'Prey to Thievery'

The Canadian Recording Industry Association and the Canadian Copyright Lobby, 1997 to 2005

By Simon Doyle

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sdoyle@connect.carleton.ca

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Abstract

This is a case study that weighs the influence of a long-term lobbying campaign by the Canadian Recording Industry Association (CRIA), representing the multinational recording companies Warner, EMI, Sony-BMG, and Universal. In 1997, Canada signaled its intent to reform copyright for the digital age. CRIA ran a powerful lobby for heavier regulation of digital content, but Canadian policy makers resisted CRIA's key proposals, which were viewed as controversial and potentially unpopular. CRIA used its influence with politicians to bypass the bureaucracy and incorporate some of its key aims in a bill introduced in Parliament, but which did not pass before the 2006 general election. The popular emergence of home computing and digital entertainment has increased public awareness about copyright policy, raising the question of whose interests it serves. In this environment it will be increasingly difficult for the content industries to influence copyright policy as they have traditionally.

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Introduction

Canada's federal copyright law is one of the most contested areas of federal policy making. What may seem to the average observer as minor changes to the *Copyright Act* have significant impacts on commercial and non-profit sectors, from broadcasting to education. A decision to apply a new royalty fee to broadcasters, for example, to compensate performers and producers of sound recordings, makes a winner out of the recording industry and a loser out of broadcasting. Each decision to amend the *Act* is in this way political in nature and necessarily creates winners and losers.[1] The government's last major round of copyright amendments, passed in 1997, earned the reputation of being one of the most contested bills in Canadian history. Sheila Copps, former Heritage Minister who helped push through the 1997 omnibus copyright bill, called it "the single-most lobbied bill in the history of Parliament."[2] Jay Kerr-Wilson, legal affairs manager for the Canadian Cable Television Association, has similarly said it has become urban legend that interested parties spent more money lobbying on the 1997 amendments than on any other single issue in history.[3] More than 80 stakeholder organizations got involved, to press their cases to government officials and attempt to win over MPs and ministers, all in the hope of influencing the legislation.

Within this government-relations (GR) contest is the Canadian Recording Industry Association (CRIA), one of the single most powerful and influential stakeholders in the copyright reform process. It represents the "Big Four" multinational recording companies of Warner, EMI, Universal and Sony-BMG, as well as some major

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[1] William T. Stanbury describes this principle generally in *Business-Government Relations in Canada,* 2nd ed., (Scarborough, Ont.: Nelson Canada, 1993), 95.
[2] Sheila Copps (former Minister of Heritage), in discussion with the author, December 2005.
[3] Jay Kerr-Wilson (vice-president, legal affairs, CCTA), in discussion with the author, January 2006.

independent labels in Canada, such as Nettwerk, and controls 95 percent of all music manufactured and distributed in Canada. CRIA's executive team consists of representatives from the Big Four, making it the primary vehicle for the GR activities of the major labels in Canada; and in the digital environment, it had a lot to lose. Industry groups, which have a large stake in copyright, have typically sat down with policy makers to describe their needs, argue amongst themselves, and help write the law. In the new economy, however, digital copyright laws affect many more actors, from high tech companies to computer users, making the traditional approach to drafting copyright a more complex and taxing task.

Technological developments have thrown the whole principle of copyright into question, asking to what degree copyright should extend into the digital age. The digital environment has brought forward great opportunities for the public – as the new creators and distributors of independent content – but it has also spurred traditional copyright stakeholders, such as the recording industry, to call on governments to rein in control and regulate the digital realm. Digital material is easily copied and distributed through the Internet, and copyright owners see the advance of technology as a threat. The content industries want governments to respond by restoring their control over content, but this would come as a risk and detriment to emerging competitors and public freedoms in the digital age. In the digital environment, for example, content companies can use so-called "digital locks," or technological controls, to restrict access, copying and certain uses of digital works, and argue that these technological controls need to be protected by copyright. Governments are faced with difficult decisions. Their traditional stakeholders, the content industries, want tougher protections, but stronger copyright laws could hand

rights holders too much control over digital content at the cost of removing the new freedoms of the public and hampering competition in the digital economy.

In 1997, the Canadian government signed the World Intellectual Property Organization's *WIPO Copyright Treaty* and *WIPO Performers and Phonograms Treaty,* informally known as the WIPO Internet treaties. The agreements, adopted in 1996 under pressure from the U.S., would address many of the unanswered questions about copyright in a digital age. The U.S. implemented the treaties in 1998 with the passage of the *Digital Millennium Copyright Act* (DMCA), which became known as a "maximalist" interpretation of the WIPO Internet treaties, far beyond the treaty requirements. In the ensuing years, the DMCA increasingly ran into controversy. The *Act* had included provisions against the "hacking" or circumvention of technological controls on digital content; as well as legal remedies for the distribution or manufacture of a "device" (read program) designed to circumvent a technological control. A computer user who removed the technological control on a DVD, allowing it to be copied, had infringed copyright. If a computer user, or cryptography researcher for that matter, designed a program that removed a technological control on a piece of software, and then distributed the program, he or she had also infringed copyright.

Within a few years it became evident that technological controls could be placed on everything from electric garage door openers to printer cartridges, and if companies wanted to make their products inter-operable with other products, they would have to break through the technological control – and break the law. Not only did the principle seem anti-competitive, but before long, cryptology researchers began to be sued or arrested for publishing research on copyright-protected technological controls. This is

just one example of the controversial measures within the DMCA that the major labels hoped to see introduced in Canada. When Canada signed the WIPO treaties in 1997, it indicated its intention to implement their requirements, which presented an opportunity to the content industries. The major labels, as they had done prior to the 1997 amendments, set into high-gear their GR operations in Ottawa.

As copyright law creeps into the digital sphere, observers suggest that it is largely the work of effective lobbying by industrial interests. Laura Murray, for example, writes that "rights-holder lobbies" have fostered a widespread belief that "the Internet is more of a threat than an opportunity" to culture and creativity.[4] Michael Geist, Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, and an advocate for user interests on the Internet, has suggested that the copyright industries, and the recording industry especially, have lobbied the government quite effectively.[5] At the same time, government relations has become an increasingly integral aspect of policy making in Ottawa. The growth of government in the 1980s and '90s made its machinery very complex, creating a need for those who understand how government works, who can target the right decision makers at the right moments, and with the right strategies. The number of consultant or "for-hire" lobbyists in Ottawa tripled between 1995 and 2004, for example.[6] C.E.S. Franks, renowned expert on Canadian Parliament, has called

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[4] Laura J. Murray, "Protecting Ourselves to Death: Canada, Copyright and the Internet," *First Monday,* 9, no. 10 (October 2004), http://firstmonday.org/issues/issue9_10/murray/index.html.

[5] Michael Geist, "Copyright and the Internet: Is there a Canadian way?" (guest lecture at the launch of Project OS/OA, Toronto, 10 February 2005), QuickTime http://epresence.tv/archives/2005_feb10/defaultQT.aspx?archiveID=113.

[6] Simon Doyle, "Government consultant lobbyists on the rise," CanWest News Service, 3 July 2005, via FPinfomart, http://www.fpinfomart.ca.

lobbying such a powerful force that it is like a new form of democratic representation, something like the traditional function of the commoners in the House of Commons.[7]

This thesis defines lobbying more broadly than government relations, however, because policy decisions are influenced by far more than dealings with stakeholders. Instead, it defines lobbying as an attempt to influence policy. In addition to direct government relations, this includes activism, public education and influencing the media. Effective lobbying communicates a persuasive argument, but influencing policy is a long process. For those who deal directly with the government, they are best to start early, and within the bureaucracy, to influence the goings-on between senior public servants and the Minister of the department, potentially shaping policy long before MPs are familiar with it or a bill is introduced.[8] Once policy becomes public, however – normally through the tabling of a bill or its study by a parliamentary committee – lobbying takes on a more political dimension. The more politicized a policy issue becomes, the more important the public, ministers and members of Parliament become as targets.

This thesis is a case study on the influence of the lobbying of CRIA, or the major labels, in what can be called the pre-parliamentary and Cabinet phases in the preparation of a bill to amend the *Copyright Act* and implement the WIPO Internet treaties. The pre-parliamentary phase involves work within the bureaucracy, including the identification of issues for study; framing policy ideas; drafting policy papers; consultation with the public, stakeholders and the Prime Minister's Office (PMO); consultation between departments; further feedback from stakeholders; and finally, the drafting of a detailed policy framework for approval by Cabinet. The Cabinet phase moves the policy issues

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[7] C.E.S. Franks, *The Parliament of Canada,* (Toronto: University of Toronto Press, 1989), 94.
[8] Franks, 93; A. Paul Pross, *Group Politics and Public Policy* (Toronto: Oxford University Press, 1992), 81; *Interest Groups and Parliament* (Ottawa: Canadian Study of Parliament Group, 1990), 15.

into a parliamentary, and often more politicized, setting. This phase involves sending the policy framework to a parliamentary committee for study; Cabinet's approval (or rejection) of the committee's recommendations; preparation of a draft bill by the Justice Department at the instructions of the responsible Minister (in this case the Minister of Industry); approval of the bill by Cabinet; and finally, the Prime Minister's signature to approve the proposed legislation.[9]

As a case study in public policy, the objective of this thesis was to measure the influence of CRIA's lobby, the degree to which it was influential and why or why not. Trying to determine the influence of a lobby group is a challenge, one that has been described as "akin to solving the riddle of the Sphinx."[10] It takes a great deal of analysis of causes, effects and external variables. To be sure, CRIA did not operate in a vacuum. Amendments to the *Copyright Act* generally create two communities more or less aligned against one another. On one side are the rights holders, which includes writers and musicians, but their power as stakeholders comes through industrial interests such as producers, distributors and packagers of copyrighted material: the recording companies, the motion picture studios, major publishers and software companies. These industrial interests make up what we call the content or copyright industries, expressly defined as sectors of the economy that create, produce, manufacture, perform, distribute and communicate copyright-protected works. Although this side of the copyright lobby has traditionally been called the "creators" lobby, this thesis refers to it as the rights-holder or content lobby because it is dominated by the content industries, and because these actors

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[9] Stanbury, 73.

[10] Nayda Terkildsen, et al. "Interest Groups, the Media, and Policy Debate Formation: An Analysis of Message Structure, Rhetoric, and Source Cues," *Political Communication,* 15 (1998): 46.

are CRIA's primary allies.[11] For example, CRIA found powerful supporters in groups like the Canadian Motion Pictures Distributors Association (CMPDA), representing interests of the Hollywood studios in Canada; the Canadian Publishers' Council (CPC), representing major Canadian and multinational publishers, as well as others such as the Canadian Alliance Against Software Theft and a number of copyright collectives (Access Copyright, the Society of Composers, Authors and Music Publishers of Canada, etc.). Its most powerful alliance was a temporary one of more than 30 national organizations called the Copyright Coalition of Creators and Producers.

On the other side are the copyright users, or those who want greater use of and access to copyright works, and which include the public, libraries, schools, broadcasters,[12] Internet service providers (ISPs), public and consumer interest groups, intellectuals, open source computer scientists, and in the digital environment, some hardware manufacturers, high tech and digital security companies, all of which tend to argue for less copyright protection and exceptions for various uses. The ISPs, such as Bell Canada, TELUS Corp. and Rogers Communications Inc., helped form an influential coalition of user groups called the Balanced Copyright Coalition (BCC). The user lobby also benefited from the work of the Electronic Frontier Foundation, an American civil liberties organization that helped mobilize grassroots involvement in the Canadian policy process. Michael Geist and the Canadian Internet Policy and Public Interest Clinic

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[11] To call it the "creators lobby" would not be a very accurate descriptor because, as I mention, the most powerful stakeholders in the content lobby are the producers and owners of content, not "creators" as in writers, software programmers and artists. In fact the views of creators often diverge from the content lobby. The Creators Rights Alliance, for example, was formed in 2002 precisely for this reason. See *Canadian New Media,* "Creators from new alliance to make voice heard on copyright, trade issues," 1 May 2002, 6; for more on "creators" versus "users" see Teresa Scassa, "Interests in the Balance," in *In the Public Interest: The Future of Canadian Copyright Law,* ed. Michael Geist, 41-65 (Toronto: Irwin Law, 2005).

[12] Although broadcasters are defined as part of the content industries, I lump them in with the users because they often oppose the proposals of the major labels.

(CIPPIC) also became increasingly active advocates for users' rights towards the tabling of the digital copyright reform package, Bill C-60, in 2005, and a number of Canadian educational institutions and associations formed an alliance called the Copyright Forum. The divisions between the two camps are never hard and fast and there will always exist nuanced differences of opinion that reflect the precise interests of one organization over another. In the BCC, for example, it was felt by some that the ISPs focused on their core issue – which was the degree to which ISPs should be responsible for infringements on their networks – and which limited the coalition's positions.[13]

The thesis has four chapters, the first a comparison between what the major labels proposed and what the government tabled as Bill C-60. The traditional business model of the recording industry was not only retail sales, but a domination of all aspects of the music business, from distribution to music publishing, and the digital age raised new challenges for virtually every aspect of the traditional business model of the major labels. The chapter describes the rise of the peer-to-peer (P2P) file-sharing networks and examines how implementing the WIPO Internet treaties in Canada would aid the major labels in establishing dominant online pay models and pursue file sharers through lawsuits. Ideally, the labels wanted to use copyright law in an attempt to minimize, if not quash altogether, activity on the P2P networks and set up their own distribution regimes. Bill C-60 succeeded in part. The recording industry got the tools it needed to launch an online strategy, but it did not meet the maximalist copyright agenda proposed by the labels. Instead, C-60 showed that the government took an approach that met the minimum requirements of the treaties.

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[13] Sue Lott, a member of the coalition through her work at the Public Interest Advocacy Centre (PIAC), has expressed this to me. Lott (legal counsel, PIAC), in discussion with the author, February 2006.

Chapter Two is a history of copyright revisions in Canada, from the country's first passage of the *Copyright Act* in 1921 to the last major package of amendments in 1997. The historical trend in Canada has been to strengthen rights-holder control over content with successive amendments to the *Act*, and often in response to changes in technology. Copyright, originally intended to prevent the improper commercial exploitation of another's work, has become a complex system that has placed excessive commercial value and control over creative works, undermining its original purpose of attempting to reward creativity and cultivate a rich information commons in the public interest. The international environment is examined, including American pressures to strengthen Canada's copyright law through trade agreements and treaties. The content industries are an important sector of the Canadian economy, and throughout history the Canadian government increased the strength of its copyright laws in close consultation with the content industries.

Chapter Three begins CRIA's digital copyright reform lobby, examining some of its GR strategies and how the scale and resources of its lobby outweighed those of the users. CRIA hired consultant lobbyists and targeted the bureaucracy far before the official policy process had begun, but few user groups had such resources. The major labels also helped organize the powerful Copyright Coalition alliance, and put forward a document urging, among CRIA's core issues, a maximalist interpretation of the WIPO treaties, as in the U.S. experience. However, largely due to building controversy over the DMCA, as well as public concern and activism in the copyright reform process mobilized by the user lobby, the Canadian government was wary of maximalist copyright reform. The technological landscape had changed, creating a far more difficult environment to

implement controversial DMCA-like laws in Canada. Digital copyright reform affected too many new actors in the new economy for the government to take a maximalist approach, and with the explosive rise of broadband Internet at home, the government had a new constituency to deal with – the public. The government had committed to implementing the WIPO treaties, however, and in response, adopted a slow, deliberative and minimalist implementation of the treaty provisions.

Chapter Four continues with CRIA's digital copyright lobby but examines how CRIA, allied with the rights-holder lobby, circumvented resistance within the bureaucracy by taking its arguments to the political level. The trade association had built strong relationships with Heritage Minister Sheila Copps and Sarmite Bulte, Parliamentary Secretary to the Minister of Heritage, and proceeded to exercise its relationships with those in positions of political power. The major labels successfully worked with Copps to accelerate the policy process, forcing the bureaucracy to implement all of the WIPO treaty provisions in a single legislative phase instead of two. Through a very powerful and strategic public campaign, CRIA also successfully created the perception that its economic problems were linked to file sharing. By applying various political levers to bypass resistance within the bureaucracy, the major labels accelerated the policy process and obtained key provisions in Bill C-60 that would help it carry out its online strategy.

Although CRIA's political success demonstrates an age-old coziness between corporate and political elites, the bureaucracy denied many of the maximalist copyright reforms proposed by CRIA and the rights-holder lobby. No lobby can succeed on resources alone, and despite having several advantages, such as a powerful coalition and

several consultant lobbyists to arrange meetings and focus on strategy, CRIA and the rights-holder lobby could not convince the government to implement DMCA-like reforms. If lobbying is the art of communicating a persuasive argument, the recording industry had powerful communications tools at its disposal but lacked a persuasive argument to communicate. The bureaucracy was not interested in implementing controversial changes to the *Copyright Act* that, in addition to costing significant political capital, could do more harm than good to a competitive digital economy. The technological landscape changed so much since the adoption of the WIPO treaties in 1996 that many policy makers viewed key arguments of the recording industry as impracticable and unrealistic. While CRIA found valuable access to political power in Ottawa, and through it some success, the digital environment opened up new opportunities for the user lobby to challenge the rights holders. The public has great potential to be mobilized as a new constituency in copyright reform. Unlike CRIA, the user lobby may not have had access to a minister, but it may read the bureaucracy's resistance to maximalist copyright reform as a signal to present its arguments to policy makers more often and with more force. The government's approach to copyright revision has been, historically, to pass more provisions for rights holders, its traditional stakeholders. Policy makers resisted CRIA's proposals during the policy process, which suggests that the digital age is eroding, however slowly, old notions of who controls copyright in Canada.

Sources, methodology and limits of the study

This study deals only with the pre-parliamentary and Cabinet phases of the government's policy development, taking the reader up to the start of the legislative phase, when the bill was introduced in Parliament. The proposed amendments to the *Copyright Act,* tabled as Bill C-60 in June 2005, expired on the order paper when the 38th Parliament dissolved the following November. The period of study is from 1997 to 2005, but I focus more on government policy decisions after 2001. In addition, this study focuses on the lobbying of the major labels only, and limits itself to the major issues identified by CRIA. This thesis does not discuss educational copyright issues, for example, which were of great concern to schools and libraries but not to the recording industry.

Most of the primary sources for this thesis have been obtained through access-to-information (ATI) requests to the federal Heritage Department. These sources include e-mails between government officials, formal and informal policy briefings, memos for senior officials and ministers, letters, briefings for meetings with stakeholders, and other miscellaneous documents. Requesting documents through access-to-information is a slow process and, if the researcher does not know what documents to request, is always somewhat of a fishing expedition. For this reason, another limitation of this thesis is that most of the requests for documents on copyright policy were made to the Heritage Department, as opposed to Industry, where there are fewer documents to be had. It is a limitation that should be noted, but it is also one that reflects the Heritage Department's greater emphasis on copyright policy development. The documents are held on file with

the author but are also available at the Heritage Department's access to information office for two years from the date of release.

The thesis was approached using a kind of historian's methodology. The ATI documents served as a foundation for my research, which were contextualized with any other publicly available documents. These include CRIA's submissions to the government and the Commons Heritage Committee, interviews, various submissions to the government for the policy process, evidence from the House of Commons Standing Committee on Canadian Heritage, news reports, and government-commissioned studies. For Canadian copyright in theory and practice I rely greatly on Sunny Handa's *Copyright Law in Canada* and David Vaver's *Copyright Law*. For lobbying theory and strategies, I am grateful for William T. Stanbury's excellent work, *Business-Government Relations in Canada,* 2nd ed.

The goal of this thesis is to understand the government's decision making and the degree to which one lobby group, CRIA, influenced the policy process. Lobbying is an area of copyright policy – and policy making in general – that does not receive due attention. The documents underlying this thesis provide insightful answers to the proposed research question and it is my hope that they have opened the Canadian copyright lobby for further discussion.

Chapter One

Bailing out the music:
What the major labels proposed, and got

In 1997, when Canada announced its intention to implement two copyright treaties of the World Intellectual Property Organization (WIPO), the major recording labels recognized an opportunity. As the government began laying the policy groundwork to make significant amendments to Canada's *Copyright Act,* the Canadian Recording Industry Association (CRIA), representing the Canadian operations of the world's largest sound recording companies, planned its own policy proposals to take to the government. Over the course of the next five years, copyright reform became more important than ever to the recording industry. By the end of 2001, the industry unexpectedly found itself immersed in a battle of attrition with its own consumers. The Internet age had arrived *en masse*, and the peer-to-peer (P2P) networks allowed Internet users (in this case, "file sharers") to connect directly with one another and exchange music files. The P2P networks posed a significant new challenge to the traditional business model of the major recording labels. In the digital age, it was no longer necessary for artists to rely on major label recording contracts and commercial radio for wide exposure. The future of music was not in retail CD sales, and the labels failed to make a success of online business models before the emergence of a kind of popular revolt on the P2P networks. The major labels wanted to dominate music sales worldwide, as they had for the last several decades, and taking control from the P2P networks, where a culture of free music had developed, would be no simple task. For better or worse, the recording industry had a strategy: First, see through the implementation of tougher copyright laws to rein in free

music on the Internet; second, shut down the P2P networks, partly through legal actions against the makers of the P2P programs, but also against individual file sharers; and third, develop and expand dominant online business models.[1]

Each level of this strategy, as the labels envisioned it, involved the implementation of the WIPO Internet treaties that Canada promised to implement in 1997. CRIA's nearly 10-year lobby campaign on this round of Canadian copyright reform stressed a number of significant proposals to the government, most of them related to its efforts to quash the P2P networks and assume greater control over the uses, access to and distribution of digital content. For instance, the WIPO Internet treaties would introduce an exclusive "making available" right for copyright owners, clarifying digital distribution on the P2P networks as an infringement. It was necessary to CRIA's strategy that this right come into place next to the *Copyright Act*'s existing statutory damages provision. This provision sets a statutory minimum penalty for copyright infringement and would allow the recording industry to sue file sharers for a minimum of $500 per song distributed, amounting to million-dollar lawsuits. This was just one of CRIA's objectives as the government carried out its policy consultations, and it was one that was met when the government eventually introduced Bill C-60, *An Act to Amend the Copyright Act,* in June 2005. Curiously, however, the bill did not meet some of CRIA's most significant policy aims. In fact CRIA had been part of a powerful coalition of copyright owners, including publishers, software companies, and the copyright collectives, yet this lobby could not convince the government to move forward with a copyright-heavy legislative package. Instead of tabling a strong-headed bill to follow the U.S. example, the Canadian

[1] The recording industry's strategy also involves pervasive 'public education' campaigns to teach parents and youth about the so-called risks, criminality and immorality of file sharing, but this is not discussed in detail here. See, e.g., www.musicunited.org.

government chose to bring forward legislation to meet the minimum requirements of the WIPO Internet treaties. This was a significant, and in some ways, surprising loss for CRIA. Although the bill would have provided CRIA with the legal tools to carry out an e-commerce strategy and a legal assault on the P2P networks in Canada, it did so minimally and veered away from the overall policy direction advocated by CRIA and the content lobby.

CRIA's main strength as a lobby group is that, as the trade association representing the Canadian music industry, it claims to represent Canadian artists, and has on occasion used the "star power" of some popular musicians, such as Tom Cochrane and Jim Cuddy of Blue Rodeo, to speak in support of its goals. Its member companies control about 95 percent of all music distributed and sold in Canada[2] and include some large, independent labels such as Nettwerk Productions, a private multinational company, and Troubadour Music Inc., the private recording company of children's' songwriter Raffi. CRIA also includes Cinram International, an $800-million company[3] that manufactures and distributes the pre-recorded DVDs and CDs of the major labels. CRIA primarily represents, however, the Canadian branches of the most powerful companies in the global sound recording industry, particularly their manufacturing, production and distribution operations in Canada. Although these include major entertainment companies like Walt Disney Music, they are best known as the "Big Four" labels of Sony BMG (Canada), EMI Music Canada, Warner Music Canada and the largest music company in the world,

[2] See www.cria.ca.
[3] Based on total 2004 assets in the "FP Analyzer," via FPinfomart, www.fpinfomart.ca.

Universal Music.[4] These four multinational labels run CRIA's operations. According to Industry Canada, the association's five-member board of directors consists of senior managers from each of the "Big Four" labels, plus Graham Henderson, president of CRIA.[5]

CRIA's activities at home are strengthened by its position within an international network of music industry groups that, among other advocacy activities, work to harness, through stronger copyright laws, their vision of the e-commerce potential of the Internet. For example, CRIA is the Canadian national office for the International Federation of the Phonographic Industries (IFPI), representing the recording industry worldwide, and which is closely affiliated with the Recording Industry Association of America (RIAA), CRIA's sister organization representing the operations of the major labels in the U.S. The IFPI and the RIAA are also members of the International Intellectual Property Alliance, a lobby group spearheaded by U.S. copyright industries.[6] In other words, CRIA is the Canadian version of the RIAA, which Lawrence Lessig, a law professor at Stanford and an advocate for open access to digital content, describes as "an extraordinarily powerful lobby" under which the "president of the RIAA is reported to make more than $1 million a year."[7]

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[4] For list of CRIA's members see Canadian Recording Industry Association, submission, House of Commons Standing Committee on Canadian Heritage, 2nd sess., 37th Parliament, September 2003, Appendix A.

[5] As of March 2005 CRIA's board of directors included, in addition to Henderson: Steve Kane, managing director at Warner Music Canada; Deane Cameron, president of EMI Music Canada; Randy Lennox, president and CEO of Universal Music Canada; and Lisa Zbitnew, president of Sony BMG Music (Canada). See Industry Canada, "The Canadian Recording Industry Association," Industry Canada, http://strategis.ic.gc.ca/cgi-bin/sc_mrksv/corpdir/dataOnline/corpns_re?company_select=201936#directors.

[6] Ruth Towse, *Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada* (study commissioned by Industry Canada, Ottawa, 2004), 8.

[7] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (NY: Penguin Press, 2004), 52.

CRIA, like major publishers and software companies throughout the latter half of the 1990s, saw the WIPO Internet treaties as the answer to regulating the Internet toward their vision of e-commerce. The treaties became more important – and the recording industry's vision obstructed – in 1999, with the launch of a new, free Web service called Napster, which quickly gained popularity. Napster, a small start-up company of about 35 employees, offered music users what was then a new and innovative technology called "peer-to-peer networking." Its members logged onto the Napster site and immediately had access to the folders on other members' computers, from which they exchanged sound files, or mp3s. By September 2000, Napster attracted about 20 million users, "and the tally is rising every day," reported *The Atlantic Monthly.*[8] Although popular, Napster was relatively short-lived. The service did not store its music files on a central server, but it did so with a database of available mp3s, setting itself up for copyright infringement liability. In 2001, after a court battle with the major labels, including Sony, MCA and Atlantic Recordings, Napster's file-sharing boom came to an end. A U.S. federal court ruling found the service contributed to copyright infringement.[9]

Napster's reported 64 million users[10] looked elsewhere for their mp3s, but they did not flock to pay-download services. By the time of Napster's demise, a second phase of more sophisticated and again, free, file-sharing programs such as Kazaa, Gnutella and Morpheus had emerged. These services operated in a much greyer legal zone than Napster: they did not require the assistance of a central server. The makers of the programs merely created the software, and after individual users installed it for free, they

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[8] Charles C. Mann, "The heavenly jukebox," *The Atlantic Monthly,* September 2000, CBCA Business via Proquest, http://proquest.umi.com.proxy.library.carleton.ca.
[9] *A & M Records v. Napster,* 239 F.3d 1004 (9th Cir. 2001).
[10] Steven Chase, "Court Order put further squeeze on Napster," *The Globe and Mail,* 7 March 2001.

logged onto networks and distributed the files directly between their home computers. The available file-sharing programs formed three vast file-sharing networks: Fasttrack, iMesh and Gnutella (later, eDonkey also became popular). The new services gained users and demand increased for online music. As the arrival of the Compact Disc demonstrated in the 1980s, new media carry with them a novelty attraction, and by the end of 2001, music consumers, especially students with Internet connections, sought the online delivery of music in greater numbers. By the summer of 2002, according to a California company tracking P2P activity, the average number of simultaneous users logged onto all the networks combined, at any given time, was greater than 3.6 million. The Fasttrack network alone, by far the most popular, reached a peak of 2.5 million simultaneous users during August 2002.[11] In other words, a user who launched the Kazaa program (plugging into the Fasttrack network) in August 2002 had free access to the digital music libraries of as many as 2.5 million users. Since then, trading on the P2P networks has continued to increase.

File-sharing threw into question the ability of the major labels to control the music market in the digital age. This challenge came on several fronts. Certainly, one aspect of this was the doubt surrounding the future of the CD and the recording industry's old-fashioned business of retail sales. In the latter part of the 1990s, CD sales (and cassettes before that) were a major source of revenue for the recording industry. In Canada, for instance, revenues from CD sales grew from about $394 million in 1992-93 to $805 million in 2000.[12] CDs are cheap to manufacture – about US$1 per disc – but much of the final product's additional costs are in warehousing and shipping. These were

[11] BigChampagne, e-mail press package to the author, July 2004. Unpublished material.
[12] Statistics Canada, "Revenues in the sound recording industry," Statistics Canada, http://www40.statcan .ca/cbin/fl/cstprintflag.cgi.

components of the business that the major labels controlled and services they sold to independent musicians and labels, and a complete shift to digital delivery could eliminate the distribution business altogether.[13] File sharing also re-introduced the idea of the hit single, which consumers appeared to want but for years the recording industry did not offer. Instead, consumers were forced to buy a 12-track CD for $20, often for what consumers considered a few hits and plenty of duds. Although a downturn in CD sales began in 1996, before the arrival of the P2P networks, between 1999 and 2001 they took a significant drop worldwide, which the recording industry attributed to file-sharing. CRIA, for instance, has said that, in Canada, sales amounted $1.3 billion in 1999 but by the end of 2001 had declined $300 million to $1.02 billion.[14] Although scholars dispute the degree to which file-sharing has impacted CD sales, and there is little evidence to suggest a significant cause and effect,[15] the lesson to be learned for the recording industry was not how to save the Compact Disc. The reasons for the CD's decline mattered less to the labels than how they were going to venture online.

The value of music sales to the recording industry faced a critical decline if it could not find a way to license music on the Internet. The major labels are not just major distributors and producers of music, they also major music publishers. Recording labels come to own music copyrights through recording contracts, amassing libraries of sound recordings for their publishing operations. It is commonly known within the music business that major label artists see very little of the profits from CD sales, and that they

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[13] Neville L. Johnson, "The Internet and Music," in *The Musician's Business and Legal Guide,* ed. Mark Halloran, 215 (Upper Saddle River, NJ: Prentice Hall, 2001).

[14] Graham Henderson, "A National Dialogue on the Need to Safeguard and Promote Products of the Mind" (speech to the National Press Club, Ottawa, Ont., 29 September 2005), http://www.cria.ca/news/290905 n.php.

[15] E.g., Felix Oberholzer and Koleman Strumpf, "The Effect of File Sharing on Record Sales: An Empirical Analysis" (Harvard Business School and UNC Chapel Hill, June 2005), http://www.unc.edu/~cigar/papers /FileSharing_June2005_final.pdf.

earn more from performing.[16] Music publishers, small or large, are effectively agents for recording artists. They advise them on their productions and career moves, provide monetary advances, negotiate royalty agreements, register copyrights for commercial license, act as publicists for radio and media exposure in domestic and foreign markets, and monitor uses of their works to see that they are paid for and that piracy is minimized.[17] Although publishers such as Canadian company Peer Music, the self-styled "independent major," can become successful independent businesses, a major component of the major recording companies is running their own subsidiary publishing companies.[18] EMI, the only major label that separates its publishing operations in its financial statements, runs the largest music publishing business in the world, with a catalogue of more than one million works and operations in 30 countries. Its publishing generated 43 percent of the entire EMI Group's annual profit in 2004. As the EMI web site notes, a "significant focus of the company is the acquisition and/or administration of catalogues of musical compositions from other music publishers and composers and authors," including, for instance, the purchase of the entire copyright library of Virgin Music Publishing.[19]

The major labels hoped they could use their leverage as the dominant owners of sound recordings to develop a dominant system for online music sales, to control the

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[16] In 2000, Don Henley founded the Recording Artists Coalition in an attempt to create awareness about the major labels' approach to their agreements with artists, particularly surrounding copyright ownership. See David Wild, "Musicians unite against record labels," *Rolling Stone,* 31 January 2002, 17; and Richard Schulenberg, *Legal Aspects of the Music Industry: An Insider's View* (NY: Billboard Books, 1999), 10-11, 25-56.

