employment, the latter, by contrast, retain theirs.

"All of a sudden, one of our members — an early surfer — discovered articles in the MicroForm database which he had sold to *Canadian Business* on a one-time-right basis," says Fay.³⁶

As intellectual property law stood in 1983, there were no specific provisions for — or references to — who held the copyright on materials contained in computer databases (See Chapter II). There was a legal argument to be made, in fact, that databases were just electronic versions of libraries.³⁷ In the absence of precedent, however, jurisprudence traditionally has held that works in any form appearing without authorization represent a violation of copyright.³⁸ As well, Canadian copyright law expressly states that unless a contract indicates otherwise, a freelance author sells to the commissioning periodical first rights to publish a work, after which ownership of the article reverts to the author. Yet the freelance writer in question, who himself had paid to gain access to the database, had received no additional revenue from *Canadian Business* for such use of his material.³⁹ With the perceived *Canadian Business* violation, PWAC sensed an issue around which it could mobilize its membership.

Canadian Business had had no knowledge of what MicroForm was doing with its back issues. Still, in the eyes of PWAC, it was *Canadian Business* — not MicroForm — who had to answer for any copyright infringement, since the former, however unintentionally, had licensed MicroForm to use the material in the database.⁴⁰

In light of this, Fay, who steered PWAC's copyright committee at the time, devised a strategy for negotiating with *Canadian Business*: the establishment of a rudimentary copyright collective, based on existing examples in France, Norway and Germany. Copyright collectives represent their affiliates — writers, artists and publishers — by licensing the photocopying of their works collectively for a fee and returning the resulting royalties to their members. Those wishing to reproduce members' work must acquire licences from the collectives: doing so allows them to legally copy a vast array of material — books, periodicals, journals and newspapers — without violating the law.⁴¹ Fay successfully moved to get PWAC's then-350 members to assign the second rights to their articles to a fledgling collective created by the organization. The thinking was that with those signatures in hand, clearly showing that the writers' organization owned these rights, PWAC would be in a better position to negotiate with *Canadian Business*.⁴²

Fay says *Canadian Business* never questioned that the writer's copyright had been violated. "The negotiations with *Canadian Business* were really easy, because at that point [the magazine] was a good citizen in the periodical world," he recalls. "They were embarrassed and they were willing to compensate us for what had happened. So we negotiated a settlement with the publisher that our collective would receive a payment. It wasn't thousands; it was hundreds. But what it did was establish a principle."

PWAC's small collective was the first of its kind in English Canada.⁴³ (A similar collective, formed by the *Union des écrivaines et écrivains Québécois* [UNeQ], was already in operation in Quebec.) As a result, during Phase I negotiations on copyright reform in the early 1980s, the writers' organization played a significant role in the

establishment of CanCopy, now a broad-based organization which administers the rights to published print materials throughout Canada, with the exception of Quebec.⁴⁴

CanCopy, a member of the International Federation of Reproduction Rights Organizations (IFRRO), also represents published works from around the world through agreements with like-minded international organizations in the United States, the United Kingdom, France, Norway and Australia. Through its licences, CanCopy provides access to published works and ensures writers and publishers of reprography-related income. In 1997, PWAC members, affiliated with CanCopy, each received cheques of \$400 — their individual share of the monies in CanCopy's coffers collected on their behalf.⁴⁵

After the establishment of CanCopy — and before the advent of the commonplace use of the Internet — PWAC's interest in copyright issues temporarily waned. There were incidental rights scrimmages between writers and periodicals, but no all-out battles. On occasion, publishers would issue cheques to Journalists for their stories with the proviso on the stub that payment was for first-time and "electronic rights."⁴⁶ Unsuspecting or coerced authors would cash these cheques, an action tantamount to agreeing to the terms. But observant writers would cross out the offending phrase to ensure that their material legally could not be made available, electronically or otherwise, without their permission.⁴⁷ So it went.

But with the widespread use of the Internet in the early- to mid-1990s, publishers began setting up more databases and new websites, using the work of freelance writers to fill them. More and more writers were finding their copyrighted works on the Internet,

made available to anyone with a computer, a modem and an Internet Service Provider —and PWAC launched into action again.

Publishers regard these websites as not-for-profit “promotional tools,” and argue that these and the databases are simply extensions of the original periodicals — and thus don’t call for additional payment to writers. (See Chapter IV) Ironically, among the more hard-line is CB Media, publisher of *Canadian Business*, whose 1983 precedent-setting acknowledgment of electronic reproduction as a separate right has been effectively annulled — the victim, some argue, of a conveniently short corporate memory.⁴⁸

“Technically it’s not republishing,” says Peter MacDonald, head of new media for CB Media. “Or if it is, it’s a different format. A writer may say: ‘If you want me to write a feature for the magazine and you’re willing to pay \$2,000 for it, that’s fine. But if you’re going to put this up on the web, then I want another \$500.’ They’re perfectly free to say that. We’re also perfectly free to say no. If it’s important enough to get the feature written, we won’t put it up on the net and we’ll just pay the \$2,000 for the print piece. But to tell you the truth, I think that’s very unlikely. I think we’d say: ‘Fine. We can’t come to an agreement here, so it ‘just doesn’t get done.’ From my point of view, that’s a perfectly reasonable position.”⁴⁹

Freelance writers, on the other hand, view this as a “rights grab,” countering with statistics about revenues from electronic databases. Indeed, SIMBA Information Inc., a U.S. research firm, estimates the market for business and professional information in electronic format totalled \$21.05 billion (U.S.) in 1996.⁵⁰ The rhetoric has heated up, as

several seminal events served to crystallize the polarization between writers and the publishers.

As Phase II of copyright reform got underway and lawyers debated whether works appearing in databases and websites constituted reproductions (See Chapter II), large media concerns, prompted by their attorneys, woke up to the value of a standard contract with writers. It was by no means the simple contract the writers had negotiated for in the previous decade.

In January 1996, two of the largest producers of consumer magazines, Telemedia and Maclean-Hunter, designed new contracts that would have freelance writers turn over all rights to their works to the publishers, thus allowing the to use freelance material on the Internet, and in any other capacity, at will."⁵¹

By mid-1996, Thomson and Southam had issued similar contracts. Some, such as Maclean-Hunter's *Chatelaine*, offered what writers saw as a token one-per cent fee for using their stories on the Internet —amounting to \$20, for example, against an original story fee of \$2,000.⁵²

Around the same time, *The London Free Press*, owned by the Blackburn Media Group, issued the following contract, typical of the new breed, which it urged creators to sign:

You grant to us exclusive first publication rights in the *London Free Press* together with a nonexclusive, perpetual, royalty-free license to publish, distribute and reproduce the Work, in whole or in part, in print, electronic or other forms, and the right to grant sub-licences to any person, including any member of Blackburn Media Group, to do any of the above. The Work will be published and reproduced in association with your name except where the editing of the Work is substantive; in such event, you hereby waive your right to have the Work published or reproduced in association with your name.⁵³

PWAC and other freelance writers responded with anger. Writers began to use words such as “theft” and “violation” to characterize situations in which their work appeared on line without their permission or in reference to what they regarded as draconian new contracts. One such writer was Jim Carroll, author of *The Canadian Internet Handbook*. In the mid- 1990s, he received a letter from Plesman Publications, owners of *Computing Canada*, for which he wrote a regular column, asking him to immediately sign and return it.

“... [I]t had a nice conversational tone,” Carroll recalled in an article in the Canadian Association of Journalists *Media* magazine. “Yet buried among the nice, pleasant terminology was the seemingly innocuous phrase that Plesman wanted the ‘first North American serial rights for work to be published in a single issue of one publication, irrespective of the forms in which the work was published. These include, but are not limited to, its publication in printed form, on-line electronic database, CD-ROM and microfilm.’ ... It turns out ... Plesman wanted me to give up all electronic and other rights to my article, without any chance of me ever sharing revenue which might have derived from that article. Since I had started to educate myself about copyright law, I realized that this was wrong. Plain and simply, wrong.”⁵⁴

In the same issue of *Media*, freelance writer Kim Goldberg wrote that: “A pernicious, invisible censorship is spreading across the nation, as voices are stilled one by one at newspapers and magazines where freelancers have contested the theft of their work or refused to sign new rights-grabbing contracts. And the implications of this

creeping oblivion are grave not only for Canadian journalism, but for Canadian society.”⁵⁵

Writers thus began framing the fight against electronic “rights grabbing” as a cultural issue as much as an economic one. In a CBC Radio national commentary aired May 28, 1996, Lawrence Jackson said:

I suggest that you, as the readers of Canadian magazines and newspapers, have more at stake in this dispute than freelancers do. Writing for a living is a very, very hard business, but those who do it well have no lack of opportunity. We write for magazines and newspapers not because the pay is any good — it’s lousy, and few of us make more than 30 per cent of our income from these media. But we write for them because we want to engage in the life of our society. We want to share our experience and our opinions with other Canadians, but not at the cost of being systematically cheated. So if these abusive contracts drive the best writers into other kinds of work, the writers themselves will probably come out ahead. It is you, the readers, and the industry itself, which will lose.

