Copyright at Home: Copyright and The Phantom Public

by

Sara Bannerman, B.Mus.

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

Master of Arts

School of Journalism and Communication

**Carleton University
Ottawa, Ontario
August, 2004**

**© Sara Bannerman, 2004
sbannerman@canada.com**

Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 0-612-98950-X

Our file Notre référence

ISBN: 0-612-98950-X

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

Abstract

Rather than existing only for the benefit of creators, Anglo-American copyright takes the interests of “the public” into account. Through an examination of historical writings on “the public”, an analysis of submissions to a Canadian public consultation on copyright reform, and a study of international copyright agreements, I argue that copyright’s references to “the public” have taken on multiple meanings throughout history, in recent years, and in international trade and copyright regimes. As the roles, makeup, and expectations of “copyright’s public” change, new relationships between copyright and the publics it serves are indicated and required. Interest groups have an important role to play in representing the “public” of individuals at home as consumers, users, and creators. However, the specific language used in copyright regimes to recognize “the public” – terms such as “the public interest”, “balance”, and “rights” – affects the abilities of new interest groups to claim status within governing copyright discourse.

Acknowledgements

I would like to thank my family for their encouragement: my mom and my sister, for always believing that I was doing a good job, Grandpa for his appreciation of his granddaughters, and my dad for all his wise and loving advice, especially in urging me to do things I enjoy. It was Grandma, more than anyone, who dreamed that I would someday pursue a Master's degree.

I could not have finished this thesis without the support of my friends: especially Pu Chen and Sarah R. Evans. I am indebted to my supervisor, Dr. Michèle Martin, for her encouragement, to Drs. Sheryl Hamilton, Paul Thèberge, and Paul Attallah for their helpful comments, and to the School of Communications for giving me this opportunity.

Loris Mirella at the Department of Canadian Heritage, and Betty Muldoon, Goldie Shea-Green, and Bruce Couchman at Industry Canada provided invaluable assistance: thank-you.

Thanks as well to Dan Roseman, Dennis Souder, Russell McOrmond, Maureen Smith, Andrew Wolgemuth, Melissa Benner, David Phung, Jason Young, Leslie MacDonald-Hicks, Nancy Peden, Dr. André Turcotte, the Bank of Canada, and all of my colleagues at the Bank of Canada.

Dedicated to Grandma, at home.

...and Grandpa too.

Table of Contents

Introduction.....	1
Chapter One: The House that Copyright Built.....	24
Chapter Two: Copyright Moving In.....	47
Chapter Three: New Neighbours	61
Chapter Four: Make Yourself at Home.....	92
Chapter Five: Copyright in the World.....	114
Conclusion: Copyright at Home.....	137
Appendix A: Electronic Frontier Foundation Form Letter.....	146
Works Cited.....	148

Introduction

1. "Copyright's Public"

Rather than existing only for the benefit of creators, Anglo-American copyright has traditionally taken the interests of "the public" into account.¹ The public relations of Anglo-American copyright, this relationship between copyright and "the public", has been built on a philosophy, especially recently, that *balances* the interests of the copyright holder and the interests of some *other*: the non-copyright holder, users, or "the public"; or between protection of works and access to works. The dynamics of the public relations of copyright have changed over time. Where there once was a rhetorical reference to "the public interest" on the part of copyright's administrators requiring certain limitations on copyright law but no substantial interaction between administrators and "the public", there is now a perceived necessity to interact with individual members of "the public", a perceived requirement for "the public" to be involved in copyright as an active stakeholder. This "public" is often viewed as a vast group of individual consumers and users of works – so vast that it is even referred to as "the general public".

The problem with a public policy or legislation that explicitly serves "the public" or balances "the public interest" is that "the public interest" does not exist; it is not a singular and identifiable body. Neither is "the public". As Walter Lippmann notes, "We may be sure that any body of farmers, business men, trade unionists will always call themselves the public if they can."² Claims to be "the public" are very powerful because, in a democracy, "the public" is the ultimate power. Therefore, many groups will claim to

¹ In using the word "copyright" as a subject, I recognize that "legal strategies and institutions may lend authority to certain interpretations while denying status to others." (Coombe, *The Cultural Life of Intellectual Property*, 11.) Anglo-American copyright legal discourse has traditionally lent itself to interpretations of the law that placed "the public interest" in a position of relatively high importance.

² Lippmann, *Phantom Public*, 133.

be “the public”, or to represent “the public interest”. Claiming that something is in “the public interest” is theoretically the most powerful rhetorical argument in a democratic system. However, just as “the public” is conceptualized in various ways over time, the groups of people who represent themselves as being “the public” also change. For that reason, the term “the public” must always be examined in the light of who is using it, and references to “the public interest” must be taken within the context of the particular “public” being referred to.

The type of policy that refers to “the public interest” often does so merely as reassurance: “This is good for you.” “This won’t hurt too much.” It is simply a general statement that legitimizes the policy or legislation. It often does not mean that “the public” should or will have a seat at the table; it means only that those “at the table”, whatever they might negotiate among themselves, claim to have the best interest of all at heart. A significant shift in copyright discourse occurred when “the public” changed from being a point of reference that legitimized copyright to being thought of as a flesh-and-blood stakeholder who expected to be engaged in copyright debates and to have rights under copyright law.

Copyright is a nexus of relations between groups. It places certain groups as rights holders, certain groups as users, certain groups as consumers, and certain groups as “the public”. Copyright’s “public” may be different things to different people. It may be rights holders; it may also include users and consumers; it may be all Canadians or even all citizens of the planet.

Copyright covers original literary, dramatic, musical, and artistic works, as well as compilations. In most cases, copyright originally resides with the author of the work.

Copyright confers both economic and moral rights. Economic rights include the right to authorize and seek payment for use of a work, and to prohibit certain uses of the work, including reproduction, public display or performance, adaptation, and communication to the public by other parties. Moral rights include the right to protect the integrity of a work from alteration and the right to claim or not to claim authorship over the work. In Canada, registration is not required to establish copyright protection.

Other forms of intellectual property include patents, trademarks, and trade secrets. Patents are the strongest form of intellectual property protection, allowing the patent owner discretion on who can make, use, or sell an invention such as a product or a device. Patent protection requires a lengthy process of registration. Trademark protects the use of words or designs that help an individual or a company to be distinguished from competitors. A trademark's value is derived, not as a stand-alone creative work, but from its ability to represent and signify an individual or company. A procedure of registration is necessary to establish trademark. Trade secret law is the weakest form of protection, covering things such as formulae, patterns, devices, or compilations of information that allow one an advantage over competitors. Qualifications for coverage under trade secret law are not as stringent as those for coverage under copyright or patent law. Trade secret law might apply to items that are often covered under employee confidentiality agreements, such as processes, methods, or customer lists. No procedure of registration is required to establish trade secret status.

Copyright's "public" may be "inside" or "outside" the scope of copyright law; that is, it may be inside or outside the organizations that make that law. Organizations, such as those involved in copyright lawmaking and administration, tend to establish

relationships with groups and individuals with whom they interact regularly. These groups and individuals become part of the organization's practices, and possibly also part of the organization's decision-making practices. The "public", then, may usefully be defined in two ways: as those individuals and groups that are officially external to the organization itself but that are integrated into the organization's decision-making practices (this is the "inside public"); or, those individuals and groups that are external both to the organization itself and to the organization's decision-making practices (this is the "outside public").

Some organizations, especially governments, have a mandate or a necessity to take the interests of "the public" into account. Because the word "public" has the flexibility to be defined in both ways, to encompass those who are internal and those who are external to an organization's decision-making practices, it can act as a door of entry for individuals and groups to move into a position of consideration in an organization's decision-making.

Whenever a change takes place, such as a technological change (the invention of piano rolls, personal recording technology, or the Internet, for example) a new relationship is formed between "copyright", copyright's administrators, and a given new "public". The "public" at hand may be made up of any affected group: groups as diverse as translators, software developers, or Internet users. When such a change takes place, there is a jostling of discourse as a new "public" frames itself for status, first as an "outside public" and then as an "inside public". A new relationship must be formed between legislators, lawyers, judges, industry groups, the media, and this new "public". This change in turn requires the adjustment of communication networks. New methods

of communication and new discourses grow around the change, requiring new organizations and new lobby groups, as well as new or altered strategies to communicate each group's position within the copyright regime. These changes in discourse and communication methods are part of the public relations practiced by all parties involved. Put more simply, they perform public relations for copyright, influencing how copyright is publicly perceived, while at the same time being intertwined with the public relations of the government, creators, copyright industries, service providers, and the consumers and users of works.

Ideas about "the public" also change. Recently, references to a vaguely defined "public" have lost some of their altruistic glow as "the public" has become subject to accusations of "stealing" and "piracy". As well, references to authors' rights have lost some of their moral high ground in an interconnected environment that makes transparent the limitations of the myth of original authorship, in a corporate environment that makes transparent the interests of large organizations in copyright, in an Internet environment that challenges the primacy of the property model of copyright.

The result is a public relations crisis for copyright. What copyright needs now is a new "public relation" – a new "public relationship". This need came to exist in the same moment that that vast "public" – individuals at home – came to be placed, in their private actions, as liable under copyright. It came about, also, at the same moment when a non-commercial public domain became visible on the Internet. These were moments that fundamentally changed copyright's "public relation". If copyright is to continue to legitimize itself with reference to the "public good", then the nature of this "public good" must be clearly explained and understood. If the "public" of individuals at home is to

exist as an actual player in the public sphere of copyright debate (as it must if it is also to be held liable), then this “public” must be more clearly organized, defined, and theorized, as consumers, users, and creators.³ This is the heart of many copyright debates.

For a “public” to succeed in its public relations with government, it will be helpful, at times, to represent itself as “the public”, just as it was helpful to Lippmann’s farmers. However, there will also be contexts where this will not be an effective strategy. At certain levels, a more specific identification of groups and organizations and their issues will be helpful in a process where various groups and their varying conceptions of the “public good” and “the public interest” must interact. The language of “rights” can, at many levels, also become intertwined with certain conceptions of “the public good”.

2. Public Consultation

One of the ways that the “public relation” of copyright is carried out is in the process of public consultation. In Chapter Three I discuss way that the departments of Industry and Heritage carried out public consultation as a part of copyright reform processes. In particular, I examine the online written consultations that began in June of 2001. These consultations reflected a larger Canadian trend:

In the second half of the last century, the general public – now better educated and better informed – increasingly demanded a greater say in decision-making. The system, they protested, was closed to popular will. Powerful elites competed and negotiated among themselves for the spoils of power, leaving electorates with largely meaningless choices every four years.

³ It is important to distinguish between the extension of political power under copyright to a “public” of individuals and the extension of power under copyright to individuals themselves. Some see the extension of political power under copyright to all individuals as “progress”, as individuals taking their proper place, long vacant, as stakeholders to legislation that affects them. I want to be very careful to note that, for a certain period of time, the extension of this political power was not necessary or desirable. As I will discuss, a “general public” – all individuals – is an unwieldy, unmanageable, unidentifiable thing. For this reason I suggest that organized groups or “publics”, representing various individuals in a very identifiable way, as consumers or as Internet users for example, are often more helpful than is “the general public”, or individual members of “the public”.

Politicians discovered they could get elected by accommodating these concerns. And so we entered the second era of liberal democracy, the era of public consultation. Governments convened public hearings to solicit the views of citizens on important pieces of legislation. They polled public opinion, and tailored their policies to satisfy the prevailing mood....

But problems quickly emerged. As anyone who has been condemned to sit through one quickly learns, public hearings offer no real opportunity for citizens to offer their opinions. Instead, interest groups representing business, labour and social movements hog the microphone, competing to see which can be more strident and humourless....

But still the public demands that politicians account to them.... We find ourselves entering a third era of representative democracy. Not only in Canada, but around the world, governments are exploring new forums and new technologies to engage the citizenry in the democratic process.⁴

I argue that, although the online copyright consultation reflected a trend in general democratic processes, it reflected even more the changing ways that individuals placed themselves or were placed as stakeholders to copyright. David Vaver, writing before the 2001 consultations, notes a lack of “public interest” in copyright:

If one feature stands out about intellectual property law, including copyright, it is how much the law affects the public, but how little the public affects it – indeed, how little the law lets the public affect it. Intellectual property law is a social construct that shuns social participation, let alone control. Few Jane and John Does turn up at legislative hearings when revision or amendment of the law is contemplated; they are certainly not present at the international meetings where global intellectual property standards are set. The registries of the Canadian Intellectual Property Office are open to the general public, but are rarely consulted by it. Trials involving intellectual property matters are by a judge alone, without a jury. The Acts justify themselves by how they benefit the public, but the justifications are long on assertion, short on proof. Beneath the veneer, one finds an infrastructure inhospitable to public entry.

The substance of the law is no more embracing. The tone is well set by the British judge who, admitting that the “public interest” could override a copyright, indicated how atrophied this “public” interest is; “[T]here is a world of difference between what is in the public interest

⁴ John Ibbitson, “Welcome to a New Era of Liberal Democracy,” *The Globe and Mail*, 12 January 2004, A13.

and what is of interest to the public,” he said, with no trace of embarrassment. If intellectual property rights really do benefit the public, any member of the public should be able to oppose grants that may not operate in the public interest, or have those that are not so operating expunged. But it is impossible with copyrights, which conveniently appear automatically without further government involvement.⁵

In fact, over five hundred individuals “turned up” for the online public consultation in the summer of 2001. Vaver’s comments and the comments of those individuals reflect the strengthening of a copyright philosophy that places “the general public” – whether thought of as all Canadians, Internet users, or individuals at home – as having a legitimate and active part to play in copyright debates. This is not a new philosophy. Editorials in the *Toronto Telegram* in Canada’s early copyright history spoke of a copyright bill that would “revolutionize the reading habits of the Canadians”, that would “press upon the people in a thousand ways undreamed of by the Government, and will raise an outcry very little anticipated by members of parliament.”⁶ However, the strengthening of this philosophy today is important to document:

In working through the layers of narrative created in the copyright story, it is important to document the types of stories that are being told about intellectual property and who is telling these stories. The narratives that have been created to entrench private property in the information age present multinational corporations as victims, teenage hackers and developing countries as villains, and involve the government as both a peacekeeper and enforcer. This narrative process serves to establish property lines in new technology and socializes the average citizen to an understanding of what is and is not acceptable.⁷

In turn, many of the individuals who wrote in to the public consultation placed corporations as villains, and “hackers” as performing legitimate academic or security

⁵ Vaver, *Copyright Law*, 296. The reference to the British judge and the quotation are referring to *Lion Laboratories Ltd. v Evans*, Q.B. 526 at 553 (C.A.)(1985).

⁶ *Canadian Copyright*, 3 and 11.