[17] Paul Audley and Michel Houle, "The Role of Music Publishers," *A Review of Music Publishing in Canada* (report commissioned by Canadian Heritage, 2001), http://www.pch.gc.ca/pc-ch/pubs/Music Publishing/english/english.html.

[18] Audley and Houle, "Profile of the English-language Music Publishing Industry," *A Review of Music Publishing in Canada.*

[19] For financial figures see EMI Group, *EMI Annual Report 2005*, 27-30, 34, http://www.emigroup.com /financial.html; also see EMI Group, "Music Publishing," EMI Group, http://www.emigroup.com /publishing/i-.html.

channels of online distribution as they had the channels of CD distribution. But the major labels were not able to exploit the Internet successfully, partly because they did not respond quickly enough with a competitive distribution model. Although the major labels tried various delivery systems, the emergence of Napster and the P2P networks caught the recording industry off guard and became hugely popular years before they offered a competitive online alternative. After the fall of Napster, which had been shut down in a court action by the RIAA, the major labels prepared to release their own distribution systems amid allegations of collusion and anti-competitive behaviour. The U.S. Department of Justice launched an investigation into the recording companies after critics alleged that the majors refused to license their catalogues to other distribution systems and blocked competitors from participating in the development of their own models.[20]

They went on to unveil distribution services such as Pressplay and MusicNet, which represented the recording companies' fears of treading headlong into the digital age. The services used technological controls to limit customer access and use of music, failing to meet high consumer expectations that had already been shaped by Napster. For instance, the services placed limitations on CD burning and the transfer of music files to portable players; some only offered song rentals (temporary downloads) or on-demand streaming of music; and charged monthly subscription fees, not per-song payments. Perhaps the greatest fault of the services, however, was that the labels, as competitors with one another, had reservations about licensing all of their works to a single service owned by a rival, which led to incomplete catalogues on various portals.[21]

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[20] *Billboard,* "Majors face antitrust probe," 18 August 2001, Business Source Premier via EBSCOhost, http://web12.epnet.com.proxy.library.carleton.ca.

[21] Des Freedman, "Managing Pirate Culture: Corporate Responses to Peer-to-Peer Networking," *The International Journal on Media Management,* 5, no. 3 (2003): 176.

It was not until April 2003 that the major labels collectively licensed their catalogues to the most competitive online service yet: the Apple iTunes online music store, which, available in the U.S., sold mp3s for 99 cents each.[22] The arrival of iTunes seemed too late, however. By the time of its debut, an average of 7.1 million simultaneous users were found on the P2P networks in total, about double the 3.6 million users recorded on the networks in August 2002.[23] The P2P networks, having beat the major labels to online music, obstructed their attempt to go online. Internet users wanted on-demand mp3s and, for many, file-sharing had already become a common and acceptable way to get them. CRIA president Brian Robertson acknowledged as much in 2004 when he told *National Post Business* that if the major film studios wanted to avoid the situation the recording companies found themselves in, they should move to a competitive online delivery system as quickly as possible, before movie file-sharing became the new norm. "The sooner the movie industry can move to an online, on-demand delivery system that's faster and cost-efficient," he said, "the better they're going to protect themselves...."[24]

The rise of the Internet and the P2P networks also put in jeopardy the major labels' traditional grip on emerging talent. The recording industry invests a tremendous amount of energy and wealth into signing potential stars, then marketing their brand and music as widely as possible. Most major record companies operate a separate, national promotions department with its own vice president and a handful of regional sales managers, whose total budget per record tends to exceed its production costs. The labels also tend to operate a separate department to oversee the release of albums internationally

[22] iTunes arrived in Canada in December 2004 and in the U.K., France and Germany in June 2004.
[23] BigChampagne.
[24] Simon Doyle, "Invasion of the movie snatchers," *National Post Business,* August 2004, 43.

and ensure as much exposure as possible, particularly through the crucial channels of television and radio.[25] Commercial radio, because of its wide audience reach, is an essential component of the music industry's control of emerging artists' access to major markets. In the traditional model of retail sales, commercial radio determines national song charts, which distributors use to determine what they should carry for retailers. In theory, emerging artists who are not played on the radio, do not make the charts, are left off distribution lists and never make it onto store shelves. Commercial radio stations take few chances with emerging artists. Radio stations, caught in the competitive ratings game, do not want to venture the risk of losing listeners by airing lesser-known artists. Stations prefer to play music that they know is well-marketed and that has some sense of familiarity with the public. Payola schemes have also been common in the relationships between commercial radio stations and the major labels,[26] and Canadian play lists are mostly determined by the American charts. This resistance to giving airtime to lesser-known, emerging artists surfaced quite strongly after the introduction of the Canadian content ("Cancon") regulations in 1971, when commercial radio stations created stockpiles of "B list" Canadian songs to fill their Cancon requirements at off-hours of the day.[27]

Such is the traditional relationship between the major labels and commercial radio, but the arrival of the Internet put new challenges to the dominance of major label talent and delivered musicians the new power to market themselves. Web sites like

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[25] Schulenberg, 6-8.

[26] Payola schemes are examined historically by Charles C. Mann, "The heavenly jukebox"; and for a contemporary example see Jeff Leeds, "2nd Music Settlement by Spitzer," *The New York Times,* 23 November 2005.

[27] Brian O'Shea Papizzo, "Towards a Political Economy of the Canadian Recording Industry" (M.A. thesis, Carleton University, 1993), 130-135; Robert Wright, *Virtual Sovereignty: Nationalism, Culture and the Canadian Question* (Toronto: Canadian Scholars' Press, Inc., 2004), 82.

www.garageband.com, www.pitchforkmedia.com, independent music blogs and individual band sites make use of an inexpensive yet powerful medium through which independent bands can be discovered and heard. In the same vein, the P2P networks provide an expansive medium for the distribution of, and access to, independent music at a single source. Giving away mp3s comes as a trade off for independent bands. Provided their music is good enough to warrant demand, widespread exposure on the Internet may be freely if not cheaply distributed, and there is plenty of money to be made performing and selling merchandise at concerts.[28] Warner Music Group appeared to recognize the trend of online promotion with its recently-launched "all-digital" music label, Cordless Recordings, which sells its songs online and promotes its bands through blogs and other online sources.[29]

Although the Internet does not have nearly the marketing and promotional clout of a major label, and music business lawyer Neville Johnson rightly points out that an independent artist cannot strike Britney Spears-level stardom without this marketing power, the Internet has emerged as a tool for independent artists to get noticed. Hearsay, a very powerful form of advertising, moves very fast within niche online communities. Internet marketing can bring enough exposure to an independent group that, in some cases, even commercial radio is forced to take notice. Wilco's Jeff Tweedy has joined a chorus of independent bands who say that file-sharing improves their business. Wilco, after being dropped from major-label subsidiary Reprise in 2001, released their newly recorded album for free on their Web site. Tweedy subsequently told Alex Veiga, of the

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[28] Independent bands do very well selling merchandise this way, with limited overhead costs, says Alexander Mair (board member, CIRPA), in discussion with the author, February 2006.
[29] John Borland, "Opening the door on a CD-less music label," *News.com,* http://news.com.com/opening +the+door+on+a+CD=less+music+label/2100-1027_3-5942975.html.

Associated Press, on 24 March 2005, that P2P is like "a library. I look at it as our version of the radio.... It's a place where basically we can encourage fans to be fans and not feel like they're being exploited." Montreal's Arcade Fire is another independent band enjoying international recognition without major label contracts. The band managed to sell more than 500,000 copies of an album and land a distribution deal with EMI while remaining on an independent label.[30] As Johnson explains, the Internet, and particularly the P2P networks, suddenly dropped the largest obstacles to success in the music business, which were "the cost of production, delivery, and in some cases the promotion of the product."[31] Artists' success outside of major label control is another sign of the recording industry's sliding grip on music in the Internet age, and yet another reason, however large or small, for the industry to seek the collapse of file-sharing and its powerful distribution networks.

Faced with this large set of problems, the recording industry looked for answers in one of its most powerful weapons: copyright law. The best case scenario for the recording industry was to see the P2P networks wiped out entirely, and key to its strategy was the harmonization of tougher copyright laws in industrialized countries around the globe. To this end the recording industry, along with the content lobby, looked to the WIPO Internet treaties. WIPO, a United Nations agency, promotes the acquisition and protection of intellectual property, including copyright, trademarks, patents and intellectual designs. This is done through treaties and international cooperation on intellectual property laws, particularly the *Berne Convention,* a copyright treaty dating

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[30] Angela Pacienza, "400 bands flocking to music showcase to take advantage of healthy indie scene," Canadian Press, 8 June 2005, via Factiva, http://global2.factiva.com.proxy.library.carleton.ca; and Pacienza, "Whoa Canada! Canuck rock bands turned heads around the world in 2005," *Yahoo! News*, 31 December 2005, http://fullcoverage.yahoo.com.

[31] Johnson, 215-16.

back to the 19th century which, through several amendments, has served as a foundation for international copyright law among western industrial nations. Late on 20 December 1996, at an international conference in Geneva that included Canada, WIPO closed a three-week conference by adopting two new treaties, the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), informally known as the WIPO Internet treaties. The two multinational agreements reinforce the existing *Berne* and *Rome Convention* with new rules to meet advances in technology and answer legal questions surrounding the use and transmission of digital works.

Although the WIPO treaties were not adopted with file-sharing in mind – because in 1996 the activity had not yet been popularized – the recording industry saw the treaties as the answer to their set of problems. The treaties set out a series of guidelines for copyright revision that, if adopted through a maximalist approach like that of the U.S. – which in 1998 implemented the treaties with the passage of the *Digital Millennium Copyright Act* (DMCA) – the content industries could potentially see similar laws enacted in Canada. The WIPO treaties presented the content industries with an opportunity to make significant strides in Canada's copyright law. Both treaties introduce a host of new provisions for rights holders that CRIA, along with the rest of the rights-holder lobby, came to see as crucial to success in Canada's e-commerce market. The WCT, for instance, lends protection to databases as well as computer programs by defining them as literary works, and gives their owners control over their commercial rental. In a more significant provision, the treaties create a new right for on-demand communication "by wire or wireless means" (known as a "making available right"). The treaties also make it an infringement to hack or "circumvent" copy-protection programs

(known as technological protection measures, or TPMs) on copyrighted works like CDs, software, and DVDs; as well as tamper with or alter the identifying and catalogue information (also known as rights management information, or RMI) imbedded in computer programs, DVDs and CDs.[32] Technological controls and rights management information are closely related because a rights management system can be part of a program that is also a technological control. The copy-protection controls found on some CDs, for example, include RMI, and similarly, iTunes employs an RMI system that limits the number of copies of mp3s that can be made per unique computer.

As one of the most influential players in Ottawa on copyright policy, CRIA played an active role in its attempt to see through the ratification of the treaties in Canada and make sure that the government was aware of the legal tools it needed for its e-commerce agenda. CRIA advocated an approach much like that taken in the U.S., which saw the passage of stringent measures in the DMCA. In the summer of 2001, the departments of Canadian Heritage and Industry Canada released a working paper called *Consultation Paper on Digital Copyright Issues,* which sought input from organizations and individuals on how best to proceed with Canadian copyright reform on four issues: the making available right, legal protection for RMI, legal protection for TPMs, and ISP liability. The four issues made up a prospective package of digital copyright reforms to implement the major components of the WIPO Internet treaties, plus address the issue of ISP liability.

CRIA responded to the government's call for input with a series of legislative proposals. One of the most important provisions was WIPO's making available right,

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[32] The WCT extends these rights to literary works and the WPPT to phonograms. WCT, arts. 4, 5, 8, 11 and 12; and WPPT, arts. 8, 10, 14, 18 and 19; both available at http://www.wipo.int/treaties/en.

giving rights holders the exclusive right to communicate works on the Internet. In its submission to the government, CRIA called the making available right "fundamental for the dissemination of music over digital networks and therefore for promoting the development of electronic commerce and of new business models by the recording industry." This was largely true, but the right had more to do with gaining control of the distribution of music in the digital age than it had to do with promoting e-commerce. The major labels, as the dominant music publishers, wanted to be sure that others could not somehow communicate their works on the Internet without paying for it – such as on the P2P networks. A making available right would not only put to rest any unanswered questions about the legality of file sharing, but would also provide them with their desired "exclusive control" over Internet distribution.[33]

The making available right was more than just a music-licensing tool, because the recording industry would prove so by venturing online in Canada without it. A significant power of the making available right was that it would be one of the major labels' most powerful weapons to combat the P2P networks – that is, if it could be enforced in partnership with the *Copyright Act*'s statutory damages provision. In a 1997 package of amendments to the *Copyright Act,* the Liberal government introduced the statutory damages provision, writing into the statute a minimum penalty for copyright infringement. The provision means that a plaintiff in a copyright infringement case does not have to prove he or she suffered actual damages and can instead rely on the $500-to-$20,000 penalties, per infringement, written into the law.[34] The recording industry would

[33] Canadian Recording Industry Association, submission regarding the consultation papers, (September 2001), 8-9, http://strategis.ic.gc.ca/pics/rp/cria.pdf.
[34] *Copyright Act, RSC* 1985, c. C-42, s. 38.1.

pursue the makers of the P2P programs through the courts, with some success,[35] but part of its strategy involved intimidating file sharers individually with lawsuits. The statutory damages provision would effectively allow CRIA to sue file sharers for $500 per song made available in a shared folder, which often amount to thousands of mp3s. In its submission, CRIA described the making available right as one "of greatest importance for record producers to stop the unauthorised exploitation of their sound recordings over the Internet." The right could be used, the labels said, to stop the activities of "pirates who upload and open to the public databases containing thousands of music tracks."[36]

Although the power of statutory damages against file sharers was not plainly evident in 2001, its legal clout would unfold in the coming years in the U.S., wielded by CRIA's sister organization, the RIAA. American law had an equivalent to the making available right, and statutory damages in the U.S. set the penalties for copyright infringement between US$750 and US$30,000.[37] In January 2003, the RIAA won a U.S. federal court decision, ruling that Verizon, an American ISP, had to disclose to the RIAA the name of a customer, a file sharer. The precedent-setting judgment opened a legal avenue through which the recording companies could sue individual file sharers for distributing copyrighted works on the Internet. Since that time, the RIAA has launched a campaign in the U.S. that threatens file sharers with legal actions based on exorbitant statutory damages penalties. For instance, a file sharer caught with 2,000 mp3s in a

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[35] In June 2005 the U.S. Supreme Court ruled that the distribution of a file-sharing program could be considered an infringement, provided it was distributed for the purpose of infringement. See United States, *MGM Studios v. Grokster,* 545 U.S. ___ (2005), http://www.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf; in the fall of 2005 an Australian federal court ruled that the maker of the Kazaa file-sharing program infringed copyright by authorizing copying. See Australia, *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.,* [2005] FCA 1242, http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html.

[36] CRIA, submission (September 2001), 9.

[37] United States, 17 U.S.C. s. 504 (c).

shared folder can be fined a minimum of US$750 per song, amounting, in this case, to US$1.5 million. As of November 2005, the RIAA had sued more than 15,000 file sharers, who, often faced with million-dollar legal actions, typically agreed to settle for amounts between US$3,000 and US$5,000.[38] At a Bill C-60 conference in Ottawa in 2005, Howard Knopf, a copyright lawyer, used the U.S. example to describe the power of the Canadian statutory damages provision when combined with a new making available right:

> That provision was never intended to apply in circumstances where several thousand works are involved, like in the hands of ordinary individuals.... They [the RIAA] say, 'Well, just because we're such nice folks, today only, until five O'clock, if you agree to pay $5,000, we'll let you go and you don't have to give us your house or anything.' That's the sword, that's the gun that's pointed at their head.[39]

Although CRIA's 2001 policy proposal to the government did not allude to statutory damages, it was evident that the measure, along with the making available right, would play an important role in its campaign against file sharing.

Also at the top of CRIA's agenda was the WIPO treaties' provisions for making it illegal to crack the technological controls on CDs, mp3s, not to mention DVDs, e-books and other digital content. The recording industry did not want to see purchased music, such as CDs or mp3s, contribute to the mass of music on the P2P networks. File sharers tend to "rip" CDs, or save the tracks as mp3s on their hard drives. They can then make them available to other file sharers by storing them in a shared P2P folder. The recording industry sees the development of technological controls as a way to prevent "rips" and the

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[38] Mark Coleman, *Playback: From the Victrola to MP3, 100 Years of Music, Machines, and Money* (Cambridge, Mass.: Da Capo Press, 2003), 181; Electronic Frontier Foundation, *RIAA v. The People: Two Years Later* (EFF whitepaper, November 2005), 2, http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf.
[39] University of Ottawa Faculty of Law, "Techlaw Copyright Summit" (conference, University of Ottawa, Ottawa, Ont., 29 September 2005).

sharing of mp3s, and continues to experiment with various technological controls and "copy proof" CDs. But hackers and consumers find ways around the copy-protection programs. In some cases consumers develop their own method of circumventing the technological control; in other cases, hackers make available free programs to circumvent the control for them. Some consumers discovered, for instance, that Sony's "Key2Audio" copy protection on CDs could be turned off simply by colouring the edge of the CD with a black, felt-tip marker.[40] The technological control on DVDs, a program called Content Scramble System (CSS), was similarly hacked in 1998 by a Norwegian teenager named Jon Johansen. Johansen, later earning the name "DVD Jon," had written a program called DeCSS to crack CSS, allowing people to copy and download the DVD's contents onto their computers. He made the program available for free on the Internet and DeCSS has since become widely available.

CRIA's 2001 submission to the government called these technological access controls important to "maintain adequate incentives for creativity."[41] If the recording industry was going to combat the P2P networks, it hoped to be able to impede the flow of works onto the networks. The major labels saw technological controls over the access and use of digital works as an important component of its online strategy. Legal remedies against the cracking of TPMs had less to do with soon-to-be obsolete CDs than with the technological controls the industry could place on music through online distribution systems. As the major music publishers, the Big Four had the power, they hoped, to provide the answer to the digital delivery of music. They did not want to license their music to some kind of third-party P2P network. Instead, they wanted to run their own

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[40] Reuters, "CD crack: magic marker indeed," *Wired News*, 20 May, 2002, http://www.wired.com/news/technology/0,1282,52665,00.html.

[41] CRIA, submission (September 2001), 16.

digital services on their own terms, with greater access and use controls over the digital music they sold. Legally protecting these technological controls, in their view, would help them rein in some semblance of order and control over content in the digital age.

The recording industry, along with the major Hollywood studios, wished to see the cracking of these digital locks an infringement under copyright law, as the WIPO treaties stipulated. In fact CRIA, among others, proposed that Canada go one step further: the government should not only make it an offence to circumvent TPMs, it should also become an infringement to manufacture and distribute programs like DeCSS, which circumvents technological controls. In its policy proposal, CRIA wrote:

> As no technological measure can permanently resist deliberate attacks, a TPM is only as good as its legal protection.... [P]rovisions implementing the Treaty obligations need to cover both the act of circumvention as well as the manufacture and distribution of a range of circumvention devices.[42]

CRIA wrote that the anti-circumvention law should apply to the distribution of access codes for computer programs or other copyrighted works, and that no exceptions should be made for the circumvention of TPMs. "The case of allowing exceptions to protection of TPMs is similar to allowing someone to break the lock on a safe, or take copies of works from shops without paying for them," CRIA wrote.[43]

If the labels wanted the law to help it prevent the cracking of TPMs on digital content, it also wanted the law to force ISPs to be more responsible for Internet infringers. Although the issue of ISP liability was not an element of the WIPO treaties, the government had identified it as a legislative priority. Again, CRIA proposed to follow the American approach, where, through the passage of the DMCA, the U.S. adopted a "notice and takedown" regime for ISP liability. Under this system, when a copyright

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[42] Ibid., 17.
[43] Ibid., 18, 20.

holder finds infringing material available for distribution on the Internet, such as music files, articles, or videos, the owner notifies the ISP hosting the Web site and the ISP is obligated to remove the alleged infringing material. CRIA made it clear in its proposal to the government that it wanted ISPs play a large role in the regulation of the Internet and that, "knowingly or unknowingly," they were "the conduits for all of the infringements that occur online over the Internet." CRIA argued that ISPs, under the control of large cable and telephone companies in Canada, should not "escape all responsibility for millions of copyright infringements made possible by the operation of their commercial businesses."[44] A larger degree of responsibility for ISPs would assist CRIA to police the Internet for copyright infringements.

Another crucial issue for the major labels surrounded the private copying levy on blank CDs and cassettes. In the 1997 amendments to the *Copyright Act,* the government had introduced the private copying regime, which introduced an exception for the private copying of music as well as a levy on blank media to compensate the music industry for this copying. Between 2001 and 2003, the Copyright Board set the surcharge at 29 cents on blank cassettes, 21 cents on blank CDs and 77 cents on MiniDiscs. In 2002, the Canadian Private Copying Collective, the organization delegated to collect and distribute the levy, began arguing that the surcharge should also apply to the memory inside portable mp3 players, such as iPods. As these arguments progressed, and as consumers paid the levy on rising sales of blank CDs, CRIA recognized that the nature of the regime was changing. In its 2001 submission to the government, the association argued the levy was originally intended to compensate copyright holders for home taping for personal use, not for the distribution of copies on the Internet. Consumers appeared to increasingly

[44] Ibid., 31, 33, 35.

view the levy on blank CDs as a kind of tax that lent legitimacy to file sharing. Expanding the levy to mp3 players[45] would further solidify this notion.

CRIA had this in mind in September 2003, when, in a submission to the House of Commons Standing Committee on Heritage Committee, it proposed that the purpose of the private copying exception be clarified so that it could not apply to file sharing. "Simply put, Parliament must not and could not have intended to legalize the copying of infringing or stolen material when it enacted the private copying exception in 1997," CRIA wrote.

> [T]he exception was first referred to as the "home taping exception," reflecting the fact that it was conceived and intended to cover the circumstance of a private individual making a copy of a legitimately owned recording on an analog tape in his or her own home for personal use.... The overly broad definition could lead to the absurd conclusion that the private copying exception legalizes the copying of infringing or stolen material ... particularly at a time of widespread file-sharing of infringing copies.

Ironically, CRIA had lobbied hard for the creation of the regime prior to its introduction in 1997, but by the fall of 2003 it created nothing but problems. Perhaps the best case scenario for CRIA was to see it scrapped altogether, or at the very least, see it clearly redefined as a remuneration scheme that had nothing to do with file sharing. The recording industry felt that it could not move to licensing its content online with this legal instrument in its path. As CRIA described it in a 2005 press release:

> The private copying levy currently provides rights holders with approximately 2.8 cents per "lost sale" for copies made to blank CDs, and nothing for copies made to personal computers or ... digital audio recorders. At Puretracks [a pay-per

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[45] A Copyright Board ruling extended the levy to mp3 players in 2003, but the Federal Court of Appeal reversed that decision the following year. See Copyright Board Canada, *Private Copying 2003-2004: Copying for Private Use,* decision, 12 December 2003, http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf; and *Canadian Private Copying Collective v. Canadian Storage Media Alliance* [2004] FCA 424, http://reports.fja.gc.ca/fc/2005/pub/v2/2005fc35956.html.

> download site] or iTunes, rights holders receive 99 cents. Thus a single legal download sale compensates rights holders 50 times as much as the levy would.[46]

The government intended to revisit the private copying regime, but in 2002 it identified it as a medium-term priority, not short-term,[47] meaning that an overhaul of the regime could be another 10 to 20 years away. Despite this, CRIA wrote in 2003 that the broad scope of the private copying exception must be "immediately corrected."[48]

Just as the government seemed to delay the issue of the private copying regime, the timing of new copyright legislation became an issue for the major labels. The government, moving at a cautious and informed pace, did not proceed with the urgency CRIA hoped. As a blow to the rights-holder lobby, the government's 2001 *Consultation Paper* raised several digital issues surrounding copyright but made no reference to implementing the WIPO treaties under a near-term plan. Instead, it identified four issues for reform, most of which were WIPO issues, but the paper did not propose dealing with all of the treaty requirements. Although the government acknowledged that the issues it identified did not "represent a definitive statement of the government's near-term legislative agenda for the *Copyright Act*," it was quite clear that the government was avoiding implementing WIPO in its next phase of reforms. The government's plan was, instead, to merely study the implementation of the WIPO treaties and consider how they would meet its "public policy objectives."[49] In response, in 2001, CRIA urged the

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[46] Canadian Recording Industry Association, "Recording industry welcomes Supreme Court decision on private copying" (press release, 28 July 2005), http://www.cria.ca/news/280705_n.php.

[47] Industry Canada and Canadian Heritage, *Supporting Culture and Innovation: Report on the Provisions and Operation of the* Copyright Act (Section 92 report, tabled in Parliament 3 October 2002), 45, http://strategis.ic.gc.ca/pics/rp/section92eng.pdf.

[48] CRIA, submission (September 2003), 9, 10.

[49] Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (Ottawa, June 2001), 7, http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf.

government to "move swiftly" on the matter.[50] In the same way, CRIA co-chaired a coalition of creators and rights holders called the Copyright Coalition of Creators and Producers, which told the government that "[i]mplementation and ratification" of the treaties "is our most pressing concern," and urged it to address, in the short term, the WIPO measures left out of the *Consultation Paper*, namely, moral rights for performers and corporate ownership and the term of protection in photographs.[51]

The answers to CRIA's proposals came on 20 June 2005, when the government tabled Canada's next copyright reform bill in Parliament. The departments had released an outline of their proposed legislation in May, but it was not until June that Heritage Minister Liza Frulla tabled in Parliament Bill C-60, *An Act to Amend the Copyright Act.* Due to an unstable minority Parliament, the bill did not proceed beyond first reading, but it marked the clearest public display of the government's policy intentions in this round of copyright reform. Parliament, elected in the summer of 2004, dissolved for a general election in November 2005, and Bill C-60 expired on the order paper. As many expected, the proposed legislation was far from a failure for the major labels and the content industries. Bill C-60 would certainly benefit the content industries more than it would benefit users. Curiously, nor was it considered a victory.

To the benefit of CRIA and the content lobby, Bill C-60, the government's short-term legislative package, included all of the necessary legislative items to ratify the treaties. This was a major victory for the content industries. Along the way, the government had accelerated the implementation of the treaties by dealing with them in its short-term plan. Because of their complex nature, a package of copyright reforms had in

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[50] CRIA, submission, (September 2001), 37.
[51] Copyright Coalition of Creators and Producers, submission regarding the consultation papers (September 2001), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00349e.html.

recent history taken about 10 years to implement. If the measures in the treaties had been split up into two legislative phases, the process could have been extended by several years – time that the recording industry did not want to spare. Canada represented a target country of the labels' global campaign toward greater regulation of the Internet, and as part of its strategy to combat file sharing and succeed with online sales, the labels wanted to see the WIPO treaties enacted – and ratified – without delay. The longer CRIA waited before launching its legal suits against file sharers and P2P networking, the more culturally attuned Canadians would become to file-sharing and the more difficult it would be to sway them toward pay services like iTunes, or so the thinking went. The labels, then, considered it a victory to see the WIPO treaties in legal language in Canada. The day Frulla tabled the bill, CRIA president Graham Henderson told CanWest News Service that simply holding a copy of the bill in his hands delivered a degree of satisfaction: "Overall, just seeing this thing," he said. "Oh my God, it's actually here."[52]

From CRIA's perspective, a significant provision of Bill C-60 was the introduction of a making available right without any amendment to the *Copyright Act*'s statutory damages provision. This was an important clause because the government had acknowledged, in its 2002 report on copyright reform, that the provision was contentious. "At present, virtually any infringement of the Act, however minor, can trigger statutory damages for copyright infringement," the report said, noting that in "certain circumstances, these can create hardships or inequities."[53] By 2005, the RIAA's practices of using a similar provision to intimidate file sharers with exorbitant lawsuits in the United States had also become very well known in Canada. Despite lessons that could be

[52] Simon Doyle, "Music industry lauds proposed copyright legislation," CanWest News Service, 21 June 2005, via FPinfomart, www.fpinfomart.ca.
[53] *Supporting Culture and Innovation,* 29.

learned from the U.S. experience, the government made a clear decision to proceed with the powerful combination of a making available right and full statutory damages.

Another important aspect in C-60, which received little-to-no attention publicly, met CRIA's wish to clarify the role of the private copying exception in the digital age. A clause in the bill would effectively narrow whatever small influence the exception had on Canadian copyright in the digital world. As expected, the bill included provisions to make it an infringement to tamper with rights management information or to remove or "render ineffective" a technological control. That much was expected by many as part of the government's implementation of the WIPO treaties, but an additional, unexpected condition came with it, which greatly benefited the recording industry. One would have assumed that, because Canadians pay a 21-cent levy on blank CDs for private copying, the bill would have provided an exception for consumers to circumvent technological controls on CDs for the purpose of making private copies. Ironically, the bill did just the opposite. It says that it is an infringement to circumvent a copy-protection measure on a CD "for the purpose of making a copy" under the *Copyright Act*'s private copying regime.[54] The measure marked a narrowed approach to the exception that even the Library of Parliament acknowledged in its analysis of the bill:

> The anti-circumvention rule set out in subsection 34.02(1) would seem to render the right to make personal copies under section 80(1) virtually useless, since it is likely that all future CDs and DVDs will be protected by technological measures.[55]

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[54] Bill C-60, *An Act to Amend the Copyright Act,* 1st sess., 38th Parliament (first reading, 20 June 2005), cl. 27 (34.02), http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF.

[55] Sam N.K. Banks and Andrew Kitching, *Legislative Summary: Bill C-60: An Act to Amend the Copyright Act,* (Library of Parliament analysis of Bill C-60, September 2005), 10, http://www.parl.gc.ca/38/1/parlbus /chambus/house/bills/summaries/c60-e.pdf

The provision fell directly in line with the recording industry's attempts to limit the scope of the levy and essentially eliminate its application to music in the digital age. As the recording industry continues to roll out CDs with new copy-protection programs,[56] the private copying exception, with this provision, would no longer apply to these CDs in Canada.

What is more interesting about the bill, however, is how far it diverged from the desired policy approach of CRIA and the rights-holder lobby, which was to follow the lead of the U.S. Instead of tabling a bill to follow that approach, the government did the opposite, and went ahead with legislation that met the minimum requirements of the WIPO Internet treaties and, in addition, took a much more moderate approach to ISP liability. Moreover, Bill C-60's approach to the outlaw of anti-circumvention programs came as a failure for the recording industry – because such a measure was absent from the bill altogether. C-60 did not propose, as CRIA wished, the outlaw of anti-circumvention programs like DeCSS, a policy move that sidestepped CRIA's 2001 proposal that "protection against the making and dissemination of circumvention tools must be unhampered and overreaching."[57] Ken Thompson, former legal counsel for CRIA, called the bill a minimum WIPO implementation:

> The bill was inadequate on many levels, in terms of protections.... I think that the record companies genuinely require those protections, and the fact is that the bill comes in at the very lowest level ... to be able to ratify the treaties.[58]

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[56] In 2005 Sony BMG released CDs with an advanced copy-protection program that, like a virus or 'malware,' downloaded itself onto users' computers and made them vulnerable to security breaches. The program was widely criticized and Sony has since faced class-action lawsuits. See Reuters, "Sony folds tent, recalls CDs," *Wired News,* 16 November 2005, http://www.wired.com/news/technology /0,1282,69590,00.html.

[57] CRIA, submission (September 2001), 20.

[58] Ken Thompson (former legal counsel, CRIA), in discussion with the author, 13 December 2005.

CRIA had called for a DMCA-style, American approach to further the labels' online strategy, in which technological controls would become a major element. The labels claimed, for instance, that without the ability to take legal action against the "DVD Jons" of the Internet, they could never write a copy-protection program to solve CD or DVD ripping.

The failure to outlaw the distribution of circumvention devices is just one example of Bill C-60's minimalist approach to the implementation of the treaties. The bill's measure against the circumvention of TPMs was limited in another way that the DMCA was not. The wording of the bill would make circumvention an offence only when it is for "the purpose of an act that is an infringement of the copyright" of the work.[59] This meant that the user's intention toward how he or she would use the work after circumventing a technological control had a lot to do with whether the circumvention itself was an infringement. Presumably, the wording of this clause would exempt cryptographers who circumvent TPMs for the purpose of scientific study or a student who circumvents a technological control on a digital article for the purpose of copying some text. The issue of legal protection of TPMs proved to be very controversial in the U.S., leading to the arrest of at least one cryptologist and raising questions about the law's constitutionality.[60] Depending on how the courts would interpret the wording of the law, the bill appeared to be drafted in a way to avoid the controversial consequences of the DMCA in the U.S., so that no technological control in Canada could use the law to go unchallenged.