... Copyright law does not exist merely for some striving for fairness — a notion that seems quaint in the context of an industry run by conglomerates. Copyright law exists because the whole society benefits when creative people profit from their work. The more directly and abundantly they do so, the more good work they produce, and the more society benefits. An industry which evades this principle condemns itself to mediocrity. Our publishers are well on the way to doing just that.⁵⁶

Freelancer authors also responded with lawsuits. In the spring of 1996, 12 freelance writers who worked regularly for the *Montreal Gazette* served legal notice on the parent company, Southam Inc., for copyright violation. The 12 charged that Southam had made unauthorized use of their articles on Infomart, the company’s full-text database. (The group has since expanded to 18.)⁵⁷

In the summer of 1996, author Heather Robertson also launched a \$100-million class-action suit against Thomson Corporation for violation of “electronic publishing

rights. She took the action in response to what she considered a copyright infringement, occurring in October 1995, based on the following circumstances: *The Globe and Mail's Report On Business* magazine legally ran an excerpt from her book, *Driving Force*. Thomson had contracted with the book's publisher, McClelland & Stewart, for one-time publishing rights only. In short order, however, the excerpt appeared in InfoGlobe, the company's database. InfoGlobe clients were therefore able to read and download the excerpt for a fee.⁵⁸

In a statement, Robertson's lawyer, Michael McGowan, demanded a permanent injunction against further such copyright violations.⁵⁹

At the time of this writing, neither lawsuit has been resolved. However, on August 13, 1997, U. S. District Judge Sonia Sotomayor ruled on a related American lawsuit, *Tasini vs The New York Times*, and the results don't bode well for the suits of Canadian writers. The case was a copyright suit brought by the 4,500-member American National Writers Union (NWU) against The New York Times Company, Newsday Inc., Time Inc., Lexis/Nexis and University Microfilms Inc. charging them with using work electronically without permission of the copyright holders. The decision was seen as a defeat by American freelance writers.⁶⁰

The judge ruled that, even when there is no contract relating to electronic rights, a print publisher may put the writings of freelancers on databases and CD-ROMs that include the entire textual content of the print publication. She ruled as well that publishers were not obliged to further compensate writers.⁶¹ The judge based her conclusion on an interpretation of American copyright law which deals with "collective

works,” — works, including periodicals that bring together various contributors. The law states that even though individual authors can retain the copyright in their portion of the work, the publisher can claim copyright on the collection as a whole. She therefore ruled that electronic databases were merely “revisions” of collected works and that the publisher, therefore retained the right to such compilations. The judge didn’t rule on whether she viewed the freelance writer’s individual right and the publisher’s collective right as exclusive or non exclusive.⁶² At any rate, the ruling was a realization of the precise concern expressed by Canadian copyright scholar David Vaver regarding the potential conflict between corporate “creators” and individual authors (see Chapter II).

Sotomayor rejected the argument, however, that publishers can claim electronic rights if there is only an initial grant of First North American Serial Rights or First Publication Rights. She also rejected the *New York Times* argument that databases constituted archives. Nor did she allow publishers to claim electronic rights by stamping the back of the check they send freelance writers as payment.

“On the one hand,” said Jonathan Tasini, president of NWU and the lead plaintiff, “the ruling seemed to implicitly accept that freelancers who have not signed away electronic rights can license the reuse of an article to databases. On the other hand, it finds that publishers have a competing right to automatically put all their published articles onto those same databases without permission from writers and without having to share revenue.”⁶³

The NWU plans to appeal the decision.

“One important positive aspect of the ruling,” wrote Tasini, “is that it does not apply to electronic uses other than Nexis-type databases and CD-ROMs that contain all the articles from a given periodical. In other words, a publisher must still negotiate with you to obtain the right to put your article on its web site, the America Online site or any other use that does not completely reproduce the print publication.”⁶⁴

While awaiting legal decisions in Canada, meanwhile, PWAC is in the process of establishing an electronic rights collective, independent of CanCopy, which now has a publisher as executive director — a factor that has made many members wary.⁶⁵

In response, PWAC is spearheading the drive to form the Canadian Creators Coalition, which at present includes the Canadian Association of Photographers and Illustrators in Communications, Concerned Writers of Canada, The Canadian Science Writers’ Association, SF Canada, Alberta Writers Federation, the Travel Media Association of Canada and the Writers Union of Canada. The coalition now represents about 2,000 Canadian creators.⁶⁶

The PWAC decision to form a new coalition rather than extend its affiliation with CanCopy is wrong-headed, according to Michael Fay.

“The group is framing this as a romantic battle between writers and publishers,” he maintains. “In reality, it’s about rights holders. As Judge Sotomayor ruled — and as, no doubt our own judges will heed — publishers have some claim to compilations. “[PWAC is] still trying to do this creator-based thing. In 1982, I represented 350 writers. In order to get the government to grant you licensing rights, which is what it’s all about, I recognized we needed a huge base of repertoire. You don’t get that by saying you’re only

going to represent one arm of the process. We had to get the publishers equally involved. So we did. You can't have just a creators' collective in Canada, because no one's going to license you. Look at the Tasini decision: you have to recognize the publishers. The only way is to have both at the table and talk about licensing 'our' rights.

"It's going to get down to two big infrastructures — Netscape and Microsoft. They aren't publishers, they're mediums — and these are the ones that are battling it out, If you look at it squarely with the same kind of reasoning I was using in 1982, you'd say 'yes, in fact, as a Canadian book or periodical publisher I have interests in common with my creators against the medium that's going to produce this stuff.'"⁶⁷

Regardless, for the moment PWAC is pursuing its course.

"Canadian publishers are systematically excluding writers from the revenue generated by electronically distributed freelance articles," the Mark Zuehlke, the immediate past-president of PWAC maintains. "[They're] doing this by flagrantly infringing the copyright of freelancers and re-writing the terms of standard industry agreements entirely in favour of publishers."⁶⁸

If Fay is right, such rhetoric may ultimately isolate PWAC from the very publishers with whom the organization sought to negotiate shortly after the group was first formed — and they may shoot themselves in the foot in the process.

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“Why the Uproar?”: The Publisher’s Response

Even after all these months, it’s worth wondering: When the freelance contribution doesn’t change from paper to on-line, when the newspaper tells you to negotiate a fee based on any extended application, and when no one’s material is being used without ... a contract, why are some freelancers in such an uproar?¹

The writer is Kirk LaPointe, editor of the Southam Newspaper chain’s *Hamilton Spectator*. He is also former editor of the chain’s wire service, *Southam News*, parent of the *SouthamStar Network*, which distributes features to the 17 daily and 33 weekly newspapers that Southam owns in Canada, and which together have an average circulation of 1.5 million.² In these various capacities, LaPointe has been a key negotiator since 1992 on the issue of the electronic rights of freelance writers whose articles have been bought by Southam.

In an attempt to address the legal and practical ramifications of freelance writers’ work for Southam appearing on the Internet, the chain introduced a new contract in 1996.

The salient terms of the Southam contract are as follows:

- (1) As a freelance supplier and not as an employee, the freelancer will create and supply material to the Publisher. In consideration of the fee, the Publisher shall have:
 - (i) The right to reproduce the material once in [the newspaper in question] and in any other daily newspaper published by Southam Inc. that chooses to reproduce it, on payment by such newspaper of a reprint fee in accordance with the schedule set out below; and
 - (ii) a nonexclusive licence to reproduce or sublicense the reproduction of the material, in association with the name of the freelancer, by any means or technology, as part of the database of the relevant newspaper or newspapers or in products derived from it.
- (2) The freelance warrants that each item of material supplied will be an original work by the freelancer, that the freelancer is entitled

to enter into this agreement, and that the publication of the material will not violate the rights of copyright interests of any other person or entity, the freelancer will indemnify and hold harmless the Publisher for any loss or damage that the Publisher may suffer by any reason of any breach by the freelancer of this warranty. The Publisher may edit all material for publication. Neither publication nor positioning are guaranteed.

(3) The freelancer retains copyright in the material, including the right to alter and/or publish the material elsewhere. We will not republish your material in print except with your prior approval. Either the publisher or the freelancer may terminate this agreement at any time, but termination shall not affect rights granted hereunder in previously submitted material.³

The contract further stipulates that each of the following newspapers will pay 10 per cent of the original fee for freelance material they choose to reprint: the *Vancouver Sun*, *Vancouver Province*, *Calgary Herald*, *Edmonton Journal*, *Windsor Star*, *Kitchener-Waterloo Record*, *Hamilton Spectator*, *Ottawa Citizen* or *Montreal Gazette*. If a freelance work is republished in any other newspaper in the Southam chain, the writer receives five per cent per newspaper of the original fee, usually 25 cents a word.⁴

The Periodical Writers Association of Canada finds LaPointe's arguments disingenuous. The organization balks at Southam contract language, specifically at its reference to the "licence to reproduce or sublicense the reproduction of the material, in association with the name of the freelancer, by any means or technology, as part of the database of the relevant newspaper or newspapers or in products derived from it."