⁷ Halbert, *Intellectual Property in the Information Age*, xiii.

functions. Indeed, it is important to note the types of stories that are told, and who is telling them, as the “public relation” of copyright plays itself out. My study takes a closer look at the storytellers – who they are and what they are saying – who wrote in to the 2001 public consultation. It asks how they can usefully tell their story in the places where copyright is built.

3. Literature Review

Canadian copyright literature lacks a body of critical and historical works similar to the one that has been developing in the United States since the beginning of the 1990s. Since the 1990s, writers such as Lawrence Lessig, Pamela Samuelson, Jessica Litman, and Peter Jaszi have written critically about American copyright and copyright’s implications for the American public. While several readable historical works exist on American and British copyright, writers in Canada have, thus far, generally stayed on more conservative analytical grounds, writing either reference works that include bare-bones histories of Canadian copyright and explanations of copyright legislation, or writing analyses of topical issues relating to Canadian legislative or judicial dilemmas. This lack of critical and historical works on copyright in Canada is an unfortunate void, given that Canada is in a unique position with regard to copyright, being influenced by two rather different copyright traditions. Canada has been seen as an innovator in copyright – being the first to recognize moral rights in its legislation,⁸ and being home to what has recently been viewed as a roguish court system whose recognition of “user’s rights” in copyright has been very controversial.⁹

⁸ Tawfik, “Copyright as Droit d’auteur,” 61.

⁹ *CCH Canadian Ltd. v Law Society of Upper Canada*.

Canadian copyright is hitting the choppy waters of “copyright’s public” in a singular way that cannot be understood simply through American critical works. Canada has its own copyright legislation, its own copyright tradition, its own approaches to addressing various interests in copyright legislation and court decisions, and its own traditions of public consultation. Canada is in a unique position because its approach to copyright is a product of two distinct traditions: the Anglo-American copyright tradition, and the Continental tradition, which refers to copyright as *droit d’auteur*. Canada, having inherited from its colonial past the Anglo-American tradition, has also been receptive to the Continental tradition of *droit d’auteur* because of Quebec’s influence and the Canadian bijural legal traditions.¹⁰ The two copyright traditions differ in their conception of the fundamental purpose of copyright law: the Anglo-American approach views copyright as a “statutory monopoly designed to balance the competing interests of authors and end users with the ultimate objective of advancing the public good,” while the continental approach views copyright, or *le droit d’auteur*, as a natural property right belonging to authors.¹¹ Because of its mixed approach, which some argue leaves Canada in a more flexible position in terms of how it can legislate and in terms of legal decisions,¹² the Canadian approach to the interests of “the public” in copyright is complex and rich and cannot be viewed simply through American legal analyses and literature. Canada’s unique historical and present-day approaches to “copyright’s public” deserve greater attention. My thesis does not offer a view of Canada’s position between these two traditions, but, instead, provides a preliminary theoretical exploration of “copyright’s public”, variously conceived, that could be used as a starting-point to

¹⁰ Tawfik, “Copyright as Droit d’auteur,” 60-61.

¹¹ Ibid., 62.

¹² Ibid., 60.

exploration of issues in this area. I draw from works dealing with a number of theoretical approaches to “the public” (primarily Habermas and Lippmann).

A search for works discussing Canada’s approach to “copyright’s public” and Canada’s approach to copyright in general reveals several starting points. There are a few Canadian book-length reference works on copyright aimed at various levels of readership, ranging from introductory guides to copyright (Harris, *Digital Property*) to references aimed at those in the legal profession (Handa, *Copyright Law in Canada*; McKeown, *Fox Canadian Law of Copyright and Industrial Design*; Vaver, *Copyright Law*). There are, however, few Canadian book-length critical discussions of copyright law dealing with the cultural implications of copyright; only one comes to mind: Coombe’s *Cultural Life of Intellectual Property*. Bruce Doern and Marcus Sharaput’s *Canadian Intellectual Property* offers an excellent introduction to the intellectual property system and institutions in Canada. While the book-length selection of Canadian copyright works is rather limited, there is no shortage of Canadian articles relating to copyright (Ysolde Gendreau, Daniel Gervais, Howard P. Knopff, Myra Tawfik, David Vaver, and many others have written interesting articles on Canadian copyright).

Since the beginning of the 1990s a number of American lawyers have taken an interest in copyright’s implications for “the public”. Positioned very much in the Anglo-American tradition of copyright, these lawyers (Lawrence Lessig, Pamela Samuelson, Jessica Litman, Peter Jaszi, and perhaps Jane Ginsberg) have taken an activist tone in their writing, advocating strongly for a greater consideration of the interests of “the public” in copyright legislation. American communications scholars (Ronald V. Bettig, TyAnna Herrington, Kembrew McLeod, and Siva Vaidhyanathan) have also jumped into

the fray, similarly arguing against a *droit d'auteur* conception of the purpose of copyright. The communications perspective is useful because it provides a wider contextual view on copyright and the implications of copyright on culture. Jessica Litman's book in particular, *Digital Copyright*, is substantially about the relationship between copyright and "the public". Giving a detailed history of the crafting of the United States' *Digital Millennium Copyright Act*, Litman comments that copyright law, written in the United States with heavy input from copyright industries, lawyers, and lobbyists, cannot be understood by, or represent the interests of, "ordinary consumers". Patterson and Lindberg's book, *The Nature of Copyright: A Law of Users' Rights*, also focuses on the topic of users; their book, written in 1991, views the entire history of copyright through the lens of users' interests and is critical of some of the developments in American copyright law that they view as having moved away from principles that work in the interests of users. A number of articles also centre on this topic. For example, Litman's "Convergence of Paradigms and Cultures: War Stories" offers an excellent discussion of individuals' subjectivity to copyright law in their private actions.¹³ Pamela Samuelson's "Toward a New Politics of Intellectual Property" argues, as I do, the importance of a clear articulation of groups' agendas for copyright reform and of the interests of "the public" in ensuring access to works. Peter Jaszi, in his article "Goodbye to All That – A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law" also argues for a clear articulation of agendas that do not rely on the term "public interest"; he points out that "the public

¹³ Just as "men have learned to recognize themselves as subjects of 'sexuality,'" (Foucault, *The Subject and Power*, 208) so individuals learn to recognize themselves, to think of themselves, as subjects of copyright law and as subject to that law. The law, its language, and its institutions may encourage or discourage interpretations of the law that place individuals as subject to and subjects of copyright law. This is what I mean by individuals' "subjectivity" to copyright law.

interest” in free access, or the availability of a free public domain, conflicts with the differing conception of copyright *protection* as serving “the public interest”. Jane Ginsberg’s article, “How Copyright Got a Bad Name For Itself”, focuses on the public relations of copyright and argues that the copyright system tends to even out the negatively perceived actions of one group of interests (the recording industry, for example) by rewarding an opposing interest group with sympathetic judicial decisions or legislation (such as more lenient fair-use decisions).

Few Canadians stand out as having written major works on copyright from an activist or critical standpoint. That is not to say that Canadian copyright activists do not exist; Michael Geist writes about copyright and technology law regularly in the *Toronto Star*, often advocating for user interests, and Rosemary Coombe has done a great deal of work in the areas of public interest advocacy and traditional knowledge. In fact, Coombe’s book, *The Cultural Life of Intellectual Properties*, is the only substantial work of Canadian criticism in the area of intellectual property that I have come across. Copyright as an area of interest has begun to spring up in a number of disciplines, and intellectual property and technology law specializations are now offered at a number of Canadian law schools. From these programs a number of interesting conferences and organizations have begun to appear, some of them relating to copyright activism and user interests.

American scholars have a strong historical literature on copyright to work with – a literature that outlines the British and American copyright development (Patterson and Lindberg, *The Nature of Copyright*; Goldstein, *Copyright’s Highway*; Kaplan, *An Unhurried View of Copyright*; Walterscheid, *The Nature of the Intellectual Property*

Clause; Whale, Copyright: Evolution, Theory and Practice). This body of foreign copyright histories includes accounts of copyright's history that are enjoyably readable and that include much of the historical and cultural context that is necessary to understanding copyright, its purposes and origins. Books about the development of authorship in the United States and in England are also very helpful to understanding this context (Rice, *The Transformation of Authorship in America*; Rose, *Authors and Owners*).

The Canadian offering of historical works, on the other hand, is limited to short works dealing with specific aspects of Canadian copyright history (Sills, "The Role of the Canadian Authors Association"; Caldaressi, "Music Publishing in Canada: 1800-1867"; Parker, "The Canadian Copyright Question in the 1890s"). A historical section in Doern and Sharaput's *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* may be the only history available that relates the history of copyright in Canada to a wider context; this history is particularly useful because it relates Canada's copyright legislation to its context in Canadian policy initiatives, such as Canada's innovation strategy. There are also some bare-bones reference-style Canadian histories: almost 20 pages on the history of Canadian copyright in the *Fox Canadian Law of Copyright and Industrial Designs*, and a section in Sunny Handa's *Copyright Law in Canada*. There is a great deal of room for expansion of Canada's body of historical works about copyright. I would especially like to see some historical works that would explore Canadian copyright's particular relationship with "the public" and Canada's movements between the Anglo-American and Continental copyright traditions.

The relationship between copyright and “the public” has recently changed both in nature and in importance. This change is being recognized within Canadian organizations and forums, so it is likely that this relationship will be discussed at greater length, and that Canada’s body of work relating to copyright will continue to grow.

4. Theoretical Approach

My thesis contributes a critical investigation into the nature of copyright’s “public”, drawing primarily from two theoretical sources: Walter Lippmann and Jürgen Habermas. Michel Foucault’s ideas about how discourse is used to situate individuals within particular identities or relationships also lurks in the theoretical background of my analysis, as it explores how individuals are placed by copyright as particular kinds of “public”. Especially useful are Lippmann’s *The Phantom Public*, Habermas’ *The Structural Transformation of the Public Sphere*, and Foucault’s “Afterword: The Subject and Power”, printed in Dreyfus and Rabinow’s *Beyond Structuralism and Hermeneutics*. Lippmann criticizes an idealized notion of “the public” – a view of “the public” as capable and knowledgeable regarding decisions of governance – while Habermas offers a very interesting history of various notions of “the public”. As well, Bruce Robbins’ *The Phantom Public Sphere* contains chapters by Robbins and Nancy Fraser (“Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy”) that are also especially useful in understanding the problems surrounding the use of a word like “public”.

4.1 Habermas and Lippmann

My analysis makes use of the ideas of two important theories of “the public” – the theories of Jürgen Habermas and Walter Lippmann. Habermas and Lippmann both ask whether “the public” has power, whether “the public” should have power, and, if so, what sort of power “the public” should have within a democracy. In a sense, Habermas is an optimist about “the public”, while Lippmann is a pessimist; Habermas envisions a world of full democratic participation, a world of transparent public decision-making, while Lippmann does not believe that “the public” is capable of useful democratic participation or decision-making; he believes that “the general public” is not well-placed to be able to understand or make decisions on most issues. Habermas is an idealist in his views about “the public”, while Lippmann is a pragmatist; Habermas has been criticized for holding a vision of transparent communication and decision-making that is too optimistic. Lippmann, on the other hand, refuses to idealize the public; he takes a very pragmatic approach to its real capabilities and the responsibilities that can reasonably be placed on it.

My thesis will incorporate both of these differing approaches. Where Lippmann’s main conception of “the public” conjures a vast “public” filled with “average citizens”, I argue that, in place of one vast “public”, there exist many variously conceived publics – many groups of people placing themselves in the guise of “the public”. Setting aside the main conception of “the public”, disconnected from tools required for decision-making, Lippmann also acknowledges the propensity for various interest groups to place themselves as “the public”. Whereas Lippmann’s “public” is generally disconnected from many of the decisions it is ideally called upon to make, “the public” dealt with in

my thesis – individuals at home – is now, more than ever, connected with the issues of copyright. This “public” is called upon to organize, to become knowledgeable, and to represent itself well. Lippmann would agree that it is its place to do so. Habermas would also agree that this task of transparency is one that “the public” must undertake as it materializes from its “phantom” form.

4.2 Foucault

In the background of my thesis lurks Foucault. His approach helped me to raise many questions, which I attempted to answer in the chapters that follow. In a sense, what I will ask in Chapter One is: What are the dividing practices of copyright? What causes groups of people to be objectified as a part of “the public” that is relevant to copyright law? How have the historical conditions that motivate this conceptualization of “the public” changed over time?¹⁴ What are the practices associated with being part of “the public” with respect to copyright law? Do they include active participation in copyright reform processes? In Chapter Two I will ask: What causes people to be subjectified under copyright as either a copyright-owner or liable under copyright? What causes groups of individuals to see themselves, or not, as liable under copyright or as a stakeholder to copyright? In Chapter Three I ask: How are individuals subjectified in the discourses that appear in government publications and messages from interest groups to which they may or may not subscribe? Chapter Four raises the following question: How might individuals otherwise be subjectified as creators, consumers, users, and citizens? Finally, in Chapter Five I ask: How do struggles against subjectification play out at the international level? How do groups, subjectified as “outside publics” by

¹⁴ “We have to know the historical conditions which motivate our conceptualization. We need a historical awareness of our present circumstance.” Foucault, “Afterword,” 200.

international copyright regimes, re-subjectify themselves? How do they place themselves in the discourses of “balance” and the “public good” that are used at the international level? Foucault observes, in a passage where he likens the role of the government to that of a pastor, that the “public good”, or “salvation”, as he calls it, “takes on different meanings: health, well-being (that is, sufficient wealth, standard of living), security, protection against accidents. A series of ‘worldly’ aims took the place of the religious aims of the traditional pastorate.”¹⁵ He notes that today there is a struggle to refuse this form of worldly “salvation” or “public good” – to refuse “what we are” under that form of subjectification.¹⁶ How, then, is it possible to refuse these types of subjectification that are especially dominant at the international level? How is it possible to reject certain conceptions of the “public good”? What is the most likely method for doing so?

This work will provide, I hope, a useful starting-point for further examination of the subjectivity of individuals at home under copyright and the changes to this subjectivity that have been, and are, taking place, especially in Canada. I also hope that this work will provide some helpful observations about how subjectivity as “the public” can be useful, and at what point subjectivity as “the public” is no longer useful. Moreover, it may be possible to launch from my thesis into a deeper examination of strategies that promote “rights” in place of “the public interest” in various copyright forums.

5. Methodology

In Chapter One I use Lippmann, Habermas, and Jean-François Lyotard to review a number of different historical conceptions of “the public”. I apply these conceptions to

¹⁵ Foucault, “Afterword,” 215.

¹⁶ Ibid., 216.

the specific case of copyright to ask: is copyright's "public" a phantom? How has the concept of the "public", as it relates to copyright, changed within the writing of various historical and present-day theorists?

In Chapter Two, advancing to the twentieth century, I draw upon the writings of several copyright theorists (Sunny Handa, *Copyright Law in Canada*; and Peter Jaszi, "Goodbye to All That") to examine the usefulness of ideas such as "freedom", "liberty", "privacy", and "the public interest" to groups who wish to defend "the public domain" or a "private domain".