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[59] Bill C-60, cl. 27 (34.02).
[60] See, e.g., Ronald S. Katz and Adam J. Safer, "Whither the DMCA? A Tale of Two Cases," *Journal of Internet Law,* 6, no. 11 (May 2003).

CRIA was also not impressed with the government's approach to ISP liability. Bill C-60 would set out, instead of a notice and takedown regime, a "notice and notice" system of ISP liability. Instead of ISPs having to respond to the requests of copyright holders to remove alleged infringing materials from Web sites, the bill recognized them as mere intermediaries with a limited amount of responsibility to copyright holders. In a notice and notice regime, when a copyright holder discovers infringing material on a Web site, it notifies the ISP, which is then legally required to notify the Web site owner about the alleged infringing material. Web site owners who do not remove the material can be found liable for infringement by a court, but the ISP is not be held liable unless it neglects its obligation to notify Web administrators. Under the system, ISPs also charge copyright holders fees for the notification service.[61]

To little surprise, CRIA released a critical statement the day Heritage Minister Frulla tabled the legislation, saying that "the bill fails to provide digital businesses with adequate protections from hackers" and that ISPs should have had to "shoulder more responsibility for piracy that occurs on their networks."[62] Similarly, those in the user lobby were relatively pleased with the bill. When the government released its preliminary proposals, which became Bill C-60, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) said that: "[T]hese proposals appear to represent a commitment to balance in copyright law, not just lip service."[63]

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[61] Bill C-60, cl. 29.
[62] Canadian Recording Industry Association, "Music industry says draft law takes key steps to bring Canada into the digital age" (news release, 20 June 2005), http://www.cria.ca/news/200605_n.php.
[63] David Fewer, CIPPIC legal counsel, quoted in, Canadian Internet Policy and Public Interest Clinic, "CIPPIC cautiously optimistic regarding government plan to amend the *Copyright Act*" (press release, 24 March 2005), http://www.cippic.ca/en/news/documents/Press_Release_-_Government_Copyright_Announcement.pdf.

CONCLUSION

Bill C-60 struck direct hits with some of CRIA's policy goals. The bill brought legislation forward that the recording industry saw as crucial to its strategy of maintaining control of the music business in the digital age – and it brought forward the legislation under a short-term plan, saving CRIA and the content lobby what could have been years of policy work before Canada could be in a position to ratify. The recording industry's traditional business model had been based on signing emerging artists, taking ownership of the copyrights, and turning them into international stars to capitalize on both the sale of records and the license of rights for commercial use. The Internet and the P2P networks put serious challenges to this business model. The P2P networks, which arrived unexpectedly, evolved quickly, gained widespread popularity and obstructed the recording industry's attempts to dominate online sales. The recording industry believed that to carry out its strategy, which involved shutting down the P2P networks and dominating the online delivery of music, depended on stronger copyright laws, and the Canadian government's legislative proposals to implement the WIPO Internet treaties in their entirety came as a welcome answer. The making available right with statutory damages would allow CRIA to take the war on the P2P networks north, mirroring the RIAA's intimidation of file sharers in the U.S. The government was prepared to go along with CRIA's plan to quash the P2P networks, drafting for CRIA the legal instruments to do so. The clarification of the private copying exception was also a significant development. Although some preferred to see the exception broadened in scope, the government chose to limit it, and as drafted, the bill calls into question why the regime exists at all if will not apply to CD burning.

Although the government rolled out legislation to support the major labels' broad online strategy, the government's policy agenda was to meet the requirements of the WIPO treaties with or without CRIA, and the bill proposed a minimalist approach to digital copyright reform. Bill C-60 failed CRIA on some of its most important and controversial proposals for copyright reform. It did not propose legal remedies for the distribution of circumvention devices and would permit the circumvention of technological controls for non-infringing purposes. A notice and takedown system would have given rights holders a tremendous amount of control over material on the Internet without judicial oversight. In its place, Canada proposed a more moderate notice-and-notice regime. Although the government rolled out a legislative package that would allow CRIA to pursue its e-commerce strategy in most of its avenues, the bill reflected government resistance the most powerful copyright lobby in Ottawa and a desire to take a minimalist approach to digital copyright reform.

Chapter Two

Industry over access: Canadian copyright reform, 1921 to 1997

In the spring of 2004, the Department of Canadian Heritage released a report titled *The Economic Contribution of Copyright Industries to the Canadian Economy*, by Wall Communications Inc. Although the report noted that Wall did "not necessarily represent the policies or the views" of the Department, the study represented an economic argument for implementing the WIPO Internet treaties and, in a more general sense, the government's continued, even expanded support for Canada's copyright industries. These industries, also known as the cultural or content industries, represent sectors of the economy that create, produce, manufacture, perform, broadcast, distribute and communicate copyright-protected works, and as the Wall report said, they had taken on larger-than-ever role in Canada. "There is a growing body of international research demonstrating that the economic contribution of copyright-based (CB) industries is becoming increasingly important," the report said. Including revenues generated by peripheral but related sources, the industries had increased their contribution of value-added to the Canadian economy from $19.6 million in 1991 (3.87 percent of GDP) to $39.6 million in 2002 (5.38 percent of GDP). Similarly, the content industries provided jobs for about 500,000 employees in 1991, but by 2002, had hired 900,000 Canadians.[1]

Heading into the policy debate on the WIPO Internet treaties in the mid-1990s, if the Canadian Recording Industry Association (CRIA) took a broad, historical look at the government's policy toward the copyright industries, it had reason to be optimistic. The

[1] Wall Communications Inc., *The Economic Contribution of the Copyright Industries to the Canadian Economy* (report commissioned by Canadian Heritage, March 2004), i-iii, http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/economic_contribution/economic_contr_e.pdf.

government's policy on copyright has, for the economic reasons described above, shown a steady shift of rights toward copyright holders. Copyright began in Canada as a relatively simple legal system to protect Canadian publishers and music producers from those who could otherwise freely re-publish, sell and profit from their works. Over time, repeated amendments to the *Copyright Act* have, to quite astonishing extents, turned the law into an industrial tool that resembles little of copyright's origins. Traditionally seen as a policy to foster creative works and strengthen society's education and knowledge through access to these works, copyright today has become a complex legal system designed to strengthen the hand of those industries that trade in intellectual property and thrive on a multitude of legal rights attached to the distribution and use of their works. It has become a system designed to give greater control to the copyright industries, but it has come at an expense to the public. Someone who faxes a newspaper article to a friend or downloads a purchased DVD onto their computer, for instance, has technically broken the law.[2] Ron Thomson, chair of the Canadian Copyright Institute, an association advocating for the interests of producers of copyrighted materials, expressed it well in 1996, when he described before the Commons Heritage Committee the kind of copyright exceptions that, to him, are acceptable for teaching:

> [W]e're quite happy with the transitory copying of material onto blackboards or flip charts and things like that. That's fair enough; it's transitory. I know teachers are quite worried that if they copy a line from Margaret Atwood onto the blackboard, they might be charged with copyright infringement, but we're quite willing to have that.[3]

The government has formed the Canadian copyright regime mostly during the last 20 years. Amendments to the *Copyright Act* largely came in response to the emerging power

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[2] David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000), 126, 271.
[3] House of Commons Standing Committee on Canadian Heritage, evidence, 2nd sess., 35th Parliament, 8 October 1996, http://www.parl.gc.ca/committees352/heri/evidence/23_96-10-08/heri23_blk101.html.

of content industries in an increasingly technology- and knowledge-based economy. The government came to rely on government relations and trade organizations, like the Copyright Institute mentioned above, to help formulate policy, largely excluding the public. Ottawa's intellectual property policies have also been influenced by the international pressures borne by treaties and trade agreements. Above all, the government has allowed industrial and economic interests to supersede the interests of consumers and the public. The aims of the copyright industries, and the government's corresponding interest in fostering a healthy economy, have guided Ottawa's approach to copyright law, which has brought about a system that leaves users, or those who want easy and inexpensive access to works, at a disadvantage.

Canada's first *Copyright Act* came into force in 1924, building on the Anglo-Saxon tradition, which, although traceable to the laws of 15th-century England, is rooted in the first statutory copyright law implemented in Britain in 1709. Laboriously titled *An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasors of such Copies during Times therein Mentioned* [sic], lawmakers enacted the statute to protect publishers, who were powerless to stop the reprinting of their books. The government saw the law as a tool to encourage publishers and to ensure there was some economic reward for producing and distributing original works. According to the statute, reprints often led to publishers' "very great Detriment and to[o] often to the Ruin of them." The law also gave authors and publishers, for a limited term, an exclusive right to publish and to sell that right to another printer. As a condition of registering the copyrights, copies of the books had to be distributed to nine libraries available to the public. Although the law was primarily motivated by economics – drafted

as a measure to protect printers, not authors – the British government also recognized the social importance of facilitating public access to copyright works.[4]

The 1924 *Act* was Canada's first sovereign copyright statute, replacing an 1886 *International Copyright Act* imported from Britain, and although amended several times since, it is the statute in use today. The 1924 law put to use a new power brought on by the *Constitution Act* of 1867, giving Canada the authority to write its own copyright laws independent of the United Kingdom. Canada's approach does, however, follow the tradition of colonial nations like the United States, Britain and Australia, which is primarily based in economics. Canada's law is a "work-centred," "economic" or "utilitarian" view of copyright. The focus of protection is on the copyright work, as opposed to the European *droit d'auteur* tradition, which instead associates rights with the individual creator of the work.[5] The Supreme Court of Canada, in a 2002 judgement on copyright law, identified Section 3 of the *Copyright Act* as an attempt to draft Canada's "definition of copyright," and as the court noted, it is a definition that refers only to the economic, or utilitarian understanding of copyright. The court said: "The economic rights are based on a conception of artistic and literary works essentially as articles of commerce.... Consistently with this view, such rights can be bought and sold either wholly or partially."[6] Like the United Kingdom's 1709 law, Canada's 1924 *Act*, based primarily on a 1911 British statute, recognized the value of public access to works. The 1924 *Act* set the term of copyright for authors and creators at life of the author plus 50 years, but legislators included an important exception to this rule. After 25 years, the

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[4] Statute quoted in Linda Hansen, "The Half-Circled 'C': Canadian Copyright Legislation," *Government Publications Review,* 19 (1992): 138.
[5] Sunny Handa, *Copyright Law in Canada* (Markham, Ont.: Butterworth Canada Ltd., 2002), 62-63.
[6] *Théberge v. Galerie d'Art du Petit Champlain inc.* [2002] 2 S.C.R. 336, 2002 SCC 34, http://www.lexum .umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html.

public had the right to reproduce and sell a copyright work provided they notified the right holder and paid a 10 percent royalty.[7] The exception would not last until contemporary times, but the 1924 *Act* upheld a traditional notion of striking a balance between the interests of copyright holders and copyright users. Ideally, the principle works toward a greater social good by making a maximum amount of knowledge and works available to the public while remunerating creators fairly.[8]

Although the content industries in Canada were relatively small in 1924, the statute represented an early recognition of the economic importance of the domestic copyright industries. The law introduced measures to protect Canadian book publishers, making it unlawful, in most cases, to import a book if a Canadian publisher already owned the right to reproduce it. Legislators intended to prevent the importation of books that could instead be bought from Canadian suppliers, but the principle immediately came under attack from critics. Arthur Stringer, an author and member of the League of Canadian Authors, told *The Globe* in 1921 that the law would remove rights from individual authors in favour of publishers, who could sell Canadian books as cheaply as they wished and only have to pay the author a 10 percent royalty. Stringer said:

> For a nominal Governmental fee, it permits a Canadian printer whose eagle eye first spots a serial published outside Canada to reprint that serial in his own country and to remain for 60 years the proprietor of its publication.... This home reprint may be listed as low as 25 cents a copy, no matter what its original price and original format may have been. The author's will or consent is not considered. He is given two and one-half cents per copy.

As early as 1921, Canada's protection of the content industries, by implementing laws in an attempt to foster a stronger domestic industry, appeared to be departing from its original principle of protecting publishers from reprints. The impact of the law on authors

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[7] *An Act to amend and consolidate the Law relating to Copyright, SC* 1921, c. 24, s. 5.
[8] For copyright theory see Handa, 112-113, 53-54.

may have been small, but Stringer's criticism at least symbolized what would become a general a trend toward the protection of the content industries in Canada, often at the expense of the public or, in this case, individual artists.[9]

In 1936 an amendment to the *Act* provided new assistance to Canadian copyright holders for the management of music copyrights. The amendments created the Copyright Appeal Board to consider the appropriate tariffs, or royalties, for performance rights. The board created a need for collective societies, or copyright collectives, to manage royalties for rights holders. Collectives like the Canadian Performing Rights Society, established in 1925, would charge for the performance of music in public, such as over radio airwaves and in concert halls, and distribute those fees to rights holders.[10] The *Act* also delegated these collectives with a significant power: the right to argue before the board for what they saw as the appropriate royalty rates. This power would play a larger role after the expansion of collective licensing and the creation of the Copyright Board in 1989, after which a larger assortment of copyright collectives would wield more influence and administer a larger number of rights.

Although the *Copyright Act* did not again see significant changes until 1988, the government continued its study of copyright. In 1954, it set into motion the Royal Commission on Patents, Copyrights, Trade Marks and Industrial Design. The Isley Commission, as it became known for its chair, was asked to determine if Canada's federal laws offered enough incentives toward innovation, research, writing, art and science, on terms "adequately safeguarding the paramount public interest." Part of this mandate

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[9] Hansen, 143; *The Globe,* "Arthur Stringer shows how Copyright Act handicaps authors: Makes 'outlaw' nation," 2 April 1921.

[10] CPRS no longer exists, but its role is now filled by SOCAN; see *Encyclopedia of Music in Canada,* 2005, "CAPAC," http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params =U1ARTU0000603.

included an examination of copyright and whether the law struck a fair balance between the interests of copyright users and creators. Witnesses debated the role of copyright, from discussions on its very nature to one far-reaching submission that argued for a natural right, which, in the *droit d'auteur* tradition, ties rights to the individual creator for the labour put into the work and equates copyright with physical property. The argument was justified "on the ground that nothing is more certainly a man's property than the fruit of his brain."[11]

The commission also confronted questions of copyright policy in international trade. Canada signed the *Berne Convention* in 1928, the oldest international treaty on copyright, which sets out basic minimum standards for member countries. The convention affords its signatories national treatment, extending the full protection of a host country's domestic copyright law to the works of foreign nationals. The Isley Commission had been asked to expand on Canada's international commitments and respond to the potential ratification of two international agreements: the 1948 Brussels revision of the *Berne Convention* and the 1952 *Universal Copyright Convention.* Recognizing the public interest, the commission recommended in 1957 that Canada not implement the Brussels text partly because it would unfairly increase the term of copyright to a mandatory minimum of life plus 50 years. The report also considered Canada's trade deficit, noting that the Brussels revision would have introduced a re-transmission right for American broadcasts, causing an outflow of remuneration fees to the U.S. At the same time, however, the commission did propose that Canada sign the

[11] Commission quoted in Hansen, 143.

Universal Copyright Convention because it was seen to afford economic benefits to Canadian publishers.[12]

The Liberal government, under Lester B. Pearson, in 1966 directed the Economic Council of Canada to study a number of consumer and trade issues, including federal copyright law and how it fit into the government's long-term economic objectives. As a consequence, the council published three reports: *Interim Report – Consumer Affairs and the Department of the Registrar General* (1967); *Interim Report on Competition Policy* (1969); and *Report on Intellectual and Industrial Property* (1971). The intellectual property report, giving favour to public access to copyright works, did not recommend any significant changes to federal copyright law. Although the council heard arguments for reducing the term of copyright, the report made no reference to the idea. Instead, the reports identified a growing problem in the enforcement of copyright and called for better measures to protect what it saw as a Canadian cultural fabric under assail from the intellectual property exports of the U.S., such as music and television.[13]

The Economic Council of Canada's studies highlighted part of a trend that, over the course of the 1950s, '60s and '70s, saw the influence of the U.S. cultural industries grow to remarkable, multi-billion dollar proportions and attract the attention of policy makers. As early as the 1950s there emerged, among some nationalist-minded Canadians, somewhat of a moral panic over the influence of American culture, especially music, which later led the government to claim a larger role as protector of the Canadian content industries from American influence. The growing popularity of rock and roll stars like Elvis Presley, with his gyrations and suggestive lyrics, not only offended mainstream

[12] The government ratified the UCC in 1962, however. See Hansen, 143; and Handa, 84, 394, 400, 403.
[13] Hansen, 145.

Canadian and American sensibilities, but also Canadian nationalists such as choral leader Leslie Bell, who in the 1950s observed Canada's inability to control the flow of American content on Canadian airwaves. American pop songs had emerged as a new cultural threat in Canada, appearing to crowd out distinct Canadiana like East Coast fiddler Don Messer, country artists like Wilf Carter, Hank Snow and other traditions like prairie square dancing and Quebec folk songs. By the 1960s and '70s, as Canadians increasingly looked to home-grown artists such as Neil Young and Gordon Lightfoot to define themselves, the government looked to forge policies to stimulate home-grown, Canadian productions and stronger Canadian copyright industries.[14]

Over time, Ottawa's "Canadian culture" agenda naturally found its way into the government's approach to cultural policy and copyright. Federal departments pointed, for instance, to the influence of American culture, and its ability to destroy what some saw as the uniqueness of the Canadian identity, when the government created the National Film Board and the CBC in the 1930s, and in the 1950s, the Canada Council. In 1971, Gerard Pelletier, secretary of state under Prime Minister Pierre Trudeau, became the first to use the phrase "cultural policy" when he unveiled federal assistance to promote Canadian culture. Alongside these programs, Canada's *Copyright Act* has increasingly fallen under the ministerial rhetoric of protecting Canadian culture, despite the fact that the *Act* tends to put business interests, many of them foreign, above arts and culture.[15]

Throughout the 1960s and '70s, the content industries, alongside arts and cultural organizations, recognized a much larger role for government in their affairs, and Ottawa

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[14] Robert Wright, *Virtual Sovereignty: Nationalism, Culture and the Canadian Question* (Toronto: Canadian Scholars' Press, Inc., 2004), 60-61.

[15] Canada's policies on intellectual property and trade protect business interests over arts and culture, writes Susan Crean, "Looking Back to the Future – Creators and Cultural Policy in the Era of Free Trade: A Commentary," *Journal of Canadian Studies,* 35, no. 3 (2000), 199-211.

saw itself as having a correspondingly larger role to play among them. The 1960s marked a new, expanded era in the government's approach to cultural policy. It was no coincidence that in this decade federal agencies established the Canadian Film Development Corporation (later Telefilm Canada) and the Canadian Radio-Television Commission (CRTC). In the twenty years leading up to 1980, an expansion of provincial and municipal arts programs corresponded to growing federal support for the arts. The Canadian market for cultural products grew, and recognizing an opportunity, the private sector expanded its investment in film, music, bookstores, cinemas, television and radio. At the same time, the cultural sector expected more support from various levels of government. It found power in numbers, forming movements and organizations to lobby for greater government protection of their rights and support for their work.[16]

The number of cultural-based associations and organizations rose significantly during this period, adding significantly to the relatively small number of groups, such as the Canadian Council of the Arts, that lobbied the federal government prior to 1960. On 9 April 1963, for instance, as the Canadian recording industry emerged as a more influential sector, the major labels established CRIA, with 10 member companies. Then known as the Canadian Record Manufacturer's Association, it took on the name CRIA in 1972 under an expanded membership and with an interest in increasing its profile and advocating for favourable government policies.[17] Several now-prominent cultural industry groups formed during this period, many of them to add their input on copyright law. *The Globe and Mail*'s Paul McGrath noted as much on 12 July 1984:

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[16] Ibid., 201-202.
[17] *The Canadian Encyclopedia,* 2005, "Canadian Recording Industry Association," http://www.canadianencyclopedia.ca/index.cfm?PgNm=TCE&Params=U1ARTU0000587.

> In the 13 years since the Economic Council of Canada first suggested a massive overhaul of the Canadian *Copyright Act* – which has not changed substantially since it was created in 1924 – scores of cultural industry organizations, representing artists, manufacturers and transmitters, have gone head-to-head on crucial copyright issues, each defending his turf from encroachment by others.

The host of groups that sprung up during this time include the now-influential Canadian Independent Record Production Association (1975), The Writers Union of Canada (1973), the Association of Canadian Publishers (1976) and the Council of Ministers of Education, Canada (1967). In the 1960s, the Canadian Music Publishers Association (CMPA), formed in 1949, also began heavy lobbying of the government with support from Walt Grealis' advocacy magazine *RPM.* The CMPA was instrumental in the campaign for the Canadian content ("Cancon") rules to help develop, as it argued, a stronger Canadian music community.[18] Organizations such as these, representing various interests in the content industries, came to be the primary stakeholders in copyright.

By 1980, the copyright industries looked radically different than in 1960. In the early 1980s the Canadian Institute for Economic Policy commissioned consultant Paul Audley to write an overview of the content industries in Canada. The 350-page study, published in 1983, was the first of its kind in Canada. Audley reported that the content industries had grown "rapidly" over the previous decade, and as he noted in his introduction, copyright had taken on a new importance, providing "the fundamental basis for the operation of the cultural industries." He continued:

> [I]f the interests of Canadians as creators of copyright materials and of Canadian companies as producers of such materials are not accorded protection at least as effective as that provided in other countries, particularly those which Canada has extensive trade relationships, then development strategies cannot be successful.

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[18] Wright, 59; Brian O'Shea Papizzo, "Towards a Political Economy of the Canadian Recording Industry" (M.A. thesis, Carleton University, 1993), 130; for the years these organizations were founded see their individual Web sites: www.cirpa.ca; www.writersunion.ca; www.publishers.ca; www.cmec.ca.

Audley noted that, in 1980, total public and private expenditures on the content industries, including spending on newspapers, magazines, books, sound recordings, film, radio and television, amounted to $5.4 billion for the year. Advertising expenditures alone, on television, newspapers, radio and serials had increased 265 percent over the previous 10 years, from $621 million in 1970 to $2.27 billion in 1980. Gross National Product, over the same period, increased by 238.2 percent. Similar increases could be seen in the public consumption of cultural commodities. The Consumer Price Index had increased 116.7 percent; Canadian record distributors increased their revenues by 304 percent, from $65.7 million in 1970 to $265.1 million in 1980; and annual consumer spending on cable television increased seven-fold, from $54.9 million to $352.2 million.[19]

To policy makers in the early 1980s, amendments to the *Copyright Act* carried more importance than ever, and the Liberal government set the scene for new legislation. In 1977, two officials from Department of Consumer and Corporate Affairs, A.A. Keyes and C. Brunet, released *Copyright in Canada*, a 240-page working paper for legislative action. Among other things, it proposed a "nationalistic" approach to the content industries in Canada and, like Audley, noted the importance of copyright. Their Department had "the general objective of fostering an efficient Canadian market system," they wrote. "The Department brings together all federal laws regulating business in the market-place, reflecting government policy that a competitive market is the basis for an effective national economy."[20] It followed that Keyes and Brunet would propose an

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[19] Paul Audley, *Canada's Cultural Industries: Broadcasting, Publishing, Records and Film* (Ottawa: Canadian Institute for Economic Policy, 1983), xxx-xxxi, 316-318.
[20] A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Minister of Supply and Services, 1977), iv, 1.

approach to copyright that centred around the rights of copyright holders. In one of their more controversial statements, they downplayed the need for public access to works and, echoing the *droit d'auteur* approach, equated copyrighted works with a form of private property:

> [I]t can be said that the "public interest," in terms of copyright, encompasses at the same time both the recognition of creators' rights as well as the limits that should be attached to those rights. Identifying exclusively, as has been done, the public interest with the public's *"right of access to information" is a bias that should be resisted*, in that it would eventually lead to the demise of the concept of private property in copyright law.[21]

The suggestion that there was no substantial difference between natural rights, that is, the property right attached to a creation because of the labour put into it, and mere statutory rights granting privilege to a work for a limited time, was a departure from Canada's traditional notions of copyright and one that would lend far more power to rights holders. In a reply to the report, R.J. Roberts, a faculty member at the University of Western Ontario's law department, wrote, "This principle leads directly to the inference that a creator has a natural right to remunerate every time his published work is used by someone else."[22]

The Liberal government later decided, apparently due to the controversy generated by the report, to conduct further consultations before it proposed any legislation, and did not make any changes to the *Copyright Act* for several years. Joe Clark's Progressive Conservative minority government came to power in 1979, followed by a Liberal majority government in 1980. Although the Liberals intended to bring forward legislation, by May 1984, they expressed concern that they would not be able to do so before an expected fall election. That spring, Judy Erola, Minister of Consumer and

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[21] Emphasis added. Ibid., iii.
[22] Roberts quoted in Hansen, 145-146.

Corporate Affairs, and Francis Fox, Communications Minister, tabled a white paper on copyright called *From Gutenberg to Telidon.* The report called for the revision of the *Copyright Act* to accommodate for changes in technology, such as the advent of radio, television, photocopying, computers and satellites, which, in the views of the ministers, had created an unfair environment for copyright holders and the "exploitation of intellectual property." The government wanted to "help Canadians benefit as much as possible from technological change"[23] and claimed that it was "not only timely but urgent and necessary that Canada's *Copyright Act* be revised to meet the challenges of the new environment."[24] The paper proposed, for instance, that computer programs be granted special protection under the *Act*; that various rights be recognized in the production of films; and that the role of Copyright Appeal Board be expanded to encourage and give greater purpose to the administration of copyrights by collective societies.

In the fall of 1984, before the Liberal government could table a bill, a federal election saw Brian Mulroney's Progressive Conservatives emerge with a 211-seat majority government, by which time policy makers felt that revisions to the federal copyright law were far overdue. In 1983, Consumer and Corporate Affairs Minister Erola told the Canadian Press that the *Act* badly needed reforms and the laws on sound recordings were designed for the age of the "player piano." The Conservative government got to work on copyright almost immediately, establishing a Subcommittee on the

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[23] Consumer and Corporate Affairs Canada and Department of Communications, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa, 1984), i.
[24] Ibid., 2.

Revision of Copyright that, after viewing 300 submissions and hearing from 111 witnesses, released a report called *A Charter of Rights for Creators.*[25]

The report reflected its title, recommending a host of new rights for copyright holders and called for the urgent revision of the *Act.* "Canada's *Copyright Act* has existed for more than 60 years. It is imperative that we revise this antiquated copyright law which speaks of 'mechanical contrivance' and 'perforated rolls' as used in player pianos," it read.[26] The report called copyright a "policy tool" to foster Canadian culture, but perhaps more telling of the government's approach, it noted:

> Copyright is also big business. Almost 500,000 Canadians are directly employed in major commercial industries such as broadcasting, music publishing, sound recording, and advertising. All of these industries depend on the law of copyright to protect the works that are the basis of their commercial existence.[27]

A Charter of Rights recommended the creation of "new property rights" and other measures for rights holders, including: introducing moral rights to protect against the mutilation or alteration of artistic works; keeping Crown copyright on works like those of the CBC or the National Film Board; introducing copyright on computer programs for the life of the creator plus 50 years; enacting statutory recognition of a sound recording as a creation; compensating rights holders for the lending of books from libraries; not creating a "fair use" doctrine to replace the more narrow "fair dealing" principle already in place;[28] expanding the Copyright Board to regulate copyright collectives and to

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[25] Hansen, 146-147; for Erola on the need for revisions see Canadian Press, "Help for artists promised," *The Globe and Mail,* 8 December 1983.
[26] House of Commons Standing Committee on Communications and Culture, *A Charter of Rights for Creators* (Report of the Sub-committee on the Revision of Copyright, October 1985), xi.
[27] Ibid.
[28] Fair dealing is the Canadian import of a U.K. principle, allowing the "fair dealing" of a copyrighted work for the purpose of private study, research, criticism, review or news reporting, provided the source is attributed. It provides the public with fewer rights for accessing works than the U.S. principle of fair use, which has a broader definition and does not require attribution so long as the "use" of the work is done "fairly." See Vaver, 190-200.

encourage more collective licensing; and increasing the maximum penalty for copyright infringement to $1 million.[29]

The new penalties for copyright infringement were particularly important for the government and rights holders. Since the early 1970s, CRIA had lobbied for stronger rules against what it called the piracy of cassette tapes and rampant, illegal home copying of music. As early as 26 July 1973, *The Globe and Mail*'s Angela Barnes highlighted the "plague" of pirated cassettes flowing into Canada from the U.S. At the time, Arnold Gosewich, president of Capitol Records (Canada) Ltd. and new president of CRIA, told the *Globe* that tape piracy was a growing problem and difficult to control. Canadian police carried out 96 raids over the previous year, 79 of which led to the seizure of about 25,000 pirated cassettes, he said, adding: "It's safe to say that if we have prevented the sale of 200,000 tapes, three to four times that number were sold." CRIA set up an anti-piracy bureau in 1980, the same year that CRIA president Brian Robertson estimated home copying and piracy cost the industry $120 million a year. "If our calls are being heard," he said in 1981, "the reaction from government has been nothing but lethargic." By 1981, the film and television industries vociferously joined CRIA's calls for harsher penalties against "counterfeiting."[30]

Perhaps the most controversial aspect of the Conservative government's plan to implement *A Charter of Rights* was its decision to enact the amendments in stages, with the proposals set out in the *Charter* representing a first legislative phase. Although the

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[29] *A Charter of Rights for Creators,* 103-112; Hansen, 147.

[30] Robertson quoted in Kirk Lapointe, "Copyright laws come under fire," *The Globe and Mail,* 29 September 1981; for Robertson's $120-million estimate see Paul McGrath, "Grand theft disco ... And rock and pop: A British survey showed a potential loss in 1980 of $300 million because of home taping," *The Globe and Mail,* 12 April 1980; also see McGrath and John Kraglund, "Music industry seeks federal aid," *The Globe and Mail,* 3 June 1981; and McGrath, "LP hire raises industry ire: Album rental scheme has record companies in a spin," *The Globe and Mail,* 31 January 1981.

Charter recognized that copyright policy should balance the rights of creators and users, the government said it intended to implement rights for users in a second phase of amendments. Critics rightly pointed out that the government would unfairly bring forward a host of creators' rights, but the government repeatedly rebuffed those charges with its promise to introduce Phase II proposals "as quickly as possible."[31] The *Charter* went ahead as the mainstay of the government's first legislative phase, with plans to implement 121 of the 137 legislative proposals in the *Charter* and reform the 1921 *Copyright Act,* which Finance Minister Michael Wilson called "a real obstacle to economic growth."[32]

The government tabled its legislative proposals in the form of Bill C-60 in 1987, and, like the tabling of *A Charter of Rights,* critics faulted the government for leaving crucial exceptions out of the bill. They said the legislation should have clarified the law to identify certain activities as not an infringement, such as the use of works for educational purposes in public schools and making copies for storage and interlibrary loans.[33] Following through on most of the proposals in the *Charter,* Bill C-60 included measures to: assist the formation of copyright collectives (but did nothing to support artists who may not want to join a collective); create a new Copyright Board for the arbitration of royalties; award moral and exhibition rights to protect the original integrity of works; increase the legal protection for choreographed works; define computer software as copyright works; increase the basic music reproduction royalty for composers from two cents to 5.9 cents per song; and step up the maximum penalties for conviction or indictment on charges of piracy or bootlegging to five years in prison and a $1 million

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[31] Quoted in Hansen, 148.
[32] Wilson quoted in *A Charter of Rights for Creators,* 1.
[33] Hansen, 149.

fine.[34] The new penalties, which were increased from $200, drew the comments of a "delighted" Robertson, president of CRIA, who said the government had finally introduced "a meaningful deterrent" to infringement. In 1987, the year before the amendments received Royal Assent, Communications Minister Flora MacDonald called the measures "long overdue" and Paul Berry, a spokesman for the Canadian Music Publishers Association, said: "We're in the revision package after 20 years of lobbying.... Now we're rolling at last."[35]

The House of Commons passed the bill in February 1988 with minor amendments agreed to by the government. It faced some obstacles in the Liberal-dominated Senate but passed without amendments in June on assurances from the Conservative government that a Phase II package would be introduced without delay. Phase II, however, was never implemented, despite a promise to do so in a Conservative Speech from the Throne in 1989. The government said it would table a bill the following year, but nothing appeared on the order paper, leading the Canadian Association of University Teachers to declare in May 1991 that legislation to implement users' rights seemed to have disappeared. The Conservative government subsequently lost the 1993 election to the Jean Chrétien Liberals, having never implemented Phase II.[36]

Bill C-60, passed in 1988, strengthened copyright law in the interests of industrial producers and in consultation with industry groups. The passage of C-60 saw industry associations play a larger role than ever in Canadian copyright policy formation. Before C-60 passed, Jim Edwards, Parliamentary Secretary to Communications Minister

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[34] *An Act to amend the* Copyright Act *and to amend other Acts in consequence thereof, SC* 1988, c. 15.
[35] Berry and Robertson quoted in Greg Quill, "Music copyright proposals meet approval," *Toronto Star,* 1 June 1987; MacDonald quoted in Martin Cohn, "Copyright law pirates may face $1 million fines," *Toronto Star,* 28 May 1987.
[36] Hansen, 150-151.