"Under this contract," PWAC protested in its occasional copyright-issues newsletter *Contracts Watch*, "freelance writers would ... become a source of free content for various electronic products, like databases, CD-ROMs and Internet websites. If you sign this contract, Southam can pay you once and use your work indefinitely, 'as part of the relevant newspaper or newspapers or in products derived from it.' In other words, in the age of electronic publishing, they can do what they like with your work, for nothing. If your work has value in a variety of new media, Southam wants it all."⁵

Indeed “electronic rights” for freelance material is an omnibus term covering a range of different means of disseminating information. As generally understood at present, “electronic rights” are broken down into the following categories: the right to provide libraries with freelance material for the purpose of archiving that material; the right to make freelance articles available to a publisher-generated in-house database service or to an independent service such as Lexis-Nexis or Compuserve; the right to include freelance material on CD-ROMs as part of a compilation; and the right to post a story on a publisher’s website.

The electronic delivery of information is only in some instances a profit-making venture for publishers. In terms of archiving, before the electronic transfer of data became commonplace in the late 1980s, public and university libraries generally paid an intermediary organization to place material from magazines and newspapers onto microfiche. As well, they paid a set fee to publishers for the content in question — a standard industry practice. Libraries still do so, but they now also archive content via electronic delivery from publishers; there is no additional fee to the library for this delivery form. Users who copy material from library archives pay a percentage of the fee for photocopying to the Canadian licensing agency CanCopy, a portion of which is returned to the copyright holder.

In the case of independent databases, such as Compuserve or Lexis-Nexis, publishers, for a fee, provide their print material to the companies. The companies in turn charge clients a set fee — usually a per-hour rate — for access to these databases, returning a royalty to the publishers each time database clients make use of the material a publisher has provided. The case of *Canadian Business* magazine is an example. Prior to September, 1997, CB media, the magazine’s publisher, provided Compuserve with about 100 articles from the publication. Peter MacDonald, director of new media for *Canadian Business*, says the average article would earn the magazine about 17 cents all told in royalties from Compuserve. (In September, 1997, *Canadian Business* discontinued its

relationship with CompuServe and established its own website where it now posts articles from the magazine.)⁶

MacDonald says a magazine website and a formal business database serve different purposes.

“To my mind,” he explains, “online databases are pure research. Nobody ever goes to Lexis-Nexis for fun. It’s business. It’s a high-ticket item. What you’re paying for is a whole lot of convenience. What we offer on the *Canadian Business* magazine site is the opportunity for interested people to browse through a few articles of the current issue: as well, we’ll have a few past articles on that will be of current interest for some reason or another. Eventually, if we have enough up there, it will be searchable by database. But compared to a Lexis-Nexis or a CompuServe, our website database will always be much smaller and more specific. What you’re getting when you come to the *Canadian Business* site is what you get when you come to the magazine — *Canadian Business* editors’ judgments on what you will be interested in ... Maybe there will be some of the same kind of information that might appear on a business database, but in a completely different context and with a completely different function.”

The trend in recent years has been for newspaper publishing companies to establish in-house databases, such as Southam’s Infomart and Thomson’s InfoGlobe, which cut out the need for an intermediary. These companies make the content of their databases available to consumers for a fee, and collect all profits from the venture.⁷

In Canada, the legal debate over whether publishers have the right to post (either on in-house or independent databases) the material of freelance writers who have licensed to them first-time print rights remains unresolved: the issue is at present before Canadian courts. But in a similar court case settled this summer (*Tasini vs New York Times et al*), a U.S. judge ruled that as long as an article is placed on line in the context of the entire issue of the newspaper or magazine in which it first appeared, the act qualifies as archiving, for which there are already provisions under copyright law. Thus,

an additional electronic right to post the article is unnecessary (see Chapter IV). It remains to be seen whether Canadian courts will follow this precedent.

Whether there is a need to establish a third form of electronic rights — the right to include freelance material on CD-ROMs as part of a compilation — remains a grey area. Again, if a freelance writer's work is placed on a CD-ROM in the context of the entire periodical in which it originally appeared, the courts may rule that this is another form of archiving and may opt to decree that there is no need for additional electronic rights. If material is placed on a CD-ROM out of context, however, it may be regarded as a "re-publication," an act that would require the copyright holder to license the material.

Finally, there is the fourth form of electronic right — the right to post a writer's work on a website. It is commonplace, for magazines in particular, to abbreviate articles to highlight on a website and to select one or two articles from a current issue to appear in full on a website.

Key to the issue of electronic rights is whether copyright infringement requires that the document in question be "fixed" — that is reproduced either in print form or saved digitally to an electronic file. Phase III of the federal government's copyright reform process will address the issue, but if legislation is determined by an Information Highway Advisory Committee recommendation (see Chapter II), the law will deem even "browsing" — that is, reading an article on screen — as a form of copyright infringement. Regardless, the periodical publishing community's introduction of new contracts, says PWAC, is designed as an end-run to encompass whatever new rights Phase III legislation may cover.

Kirk LaPointe says the introduction of contracts merely removes the danger of copyright infringement and is simply good business practice. "When Southam told freelance contributors in 1996 that we wanted to institute contracts," he says, "we did so because we believed that too much involving editorial operations was done without contracts — and that wasn't good for anybody. There was too much room for

misinterpretation on both sides concerning which rights were bought and how the material would be used.” He adds that the standard contract designed by Southam was straightforward and clear, if sweeping. “There was no fine print,” he says. “It was about as direct as you can get. The contract said that Southam would buy one-time rights to publish an article in any or all of its newspapers and in all its forms.”⁹

The new contract, according to LaPointe, actually benefits the freelance community. He says it clarifies the exact terms under which articles can be used, by explaining how Southam distributes material throughout its network. “Now that everyone understands,” he says, “there is going to be more such [freelance] material on the network. But everyone is clear about its presence and can negotiate with that understanding.” As well, he says freelance writers, who must now sign Southam’s contract if they wish to sell their works to the publishing company, will see advantages resulting from having their writing made more widely available to newspapers across the chain. “[Freelancers’ work appearing on the Southam system] has led to many group-style purchases of material by newspapers when it’s clear, or even just likely, work will be used outside the local market,” he says. “Although it’s too early to tell, freelancers are bound to benefit from this. And since more editors are now seeing freelance work from other markets, it has led to some interest elsewhere in Southam of some contributors’ work.”¹⁰

LaPointe also maintains that Southam is protecting freelancers from their own naiveté. “[The contract] has prompted Southam editors, mindful that not all freelancers are good negotiators, to agree to a down-the-road supplement to the initial freelance fee if the work unexpectedly plays in another newspaper,” he says. “Southam has paid for the monitoring of such play. Granted, the supplement (10 per cent a market) isn’t enough to get rich. But it does remind both parties that the work has non-local value that should be recognized.”

As well, says LaPointe, freelance writers are not the only ones forced to adapt to the freewheeling nature of the Internet and what he describes as its Wild West climate.

“Large and small organizations alike are finding their best work — many millions of dollars of editorial investment they thought was exclusively their own — used in big and not-so-big ways (radio newscasts, company newsletters, e-zines, neighbourhood flyers, media monitoring services) without credit. ... [On the web] there is an ethic of sharing and an expectation of instant and free content — and if you don’t provide it, someone else will. And there is no apparent Canadian solution, because the virtual neighbourhood honours no borders. Of all the cultural forces of the Internet, this one is perhaps most unstoppable.”

He further asserts that conventional publishers are at present not making money off the Internet. “Neither Southam nor any other media organization I know has profit, much less an investment recoup, on its Internet horizon. Any time now, the big guns could pull back.”¹¹

PWAC and other freelance writers object to this argument, referring to it as “compulsory charity.”

“Southam Newspapers is losing money,” the organization protests, “so they want [freelance writers] to write for free.... The more free copy Southam can acquire by bullying freelancers, the fewer staff it need employ.”¹²

PWAC also decried a new contract created by Thomson Inc., publishers of *The Globe and Mail*, that was put into effect in January 1997. The agreement, which freelance writers must sign to work for the newspaper, provides an across-the-board three percent additional fee for electronic rights. In a letter informing contributors of the contract, *Globe and Mail* editor-in-chief William Thorsell told freelancers: “Over the years without explicit agreements, we feel we have paid for what we used: print rights and archiving, along with electronic access to archived material. Copyright and its related resale rights have always stayed, and will continue to reside, with the freelance creator.