In Chapter Three I analyze the submissions that were made by organizations and individuals to the June 2001 public consultation on copyright reform. There were at least 623 submissions; 77 from organizations and 546 from individuals.¹⁷ Using a methodology of content analysis, I took a random sample of thirty submissions from individuals and thirty from organizations.¹⁸ These submissions were evaluated in terms of length; mentions of certain key terms such as "*The Digital Millennium Copyright Act*" or "DMCA", "rights" (user's "rights" and copyright holders' "rights"), "balance", and "Dmitri Sklyarov" (the subject of a contemporary news story); and references to the four consultation issues that were the focus of the 2001 consultation according to the government's consultation paper.

As a part of Chapter Three I also conducted an interview with Loris Mirella, a senior policy analyst with the Department of Canadian Heritage who was involved with

¹⁷ 622 submissions are posted online at http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html. One additional submission was provided to me by Industry Canada in paper copy, for a total of 623. According to The departments of Industry Canada and Canadian Heritage, "An Overview of Submissions on the Consultation Paper on Digital Copyright Issues," 2, there were "approximately 670 submissions". I have been unable to account for this discrepancy except to say that perhaps not all of the submissions have been made available or perhaps the Overview is incorrect.

¹⁸ The random sample of individuals' submissions excluded those based on the Electronic Frontier Foundation form letters, which I discuss separately in the chapter.

the 2001 public consultation. This interview allowed me to understand what process was followed to conduct the consultation, how the government responded to the submissions that were made, and what difficulties were presented by the submissions.

Chapter Four sets forth a range of possible subject positions for the individual under copyright. I argue that the individual at home can be a copyright-infringer, a user, a consumer, and a creator under copyright. I explore the possible intersections between these subject positions and four issues laid out in the 2001 public consultation through an analysis of the issues themselves and through an analysis of the consultation paper.

Chapter Five relates the notions of the “public” and “the public interest” as they are conceived in international copyright and trade regimes. I examine these issues through an analysis of the statements contained in various conventions, plans, and agreements of the World Trade Organization, the *North American Free Trade Agreement*, the Free Trade Area of the Americas, and the World Intellectual Property Organization.

6. Outline

Chapters One and Two discuss how “the public” has been framed by copyright in the past and today. Chapter One, “The House that Copyright Built”, questions the role of “the public” in governance (is “the public” really qualified to govern – or are decisions of governance best left to a governing elite?) and outlines the way that the theoretical role of “the public” has changed within writings of various theorists, from 1710 to today.

Chapter Two, “Copyright Moving In”, focuses on the twentieth century, beginning with a discussion of the recent forms of subjectivity of individuals at home under copyright – the “framing” of individuals’ private actions as potentially liable under

copyright, and also the framing of individuals in new ways as creators. The chapter argues that, although those who hope to defend a private or non-commercial space use concepts such as “freedom” or “the public interest” to make their claims, attempts to protect private or non-commercial space from the incursions of copyright by referring to “the public interest” or to “freedom” will not succeed because there exist multiple conceptions of the nature of “the public interest” and the state of “freedom”.

Chapters Three and Four, focusing on the public consultations on copyright reform held by the government in the summer of 2001, discuss how “the public” frames themselves within copyright and how government, organizations, and individuals construct this framework. In Chapter Three, “New Neighbours”, I examine the submissions that were received as part of the public consultation. I argue that the way notification about the public consultation was disseminated strongly affected the submissions that were received from individuals. I also examine a number of problems that arose for the government in attempting to process these submissions. The chapter questions whether this is a temporary problem as individuals organize politically, or whether there were things that could have been done differently in disseminating the announcement of the public consultation. Chapter Four, “Make Yourself at Home”, discusses in more detail the consultation document and the issues presented in it. Each issue is examined in light of the four main roles played by individuals at home. These are: creator, user, consumer, and copyright-infringer. This chapter asks how each of the four issues raised in the consultation document affects individuals at home in these four roles. It also asks how the consultation paper and the submissions themselves frame individuals in each of these four subject positions. Chapter Five, “Copyright in the

World”, discusses the variety of ways that international copyright regimes refer to “the public” and the public interest. Referring to the World Intellectual Property Organization treaties, the *North American Free Trade Agreement*, the Free Trade Area of the Americas, and the World Trade Organization, this chapter discusses various conceptions of “the public” and “the public interest” and argues that these concepts, because they can refer to multiple entities or goals, can act as a door to new voices, new norms, and new types of language. The chapter argues that, once this door has been passed through, more specific and precise language is required.

7. Further Notes

It may be useful to explain why I insist on using the word “public”, laden with awkward quotation-marks, throughout my thesis. I do it because the term “the public” is a term that is often used within Anglo-American copyright discourse, and is a term that can act as a door. The fact that governments use references to “the public” – an idealized yet flexible concept – to gain legitimacy keeps their organization open, allowing new stakeholder groups to claim to be “the public” or part of “the public”. By using the term, by keeping it viable, problematic though it may be at times, that door will continue to swing – will continue to be opened to new groups of people. Although the terms “the public” and “public opinion” is problematic because they are used in the singular, as though “the public” and “public opinion” could be universally identified, I do not find the plural form of the word, “publics”, to be problematic in the same way. For that reason, I do not use quotation-marks around that word.

Whatever is provided by copyright reform and the economic and social structures that accompany it, there will be a certain element of freedom as well as a certain element

of controlling influence. The question that must be asked is: what kinds of freedom are most desired, and what kinds of control are most desired? I will situate myself with Walter Lippmann to say that these questions must be addressed to the individuals and groups most involved. That now includes a very large number of people and requires a carefully designed public relation – a public relation that is thoughtfully promoted from all sides. Although organizations that are part of copyright's governance will want to represent themselves well – to maintain a good public relation – quite understandably, the various publics that will represent Canadians will want to do the same.

Chapter One: The House that Copyright Built

1. The Phantom Public

Copyright and individuals at home once silently co-existed, one crossing the boundaries of the other and passing through, unnoticed, unstopped, and uncontrolled. It was peaceful there, in the copyright house, until the renovations. Then the walls of the house closed in and the “phantom public” began to bump up against posts in positions that were not suited to its patterns, doors that were closed where it wanted to pass. The “phantom public”, as phantoms will do, began to go “bump” in the night. The phantom began to roam, haunting the house that copyright built, a ghost in its own home, unable to interact with the tools for building, for renovating, for moving out. Who is this phantom?

The “phantom public” was originally conjured by Walter Lippmann. Lippmann, writing in the United States in 1925, began to suspect that “the public”, the reputed ultimate power in democracy, did not really exist. The private citizen, he observed, goes about day-to-day life, not fulfilling the terms of what a responsible and powerful democratic “public” should be, relatively unaware of public affairs.

No newspaper reports [the private citizen’s] environment so that he can grasp it; no school has taught him how to imagine it; his ideals, often, do not fit with it; listening to speeches, uttering opinions and voting do not, he finds, enable him to govern it. He lives in a world which he cannot see, does not understand and is unable to direct.¹⁹

Lippmann does not blame the private citizen for this:

My sympathies are with him, for I believe that he has been saddled with an impossible task and that he is asked to practice an unattainable ideal. I find it so myself for, although public business is my main interest and I give most of my time to watching it, I cannot find time to do what is expected of me in the theory of democracy; that is, to know what is going on and to have an opinion worth expressing on every question which confronts a self-governing community. And I have not happened

¹⁹ Lippmann, *Phantom Public*, 13-14.

to meet anybody, from a President of the United States to a professor of political science, who came anywhere near to embodying the accepted ideal of the sovereign and omniscient citizen.²⁰

What does this mean for democracy? What is the real role of “the public”? The role of “the public”, according to Lippmann, is to delegate governance to the experts, to the people most closely involved with a given situation, to the people who have an immediate knowledge of what is going on.²¹ It should be sufficient for “the public” to generally ensure that rules of some kind are being followed, and to become concerned only when there is a crisis requiring “the public” to reconsider its delegation of authority.²² Lippmann’s “phantom public” is an “outside public”. It is not stupid; it is simply not well placed to have the knowledge required for governance, being, by definition, always situated in a position external to the problem at hand.²³

In this chapter I explore a number of conceptions of “the public” that are suggested by Habermas and Lyotard, applying these conceptions to the particular case of copyright. The term “the public” has multiple meanings. While it is a term that is still important today, its object is not a unified whole. “The public” is not fully transparent in terms of its meaning, its composition, or its interests. I argue that today’s “public” is actually a plurality of many publics – a nexus of competition between many different interests.

2. Public Representation

Lippmann, having killed the ideal of the participatory “public” so necessary for a social democracy, made room for various incarnations of “the public”. “The public”

²⁰ Ibid., 20-21.

²¹ Ibid., 198.

²² Ibid., 144-145.

²³ Ibid., 149-150.

functions, in these reincarnations, in a public sphere that is more complex than the sphere of direct decision-making highlighted by Lippmann. The public sphere is also an arena of representation between groups and individuals, an arena where representations constantly change, as do the ways that things are represented and those who represent them. This interchange of representation is not the aspect of the public sphere that Lippmann concerns himself with, since he is interested more specifically in direct mechanisms of democracy.

If we take this more encompassing view of the public sphere, we note that the roles played by “the public” in democracy outside of the direct execution of democratic decision-making are quite important.²⁴ The public sphere as an arena of representation is an aspect of “the public” that plays a strong but indirect role today in the way the state governs. A large part of the indirect interface between the government and “the public” takes place in the media, but other interfaces also exist, including public information services, service-delivery mechanisms, and various forms of public consultation including polls, referenda, negotiations, mediation, public meetings, advisory committees, and written consultations. These forms of government-public interface are indirect because they do not bind the government to any particular course of action. They

²⁴ Robbins outlines Jeff Weintraub’s classification of four significantly different definitions of “private”:
 1) liberal-economistic definition (used by Lippmann, Dewey, and Richard Rorty): “Public” means the state administration (while “private” means the market economy).
 2) republican virtue definition (used by Habermas): “Public” means community and citizenship, as distinct from both state sovereignty and the economy.
 3) sociability definition (used by Richard Sennett and Philippe Ariès): “Public” means an arena of symbolic display and theatrical self-representation, rather than collective decision making or state power.
 4) feminist definition: “Public” means the economy of wage earners (while “private” means domestic or family life).

The conception of the public sphere used in this chapter takes definitions 2 and 3 in combination, using an idea of the public that makes room for both rational debate (definition 2) and theatrical self-representation (definition 3). See Robbins, “The Public as Phantom,” viii.

are a part of public relations. They allow a certain amount of interaction between the “inside public” and the “outside public”.

Who is our phantom, seen within these indirect public interfaces? Do these types of interface give form to “the public”? Are they simply chains for “the public” to rattle, to make noise with little effect? One thing is clear: to the extent that “the public” becomes visible within these interfaces, we see not one whole but various publics, grouped formally, informally, and not grouped at all; we see individuals reflecting their own interests or the interests of others; we see groups claiming to represent “the public”, or artists, or morality itself; we see earnest members of the Canadian “public” representing Russian programmers.²⁵ To the extent that “the public” becomes visible within these interfaces, we see a complex of opinion too difficult to capture fully in a decision, an election, a summary of “public opinion”, even in the interface of public consultation itself.²⁶ Another thing is equally clear: the interface itself defines “the public” framed (or chained) within it. “The public” as defined at a closed meeting between the government and certain stakeholders is very different from “the public” as defined in an open consultation advertised and conducted on the Internet; “the public” in an open consultation is potentially much wider. “The public”, through the interface, is defined as those who, complying with the parameters of the interface, duck their heads and pass through it. This “public”, passing through, becomes a visible “public” – an “inside

²⁵ See Chapter Five, pages 66-67, 77-78, and 82 for a discussion of Dmitri Sklyarov.

²⁶ “We go to a polling booth and mark a cross on a piece of paper for one of two, or perhaps three or four names. Have we expressed our thoughts on the public policy of the United States? Presumably we have a number of thoughts on this and that with many buts and ifs and ors. Surely the cross on a piece of paper does not express them. It would take us hours to express our thoughts, and calling a vote the expression of our mind is an empty fiction.” Lippmann, *Phantom Public*, 56.

public” – insofar as it is now situated in a position that is recognized in the government’s processes of communication.

We may or may not be satisfied that indirect forms of influence of “the public” on the government do exist outside the direct voting mechanism. We may or may not agree with Lippmann’s conception of the relative power of that voting mechanism. Finally, we may or may not agree on whether forms of indirect influence by “the public” on the government are, in fact, powerful. Our opinions would probably differ depending on the specific circumstances and the specific indirect mechanisms under discussion. “The public”, depending on its conditions and on how it is theorized, is sometimes thought of as more powerful and sometimes as less powerful. “The public”, variously conceived, whether more powerful or less, is part of the way that copyright is justified after 1710.

3. “Copyright’s Public”

The justification for the granting of copyright to authors has traditionally been twofold. First, copyright recognizes artists; it gives them specific rights that allow them to make money from the exploitation of their works. This benefit to artists is further justified by the fact that copyright, in recognizing artists, encourages works to be published, thus benefiting “the public”. Some would argue that we have, in copyright, a house that was purportedly built for a phantom – “the public” – but that is inhabited by its builders, not the phantom at all, but corporate interests. Although copyright is thus ultimately justified as serving the “public good”, a growing number of people today see this justification as a cover for a regime that actually benefits first and foremost neither individual artists nor “the public”, but a constituency of corporate copyright holders. That is Jessica Litman’s view. In her book, *Digital Copyright*, Litman discusses the way

that United States copyright legislation was written. She describes the ways that the United States Copyright Office represents the content industry:

Unfortunately, the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry's pocket. The reasons are unexceptional: The office has a limited budget, and relies on the goodwill of its regular clients. Copyright Office policy staff often come from and return to law firms that regularly represent copyright owners. Perhaps most importantly, the Copyright Office relies on the copyright bar to protect it from budget cuts and incursions on its turf. When Sen. Orrin Hatch introduced a bill that would have transferred the Register's copyright policy-making authority to a new administrative agency, for example, the copyright bar rallied in opposition to the change. Thus, it is unsurprising that the Register has routinely given positions advanced by the content industry enthusiastic endorsement.²⁷

"None of the lawyers," she says, "involved in making copyright laws can afford to view the public's interests as sufficiently compelling to override the immediate pressing needs of their various clients. The resulting legislation shows it."²⁸

Litman would say that, in the United States, a copyright house was built for the "the public" but that "the public" had little say in its construction. It is a house in which the "phantom public" lives but, increasingly, due to legislated protection for copyright protection technologies which restrict "the public" from using protected works as they might wish, and to the increasing technological capability of calling the individual at home to account for copying done in private, it is a house in which "the public" cannot move. It is a house built more to the tastes of the builders, the content industry, a house in which the builders happily reside. Individuals at home, Litman would say, lived in this house for a long time as phantoms, walking through its walls, acting as they wished, copying as they chose to. They were invisible to a content industry that could not track

²⁷ Litman, *Digital Copyright*, 74.