MacDonald, told the committee studying the bill that "one of the most helpful witnesses of all was the IBM corporation."[37] The passage of the 1988 legislation, and the policy process in which it was undertaken, marked a new trend. The content industries, as new and powerful actors in the economy, became the primary stakeholders in copyright. Largely outside the scrutiny of the public, they debated amongst themselves as to the best policy course.

The government had passed legislation to protect "creators," but one of the more important questions that emerged from critics was whether Canadian creators would benefit most from the amendments. The content industries had expanded in Canada, and by the 1980s their character was not very Canadian. Canada had increasingly become a net importer of cultural goods, attracting a significant amount of foreign investment, especially in the form of American magazine and television advertising. Canadians consumed their fair share of Canadian news, sports and talk radio, but mostly foreign books, films, television programs and records. Foreign-owned subsidiaries in Canada controlled more than 75 percent of all imported books, for example.[38] The multinational recording labels had operated branch plants north of the border since the 1930s, when Canada signed the most favoured nations agreements and placed a 15 percent tariff on sound recording imports. The branch plants primarily operated as production and distribution houses for popular American recordings. The CRTC's 1971 ruling, requiring that 30 percent of songs on the radio be Canadian productions (or at least partly Canadian), encouraged the major labels to seek out and sign Canadian talent, but foreign domination of the industry remained. In 1984, twelve multinational subsidiaries

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[37] Quoted in Hansen, 148-149.
[38] Foreign domination of the cultural industries is described by Audley, 320, 326.

controlled 89 percent of the Canadian sound recording market.[39] In the content industries, company employees, musicians and writers often do not own the copyrights to the works they produce. Recording contracts with large labels or book deals with publishers, for instance, commonly require that the creator assign all rights to the company through a contract.[40] Not only did foreign domination of the Canadian market mean that most of Canada's royalties flowed out of the country, but contrary to popular belief, Canada's stronger copyright laws did not benefit individual authors and artists.

It was on this point that New Democrat Lynn McDonald challenged *A Charter of Rights for Creators,* which asserted that copyright amendments were needed "to give basic protection to individual creators who work with their minds and their imaginations."[41] McDonald recognized the amendments as more of an industrial and economic policy than one to protect Canada's creative community. She also questioned the power of rights holders and their associations in the public policy process. In the only dissenting opinion published in the *Charter,* she wrote:

> The old model of copyright was the individual, and often the impoverished poet, playwright, author, composer or painter. The new model is the cultural enterprise, including large and highly profitable corporations whose employees do creative work.... I can, and must, question, to what extent their desires and powerful lobbies should influence the design of a new *Copyright Act.*[42]

Similarly, at a meeting with students at Queen's University in 1987, Communications Minister Flora MacDonald deflected charges by Queen's chief librarian, Margot McBurney that, under the proposed bill – which did not include an exception for copying

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[39] For a history of the multinational recording companies in Canada see Papizzo, 48-126; for the impact of the Cancon regulations see Wright, 82; for 1980s recording industry statistics see Department of Communications, *Vital Links: Canadian Cultural Industries* (Ottawa, 1987), 52.
[40] Teresa Scassa makes this point in "Interests in the Balance," in *In the Public Interest: The Future of Canadian Copyright Law,* ed. Michael Geist, 53-56 (Toronto: Irwin Law, 2005); also see Vaver, 236.
[41] *Charter of Rights for Creators,* xi.
[42] Ibid., Appendix A.

in libraries – a large amount of royalties would have to be paid, half of which would flow out of the country to foreign rights holders. Another critic who attended the event, Denis Magnusson, formerly Queen's dean of law, told the Canadian Press that copyright was misunderstood, that increased protections did not mean better livings for artists. Instead, he said, they tended to mean more revenue for "large, very profitable, often foreign" companies.[43]

Canada's trade deficit in intellectual property points to the international dimension of copyright and trade. Over the course of about the last two decades, western notions of copyright and its role internationally have been increasingly driven by American industrial imperatives. In 1985, the U.S., for the first time, fell into an overall trade deficit, and since then has more aggressively pursued more treaties on trade and intellectual property law. Canada, as its largest trading partner, has played a key role in those pursuits.[44] Myra Tawfik, in "International Copyright Law: W[h]ither User Rights," argues that, in the interest of strengthening the hand of copyright holders, Canada has scraped away the rights of copyright users, beyond its international legal obligations. Canada's laws have gone so far as to ignore the recommendations of some international agreements on the rights of users. The *Berne Convention,* for instance, allows signatories to create exceptions for the public communication of news and lectures for the greater public good of fostering an information commons. *Berne* also recognizes that "in certain situations, the right of an individual to use a work for private, non-commercial purposes

[43] Canadian Press, "Proposed law of copyright attacked over royalty fees," *The Globe and Mail,* 7 December 1987.
[44] U.S. influence in international agreements is discussed by Handa, 423-424.

should be permissible," Tawfik writes.[45] However, these provisions for users have been ignored. The Canadian government's approach to copyright, from an international perspective, has been one that trumps the interests of the public with the interests of industry.

The year 1988 marked a new, more responsive Canadian government on trade policy. The Canada-U.S. Free Trade Agreement, signed that year, represented the Canadian government giving into American pressure to liberalize trade and change its copyright law. For years Canadian cable broadcasters freely re-broadcasted American television programming without paying royalties to the U.S., which became a source of contention between the two countries. As Handa writes, the U.S. government in the 1980s strongly urged Canada to amend its copyright law to force Canadian companies to pay these royalties. A 1984 report to the U.S. Senate Judiciary Committee said that

> Canada has been, still is, and one hopes will remain, the most important and profitable foreign market for many of the United States copyright industries which feel most aggrieved by Canada's past copyright policies. More could be lost to domestic copyright interests in a confrontation with Canada than we can deprive their copyright owners in this country.[46]

Under pressure from the U.S. government, and in line with the concerns of major trade associations like the Motion Picture Association of America,[47] Canada agreed, when it signed the Canada-U.S. Free Trade Agreement in 1988, to settle the retransmission issue. The resulting *Canada-United States Free Trade Implementation Act,* passed in 1988, amended the *Copyright Act* to force cable broadcasters to pay retransmission fees. Liberal

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[45] Myra Tawfik, "International Copyright: W[h]ither User Rights?" in *In the Public Interest: The Future of Canadian Copyright Law,* ed. Michael Geist, 73-74 (Toronto: Irwin Law, 2005).
[46] Quoted in Handa, 400.
[47] Jack Valenti, president of the MPAA, launched a "massive" lobby campaign on the retransmission issue, says Judy Steed, "The copyright conundrum or, how should people benefit from what they create?" *The Globe and Mail,* 4 June 1986.

communications critic Sheila Finestone, in 1989, hinted at the power of U.S. influence in the face of Canada's large copyright trade deficit and consequently weak international bargaining position. "We've allowed American broadcasters to penetrate our market to such an extent, you might call it open airways," she told the *Toronto Star*'s Rosemary Speirs in a report on 11 May 1989. "There's no question most of the moneys will flow to American artists, but it is not fair to avoid that payment."[48]

With the passage of the free trade bill, Canada stepped into the new international environment of trade and the copyright industries. As early as 1977, the Keyes and Brunet report identified the power of American influence in international treaties. They wrote that, as Canada had become a net-importer of copyrighted goods over the previous 50 years, there had grown an "imbalance of international payments." They continued:

> [T]he fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half-century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions.[49]

The 1988 Free Trade Agreement marked a turning point for Canada to follow its major trading partner on copyright law. By the end of the 1990s, Canada had, in addition to acceding to the FTA and the NAFTA, signed the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), which came into being along with the World Trade Organization in 1995. The TRIPS agreement took shape in response to growing concerns among Western nations about international digital piracy, including that of CDs and

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[48] For the retransmission issue see Michael Geist, "Old Copyright Law and New Technologies: Canadian Copyright Reform in the Digital Age," *Transactions of the Royal Society of Canada* 11, no. 6 (2000): 93.
[49] Keyes and Brunet, 234.

software. Piracy was estimated to total billions of dollars in lost revenue per year, which Western countries had discussed in a meeting prior to the 1995 TRIPS agreement.[50]

Although the rhetoric of the Canadian government often expresses a desire to strengthen copyright laws for its domestic copyright holders, in reality, amendments to the *Copyright Act* often extend protection, through its international treaties, to the works of foreign nationals and the companies that own them. Graham Henderson, president of CRIA, has said Canada should expect the U.S. to become more protective of its intellectual property, what is a major component of its economy:

> That's why in places like the United States, you see, I think, intellectual property rights accorded such regard, because ... the U.S., whether we like it or not – and for a large part we might not like it – sees intellectual property as how they extend hegemony in the future. Not softwood, not cattle, not beef – IPR [intellectual property rights] – that's what's number one or two or whatever on their agenda when they come calling.[51]

The U.S., as one of the few net-exporters of intellectual property in the world, greatly benefits from international standards on copyright, and the foreign content industries, such as the multinational recording companies, have much to gain from Canada's consumers by seeing through the strengthening of Canada's copyright law.

In order to accede to its international obligations, Conservative and Liberal governments amended the *Copyright Act* again in the early 1990s, introducing further rights to copyright holders while extending no further rights to the public. Under pressure from the U.S. on pirated software and subsequent to further free trade talks with the U.S., the Mulroney Conservatives passed a bill, just before the 1993 election, to implement the *North American Free Trade Agreement.* The amendments, which did not come into force until 1994, after the Chrétien Liberals came to power, created new rights for the rental of

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[50] Crean, 205.
[51] Graham Henderson (president, CRIA), in discussion with the author, December 2005.

sound recordings and computer software, a measure that effectively prevented retailers from renting software or music and one which fell in line with the interests of organizations like the Canadian Alliance Against Software Theft, representing major software companies such as Microsoft. The *Act* also provided rights holders the power to prohibit the import of their works; and set the term of copyright at life of the author plus 50 years, ending on 31 December in the 50th year after the author's death.[52] It was certainly enough for *Words and Music,* a music industry publication, to declare in a 1994 headline: "NAFTA good news for copyright owners."[53] The Jean Chrétien Liberals made further amendments by way of the *World Trade Organization Agreement Implementation Act,* extending the legal protection under Canada's *Copyright Act* to members of the World Trade Organization; and added further protection for live performances by prohibiting the recording and transmission of live bootleg recordings.[54] Michael Geist, a law professor at the University of Ottawa and an advocate for the public interest in copyright, has suggested that amending copyright laws through international trade agreements represents a dangerous and underhanded way of skirting the entire public policy process.[55]

It was not until 26 April 1996 that Parliament launched headlong, once again, into copyright reform, when the Liberals tabled Bill C-32, to implement Phase II, the long-awaited amendments promised by the Conservative government nearly a decade earlier. In fact the Conservatives had begun the Phase II reforms in 1992, with the tabling of Bill C-88. The government avoided an omnibus bill, however, introducing a small package of

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[52] *North American Free Trade Agreement Implementation Act, SC* 1993, c. 44; Handa, 418.
[53] *Words & Music,* "NAFTA good news for copyright owners," February 1994, 9.
[54] *World Trade Organization Agreement Implementation Act, SC* 1994, c. 47; Handa, 418-421.
[55] Michael Geist, "Why we must stand on guard for copyright," *Toronto Star,* 20 October 2003.

amendments to clarify musical works as those in both visuals and sound, so that music rights holders would receive remuneration for the cable retransmission of television programming that contained copyrighted sound recordings. The bill also removed the requirement of copyright registration with the national copyright office, so that works automatically became protected upon their first publication.[56] But the election of 1993 had certainly given the Liberals the mandate to continue the Conservatives' work. After years of domination, the electorate seemingly wiped out the Progressive Conservative party, electing just two MPs. A large Liberal majority, led by Chrétien, had taken the place of the Conservatives.

The Liberals' Bill C-32 laid out a number of significant amendments, including: creating a levy on blank cassettes and CDs to compensate copyright owners for the home copying of music; increased protection for book distributors by making it illegal for a book retailer in Canada to order directly from an American book wholesaler; adding statutory damages, so that a plaintiff in a copyright infringement case no longer has to prove actual damages and can instead rely on the $500 to $20,000 penalties written into the law; creating a "secondary infringement" rule to hold people responsible for knowingly contributing to copyright infringement (but who do not commit primary infringement); setting the term of copyright on photographs at life of the photographer plus 50 years; creating a copy exception for libraries, museums and schools and an exception for people with disabilities; introducing "neighbouring rights," which would extend remuneration to all "music makers," including composers, producers and performers. The government promoted the measures as important economically. "These amendments will help strengthen Canada's cultural industries," said the press release

[56] *An Act to amend the* Copyright Act, *SC* 1993, c. 23; Geist, "Copyright and the Internet."

announcing the tabling of the bill. Canada's "cultural sector" employed "670,000 creators and producers," it added, and contributed $16 billion to the economy.[57]

The central opponent to neighbouring rights was the Canadian Association of Broadcasters (CAB), whose member radio stations claimed that the legislation would dramatically increase their copyright fees and put small radio stations out of business. The broadcasters also argued that they needed an exception for ephemeral recordings, or the temporary copying of a live program for broadcast at a later time. Broadcasters argued that if they recorded concerts or live programs for broadcast in another time zone, it would amount to an unnecessary infringement of copyright. Bryn Matthews, from the CAB, told the Commons Heritage Committee that the statutory damages provision in the bill could be used against radio stations for this copying:

> How do you have any reasonable negotiation in the 24 hours you have between the taping and the airing of a program or, worse still, after you've already incorporated the music? How do you have any reasonable negotiation when every technical infringement entitles a rights holder to a fine of up to $20,000 under the statutory fine provisions of this bill?[58]

Out of fear from the potential power of statutory damages, the provision would effectively force radio stations, libraries and educational institutions into licensing agreements with the collective societies. Consumers' rights advocates also contested the proposal to create the levy to be applied to the sale of blank media. The amount of the levy, to be set by the Copyright Board, would be applied to all blank media, such as CDs, cassettes (and later mp3 players), to compensate rights holders for apparent losses in revenue due to the home copying of music. Consumer groups challenged this proposal on

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[57] Canadian Heritage, "Copyright Reform Bolsters Canadian Culture" (news release, 25 April 1996), http://www.canadianheritage.gc.ca/newsroom/news_e.cfm?Action=Display&code=6NR075E; Bill C-32, *An Act to Amend the Copyright Act,* 2d sess., 35th Parliament, 1996 (assented to 25 April 1997), *SC* 1997.
[58] Standing Committee on Canadian Heritage, evidence, 8 October 1996.

the ground that consumers who did not buy tapes or CDs to copy music would still have to pay the levy.[59]

The collective licensing of copyright, encouraged through the passage of the 1988 amendments, had by the mid-1990s become the mode for negotiating various exceptions or uses of works in libraries. Copyright collectives control much of the distribution of rights through licensing agreements, in which the collectives sell rights-holder licences *en masse* to large-scale users, such as libraries or radio stations. The 1988 amendments, which created the Copyright Board, included an amendment that excluded collective societies from the authority of the *Competition Act* and anti-competitive behaviour such as unfair pricing.[60] Steve Wills, legal counsel at the Association of Universities and Colleges of Canada, has said this created a large number of powerful copyright collectives that operate more like "cartels." He observed that Access Copyright, for instance, is unaccountable with its finances, which

> they've raised from educational institutions and libraries to fund their lobbying efforts, and the kind of legal and lobbying activities they can undertake is beyond the scope of many other organizations because we don't have the funds to compete with them.... They [collective societies] are given an awful lot of power under the law and I think there should be a lot more accountability as to what they're doing. Are they really helping the starving artist or are they helping as much, or more, the industry players?[61]

After the 1988 amendments, the collective societies, representing the interests of their members, evolved into powerful stakeholders in the government's copyright reform process, arguing for more rights to be managed through collective licensing regimes and fewer exceptions for public access to works.

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[59] Ibid.
[60] *SC* 1988, c. 15, 50.5 (3)
[61] Steve Wills (legal affairs manager, AUCC), in discussion with the author, January 2006.

Research libraries saw the copying exception in the bill, allowing patrons to copy articles for themselves and libraries to reproduce them for interlibrary loans, as a positive measure. The existing *Copyright Act* did not provide any such exception. Libraries had for years been negotiating exceptions for the use of materials into their contracts with collective licensing agents such as CANCOPY (now Access Copyright). However, if an academic journal did not fall under the responsibility of a collective licensing agency, an article from that journal could not be copied without contacting the publisher of the journal and acquiring legal permission. Libraries saw the interlibrary loan exception as an important development for Canadian researchers, and to their satisfaction, it was proposed as part of Bill C-32.[62] Still, before the bill was passed, Sally Brown, a vice president at the Association of Universities and Colleges of Canada, told *The Lobby Monitor* that she was concerned about pressure from the publishers' lobby. Members of the House committee studying the bill, she said, were under "relentless pressure" to amend "even the most limited exceptions.... [The Writers Union of Canada] can bring in Margaret Atwood to plead their case. The creator's viewpoint on exceptions is increasingly the one being heard."[63]

The divide between users and rights holders took on a similar polarization between the Industry and Heritage departments and, when the issue became significantly politicized, within the Liberal caucus. Media reports at the time, in both *The Globe and Mail* and the *Toronto Star,* wrote that the situation pitted the rights-holder lobby and

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[62] See testimony of the Canadian Association of Research Libraries, House of Commons Standing Committee on Canadian Heritage, evidence, 2nd sess., 35th Parliament, 29 October 1996, http://www.parl.gc.ca/committees352/heri/evidence/31_96-10-29/heri31_blk101.html; also statements by the AUCC, House of Commons Standing Committee on Canadian Heritage, evidence, 2nd. Sess., 35th Parliament, 30 October 1996, http://www.parl.gc.ca/committees352/heri/evidence/32_96-10-30/heri32_blk101.html.

[63] *The Lobby Monitor,* "Copyright Commands Attention," 25 November 1996, 3.

Heritage Minister Sheila Copps against Industry Minister John Manley and a collection of Liberal MPs.[64] Copps later said she and Manley were deeply divided on the issue of a photocopying exception for libraries. Manley wanted a full exception and Copps a limited one, and so entrenched in their positions, Prime Minister Chrétien stepped in to arbitrate. According to Copps, Chrétien decided that, because Canadian universities had recently received substantial funding, they could make do with a limited copying exception.[65]

Sharp divides also surfaced along partisan lines, especially between the governing Liberal and opposition Reform MPs on the Standing Committee on Canadian Heritage. Throughout the committee hearings, Reform MP Jim Abbot complained that the government was rushing the process to get the bill into the Senate to be passed before an expected spring election. It was a process he later called "fully derailed in a massive train wreck by the Heritage Minister."[66] The Bloc Québecois members of the committee originally had their own amendments they wished to make to the bill, but after the Bloc reached a deal with the Liberals in December, the Reform MPs withdrew from the committee, boycotting it altogether. That day, Abbot told the committee that the Reform members were abandoning the committee because

> of the decision by the Liberal government to see this bill completed in terms of clause-by-clause under the next thing to a time allocation.... We note that at this time there still are amendments the government is going to bring forward to this legislation that have not been made available to the opposition members.[67]

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[64] e.g. Shawn McCarthy, "Copyright changes threaten 'balance'," *Toronto Star,* 9 December 1996; and John Lorinc, "Copyright bill may elude law," *The Globe and Mail,* 6 February 1997.
[65] Sheila Copps (former Minister of Heritage), in discussion with the author, December 2005.
[66] Quoted in House of Commons of Canada, Government Orders, 2nd sess., 35th Parliament, 13 March 1997, http://www.parl.gc.ca/english/hansard/144_97-03-13/144GO1E.html#8993.
[67] House of Commons Standing Committee on Canadian Heritage, evidence, 2nd. Sess., 35th Parliament, 10 December 1996, http://www.parl.gc.ca/committees352/heri/evidence/41_96-12-10/heri41_blk101.html.

With the Bloc in full cooperation with the government, and the Reform MPs not there to filibuster, the committee moved rapidly. In all it made more than 170 amendments to the legislation in the span of three meetings. The government then introduced an additional package of amendments on 11 December, which the committee sped through "at lightning speed," according to *The Lobby Monitor.* Lobbyists in the room said they could not keep up, and when the committee completed its work on the bill that day at about 5:30 p.m., observers had little clue as to what had happened.[68]

Bill C-32 received Royal Assent on 25 April 1997, and Chrétien called an election three days later. The bill was an important one for the Liberal party. In the month preceding the general election of 1993, the Liberals released *Creating Opportunity,* popularly known as the Red Book, which included a section called "Enhancing Canadian Cultural Identity." The party promised "nation building" through the strengthening of cultural institutions and would "help Canadian books, films, and sound recordings to increase their share of the domestic market through the establishment of policies and legislation with respect to marketing, distribution and exhibition." The platform stressed that "the promotion of cultural industries contributes to enhancing Canadian identity" and that 400,000 workers were employed in Canada's "cultural economy," earning revenues of $11.5 billion.[69] The bill passed with some sense of victory for Heritage Minister Sheila Copps. On that day, Copps addressed a group of lobbyists and officials from the content industries in Toronto, saying that, "We have a better and fairer deal for our artists and producers and for our book publishers." Brian Robertson, president of CRIA, called the legislation "just a tremendous milestone"; and Diane Wood, president of the Canadian

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[68] *The Lobby Monitor,* "Copyright Update," 23 December 1996, 6.
[69] Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Liberal party platform, Ottawa, 1993), 88-89.

Publishers Council, said the bill "would not have reached assent but for her [Copps'] tenacity."[70] Even as the bill was introduced into the Senate in April, Copps told the *Toronto Star* that it didn't go far enough to protect Canadian artists.[71]

On the other side of the policy debate, however, the user lobby was not so happy with the bill, despite the fact that it was originally intended to introduce the long-awaited second component to the Conservatives' 1988 bill to implement the *Charter of Rights for Creators*. Those in the educational community complained from the outset that the educational exception for copying was too limited. It should have been extended to include audio-visual materials, they had argued. Instead, libraries and library patrons received only the right to copy published non-fiction articles (not poetry or fiction), and only for research purposes. An amendment at the committee stage further limited the copying of newspaper articles for research purposes to those at least a year old.[72] Radio and television broadcasters did get an exception to make ephemeral recordings, but again it was limited in a way that the CAB called it "unbelievable" and not useful to them. By August 2005, for example, the CAB said private broadcasters paid a collective $43 million in royalty fees annually, $7 million of which was for the simple transferal of CDs to computer hard drives.[73] The reflections of user groups on the work of the committee were similarly poor. "I've never seen a process like the one that went on in the House

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[70] All quoted in John Lorinc, "Copyright bill becomes law: Liberals praised for pushing reforms through 'minefield,'" *The Globe and Mail*, 26 April 1997.
[71] Hugh Winsor, "Senate seeks changes to copyright bill," *Toronto Star*, 15 April 1997.
[72] For changes to the bill at committee see Bill C-32, *An Act to Amend the Copyright Act,* 2d sess., 35th Parliament, 1996 (as reported to the House of Commons by the Standing Committee on Canadian Heritage, 12 December 1996), *SC* 1997.
[73] Michael McCabe quoted in *The Lobby Monitor,* "All's Quiet in the Copyright Front?" 20 January 1997, 8; and CAB, "Private Radio Cannot Wait any Longer for Amendments to the *Copyright Act"* (news release, 18 August 2005), http://www.cab-acr.ca/english/media/news/05/nr_aug1805.pdf.

committee," said Bob Best of the AUCC, after the bill passed. "I'm not aware of any user groups that still support this legislation, in its current form."[74]

CONCLUSION

Ideally, copyright strikes a fair balance between the rights of creators and users in a way that, toward a greater social good, fosters a wealth of accessible information that at the same time remunerates rights holders fairly.[75] What is considered "fair," however, is subjective, and as recent as 2001 the government called the *Copyright Act* a legislative instrument that has "evolved over time to reflect a balance between the various categories of rights holders, intermediaries and users."[76] The ideal approach to balance in copyright has been superseded by industrial powers, which view copyright as a means to maintain, and in many instances increase, their control over sectors that, with technological advances in the Internet and communications, also have the potential to deliver more revenue. David Vaver, author of *Copyright Law,* says it well when he writes that the law has unfairly created a system in which companies, repackagers and distributors profit more from the law than individual creators. While trivial things are protected, like diaries, logos and the program inside a computerized watch, the *Copyright Act* does not protect the folklore of Aboriginal Peoples and instead encourages its commercialization. To tell the average person, Vaver writes, that "it is unlawful to record a television broadcast

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[74] *The Lobby Monitor,* "Copyright Not Right For Some," 14 April 1997, 3.
[75] The Supreme Court of Canada has recognized this principle in *Théberge v. Galerie d'Art du Petit Champlain inc.* [2002] 2 S.C.R. 336, 2002 SCC 34, http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html.
[76] Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (Ottawa, 2001), 6, http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf.

without first obtaining clearance from umpteen rights-holders is to invite disbelieving stares."[77]

The 1997 amendments, like those that preceded it, represented not only the government's policy approach to copyright, but the process in which this is carried out. The simultaneous growth of the content industries and the government's interest in regulating them through the *Copyright Act* created a role for a multitude of industry groups, lobbyists and copyright collectives to inform, guide, argue over, and attempt to influence the government on its policy directions. The dominance of the content industries in this process has resulted in more rights under the *Act* for producers and copyright owners and fewer exceptions for users and consumers. Ottawa's copyright policy has also been influenced a great deal by its international agreements and American trade ambitions. At a 2005 conference on Canadian copyright law in Ottawa, a member of the public asked panel member Bruce Couchman, an Industry Department official on copyright policy, what happened to copyright's "first principles," and why they no longer seem to apply in policy decisions. Couchman answered that Canada's international agreements would probably prevent such a policy approach.[78] Throughout history the Canadian government has put the content industries at the helm of copyright policy, creating a system of intellectual property that has failed to properly regard the interests of consumers and the public.

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[77] Vaver, 292-294, 297-289.
[78] University of Ottawa Faculty of Law, "Techlaw Copyright Summit" (conference, University of Ottawa, Ottawa, 29 September 2005).

Chapter Three

No DMCA in Canada: Canadian resistance to maximalist copyright reform

When the Government of Canada officially launched its consultation process on digital copyright reform in 2001, the Canadian Recording Industry Association (CRIA), as one of the largest and most powerful stakeholders, had taken several strategic steps that a powerful trade association would consider useful: It started working on the matter early, before the government's official consultations began; it hired consultant lobbyists to target the right decision makers at key moments; and it co-chaired a powerful coalition of 30 other national organizations in the rights-holder (and creator) lobby. The major labels, closely aligned with other major actors in the rights-holder lobby, such as the Canadian Motion Pictures Distribution Association (CMPDA), the Canadian Publishers Association (CPA) and the copyright collectives, urged the government to move ahead with what many in the rights-holder lobby saw as key instruments to secure their place in the digital economy. Canada's copyright reform process opened an opportunity, and the major labels led a powerful lobby in an attempt to see that opportunity realized. The labels hoped to expand into Canada a maximalist interpretation of the WIPO Internet treaties, a get-tough style of digital copyright reform that U.S. Congress had passed in 1998.

Between 1998 and 2001, however, the technological landscape changed rapidly, and would continue to do so. In 2002, around the time that government began serious consideration of its policy options, Internet access had increased from 29 percent of

Canadian homes in 1999 to 51 percent;[1] new businesses in the digital economy emerged, seeking a competitive environment and some adopting open-content philosophies; and most importantly, Canadian policy makers viewed with alarm the negative impacts of maximalist copyright instruments in the U.S. Many Canadian policy makers, at least at the bureaucratic level, came to see CRIA's most important objectives in digital copyright reform as controversial reforms that would neither amount to smart public policy nor meet the government's objectives. CRIA and the rights-holder lobby proposed an American interpretation of digital copyright reform, modelled on the 1998 *Digital Millennium Copyright Act* (DMCA), which included the legal protection for technological controls on digital content; legal protection for rights management information imbedded in digital works; legal remedies against the distribution or manufacture of circumvention devices; a new "making available" right; and a notice and takedown system for ISP liability. These legal instruments would remove some of the liberties individual Canadians had found in their use of, accesss to, and creation of digital works. The proposed laws had the potential to entrench unnecessary control in the hands of the copyright industries in the digital age and foster anti-competitive behaviours in the new economy. The proposals of the rights-holder lobby, in the view of the government, was out of step with its vision for the online environment, which was to foster e-commerce, competition and the creation and dissemination of Canadian-produced content. For this reason, many Canadian policy makers in the Heritage and Industry departments, who together shape Canada's copyright law, resisted a powerful rights-holder lobby run by CRIA and its allies. The bureaucracy's resistance came, in part, in the

[1] Statistics Canada, "Household Internet use, by location of access, by province," Statistics Canada, http://www40.statcan.ca/l01/cst01/comm12a.htm

form of a slow and cautious approach to digital copyright reform and the WIPO Internet treaties, and eventually, a rejection of what came to be seen as CRIA's maximalist proposals.

As one of the largest industrial stakeholders in the copyright reform process, CRIA had the advantage of financial power and its attendant resources. Those with better resources are naturally better equipped to make – and defend – persuasive arguments. CRIA and the content industries employed full-time "in-house" staff to aid their lobbying and advocacy on copyright exclusively, and while public groups like the Canadian Internet Policy and Public Interest Clinic (CIPPIC) may hire a full-time legal counsel, he or she would deal with policy issues far broader than just copyright. The content industries also had the finances to hire expensive consultant or "hired gun" lobbyists to deal directly with the government. Government-relations consultants are valuable because they know the workings of the government's complex machinery. Experienced consultants come with established relationships with public officials, can target the right decision makers at the right time, arrange key meetings between clients and a department's busy senior managers, and prepare formal submissions and briefs. Consultants also make valuable gleaners of information. They can survey a few sources for new developments, then use this information to present policy options that meet the objectives of both the lobby group and the government.[2] The user lobby, on the other hand, did not, for the most part, have the resources to hire government relations consultants. A keyword search for "copyright" in Industry Canada's online lobbyist registry, from its inception to 20 January 2005, shows that few user groups hired

[2] This is my understanding largely based on informal discussions with members of Ottawa's government-relations community; however also see William T. Stanbury, *Business-Government Relations in Canada,* 2nd ed., (Scarborough, Ont.: Nelson Canada, 1993), 34-36.

consultants. Most of the user groups that registered lobbyists listed their organizations' president or CEO, yet nearly every major actor in the rights-holder lobby hired at least one consultant.[3]

A list of government meetings in 2004 appears to show the advantage of consultants and their ability to arrange meetings. The list shows all meetings between the Copyright Policy Branch at Canadian Heritage and its stakeholders between 1 April 2004 and 25 April 2005.[4] In total, the branch held 73 meetings, nearly all of them with copyright collectives, media companies, the recording industry and publishers. Of those 73 meetings, 13 are with Access Copyright. Five are with representatives from CRIA. There are meetings with Sony BMG, AOL Time Warner, music collectives such as Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Neighbouring Rights Collective (NRC), the Canadian Private Copying Collective (CPCC), and others such as the Canadian Independent Record Producers Association (CIRPA), L'Association nationale des éditeurs de livres (ANEL), the Writers Union of Canada (WUC), the Canadian Music Publishers Association (CMPA), the Canadian Association of Broadcasters (CAB), and the Information Technology Association of Canada (ITAC). There were just two meetings with groups representing the public: one with the Electronic Frontier Foundation (EFF), and one joint meeting with the Canadian Internet and Public Interest Clinic (CIPPIC) and the Public Interest Advocacy Centre (PIAC).

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[3] Search online at Industry Canada, "Public Registry – January 20, 2005 – Present," Industry Canada, http://strategis.ic.gc.ca/epic/internet/inlobbyist-lobbyiste.nsf/en/h_nx00012e.html.

[4] Canadian Heritage, *List of meetings between the Copyright Policy Branch and its stakeholders in copyright reform* (list of meetings between 1 April 2004 and 25 April 2005, undated).