... While we believe that the electronic future is bright, I would like to repeat the oft-heard truism that nobody is making much money in cyberspace.”¹³

PWAC past president Mark Zuehlke bristles at the argument. “While that may be true for many websites, commercial databases have proven to be a cash cow for some publishers,” he says. “In fact, they represent more than 40 per cent of Thomson’s very substantial revenue. In a less than subtle carrot-and-stick approach, Thorsell notes that big names like Robert Fulford have already signed the contract — although he does not say how much extra payment they received for doing so. If they can sign away their rights, the implication seems to be, why not [everyone]?”¹⁴

The use of formal contracts, once rare in the industry, became standard industry practice in 1996, as more and more publishers chose to establish a presence on line on the Internet, either with their own stand-alone websites or as part of a larger group of products offered by such services as Canoe, 60 per cent of which is owned by Sun Media Corporation, the former *Toronto Sun* Publishing Company and 40 per cent of which is owned by BCE Media Investments. Recognizing that there was a legitimate argument to be made for restricting periodicals from electronically distributing the articles of freelancers who retained copyright to their work, publishers sought advice from lawyers and devised new agreements to ensure their companies were on safe legal ground. The result was the establishing of contracts, such as those now routinely used by Southam and Thomson.

In a certain sense, PWAC must examine itself to understand why members are now finding fault with the new contracts publishers have created. From the outset of the era of on-line publishing, PWAC has taken a confrontational stance with publishers, employing heated rhetoric in describing the posting of writers’ copyrighted work on websites as “theft.” If PWAC had a justifiable concern over the cavalier manner in which publishers assumed the right to offer electronically the creations of writers, by framing the debate as a battle between publishers and writers, the freelancer’s group alienated the

publishers and alerted them to the need for contracts to avoid litigation. Thus, PWAC forced the hand of the publishers to come up with legally binding agreements, with terms not always favourable to the freelance writer.

“The new contracts effectively removed the issue of copyright from the table,” says Michael Fay, former president of PWAC and one of the architects of CanCopy (see Chapter IV). “In creating contracts, the publishers were saying: ‘yes, we acknowledge that you hold copyright on some property that we want to use on the net. But if you want to write for us again, you’ll be obliged to license your electronic copyright to us in some capacity, at a fee we’ll set.’ The result is that freelance writers control their copyright, but must accept rates according to what the market will bear. So it’s a bit of a pyrrhic victory.”¹⁵

Because the supply of freelance material generally exceeds demand, many publications have followed the lead of Southam and Thomson in offering token rates for electronic rights to writers. In this country, a partial list of those that have agreed to pay for electronic rights includes *Association Journal* (10 per cent of first serial rights for unlimited electronic use), *Toronto Computes* (15 per cent for the same), *Grain* magazine (50 per cent), Nova Scotia’s *Open to the World* (50 per cent), Montreal city magazines *Voir* and *Hour* (50 per cent of database sales) and *Quill and Quire* (\$5 to \$15 depending on length). Those that offer higher percentages for electronic rights, such as *Grain*, generally pay bottom-of-the-scale rates for first-time serial rights: in *Grain*’s case that amounts to \$30 to \$100 per item.¹⁶

A distinction should be drawn here between the issue of freelance writers’ electronic rights as they pertain to newspaper publishing and to those same rights as they pertain to magazine publishing. Concentration of ownership has left few independent newspapers in Canada. The Special Senate Committee on Mass Media reported in 1970 that the three biggest newspaper chains had increased their share of daily circulation from 25 to 45 per cent since 1958.¹⁷ The Kent Royal Commission reported in 1980 that

the figure had risen to 57 per cent.¹⁸ Today, the figure is 72 per cent.¹⁹ In the Canada of the 1990s, two corporations — Hollinger (the corporate parent of Southam) and Thomson — control nearly 70 per cent of all daily newspapers, equalling 55 per cent of circulation. In three provinces, Hollinger owns all of the daily papers; in Ontario it owns three-quarters of them.²⁰

When more independent newspapers were operating, freelance writers had greater leeway in the marketplace for selling reprints of their stories. A freelance writer who produced a travel feature about India for the *Montreal Gazette*, for example, stood a reasonable chance of re-selling the identical feature to another market such as the *St. Catharine Standard*, which until this year was an independent paper. For that second sale, he might well receive a rate that rivalled the first. In the current environment, however, in which most newspapers are members of large chains and writers are obliged to sign contracts governing the distribution of their work throughout these chains, freelancers now generally face a cap on what they can command for re-selling their work.

By contrast, although there is considerable concentration of ownership within the magazine industry — Maclean Hunter, Telemedia and CB Media representing the largest conglomerates²¹ — by their nature, magazine chains rarely share a writer's copy (except in translation) and do not therefore negotiate for reprint rights governing other English-language publications in their chains. As such, a writer whose work appears in *Maclean's* magazine, for example, in theory is free to pitch the identical story to the newsmagazine's sister publication, *Chatelaine*.

Nonetheless, in 1996, magazine publishers also instituted contracts to ensure their right to post freelance-created articles on line. They have three principal reasons for wanting a website presence on the Internet, says Ian MacGugan, executive editor of *Canadian Business* magazine.

"First, I think it's a really good way to give a magazine a profile internationally," he points out. "In our own case, anybody on the Internet who wants information on

Canadian business will likely find our website. Second, it's a way to gain experience in an area that is likely to be profitable at some point in the future and to give us a chance to explore other profit-making opportunities there. One thing that may eventually be possible is to sell advertising at the site to make it a revenue spinner.

"A third strand in all of this is that it does increase our ability to talk to readers. If people have a strong opinion about an article, often they will sit down at a typewriter or word processor and turn out a paper letter and stick it in an envelope and mail it. But they are far more likely to respond if they can fire off an e-mail. So we're hoping that it's going to build up some sort of goodwill and interactivity with readers that will be perceived as being a nice benefit to have." ²²

For all these reasons, *Chatelaine*, the flagship magazine of publisher Maclean-Hunter with Canada's largest circulation (997,000 combined French and English editions), became one of 23 consumer magazines to launch a website between 1994 and 1996; ²³ *Chatelaine's* resides on the Canoe database. As *Chatelaine* began putting articles on line, it formulated an agreement that all writers were obliged to sign if they wished a relationship with the women's periodical.

Chatelaine's contract was somewhat more generous to freelance writers in the rights it sought. In signing the contract, writers agree to the following:

We (*Chatelaine*) are buying, in respect to the work you are providing, the right to first publication of the work, the right to edit the work, the right to translate the work into all languages we publish, and the right to publish such translation. We are also buying the right to store, copy and distribute the work as published by us, or an edited version thereof, on microfiche and in any electronic medium, and the right to use the work as published by us, or an edited version thereof, in any promotional material associated with our publications. ²⁴

By thus allowing their work to appear on-line in *Chatelaine's* website residing on the Canoe service, writers agree to accept an additional \$10 for articles of between 500

and 1,500 words, \$20 for works of between 1,500 and 3,000 words and \$30 for works of more than 3,000 words. For an item of less than 500 words, the basic fee — usually one dollar per word — is deemed to include the additional right. Regular columnists receive a lump sum additional electronic-rights payment of \$40 annually.²⁵

Chatelaine's contract in fact represents an improvement for writers, says its principal architect, Ivor Shapiro, the magazine's managing editor until May 1997. "Those who have written for us in recent years were expected to turn over all electronic rights along with first print rights," he points out. "The new contract actually limits *Chatelaine*'s rights quite substantially."²⁶

Shapiro says that *Chatelaine*'s new contract merely extends to electronic rights the magazine's longstanding policy of purchasing first-time print rights. Just as writers retain their subsidiary print rights — that is, the right to re-sell their work for republication in a book or another magazine in Canada or elsewhere — they may also re-sell the subsidiary electronic rights to their work to other media.

"Suppose someone were to write an article about breast cancer for our September 1998 issue," he explains. "We might include it in an electronic edition of that issue, or a snapshot of that issue on our website. As in past years, we will also include it in electronic copies of the issues that are sold to third-party databases such as Lexis-Nexis. We are also buying the right to archive a story in an on-line site that we establish. For example, we could put the breast cancer story, or a summary of it, in a health-issues library on *Chatelaine*'s on-line site. However, even if we do archive a story, the writer is still free at any point to re-sell it to any other electronic media interested in buying it. As

well, we don't have the right to include the article in a book or CD-ROM about some subject such as women's health. To take it out of context of the issue amounts to republication — and the writer retains republication rights, except as regards our on-line site.”²⁷

Shapiro acknowledges that the additional fee for electronic rights is small, but says the token payment merely confers the *right* to select any article in the magazine for the site, but does not reflect a commitment to post the article on line. On average, about 30 per cent of the freelance stories in a given issue is likely to appear on line.

Canadian Business magazine's MacGugan is another to make the point that publishers are not reaping financial rewards for making their material available on line. His magazine also introduced a contract, which writers must sign to work for the publication. He says the decision to enforce a contract was administrative.

“The difficulty for us at that point is that we then have to look at the expense of trying to track which articles have electronic rights attached and which don't,” he says. “So we've made it our policy that if you do an article for us, you sell us the non-exclusive rights.

“Our take on things is that we should pay something for electronic rights, something that reflects whatever added value we might hope to derive from it. The problem is, that amount tends to be in the pennies at the moment. So we set up a flat-rate structure, where essentially we buy the non-exclusive electronic rights that we're interested in for a set fee that's dependent upon the length of the article. I think that anyone who looks at the real economics of the situation, as opposed to what people like

PWAC would like to have people believe, finds that, in fact, it is a more than fair deal.”²⁸

For columns, *Canadian Business* now pays an additional \$40 a year for non-exclusive electronic rights,²⁹ and between \$10 and \$30 for individual articles, depending on the length.³⁰ That fee gives *Canadian Business* the right to republish a complete work or an edited version in an online site in which the magazine participates.