²⁸ *Ibid.*, 74.

individuals' individual actions and to a government that, perhaps, did not wish to. After the renovations brought by new technologies, however, the "phantom public", in various forms, found itself in a number of chains that it began to rattle. Litman relates that this rattling, in the United States, went relatively unheard by the Copyright Office as it undertook to update its copyright legislation. Indeed, it confirmed, "the public" is a phantom....

Perhaps, though, the "phantom public" was simply one of many "outside publics", represented neither by itself nor by the Copyright Office as "copyright's public". Perhaps it is only now that Litman's vast "public" would envision itself in copyright's doorframe. Canada, for example, has traditionally invited "the public" to participate in copyright reform, and recently Canada expanded its consultation process to allow for Web-based submissions to the process from "the public". This change in communication practice indicated or, perhaps, necessitated, a reconceptualization by the government of "the public"; it allowed Internet users, and visitors to government's Web sites, to be included in the conceptualization of "copyright's public". It therefore also made room for Internet users and visitors to the government's Web site to think of themselves as "copyright's public" – as contributors to legislative processes of copyright reform. The level of response to this public consultation was unprecedented for a consultation on copyright.

It remains to be seen to what extent the concerns of individuals will affect legislative reform. Although the legislative outcome is still pending, the process of this consultation remains important regardless of its impact on eventual legislation.²⁹ If we conceptualize the public sphere not simply in interface with the government, but also as forums of self-representation, then the responses to the public consultation are important

²⁹ The influence of the consultation on legislation is very important too.

not only insofar as they inform the decision-making of the government but also insofar as they create a theatre of self-representation that may be expanded elsewhere, referred to, and drawn upon in various ways, not only by government, but also by groups such as counter-publics, judicial systems, and consumer society. Indeed, the American public sphere, ringing with reactions to the *Digital Millennium Copyright Act*, has been drawn upon in Canada's experience of copyright reform.³⁰ Thus, the act of self-representation in a public sphere is extremely important, even when it bears little weight in the legislative process. Copyright reform consultations are a theatre of self-representation not only for publics, but also for the government. Through these processes, the government constructs its own public relation – its view of “the public” and what it thinks “the public’s” issues are.

If copyright is justified ultimately as a “public good”, why has “the public” not played a more important role in copyright reform, especially in the United States? Why was “the public” not more prominently represented during the reforms that resulted in the United States’ *Digital Millennium Copyright Act*? It may be that Litman’s “public” was simply not framed as “copyright’s public”.

4. Copyright and “The Public”

Copyright as we know it was first legislated in 1710, in England. Various licensing arrangements between the monarchy and the printing guilds, wherein the monarchy granted to the guild a printing monopoly and the responsibility to enforce censorship, acted as precursors to copyright. In 1557 Queen Mary first granted a charter to the Stationers’ Company, a guild of printers. This charter gave the members of the company (not authors) the exclusive right to print books and literature. The name of each

³⁰ See Chapter Three, section 4.2.3, “Copyright and American Influence.”

work printed was to be entered into a register in the name of one of the members of the Company as evidence of the exclusive right of the member to print that particular work in perpetuity. Only members of the Company could be granted printing licences. The Company, at the same time, was given the authority and the responsibility of policing the printing industry, and to stop the publication of seditious or heretical publications. In essence, prior to 1710 copyright worked in the interests of the monarchy and carried out a censorship function.³¹

After 1710 copyright was legitimized not by the authority of the monarchy, not for the security of the monarchy, but by the authority of Parliament for the benefit of authors and “the public” – indeed, to the benefit of authors as part of “the public”. Titled *An Act for the Encouragement of Learning*, the 1710 *Statute of Anne* justified itself as benefiting authors and “the public”: it granted to authors rights over their works, and it benefited “the public” both by encouraging “learned men to compose and write useful books”³² and by setting price controls.³³ It also encouraged a public domain by limiting the term of protection for copyrighted works. This appeal to “the public”, rather than to a religious or monarchical authority, is a hallmark of modern copyright. The particular “public” viewed in the Act is made up of “learned men” and a book-purchasing population.

The 1710 Act was the result of a public relations crisis – the result of a new group, authors, claiming their place in copyright’s doorway. Having increased in stature from their days under the patronage system, authors claimed that the *Licensing Act* of

³¹ Goldstein, *Copyright’s Highway*, 41–42.

³² *Statute of Anne*, Art. I.

³³ The *Statute of Anne* grants rights to authors in their own work. It also grants to the public the right to appeal the price of a work if the price is deemed to be “unreasonable”. (*Statute of Anne*, Art. IV.)

1662 (similar to the 1557 Act), *An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Bookes and Pamphlets and for Regulating of Printing and Printing Presses*, which gave the right to copy and censor works to the Stationers' Company, did not properly consider their rights. The 1710 Act came about because authors placed themselves into the public sphere, representing themselves as rightful copyright owners. "Public opinion" supported their claim. After Parliament allowed the *Licensing Act* to expire in 1692, it was replaced in 1710 by the *Statute of Anne*, which ended the perpetual term that the Stationers had been granted under the *Licensing Act*, replacing it with a limited term of protection that was granted to authors directly. The censorship function of copyright also ended. Copyright instead took on the purpose of making works available to "the public" – a "public" now considered to have an interest in learning and benefiting from the commercial availability of books.³⁴

4.1 Locke's "Public"

"The public", in the late seventeenth and early eighteenth century, took a different form than did the later democratic "public." Jürgen Habermas outlines changes in the conceptions of "the public" and "public opinion."³⁵ He describes changes in the meanings and connotations of "opinion" and "public opinion" through the writings of, among others, John Locke and Edmund Burke that, I argue, can be seen reflected in the role of "copyright's public" after the relationship between copyright and "the public" was established with the 1710 copyright act.

To begin with, Habermas outlines a concept of "public opinion" used by John Locke in his 1689 *Essay Concerning Human Understanding*. In this view, the authority

³⁴ Bettig, *Copyrighting Culture*, 22-23.

³⁵ Habermas, *The Structural Transformation of the Public Sphere*, 89-102

of the “public” was not in its rationality; rather, it was in its “common-sense.” It rested in opinion, “the informal web of folkways whose indirect social control was more effective than the formal censure under threat of ecclesiastical or governmental sanctions.”³⁶

“Public opinion” held a certain controlling influence, but it was not thought of as a direct authoritative influence. Copyright legislation, in this view, would have appealed to and drawn from a “common-sense” conception of copyright – a common opinion of copyright that was “right” because it was grounded in the “consent of private men who have not authority enough to make a law.”³⁷ “The public’s” role was to consent, not to authorize. Therefore, while copyright appealed to the “common-sense” conception, it did not take that “common-sense” conception as the full authority. While legislation appealed to opinion, its authority still rested with Parliament, not with “the public”. Copyright law may have been considered to be a natural right of authors, but Parliament was confirmed as the utmost authority on the matter, overriding any opinion or “common-sense” law, when it was decided in *Donaldson v Beckett*³⁸ that the *Statute of Anne* took away perpetual common law copyright and replaced it with a limited statutory copyright.³⁹

Thus, the statute, itself appealing to “common-sense”, had greater authority than did the “common-sense” of “the public” alone. This is still the case today. Copyright law is, in some senses, in conflict with “public opinion” or “common sense”; it seems acceptable to many Internet users to use peer-to-peer networks to download and copy copyrighted materials, to photocopy sheet music from a friend, to duplicate an article for a group of people. Nevertheless, copyright law remains authoritative – it retains its authority over

³⁶ Habermas, *The Structural Transformation of the Public Sphere*, 91.

³⁷ Locke, *An Essay Concerning Human Understanding*, bk. 2, ch. 28, sect. 12. As quoted in Habermas, *The Structural Transformation of the Public Sphere*, 91.

³⁸ *Donaldson v Beckett*, 4 Burr. 2303, 98 Eng. Rep. 257 (K.B. 1774).

³⁹ Patterson, *The Nature of Copyright*, 36.

and above this kind of “common sense.” However, there is a desire, on the part of some groups of people, to wield a more direct influence on copyright law. As “public opinion” has changed, and as “copyright’s public” has changed, the tacit consent between the law and opinion that gave copyright law its binding authority has been eroded. I will come back to this in Chapter Two.

4.2 Copyright and Burke’s American “Public”

In the late eighteenth century, authors petitioned for copyright law in the United States. Author Noah Webster, whose book, *Grammatical Institute of the English Language* eventually sold more than 70 million copies, campaigned for copyright and won in 1783, when the state of Connecticut enacted the first American copyright act, titled *An Act of the Encouragement of Literature and Genius*.⁴⁰ Authors petitioned for and won, in the same year, a federal resolution encouraging states to pass similar laws. Twelve of thirteen states passed copyright acts between 1783 and 1786, generally basing their statutes on the language of the *Statute of Anne*. However, copyright between states varied significantly. With increasing trade between states, a federal copyright act was becoming necessary.

James Madison, later President of the United States, and Noah Webster promoted federal copyright, and on 5 September 1787, less than two weeks before the end of the Constitutional Convention, a proposal for a copyright clause was presented to the Convention.⁴¹ This clause, as adopted in the American Constitution, granted Congress the authority “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and

⁴⁰ Goldstein, *Copyright’s Highway*, 51.

⁴¹ *Ibid.*, 52.

discoveries.”⁴² The first federal copyright law, enacted in 1789, granted protection to the author for a limited term but excluded works first written, printed, or published abroad.⁴³

This American copyright law added a different method of legitimization to copyright. It was also *An Act for the Encouragement of Learning* but its purpose, rather than to encourage “learned men to compose and write useful books”,⁴⁴ was to “promote the Progress of Science and useful Arts.”⁴⁵ It saw the “public good” as being “progress” rather than “learning”.

According to Habermas, “the public” in the eighteenth century came to be thought of as having a more active role to play in the philosophy of government. The writings of Edmund Burke, to use Habermas’ example, looked to the American example of “the public”, where “the public’s” “general opinion”, Burke said, had to be taken into account in every piece of legislation, where every individual “thinks he has a concern in all public matters,” and where each individual’s reason played an important part in the formulation of ideas about public affairs.⁴⁶ The “American public” came to be thought of in some writing as an ideal forum where legislation formed through debate could be thought of as “right”, or approximating “rightness” as far as possible.⁴⁷ Copyright had legitimacy not simply in its appeal to “the public interest”; it could also be thought of as having been ascertained through reasoned debate in a step forward towards “progress”. Consequently, copyright could be seen as the product of reasoned debate, “right” not only insofar as it

⁴² *U.S. Const.*, Art. I, §8 cl. 8.; Copyright protects “science”, while patents protect “useful discoveries”. (Goldstein, *Copyright’s Highway*, 52.)

⁴³ Bettig, *Copyrighting Culture*, 27-28.

⁴⁴ *Statute of Anne*, Art. I.

⁴⁵ *U.S. Const.*, Art. I, § 7, cl. 8.

⁴⁶ Hoffmann and Levack, eds. *Burke’s Politics*, 106 in Habermas, *The Structural Transformation of the Public Sphere*, 94.

⁴⁷ McSwite, “Postmodernism, Public Administration, and the Public Interest,” 202.

held the tacit consent of “the public” but also a form of “progress” resulting from the political system that shaped it.

4.3 Lyotard’s “Public”

There is another view of “the public”, drawing upon Lyotard’s ideas, that emphasizes not the “opinion” or “reason” of “the public”, but that perceives instead “the public” as an element in a networked system. The role of “the public” or of private individuals in a computerized society is to discuss and make knowledgeable decisions using memory and data banks.⁴⁸ According to Lyotard’s ideal, “temporary contracts”⁴⁹ and local rules should govern groups within the system, rather than a “general opinion” or “reason”. Groups should have the ability to self-govern by constructing local rules that are temporary and that can be altered as the circumstances of discourse change.

There are two distinguishing characteristics of Lyotard’s “public” thus described: it consists of multiple groups with direct control over local rules and the ability to change those rules; and it has efficient access to “perfect information”. It is these two characteristics of Lyotard’s “public” that require a new consideration of “copyright’s public” – a new public relations of copyright in a networked world. “Copyright’s public”, in this networked world, imagines “perfect” access to information and requires that publics have direct control over the rules that govern them, including copyright law. These rules must be determined or agreed to locally, by various local groups. Lyotard’s “public”, similar to Burke’s informed and authoritative “public”, but now networked and composed of multiple local groups, requires copyright to legitimize itself in new ways: copyright must provide perfectly efficient access to information and it must bend to the

⁴⁸ Lyotard, *The Postmodern Condition*, 67.

⁴⁹ Lyotard, *The Postmodern Condition*, 66.

direct authority of groups. This view is in marked contrast to Locke's "public", who needed only give tacit consent to a copyright that was consistent with "opinion" – an "opinion" that could not have, in a pre-networked time, imagined access that was "perfect" or "free". This "public" also contrasts with Burke's "public", wherein a "general opinion" is constructed by the reasoned thoughts of individual citizens: Lyotard's "public" contains multiple groups, consisting only of temporary and local contracts – nothing that could be called "general."

Given that he calls for rules that are entirely local and that, therefore, no arrangement exists for the compatibility of information between local systems, the quandary with Lyotard's conception is that it does not account for the relationship between local groups or the method by which "perfect information" can be attained.⁵⁰ In any case, under Lyotard's view, instead of ideas of general "truth" or "progress" to guide action in a networked world, there is a conception of a networked society. Within this networked model, and within Lyotard's way of thought, there is a tension between the idea of the networked system as something that must be balanced and tuned to operate effectively and efficiently, and the system as something that will tolerate contradiction, confusion, or what Lyotard calls "paralogy".⁵¹ This tension appears in Lyotard's call, on one hand, for a system that can provide "perfect information" and, on the other hand, for a system that does not hold efficiency as its governing principle, but rather for a system that tolerates paralogy. In any case, despite the seeming contradiction between a system of "perfect information" and a paralogous system in Lyotard's thought, the conception of a perfect system is one that has been attractive to a number of theorists, including Adam

⁵⁰ Lyotard, *The Postmodern Condition*, 67.

⁵¹ Lyotard, *The Postmodern Condition*, 66.

Smith, Niklas Luhmann, Talcott Parsons, the inventors of the Internet, and many others. The authority is no longer a “public” that collectively accesses “progress”. “The public” is a collection of individuals using reason and information to forward their various interests. Therefore “truth” is relative, as diverse and as changeable as the discourse and information shared within and between groups. Instead of the ideas of “truth” or “progress” to guide action in a networked society, there is a conception of the world or society as a system made of elements that must be “articulated” to be balanced and tuned to operate effectively and efficiently.