It is of even greater advantage to have these consultants stationed in Ottawa permanently. They can monitor government activities by talking to officials, organize meetings when necessary, and in this way attempt to shape not just policy, but the policy process. If behind the scenes the government decides it needs to identify a set number of issues for review by a certain deadline, it would be of great benefit to any stakeholder to help determine those issues. William Stanbury describes the slow-and-steady approach this way:

> [I]t is absolutely crucial for those who wish to influence the governmental process on an on-going basis to identify the policymaking privates and corporals and to present their ideas and needs to them at an early stage. Then, the effective lobbyist will maintain contact with the project as it goes up through the department, making sure that he talks to every rung on the ladder.[5]

CRIA recognized this strategy and employed long-term consultant lobbyists in Ottawa to monitor what is effectively the government's continual review of the *Copyright Act*.

For example, Industry Canada's Lobbyist Registry shows that CRIA, among other influential organizations in the content lobby, hired consultant lobbyists for intellectual property issues in 1996, and who remained registered in 2005. Lobbyists such as Glen Bloom, from the government-relations firm Osler, Hoskin & Harcourt, registered for the CMPDA, the Video Software Dealers Association and the Committee of Major Law Publishers in 1996, and the registry showed him working for all three associations in 2005. Similarly, David Dyer, who *The Hill Times* once called "a well-known face in the cubicles of the federal Heritage Department,"[6] was chief of staff to the office of the Minister of Industry and Consumer and Corporate Affairs in the 1980s, and went on to become a senior consultant at the Capital Hill Group for several prominent players in the

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[5] Stanbury, 210-211.

[6] Jenefer Curtis, "Copyright ruling stirs lobbying pot," *The Hill Times,* 19 April 2004, CBCA Business & Reference via ProQuest, http://proquest.umi.com.proxy.library.carleton.ca.

content industries. Dyer registered on behalf of CRIA in 1996 and the Canadian Publishers' Council in 1998 and continued to represent both organizations in 2005. CRIA also hired David Angus, a consultant at the Capital Hill Group, between 1996 and 2005.[7] Again, it was the rights-holder lobby that had the financial power to exercise this strategy. In a search for the keyword "copyright" under the historical registry, hundreds of organizations turn up, but few registered before 1999, and of those that did, most represent copyright owners.[8]

As an additional strategy, CRIA became a chief organizer for the Copyright Coalition of Creators and Producers, a formal coalition of more than 30 arts and rights-holder groups. CRIA president Brian Robertson co-chaired the coalition with Jacqueline Hushion, of the Canadian Publishers' Council (CPC), an organization representing major Canadian and multinational publishers. The Coalition's member organizations included the major copyright collectives, such as SOCAN, the Canadian Musical Reproduction Rights Agency (CMRRA) and Access Copyright. It also included photographers and artists' organizations like the WUC and the Canadian Conference of the Arts (CCA).[9] Graham Henderson, who became president of CRIA in September 2004, called the coalition "very useful":

> In government, they are going to respond to key constituencies.... If [the government sees] the copyright industries, which are a large sector, getting bigger, employing hundreds of thousands, [it will try] to protect them. If we were small and fragmented and disorganized then we wouldn't be seen as significant or worthy of protection.[10]

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[7] Industry Canada, "Public Registry."
[8] Search "copyright" as a keyword at Industry Canada, "Public Registry."
[9] Copyright Coalition of Creators and Producers, submission regarding the consultation papers (September 2001), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00349e.html.
[10] Graham Henderson (president, CRIA), in discussion with the author, November 2005.

The government's *Framework for Copyright Reform*, released at the same time as its 2001 *Consultation Paper*, identified the copyright industries as the "third most important contributor to Canada's economic growth."[11] In this way, the coalition struck a nerve within government, particularly the Heritage Department, and would attempt to exploit the government's traditional protection of the content industries.

By the same measure, the user lobby benefited from the industrial influence of the Internet service providers (ISPs), the Industry Department's most powerful stakeholders in copyright reform. Companies like Bell Canada, TELUS Corp. and Rogers Communications Inc., each of which earn billions of dollars per year, carried an enormous amount of influence as stakeholders. Although their lobbyists focused almost exclusively on the issue of ISP liability, the ISPs, with others in the users community, formed an alliance in 2003 called the Balanced Copyright Coalition, whose members included PIAC, the Retail Council of Canada, the Canadian Advanced Technology Alliance (CATA) and a number of interested professors. Jay Kerr-Wilson, who was on the coalition's steering committee, said that:

> It was originally organized by people who felt they had a very strong interest in the copyright reform process.... There was a sense at the time that the recording industry and some of the rights-holder groups had very-well organized, very thoughtful, very well-supported lobbying efforts going into this. We wanted to be similarly equipped.[12]

Together, the Coalition identified about four common issues to address in written submissions to the government, urging it to take a balanced approach to copyright reform.

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[11] Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa, June 2001), 4, http://strategis.ic.gc.ca/pics/rp/framework.pdf.

[12] Jay Kerr-Wilson (vice-president, legal affairs, CCTA), in discussion with the author, February 2006.

The user lobby also benefited in some way from grassroots activism. Although copyright is very technical and difficult to make populist,[13] technophiles and other interested members of the public discussed the copyright reform process through listservs, blogs and other online communities. Bolstered by public interest groups PIAC, the San Francisco-based Electronic Frontier Foundation (EFF), as well as advocates like law professor Michael Geist and software consultant Russell McOrmond, public discussion on copyright at times mobilized activism and influence. Sue Lott, legal counsel at PIAC, has said that in some way, being a small, non-profit organization brings a group more credit with some policy makers.[14] Michael Geist has similarly said that, because the user community is stacked with advocates who are not paid lobbyists, they carry an advantage of what he calls "the power of right":

> This is being done by a large number of people because they genuinely believe in this, and I do think that the facts support this perspective.... I actually do think that those that look at this in a balanced, neutral manner, will see the impact that some of these issues have on their every day lives and recognize that CRIA does what it does because it's got members, and this affects their bottom line....[15]

The role of this activism would grow in scope after 2003, when copyright blogs became more popular, Geist began writing a well-circulated column in the *Toronto Star* and another public interest group, CIPPIC, formed in Ottawa.

As the government set out to develop digital copyright polices, these were the two main camps in the copyright lobby who tried to influence Ottawa's decision makers. In its 2001 *Consultation Paper,* the departments asked how to solve the following core question:

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[13] E.g., *Canadian New Media,* "Users rights groups struggle to make copyright an election issue," 25 June 2004, 4-5.
[14] Sue Lott (legal counsel, PIAC), in discussion with the author, February 2006.
[15] Michael Geist (Canada Research Chair, Internet and E-commerce law, University of Ottawa), in discussion with the author, November 2005.

> The problem that confronts the policy maker in such a rapidly changing technological environment, is to determine when, whether and to what extent promoting content on-line for and by Canadians requires government intervention.[16]

The question was not how to strengthen control of the content industries (although judging by history, one could say that has been a typical response). The question was how to promote the creation and dissemination of Canadian content and foster a healthy digital economy in the Internet age.[17] The impacts of the DMCA in the U.S. would have a measurable effect on thinking in Ottawa, where analysts would, for public policy reasons, resist the maximalist proposals of the content lobby and come to empathize with many of the basic concerns within the user lobby.

Canada looked to enact two treaties that can find their origins in U.S. Congress. The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) can be traced to similar but more stringent copyright amendments that U.S. legislators introduced in the mid-1990s. After its election in 1992, the Bill Clinton administration felt it imperative to develop a policy toward the Internet, a network the administration at the time termed the coming "National Information Infrastructure." Many foresaw the network as the road into the new economy, and it was important to U.S. policy makers that America play a role in the development of its infrastructure. But, as Jessica Litman writes in *Digital Copyright*,

> well-meaning policy makers fell into an understandable fallacy. If America were to retain (or regain) economic world dominance through the deployment of this Information Superhighway, the infrastructure would need to be built and funded

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[16] *Consultation Paper,* 4.

[17] The Section 92 report stressed the importance of economics. See Industry Canada and Canadian Heritage, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Section 92 report, tabled in Parliament 3 October 2002), i, http://strategis.ic.gc.ca/pics/rp/section92 eng.pdf.

> by American private industry, who were unlikely to invest in it unless it looked likely to be profitable.[18]

The Internet lay before the content industries as both a tremendous risk and opportunity, and if private industry participated in its development, the government would return the favour by doing its best to make the opportunity their success.

The content industries of the U.S., the world powerhouse of intellectual property, needed a way to maintain control over content in the digital age. Seeking a solution to this, the U.S. government appointed a task force on the Internet to seek input from the private sector and delegated copyright issues to a Working Group on Intellectual Property, chaired by Bruce Lehman, Commissioner of Patents and Trademarks and former intellectual property lawyer representing software companies. As commissioner, Lehman staffed his office with former lobbyists from the software and sound recording companies, and after consultations with the content industries, the Working Group in September 1995 issued a white paper on copyright. The report argued that if the public wanted content online and in a digital format, it should expect the application of copyright law and digital controls. Otherwise, the white paper said, "[c]reators and other owners of intellectual property rights will not be willing to put their interests at risk."[19] Among the white paper's proposals were legal remedies to circumvent technological controls on content like computer programs, e-Books, CDs, and DVDs; as well legal remedies for the distribution or manufacture of anti-circumvention devices. The white paper's most controversial recommendation, however, was that each copy made within a

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[18] Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), 90.

[19] United States, Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* (report of the Working Group on Intellectual Property Rights, Information and Infrastructure Task Force, Washington, D.C., September 1995), http://www.geog.ubc.ca/~acitpo/copyright/clinton_whitepaper.html.

computer amounted to a reproduction. This meant that when a file was opened on a computer and copied into the system's random access memory (RAM), an unauthorized reproduction would be made. It followed that rights holders should have control over this copying, which essentially amounted to licensing the *use* of digital works, as opposed to licensing their sale or distribution.[20]

Bipartisan bills were introduced to implement the recommendations of the Lehman white paper,[21] but due to their controversial nature, libraries, law professors, ISPs, consumer electronics companies and other user groups, quickly lined up to oppose them. By the summer of 1996 their complaints effectively put the legislation on hold. Lehman found it too difficult to proceed with the unpopular proposals, so he attempted another strategy. He believed that if WIPO adopted the proposals in his white paper as an international treaty, it would lend authority and leverage to their implementation in the U.S. Lehman's plan succeeded in part. In December 1996, he led the U.S. delegation to Geneva for WIPO's Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. Before the conference closed about three weeks later, WIPO, inspired by Lehman's proposals, adopted the WCT and WPPT but threw out the more controversial items. The conference did not accept, for example, Lehman's proposal that RAM copies were unauthorized reproductions. Nor did it adopt a provision to require legal remedies against circumvention devices.[22] Instead of adopting legal remedies for the mere circumvention of technological controls, it tied those legal remedies to willful

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[20] Litman, 90-91.
[21] HR 2441 and S 1284.
[22] Litman, 122-129; also see Pamela Samuelson, "Big Media Beaten Back," *Wired News,* March 1997, http://www.wired.com/wired/5.03/netizen_pr.html.

copyright infringement. In other words, the treaties' anti-circumvention provision, as adopted, would only apply when connected to copyright infringement.[23]

Lehman's maximalist approach may have been rejected in Geneva, but the new treaties brought him leverage at home. In the following Congress, partly because of the WIPO conference's moderate approach to Lehman's proposals, and partly because the rights-holder lobby sought to avoid the controversy and stalemate of the previous Congress, it conceded its argument for control of the digital reproductions by computers. Instead of pushing for that provision, it focused on the provisions in the WIPO Internet treaties. Lehman argued, quite convincingly, that the WIPO conference's moderate approach to the treaties supported the view that the U.S. should lead by example and demonstrate to its major trading partners, as they looked toward implementing the WIPO treaties, the kind of intellectual property laws the U.S. expected of them. Through a strong rights-holder lobby, concessions from the users, and pressure to pass the legislation before the end of the 105th Congress, the United States enacted the DMCA in October 1998. The most controversial measures of the DMCA went beyond the requirements of the WIPO treaties to include: legal remedies against the circumvention of technological controls, as well as the distribution or manufacture of circumvention devices; and a notice and takedown regime for ISP liability.[24]

Three years after the passage of the DMCA, and four years after Canada signed the WIPO treaties, the Heritage and Industry departments officially began their consultations on digital copyright reform. In March and April 2001, department officials held a series of cross-Canada town hall meetings with the public. They met in Halifax,

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[23] WCT, art. 11; WPPT, art. 18; both available at http://www.wipo.int/treaties/en.
[24] Litman, 129-145.

Vancouver, Montreal, Toronto, Ottawa and Edmonton. Then on 22 June 2001, the government released its *Consultation Paper on Digital Copyright Issues,* which solicited written submissions from the public. The public response opposed any attempt to introduce DMCA-like copyright reforms in Canada, but more interestingly, people attended the discussions and submitted their opinions in surprising numbers.

In the intervening years between the passage of the DMCA in the U.S. and the Canadian consultations, the digital landscape rapidly changed, and would continue to do so. If the DMCA was controversial in 1998, it was three or four times as much in 2001, and even more so by 2003. Open-access philosophy services like Yahoo! and Google had become successful business enterprises. News sites such as C|net, and later the *Toronto Star* online, hoped to do the same. ISPs become major actors in Canada's emerging digital economy, and Web and software security companies played increasingly important roles. Copyright suddenly affected all kinds of business interests. Perhaps more significantly, however, broadband and home computer use exploded, creating a much different environment. Computer users worried about the security of their systems. Students wanted music online, and after trying major label services like Pressplay and MusicNet, began to experience how much technological controls limited their access and use of digital music. Personal Web sites began to flourish, in which bands, amateur movie critics and other Web enthusiasts became creators spreading content. Creative Commons licenses, which license works for use and distribution by the public, also accelerated in number after their introduction in 2001.[25] Bruce Stockfish, director of

[25] E.g., Reuters, "Music biz wary of copyright sharing movement," *Reuters*, 20 May 2005, http://today.reuters.com.

copyright policy at Canadian Heritage, later said that, in this new model of content distribution, people want to

> share ideas. The model is not always exactly the same. People may wish to have chat rooms. If they write something original, it is copyright protected. Should it then be subject to the *Copyright Act* in the same way as something of a commercial nature in a book, where if you make a copy of the book, you're taking away the ability to make money? It is in that context that we are still struggling to determine ... whether we agree with the principle that some things on the Internet are free. Yes, they are. The rights holders do not necessarily want to exercise their rights, because they want to put the information there in order to exchange ideas. That's almost the principle of fair dealing. You want to exchange ideas. Users become creators, creators become users, and it's a free flow.[26]

As *Maclean's* would also declare: "Someone call Karl Marx: The means of production is in the hands of the masses and a revolution is under way."[27]

The traditional divide between creators and users of content became blurred, and copyright began to emerge as a kind of populist issue – at least among technophiles. The *Consultation Paper* noted that Canada provided some of the cheapest Internet access in the world, and in terms of connected Canadians, ranked second internationally, just behind the U.S. It also said that Canadians increasingly looked to the Internet for commercial transactions. Sales over the Web increased $7.2 billion in 2000 and 73.4 percent since 1999. The *Consultation Paper* appropriately noted that since 1998, "because of technological evolution and the fallout from legislative measures taken in other jurisdictions, some stakeholders have returned to the departments with new concerns about the impact of intervening too quickly."[28]

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[26] See testimony of Stockfish, House of Commons Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 25 March 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=82123.

[27] Brian D. Johnson, "Someone call Karl Marx: The means of production is in the hands of the masses and a revolution is under way," *Maclean's,* 19 December 2005, http://www.macleans.ca/topstories/technology/article.jsp?content=20051219_118037_118037.

[28] *Consultation Paper,* 2, 11.

It became increasingly clear to interested Canadians that the U.S. experience with the DMCA was not a positive one. As Sara Bannerman writes in *Copyright at Home,* the Heritage and Industry departments' consultations came at a time of increasing awareness and controversy over the DMCA. Of special concern was the law's section 1201, which made it an infringement to circumvent technological controls as well as distribute circumvention devices. As the government's consultations got under way, authorities arrested Dmitry Sklyarov, a Russian programmer, under section 1201, while he delivered a presentation in Las Vegas on security flaws in Adobe e-Books. Sklyarov had developed a device that broke a technological control on e-Books, allowing users to convert them into more user-friendly .pdf files. In June 2001, the EFF, the American public interest and civil liberties organization, financed a lawsuit on behalf of computer scientists to challenge section 1201. Other court actions seemed to represent a crackdown of rights holders on Internet users. A U.S. Court of Appeals ordered Napster to filter out copyrighted songs, effectively shutting it down. MP3.com had also offered music for download, but faced a lawsuit for copyright infringement.[29]

Scientists other than Sklyarov also felt chills on their research. In the spring of 2001, a music industry security agency, the Secure Digital Music Initiative (SDMI), invoked section 1201 to prevent a Princeton cryptology researcher from publishing, at an academic conference, his findings on how to crack an SDMI watermarking security on CDs. This was despite the fact that SDMI had invited the public to participate in a contest, challenging anyone to break the new security technology (and share his or her findings with SDMI, not the public). Although the researcher, Edward Felton, beat the

[29] Sara Bannerman, "Copyright at Home: Copyright and the Phantom Public" (M.A. thesis, Carleton University, 2004), 62-67.

access control, the SDMI used legal action to intimidate him and prevent him from publishing the results. Some companies used section 1201 to prevent competitors from reverse engineering and creating inter-operable technology. Sony sued two companies for marketing software that allowed consumers to run Sony Playstation video games on Apple and PC computers. To write inter-operable programs, the companies had to reverse engineer a Sony Playstation, and it was alleged the companies violated federal copyright law. The cost of the lawsuits forced the companies to withdraw their products. For many, the DMCA was not functioning properly, and more examples would follow.[30]

News in the world of digital copyright reached audiences quickly through special-interest sites like *Slashdot* (www.slashdot.org). With the consequences of the DMCA in full view, online activist communities mobilized a response to the Canadian government's call for input on copyright reform. Forums and listservs took shape within online communities such as Linux groups, the Green party and the EFF, which called on the public to voice their concerns at the department's consultations and make written submissions. Russell McOrmond, an open source software advocate in Ottawa, began an online list called the "Canada DMCA Opponents forum," and the EFF created a public form letter to send to the government. Loris Mirella, a policy analyst at Canadian Heritage who helped organize the consultations, later said that the public response had a lot to do with "the nature of communication on the Internet":

> I saw it on Slashdot and after that a lot of submissions came in because Slashdot is a clearinghouse for information for people who are technologically interested. So that was another way word got out. That introduced a whole new dimension of

[30] For a good summary of various consequences, see Electronic Frontier Foundation, *Unintended Consequences: Five Years under the DMCA* (EFF white paper, 2003), http://www.eff.org/IP/DMCA/unintended_consequences.pdf.

> the public, the general organized public as opposed to ... what we would call the traditional stakeholders.[31]

In all, 300 stakeholders and individual Canadians participated in the town halls, and the government received far more submissions than it expected, extending the deadline for an additional month. In all, the departments ended up with about 670 written submissions, 547 of which came from individuals. The government later identified 234 of the submissions as "closely modelled" on the EFF form letter.[32]

The submissions from the public made it clear to the government that public interest in copyright had grown, and within this, there was little appetite for a Canadian DMCA. As the government entered its policy-making process, concerns about DMCA-like provisions, not only from the public but within the government, presented serious challenges to the content lobby and its copyright reform ambitions. A confidential, departmental memo to Heritage Minister Sheila Copps, in December 2001, acknowledged that the DMCA had gone far beyond the WIPO treaty requirements and that, put simply, would not amount to smart public policy in Canada. The memo, drafted by a Canadian Heritage policy analyst and signed by Michael Wernick, an Assistant Deputy Minister (ADM) under Copps, said that:

> The US has been in turmoil since passage of its *Digital Millennium Copyright Act* (DMCA) in 1998, with a parade of lawsuits that have not only threatened key provisions of the DMCA but have also dramatically politicized copyright issues. There is a possibility of further substantial change to the US law, as well as a consumer backlash against some of the restrictions it imposes. There is also concern that the DMCA provisions are not essential for developing business

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[31] Quoted in Bannerman, 67-68.

[32] Bannerman, 67-70; also see Industry Canada and Canadian Heritage, *An Overview of Submissions on the Consultation Paper on Digital Copyright Issues* (Ottawa, 2002), http://strategis.ic.gc.ca/pics/rp/summary.pdf.

> models for the digital world, especially since the problems with Napster, for example, were dealt with using traditional copyright remedies.[33]

A maximalist interpretation of the treaties, which CRIA and many of the rights holders favoured, did not appeal to some Canadian policy makers, who viewed digital copyright reform with far more caution than haste.

Contrary to those in the users community who argued that Ottawa should altogether rethink its approach to digital copyright reform, the Industry and Heritage departments were on a track to implement the treaties. That much had been agreed to by Cabinet when the government signed them, and the *Consultation Paper* had identified four WIPO treaty issues for reform and analysis, which, aside from being the most controversial, were by association also the most important to CRIA and the rights-holder lobby. These four issues were legal protection for technological controls; legal protection for rights management information; the making available right; and ISP liability. To understand the government's approach to these policy issues, and why they were taken, it is important to first understand the government's complex and often contentious copyright policy process.

In recent years, the Heritage Minister has pushed for copyright reform, but the file is shared with the Industry Minister, who is responsible for copyright policy. Canada's copyright law is handled by the Copyright Policy Branch at Canadian Heritage and the Intellectual Property Policy Directorate at Industry Canada. Complicating this round of reform was that the two departments were often at philosophical odds with one another as to how to reform copyright in the digital environment. The Industry and Heritage departments have very different mandates, and in the Internet age, negotiating new

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[33] Michael Wernick (ADM, Canadian Heritage), memorandum to Sheila Copps (Heritage Minister), 13 December 2001, 4.

provisions and exceptions into the *Copyright Act* largely became exercises in compromise, if not stalemate. The Heritage Department's overall mission is to protect and support Canadian "creators." The Department's mission statement is, in part, to promote the "creation, dissemination and preservation of diverse Canadian cultural works."[34]

Industry Canada, on the other hand, tends to view intellectual property through the lens of an economist. Its overall mission is focused on the marketplace, "to help make Canadians more productive and competitive in the knowledge-based economy." In this way, the Heritage Department's most important copyright stakeholders are producers of cultural works, and the Industry Department's are consumers (and marketers), businesses and investors, who, according to the Department, want "confidence that the marketplace is fair, efficient and competitive."[35] Some of the proposals brought forward by CRIA and the rights-holder lobby, such as protection of technological controls and legal remedies against circumvention devices, conflicted directly with the Industry Department's mission of protecting consumers and a competitive marketplace. Paul Bonwick, a former MP on the Commons Heritage committee and now a lobbyist for Access Copyright, has noted that the Industry Department covers everything from the aerospace industry to inter-provincial trade. As a result, it affords little priority to copyright. He said he could "count on one hand" the number of staff in the department working on the file. Similarly, Ken Thompson, former legal counsel at CRIA, has said Industry Canada's diverse programs easily conflict with its copyright policy, especially those proposals from Canadian Heritage. "Industry is a huge ministry," Thompson said. "It covers competition. There's

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[34] Candadian Heritage, "Mission and Strategic Objectives," Canadian Heritage, http://www.pch.gc.ca/pc-ch/org/mission/tex_e.cfm.

[35] Industry Canada, "Mandate," Industry Canada, http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages /Mandate.

all kinds of things that come into play.... The larger the portfolio, the more difficult it is to find an easy solution."[36]

Because of these differences, the Industry Department has earned a reputation among rights holders of resisting any copyright reform at all, but it is a reputation that is probably undeserved. Sheila Copps, Heritage Minister from 1996 to 2003, has gone so far as to say that Industry Canada "absolutely" held up Heritage Department proposals by employing various stalling tactics:

> Because of telcos [telephone companies] being under Industry, we had this sort of two-headed monster, which meant that just about any initiative that protected the artists ended up getting stopped by Industry. And you'd never actually get somebody saying "No," but what it would be was sort of like a slow death.[37]

There is little evidence to suggest that any Industry ministers – who tend to wield more political clout in Cabinet than Heritage ministers – deliberately slowed the process. Frequent change in the Department's ministers between 1995 and 2004[38] would have meant few were very familiar or involved in the Department's peripheral work on copyright reform, leaving more discretion up to its senior managers. Nor is there much evidence of stalling tactics by management. Of Bill C-60, Loris Mirella, for example, has said that, "Just because the stakeholders are impatient doesn't mean the process was any slower than normal."[39] The government proceeded carefully, according to normal pace and, if there was an appearance of stalling, it would have come from officials at Industry Canada who deliberately resisted, even resented, attempts of the rights-holder lobby to accelerate the process.

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[36] Ken Thompson (former legal counsel, CRIA), in discussion with the author, December 2005.
[37] Sheila Copps (former Heritage Minister), in discussion with the author, December 2005.
[38] Industry ministers since 1995 have been: John Manley (1995 to 2000); Brian Tobin (2000 to 2002); Allan Rock (2002 to 2003); Lucienne Robillard (2003 to 2004); and David Emerson (2004 to 2006).
[39] Loris Mirella (policy analyst, Canadian Heritage), in discussion with the author, January 2006.

The departments could agree, however, that after the fervently contested and politically charged Phase II reforms, passed in 1997, neither had an appetite to wade into a "Phase III." A package of reforms to the *Copyright Act*, or one phase, is incredibly complex, involves more than 80 stakeholder organizations and, needless to say, takes years to resolve. The 1997 copyright amendments introduced a statutory measure, known as Section 92, that required the government to table in Parliament, within five years, a report outlining its intended course on copyright reform. The report would identify any necessary copyright issues to be reviewed for its next package of amendments. But the departments feared that implementing all WIPO treaty issues at once would turn the package into a complex, controversial – and politicized – Phase III.

Instead, the departments developed a long-term vision for copyright reform, in which it would make amendments in smaller stages. These would be later identified as short, medium and long-term phases. The departmental memo to Copps, in December 2001, points out that the government "would attempt to undertake legislative reform through incremental packages to keep the process manageable." The memo clarifies for Copps that the four issues identified in the *Consultation Paper* were insufficient for Canada to ratify, but

> the Government took the view that this cluster of issues was appropriate to ensure a manageable process that focused on digital issues. The remaining outstanding questions necessary for WIPO Treaties' ratification, ownership of photographs and moral rights for performers, were to be addressed separately.[40]

[40] Wernick, memorandum to Copps, 13 December 2001.

To implement the treaties in full, the departments would also have to consider a number of technical issues to ensure that Canada's laws complied with the treaties and that the country could be in a position to ratify.[41]

A single package of short-term reforms could take between five and 10 years to thoroughly analyze between the Industry, Heritage and Justice departments, write into legal language, and pass as legislation.[42] As a long- or medium-term objective, full WIPO implementation, realistically, could take another, say, eight to 20 years. Enacting the treaties quickly was important to the rights-holder lobby, however. The longer the reforms were delayed, the more technology evolved, fostering a public more experienced with digital content and, as a consequence, creating more interest in copyright and opposition to the proposed laws. As the departments prepared to release their 2001 *Consultation Paper,* which would not lay out all of the WIPO issues in a short-term package, they would also have to prepare for some dissatisfaction within the rights-holder lobby. One Canadian Heritage policy analyst, Claude Lafontaine, noted as much in an e-mail in 2000, when he wrote to other officials in the Department to say that, "The danger of a superficial paper dealing with only 4 issues (one of them only for the benefit of ISPs) is not going to impress that crowd."[43]

If the government preferred a cautious implementation of the treaties, so was its approach toward ratification. This was one aspect of the treaties that seemed to hang, for some, distastefully over the entire digital copyright reform process. Those in the users

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[41] See these issues in *Supporting Culture and Innovation,* 43.

[42] Although the Section 92 report (p. 46) identifies short-term issues as taking one-to-two years, medium-term as two-to-four years, and long-term as "beyond 4 years," these are very conservative estimates. After the passage of the Phase I reforms in 1988, the government intended to implement Phase II as soon as possible, but did not until nine years later, in 1997. Eight years also passed between the government's commitment to ratify the WIPO treaties in 1997 and the tabling of Bill C-60 in 2005.

[43] Claude Lafontaine (policy analyst, Canadian Heritage), e-mail to Loris Mirella (policy analyst, Canadian Heritage), Bruce Stockfish (DG, copyright, Canadian Heritage), et al., 21 November 2000.

community viewed the WIPO treaties as an instrument of American hegemony. Although Lehman saw some of his proposals adopted as treaties, WIPO required that 30 countries meet and ratify the agreements before they could come into force. The European Union adopted a set of proposals in 2001, known as the *EU Copyright Directive* (EUCD), and set a deadline of 22 December 2002 for its member states to implement them. Enacting the provisions proved to be far more controversial and complex than expected, however. Only Greece and Denmark met the deadline as other member states struggled with the proposals in the ensuing years. The WIPO treaties' 30-country mark was not met until 2002, and even then most members were developing countries without the technological infrastructure and civic involvement necessary to understand and resist such policies. Although the recording industry would use this to say that Canada was behind developing nations and "at risk of becoming one of the last major technologically sophisticated countries to enact WIPO,"[44] Michael Geist has, to the contrary, called the whole process "a neat piece of policy laundering."[45] Russell McOrmond wrote to Prime Minister Paul Martin in 2004, urging the government to "question the validity of these treaties."[46] Similarly, the Balanced Copyright Coalition, in a submission to the Commons Heritage committee in 2003, explained that:

> While it is true that, as of October 15, 2003, 42 countries had ratified each of the [WIPO treaties] ... the only G7 countries to have ratified the treaties are the United States and Japan. Many of the countries that have joined the treaties are developing nations whose citizens have virtually no access to the Internet.[47]

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[44] See the testimony of Brian Robertson (president, CRIA), House of Commons Standing Committee on Canadian Heritage, evidence, 2nd sess., 37th Parliament, 6 November 2003, http://www.parl.gc.ca /committee/CommitteePublication.aspx?SourceId=67965.

[45] Geist, in discussion with the author, December 2005.

[46] Russell McOrmond (software consultant), letter to Paul Martin (Prime Minister), Paul Bonwick (Parliamentary Secretary, Minister of Human Resources and Skills Development), and Reg Alcock (President, Treasury Board), 4 March 2004, 3.

[47] Balanced Copyright Coalition, submission, House of Commons Standing Committee on Canadian Heritage, 2nd sess., 37th Parliament, 30 October 2003, 2.

Although the U.S. may have hoped to see the treaties adopted more quickly by its major trading partners, the process was complex and controversial, and as a result, slow.

The Canadian government understood at least that much. Nor did senior officials consider it wise to commit to the ratification of the treaties before it considered all of their potential pitfalls. Canada's status as signatory to the treaties did not amount to a commitment to enact them, nor ratify. A 2002 memorandum to Alex Himelfarb, Deputy Minister (DM) at Canadian Heritage, noted that ratification of the treaties was still a matter under discussion, and that Canada was not yet under any legal obligations. If Canada chose so, the memo said, it could "delay its adherence, without, in theory, other countries being able to hold it strictly accountable to the international agreements."[48] Until their ratification, the Canadian government had no international obligations. Although the government had agreed to implement the treaties and expressed so publicly, as early as 2002, some in government felt that they should not commit to their ratification.