MacGugan makes a distinction between the right to re-sell full issues of *Canadian Business* to databases such as Lexis-Nexis and the right to mount individual articles from the magazine on the Internet.

“The right [to re-sell an] entire issue is something that we’ve bought for years,” he says. “Libraries [have always put our magazine] on microfiche and the advent of other forms of distribution doesn’t really change anything. So what we’re buying in addition to the stuff that we’ve historically purchased is this right to republish work on an online site. Essentially the difference comes between cases in which we’re archiving an entire issue and cases in which we’re putting individual articles up.”³¹

Publishers like to lump all electronic-rights issues into the “archive” basket: there are clear legal rules allowing archiving and it is often these precedents they cite to address all electronic rights. Hugh Stewart, executive director of Canoe, the on-line content service, says the copyright debate may hinge on whether the courts decide, as they did in August in the *Tasini vs New York Times et al* case in the U.S. (See Chapter 4), that archiving of the full contents of magazines and periodicals does not violate copyright.

“I think you may see a change in the climate,” he predicts. “There could well become a blurring of the line between databases and large websites when it comes to archiving. Most publications do have some kind of contract with a Lexis-Nexis or Infomart. Even publishers themselves are not particularly thrilled to see their content being given away for free. If we can prove a value in the marketplace — because the

web started as a pretty wide open and Grateful Dead kind of experience; ‘find what you want and it’s free, man.’ — if we could get people to accept that you need to pay for a search or you need to pay for this level of information, then we will do that. But right now the climate doesn’t support it.”³²

By and large, publishers recognize that the Internet — and the new forms of “publishing” that appear on it — are having a radical impact on the periodical industry in ways that it is still too premature to evaluate. There is a frontier atmosphere in cyberspace at the moment, wherein laws of civil behaviour are still in the process of being worked out. In this atmosphere, there is much posturing and rhetoric from both writers and publishers.

Publishers see themselves as bargaining in good faith, albeit from a position of strength. It is, from their point of view, a buyer’s market: there is always a new batch of freelancers coming on stream eager to be published — many of whom have faced a difficult job market. As well, there are as yet no new definitive laws declaring for the rights of freelance writers: if publishers wish to set a precedent, they must assume a hard line now in hopes that creators will acquiesce and accept the publishers’ contention that electronic rights are merely extensions of rights the latter have held all along.

Furthermore, for the moment, publishers are reacting with confusion about the profit potentials of the Internet. Not unlike the experience of telegraph entrepreneurs when that technology was first made available, business people at the end of the 20th century have not yet quite figured out where the inevitable profit they envision from the Internet will come from.

Until they can see the black ink, however, they will continue to minimize their costs wherever they can. At present, that means playing hard ball with freelance writers.

Endnotes

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Copyright Revisited: A Survey of Some Current Thinking

Humanity now seems bent on creating a world economy primarily based on goods that take no material form. In doing so, we may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others find in their works. Without that connection, and without a fundamental change in consciousness to accommodate that loss, we are building our future on furore, litigation and institutionalized evasion of payment except in response to raw force.¹

In Canada in 1998, the arena in which authors, the Internet and periodical publishers intersect remains frontier territory; like most frontiers, it fosters a tendency among those within its boundaries to jockey for power. What follows is an exploration of some of the current, tentative approaches the various players involved have taken toward settling the issue of who, how and whether to pay for freelance material mounted on the Internet. These fall into the following general categories: regulating and licensing responses; technological responses; and ideological responses.

1. Regulating and licensing responses

Slow off the mark to embark on Phase III of copyright reform (see Chapter II), Canadian lawmakers have yet to accommodate the vocabulary — let alone, the reality — of world-wide networked computers. Therefore, when legal debates arise about copyright ownership, the courts must rely on Phase-II language to account for new technology. (For example, under Canadian law, software programs are at present categorized as “literary works.”)² Even more problematic, without definitive legislation to guide them in copyright issues pertaining to the Internet, courts are obliged to make law, rather than merely to apply it. As such, the courts must manipulate existing copyright legislation —

knowing a third phase of reform is in the offing, which may or may not substantially redesign the law — to resolve on a piecemeal basis cases now before them. The result is that judges must make determinations on complex issues, such as whether a work made available on a publisher's website or database without express author permission, is merely "archived" in the traditional, legal sense, or whether it constitutes a copyright infringement (*Robertson vs. Thomson*, see Chapter III). In turn, these judgments, made in an atmosphere of some uncertainty and upheaval, will nonetheless serve as precedents for future cases.

Legislative means of resolving issues of copyright and the Internet fall into the group of what might be termed the regulating and licensing approach. The federal government has undertaken a series of studies to help determine Canada's appropriate course of action in this regard. One of the most definitive recent studies was Industry Canada's *Liability for Internet Copyright Infringement* produced in 1997.³ In it, the authors outlined four distinct policy development positions the federal government might take in considering copyright reforms, indicating the advantages and disadvantages of each.

The first policy option of the report calls for the free hand of the marketplace to determine the value of intellectual property made available on the Internet. While this alternative sees changes to existing copyright policies, these changes would be minor. Essentially anti-regulatory, this approach argues that present-day copyright legislation is effective for non-digital media but little better than useless for digital media. It suggests copyright on the Internet is extremely difficult to administer — and conceptually

obsolete. The reasoning is that in an environment in which electronic versions of “creations” supplant actual physical versions, issues such as importation and national jurisdictions are still rooted in pre-digital copyright models.

This view also stresses that the problems involved in ensuring reliable payment, in tracking individual uses (without infringing on user privacy), and in determining the value of a work, make copyright administration and practice untenable. Even technological solutions to copyright, such as encryption (discussed in some detail in this chapter under technological solutions) can prove pointless if technology can unscramble the encrypted transmission and allow for pirated copies.

This position ultimately argues, therefore, that copyright policies and mechanisms do nothing more than retard the further development of new media applications and services. In the end, according to this option, the perceived value of a work to a particular user will ensure that the work is used, and the principle of “if it’s worth copying, then it’s worth paying for” will prevail. In this world of unfettered use of digitized content, there will be some form of recompense devised for the creator and producer. In a sense, then, for the creator, ensuring public access and sales of product (physical or electronic) become more important as a marketing tool than receiving royalty payments or attempting to trace violations of the creator’s moral rights.” The market, in this view, determines how works will be used, who will be paid and how.⁴

Copyright watcher Esther Dyson concludes that the marketplace model will likely prevail and envisions a return to a less mediated relationship between the consumer and the producer of artistic works on the Internet.

In essence, advertisers will sponsor lives and online forum hosts rather than content. Creators and performers will be under contract — the best ones at high prices, since they will be free to negotiate for the highest bid. Just as prominent patrons such as the Medicis sponsored artists in the Renaissance, corporations and the odd rich person will sponsor artists and entertainers in the new era. The Medicis presumably had the pleasure of seeing or listening to their beneficiaries and sharing access to them with their friends. This won them renown and attention as well as a certain amount (we hope) of sheer pleasure at the art.⁵

In this respect, then, the publishers' push to introduce new media or multimedia clauses into existing contracts (see Chapter IV) is one way that the "market" addresses remuneration outside the strict policy framework of copyright law and is thus a viable response to the problem of copyright and new media. However, these contracts themselves are based on the existing foundation of copyright policies and on the assumption that they can be made to apply to new media as well as traditional media. Thus, this proposed *laissez-faire* marketplace approach does not truly break away from the strictures of existing copyright law, but instead potentially reinforces the present litigious atmosphere between freelance writers and publishers.

Another approach in the study calls for revamping the existing copyright framework substantially. This version sees existing copyright law as basically sound but in need of renovation. The present copyright framework, in this scenario, is seen as complex and unmanageable: This argument maintains that with digitization, new media works are all "essentially strings of ones and zeroes: works become effectively equivalent, and do not require the complex regime that was established for non-digital media."⁵

The Industry Canada study determined that there are at least two ways of revamping the legislative framework. One version envisions multimedia or new media works being specifically defined in the Copyright Act and regarded as another type of work, added to the list of “literary,” “artistic,” and “dramatic.” Multimedia or new media works could then be covered under the same kinds of rights as other works. Certain specific aspects of new media rights could be addressed in the revised Act (e.g. a definition of “substantial” portion, a broader “fair dealing” provision, a signal right that specifically addresses communication by telecommunication), but otherwise, the same rights would exist for new media. Furthermore, with the addition of multimedia or new media to the types of works named in the Act, the Copyright Office could incorporate multimedia works as a specific category of works for registration purposes.