4.4 Canada and Efficient Copyright

In light of a heightened awareness of the efficiency of systems it becomes possible to argue that individuals should be able to access works in the most efficient way possible, that a faster and more effective system is better, regardless of what is “good”. If the law conflicts with effective and efficient access, we must conclude that there is a problem with that law. This has been especially true in the case of Canadian copyright. Throughout its copyright history, Canada has been especially concerned with efficiency of access. Canada, originally a British colony, had had several of its own copyright acts after 1868 but was still subject to the British *Imperial Copyright Act* until 1924. When the colonies were given permission to repeal Britain’s *Imperial Copyright Act*, many colonies adopted British copyright, but Canada drew up independent legislation in 1921, and in 1924 the new Canadian *Copyright Act* took force.⁵² This act included the longer term of protection: life of the author plus fifty years (rather than twenty-eight), expanded the definition of dramatic works, and protected unpublished works as well as published works. The Act provided a compulsory licensing system for broadcasters. Perhaps the

⁵² McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 31-39.

most controversial parts of the new *Copyright Act* were its licensing clauses. These clauses allowed printers to apply to the Minister for a licence to print books published but not printed in Canada or printed but not supplied in Canada. This compulsory licence meant that, although the copyright owner would be paid royalties on the book, he had no control over its publication, the selection of printers for the work, the quality of the printing, or the amount paid in royalties. As a result, Canadian printers could make books available to Canadians sooner and at a lower price. This legislation placed the efficiency of the system above authors' rights.

The efficient operating of the system is achieved, in the case of the economic system, through the mechanism of competition. In a networked context, an interest develops, not in the "rightness" of copyright legislation, but in the efficiency of copyright. Copyright, at an international level, becomes a matter of concern under systems of trade as well as a concern under systems of international law.⁵³ The best system is the one that produces the greatest overall profit (for a country, for an individual, or globally, depending on the perspective taken) and the greatest overall efficiency of use. The efficiency of a communication exchange is further justified economically as producing the possibility of a perfect market system. The Internet, for example, increases consumer choice while lowering the cost of disseminating information. It is therefore "good" not simply because it is an efficient system in and of itself; it is "good" because it produces an efficient and effective market system. E-bay, an online auction site, for example, is incredibly popular and has been called the "perfect market".⁵⁴

⁵³ See Chapter Five.

⁵⁴ See G. Beato, review of *The Perfect Store: Inside E-bay*, by Adam Cohen, *The Washington Post*, 7 July 2002, T06 (F).

“The public”, in a market system, plays a different role. It is appealed to, not as the ultimate authority and holder of reason, not as the body that, through opinion or debate, locates or approximates “truth” or “rightness” and ascertains the correct direction towards “progress”. Experts are the ones who can most perfectly tune and balance the system. Rather, “the public” plays a role of self-representation in a game of competing interests. Competition is a sign of a healthy system. The competing voices of a “public”, no longer thought of as a “truth”-producing whole but thought of as many competing voices, are helpful to the experts insofar as they are necessary in identifying areas of the system that are not working efficiently or effectively – areas that need attention and tuning.⁵⁵ They are helpful, both in directing the attention of the media or the government to attend to a particular issue, and in identifying particular conflicting viewpoints that need to be brought into “balance” in a better-tuned system.

What is it that is being represented by this “public”? “The public”, still a holder of rationality, but no longer thought to necessarily direct that rationality towards any *singular* goal such as “progress”, instead represents *various* conflicting economic interests, or various other interests that particular individuals may have. Perhaps individuals are concerned about their ability or inability to do or accomplish various things. These goals can be seen as elements of a system – an economic system, a technical system, or another type of system. While many systems can be appealed to, the economic system is often thought of as the most important. In public consultations on

⁵⁵ Loris Mirella, senior policy analyst at the Department of Canadian Heritage who I interviewed for my thesis, seemed to especially appreciate the technical information gained through the public consultations – submissions from technologically-savvy people dealing with copyright-related technologies or systems. This technological information would have helped the Departments to know more about the situation they were dealing with, the possible policy alternatives, and the implications of those policies. (Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.)

copyright, a particular individual may, for example, be concerned about a potential liability she may incur under new legislation. This potential liability would make her less competitive economically.

In actual fact, the systems perspective does not operate alone. Many different conceptions of the role of "the public" are evoked today. "Public opinion" is still important and is constantly monitored on a number of issues. Artists' rights are "good" in the sense that they are agreed upon as being "good", in the sense that publics, according to reason and/or opinion, deem them so. In the same way, public learning is "good", and learning is "progress". On one level, no appeal to efficiency is necessary; arguments upholding certain sets of values and certain ideals of "goodness" or "progress" continue to operate. On another level, an appeal to an efficient system is often more convincing than an appeal to what is "right" or "good" or "progress". The creation of an efficient market system can itself be termed as "progress". In any case, "progress", the "right" and the "good" do not exist as unambiguous values. They are ideologically laden, they are replaceable with systems arguments, and they can be made to serve systems arguments in a world where "copyright's public" is networked and demands access, efficiency, and control.

With the development of systems of transportation, communication, media, information technology, commerce, banking, and finance, and their adoption into the routines of everyday life, substantial changes in our way of thinking have emerged. Increasingly, individuals expect to be able to use efficient systems. Systems are constantly modified and laden with additional functions as individuals create demand for systems that can expand to meet their increasing needs and desires. In the minds of

networked publics, one “good” (artist’s rights) can be replaced with others: efficiency and effectiveness. Copyright, at a certain level, is no longer seen as the culmination of “progress” or the approximation of the “good”. It is simply seen as an economic regulator. For some, copyright is seen as an inefficient system that prevents Internet users from obtaining what they wanted efficiently and effectively. For some, it is a poor system that requires constant upgrades, beyond fixing or tuning. For others, it is an effective system that simply needs to be re-balanced.

5. “What is that banging? Damn pipes.”

What, in a networked world, is the role of “the public” with regard to copyright? The role of “the public” is to perform a role in a system: perhaps to consume, to create demand, to make new demands in an economic system. In the information system “the public” has another role: to consume information, to post information, to transfer information, to search for information, to use information.

We must also consider what role the “outside public” – individuals at home, for example – plays with regard to public consultations on copyright legislation? Does “the public” need to be consulted? The extent to which individuals at home could actually inform a public consultation might be questioned if, as Lippmann argues, this “public” is not generally knowledgeable about public affairs. However, Lippmann did not believe that an ideal of individuals at home as generally knowledgeable should be upheld. He believed that government was best administered by those directly involved in particular affairs. In this case, individuals at home, being directly involved in copyright insofar as it applies to their everyday actions on the Internet, and insofar as they demand access to

information, authority, and control, have a legitimate role to play in public consultation. They should rightfully represent their own knowledge and experience to the government.

Accordingly, “the public” is entitled to representation. At times, a “public” may represent something they will call “good” or “rights”, or “the public good”, or “the good life”. These may be countered by other versions of what is “good”, other rights, other ideas of “the good life”. A “public” brings reason but not a singular unified direction to public consultations. It brings, instead, many conflicting voices that may draw attention to various problem areas that may provide material that will assist the experts in “balancing” the system so that business practices, consumption practices, and legal practices can go ahead efficiently in some predictable manner and so that publics can continue to perform their various functions as a part of various systems. There is no unified “public” present at public consultations; there are various coalitions of individuals, aligned temporarily because they perform similar roles within a particular system.

6. The Phantom Public

Just who is this “public” — this phantom? It is a multiplicity of groups, of publics. The “public” consists of multiple publics, multiple stakeholder groups, multiple groups of temporarily aligned individuals. It includes what is, for my thesis, the main “public” — the non-private “public” (“the public” that is not a private-enterprise), simultaneously the private “public” (the domestic “public”) — the individual at home.

For my purposes here, the individual at home is the most important “public”. It is the under-represented “public”, and, as far as copyright goes, the under-theorized, under-consulted “public”, “the public” that, until now, has most often been an “outside public”,

a phantom to copyright, passing through copyright untouched and unseen. It is this “public”, hard to identify, who we might presume wrote in to Canada’s public consultations on copyright reform, in some ways indistinguishable from other publics, including computer-programmers, independent musicians, American rights activists, and others, who also participated. It is alternately and simultaneously a “public” of citizens, a “public” of consumers, a “public” of creators, a “public” of emailers, a “public” of Web-posters, sometimes a sympathetic “public”, sometimes an offended “public”, sometimes a “public” claiming rights, sometimes a “public” worried about their liabilities, now a “public” concerned about privacy and then a “public” thrusting themselves as individuals into the limelight. It is a “public” with varying conceptions of copyright, drawing from and driven by copyright discourses derived from many sources.

7. Conclusion

In summary, “the public”, as conceived by a number of theorists over time, has played very different roles in legislative decision-making, some more active than others. I have argued that individuals at home have been an “outside public” to copyright, neither being consulted nor caring to be consulted on matters of copyright. I shall discuss this further in the next chapter, explaining why this has changed and why, now, we must look more carefully at “the public” to see multiple publics, representing various interests and pointing to various problems in a system of access to works.

“Publics” appear in the portal of government consultation. They also appear in the media; in everyday practices; in technology, constantly re-forming; in creative and communicative practices; on the Internet; in consumer feedback. (Some say “the public” appears better there than anywhere else; that a market can “express the often contestatory

desires of its diverse publics far better than the culture otherwise available...one must conclude that state intervention is not inherently more public — more democratic, more empowering — than the market.”⁵⁶ This is a view to be discussed in Chapter Two.)

Publics appear in many forms in these various portals, available for examination by governing parties, other publics, and themselves; having simultaneously become visible and lost their transparency. “The public”, as long as the term is used, and as long as other identifiers do not accompany it, is not transparent in these portals; it is not fully identifiable as to its purposes, its whereabouts, its heredity, its conditions, its interests. This “phantom public” haunts the copyright house, unable to interact fully with the tools for building, frustrated in all its efforts due to its own phantom form.

⁵⁶ Robbins, “The Public as Phantom,” xiv-xv.

Chapter Two: Copyright Moving In

1. Multiple Rooms, Multiple Interests, Multiple Freedoms

Copyright, from its beginnings, reflected a growing commercial sphere that was the result of increasing urbanization, increasing connectivity, and the drive, under the market system, to create commodities. The same holds true today. Printed music, phonograms, visual art, movies, mp3s: copyright gave a commercial value to the act of copying each of these. As such, it is an expansionary system. Once limited to a room in the house – the library – copyright has strewn its things into the studio, onto the walls of the living room, over the entertainment centre, and into the computer room.

Before the widespread availability of home copying technology and the Internet, individuals at home were not implicated in copyright law. For all practical purposes, they would not have seen themselves as subject to copyright. I will outline the steps that were necessary before individuals at home would consider themselves to be subject to copyright. Ironically, I will show that these same steps would lead those same individuals to consider themselves *not* to be subject to copyright. The renovations that new technologies undertook on copyright at home meant that the zoning for the home had to be changed from “residential” to “commercial”. At the same time, a new non-commercial zone was created. Those who would like to see a non-commercial zone protected from the incursion of copyright often place themselves as defenders of privacy or “the public interest”. However, arguments that simply refer to privacy or “the public interest” cannot be relied upon to convince legislators. This chapter argues that copyright, as it moves into private space, can be said to reduce freedom; but that the availability of works and technologies made possible by copyright can also be said to

create new freedoms. Attempts to protect private or non-commercial space from the incursions of copyright simply by referring to “the public interest” or to “freedom” will not succeed because there exist multiple conceptions of the nature of “the public interest” and the state of “freedom”.

2. The Steps that Brought Individuals at Home to Consider Themselves to be Subject to Copyright

Step 1

The first step towards individuals’ subjectivity to copyright at home is home creativity – individuals who are creators at home. Individuals throughout history have written letters and journals, made up stories, painted and sketched. Prior to the 1924 *Copyright Act* these private creative works were not subject to copyright but were subject to common-law protections.⁵⁷ After 1924, even unpublished works were subject to copyright. This copyright-subjectivity would have meant little to most individuals, for whom the 1924 change occurred with complete transparency.

Step 2

Individuals’ subjectivity to copyright at home expanded with the ability to copy at home. Before the widespread availability of home copying technology individuals at home were generally only subject to copyright law in their capacity as unpublished creators. Copying in any significant quantity was expensive enough that it remained a commercial endeavour. Few people had a printing press in the basement, inviting copyright to wander down the stairs. With the capacity to copy came the widespread capacity to infringe copyright, that is, to be subject to copyright as an infringer.

⁵⁷ McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 104.

Tape recorders and photocopiers also allowed the expansion of individuals' roles as creators. Children recorded songs for their grandparents. Individuals produced copies of newsletters they had written for their own dissemination. Multi-track recorders enabled increasingly professional-sounding audio recordings.

Step 3

With home computers came the ability to copy something new: software and other digital files for use at home. Individuals copied computer games from their friends, first on magnetic tape and, later, on floppy diskettes. Individuals carried word-processing files between the office and the home.

At the same time, creative software gave individuals at home the ability to be creative in new ways, often mimicking commercial creative works. Home digital audio recording software paved the way for home recording studios and high-quality recording and multi-tracking. Word processing software resulted in the production of professional-looking texts.

Step 4

With networking came the ability to copy files more easily between individuals and computers. As the available bandwidth grew, bigger files could be copied. Text files were transmitted and downloaded, then images, music, and video.

Networking also influenced the creative capacity of individuals, especially because it enabled individuals to create together in groups. Not only could multiple individuals contribute to the same Web site or discussion forum; video conferencing and the development of collaboration protocols allowed individuals to work simultaneously

on the same digital document. As well, it was easier to quote from and reference the works of others, to incorporate the works of others directly into your own work.

Computer networking allowed communication in a format which was highly convenient for the discussion and dissemination of information. Eventually, this would include the discussion and dissemination of information regarding copyright. Because of this, the online environment changed the capabilities of “the public” and “the public sphere”.

3. After the Renovations

With home-copying technologies and the Internet, individuals’ everyday practices at home included non-commercial copying of commercial works, non-commercial copying of non-commercial works, and non-commercial copying of works imitating the style of commercial works. At the same time, individuals at home had gained tools for the dissemination of, and access to, information. The very technologies that made individuals at home subject to copyright (as creators and as infringers) also created pools of works that were copied every day under the assumption of a commercial-free and copyright-free zone.