Heritage Department documents also point out that ratification of the treaties was under some discussion partly because it did not appear to make the best sense economically. Canada's membership in international treaties like the *Berne Convention* and the *Universal Copyright Convention* affords what is known as "national treatment" to treaty members, which means that foreign countries selling their goods or services in Canada can enjoy the benefits of the domestic copyright law, and Canadian goods and services the same in other member states. As a net importer of copyrighted goods,

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[48] Translated from French. The original text says, *Le Canada pourrait ... retarder son adhésion, sans qu'en principe, d'autres pays puisse lui en tenir rigueur au stricte plan des obligations internationals.* Michael Wernick (ADM, Canadian Heritage), memorandum to Alex Himelfarb (DM, Canadian Heritage), 15 March 2002, 5.

however, the ratification of intellectual property treaties can make for poor economic policy in Canada. The *WIPO Performances and Phonograms Treaty* (WPPT), once ratified, would require the private copying levy be extended to member states under national treatment. The Wernick memo to Copps acknowledged that:

> Another issue of concern is that the national treatment provisions of the WPPT would result in a net outflow of revenue collected to foreign rights holders, especially U.S. interests.... [T]he result would be a sharp increase in the amount of revenues flowing out of Canada, primarily to the U.S., as the money collected for performers, as well as for private copying, would be required to pay there.[49]

With WIPO ratification, the multinational recording companies and foreign performers and producers would share in Canada's private copying levy, significantly increasing its costs to Canadian consumers. The memorandum to Himelfarb, for example, said preliminary estimates suggested that ratification could double the size of the levy. In 2002, $32 million had been collected for distribution to the music industry. With the addition of global sound recording catalogues, that figure could jump to $64 million.[50]

Rather than giving in to the American maximalist view, the departments came up with a minimalist approach to the treaties and digital copyright reform. CRIA, as co-leader of the Copyright Coalition, provided the government with what it saw as the solutions to the government's policy questions, and submitted a set of proposals that closely reflected the American approach. In response to the 2001 *Consultation Paper*, the Copyright Coalition submitted only a principled statement, urging the government to adopt the WIPO treaty provisions quickly,[51] but on 14 February 2002, it presented a more detailed paper. That day, the Coalition submitted to the Heritage Department draft legal language for the implementation of the WIPO Internet treaties. Borrowing heavily from

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[49] Wernick, memorandum to Copps, 13 December 2001.
[50] Wernick, memorandum to Himelfarb, 15 March 2002, 6.
[51] Copyright Coalition, submission (September 2001).

the language of the treaties, the 22-page *WIPO Treaty Implementation Proposal* presented a list of recommendations. Of those, they included the most important to CRIA, and a DMCA-like approach to the WIPO issues raised in the *Consultation Paper*: legal remedies for the circumvention of "a technological measure that effectively controls access to a work"; legal remedies for the import, manufacture or distribution of a device designed to circumvent technological controls; legal remedies for the removal or alteration of rights management information; and a making available right for authors, performers and producers. The proposal also advised that, "Exceptions and limitations to technological measures should be kept to a minimum" so that the "approach would be consistent with both the DMCA and the European Union Copyright Directive." The proposal did not, as CRIA later wrote, "reflect precisely what any of the particular members of the Copyright Coalition would want," but it fell in line with those proposals put forward in CRIA's separate submissions to the government. The rights holders' Copyright Coalition, led by CRIA and the CPC, had made their wishes known.[52]

The reaction within the department, at least from one policy analyst, was somewhat mixed, but it was clear that the views of the Coalition were largely the views of CRIA and the major industrial actors in the content lobby. Although the *Implementation Proposal* was helpful, it missed its target. About a week after the Coalition submitted the document, Mirella wrote a response to the proposal for about 10 officials in the Department. He wrote that the brief "provides a good overview of the 5 main issues necessary" to implement the WIPO treaties as well as a "full analysis" of the

[52] CRIA later submitted the same Coalition document, titled *WIPO Treaty Implementation Proposal,* to the Commons Heritage Committee. See Canadian Recording Industry Association, submission, House of Commons Standing Committee on Canadian Heritage, 3rd sess., 37th Parl., 20 February 2004.

making available right. Mirella quickly noted, however, that many of the proposals went beyond the treaty requirements:

> For the most part, with respect to TPMs, the Coalition paper takes into account the concerns raised in the submissions [in response to the *Consultation Paper*] only to dismiss them. They do address questions of public domain and exceptions ... but the arguments are tangential and tendentious. The paper also relies heavily on the US DMCA as the basis for interpretting [sic] the WIPO Treaties' provisions.... The options presented for TPMs could be complex to implement and since they include prohibitions for both acts and devices, go beyond what the Departments contemplate and beyond what would be a minimal level of WIPO Treaties' protection.[53]

Policy makers looked to implement the provisions in a manner that fit with the Heritage and Industry departments' core principles and that avoided controversy and a politicized climate. Although the issues had to be dealt with in a way that complied with the treaties, few officials wanted their policies to become the targets of controversy, it appeared to those interpreting the treaties that to do less was in many cases better than more.

Instead of taking CRIA's Coalition proposal word for word, the departments adopted, early on, a minimalist approach to digital copyright reform. On CRIA's core issues, the Heritage, Industry and Justice departments analyzed Canada's existing statutes to determine to what degree the *Copyright Act* already complied with the WIPO treaties, and whether, under some of their requirements, the *Copyright Act* needed any amendment at all. The legal protection of technological controls, for example, was too controversial for the public and too harmful to a competitive digital economy for the departments to consider a DMCA-approach. Software programmers and security companies expressed special concern about this, and by 2005 formed a coalition to voice their dissent to even

[53] Loris Mirella (policy analyst, Canadian Heritage), e-mail to Bruce Stockfish (DG, copyright, Canadian Heritage), Luc-André Vincent (Canadian Heritage), Richard Matthews (Canadian Heritage), et al., 22 February 2002.

the minimalist WIPO provision.[54] In McOrmond's letter to Prime Minister Martin in 2004, he argued that the legal protection of TPMs would legitimize an already detrimental amount of control in the hands of powerful software companies such as Microsoft. Contrary to popular belief, TPMs, he wrote, were "not the use of technology to protect copyright." He continued:

> What critical sections of the WIPO treaties are asking parliaments to do is take this control away from creators and other citizens, and hand it over to third party intermediaries such as "software manufacturing" vendors and the "content industries."[55]

McOrmond viewed TPMs as a tool for software and content vendors to assume greater use and access controls over their products. TPMs removed some of the new powers that "creative citizens" had found in the digital environment, he wrote, and to legally protect them would entrench that control.

Technological controls are not as simple as mere copy-protection security systems; and rights management information (RMI) is not as simple as mere catalogue information in digital works. Collectively known as digital rights management (DRM), these two measures often come deceptively in the form of computer programs, which, in addition to controlling access to digital works and managing copyright information, can double as "malware" (malicious software) or "spyware" programs – what Michael Geist has called a "'Hotel California' program that checks in but never leaves."[56] Such programs can conduct "data mining" of computers and their users for commercial interests. An influential study in 2002, commissioned by Canadian Heritage, noted that these programs

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[54] See the Web site of the Digital Security Coalition, an alliance of high tech security companies, at http://www.digitalsecurity.ca.
[55] McOrmond, letter to Martin, et al., 4 March 2004.
[56] Michael Geist, "Geist: Sony incident wake-up call for regulators," *Toronto Star,* 21 November 2005, http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1132527022374&call_pageid=970599109774&col=Columnist1036500183695.

can raise serious privacy concerns. The report, by Ian Kerr, wrote that, "In some instances, use control technologies utilize surveillance or tracking means to monitor how a work is used as well as personal information about those who use a work."[57] The report went on to sum up every concern about the adoption of anti-circumvention provisions. Implementing them, he wrote, would run the risk of

> skewing copyright's delicate balance, interfering with personal privacy, chilling expression, stifling important scientific research, shrinking the public domain [and] undermining the public's ability to access information....

Kerr concluded that an anti-circumvention provision had "the potential to undermine the philosophical foundations of copyright law and policy," and questioned the government's very policy framework of considering anti-circumvention measures in the first place. "Before asking whether and under what circumstances copyright legislation ought to protect TPMs," Kerr wrote, "it is necessary to first ask *whether and under what circumstances TPMs should be permitted to flourish.*"[58]

The government came to see the rights-holder lobby's arguments on TPMs as a flawed one. Although the Heritage Department empathized with content producers in the digital age, it did not view the protection of TPMs and the outlaw of circumvention devices as the best solution to the problem. An argument is only as good as its facts, and the facts illustrated that the legal protection of TPMs and RMI was not smart public policy. In response, the departments examined whether they needed to introduce any new right to comply with the treaties. Benoît St-Sauveur, a Heritage Department policy analyst, researched, as he wrote in a 2003 e-mail, "whether the Canadian Criminal Code

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[57] Ian Kerr, Alana Maurushat and Christian S. Tacit, *Technical Protection Measures: Part II, The Legal Protection of TPMs* (report commissioned by Canadian Heritage, Ottawa, April 2002), 29, http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/protection_e.pdf.
[58] Kerr, et al., 67-69.

complies with legal protection of TPMs included in the WIPO Treaties."[59] Although the departments agreed, in consultation with the Justice Department, that a new anti-circumvention provision was necessary to meet WIPO's requirements, they chose to make use of the limitations within the language of the treaties, which tied the anti-circumvention provision to infringing purposes. Under Bill C-60, the government's proposed law, technological controls could be removed for non-infringing purposes and rights management information for purposes that do not "facilitate or conceal" an infringement.[60] An informal policy review of the decision on TPMs, drafted in 2005 after the release of Bill C-60, noted that the government's minimalist proposal in the bill "was made to be compliant with the [WIPO] Treaties. The proposed provision, according to Justice, is *sufficient* for Canada to meet its international obligations."[61] It was an approach that Mirella summed up when, in 2004, he told other Heritage officials that he intended to bring Russell McOrmond into the Department for a discussion on TPMs, "to make sure that our proposal and our rationale match up with our 'minimal approach.'"[62] So concerned about the provision, Canadian Heritage sought opinion from a stakeholder who opposed the WIPO provision altogether.

The departments also recognized that the WIPO treaties did not require the creation of a provision outlawing circumvention devices, despite the fact that CRIA and the rights-holder lobby called the provision an essential tool for their businesses to succeed in the digital economy. The Canadian Heritage policy review of technological

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[59] Benoît St-Sauveur (policy analyst, Canadian Heritage), e-mail to Loris Mirella (policy analyst, Canadian Heritage) and Luc-André Vincent (Canadian Heritage), 24 November 2003.
[60] Bill C-60, *An Act to amend the Copyright Act,* 1st sess., 38th Parliament, (first reading, 20 June 2005), cl. 27, http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF.
[61] Emphasis added. Canadian Heritage, *Review of Rationale for TPM Policy* (informal policy brief, 2 May 2005).
[62] Loris Mirella (policy analyst, Canadian Heritage), e-mail to Albert Cloutier (Industry Canada), Bruce Couchman (Industry Canada), Claude Lafontaine (Canadian Heritage), et al., 8 January 2004.

controls speaks to the rights holders' dissatisfaction with Bill C-60 on this matter and provides a clear rationale for the Department's decision:

> The second major objection from rights holders is that Canada is open to becoming a piracy haven because there is no protection against devices, or tools, which are used to infringe copyright. In this respect it is important to note a number of facts. First, despite years of protection against devices, the US remains, by any standard of measurement, the main resource for those seeking tools to bypass anti-circumvention measures. Second, since most circumvention measures are software-based, the 'tools' to circumvent are also software-based, and therefore simply language. Even the United States where the DeCSS code used to circumvent the Content Scrambling System (CSS), the access control measure used on licensed DVDs, is illegal, it is still widely available because computer scientists view it as a form of expression or speech. The closer a law comes to outlawing forms of speech, the greater the constitutional scrutiny and challenge it will face. Third, there is no possibility of devising a satisfactory definition of a device that will capture recent successful circumvention devices such as magic markers and shift keys. At the same time, Canadian law has passed laws against devices that clearly have illegal uses such as satellite decoder boxes under the Radiocommunications Act. Moreover, while there are significantly weighty provisions under the Criminal Code to discourage violat[ions] on computer systems, there are other laws that allow more flexibility, such as trespass and misappropriation laws.[63]

The policy review lists several reasons why creating legal remedies against circumvention devices was not a sound decision, and one of those reasons involved freedom of expression in the *Canadian Charter of Rights and Freedoms.* The rights holders' proposals for legal remedies against circumvention devices not only amounted to misguided and detrimental public policy, but as the policy review notes, an ineffective one as well. The policy review concluded that its chosen direction on technological controls was "designed to be realistic in terms of what it can actually achieve for rights holders, given the limitations of law and technology."

One of the most important issues for CRIA was the making available right, and although the government would come to propose it as part of Bill C-60, it came with

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[63] *Review of Rationale for TPM Policy.*

internal wrangling and, like other controversial issues, resistance from the bureaucracy. CRIA argued that the making available right held a crucial role in the recording industry's success in the digital economy, but the departments struggled with how to meet the requirements of the treaties when the new right, once again, did not appear to meet its policy objectives. Nor did it seem necessary, at least by 2003. That year the recording industry showed it could succeed online without the making available right. Puretracks launched in Canada in October 2003, selling tracks for 99 cents. iTunes then launched in Canada in December 2004, by which time the service had proved to be vastly popular, selling more than 150 million tracks in the U.S. since its debut a year and a half earlier.[64]

Recording companies such as Warner, Universal, and EMI, whose businesses included extensive music publishing operations, had use of communication and reproduction rights to license their music online, and some argued that a new making available right would lead to excessive control and anti-competitive behaviour on behalf of the major record companies.[65] In response to the *Consultation Paper,* for example, the Canadian Association of Broadcasters (CAB) argued that the new right would give major music publishers an unfair bargaining position in the digital environment. The major labels could invoke the making available right to prevent other distribution models from emerging, demanding additional payment for, or limiting altogether, the streaming of content online by radio stations. "It is becoming apparent that the real objective of certain rights holders (primarily, the multinational record studios) is *not* to maximize the value of

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[64] Matt Hines, "Apple delivers iTunes Canada," *Cnet News.com,* 2 December 2004, http://news.com.com/Apple+delivers+iTunes+Canada/2100-1027_3-5474617.html?tag=st.bp.story.
[65] *Canadian New Media,* "New right proposed by government could upset competitive access to content," 2 November 2001, 4-5.

their creations *per se* or to protect the inherent value of their works," the CAB wrote, "but rather to extend their businesses to include use as well as creation."[66]

The CAB made a valuable point. The making available right would give additional control to the major recording companies by handing them the legal framework to establish their own distribution models and restrict the development of others. The fall of Napster illustrated this. The major labels refused to license their works to Napster, and instead developed their own models: Pressplay (Vivendi-Universal, Sony) and MusicNet (EMI, AOLTimeWarner, BMG). The labels' delay of new distribution systems sparked an investigation of anti-competitive behaviour by the U.S. Justice Department, which Canadian Heritage acknowledged in a confidential memorandum to Alex Himelfarb, DM at Canadian Heritage, in December 2001. The memo, which referred to potential collusion between the major labels, noted in an understated way that: "There are some concerns that the DMCA did not fulfill its purpose to make copyrighted works such as music and film more widely available online."[67]

In a related issue, a new making available right also had the potential to create an additional remuneration for the recording industry and further complicate the collective management of music rights. The management of music royalties was already submerged in a complex array of rights and remunerations. Few understand the various number of rights attached to any given sound recording, and that each right typically means an additional layer of revenue for those who own them. Sound recordings contain mechanical rights for the reproduction of music; performing rights for its communication

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[66] Canadian Association of Broadcasters, submission regarding the consultation papers (September 2001), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00257e.html.
[67] Michael Wernick (ADM, Canadian Heritage), memorandum to Alex Himelfarb (DM, Canadian Heritage), 20 December 2001.

or broadcast; a "neighbouring rights" remuneration to sound recording performers and producers for the broadcast of music; and a private copying levy on blank CDs and cassettes, which is paid to recording companies, composers and performers.[68] Each of these remunerations must be paid under the law, and major-label recording contracts have been known to assign all possible rights, permissible under the law, from the recording artist to the label's publishing subsidiary.[69]

The government viewed the prospect of a new layer warily. A 2003 Canadian Heritage memo from Bruce Stockfish, Director General (DG) of the Copyright Policy Branch, to his senior, Susan Peterson, an ADM at the Department, called attention to the making available right and its potential to conflict with the government's stated goal of clarifying and simplifying the *Copyright Act.* The memo reads:

> On the basis of our discussions with [CRIA lobbyist] Mr. [David] Dyer and CRIA, it appears that one of the most fundamental rights that is being sought is an exclusive making available right for music producers; however, we must ensure that this right does not create a new layer of rights that would be contrary to the Government's stated long-term objective of simplifying the *Act*.[70]

With that in mind, the government approached the making available right cautiously. An e-mail summary of a year-end "taking stock" meeting, in December 2003, wrote that one policy option was to avoid implementing any new making available right at all. Although the e-mail said there "is not a perfect consensus on all these issues," it noted that the government could meet the requirements of the treaties by relying on the communication right for songwriters and the reproduction right for producers, both already in the *Act*.

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[68] CRIA refers to the various rights in, Canadian Recording Industry Association, submission regarding the consultation papers (September 2001), 12, http://strategis.ic.gc.ca/pics/rp/cria.pdf.
[69] Only part of an artists' performing right can be transferred, however. David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), 236-237.
[70] Bruce Stockfish (DG, Copyright Policy Branch), memorandum to Susan Peterson (ADM, Canadian Heritage), July 2003.

The e-mail also said that, if the government chose the other option, which was to introduce the making available right, it "may need to adjust [the] collective management regime."[71]

ISP liability was another issue in which the rights-holder lobby met resistance from the bureaucracy. Submissions for the copyright reform process had pointed out the failings of a notice and takedown regime. One submission, from Electronic Frontier Canada (EFC), a coalition formed in 1994, wrote that any system of ISP liability should not force intermediaries to monitor or control publicly available material.[72] A notice and takedown regime, however, would force ISPs to intervene in disputes between rights holders and their clients. The DMCA notice and takedown system created controversy because copyright holders could force ISPs to take down their clients' material from the Internet with only an *allegation* that it infringed their rights. No court order was required. If adopted in Canada, it would become easier for a copyright holder to remove an infringing mp3 from a Web site than it would for police to remove child pornography, which, since 2002, required a court order.[73]

Nor would a notice and takedown regime have solved the problem of peer-to-peer (P2P) file sharing. As the departments later explained, a "drawback" of the notice and takedown system is that it "cannot cover P2P file sharing, arguably the most prevalent

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[71] Mirella sent a follow-up e-mail to the "taking stock" summary, which said that if the government were to rely on the reproduction right for performers and producers, its definition would have to be "tweaked." Loris Mirella (policy analyst, Canadian Heritage), e-mail to Bruce Stockfish (DG, copyright policy, Canadian Heritage) and Danielle Bouvet (Director, copyright policy, Canadian Heritage), 23 December 2003; Mirella, e-mail to Luc-André Vincent (Canadian Heritage), 24 December 2003.

[72] The EFC was most active in the 1990s but still maintains a Web site at www.efc.ca. See Electronic Frontier Canada, submission regarding consultation papers (September 2001), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00559e.html.

[73] The same applies to hate speech. See Sheryl N. Hamilton, "Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement," in *In the Public Interest: The Future of Canadian Copyright Law,* ed. Michael Geist, 303 (Toronto: Irwin Law, 2005).

source of infringing material." ISPs could not be expected to remove infringing material from clients' home computers, on which files are stored for exchange on the P2P networks. The only capacity an ISP has in this situation is to close the client's account entirely – which was not a reasonable option. Notice and notice, on the other hand, addresses file sharing, the departments noted. The ISP acts as the messenger for the rights holder, warning the file sharer to remove the infringing material.[74]

Effective lobbying by the Industry Department's most powerful stakeholders, the ISPs, also facilitated the government's decision on notice and notice. Early on, the ISPs had proved to the government that the system worked. In 2000, both the CCTA and the Canadian Association of Internet Providers (CAIP), both representing the largest ISPs in Canada, voluntarily set up notice and notice agreements with rights holders.[75] By 2003, Bell confidently wrote the Commons Heritage committee to suggest that the issue of ISP liability was more or less settled and that, after "extensive and ongoing consultations" with both departments, it "may be that the Committee's time is better spent reviewing other copyright issues."[76] Kerr-Wilson has said that the ISPs had a "great deal of support" from both departments on the notice and notice system, to such a degree that the recording industry stepped back from the issue and focused on items that were either more important or at least realizable:

> I think the recording industry came out and staked out very definite positions on a lot of the issues, as we all did, and then they had to, as we did, pick and choose: Which ones do we care about most? And it became pretty clear that the recording industry was much more concerned about how technological protection measures

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[74] Government of Canada, "Frequently Asked Questions: Amendments to the *Copyright Act*," Industry Canada, http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01146e.html; also see Hamilton, 304.
[75] Hamilton, 295.
[76] Bell Canada, submission, House of Commons Standing Committee on Canadian Heritage, 2nd sess., 37th Parliament, 15 September 2003, 3.

> provisions were drafted, and upon reflection and discussion with us, probably realized they could live with some form of notice and notice....[77]

Early on, the government saw ISPs as emerging and important actors in the digital economy, whose role should not be restrained by unnecessary legal liabilities. The bureaucracy chose a moderate approach that rebuffed the rights-holder position.

Then, in 2004, the Supreme Court of Canada handed down a decision that, for Kerr-Wilson, "pretty well sealed" the issue. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) had, in 1996, proposed to the Copyright Board that ISPs be charged a 3.5 percent tariff for the file sharing of music on their networks. Denied its tariff at the Copyright Board and the Federal Court, SOCAN appealed the case to the Supreme Court, which, on 30 June 2004, upheld the decision of the Copyright Board, which ruled that ISPs could not be held liable for infringements on their networks. In an eight-to-one decision, the Supreme Court held that an ISP is more of a "conduit," with neither knowledge of specific infringements on its networks nor the technical or economic capacities to monitor them.[78] The court reaffirmed the government's approach to the issue. As the departments later explained the decision: "This approach provides legal clarity for ISPs so as to continue to encourage the availability of high-quality Internet services to Canadians at affordable cost. It is also consistent with the 2004 decision of the Supreme Court of Canada."[79]

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[77] Kerr-Wilson, in discussion with the author, February 2006.
[78] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2004] 2 S.C.R. 427 at para. 101, 2004 SCC 45, http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0427.html.
[79] Government of Canada, "Frequently Asked Questions."

CONCLUSION

Although the rights holders came into the copyright reform process with far more resources, the bureaucracy resisted the policies of this powerful lobby. No lobby can win on resources alone. The rights holders' proposals were in many cases out of step with the departments' public policy objectives. The technological landscape changed significantly in the years following the passage of the DMCA in the United States, so that while the government's traditional approach to technology and the content industries may have been to increase their legal protections under the *Copyright Act*, the same approach in the new economy affected too many new actors. When the government identified its core question in 2001 as how to foster the digital economy, produce Canadian content and promote Canada's visibility in the world, it suggested that the answer may come from its traditional stakeholders, the rights-holder lobby: "Some rights holders have pointed to the 1996 World Intellectual Property Organization (WIPO) treaties, with their network-related provisions, as providing the basis for effectively responding to the digital challenges."[80] The WIPO treaties, however, did not prove to answer the departments' question. Instead, the treaties in many ways complicated the issues and interfered with the government's search for a solution.

Although the user lobby had a measurable influence, CRIA was not outsmarted or outworked. CRIA was overpowered by what Geist called "the power of right": conditions largely out of its control. As the government looked at its policy options, a new era of Canadian creation and content began to emerge. Creators were now users, empowered with technological tools of creation and dissemination. The proposals of CRIA and the rights-holder lobby would do little for individual creators; on the contrary they

[80] *Consultation Paper,* 4.

demonstrated, through the American experience, the opposite. CRIA's proposals would entrench further control into the hands of large, often foreign entertainment, media and software conglomerates and impinge on the rights, expectations and bottom lines of new actors in the digital economy. While clear to the government that a maximalist interpretation of the treaties was not wise public policy, and out of step with the departments' objectives, the user lobby helped reinforce the idea that the government had a new constituency to consider – the public. The ISPs, as powerful stakeholders, influenced the government's decision on a notice and notice system of ISP liability. Public activism informed Ottawa's decision makers the degree to which the public held an interest in digital copyright reform. Policy makers had been given orders to implement, and in response to the questions posed by the treaties (as well as ISP liability), the bureaucracy adopted a slow, staged and deliberative copyright reform process. Nor did many think it wise to commit to ratifying treaties that could do more harm than good to Canada's trade deficit in intellectual property. In the new digital environment, the government chose not to create legal remedies against circumvention devices. Instead it wrote a minimalist provision that tied its anti-circumvention provision to infringing purposes. The bureaucracy also recognized the potential negative impacts of creating a new making available right for the recording industry. The ISPs argued that they needed their role in copyright law defined. The government, in turn, saw its best course of action in an uncontroversial notice-and-notice system that had already been proven to work. Although CRIA's powerful lobby met resistance within the bureaucracy, it would go on to succeed to accelerate the copyright reform process and win a making

available right in Bill C-60. This would be accomplished through the political channels, and against the wishes, it would seem, of some public servants.

Chapter Four

'Pack me the snowballs':
CRIA, the rights-holder lobby, and the politics of copyright reform

In November 2003, Heritage Minister Sheila Copps appeared before the House of Commons Standing Committee on Canadian Heritage and said that, in so many words, she was fed up with the government's slow and measured approach to implementing the WIPO treaties. The government had in 1997 signalled its intent to implement them, but Cabinet had not given the issue the kind of legislative priority she hoped. Since the Industry and Heritage departments would not come forward with draft legislation on her timeline, in an unusual move, she suggested that the committee draft a new bill to amend the *Copyright Act*; and, she added, they could do that on the advice of the Canadian Recording Industry Association (CRIA), representing the major labels of the recording industry. Apparently frustrated, Copps told the committee that:

> Simply put, if you're waiting for me to go and get Cabinet authority on the wording [of a bill], it could be a rather long wait. I've been waiting actually since 1999. At this point I would suggest that the best course of action to achieve your objectives might be to hear from CRIA to see what would be an acceptable wording. You don't need to have ministerial approval to proceed with wording that you propose. And if that wording in the end is given to the government and a minister decides to take it before Cabinet and defend it, you're charting new ground, but it's very good ground.... [I]f you do the work and pack me the snowballs, I can throw them.[1]

Copps asked the committee to draft a bill on the advice of – not neutral experts – but what many consider the most powerful trade association in the copyright lobby. Nor, according to the committee evidence, did the committee members wholly object to the idea. Although the committee went on to draft a report on copyright reform, and not a bill

[1] House of Commons Standing Committee on Canadian Heritage, evidence, 2nd sess., 37th Parliament, 6 November 2003, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=67965.

as Copps suggested, its members and the Minister saw CRIA as a key player in their effort to speed up the copyright reform process. It was an approach that fell directly in line with the rights-holder lobby, and an attitude neatly summed up in the way Copps concluded the briefing: "If you can achieve a WIPO ratification, it will be one of the happiest days of my life."

In a matter of weeks, Copps would leave her job as Minister in a Cabinet shuffle, but by that time she had already played a major role in CRIA's digital copyright lobby. She proved to the major labels that the political channels of government were of far greater value to them than the departments' career officials. The major labels, aligned with the content lobby, hoped to see the government move swiftly on a legislative package to enact the WIPO treaties, but it had significant challenges to overcome. From the time that CRIA began its WIPO lobby in the late 1990s, it met considerable resistance from the bureaucracy. Many policy analysts were wary of handing the content industries the laws they desired. They wanted to avoid a controversial bill and sought a minimum WIPO implementation to avoid restricting the freedoms of smaller tech companies – in areas such as software inter-operability and online licensing – in a potentially competitive digital economy. Nor were the departments in very much of a rush. They did not intend to implement the WIPO treaties in a single, short-term package, which came as another source of irritation for the content lobby.

If CRIA's successes are measured by comparing what it proposed to the government and achieved in Bill C-60, significant victories can be found in three areas: WIPO implementation identified as a short-term priority; a full making available right with statutory damages; and the private copying exception narrowed. Convincing the

departments to move more quickly on WIPO implementation was a tremendous challenge, as was the push for a making available right. The government's decision to narrow the private copying exception – so that it would not permit the removal of a technological control on a CD – was an important one for the recording industry, but it came mostly as a technical amendment to make Canada treaty-compliant. To CRIA's credit, however, it was an issue that emerged directly from the content lobby's ability to accelerate the copyright process and pressure the government to agree to full WIPO implementation under a short-term plan, forcing it to examine all areas of treaty compliance. To realize these goals, CRIA bypassed a resistant bureaucracy by utilizing the political arena: it made contributions to the right political parties and candidates to strengthen its relationship with those in power; found valuable support from Minister Copps; ran an influential public campaign that simplified, narrowed and politicized the file sharing debate; took advantage of a less powerful user lobby; and made strategic use of political levers, such as a Federal Court ruling on file sharing. All of these factors combined to build effective points of political pressure that the major labels and their allies could wield within the bureaucracy. In short, CRIA accelerated the policy process and realized some of its key aims in the form of a bill by working from the top down.

The single most powerful political lever of the rights-holder lobby was its relationship with Sheila Copps. After becoming Heritage Minister in 1996, Copps immediately fought hard for the rights-holder lobby during the Phase II reforms and the passage of Bill C-32 in 1997. Canada signed the WIPO treaties in the same year, after which Copps backed off somewhat, in the view that she had done her work, at least for the time being, for copyright creators. Once the 2001 *Consultation Paper* revived

copyright reform, Copps again assumed the role of a kind of copyright crusader, largely acting for the interests of major players in the content lobby, such as CRIA and Access Copyright. This was the Minister who, after all, in 1997 called copyright the "lifeblood of creators."[2]

On copyright policy, Sheila Copps could be described as a "mission-oriented" minister.[3] She approached her portfolio with strong opinions and a predisposition toward the kind of policies and projects the department should be developing and maintaining. Graham Henderson, president of CRIA, has, for instance, called her a "crusading minister" and a "big, big artists' person."[4] But the degree to which CRIA and the content lobby shaped Copps' views is difficult to ascertain because the relationship was a reciprocal one formed over several years. As William T. Stanbury writes about mission-oriented ministers, "Lobbyists able to advance positions consistent with the minister's views are likely to have a strong ally – but the reverse is true as well."[5] In this way, Copps was as likely to rely on CRIA to advance her agenda as CRIA depended on her to move its own. Judging from the way Copps spoke about the Phase II amendments, the Minister saw copyright as an opportunity to earn political capital and positive publicity, benefits that come in addition to the constructive public policy she believed she was carrying out. Copps' office, for example, saw every opportunity to release press releases

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[2] Canadian Heritage, "Cultural Community to Benefit as Copyright Bill Receives Royal Assent" (news release, 25 April 1997), http://www.canadianheritage.gc.ca/newsroom/news_e.cfm?Action=Display&code=7NR027E.

[3] Five ministerial management styles are identified in William T. Stanbury, *Business-Government Relations in Canada,* 2nd ed., (Scarborough, Ont.: Nelson Canada, 1993), 216.

[4] Graham Henderson (president, CRIA), in discussion with the author, December 2005.

[5] Stanbury, 216.

on copyright reform, all of which heralded the benefits that would come to Canada's "artists" or "cultural community."[6]

CRIA's political contributions to the Liberal party and individual candidates reinforced the relationship between the content lobby and its political targets. This is not to suggest that campaign contributions are necessarily a *quid pro quo* between lobby groups and politicians. It is probably better explained as the nature of human relationships and the idea that favours make people want to return them.[7] Liberal MP Sarmite Bulte, Parliamentary Secretary to the Minister of Heritage, and who largely assumed Copps' role as the so-called copyright crusader after Copps' departure, once described campaign funding as an exchange between friends and professional allies. In the 2006 election, after it emerged publicly that Bulte had, in previous elections, also accepted campaign contributions from the content lobby, she told the *Toronto Star* that:

> These people support me. They support me because of my position on copyright. I'm not being influenced by them.... These people have become my friends and I don't apologize for that. Do I believe in strong copyright laws? Absolutely. I make no bones about it. And, do I believe that stealing and downloading music off the Internet is illegal and should be illegal? Absolutely, and I don't apologize for that.[8]

Criticism also swirled around Bulte in the 2006 election because of a fundraising gala organized by representatives from CRIA, the Canadian Motion Picture Distributors Association (CMPDA), the Canadian Publishers' Council (CPC) and the Entertainment Software Alliance. Echoing Bulte's feelings on the matter, CRIA president Henderson called the fundraiser "part of the political process." He told the Canadian Press that,

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[6] Canadian Heritage, "Cultural Community to Benefit"; and Canadian Heritage, "Canada Commits to Sign International Copyright Treaties" (news release, 18 December 1997), http://www.pch.gc.ca/newsroom /news_e.cfm?Action=Display&code=7NR135E.
[7] Stanbury, 319.
[8] Jim Rankin, "Fundraiser a rare glimpse into party power politics," *Toronto Star,* 6 January 2006.