The government could then encourage the creation of registries, and even a “registry of registries” that includes works of all types. This could involve the development, in collaboration with creators and industry, of a central registry, or it could mean facilitating the dissemination of software and general tracking mechanisms, so that each transaction is automatically recorded (this is the model of electronic commerce, or of an intellectual property accounting “engine”). This revamping of the copyright framework could therefore address the specific challenges of new media and ensure that copyright can adapt to any kind of work. It can also help creators, distributors, producers and users resolve the problems associated with the administration of copyright in new media.

A different route in the context of this option would be to revise the Copyright Act to address more fundamentally not specific types of works, but just “works” (writ large) or “creations.” In this case, all works would have the same copyrights, where relevant, and the regime would be harmonized (i.e. the same terms, exceptions and rights for each work, irrespective of the type of work).⁶

A third option elaborated by Industry Canada envisions the Canadian government creating a *sui generis* right for multimedia (or new media) works. A precedent for this option exists — the Integrated Circuit Topography Act of 1990, which offers protection for electronic “chips.”⁷

Not all countries have such *sui generis* integrated circuit protection, and another *sui generis* right (in this case, for new media) would require international harmonization and coordination if it were to follow the model set by the international copyright conventions, such as Berne and the UCC. Already, though, the protection for integrated circuits is described in NAFTA, and therefore, international harmonization has begun. In the case of integrated circuits, NAFTA states that protection applies to layout designs of semiconductor circuits, or to articles incorporating protected circuits. The protection echoes copyright, in the sense that the rights holder has the right to prevent the unauthorized import, sale or commercial distribution of protected designs. The term of protection in NAFTA is between ten and fifteen years, which is shorter than both patent and copyright.⁸

The *sui generis* new media right could therefore draw on the integrated circuit protection as outlined in NAFTA or in Canada’s own Integrated Circuit Topography Act.

It would allow a reconsideration of terms of protection (long enough to protect the creator, but short enough to allow for continuing innovation). It could also incorporate those aspects of multimedia databases that are valuable, but not copyrightable, such as the facts and information available on the database.

As with the revamped copyright option, though, the *sui generis* right would most likely require considerable attention to the definition of “new media” or “multimedia”, given the fact that in a multimedia work, there are “layers” of rights holders (e.g. composers, authors, publishers, and, if there is a neighbouring right, producers and performers), whose works are still protected under copyright. The *sui generis* right option could be presented as a way of retaining the existing copyright framework, which is familiar to creators, producers and users, for non-digital media; and addressing the particularities of new media in a specific statute.⁹

A fourth policy option the study discussed entailed tinkering with existing legislation — but introducing new modes of administration to buttress the laws. This option supports the continuing use of copyright to protect works, but suggests making small changes to the policy, and larger changes to the administration, to guarantee that copyright remains relevant to new media. “Tinkering” would involve ensuring that future rights are technology-neutral. Administrative strengthening might mean giving industry incentives to implement technologies that limit unauthorized reproductions and uses, track rights and determine payments. (See technological solutions, below.)

This fourth option could further give government a role in promoting education on copyright issues among creators, producers, distributors and users. It could also

encourage the federal government to lobby, in the international arena, for world-wide rights registry (for multimedia, audiovisual, or other categories of works) and supporting Canadian-based collectives to establish specific registries in the interim. (The Copyright Act allows for the creation of new collectives. If a collective is considered necessary, therefore, the industry might form its own for multimedia.) Essentially, though, this system would place the responsibility for refining copyright practices on the creators, publishers and packagers of articles themselves. It would involve ensuring that collectives share information, and that registration of works be done on a wider scale.

This “policy tinkering” scenario is not necessarily incompatible with two of the other options discussed (revamping the copyright framework or devising a *sui generis* right for new media). Indeed, slight revisions to the copyright framework could precede more fundamental, longer-term reconsiderations of that framework.¹⁰

Indeed, in the realm licensing solutions to copyright problems on the Internet, events have overtaken theory. Several organizations have attempted recently to launch new copyright collectives, based, in part, on existing collectives such as CanCopy, that will ultimately involve a means of distributing compensation to freelance writers whose works appear on the Internet.

Many kinds of licences are available through CanCopy. A transactional licences is a one-time only licences designed for those who do not photocopy much published material. Cancopy also provides comprehensive licences for large-volume users such as government, universities, colleges, provincial ministries of education for schools across the country, corporations and non-profit organizations.¹¹

In particular, CanCopy licenses the ministries of education in British Columbia, Alberta, Saskatchewan, Manitoba and Ontario for province-wide coverage of photocopying in publicly funded schools. The federal government has a joint photocopying license with CanCopy and its Quebec equivalent run by the *Union des écrivains du Québec* (UNEQ) for copying by federal government employees. Ontario and Alberta are also licensed to cover photocopying by provincial civil servants.

CanCopy has licences with all universities outside Quebec and most community colleges. Through its licences, CanCopy provides access to published works and ensures writers and publishers of their legitimate income.¹²

The CanCopy model is being used as the basis for The Electronic Rights Licensing Agency (TERLA), a collective still under construction and spearheaded by the Periodical Writers Association of Canada. TERLA was also inspired by an American collective, the Authors Registry, which was launched in 1996.¹³

The Registry, sparked by the explosion of electronic publishing, is itself loosely modelled after the music world's ASCAP, founded more than 80 years ago when, in a similar industry change, songs that had brought income only from sheet music sales began to yield royalties from radio, records and live performance.

Now that the Authors Registry is delivering royalties and fees to freelance writers, say members, it is in publishers' best interest to pay for re-using their work. If they don't, contributors can block use of their material on websites and in research article databases, which, since they are sold on the merits of their comprehensive collections of thousands

of articles, can ill afford to have chunks of their content lacking because of authors' objections.¹⁴

Publications such as *Harper's*, *Publishers Weekly* and *The Nation* were the first to agree to use the Authors Registry's services. The agency has already issued payouts, the first totalling more than \$150,000 (US), to hundreds of writers around the country. The cheques, ranging from a few dollars to nearly \$1,500, cover licence fees for photocopying and publishers' splits of income from electronic publishing.¹⁵

Harper's said its contributors are pleased with the magazine's new practice of splitting electronic database income with them. "Before, some writers and agents allowed us those rights; others didn't," *Harper's* vice-president and general manager Jeanne Dubi told *Contracts Watch*, the widely read electronic newsletter from the American Society of Journalists and Authors (ASJA). "But in the past several months, since we changed our contract and started sharing income through the Authors Registry, we've been able to acquire electronic rights for every original piece in the magazine. We seem to have gotten rid of a big headache."¹⁶

Dan Carlinsky, a spokesman for the Authors Registry, told a reporter: "In creating the Registry we've made it possible for publishers who want to, to do the right thing. For those who don't, we take away their excuse."¹⁷

Since its founding, the Authors Registry has gathered in its corner as cooperating organizations virtually every important writers' group and nearly 100 literary agencies, whose members and clients total more than 50,000. Those writers are eligible to enroll without charge. Other, unaffiliated writers may join as individuals for \$10.¹⁸

Another U.S. organization, the National Writers Union (NWU) has set up its own collective, the Publication Rights Clearinghouse (PRC), a licensing project for obtaining payment for writers whose work is distributed electronically. The UnCover Company, owner of the UnCover database, which has more than seven million articles from 17,000 periodicals, is the first company to participate in the PRC.

The UnCover company and the National Writers Union have created a transaction-based writers royalty system in the new electronic media. Under the agreement, the NWU will clear copyrights and distribute royalties to writers for fax-delivery orders from UnCover.¹⁹

“With UnCover’s vision and support, we are helping to point the way for every writer, graphic artist, videographer and photographer who struggles to get fairly paid in the new digital markets,” Jonathan Tasini, president of the NWU said when the PRC was formed in 1996. “We expect to turn this model of copyright clearance into the standard of the electronic database industry.”²⁰

Both NWU members and non-members are eligible for PRC enrollment. All must fill out an enrollment licence and pay a one-time initial copyright clearance fee (\$20 U.S. for NWU members and \$40 U.S. for non-members.) The PRC can only obtain payment for articles writers still own the rights to. UnCover, is accessed through the World Wide Web and online libraries. Users have articles faxed to them, and in most cases pay \$8.50 U.S. per article, plus, for PRC licensed material, a copyright fee of \$2.55. The PRC receives that copyright fee and deducts an administrative charge of 20 per cent for

members, 25 per cent for non-members. The writer gets the rest — \$2.04 for NWU members, \$1.91 for non-members.²¹

Canadians may join either the Authors Registry or the Publication Rights Clearinghouse, but the very proliferation of rights collectives underscores a problem articulated by Michael Fay, former PWAC president and one of CanCopy's architects.