After the renovations, the public domain – the set of works not protected by copyright – was no longer transparent to Internet users. The public domain⁵⁸ includes

⁵⁸ One must be careful not to confuse the “public domain”, works that are free from copyright, with “public availability”. Many works are freely available for download on the Internet that are not in the public domain; they are copyrighted works. I use what Jessica Litman terms the “lay definition” of the public domain: “The lay understanding of the public domain in the copyright context is that it contains works free from copyright.” (Litman, “The Public Domain,” 975.) Litman would go further to include ideas, facts, theories, and processes in the public domain, since they are not covered by copyright. (Ibid., 977.) This allows Litman to note that if the public domain did not exist, most authorship would be illegal. Every work, since it makes use of ideas, facts etc. that also exist in other works, would have to be said to draw from other copyrighted works. (Ibid., 977.) Litman thus frames the public domain, a world of facts and ideas etc. that can be freely referred to, as an escape-hatch from perpetual copyright liability. Since I am referring in this chapter to the relative transparency of the public domain to individuals at home, I will use

works that were never protected by copyright, along with works whose copyright term has expired. Before the Internet, most public-domain works – books whose copyright term had expired, for example – were either no longer available or were available, in much the same way as any other book, at the library or in the bookstore. There was no real reason to “protect” or even be aware of the public domain; in general, public domain works were only widely visible if they were available commercially. However, with the Internet came a way to make public domain works widely available on a non-commercial basis. Suddenly these works were available free of charge, and accessible from home. People liked that. Some people even created new works and “dedicated” them to the public domain.⁵⁹ The public domain became a visible and useful resource.

Many of the new works created and posted on the Internet by individuals (their own works or the works of others) were, on the other hand, subject to copyright.⁶⁰ This fact, however, continued to be transparent to creators and users at home, much as it was transparent to unpublished letter-writers after 1924. Individuals at home were still, in many ways, zoned “residential” – were still, by default, zoned “private”.⁶¹

The *Copyright Act*, concerned as it is with public uses – commercial exploitation and dissemination – has traditionally addressed private uses negatively; by making no specific mention of them, that is by not considering private use as a separate case.

Litman’s “lay definition”, the more common understanding that includes only works, not ideas and facts etc.

⁵⁹ The GNU Project (<http://www.gnu.org/>) and Creative Commons (<http://creativecommons.org/>) are part of the movement encouraging authors of software and other works to licence their products to be used in certain ways without payment.

⁶⁰ In compliance with the *Berne Convention*, works are automatically subject to copyright upon their creation with no formalities, such as registration or a copyright statement, required. “The enjoyment and the exercise of these rights shall not be subject to any formality.” (*Berne Convention*, Art. 5, section 2.)

⁶¹ I use “private” in one of the two senses outlined by Nancy Fraser: “pertaining to intimate domestic or personal life, including sexual life” and *not* in the other sense outlined by her; by “private” I do *not* here mean “pertaining to private property in a market economy.” (See Fraser, “Rethinking the Public Sphere,” 19-20.) I use the word “private” throughout my thesis to designate the non-commercial, the individual, the home, etc.

Copyright was not originally intended to govern private use. There was a time when copyright did not come sauntering through every room in the house. The boundaries of copyright once stopped at the edge of the library, outside the living room, just beyond the door of the computer room, somewhere outside the rec. room. Nobody posted any signs outside their doors ("Private! Keep Out!")

Its original domain was once outside the home, but copyright, like a pitied dog, now sleeps on the kitchen floor (or worse!) Where once the *Copyright Act* had built-in negative limits, the inability of private users to copy or publish, it now has exceptions – including an exception for a predicted use: private copying. Canada's private copying regime makes it perfectly legal to copy sound recordings for personal use.⁶² That is because we pay for those recordings via a levy on blank audio media. While there have been many objections to Canada's Private Copying Regime, there was a strong feeling that private copies should be paid for *somehow* when it was put in place. It would be difficult to argue anything else. Without a sign on the door anywhere – without anything to say otherwise – to claim that the right to *copy privately* is different from the right to *copy in general* is a difficult one to make. When the sign was finally posted, reading ("Private! - Keep Out!"), it came with a price paid in the form of a levy.⁶³

The private space is becoming a *negative* space. Rather than being a space whose boundaries are defined in a positive way, on its own terms, by what, it is agreed, should remain private, a space defined by certain principles, it is coming to be defined by the inverted boundaries of public space. The private space of the home has no grounds on

⁶² *Copyright Act*, Part VIII.

⁶³ The Heritage Committee, which is currently working through a new round of copyright reform processes, is considering a levy system, similar to the blank-tape levy, for educational uses of the Internet. Michael Geist, "Will Copyright Reform Chill Use of Web?", *Toronto Star online*, 31 May 2004.

which to claim its own; capitalism and democracy provide legitimacy for the expansion of the public or commercial space, while the private or non-commercial space is defined only by the weak walls of “decency” and tradition, regularly relocated. The public space expands, while more kinds of creativity become commodified (first books, then music, sound recordings, film, and software programs) and while more and more areas of discourse become the subject of public discussion (as books and talk shows bring more and more topics previously not discussed in public into the open, and as activist organizations do the same). It is difficult, in fact, to argue for the maintenance of a private space by referring to tradition or “decency” when making public many formerly “private” subjects has led to greater freedom for many people.⁶⁴

While the idea of paying for private copies is seen as a price for a particular kind of freedom (to have available a body of creative works) and is strongly supported on some sides, there is also strong sentiment supporting the idea of liberty of action in private spaces with regard to private copying; it has been argued that anything that is as easy, as inexpensive, as private, and as widely-practiced as private copying comes to be widely seen as legitimate and, because the law reflects the values of a society, should be legal. Copyright holders are not of the same opinion.

Investigations by police to uncover private copying would be considered highly offensive today. It would be seen as authoritarian, an intrusion on private lives.

Investigations using technology, like those recently undertaken for the Canadian

⁶⁴ Nancy Fraser points out the negative aspects of actively promoting a “private sphere”, saying that this promotion is often done by an empowered group to keep issues that are not in its interests off the table, out of public debate. “The rhetoric of domestic privacy seeks to exclude some issues and interests from public debate by personalizing them or familializing them; it casts these as private-domestic or personal-familial matters in contradistinction to public, political matters.” (Fraser, “Rethinking the Public Sphere,” 88.)

Recording Industry Association,⁶⁵ however, are not perceived in the same way.

Penetration by the state into private practices is something that individuals are extremely wary of, but penetration by the corporate world via technology does not seem to raise the same impassioned reaction.

4. Freedom and Liberty

Freedom is often taken to mean the ability to *do*, while liberty often signifies a negative, the right not to be interfered with. Privacy, then, is a form of liberty. Most law deals in the realm of negative liberty, with stating what an individual should *not* be free to do, rather than stating what an individual *must be left free* to do:

Translating theoretical notions of liberty into law is no easy task. Typically Western laws espouse the negative principle of liberty. Softer documents, such as the *Universal Declaration of Human Rights* and newer legislation concerning human rights, are beginning to reflect a positive concept of liberty. Similarly, notions of equality, broadly mentioned in the Canadian and American Constitutions, are being increasingly interpreted in this fashion. ... Notwithstanding some movement towards a positive concept of liberty, much of the foundation of our political-legal system in Canada and the United States is based on the negative concept.⁶⁶

Privacy will come to be a greater concern in the copyright system as copyright comes to be increasingly administered through computer networks. As copyright, whether originally intended to or not, interfaces with and limits private action, the scope of private liberty is reduced. On the other hand, the availability of works and technologies made possible by copyright also *creates* new freedoms – the freedom to File! Save! Print! – the freedom to Download! Wait! – the freedom to Record! Pause! – the freedom to Cut and Paste.

⁶⁵ Kevin Restivo, "Shaw Fights to Keep Web Client Names Private: Music Sharing Suits Loom," *Financial Post* (National Post), 13 February 2004, FP04.

⁶⁶ Handa, *Copyright Law in Canada*, 94.

5. The Utility of Appeals to “The Public Interest”

Attempts to define the private space, to put a wall around the individual at home – to create or keep a non-commercial zone, a zone of privacy – often appeal to “the public good” or “the public interest”. Given Anglo-American copyright’s philosophy of balance between the interests of creators and the interests of the public, this appeal to “the public interest” is especially alluring. The defendants in a recent case, for example, appealed to privacy to protect the personal information that would allow individuals to be sued by the Canadian Recording Industry Association.⁶⁷

The claim of privacy can be effective in court and even in public discourse, but it is not a technique that can be relied upon to convince legislators and policy-makers. That is because privacy can always be trumped by “the public interest”, and “the public interest” is a fluid concept that can just as easily refer to “the public good” of publication, availability of information, learning, a vibrant cultural product, the survival of the existing recording industries, or contribution to Gross Domestic Product. Peter Jaszi, an American professor and specialist in intellectual property, was once invited to testify at an American Senate Judiciary Committee on the *Copyright Term Extension Act* of 1995.⁶⁸ This bill would extend the term of copyright on works that were already in existence. Jaszi was against this extension, which he viewed as an incursion on the public domain. According to his own account, his argument, invoking the traditional balance between creators’ interests and users’ interests, “fell on deaf ears”.⁶⁹

⁶⁷ Robert Thompson, “ISPs Refuse to Hand Over Downloaders: Court Battle Adjourned,” *Financial Post* (National Post), 17 February 2004, FP01.

⁶⁸ United States. *Sonny Bono Copyright Term Extension Act*, P.L. No. 105-298 [S. 505], (112 Stat.) 2827 (1998).

⁶⁹ Jaszi, “Goodbye to All That,” 598.

These arguments failed to persuade or even interest the members of the panel, because there was an effective consensus in the hearing room for an alternative vision of the copyright system. In this vision, the goal of copyright, so to speak, is to improve the competitive position of companies that have significant investments in inventories of copyrighted works.⁷⁰

Jaszi notes that “the public interest” was, for the members of the panel, a different “public interest” than the one he envisioned, the one with a vibrant non-commercial public domain. The panel’s definition of “public interest” consisted of the promotion of additional income to existing industries that could be used to promote the production of new works:

In the emerging new understanding of what constitutes the progress of science and the useful arts, enhancing overall financial well-being of companies that invest in the production and distribution of copyrightable works contributes generally, if not specifically, to the promotion of creativity and authorship, especially in the form of works for hire.⁷¹

While perhaps, theoretically, the public domain and privacy *should* matter to the “general public”, it is probably fair to say that most Canadians are not all that concerned. Certainly, the members of Jaszi’s panel were less than completely convinced about the importance of the public domain:

if you think of your own behavior when going into a bookstore, there are lots of books – Shakespeare is not under copyright anymore. Do you really see a big difference in price between the public domain stuff and the nonpublic domain stuff? Do you really – does that even enter into your consciousness as a consumer?⁷²

The public domain is probably more important to the people who need it and use it – Internet users, for example – and, more specifically, Internet users who make use of

⁷⁰ Ibid., 599.

⁷¹ Ibid., 609.

⁷² *The Copyright Protection Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 23 (1995)(testimony of Hon. Bruce Hehman, Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office)(transcript provided by Federal News Service) quoted in Jaszi, “Goodbye to All That,” 611.

public domain materials and are aware that they are doing so. There may be a difference between those who primarily see themselves as “consumers” of works and those who see themselves as users (users being distinguished from consumers in that they make non-commercial use – use that varies from the traditional or predicted “consumptive” use – or being distinguished from consumers in that they use non-commercial works). An appreciation of the freedom to make use of public-domain works may not be well developed or even of concern to most individuals.

A strong sense of the liberty of privacy, of what is and what should be private, is also not well developed in the North American public. This may be due to the relative newness of issues of privacy, many just now emerging with the introduction of new technologies. Handa points out that “privacy rules are a relatively recent phenomenon. They have not yet reached the level of legal recognition on par with liberty or even property rules. For example, privacy rules are not supported *per se* by either the Canadian or American Constitutions.”⁷³

Privacy was once a default state of affairs. It was difficult to obtain private information. In today’s world, personal information is generated automatically in the course of everyday commercial transactions, and transmitted and stored automatically; in a time where special effort is necessary to *avoid* collecting personal information, privacy may indeed reach a level of recognition on par with other rights. Nevertheless, a sense of privacy, and, more generally, a sense of a definite right not to be interfered with, remains weak. A sense of freedom, freedom within a private realm to act, to privately make use of creative works, also remains weak.

⁷³ Handa, *Copyright Law in Canada*, 102.

If what is desired is a realm of the private, of the non-commercial, then a stronger definition of that realm must be developed in the minds of individuals and in the justice system. Liberty and freedom would have to be more strongly defined and associated with that non-commercial realm. However, if ideas of liberty and freedom consistent with a commercial-free zone are to be convincing at the legislative level, additional techniques must be found:

Unfortunately, a new understanding of the purposes of copyright, which focuses on promoting the well-being of the copyright industries rather than providing incentives to specific acts of creativity (or distribution), will gradually supplant the traditional understanding on which so much of our public interest rhetoric relies. If this occurs, how should those concerned about the public interest respond? One answer has already been suggested: they must refurbish the policy arguments for a vital, robust public domain.⁷⁴

Refurbishing policy arguments does not mean simply re-establishing the traditional references to “the public interest”:

[The] assault on the notion of the public domain as something of value is nothing new, but it seems to be gathering force. To counter this momentum, defenders of the public interest must begin to develop evidence and arguments that function, at least to some extent, independently of the specific terms of the Patent and Copyright Clause [The Patent and Copyright Clause is often interpreted in terms of the traditional copyright balance between the public’s and creators’ interests.], and carry on the work of explaining why and to whom the public domain matters.⁷⁵

Explaining *to whom* a non-commercial zone, or privacy, matters is currently one of the major hurdles.⁷⁶ If, as Jaszi claims, the general conception of “the public interest” at the level of legislative reform was and is still the survival of the existing copyright industries, or a contribution to Gross Domestic Product, then it would be easier if groups

⁷⁴ Jaszi, “Goodbye to All That,” 610.

⁷⁵ *Ibid.*, 611.

⁷⁶ See Chapter Three for a discussion of how new interest groups have begun to form and how they attempt to argue their particular positions with regard to copyright law.

advocating for a commercial-free or private space could appeal to similar conceptions, rather than to liberty or freedom or some alternative “public interest”. Throughout copyright’s history, when new technologies created new infringing practices, an industry stood behind that technology willing to fight for the consumers’ right to use or pay to use that technology. Those industries could appeal to the “public good” of their own survival.

A number of different industries have sprung up on the Internet which argue that their own survival and well-being is a form of “public good”; some of these are based on traditional intellectual-property business models, whereas others are not. Those industries that do not pose a threat to the existing copyright industries because they have no interest in protecting copyright in the works they make available. They pose a competitive threat by using a competing business model. Those industries based on traditional intellectual property business models may make public domain works available to “the public” but do so, much as the bookstores did, commercially. A third group, comprised of lawyers, academics, and civil liberties organizations arguing for a non-commercial public domain, have no bottom-line or existing industry to appeal to, only “the public interest” of learning, creativity, a rich “cultural commons”, or freedom of information. That makes explaining *to whom* the non-commercial public domain matters, in terms of the dominant conception of “the public interest” – the survival of existing copyright industries – difficult to do.