"We're fundraising for a person who has notably stood up for copyright reform and for artists."[9]

Political contributions are, in the eyes of the content lobby, a normal part of the policy process. Stanbury, a leading expert on lobbying strategies in Canadian government, writes that the most effective political contributions are made to all major parties each year, with additional contributions in election years. Although lobbyists should be "very leery" of contributions to individual candidates because it may create "hard feelings," he recommends annual donations to parties and increasing them each year at the rate of inflation. "Large contributions," he writes, "may result in off-the-record meetings in which both parties can be more direct and the contributor can make arguments that cannot be made officially." A pressure group should never assume it can "buy influence," Stanbury notes, but contributions "indicate to ministers that the corporation [or pressure group] understands the practical aspects of political life."[10]

Like the copyright collectives and content companies, CRIA recognized these practicalities and made donations accordingly. Michael Geist has examined the Elections Canada database to find that, between 1993 and 2001, CRIA donated funds to the governing Liberal party each year, except for 2001.[11] He noted that between 1997 and 1998, CRIA's annual contribution leaped from $350 to $2,414. This jump came after the passage of the Phase II reforms and the government's commitment to implement the WIPO treaties, both in 1997. Also in 1998, the CMPDA contributed $2,014 to the

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[9] Angela Pacienza, "Film, record industry fundraiser for a Liberal MP a 'worry': Granatstein," The Canadian Press, 5 January 2006, via Factiva, https://global.factiva.com.
[10] Stanbury, 318-319.
[11] Michael Geist, "Who speaks for the public?" *Toronto Star,* 16 January 2006, http://www.thestar.com /NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1137365412559&call_pageid=970599109774&col=Columnist1036500183695.

governing Liberal party, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) $1,658, the Canadian Musical Reproduction Rights Agency (CMRRA) $1,658, and Universal Studios $4,393, all of who donated to the Liberals only. CRIA also donated directly to Copps in the 2000 election ($350), along with major corporations such as CanWest Global Communications Corp. ($3,000) and CTV Inc. ($1,000). CanWest, Rogers Communications Inc. and others (but not CRIA) also contributed directly to Copps' 1997 campaign.[12] Bulte, Parliamentary Secretary to the Minister of Heritage from 2000 to 2003, and again between 2004 and 2006, similarly accepted contributions. Michael Geist and CIPPIC's legal counsel, David Fewer, sifted through the Elections Canada database and posted Bulte's contributions on their blogs during the 2006 election. They found that Bulte's riding association in the election years of 2000 and 2004 received donations by prominent organizations in the content lobby, such as SOCAN, the CMPDA, Alliance Atlantis Communications Inc., Epitome Pictures, CanWest Global, CTV, Rogers Communications, Astral Television Network, the Association of Canadian Publishers, the Canadian Film & television Production Association, the CMRRA, and the Canadian Publisher's Council. "What makes the thousands of dollars raised from these groups particularly noteworthy," Geist wrote, "is that Bulte's riding association was the only one to receive such contributions."[13]

With Heritage Minister Copps strongly onside, CRIA could depend on her to act as, what Stanbury calls, a kind of "court of appeal" to the bureaucracy.[14] After the release

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[12] Elections Canada, "Elections Canada Financial Reports," Elections Canada, http://www.elections.ca/scripts/webpep/fin/welcome.aspx?lang=e.
[13] Michael Geist, "Campaign Contributions," Michael Geist, http://www.michaelgeist.ca/index.php?option=com_content&task=view&id=1058&Itemid=113; David Fewer, "The Bulte Scandal: A 'Transparent' Conflict of Interest," CopyrightWatch.ca, http://www.copyrightwatch.ca/?p=22.
[14] Stanbury, 217.

of the *Consultation Paper* in June 2001, it became clear to the content lobby that the government did not intend to implement all of the WIPO provisions in a short-term package, and this came as an unnecessary nuisance to the rights holders. To avoid implementing the WIPO treaties in a single package was to delay their implementation and potential ratification for several years, and it had already been four years since Canada signed the treaties. As a primary force in the content lobby, CRIA regularly approached Minister Copps to express its frustration with the process. "They were always coming," Copps explained.

> I had so many meetings with them that it came to the point where I said, "Look, have a meeting with the guy [at Industry] that's holding it up, because I can't have another meeting with you, telling you that I support you and believe in you."[15]

Around the end of 2001, in two separate speeches, Copps, for the first time publicly, expressed a government intention to implement and ratify the WIPO treaties. In December 2001 she promised to adhere to the WIPO treaties before a meeting of the Canadian Association of Broadcasters (CAB). Copps then committed to ratify them at a meeting of the Canadian Bar Association on 24 January 2002. The speeches were referred to in a March 2002 memo to Alex Himelfarb, Deputy Minister (DM) at Canadian Heritage. The memo pointedly noted, "The Industry Minister would not have made such a statement."[16]

In Canada's Westminster system of government, a minister's words are the supreme authority within the Department. As explained by Loris Mirella, policy analyst at Canadian Heritage, all of the department's public communication, be it through

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[15] Sheila Copps (former Minister of Heritage), in discussion with the author, December 2005.
[16] Translated from French. The original text says, *Le ministre d'Industrie Canada n'aurait pas fait de déclaration similaire.* Michael Wernick (ADM, Canadian Heritage), memorandum to Alex Himelfarb (DM, Canadian Heritage), 15 March 2002, 5.

consultation with stakeholders, reports, press releases, speeches, or appearances before committees, have to reflect the minister's public statements.[17] In a single speech, Copps made a substantial shift in the government's approach to the treaties. The Phase I and II reforms had been notoriously divisive for the Industry and Heritage departments. Technical arguments about what measures to implement, how best to enact them and in what timeframe, can be fought all the way up the chain of command. The debate may start between policy analysts, who, unable to compromise, pass the matter on to the directors, who then hand it to director generals (DGs) to settle, then the assistant deputy ministers (ADMs), then DMs, and finally the issue, however large or small, may have to be settled between ministers' offices.[18] When Copps makes a statement of this kind it is a victory to the rights-holder lobby because suddenly the disputed point – in this case ratification and full WIPO implementation – is instantly at the ministerial level.

Nor did the speeches appear to be at the whim of Copps. Rather, they were the result of negotiations between CRIA, Copps and apparently, her Department. The ratification speech is referred to in a March 2002 letter from CRIA president Brian Robertson to the new Industry Minister, Allan Rock. Robertson wrote that

> we did have a very productive dialogue with officials in Heritage and with the Minister in particular. In fact our arguments were persuasive enough to have the Minister of Heritage publicly state on January 24th at meeting of the Canadian Bar Association that it was now the government's intention to ratify the Treaties.[19]

Of the 2002 speech on ratification, Mirella has also said that:

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[17] Loris Mirella (policy analyst, Canadian Heritage), in discussion with the author, January 2006.
[18] For instance, Copps has said the Phase II reforms caused an intense "fight between Industry and Heritage" which, over the single issue of an exception for photocopying in libraries, ultimately went to Prime Minister Jean Chrétien, who was called in to arbitrate. Chrétien eventually granted Heritage its wish to limit the exception because the universities had recently received substantial federal funding. Copps, in discussion with the author, December 2005.
[19] Brian Robertson (president, CRIA), letter to Allan Rock (Industry Minister), 11 March 2002.

> Like all ministers, she [Copps] would have been hearing from the major stakeholders relating to her department, and they would have been complaining about this and that, and so she would go on the record and say where she stood. And that way, like with any department, they could point their fire towards the department or anywhere they thought the bottleneck was.... [S]he still has to get the agreement of the Industry Minister, and sometimes, when she says something, it may be the result of negotiations behind the scenes.[20]

Whether Copps' negotiated with CRIA, her Department, or both, she cleverly shifted the pressure from herself to the bureaucracy, especially Industry Canada.

The 2002 speech became a powerful bargaining chip in which the rights-holder lobby could approach other areas of government and invoke the Minister's commitment to ratify as an attempt to speed up the process. This is precisely how Robertson used Copps' speech in his letter to Rock. "[W]e were surprised and disappointed to learn that some articles of the WIPO Treaties were not proposed for discussion," the letter says, in reference to the 2001 *Consultation Paper*. "[W]e are writing you today to urge you to join your colleague, Hon. Sheila Copps, in recognizing the benefits that ratification of the WIPO Treaties bring to Canadian creators...."[21] It was no accident that the Copyright Coalition submitted its WIPO treaty *Implementation Proposal* to the Heritage Department just following Copps' January 2002 ratification speech, at the request of the Minister.[22] Such explicit instruction from Copps shifted pressures from the Heritage Department onto Industry, forcing it to compromise on the departments' plans for a short-term, incomplete WIPO package. Mirella has said that Heritage Department stakeholders initially asked it to commit to fixed deadlines, but copyright law is too complex and

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[20] Mirella, in discussion with the author, January 2006.
[21] Robertson, letter to Rock, 11 March 2002.
[22] CRIA's 2004 submission to the Commons Heritage Committee said that the 2002 Coalition "document was prepared for the Minister of Heritage at her request." Canadian Recording Industry Association, submission, House of Commons Standing Committee on Canadian Heritage, 3rd sess., 37th Parliament, 20 February 2004.

contentious to form according to strict timelines. Instead, the departments identified all WIPO issues as short-term:

> The stakeholders wanted to pin the government down to a specific date, a specific timeline. I think that's where the pressure was, to be specific.... They wanted us to come [up] with a timeline and then hold our hands to make sure we followed the timeline. So then they have something concrete, and they can go to other[s] ... and say, look, you gave a timeline. It's kind of strategic. [It was decided] to just call it short-term.[23]

Copps' speech pressured the bureaucracy, especially Industry Canada, into making a significant compromise. The Section 92 report, tabled in Parliament in October 2002, committed to enacting the WIPO treaties in a single, short-term phase.

Since the departments agreed to make Canada WIPO treaty-compliant in a short-term package, this meant extensive analysis of its copyright provisions to see that nothing in the C*opyright Act* conflicted with the WIPO requirements, and forced the government to take an in-depth study of the private copying exception. CRIA submitted to the government, on more than one occasion, its position that the private copying exception should not permit circumventing technological controls. In fact on this point CRIA had the support of the Industry Department, which had for years viewed the private copying regime as arcane and unnecessary. The Canadian Coalition for Fair Digital Access (CCFDA) and its cousin the Canadian Storage Media Alliance (CSMA), whose members include major companies such as Apple Canada, Dell Computer Corp. and Wal-Mart, opposed the regime in principle and found an empathetic ear in the Industry Department. They viewed the levy as an unfair tax on media used for purposes other than storing sound recordings. CRIA and the Industry Department, in this way, placed some pressure on narrowing the private copying exception. However the government's decision had

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[23] Mirella, in discussion with the author, January 2006.

more to do with a technicality than it did effective lobbying. It appeared to policy makers that, if the private copying exception was broad enough to override a provision protecting technological controls, it may not be consistent with an article in the *WIPO Performances and Phonograms Treaty* (WPPT).

A government e-mail to officials in the Heritage Department confirms this thinking. The e-mail, although undated, presented options on how to make the "private copying regime consistent with the WPPT." It went on to say that:

> The problem arises because most experts would say that the exception in s. 80 [of the *Copyright Act,* i.e., the private copying exception], taken by itself, is not consistent with Art. 16 of the WPPT.... [T]he primary issue is the scope of the exception.... My personal opinion at this point in time would be to amend s. 80 to state that a person could not circumvent an (effective) technological protection measure for the purpose of making a private copy.[24]

Article 16 of the WPPT requires that when contracting countries provide exceptions in their domestic laws, they should not interfere with the "normal exploitation" of the sound recording and do not "unreasonably prejudice the legitimate interests" of the artist.[25] If the private copying exception became too broad, it could "unreasonably prejudice" the rights of the artist and obstruct Canada's ratification of the WIPO treaties. Although CRIA welcomed the narrowing of the private copying exception as a solution, it came in part as a technicality – and one that would not have been dealt with had the government carried out its original plan for WIPO-treaty compliance in more than one package.

The House of Commons Standing Committee on Canadian Heritage began its statutory review of the *Copyright Act,* as mandated by Section 92 of the statute, in the fall of 2003. Although Copps and the rights holders had succeeded in expediting the policy

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[24] Anonymous official (Government of Canada), e-mail to Claude Lafontaine (Canadian Heritage), Denis Gratton (policy analyst, Canadian Heritage), Pascal Bruneau (Canadian Heritage), et al., undated.
[25] WPPT, art. 16, http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

process, in the minds of those on the committee, the process still dragged on. On 23 October, in frustration with what he called a too-slow process toward treaty ratification, Paul Bonwick, a Liberal member of the committee sympathetic to the rights-holder lobby, tabled a committee motion recommending that, "in the strongest possible terms," the ministers of Heritage and Industry "instruct their officials to prepare draft legislation to be reviewed by the Standing Committee on Canadian Heritage by February 10, 2004."[26] The motion passed, but it quickly became apparent that its proposed deadline was totally impracticable, and by November, when Copps appeared before the committee to criticize the lack of movement on the issue, Industry Minister Allan Rock responded with a letter to the committee denying Bonwick's request. Rock wrote that the government would stick to the timetable set out in the Section 92 report, which was to bring legislation forward within two years.[27] It was at this point that Copps suggested the committee use the assistance of CRIA to write its own draft legislation.

The committee soon lost Copps, however. In December 2003, after Paul Martin replaced Jean Chrétien as leader of the Liberal party and Prime Minister of a majority government, he shuffled the Cabinet and removed Copps from the Heritage portfolio. In Copps' place came Hélène Chalifour Scherrer, who was not very well versed in copyright and, as a consequence, not an activist like Copps. Instead of bringing forward draft legislation for the committee, as Bonwick requested, the departments tabled in March, for study by the committee, a Cabinet-approved *Status Report on Copyright Reform,* which,

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[26] House of Commons Standing Committee on Canadian Heritage, minutes of proceedings, 2nd sess., 37th Parliament, 23 October 2003, http://www.parl.gc.ca/committee/CommitteePublication .aspx?SourceId=63633.

[27] *Canadian New Media,* "Heritage Committee attempt to reform copyright on quick timetable stalls," 21 November 2003, 4-5.

to add further insult to Bonwick's proposed timeline, suggested legislation would not be ready until sometime in 2005.

It was clear from the government's *Status Report* that the Industry and Heritage departments remained divided on most issues, a rift that appeared to polarize after Copps and the rights-holder lobby succeeded in hastening the policy process. (Scherrer, for example, told the Heritage committee at the time that, on copyright policy, "the relationship between the two departments was not particularly good whereas now, the officials are talking."[28]) The *Status Report* did not bring forward a policy framework so much as policy options, and on most issues, it identified a Heritage approach and an Industry one. The report shows some consensus; for instance on the controversial issue of technological controls it proposed the same measures as those proposed in Bill C-60. But on other issues, such as the making available right, the government put forward two options: one to use the existing communication right in the *Act* for authors, or, alternatively, "grant a new exclusive making available right to authors and to sound recording producers and performers." On the issue of ISP liability it was again two options: one to "exempt ISPs from any liability for copyright infringement when they act merely as intermediaries" and another to make ISPs "subject to liability for copyright material on their facilities." The *Status Report* also considered three educational issues surrounding digital works, and, again, in each case it put forward two opposing options.[29]

The Heritage committee, after Copps' departure, did not draft its own legislation, but went on to study the government's *Status Report*, largely taking its leadership from

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[28] House of Commons Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 9 March 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=74272.
[29] Minister of Canadian Heritage and Minister of Industry, *Status Report on Copyright Reform*, 3rd sess., 37th Parliament (tabled, House of Commons Standing Committee on Canadian Heritage, 24 March 2004), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/$FILE/statusreport.pdf.

Bonwick and the Heritage Minister's Parliamentary Secretary, Sarmite Bulte, who the Heritage committee elected as chair in February 2004. The committee tabled a unanimous response to the government's report, called the *Interim Report on Copyright Reform,* on 12 May 2004. Known to observers as the "Bulte Report," the document could have been written by the rights-holder lobby itself. Its first recommendation was that the government not just implement – but ratify – both WIPO treaties "immediately." The report set out a timeline for the government, proposing that its recommendations be "ready for cabinet approval no later than 15 August 2004" and that "legislation to permit ratification of the WIPO treaties be introduced in the House of Commons by 15 November 2004." The government had planned to introduce a bill sometime in 2005, and the committee asked the government to shorten this timeline by half, if not more.

The *Interim Report* also listed a series of policy recommendations that chose, in every instance where two options had been laid out in the *Status Report*, the rights-holder or Heritage approach. It proposed a notice and takedown scheme for ISPs. Educational institutions had called for exceptions to copyright to allow for teachers to use communications technologies and the Internet to relay information to students. Instead, the report recommended collective licensing for this use of technology. In its most controversial proposal, the report recommended that libraries enter into collective licensing agreements for allowing students to access to publicly available material on the Internet.[30] The Bulte Report marked a very clear expression of a maximalist copyright

[30] See the list of recommendations in House of Commons Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (tabled in Parliament, 12 May 2004), 23-24, http://www.parl.gc.ca /infocomdoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf.

agenda. The day it was released, CRIA president Robertson said its recommendations were like "a spring wind blowing away the smog of seven years of disappointments."[31]

The committee process had been heavily influenced by a mission-oriented minister (Copps) and the rights-holder lobby. It was clear from the start that the committee was not very balanced, and that several committee members did not approach the issues with very open minds. The committee's first meeting on copyright reform was a called a "briefing session" on the implementation of the WIPO treaties, informed by the testimony of Richard Pfohl, legal counsel for CRIA. That day, Liberal member Clifford Lincoln, former chair of the committee, called Pfohl an expert on WIPO implementation, to which Pfohl said members should instead call him "an interested lawyer" to avoid a potential reprimand from the Law Society. Lincoln replied: "We'll call you an expert. Forget about the Law Society."[32] There is also reason to believe that committee members had a limited understanding of very technical copyright reform issues, and may have been misled into supporting them. Steve Wills, legal counsel for the Association of Universities and Colleges of Canada (AUCC), has said that Bonwick and Bulte led most of the committee discussion,[33] and that after the release of the Bulte Report, when he sat down with one committee member to explain his position, the MP "seemed surprised by the nature of the recommendation by the committee." Wills continued: "When we

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[31] Robertson quoted in Angela Pacienza, "Heritage committee calls for modernization of Cdn copyright law," *Canadian Press,* 12 May 2004, via Factiva, http://global.factiva.com.

[32] House of Commons Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 11 March 2004, http://www.parl.gc.ca/infocomdoc/37/3/HERI/Meetings/Evidence/HERIEV03-E.HTM#Int-840997.

[33] Russell McOrmond, who attended the hearings, has also expressed this to me. Russell McOrmond (software consultant), in discussion with the author, January 2006.

expressed our objections, and indicated that this did not at all serve our needs, the person seemed shocked."[34]

Although the Heritage committee had much less power than Minister Copps, the Bulte Report offered the rights-holder lobby leverage to take into meetings with departmental officials. A government memo in May 2004, for example, briefed Susan Peterson, Associate DM in the Heritage Department, on a meeting with David Dyer, a lobbyist for CRIA. The memo acknowledged that "the recording industry has been pushing hard for legislation to allow Canada to ratify" the WIPO treaties and that the "main area of concern will be the anticipated timeline for a copyright bill addressing the recommendations made in the Standing Committee on Canadian Heritage's *Interim Report*...."[35] The timeline recommended by the committee may not have been practicable, and its policy recommendations were a stretch from anything Industry Canada would have considered acceptable, but it put Industry and Heritage under some pressure to come to an agreement. The *Interim Report* requested a government response, and the departments risked appearing weak and incapable if they did not reply to the committee with a decisive set of proposals. The following fall, Judith Laroque, DM at Canadian Heritage, said the committee pressure had some effect: "I can tell you that it worked. As a result of that, deputies met, associate deputies are meeting regularly, and real progress has been made."[36]

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[34] Steve Wills (legal affairs manager, AUCC), in discussion with the author, January 2006.
[35] Bruce Stockfish (DG, Copyright Policy Branch), memorandum to Susan Peterson (Associate DM, Canadian Heritage), 31 May 2004.
[36] See testimony of LaRocque, House of Commons Standing Committee on Canadian Heritage, evidence, 1st sess., 38th Parliament, 27 October 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=126909.

Although the Bulte Report may have pressured the departments to follow through on their committed timetable, the government did not take its recommendations very seriously. The Bulte Report was too far out of step with the government's aims. For this reason the few recommendations of the report that appeared in Bill C-60 were WIPO implementation (which had already been agreed to by the government) and changing the rules on the authorship of photographs. Other than that, however, the bill fell far short of the committee's recommendations. On educational issues, Bill C-60 did not propose collective licensing for the use of publicly available Internet materials, the digital transmission of lessons, or for interlibrary loans of digital material.[37] Cabinet's view of the Bulte Report was evident in its reply, tabled on 24 March 2005, which included the preliminary legislative proposals that the departments would, in June, introduce as Bill C-60. The government's letter to the committee, signed by both Industry and Heritage ministers, noted that most of its recommendations were not reflected in the government's proposals, that copyright "by its nature is complex and contentious" and that the departments "made every effort" to find a balance between rights holders and users.[38]

Committees can be very powerful to the government or ministers who want to push through an agenda with the appearance of thorough scrutiny, but in this case Bulte led a kind rogue committee trying to influence Cabinet and the bureaucracy.[39] Although the committee may have succeeded in pressuring the government to come up with a

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[37] Compare the recommendations of the *Interim Report* with Bill C-60; for a summary of the bill see Sam N.K. Banks and Andrew Kitching, *Legislative Summary: Bill C-60: An Act to Amend the Copyright Act,* (Ottawa: Library of Parliament, September 2005), http://www.parl.gc.ca/38/1/parlbus/chambus/house /bills/summaries/c60-e.pdf.

[38] Minister of Industry and Minister of Heritage, *Government Response to the May 2004 Interim Report on Copyright Reform of the Standing Committee on Canadian Heritage,* 1st sess., 38th Parliament (tabled in Parliament, 24 March 2005), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01141e.html.

[39] For the relationship between lobbyists and Parliamentary committees see A. Paul Pross, *Group Politics and Public Policy,* 2nd ed. (Toronto: Oxford University Press, 1992), 79; and Stanbury, 224-227.

response, its pro-rights-holder view of the issues not only seemed to irritate some public servants but also appeared to backfire, becoming a rallying point for the user lobby. It seemed that Bruce Stockfish, DG of copyright at Canadian Heritage, tried to instil some moderation into the committee in 2004, when, in his testimony, he repeated – six times – that the government was trying to find a balanced approach that fit in line with the "public interest."[40] After the release of the Bulte Report, the user lobby quickly emerged to criticize it. The educational community, for example, had for years formed a loose coalition of about 15 organizations called the Copyright Forum. In response to the Bulte Report, the coalition wrote a series of letters to the Prime Minister and the departments, using the maximalist Bulte Report to call for a more balanced study of the *Copyright Act.* This could be done, they argued, through a joint legislative committee with guidance from both the Industry and Heritage departments.[41] By the summer of 2005, pressure from user groups led the government to decide that the House of Commons would not study Bill-60 through the Heritage committee, as had been done in Phase II, but instead through a legislative committee made up of members from both the Industry and Heritage Commons committees.[42]

The efforts of CRIA and the rights-holder lobby to influence the Heritage committee were successful to a fault. The major labels proposed, as in their submissions to the departments, maximalist copyright reform that misjudged the intent of the government. Although they appear to have brought a minister and a powerless committee onside, they likely had the effect of further alienating public servants who were more

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[40] House of Commons Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 25 March 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=82123.
[41] Steve Wills of the AUCC has discussed these letters. Wills, in discussion with the author, January 2006.
[42] Simon Doyle, "Public pressure prompts new study of copyright bill," CanWest News Service, 5 August 2005, via FPinfomart, http://www.fpinfomart.ca.

interested in a balanced approach and responding to copyright's role in the new digital environment. As Wills would later say about the committee process: "Had they perhaps been a little more clever about it, and thrown a few crumbs to the people on the other side of the issue, maybe they would have gotten away with suggesting that they'd heard from all stakeholders and took everyone's views into account."[43]

CRIA's inroads at the political level also came through a powerful media campaign. The major labels' public campaign benefited in part from a user lobby that may have had the support of a select group of technophiles, but which had not grabbed wider public attention and support, at least not until 2004 or 2005. Although the users had mobilized interested members of the public to make submissions to the government in 2001, the users did not have a spokesperson or a central organization to seek media attention and challenge assertions made by the recording industry and Hollywood studios. CIPPIC and Michael Geist would have a measurable impact on more balanced media reports and, consequently, a more educated public, but CIPPIC did not form until the fall of 2003 and Michael Geist did not become an important figure until he began blogging on copyright in 2004 and, to a lesser degree, writing his well-circulated column in the Toronto Star in January 2003.

Even as late as 2004, Geist acknowledged that the user lobby lacked unity and messaging power. At a lecture that year at the University of Toronto, Geist said that the user lobby would have more impact if it could somehow unite its various factions. One of the greatest challenges of lobbying against CRIA and the rights holders, he said, was the

[43] Wills, in discussion with the author, January 2006.

difficulty in building public support around such a complex and technical issue.[44] Copyright is extremely complex. It is unlike the advocacy of Greenpeace or an environmental lobby, in which the public has a basic understanding of the issues. General public knowledge about copyright tends to be from little to none, which made CRIA's simplified arguments – grounded in better support for Canadian musicians – an effective false pretence. As Geist said in 2004:

> We've got to find a way to bring some of those [user] groups together.... The other side [the rights holders] has really good messaging. It's piracy, and it's more compensation. It would take me 40 minutes to explain our side and that's a lot tougher to do when I talk to the [media].[45]

Capitalizing on a less organized user lobby, CRIA and its recording industry affiliates created the appearance of "the problem of file sharing," which had a considerable impact on the government's policy approach.

CRIA and its affiliates, the International Federation of the Phonographic Industries (IFPI) and the Recording Industry Association of America (RIAA), not to mention allies such as the Motion Picture Association of America (MPAA), employed aggressive public messaging to narrow the public debate on copyright reform to one about the negative impacts of file sharing on the music industry. The IFPI, for instance, released annual reports detailing worldwide losses to piracy, bootlegging and file sharing.[46] The media, at least in the early years of the downloading debate, did not seem to fully grasp the technicalities and counter-arguments surrounding copyright, CD sales and file sharing, which made the recording industry's arguments easily deceptive. It

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[44] Geist explained this in more detail in an interview. Michael Geist (Canada Research Chair, Internet and E-commerce law, University of Ottawa), in discussion with the author, November 2005.
[45] Michael Geist, "Copyright and the Internet: Is there a Canadian way?" (guest lecture at the launch of Project OS/OA, Toronto, 10 February 2005), QuickTime http://epresence.tv/archives/2005_feb10/default QT.aspx?archiveID=113.
[46] Reports available at http://www.ifpi.com.

became common for the mainstream press to equate file sharing with "stealing," "illegal downloading"[47] or "piracy," to repeat the music industry's claims that it was losing hundreds of millions of dollars to the P2P networks and to call Canada's copyright laws antiquated or outdated.[48] Through letters to the editor, press releases, the release of polls and other statistics, CRIA expended great sums of money to drive home its argument that the P2P networks destroyed its business, when, in reality, there remains little evidence to show that file sharing had a significant impact on CD sales.[49] It was an aggressive and effective campaign that Don Sellar, former ombudsman at the *Toronto Star,* described as "driven by lawyers who write lengthy briefs and never accept anything short of total victory.... These aren't people who gently participate in mediation – they're warriors."[50]

One measure of a pressure group's public campaign is its capacity to lower debate from an intellectual level to an emotional one, and an effective strategy toward this is through the use of symbols and metaphors, which often distort the facts but create real political pressures.[51] For the recording industry, this symbol was the laid-off recording technician or the musician facing declining record sales. In 2004, for instance, CRIA said

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[47] Whether file-sharing is an infringement is a question still up for judicial interpretation. While many believe that "uploading" or distributing mp3s is an infringement, legal interpretations tend to say "downloading" is not. See David Fewer, "Making Available: Existential Inquiries," in *In the Public Interest: The Future of Canadian Copyright Law,* ed. Michael Geist, 267-284 (Toronto: Irwin Law, 2005).

[48] In a search for "pira* and (file-sharing or peer-to-peer)" in the headline or lead paragraph of stories in the *Toronto Star*, *National Post* and *The Globe and Mail*, between 2001 and 2005, 21 articles are returned. Via Factiva, http://global.factiva.com.

[49] An exhaustive study released in 2005 empirically compared record sales to downloads on the P2P networks, and concluded that the effect of file-sharing on sales "is statistically indistinguishable from zero." Among others, Geist has noted that declining CD revenues are likely the result of a mix of factors, such as the popularity of DVDs, cell phones and video games, as well as pricing pressures from discount department stores like Wal-Mart. See Felix Oberholzer and Koleman Strumpf, "The Effect of File Sharing on Record Sales: An Empirical Analysis" (Harvard Business School and UNC Chapel Hill, June 2005), http://www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf; and Michael Geist, "Piercing the peer-to-peer myths: An examination of the Canadian experience," *First Monday: Peer Reviewed Journal on the Internet,* 10, no. 4 (April 2005), http://firstmonday.org/issues/issue10_4/geist/index.html.

[50] Shlomit Kriger, "Under Pressure," *Ryerson Review of Journalism,* Summer 2005, http://www.rrj.ca/issue/2005/summer/554/.

[51] Nayda Terkildsen, et al., "Interest Groups, the Media, and Policy Debate Formation: An Analysis of Message Structure, Rhetoric, and Source Cues," *Political Communication,* 15 (1998): 47-48.

that it had lost $425 million to the P2P networks since 1999, resulting in "hundreds, if not thousands" of layoffs in Canada.[52] This was an oft-repeated claim. CRIA also led at least one lobby day on Parliament Hill with popular Canadian musicians like Tom Cochrane to speak for it. In November 2004, Cochrane, after a meeting with the Heritage Minister, told CTV news that, "We're basically like a Third World country right now, with our copyright law.... We're here [on Parliament Hill] because it's a right, [file sharing] is stealing."[53] The major labels also ran various public education endeavors, such as the MUSIC Coalition (www.musicunited.org) and advertising campaigns to instil, especially in youth, the notion that file sharing is illegal, immoral and hurts artists. CRIA, for example, distributed 10,000 copies of a video called *Listen Up 2* to schools across Canada, which emphasized the importance of music to "people's lives," and the importance of payment to those who work in the business.[54] Canadian Heritage, apparently in the hope of receiving political credit for its copyright reform, conveyed similar messaging, couching copyright in the language of protection for the Canadian arts and artists as opposed to the interests of the content industries.[55] Speaking notes prepared for the Heritage Minister in November 2004, for example, relayed CRIA's core message.

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[52] See the testimony of Richard Pfohl (legal counsel, CRIA), House of Commons Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 11 March 2004, http://www.parl.gc.ca/infocomdoc/37/3/HERI/Meetings/Evidence/HERIEV03-E.HTM#Int-840997.

[53] *CTV.ca,* "Musicians call for an update on copyright law," 24 November 2004, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20041124/musicians_copyright_041124/20041124/.

[54] Brian Robertson, "Don't torch musicians' incomes, burn media piracy," *The Globe and Mail,* 14 October 2003; CRIA, "Listen Up 2," CRIA, http://www.cria.ca/listenup2.php.

[55] Laura J. Murray discusses the government's protectionist rhetoric in "Protecting ourselves to death: Canada, copyright and the Internet," *First Monday: Peer Reviewed Journal on the Internet,* 9, no. 10 (2004), http://www.firstmonday.org/issues/issue9_10/murray/index.html.

Under "proposed answers," the notes said that, "the Association [CRIA] attributes losses of $425 million to file sharing."[56]

Through its public campaign, the recording industry managed to scrape together sympathy for the losses to their business and convince the public that partial if not full responsibility for its losses could be laid on the P2P networks. By the spring of 2004, this had been fairly well-accomplished, and on 31 March, the Federal Court of Canada dealt CRIA a ruling that, despite delivering bad news, greatly accelerated its WIPO lobby, at least on a new making available right. On 10 February 2004, CRIA had filed a lawsuit with the Federal Court, targeting 29 anonymous file sharers who had traded or "uploaded" what CRIA described as large amounts of mp3s. CRIA did not have the identities of those file sharers, however, just their Internet user names. The legal application requested that the responsible ISPs release the identities of the file sharers so that the labels could pursue them individually for copyright infringement. CRIA wanted to begin in Canada the kind of lawsuits that the RIAA had already been carrying out with much attention in the U.S.

However, the Federal Court Judge, Justice Konrad von Finckenstein, ruled that CRIA had not supplied sufficient evidence. Although von Finckenstein's judgment hinged on this, he made additional comments to say that, even if CRIA had submitted proper evidence, the recording companies would not likely obtain the names of the file sharers. The P2P users had not infringed copyright under the existing *Copyright Act* because CRIA could not demonstrate that the file sharers had in fact distributed any music. Von Finckenstein continued:

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[56] Translated from French. The original text says, *L'Association attribute des pertes de 425 millions de dollars aux téléchargements.* Canadian Heritage, *Droit d'auteur: Le téléchargement d'enregistrements sonores* (Minister's speaking notes, 11 November 2004).