"There has been a tendency to re-invent the wheel," he argues. "Existing collectives have proven very efficient in amassing and distributing compensation for freelance writers. There is power in numbers and in one large bargaining unit. With so many new collectives springing up, there is a sense that writers are divided as to who should be minding the store. Ultimately, I think that's going to work against freelancers when it comes to negotiating with the databases and their parent service providers regarding rates for electronic rights."²²

A further problem with collectives is their general efficiency. One who questions their viability is John Perry Barlow, a member of the Grateful Dead rock group and a founder of the Electronic Frontier Foundation, a think-tank dealing with Internet issues. He also authored the seminal essay on copyright and the Internet, *The Economy of Ideas*. "Broadcast media gave us another payment method for a virtual product: the royalties that broadcasters pay songwriters through such organizations as ASCAP and BMI," he wrote in that essay. "But, as a member of ASCAP, I can assure you this is not a model that we should emulate. The monitoring methods are wildly approximate. There is no parallel system of accounting in the revenue stream. It doesn't really work. Honest."²³

2. Technological Responses

Another emerging method for resolving copyright disputes between publishers and writers regarding on-line material entails employing various technological means to track the use of copyrighted material on the Internet. A method currently gaining a following is encryption, a system that installs a “burglar-bar” of sorts into on-line material to protect it from being stolen. Encryption involves implanting a code in an on-line document, thereby effectively denying users access to the document until a copyright fee is paid. (Watermarking, a similar system designed to protect on-line graphics, overlays a secondary image, generally consisting of the logo or seal of the organization which holds the rights to the primary image. It allows the primary image to be viewed, but still marks it clearly as the property of the owning organization.)²⁴

IBM is one of the companies at the forefront of encryption. In April 1997, it opened infoMarket, an electronic-content clearinghouse. The company will provide access to various databases — on the Internet and elsewhere — and offer the owners of the data the means to protect against pilfering as well as to collect money from paying customers. “It’s a way to see our data on the Internet and actually get paid,” says David Hoppmann, president of Intell.X, a division of electronic-database provider DataTimes Corp.²⁵

So far, IBM has persuaded 30 companies, including *Eastman Kodak*, *Xerox*, *Reuters*, *America Online*, and *Yahoo!* to use its technology or provide their content via the service. Their biggest client so far is *America Online*, which will use IBM’s technology as a pay-per-view mechanism for AOL customers using the Web. IBM will take from 30 per cent to 40 per cent of each transaction, depending on the information

provider. Other online services or private electronic databases charge anywhere from 15 per cent to 50 per cent of sales.²⁶

InfoMarket provides a substantially different approach to electronic services. At present, most information bought over a network is paid for on a subscription basis. Customers can download information from a particular service, such as *Lexis-Nexis* or *America Online*, for fees based on the amount of connect time or a flat monthly charge.

On InfoMarket, customers pay only for what they use — there is no service fee. The content providers control the information, running their own databases and setting their own prices. IBM provides an infrastructure, giving business researchers or consumers a way to search for information and handling all the billing.

Publishers can use InfoMarket to offer a variety of pricing schemes — for example, one fee to view the information and another to print it out. As well, the service addresses a serious issue for information providers: capturing royalties when material is purchased and then freely distributed within an organization or to the public. With InfoMarket, IBM claims it can keep track of the information so each user will have to pay a fee to view the data.²⁷ Thus, the millions of people who search the Internet daily and who, with the click of a mouse can make electronic copies at will, may find themselves required to pay a copyright fee.

At the heart of InfoMarket is an encryption technology IBM calls Cryptolope. The analogy is that of a secure “envelope” or “package,” containing data — and information on how much the data cost. Clients must register with the IBM clearinghouse to get an electronic key that will open their cryptolopes. Once the package is opened, the

cryptolope delivers a message to the clearinghouse, which notifies the publisher and bills the customer. IBM is working with Xerox Corp. to develop software that lets the content owner control the cryptolope. For example, a cryptolope could be sent out that is time-sensitive or restricts viewing to certain subscribers only. ²⁸

IBM is not the only company trying to find ways to charge for content on the information highway. Electronic Publishing Resources Inc. (EPR), a six-year-old California company, is developing similar technology to protect digital rights and payments. EPR will provide the software tools for other companies to build their own electronic-commerce setups. ²⁹

Another technological solution involves tracking Internet document use “by the click.” An American corporation, Clickshare, is one such company taking this approach. Clickshare tracks movements, manages multiple-site subscriptions and settles charges for digital transactions — down to as little as 10 cents per query — as users jump among multiple unrelated sites on the Internet’s World Wide Web. ³⁰

Conceivably, services such as Clickshare could give publishers a simple means — and thus, an economic incentive to cooperate in selling information and paying writers royalties — for units of information of a dime’s value or less that may be too small to be cost-effective for traditional payment methods.

3. Ideological responses

...Since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression. And since it is likewise now possible to create useful tools that never take physical form, we have taken to patenting abstractions, sequences of virtual events and mathematical formulae — the most unreal estate imaginable.

In certain areas, this leaves rights of ownership in such an ambiguous condition that property again adheres to those who can muster the largest armies. The only difference this time is that the armies consist of lawyers. ³¹

There is a growing body of literature that argues that, despite the desire of a few interest groups to shore up traditional approaches to copyright, the very notion of copyright must be rethought in the context of the digital age.

In Chapter I, this thesis attempted a broad discussion of copyright at three significant junctures in time marked by momentous technological breakthroughs and the evolving social theories which were, in part, the offshoot of these developments. The chapter explored the concept and practice of copyright as it progressed within the Western liberal context following the invention of the printing press in 15th-century Europe, and proceeded with a discussion of copyright law and practice during the 19th-century Industrial Revolution, a time when the seeds of political economic theory were first emerging. The section then concluded with an examination of the late 20th-century phenomenon of world-wide linked computer networks, and their impact on copyright within the social-theory “framework” of postmodernism.

This chapter now briefly revisits the three organizing theories more specifically, with a view to applying each model to the task of illuminating some of the issues surrounding current copyright dilemmas in the periodical trade.

The first comprehensive approach to copyright in the West, developing as we have seen in an atmosphere of liberal thought with the advent of the printing press, manifested as a system of regulations and privileges governed by the state. The state,

seeking control over “heretic” material which could now be reproduced easily, established a licensing system whereby printing privileges were granted only to those who agreed to strict censorship. Printers accepted these conditions because such state-granted licences restricted entry into a lucrative market. Yet, strictly pursuing the tradition of regulations and privileges in the present day may prove to be an error in logic.³²

By the 17th century, in some large part because of the widespread availability of books (see Chapter I), notions of intellectual “property” began to appear. But, as John Michael Makoto Dykes argues, while tangible forms of property are easily defined and understood, since they are, by definition, contained in real space, intangible forms of property are a source of confusion.³³

As we saw in Chapter I, John Locke played a key role in defining Western thought with respect to property. According to Locke, the most basic “property” is the most personal: “every man has a ‘property’ in his own ‘person.’” Locke binds the right of self-preservation to this property, making it intrinsically wrong to deprive others of this right, as this would trespass upon the property of others’ lives.

But Locke also suggested that the universal agreement by society to endow coins with value removed the bound on property:

...[T]hus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life. And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.³⁴

The commonplace use of money allowed man the capability to horde wealth, and thus, to enlarge his own personal property. One can collect all of the acorns, eat what he can, and then trade the rest for money — that is, “sell.” The fundamental question with respect to property changed from “How long can this keep me alive?” to “How many dollars is this worth?” In other words, property became intricately intertwined with the concept of money, since money became the unit of measure of property.

Dykes maintains that is at this point that intellectual property joins the equation. Intellectual property is the most intangible form of property that we know of. It cannot be touched, removing it from the realm of old property laws; it can nevertheless be owned, since it has monetary value. In short, the introduction of money opened the way for intellectual property.³⁴

The late entrance of this form of property is reflected in what John Perry Barlow calls the “central economic distinction”³⁵ between intellectual property and physical property, namely, the theft of physical property deprives the owner of the stolen good, while the “theft” of intellectual property merely deprives the creator of the pecuniary benefits of the idea.

However, although intellectual property in and of itself is intangible, until recently, imparting to others the right to that property required it to assume some physical form — a book, a record, a computer disk. But with the introduction of the Internet in the late 20th century, intellectual property can now be conveyed directly through the intrinsically empty vessel of the computer.

Indeed, the evolution of the notion of “property” to include “intellectual property” is one form of abstraction that occurred in the era of the Enlightenment; another such abstraction was the use of money to represent value (recently made all the more abstract because money itself is now essentially a series of staccato computer signals). But perhaps the final abstraction has occurred in this age, when intellectual property has lost its last vestige of tangibility; it no longer needs to be packaged in any form at all to be distributed.

Technological solutions to copyright protection notwithstanding, information that is all content and that takes no physical form is hard to claim as one’s own. Without their casings, moving across the world instantly and widely, books, recordings, articles, works of art cease to be immutable. Not only can an author’s name be deleted as these creations move from hard drive to hard drive, but the very creations themselves can be added to, altered and reshaped. Information moves faster and mutates in a manner that makes it extremely difficult for copyright to keep up.

Today, intellectual property bears less and less resemblance to the Lockian notion of property and more and more resemblance to the intellectual produce of the pre-Enlightenment era. Information delivered without physical form is a lot like lore; stripped of its physical trappings, it loses its hard edge of credibility. It can be passed on from computer to computer in much the same way minstrels passed stories and songs along from village to village, embellishing, enhancing and improving them as they moved along. Indeed, Barlow draws that parallel.