6. Conclusion

Individuals at home, now subject, as individuals, to copyright, must determine the best ways to represent their interests. Competing notions of “liberty” and “the public

interest” must be articulated and differentiated, not only in legislative consultations, but in various public forums as well. In these forums particular notions can be challenged, be supported, and gain or lose influence. Groups and individuals may find that a deep understanding of the various competing notions of “the public interest” and “liberty”, and an ability to challenge and use competing notions, is very useful within consultations and public forums. These various discourses through which copyright navigates, these competing notions of “the public interest”, indicate very different visions and suggest very different ends.

Chapter Three: New Neighbours

1. The New Neighbours: Problems Already

The city planners who envisioned copyright's neighbourhood in 1710, when the *Statute of Anne* came into effect, could not have predicted the ways that the neighbourhood's demographics would shift. Copyright's stakeholders, or "copyright's public", is of a different composition today than it was even 10 years ago; its demographics reflect an influx of new individuals and organizations as stakeholders. I will show that more individuals now view themselves as members of the copyright neighbourhood. It is up to the government to recognize these and other population shifts and to adjust its services as necessary. However, community-building is not simply a job for the government; it is a long process carried out, also, by community members.

This chapter asks whom the individuals were who wrote in to the June 2001 public consultation on copyright reform. It discusses how new copyright communities used the Internet to organize, and how they represented themselves in the public consultations. Many of the individuals and several of the groups who wrote in claimed to be representing "the public interest". This chapter takes a look at that claim, as well as the overall trends in the way that copyright language – the language of "rights" and "balance" – is used in the submissions. This language reflected copyright's new demographic – a demographic that included more unorganized individuals than it had previously.

Communication processes used by both the government and these communities influenced the representations that were made by individuals to the government during this process. Internet communications by semi-organized individuals had a strong impact

on the form and content of the submissions, as did the language used in the discussion papers.

Perhaps because the consultations were undertaken at a time when new copyright communities were just beginning to form, there were many submissions from non-organized or semi-organized parties: from individuals. These were individuals who may not previously have been organized (organized as a result, for example, of being part of a common institution, corporation, or industry). These submissions from individuals, some of which were form letters or otherwise motivated by the Internet postings of new copyright communities, presented a number of dilemmas for the government. First, the submissions did not always deal directly or clearly with the issues presented by the departments. Second, it was difficult for the government to know whom the submissions really represented. This chapter discusses a number of ways that the departments might have avoided some of these dilemmas, but also recognizes that issues such as these are, in a large part, an unavoidable aspect of undertaking consultation with non-organized parties or parties still in the process of organizing.

2. Background

No comprehensive reform of Canada's copyright law had ever been undertaken since Canada's first independent *Copyright Act* came into effect in 1924. In 1988, however, a series of reforms began, initiated by two papers: a 1984 white paper, *From Gutenberg to Telidon*, by the Canadian Department of Consumer and Corporate Affairs and the Canadian Department of Communications, and a 1985 paper, *A Charter of Rights for Creators*, by the Canadian Subcommittee on the Revision of Copyright of the Canadian Standing Committee on Communications and Culture.

Resulting from discussions around these two papers, the Government proposed a reform of the *Copyright Act* to be conducted in two phases. The first phase of copyright reform occurred in 1988. This reform, among other things, authorized collectives who would collect royalties on behalf of artists, subject to control of the Copyright Board, and extended copyright coverage to computer programs.⁷⁷

The second phase of reform occurred in 1997. This phase responded to Canada's obligations under the *General Agreement on Tariffs and Trade* to amend its *Copyright Act* to implement the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*. The 1997 *Act to Amend the Copyright Act* included, among others, the following changes: the definition of "copyright" was changed to include the right to rent out a sound recording in the case of a musical work; the term of protection for unpublished works was changed from a perpetual term to a limited term of fifty years after the death of the author; performers' rights were expanded; sound recording makers' rights were expanded; entitlement to copyright was given to broadcasters in their broadcasts; provisions were made for the preclusion by copyright holders and distributors of parallel imports of books; exceptions to infringements were expanded; a blank tape levy was imposed; and copying onto an audio-recording-medium for private use no longer constituted infringement.⁷⁸

On 22 June 2001 the departments of Industry and Canadian Heritage initiated an online public consultation on copyright reform, considered Phase III⁷⁹ of the reform

⁷⁷ McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 41-42.

⁷⁸ *Ibid.*, 52-56.

⁷⁹ Although this set of reform initiatives is sometimes referred to as "Phase III", it has not been *officially* referred to as such.

processes.⁸⁰ To launch the online portion of the public consultations the departments issued two discussion papers: a *Consultation Paper on Digital Copyright Issues* and a *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet*. They also issued *A Framework for Copyright Reform*, a higher-level paper that outlined the government's plan for implementing a stepped approach to the third phase of copyright reform and requesting comment on this approach:

The idea was that after that maybe it would be better to change the way we did copyright reform and try and do it in a more staged, managed process with smaller packages that could be put through more quickly, that wouldn't take up as much parliamentary time including committee time. So with that in mind there was a framework document released in June of 2001 along with two consultation papers on digital issues. The framework document, which you can find on the Web site,⁸¹ talks about this process and where we have come from and what we want to try. It was a way to launch the new reform process, which would be organized in smaller bundles.⁸²

The online written consultation was followed, in March and April, by cross-country face-to-face consultations in Halifax, Vancouver, Montréal, Toronto, Ottawa and Edmonton. Over 300 Canadians, including traditional stakeholder groups, participated in the face-to-face consultations.⁸³

A number of copyright issues appeared in newspapers in the months leading up to the consultation. In Canada, Internet site JumpTV attempted to start a television retransmitting service. This service would have allowed Internet users to watch TV online. JumpTV, in attempts to avoid the legal problems experienced by a predecessor,

⁸⁰ The actual Phase III reforms, as of this writing, have not yet been proposed.

⁸¹ http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01104e.html Last checked 18 July 2004.

⁸² Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

⁸³ http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/neuf-new/archive_e.cfm Last checked 17 May 2004.

iCraveTV, planned to offer its service only in Canada (to avoid legal problems in the U.S.) and applied to the Copyright Board to pay royalties on its content in a manner similar to cable TV companies in an attempt to gain legitimacy for its retransmissions.⁸⁴

In the United States Napster, a popular free music-file-sharing service, was ordered by the Ninth Circuit U.S. Court of Appeals to block copyright-protected songs from being passed over its service. Napster was a big news item; the *New York Times* ran 157 articles mentioning Napster in the year leading up to the public consultation. The *National Post* ran 235 articles. Napster was hugely popular in Canada; MediaMetrix estimated that it was the ninth most popular Web site among Canadians. They reported that one in three Canadians who went online in January 2001 – or 3.3 million – used Napster, at an average of three hours per month.⁸⁵ Despite its popularity, CF Group reported in March 2001 that 6 in 10 Canadian Internet users who did not use Napster supported the injunction requiring Napster to block access to copyright-protected songs.⁸⁶ In the face of the injunction, other similar music-file-sharing services, such as Gnutella, Audiogalaxy, Napigator, Kazaa, and iMesh began to attract users.⁸⁷

At the beginning of June, just before the Canadian consultations on copyright reform began, computer scientists were attempting to challenge the United States' *Digital Millennium Copyright Act*, which had been enacted in 1998. In particular, the court was asked to overturn the Act's prohibitions on the manufacture, dissemination and use of any mechanism capable of circumventing copy-protection technologies intended to safeguard

⁸⁴ Matthew Fraser, "JumpTV Takes On Vested Interests: Copyright Board To Decide Fight With Broadcasters," *The Financial Post (National Post)*, 29 January 2001, C2.

⁸⁵ David Akin, "Canadians Love Free Napster Music Files: Highest Penetration: 3.3 Million Utilized Web Site In January, Report Says," *The Financial Post (National Post)*, 23 February 2001, C7.

⁸⁶ "Non-Napster Users in Canada Support US Court Ruling Against Music Swap Service," *The Financial Post (National Post)*, 6 March 2001, C9.

⁸⁷ Robert Thompson, "Thousands Of Users Turn to Napster Alternatives: Similar Sites Abound. Pioneering Service's Future In Doubt," *The Financial Post (National Post)*, 6 March 2001, C9.

digital material. These prohibitions are collectively referred to as *the legal protection of technological protection measures* and were a controversial new element of American copyright law.⁸⁸ The legal protection of technological protection measures became one of four issues raised by the Canadian *Consultation Paper on Digital Copyright Issues*. The lawsuit was financed by a San Francisco civil liberties organization called the Electronic Frontier Foundation (EFF).⁸⁹

At the same time, alternatives to traditional intellectual-property based business models were popping up in the digital world. Microsoft and promoters of free-software were locked in debate.⁹⁰ IPublish.com and other services were offering e-books and experimenting with online solicitation of manuscripts from the public, for rating by other writers and editors, offering "hope" (and very little money) to unpublished writers.⁹¹ Mp3.com offered "small-time musicians a way to distribute their music".⁹² It also faced a lawsuit for making copyrighted music available on its service, though it offered access to this music only to subscribers who could show they already owned the copyrighted music on compact disc.⁹³

During the same period Adobe Systems offered an e-book reader with a file format that stopped e-book files from being copied or shared without authorization.⁹⁴

This meant that users could not make a copy of an e-book for another computer or as a

⁸⁸ *Digital Millennium Copyright Act*, §1201.

⁸⁹ Amy Harmon, "Judge Asked For Ruling On Copyright," *The New York Times*, 7 June 2001, C5.

⁹⁰ Laurie J. Flynn, "Despite Microsoft's Best Efforts to Kill It, The Free-Software Movement Shows No Sign of Quietly Rolling Over and Dying," *The New York Times*, 4 June 2001, C4.

⁹¹ Jane Levere, "A Campaign Seeks Out Works By Unknown Writers And Wants To Publish Them – Digitally," *The New York Times*, 21 May 2001, C13.

⁹² Matt Richtel (NYT) (Compiled by Alan Krauss), "MP3.com Offers Music From Unknowns," *The New York Times*, 11 May 2001, C4.

⁹³ Bloomberg News (Compiled by Alan Krauss), "Musicians Sue MP3.Com," *The New York Times*, 9 May 2001 C4.; Bloomberg News, "Mp3.Com, Online Music Provider, Is Fined," *The New York Times*, 7 April 2001, C3.

⁹⁴ Ian Austen, "New Electronic Book Software Makes Lending Out Impossible," *The New York Times*, 22 February 2001, G3.

back-up. Just after the consultations on copyright reform began in Canada, a Russian programmer named Dmitri Sklyarov made a presentation at a conference in Las Vegas about security flaws Adobe's e-book encryption software. He was arrested on 16 July 2001 – about a month after the Canadian consultations began – for violating the U.S. *Digital Millennium Copyright Act's* provisions against manufacturing, importing, providing, offering to the public or otherwise trafficking in a circumvention technology.⁹⁵ The company that he worked for, ElcomSoft, began selling a program that cracked Adobe's e-book encryption software soon after his arrest and was also charged. Civil rights advocates, including the Electronic Frontier Foundation, garnered a great deal of attention over the event:

Calls for boycotts of Adobe products have sprung up across the Web. A "Free-Sklyarov" e-mail list, started by an unemployed computer consultant in San Francisco, has several hundred members and has generated more than 1,000 messages. And the Electronic Frontier Foundation, a civil liberties group that is underwriting the civil cases challenging the copyright law, said it had accepted more than 200 new members last week, compared with an average of six a day.⁹⁶

3. Organization on the Internet

Other organizations also raised awareness of copyright issues on the Internet before and during the Canadian copyright consultations that summer. Loris Mirella, a senior policy analyst in the Copyright Policy Branch at the Department of Canadian Heritage who helped to organize the public consultations, noted the amount of interest in the consultations that was generated on the Internet:

It was more widely advertised...not necessarily by the government but by people being interested, being more sensitive to the issues because

⁹⁵ *Digital Millennium Copyright Act*, §1201.

⁹⁶ Amy Harmon and Jennifer Lee, "Arrest Raises Stakes in Battle Over Copyright," *The New York Times*, 23 July 2001, C1.

of what was going on in the States and elsewhere – just the nature of communication on the Internet. I saw it on slashdot⁹⁷ 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 the public, the general unorganized public as opposed to the organized public which would be expressed through different stakeholders, what we would call the traditional stakeholders.⁹⁸

It may have been Internet discussions and sites that generated most of the interest from individuals in the public consultation process. 547 of the over 600 submissions received by the consultation were from individuals. Although there were many newspaper articles related to copyright generally, there were none to speak of relating to the copyright reform consultation other than the initial announcements.⁹⁹ Submissions to the public consultation seem to correspond closely to the dates that announcements of the consultation were posted on various Internet sites.

Postings alerting people to the public consultation were made on 24 July by an open-source free software advocate, Gary Lawrence Murphy, on the Canadian Linux Users Exchange (an email list) and on the Canadian Internet site about free software that he runs, *www.teledyn.com*. Gary Lawrence Murphy's postings were then forwarded on 26 July by Stephen Samuel, a British Columbia Green Party member, to a Yahoo email group called the *gpbcc-forum* [Green Party of British Columbia forum] and on 28 July to Green Party of Canada forums by Steve Kisby, another Green Party member. From there they were forwarded on 30 July by Russell McOrmond, an open-source free/libre software advocate, to another open-source software advocate forum, the *Free/Libre*

⁹⁷ <http://www.slashdot.org> Last checked 17 May 2004.

⁹⁸ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

⁹⁹ "Ottawa Launches Review Process," *Globe and Mail ME*, 23 June, 2001, B6; Ian Jack, "Ottawa to Probe Internet Feeds on Television: Consultation on Law. Debate Pits Broadcasters Against Web Streamers," *Financial Post (National Post)*, 22 June 2001, C7.

Software and Community Networking Forum. About seventy submissions were made to the public consultation in the two weeks corresponding with and immediately following these postings, made within the open-source/free software and Green Party communities, between which there was apparently some overlap.

Russell McOrmond eventually formed a discussion group called "Canada DMCA Opponents forum" at www.flora.org/dmca/. This forum started on 2 August 2001 with the explicit goal of organizing submissions to the public consultation. The opening remarks of the forum's founder, Russell McOrmond stated:

The Government of Canada is launching the process for reforming Canadian copyright legislation over the years to come. This process has sparked the creation of this online forum, as well as a number of other forums. ... The purpose of this list is to discuss this process, and to facilitate discussion between similar-minded people who wish to make submissions, as well as promote a more balanced reform process.¹⁰⁰

The biggest upsurge in submissions came not after these Canadian developments, but after announcements on www.slashdot.org on 6 September 2001 and in the online Electronic Frontier Foundation newsletter (claiming 28 800 subscribers) of 7 September 2001.¹⁰¹ Both were American organizations. Before these two announcements, an average of just over one submission a day had been made to the consultation. (This had increased briefly to an average of five per day in the two weeks following the postings on Canadian forums.) Seventy-two submissions were made on 8 September after the two American announcements.¹⁰² From 8 September on, until the consultation deadline on

¹⁰⁰ <http://www.digital-copyright.ca/discuss/1> Last checked 17 May 2004.