> They merely presented evidence that the alleged infringers made copies available on their shared drives. The exclusive right to make available is included in the *World Intellectual Property Organization Performances and Phonograms Treaty* ... however that treaty has not yet been implemented in Canada and therefore does not form part of Canadian copyright law.[57]

Von Finckenstein told the labels, in so many words, to come back when they had a making available right.

In the public understanding of the issue, the von Finckenstein ruling suddenly directed the blame toward Canada's copyright law, not CRIA's evidence. The labels would appeal the ruling to the Federal Court of Appeal, and in a subsequent judgment on 19 May 2005, the Court of Appeal ruled that von Finckenstein's conclusions about the *Copyright Act* were misplaced and that such interpretations of the statute should wait until a file sharer is on trial.[58] For the time being, however, in the spring of 2004, von Finckenstein's decision made Canada's *Copyright Act* appear inadequate. The day after von Finckenstein's judgment, the *National Post*'s Robert Thompson, for example, quoted a "music industry insider" who said that, "This makes it open season on any intellectual property product." The same day, Mark Evans' column in the *National Post* bore the headline, "Canada could become the Kazaa capital of the world." *The Globe and Mail* took the same stand on 1 April. Along with a story by Keith Damsell that concluded "swapping songs on the Internet for personal use does not break the law," a *Globe* editorial said that file sharers "can download as much music as they wish without paying a cent to the creators," and pronounced that "the law should be toughened."

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[57] *BMG Canada Inc. v. John Doe* (F.C.), 2004 FC 488, para. 28, http://decisions.fct-cf.gc.ca/fct/2004/2004fc488.shtml.

[58] *BMG Canada Inc. v. John Doe,* 2005 FCA 193, paras. 46-47, http://www.fca-caf.gc.ca/bulletins/whatsnew/A-203-04.pdf; and Fewer, "Making available," 268-269.

Having created a relative moral panic of file sharing, the Federal Court decision pressured the government to consider a full making available right. The government was still considering what a new making available right would do to the *Copyright Act* and whether it was the right approach. Just one week before the von Finckenstein decision, the departments' *Status Report* expressed divisions between Industry and Heritage on whether there should be a new making available right for authors and producers. The von Finckenstein judgment had, virtually overnight, triggered a political response, causing the government to lean towards a new, exclusive right. Heritage Minister Scherrer had come to the portfolio with little knowledge about copyright and, for this reason, took a moderate approach to the issue. She told the Standing Committee on Canadian Heritage on 9 March, for example, that the government was, contrary to the arguments of the committee members, not behind schedule on copyright reform.[59] However, the von Finckenstein decision appeared to change that. A memorandum to Prime Minister Paul Martin, just 15 days after the ruling, noted that Scherrer had become a greater advocate for reform of the *Copyright Act*:

> The Minister of Canadian Heritage has frequently stated publicly that she will seek to reform the *Copyright Act* in a manner that safeguards the interests of Canadian cultural producers, most specifically recording artists. Since the recent ruling by the Federal Court ... she has stepped up her insistence on the need for *urgent* action by the Government of Canada.[60]

The issue had become so politicized that Scherrer was not the only one to see some potential political capital in the situation.

Paul Martin, sworn in as Prime Minister in December 2003, had succeeded Chrétien as Liberal leader. About six weeks before Martin called his first general

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[59] Standing Committee on Canadian Heritage, 9 March 2004.
[60] Emphasis added. Alex Himelfarb (Clerk of the Privy Council), memorandum to Paul Martin (Prime Minister), 15 April 2004.

election, and just two days after the von Finckenstein judgment, Martin made a surprise visit to the Juno Awards in Edmonton, where he pronounced that "the Canadian music industry is the second most important music industry in the world." He added that

> it's an important part of our sovereignty.... We are not going to let an industry that is so important to this country, so important to our ability to tell stories and sing our songs to the rest of the world, be jeopardized.[61]

Although Martin did not say exactly how the music industry should be protected, it was fairly clear from recent events that policy makers ought to think more seriously about a full making available right.

The von Finckenstein ruling not only created public pressure to introduce the right, but also gave CRIA's lobbyists every reason to argue for its necessity. Like Copps' speech on ratification and the Bulte Report, the court ruling gave the rights-holder lobby leverage to carry into meetings. It was no accident that, after the decision, *The Hill Times* quoted a lawyer who said, "This is a lawsuit that will launch a thousand lobbyists."[62] Directly following the decision, CRIA had a meeting in early April with Jean-Pierre Blais, an ADM at Canadian Heritage, and another around the end of May 2004, in which David Dyer met with Peterson, Associate DM at the Department. Briefing notes to prepare Peterson for the meeting said that, "from CRIA's perspective, the WIPO ratification package will necessarily include provisions to address the limitation [of the *Copyright Act*] noted in the recent decision of the Federal Court of Canada...." It added: "Although CRIA has stated its intention to appeal the decision, it will be pushing for inclusion of this provision [the making available right]." Both meetings would have been important ones influenced by the politicized climate of copyright reform. Senior

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[61] Larry Johnsrude, "PM vows to protect music industry: Martin short on specifics during surprise visit to Edmonton," *Edmonton Journal,* 3 April 2004.
[62] Jenefer Curtis, "Copyright ruling stirs lobbying pot," *The Hill Times,* 19 April 2004, 8.

managers in the Department would have to respond to political pressures – and unresolved issues can give the appearance of poor managerial skills.

To add further political pressure, on 3 May 2004, the United States Trade Representative released its annual *Special 301 Report* on intellectual property, which lists, in addition to "priority" countries that adversely affect American rights owners, additional countries the U.S. is watching for what Americans consider inadequate intellectual property laws. The report registered Canada on a lesser-priority watch list, but the fact that it had registered at all was significant. Canada had, according to the report, "made little headway in addressing long-standing intellectual property issues." It continued:

> a recent Canadian court decision has found peer-to-peer file sharing to be legal under the Canadian copyright law, a position that underscores the need for Canada to join nearly all other developed economies in implementation of the WIPO Internet treaties.[63]

Although such reports have little impact on thinking among bureaucrats, they are intended to apply political pressures, and real or potential threats to Canada-U.S. relations are always a source of interest within Ottawa's top echelons. Even so, there is little evidence to suggest that the report had much impact in Canada, save from reminding Canadian policy makers that the U.S. had as much interest in whether Canada adopted a new making available right as did the recording industry.

Perhaps what is most interesting about the political pressures surrounding copyright and the recording industry is not how the government responded with a making available right, but that, even in the face of such pressures, the government came forward

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[63] United States, United States Trade Representative, *2004 Special 301 Report* (Washington, D.C., 3 May 2004), 23, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf.

with a minimalist bill. It is important to note that in May 2002 Alex Himelfarb, until then DM at the Heritage Department, became Clerk of the Privy Council, an extremely powerful advisory position in government. As adviser and representative of the public service to the Prime Minister, Himelfarb had, as former DM at Heritage, been well-briefed on digital copyright issues, and as much as Prime Minister Paul Martin may have been inclined to give the recording industry all the legal tools it desired, Himelfarb acted as a balance to that. In March 2004, Paul Bonwick wrote a letter to the Prime Minister, which noted that Bonwick had actively lobbied the Prime Minister's Office (PMO) to move ahead with digital copyright reform. He had met with the Prime Minister's chief of staff, Paul Corriveau, as well as Himelfarb and Paul Martin. The letter appeared to be a follow-up to those meetings, urging Martin to use his "leadership" to create a "speedy resolution to this much delayed and sensible initiative."[64] Martin's written response to Bonwick, dated 18 May 2004, suggested, albeit very diplomatically, that the government would do nothing of the sort, and the response was written by none other than Himelfarb. The letter from Martin expressed an appreciation of Bonwick's interest in copyright reform, but said that he would refer copies of their correspondence to the Industry and Heritage ministers, "[g]iven their interest and responsibility in this matter."[65] On Himelfarb's advice, the Prime Minister offered no commitment to come to a speedy resolution, and in so many words, said he would give the matter to his ministers to handle. Bonwick's entreaties to the PMO did not appear to advance his cause, and had

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[64] Paul Bonwick (Liberal MP), letter to Paul Martin (Prime Minister), 2 March 2004.
[65] The reply letter to Bonwick was attached to a memo from Himelfarb to Martin, asking the Prime Minister to sign the letter if he approved of it. Alex Himelfarb (Clerk of the Privy Council), memorandum to Paul Martin (Prime Minister), 22 April 2004; Paul Martin (Prime Minister), letter to Paul Bonwick (Liberal MP), 18 May 2004.

Himelfarb not been there to temper hasty political decisions on copyright, things may have ended differently.

But the politicization of file sharing was significant enough to carry digital copyright reform through to the following fall, especially with respect to the making available right. In its March *Status Report,* the government had laid out a timeline for bringing a bill forward, which was to take legislative proposals to Cabinet by the end of 2004 and table a bill "shortly thereafter," which essentially meant sometime in 2005.[66] The rights-holder lobby would hold the government to that schedule. The general election of 28 June 2004 brought a minority Liberal government to power under Paul Martin, who appointed Liza Frulla as new Heritage Minister and Scherrer, who had lost her seat, as his principal secretary. Just after Frulla's appointment, CRIA President Robertson told the Canadian Press that copyright was still "the primary issue.... It's not going to be a stretch at all for her to continue to support that process."[67] CRIA kept the issue alive that November with a lobby day on Parliament Hill. "We are asking ministers and MPs to move forward immediately with this new, vital legislation," new CRIA president Henderson told the *Canadian Press,* in a news report that also noted that the "*Copyright Act,* drafted in 1908, is ill-equipped to address the issues of the 21st century...."[68] The following June, the government tabled Bill C-60, which included a full making available right.

The statutory damages provision, also key to CRIA's strategy, remained intact. To CRIA's benefit, the statutory damages provision was largely treated throughout the policy

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[66] *Status Report,* 1.
[67] John McKay, untitled, The Canadian Press, 20 July 2004, via Factiva, http://www.global.factiva.com.
[68] Canadian Press, "'Piracy' killing industry, musicians cry," *Kitchener-Waterloo Record,* 25 November 2004.

process as a non-issue. This can be attributed, in part, to the fact that CRIA and other powerful rights-holder associations keep permanent lobbyists in Ottawa who more or less shaped the copyright reform process from its inception. The statutory damages provision had not been identified in the Section 92 report as an item for short, medium or long-term review (unless it fits into "clarifying and simplifying the *Act*," a long-term objective).[69] In addition, the user lobby, partly unorganized, partly pragmatists, had little desire to attempt to change a provision in the *Act* that was well off the government's radar. Instead, the users talked much more about educational use of the Internet and technological controls, by far the most controversial issues on the table. The only person in the user lobby who actively made an issue of the power of the making available right with the statutory damages provision was Howard Knopf, a copyright lawyer in Ottawa, who told the Heritage committee in 2004 that it would allow the recording industry to turn "children and families into collateral damage."[70] As a result, statutory damages was not seen an issue deserving attention from the government. Denis Gratton, a senior policy analyst at Canadian Heritage, summed up the department's view when, after the bill was tabled, he told a crowd at the University of Ottawa that, "I don't recall that there has been that much discussion about the making available right and statutory damages in the months leading [up] to Bill C-60."[71]

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[69] *Supporting Culture and Innovation,* 46.
[70] Standing Committee on Canadian Heritage, evidence, 3rd sess., 37th Parliament, 20 April 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=79234.
[71] University of Ottawa Faculty of Law, "Techlaw Copyright Summit" (conference, University of Ottawa, Ottawa, 29 September 2005).

CONCLUSION

Bill C-60 died when Paul Martin's minority government fell on a confidence vote in November 2005, but CRIA had made significant gains as the single most powerful brand in the rights-holder lobby. Although its consultant lobbyists and allies in the rights-holder lobby met considerable resistance within the bureaucracy, CRIA overcame this resistance by exercising a strong relationship with Heritage Minister Copps and key members of the Heritage committee, including the Parliamentary Secretary to the Heritage Minister. The trade association's influential access to those in power proved to be its most valuable asset. Copps became a crucial figure in CRIA's lobby, bringing forward the WIPO implementation process by an entire legislative phase, and in this way, several years. CRIA's strong ties to Bulte had a significant impact on the Heritage committee process. Bulte, as chair of the Heritage committee and Parliamentary Secretary under Copps (and later under Frulla), knew the file well enough to fill Copps' role after a less-activist Scherrer replaced Copps. The Bulte Report represented the rights-holder lobby's influence on the committee, and although the report expressed an attempt to pressure the government into leaning towards the rights holders, it was biased to a fault. In the view of the departments, the report lent credence to users' arguments for a legislative committee; and this would have hampered any changes CRIA may have hoped to make to the bill at the committee stage.

CRIA's public campaign also made very significant strides between 2001 and 2003, so that, by the time of the March 2004 Federal Court decision, file sharing became easily corrupted. The von Finckenstein decision would have meant much less had CRIA and its affiliates not already influenced public opinion through favourable media

coverage. The decision created a kind of moral panic of the issue and pressured many, including some in the PMO and Cabinet, into thinking that a making available right was necessary. The lack of any other public education on copyright not only strengthened CRIA's messaging but harmed the users' public campaign, making it difficult for the users to cut through the arguments of the major labels. Did the public know, for example, that further copyright protection could negatively impact consumers? That losses in the music business are not easily attributed to file sharing? That technological controls may not be the answer to the music industry's problems? Few of these issues travelled beyond online discussions and into mainstream media coverage of the copyright debate.

CRIA achieved few of its aims, most of which the bureaucracy saw as controversial or unwise policy. And the political successes of the labels came less through thorough debate at the public policy level than by pulling on political levers, such as Copps' and Bulte's favouritism, the committee report and the von Finckenstein decision. This way, CRIA pressured the government to propose a new making available right, a controversial amendment that could further complicate collective rights management and bring the recording industry more bargaining power in online licensing deals, if not deliver it another layer of revenue. In Bill C-60, CRIA also retained the statutory damages provision, saw a significant acceleration in the government's WIPO implementation plan, and, as a consequence, a narrowing of the private copying exception. That the policy process had been hastened to include full WIPO implementation was crucial, in the view of the labels. The sooner the government introduced a bill (and as CRIA hoped, passed it), the sooner its strategy could be carried out in full. CRIA's successes through the political channels amounted to significant

achievements that in many respects cut against the recommended public policy approaches of the bureaucracy and that would, if passed, facilitate CRIA's online strategy: to exclusively license its music catalogues online and carry out a campaign against file sharers in Canada.

Conclusion

Although the Canadian Recording Industry Association (CRIA) came into Canada's copyright policy development with superior resources and access to government, and went on to see some of its key provisions proposed in Bill C-60, it worked through the political levels at the risk of alienating officials in the departments. Had Bill C-60 been passed, CRIA's gamble may have paid off. The bill did not proceed beyond first reading, however, and now CRIA is left with what it considers inadequate laws and what is likely a set of alienated career civil servants within the bureaucracy. Moreover, the copyright policy landscape continues to change. It has changed radically since the government signed the WIPO Internet treaties in 1997, and the new environment opens new and powerful opportunities for the user lobby. As the digital environment advances, it becomes more apparent that online business models are succeeding under Canada's current laws, making it increasingly difficult for the content lobby to force the passage of even the minimalist proposals in Bill C-60.

It has largely been changes in the technological landscape that have eroded the traditional power of the content industries in copyright policy. This landscape changed significantly in the years following the passage of the DMCA, so that while the government's traditional approach to advances in technology may have been to increase the content industries' legal protections under the *Copyright Act*, the same approach in the new economy affected too many new actors. Ken Thompson, former legal counsel at CRIA, has said that this changing landscape was one of the fundamental reasons why the rights holders could not move ahead quickly with the laws they hoped to see in Canada:

> It spans into a lot of populist issues. You now have the crossover into fair dealing for educational issues, the crossover into privacy; it's much larger than it's ever been in the past. In 1996 when they did C-32, it was record companies pitted against broadcasters. Now it's record companies and all rights holders pitted against individuals and public bodies. I mean, there's no appetite for this.... [The issues] have become much larger than they were in 1998. If you're on the exemption side or the [users] side of things, waiting is good. If you're on the copyright side of things, waiting has been bad....[1]

While new actors in the digital economy have emerged, the politics of copyright has also changed. Policy makers who once wrote copyright law by sitting down with industry groups now delve, as Thompson said, into populist issues under the watch of an increasingly interested public.

The user lobby can use the new environment to question the relevance of the WIPO Internet treaties in the new millennium. Sheila Copps approached the issue from an older school of thought. She had helped push through the 1997 amendments with most resistance coming from the Industry Department and other actors in the copyright industries, such as broadcasters. The new public policy of copyright has introduced the public as constituents, who have upended the traditional brokerage game between industry groups. By the same token, there is a lesson in the WIPO policy process for the Industry and Heritage departments. When they opened consultations to the public in 2001, they expected nowhere near as much public interest as they received. Public involvement in any policy process is healthy, and the government could benefit from further opening its doors to interested Canadians, not only to devise policy but to develop the copyright reform agenda. The digital era has restored balance to copyright, not upset it, and in this new environment it will be increasingly difficult for the content industries to control it.

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[1] Ken Thompson (former legal counsel, CRIA), in discussion with the author, December 2005.

Public interest in copyright issues continues to grow. Popular blogs such as *Boing Boing* (http://boingboing.net) and *P2PNet* (http://www.p2pnet.net) have popularized copyright and the discussion surrounding the major labels' aggressive approach towards the P2P networks. Virtually anyone who has traded music on the P2P networks now has an interest in online copyright discussions. The positions, media strategies and legal tactics adopted by the major labels have damaged their own reputations, at least within these online communities. But such discussions are widely read by music consumers, who have come to view the major labels with a great deal of scepticism. The Canadian general election of 2006, for example, brought the copyright discussion to new levels. After Michael Geist and David Fewer revealed on their blogs past contributions from the content industries to Parliamentary Secretary Sarmite Bulte, copyright became an issue brought up at local election debates. Following the election, blogger Rob Hyndman described events this way:

> - Various blogs and podcasts educate the public in the policy issues raised by copyright law. This happens incrementally over a period of time. In Canada, this focuses on Bill C-60, which contains provisions that have attracted some controversy.
> - News of the Bulte campaign fundraiser is first published on the blog of Michael Geist, a law professor at the University of Ottawa....
> - The original news is picked up by other blogs, including the widely read Boing Boing, after which it is disseminated with almost viral speed. Boing Boing eventually publishes several accounts of the issue....
> - The news aggregation website Bourque, which is widely-read outside of the blogosphere including by the mainstream media, covers the story.
> - The mainstream media notices the story and publishes information and commentary. Some of the mainstream media are also bloggers, and they blog the story. This attention lends credence to the issue....
> - Parody pictures (see here, here and here) are published on the blog of Joey deVilla, a widely-read blogger who lives in Sarmite Bulte's riding. He invites his readers to redistribute the pictures, and invites the creators of other parody pictures to send them to him for posting online.
> - Michael Geist and David Fewer separately conduct investigations and analyses of campaign finance data from previous elections, and from Bulte's fundraising

> history, and blog the results. This information spreads virally through the blogosphere....
> - Other candidates in the election notice the issue and begin to comment on it. As they do, the story gains further mainstream media attention....
> - Sarmite Bulte's Wikipedia [a free online encyclopedia] entry is updated to include a reference to the issue.
> - Citizens attend and videotape an All Candidates' Debate and record the candidates' answers to the question[s surrounding copyright].... At the meeting, Sarmite Bulte reacts strongly to the issue. Her comments are recorded on videotape.
> - Joey deVilla posts the raw video on his blog and solicits help in compressing an extract and configuring distribution of the entire segment.... Sarmite Bulte's comments at the debate create a further controversy that itself is widely blogged. Mainstream media attention to the story continues to increase.[2]

Following the election, in which Bulte lost to Peggy Nash, the NDP candidate, by 2,200 votes, there was some speculation that bloggers had mobilized enough support to affect its outcome.[3]

Although the rights holders had superior access to the Heritage Department (i.e., the department more involved in policy development), no lobby can win on resources and access alone. Ministers, no doubt, respond to powerful interests, and this puts corporate trade associations like CRIA in a far better position to access government than public interest groups like the Public Interest Advocacy Centre (PIAC). The Royal Commission on Corporate Concentration observed in 1978 a principle that still holds true:

> There is little doubt that the representatives of major corporations can and do have greater access to both politicians and public servants than do other individuals through trade associations, their own professional representatives and, perhaps most effectively, private conversations between corporate officers and those involved in the policy-making and legislative process.[4]

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[2] Rob Hyndman, "Canadian Democracy in the Age of Blogging: Anatomy of a Campaign Controversy," Rob Hyndman, http://www.robhyndman.com/2006/01/14/canadian-democracy-in-the-age-of-blogging-anatomy-of-a-campaign-controversy.

[3] Mike Oliveira, "Bloggers take some credit for ousting former MP," CanWest News Service, http://www.canada.com/ottawacitizen/news/story.html?id=7c23390d-c77c-4f9d-993f-d5a36c0d2662&k=6031.

[4] Royal Commission on Corporate Concentration, *Report of the Royal Commission on Corporate Concentration* (Ottawa, Minister of Supply and Services, 1978), 338.

Although the major labels benefited from that mysterious and age-old relationship between political and corporate elites, their strategies have probably alienated many civil servants, especially in the Industry Department.

There is also lot to be said for the influence of CRIA and the rights-holder lobby on the digital copyright reform process in its early stages. In 1997, the landscape was very much entrenched in an older school of thought developed throughout the 1970s and '80s, in which the content industries came to play a key role in shaping Canada's digital copyright reform. The very fact that WIPO treaty implementation was put on the policy agenda in 1997 demonstrates this old mode of thinking and the traditional influence of the content industries on the policy process. Once Canada had signed the treaties, the debate suddenly shifted from whether to implement the treaties to how to implement them. It is an example of the content industries' traditional influence on not only policy but the policy agenda. Why, for example, are certain issues established as short, medium and long term, and others not? Why has the government planned a consultation on the private copying exception and not on the legal protection of technological controls? Why not re-evaluate collective licensing, consult on statutory damages or consider fair dealing? Michael Geist has noted that:

> [I]f the government were really serious about a forward-looking copyright policy that really appreciated what's happening today, I think that there's a whole range of things that they would deal with that aren't dealt with [in Bill C-60]. Now, is it a win for the recording industry that we haven't dealt with those things? I would say, yes it is.... [T]here are a lot of issues that user groups and others would like to see in the bill that is not in the bill ... and may not ever get addressed.[5]

The rights holders may have influenced the agenda early on in the digital copyright reform process, but as some in the government took a hard look at CRIA's proposed

[5] Michael Geist (Canada Research Chair, Internet and E-commerce law, University of Ottawa), in discussion with the author, November 2005.

provisions in a changing digital environment, it became increasingly clear that they were not wise policy.

In the new environment, the user lobby has every reason to believe that it can play as large a role as the content industries in shaping policy and the policy agenda. Trends internationally point in the users favour. In February 2006, the United Kingdom launched a review of intellectual property, including issues such as the term of copyright protection and the use of technological controls.[6] Similarly, France is evaluating the legalization of P2P through a levy; the U.S. has passed legislation that allows for more relaxed use of digital materials in classrooms; South Korea has moved toward allowing downloading for non-commercial, personal uses; and Australia is considering fair use over fair dealing.[7]

In the new millennium, the P2P networks have become powerful and innovative distribution networks that have leveled the playing field for recording artists. The distribution and self-marketing of music has never been easier. Under the traditional model, recording artists needed the promotional power of a major label contract to become widely known. That is no longer the case. In major-label recording contracts, popular artists made their fortunes through performing, not CD sales, for which most of the revenue went to the major label's publishing operation. Now, new business models have emerged, in which independent bands are beginning to see a successful business model in encouraging the free distribution of their music but profiting from performances and merchandise sales.[8] The proposals of CRIA, and some of the measures proposed in

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[6] United Kingdom, HM Treasury, "Gowers Review of Intellectual Property," HM Treasury, http://www.hmtreasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm.
[7] For a summary with Web links, see Michael Geist, "Be Careful What You Wish For," Michael Geist, http://michaelgeist.ca/component/option,com_content/task,view/id,1095/Itemid,85/nsub,/.
[8] The Canadian independent record label, Fading Ways Music, sells music under Creative Commons licenses. See http://www.fadingwaysmusic.com.

Bill C-60, are geared toward putting control of the music business back in the hands of the multinational labels.

As Thompson noted, the more time that passes before a WIPO implementation bill is passed, the more difficult it will be for CRIA to realize the kind of legal provisions it wants. Bureaucracies are powerful, and for good reason. They resist ministers and lobbyists when they believe they are wrong. The more analysts and staff the government has working on a policy file the more difficult it is for lobby groups like CRIA to influence its collective thinking. Generally, senior managers are much more willing to trust the opinions of their staff than those of lobbyists, and even if only one "lone wolf" policy analyst is warning about the consequences of a lobby group's policy proposal, a manager is far more likely to trust that policy analyst's concerns over a lobby group's. CRIA gambled by pressuring the bureaucracy through the political channels. Had Bill C-60 passed, that gamble would have paid off. But when the 38th Parliament fell without moving Bill C-60 beyond first reading, CRIA lost all it had fought for. In all probability, it is left with soured relations with many career civil servants, who are not going away, and who likely feel bullied by their effectively lobbied political masters.

With the election of another minority government in 2006, the policy environment will again be intensely politicized, and copyright is far off any party's political agenda. The Conservative minority government, under Prime Minister Stephen Harper, is interested in improving Canada-U.S. relations, however, and as one of the only net-exporters of intellectual property in the world, the U.S. is far more likely to make an issue of copyright law than is Prime Minster Harper. Negotiations surrounding the Free Trade Agreement of the Americas, which seek a new trade agreement, is one potential avenue

for American pressure. At home, however, it will be difficult for CRIA to see Canadian policy makers re-introduce the proposals of Bill C-60, and the user lobby should view this as an opportunity. The advancing digital landscape has forced some Canadian policy makers to empathize with many of the users views, and the departments seem willing to listen.

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Appendix A

Chronology

- **12 July 1996**: Sheila Copps becomes Heritage Minister.
- **20 December 1996**: A diplomatic conference of the World Intellectual Property Organization adopts the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty,* informally known as the WIPO Internet treaties.
- **25 April 1997**: The Phase II amendments to the *Copyright Act* receive Royal Assent, enacting the private copying regime, statutory damages and other rights and exceptions.
- **18 December 1997**: After signing the WIPO Internet treaties on behalf of Canada, Heritage Minister Copps announces the Liberal government's commitment to implementing the WIPO Internet treaties.
- **October 1998**: U.S. Congress enacts the *Digital Millennium Copyright Act* (DMCA), implementing the WIPO Internet treaties.
- **1 September 2000**: Sarmite Bulte becomes Parliamentary Secretary to the Heritage Minister, a position she holds until 12 January 2003.
- **22 June 2001**: The Government of Canada releases its *Consultation Paper on Digital Copyright Issues,* soliciting submissions on copyright reform and indicating that digital copyright reform will be dealt with in multiple legislative phases.
- **13 December 2001**: Michael Wernick, an Assistant Deputy Minister (ADM) at Canadian Heritage, sends a memo to Minister Copps, saying that "the US has been in turmoil since the passage of its *Digital Millennium Copyright Act.*"
- **24 January 2002**: Minister Copps commits to ratifying the WIPO Internet treaties in a speech to the Canadian Bar Association. Copps also promises to adhere to the treaties in a similar speech about one month earlier at a meeting of the Canadian Association of Broadcasters.
- **14 February 2002**: The Copyright Coalition of Creators and Producers submits to the Heritage Department its *WIPO Treaty Implementation Proposal* at the request of the Heritage Minister.
- **May 2002**: Alex Himelfarb, previously Deputy Minister (DM) at the Heritage Department, becomes Clerk of the Privy Council.
- **3 October 2002**: The government tables in Parliament *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, also known as the Section 92 Report. The report says the government intends to deal with its digital copyright issues and become WIPO-treaty compliant in a single legislative phase.
- **22 December 2002**: Only Greece and Denmark meet the European Union's deadline for implementing the *EU Copyright Directive* (EUCD), a 2001 directive to implement the WIPO Internet treaties.
- **October 2003**: The Puretracks music service launches in Canada, selling mp3s for 99 cents each.

- **7 October 2003**: The House of Commons Heritage Committee begins its statutory review of the *Copyright Act*.
- **6 November 2003**: In an appearance before the Heritage committee, Heritage Minister Copps delivers her "pack me the snowballs" statement and criticizes the Industry Department for not expediting the implementation of the WIPO Internet treaties.
- **December 2003**: Paul Martin replaces Jean Chrétien as Liberal leader and Prime Minister.
- **11 December 2003**: In a Cabinet shuffle, Copps is replaced as Heritage Minister by Hélène Scherrer.
- **12 December 2003**: A Copyright Board ruling expands the private copying levy to include mp3 players. A subsequent Federal Court of Appeal judgement in December 2004 overturns the decision.
- **24 March 2004**: The Minister of Canadian Heritage and Minister of Industry table the government's *Status Report on Copyright Reform* for study by the Heritage committee.
- **31 March 2004**: Justice Konrad von Finckenstein at the Federal Court of Canada rules that, due to insufficient evidence, CRIA cannot obtain the names of anonymous file sharers. Von Finckenstein notes that the WIPO Internet treaties have not been implemented in Canada.
- **3 May 2004**: The United States Trade Representative releases its annual *Special 301 Report* and identifies Canada as a problem country on intellectual property law.
- **12 May 2004**: The Standing Committee on Canadian Heritage releases its *Interim Report on Copyright Reform,* informally known as the Bulte Report.
- **28 June 2004**: A general election results in a Liberal minority government under Prime Minister Paul Martin.
- **30 June 2004**: In *SOCAN v. Canadian Assn. of Internet Providers,* the Supreme Court of Canada rules that ISPs are not liable for copyright infringements on their networks.
- **20 July 2004**: Liza Frulla is sworn in as the new Heritage Minister. She replaces Scherrer, who lost her seat in the 2004 general election. Sarmite Bulte is also again named Parliamentary Secretary to the Heritage Minister, a position she holds until 5 February 2006.
- **October 2004**: iTunes launches in Canada.
- **24 March 2005**: The government responds to the Heritage committee's *Interim Report* with a set of policy proposals. The proposals, which would form the basis of Bill C-60, present a more balanced approach to copyright than the recommendations of the Bulte Report.
- **20 June 2005**: The government tables in Parliament Bill C-60, *An Act to Amend the Copyright Act.*
- **28 November 2005**: The Liberal minority government falls on a confidence vote with Bill C-60 at First Reading.

Appendix B

Members of the Copyright Coalition of Creators and Producers (2002)

ACTRA Performers Guild
American Federation of Musicians (A.F. of M)
Association of Canadian Publishers (ACP)
Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)
Association québécoise des auteurs dramatiques (AQAD)
Audio-Video Licensing Agency (AVLA)
Canadian Association of Photographers and Illustrators in Communications (CAPIC)
Canadian Conference of the Arts (CCA)
The Canadian Copyright Institute
Canadian Copyright Licensing Agency (CANCOPY)
Canadian Country Music Association (CCMA)
Canadian Film and Television producers Association (CFTPA)
Canadian Independent Record Producers Association (CIRPA)
Canadian Music Publishers Association (CMPA)
Canadian Musical Reproduction Rights Agency (CMRRA)
Canadian Motion Picture Distributors Association (CMPDA)
Canadian Publishers' Council (CPC)
Canadian Recording Industry Association (CRIA)
Directors Guild of Canada
League of Canadian Poets
Periodical Writers Association of Canada
Playwrights Union of Canada
Professional Photographers of Canada (PPOC)
Recording Artists Association of Canada (RAAC)
Regroupement des artistes en arts visuel du Québec (RAAV)
Société des Auteurs de Radio, Télévision et Cinéma (SARTEC)
Society of Composers, Authors and Music Publishers of Canada (SOCAN)
Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada inc. (SODRAC)
Société professionnelle des auteurs et des compositeurs du Québec (SPACQ)
Songwriters Association of Canada
Union des Artistes (UDA)
Union des écrivaines et écrivans quebecois (UNEQ)
Writers Guild of Canada
The Writers' Union of Canada

Appendix C

Members of the Balanced Copyright Coalition (2003)

Public Interest Advocacy Centre (PIAC)
Canadian Association of Internet Providers (CAIP)
Canadian Association of Broadcasters (CAB)
Canadian Advanced Technology Alliance (CATA)
Canadian Cable Television Association (CCTA)
Retail Council of Canada
Bell Canada
TELUS Corporation
Howard Knopf