From the Neolithic to Gutenberg (monks aside), information was passed on, mouth to ear, changing with every retelling (or resinging). The stories which once shaped our sense of the world

didn't have authoritative versions. They adapted to each culture in which they found themselves being told. Because there was never a moment when the story was frozen in print, the so-called "moral" right of storytellers to own the tale was neither protected nor recognized. The story simply passed through each of them on its way to the next, where it would assume a different form.³⁶

Thus it is getting harder and harder to reconcile the fledgling liberal Enlightenment-era notion of intellectual property in the current environment of intangibles and abstracts that characterize intellectual property today and that are more properly compared to the pre-Enlightenment era. Yet present intellectual property legislation is rooted in the tangibles and concretes of the Statute of Anne. Government continues to serve as a mediator in the marketplace between creators and consumers of those creations and to try to act as a regulator of ones and zeros. It is questionable whether the government can form policy based on liberal notions of intellectual property which hold great theoretical and nostalgic charm, but which may prove wrongheaded and outmoded in the face of rapidly changing technology.

The second organizing theory, that of political economy, would seem to support the government's "tinkering and better administration" option. From the perspective of some political economists, the rampant intangibility that is transforming the delivery of information leaves creators vulnerable if they don't form strong collectives. Thomas Jefferson wrote of ideas:

[Their] peculiar character, too, is that no one possesses the less, because every other possesses the whole of [them]. He who receives an idea from me, receives instruction himself without lessening mine; and he who lights his taper at mine, receives light without darkening me.³⁷

As Ronald Bettig has pointed out, Jefferson is describing one form of what economists call a “public good,”³⁸ characterized by the fact that consumption of such a good by one person does not reduce the amount available for consumption by others. But another property of a public good is that it cannot be withheld from one person without withholding it from all. For example, to use Jefferson’s taper analogy, it would not be possible to exclude any one individual from “consuming” fire.

This second property therefore discourages an entrepreneur from undertaking to supply such services as street lighting or policing because he would not have the power to force the community as a whole to pay him and he could not exclude anyone who did not pay him from consuming these goods.

Stanley Besen has also pointed out that in this context, intellectual and artistic creativity is a public good insofar as it remains intangible — for example, a song heard in passing on the radio or a television show watched but not taped. But as soon as a song is recorded onto a CD or TV show is taped, these become tangible private goods and the owner of these private goods can limit access to and use of them.

Besen argued that as long as intellectual property remains a public good, revenues from creators’ works will decline, along with their incentive to continue producing. Yet as intellectual property becomes less tangible, it becomes harder and harder to restrict its use to a paying group of consumers.³⁹

There have been precedents to resolving this dilemma of non-paying users. The most obvious one is the model in which the non-paying user himself becomes a commodity to be sold to the information provider. Television offers an example of this:

The content of sitcoms and dramas is merely a means of delivering an audience to an advertiser. If the content quality is appealing enough or if the demographic it reaches is specific enough, consumers will respond in acceptable numbers by purchasing the items advertised on such shows. In this way, intellectual property is just a medium through which consumers are delivered to advertisers.

Political economists such as Bettig argue, however, that this need to design intellectual “product” around the demands of advertisers reflects a culture that has become hopelessly commodified.⁴⁰

The Industrial Revolution provided an opportunity for mass production and distribution of intellectual property, and thus, for the advent of the cultural broker, one of the prime agents of commodification (see Chapter I). In today’s Internet setting, the cultural broker takes the form of an Internet Service Provider, a database company or a website manager. Such intermediaries create capital for themselves and their clients by performing distribution and promotional services which presumably add value to the cultural product. The concern among political economists is that this group is becoming too powerful and capable of exercising too much control over content.

Political economists envision an oligopolistic Internet environment governed by the likes of Microsoft and perhaps one or two other service providers. By controlling production, content and distribution world wide — classic vertical integration — these firms could perpetuate a system that allows their infinite growth at the expense of authentic culture.

From the political economy perspective, it is possible to predict what impact vertical integration will have on copyright on the Internet. Using the film industry as an example, Bettig predicts:

The new communications technologies will eventually be brought into the marketing systems controlled by the dominant core firms. However, control over the use of film and video works remains problematic. With digital storage, transmission and recording devices, it is possible to produce perfect copies of films and television programs. The next challenge ... is how to capitalize on these new technologies without exacerbating the problem of unauthorized uses. Accordingly, for filmed entertainment companies, it is imperative that they become partners in the various partners that are developing and deploying these technologies in order to ensure that they will include encryption, scrambling and/or self-destructing mechanisms to prevent unauthorized uses and copyrighting of copyrighted material. ⁴¹

From a viewpoint that regards culture as commodified, therefore, it would seem in the best interests of the large Internet Service Providers to ensure that some form of the existing copyright law be maintained and that technology be improved to prevent unauthorized use of materials — if only to further their self-interest. But, if the political economy model has anything to teach freelance writers, it is that their prime drive should be toward building a strong collective. When writers line themselves up against publishers, both possibly stand to lose control of their products and incomes in the face of what Bettig calls aggressive “core firms” such as Microsoft. What is required, rather, is one large and cohesive collective that can represent the interests of creators and producers in a powerful way against those of the cultural brokers.

Finally, from the “framework” of postmodernism, copyright is seen as a restrictive mechanism that prevents the free flow, exchange and evolution of ideas. As Barlow remarks:

[O]ur static media, whether carvings in stone, ink on paper, or dye on celluloid, have strongly resisted the evolutionary impulse, exalting as a consequence the author’s ability to determine the finished product. But, as in an oral tradition, digitized information has no “final cut.”⁴²

Material placed on the Internet, from some postmodernists’ viewpoints, is like a color on an artist’s palette; it is a starting point, a resource, an element meant to be manipulated and massaged to create whatever reality the user so chooses. From this “perspective,” information is seen as a living thing and copyright its jailer. Indeed, any physical manifestation of an idea is suspect — and contrary to an ethos that sees information as a moving, vital force of nature. As an anonymous writer suggested on the Internet:

Print literature necessitates a clear division between producer and consumer, between reader and writer. The producer of a book easily becomes the owner of a certain “knowledge,” becomes privileged through holding the licence on that cultural capital. The consumer buys (into) this commodity. Hypertext counteracts this hierarchy of privilege, ownership and prestige likewise. Like any electronic text, hypertext can be freely reproduced, and then altered or disseminated. It lends itself handily to plagiarism and the flouting of capitalist attempts at copyright control of text and language as commodity. Through it we may steal knowledge as we have need of it; no one need go hungry.⁴³

The postmodernist sensibility endorses a policy of abandonment of all copyright practices, particularly as they pertain to the Internet. The Internet is seen as a kind of anarchical free-for-all where ideas can roam unfettered and can be plucked up and used

by whoever comes across them. The postmodernist values material on the Internet specifically because of its impermanence, appendability, mutability and because it can be read in a non-linear manner. It sees these characteristics as a means of decommodifying writing. And the postmodernist perceives the “impermanent” text on the Internet as free and the work of many. “Attention has shifted from the trinity of author/work/tradition to that of text/knowledge/culture,” the anonymous “author”-postmodernist wrote on the Net. “The evolution of literature is replaced by a synchronic literary sign system freeing the literary text from psychological, sociological, and historical determinisms.”⁴⁴

Because postmodernism abhors a copyright, there can be no reconciliation between copyright and the Internet, many postmodernists would argue; indeed the Net is seen as a medium that serves as a very metaphor for postmodernism. It facilitates an aesthetic that Todd Gitlin describes as “a certain constellation of styles in cultural works: pastiche; blankness; a sense of exhaustion; a mixture of levels, forms, styles; a relish for copies and repetition; a knowingness that dissolves commitment into irony; acute self-consciousness about the formal, constructed nature of the work; pleasure in the play of surfaces; a rejection of history.”⁴⁵

Some of the less radical aspects of postmodern thinking with regard to copyright may find themselves entering the mainstream in the form of the more radical government policy, but it is unlikely at this stage that government policy will support the notion that copyright protection is a totally obsolete concept.

In the end, it is likely that freelance writers will find an accommodation that allows them to earn money for their works appearing on the Internet. Likely, in the short

run before Phase III, this accommodation will take the form of case-by-case court assessments that individually settle the question of ownership and recompense; simultaneously, new technology will temporarily provide writers with some control over their material.

In the slightly longer run, if and when Phase III negotiations get underway, we are likely to see new-media rights incorporated into existing copyright law — either as separate rights or grouped together with existing rights in a more concrete and better defined manner.

In the rather more far distant future, however, we may indeed deem intellectual property obsolete. To end with a quotation from John Perry Barlow:

Jazz improvisations, stand-up comedy routines, mime performances, developing monologues, and unrecorded broadcast transmissions all lack the Constitutional requirement of fixation as a “writing.” Without being fixed by a point of publication the liquid works of the future will all look more like these continuously adapting and changing forms and will therefore exist beyond the reach of copyright.⁴⁶

Endnotes

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