¹⁰¹ <http://yro.slashdot.org/article.pl?sid=01/09/06/2028226&mode=thread&tid=99> and <http://www.eff.org/Misc/EFF/Newsletters/EFFector/HTML/effect14.23.html> Last checked 17 May 2004.

¹⁰² The dates of submissions may not be exact; I have used the submission dates that are indicated on the consultation's Web site: http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html. Last checked 17 May 2004.

15 September, the consultation received an average of fifty-four submissions per day.

Submissions continued to be received past the 15 September deadline until 15 October.

The sheer number of submissions surprised the departments, who had committed themselves to making all of the submissions available on the Internet.¹⁰³

The number of responses was still phenomenal. It was a lot of responses – it was more than we had anticipated – and so it overwhelmed us quickly and we had to extend the period for the initial deadline because we couldn't post things fast enough ... so it took a while to get organized and we had to dedicate a lot more resources to it than we had started with. So we got bogged down a bit in submissions at first. And that was a little bit unexpected.¹⁰⁴

The departments quickly recovered and the submissions were made available online for others to read and respond to.

4. Analysis of Submissions

My analysis of the submissions to the public consultation deals with the ways that many different submissions claim to represent “the public interest” and the differences between the submissions from individuals and the submissions from organizations in terms of substantiveness, language used, and topics addressed.

4.1 “The Public Interest”

Although postings on Canadian Internet forums appear to have generated a number of submissions, postings on American Web sites seem to have generated the most interest in the consultation. Were there no large Canadian “clearing-houses” for this type of information? Indeed, there seem to have been only two Canadian “public-interest” (in their own words) organizations outside of the more traditional groups of stakeholders

¹⁰³ Submissions are available at http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html
Last checked 17 May 2004.

¹⁰⁴ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

such as libraries, archives, educational institutions, and advocacy groups for the disabled who wrote in to the copyright consultations. The Public Interest Advocacy Centre frames and represents the “public” as consumers:

The Public Interest Advocacy Centre (PIAC) is a national, non-profit organization which has provided legal services and research to Canadian consumers, and the organizations that represent them, for twenty- five years. PIAC’s members include individuals, groups and organizations representing 1.2 million Canadians. ... PIAC’s involvement in consumer issues such as privacy lead to its concern over the copyright reform process.¹⁰⁵

Electronic Frontier Canada also presented itself as a “public interest” organization, representing from a civil liberties perspective:

Electronic Frontier Canada (EFC) is Canada’s premier online civil liberties organization, and is devoted to the protection of fundamental rights and freedoms as new computing, communication, and information technologies are introduced into Canadian society. ... EFC’s several hundred supporting members are drawn from all Canadian provinces and territories, and from a diversity of backgrounds, ages, and professions. EFC maintains an interactive online presence with its supporting membership through its electronic discussion list EFC-TALK@efc.ca and its web site <http://www.eff.ca/>.¹⁰⁶

Electronic Frontier Canada joined with several other organizations to make its submission to the public consultation. These included the United States’ Electronic Frontier Foundation, OpenCola, Ltd., ColdStream Associates Ltd, Sandelman Software Works, TransGaming Technologies Inc., and FLORA Community Consulting and Community Web. The Electronic Frontier Canada submission, then, represents a very different “public” than the Public Interest Advocacy Centre submission; it involves the combined interests of the “leading civil liberties organization devoted to protecting individual rights in the digital world” (the Electronic Frontier Foundation) and a various

¹⁰⁵ Public Interest Advocacy Centre. *Response to the Consultation Paper on Digital Copyright Issues*.

¹⁰⁶ Electronic Frontier Canada. *Response to the Consultation Paper on Digital Copyright Issues*.

software companies. The software companies backing the submission included a peer-to-peer software company (OpenCola), an information security firm with large multinational corporations and other large organizations as clients (ColdStream Associates), a network design and security company (Sandelman Software), a multimedia software company producing cross-platform software portability (TransGaming Technologies), and an “open source and/or free software based computing” company concerned with “freedoms such as free speech and free software” (FLORA Community Consulting and Community Web).¹⁰⁷

Other more traditional copyright stakeholder groups (organizations representing libraries and archives, educational institutions, and the disabled), who also claimed to represent “the public interest”, also submitted. Approximately ten submissions were made representing libraries or archives, six representing educational institutions, and two representing the disabled.

Individuals also claimed to represent the “public” or “the public interest”. They used words like “general users” or “most Canadians” or “private citizens” or “we” or “we as a society” to represent themselves. Many of them identified themselves as Canadians. Much of their language made reference to themselves as consumers, but many identified themselves as computer programmers. Not all submissions identified the source of their own interest in the consultation; in that sense we do not really know who they were. Because they were not identified as part of an organization or a stakeholder group they were, to an extent, unorganized and therefore unidentified. Perhaps most of them were affiliated with the Electronic Frontier Foundation. Perhaps most of them were affiliated

¹⁰⁷ Ibid.

with open-source software groups. Perhaps the “average Canadian”, insofar as the “average Canadian” might be said to exist, did not write in at all.

4.2 Organizations and Individuals

There were significant differences between the submissions made by organizations and the submissions made by individuals. These differences showed in the substantiveness of the submissions, the language used, and the topics addressed.

4.2.1 Substantiveness

The submissions from organizations were much more substantive than the submissions from individuals. Organizations’ submissions averaged eight pages in length, as opposed to individuals’ two pages.¹⁰⁸ 43% of individuals based their submission on a form letter supplied by the Electronic Frontier Foundation.¹⁰⁹ Most organizations addressed each of the four issues outlined by the discussion paper, but individuals’ submissions typically addressed only one issue: the legal protection of technological protection measures. This issue was the one raised by the Electronic Frontier Foundation before American courts at the beginning of June. The Electronic Frontier Foundation’s form letter also addressed only that issue.

4.2.2 Language: “Rights” and “Balance”

There were also differences in the ways that individuals and organizations used “rights-talk”. Whereas 47% of individuals (or 70% including the form letters) referred to the “rights” of users under copyright, only 30% of organizations referred to user “rights”.

¹⁰⁸ All statistics are based on a random sample of the submissions. This random sample excluded the 234 submissions based on the Electronic Frontier Foundation form letter except where indicated.

¹⁰⁹ “Approximately 234 submissions seem to have been clearly identified with or closely modeled on a form letter provided by the Electronic Frontier Foundation (EFF).” Department of Industry Canada and Department of Canadian Heritage, *Overview of Submissions on the Consultation Paper on Digital Copyright Issues*, 3. See Appendix A for the text of the EFF form letter.

And, while only 23% of individuals referred to the “rights” of creators or copyright holders, 80% of organizations referred to creator or copyright-holder “rights”.¹¹⁰ This may reflect the fact that most of the organizations represented individuals and institutions with interests as copyright-holders rather than interests as users. But the rights-language used in conjunction with users is important. There is a significant difference between language that frames users as having “an interest” in copyright and language that frames users as having “rights” under copyright. Some organizations referred to “user interests”, or the importance of “balance” between users and copyright-holders, or even the importance of “access”, but stopped short of declaring the importance of user “rights”.¹¹¹

The issue of whether users have “rights” under copyright is a contentious one. Certain exceptions from copyright liability are granted in copyright legislation for the purposes of research or private study, criticism or review, news reporting, making a backup copy of computer programs, adapting a computer program into another computer language, and other miscellaneous purposes. Educational institutions, libraries, archives, and museums are also granted certain exceptions.¹¹² These exceptions are sometimes thought of as “user rights”. (Beyond exceptions, there are also uses for which no exclusive rights are held: to use ideas from a work in another work, or to copy a work after the copyright term has expired, for example.) There are two distinct interpretations of the nature of exceptions. If I make a photocopy of a newspaper article, I can be seen

¹¹⁰ Submissions had to actually use the word “right” or “rights” to be included in the statistic here. The references included were general references to “creators’ rights” or “users’ rights” but not references to specific “rights” under the Act such as the “making available right”. References to, for example, a “making available right” would not have been included in this statistic.

¹¹¹ For example, see Canadian Association of Broadcasters, *Response to Consultation Paper on Digital Copyright Issues*, or Canadian Copyright Licensing Agency, *Response to the Consultation Paper on Digital Copyright Issues*.

¹¹² *Copyright Act*, Part III.

as infringing the rights of the article's copyright holder. If I copy that article for the purpose of research, however, I can be seen as either:

- a) infringing the rights of the copyright holder, but forgiven or exempted from my liability because of the legislated research exception, or
- b) not infringing the rights of the copyright holder but, rather, exercising my own right as a user of the work.

Language situating users as having "rights" under copyright fosters an interpretation in line with b), while language that avoids "rights" language in connection with users tends to support an interpretation in line with a). Linguistic distinctions of this kind have a significant influence. This influence was evident in the outcome of the March 2004 Supreme Court case *CCH Canadian Ltd. v Law Society of Upper Canada*. Michael Geist, an Ottawa lawyer and professor specializing in Internet law commented in a *Toronto Star* article, "Low-Tech Case Has High-Tech Impact", that, in its CCH decision, "the court remarkably fashions exceptions to copyright infringement as new copyright rights — users' right [sic] — that must be balanced against the rights of copyright owners and creators." Geist notes that, "Just two years ago, the Supreme Court's view on copyright law was that it was there solely to benefit creators. Today, the court now speaks openly of users' rights and the need to balance rigorously the interests of creators and users."¹¹³ This "user-rights" language is extremely important in re-framing the place of users under copyright. It places them in a much more powerful position, as being actual rights holders rather than infringers who are excepted from liability. This "users' rights" language is situated firmly in the Anglo-American copyright tradition, flying in the face of *droit d'auteur*.

¹¹³ Michael Geist, "Low-Tech Case Has High-Tech Impact," *Toronto Star online*, 22 March 2004.

It is unlikely that many individuals submitting to the copyright reform consultation process were aware of the various subtleties in interpretations of copyright exceptions or of competing copyright traditions in Canada. Many of those who referred to users' "rights" may have been influenced by what they read on the Electronic Frontier Foundation site or other sites like it. However, the 47% of individuals who submitted using this "user-rights" language (or 70% including the form letters) reflected a trend in sentiment that was also reflected in the May 2004 Supreme Court decision: that users, as well as creators, have "rights" under copyright.

Michael Geist, again in his *Toronto Star* article, noted another trend that was also reflected in the 2004 Supreme Court decision:

Balance as the central goal of copyright is likely to cause a significant reinterpretation of Canadian copyright law. As the court demonstrated in this case, taking users' rights seriously requires a careful examination of the effects of any copyright test on both users and creators. Moreover, the need for balance will affect not only the current version of Canada's *Copyright Act* but also any subsequent amendments.

As Canada considers copyright reform similar to that found in the United States, those reforms will be interpreted and applied by Canadian courts with the overarching goal of maintaining an appropriate copyright balance.

Fourth, and perhaps most important, this case signals a societal shift in views on copyright.¹¹⁴

This trend towards an emphasis on the importance of balance is reflected in the public consultation. 43% of individuals' submissions¹¹⁵ and 47% of organizations' submissions refer to a "balance" in copyright between the interests of users and the

¹¹⁴ Michael Geist, "Low-Tech Case Has High-Tech Impact," *Toronto Star online*, 22 March 2004.

¹¹⁵ Not including submissions based on the Electronic Frontier Foundation form letter. The form letter also suggests a concept of balance in the statement: "the extreme intellectual property provisions of the Consultation Paper on Digital Copyright Issues...give far too much power to publishers, at the expense of individuals' rights." Electronic Frontier Foundation, *Newsletter*.

interests of copyright holders or creators. These references to “balance” are also consistent with an Anglo-American interpretation of copyright.

4.2.3 Content and American Influence

If, as the timing of the submissions just after the postings on slashdot and the Electronic Frontier Foundation Web site might indicate, these two Internet forums were the impetus for many of the submissions to the consultation by individuals, it may explain the similarity in the content of the submissions from individuals. Overall, the main message in submissions from individuals was “Do not implement a law like the United States’ *Digital Millennium Copyright Act* in Canada.” Approximately 73% of individuals (or 85% including form letters) included this message or one close to it. While only 33% of submissions from organizations referred to the United States’ copyright act, 90% (or 94% including form letters) of submissions from individuals referred to it. Virtually no submissions from individuals referred to it favourably. How did individuals become so familiar with the United States’ copyright act that it was their main source of reference? One might guess that they were informed about issues arising from that act on the Internet, on slashdot, the EFF Web site, and sites like them.

It was remarkable how elements of American copyright law and American current events featured so prominently in the submissions from individuals. Not only did almost all of the submissions from individuals mention the *Digital Millennium Copyright Act*; many mentioned copyright concepts from American law such as free speech, fair use (“fair use” is an element of American copyright that does not appear in Canadian law; “fair dealing” is the term used in Canada, a concept significantly different from “fair

use”¹¹⁶); and 30% (or 60% including the form letter) mentioned the Dmitri Sklyarov case. Most of those that did not mention Dmitri Sklyarov by name still mentioned the Dmitri Sklyarov issue: the legal protection of technological protection measures. Individuals saw Canada as a potential follower of the United States, as being in clear danger of following the same copyright path as the United States. Many individuals applied concepts from American copyright law (such as “fair use”) to themselves and to the Canadian situation. This may be because they were getting information about copyright from American Internet sites and forums.

5. Problems of Representation

Canadian organizing that took place amongst individuals was centred on the goal of keeping American-style copyright law out of Canada. The email list that formed as a part of this organizing displays this fact in its title: “Canada DMCA [*Digital Millennium Copyright Act*] Opponents forum”. This American-centred response presented a problem for the departments:

The references to what was going on in the United States primarily, like Dmitri Sklyarov who was arrested on criminal charges under the [*Digital Millennium Copyright Act*] related to technological protection measures, and then the reference to the U.S. international reputation and the credibility of researchers and academics, and then talking about ... protecting fair use rights and freedom of expression – these all seem to relate to the current situation in the States, using the terminology and concepts from U.S. law and relating to current events in the States – so it wasn’t even addressing our paper directly ... so it’s not helpful if it doesn’t engage with the issues as we present them for our domestic situation.¹¹⁷

¹¹⁶ “The American legislation refers to ‘fair use of a copyright work, for purposes such as criticism, comment, news reporting, teaching, scholarship or research’. The exceptions in the Canadian Act are generally more narrowly drafted and exhaustively listed. They refer to fair dealing for the specifically listed purpose. In addition, sections 29.1 and 29.2 contain specific requirements to mention source and author.” McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 548.

¹¹⁷ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

This lack of engagement, especially in the form letter, with the specifically Canadian circumstances and the issues laid out in the discussion paper made it difficult for the departments to include individuals' responses in the statistics they compiled about the submissions. Loris Mirella commented:

The people who didn't change the form letter – we felt like they couldn't be included in that kind of statistic because they didn't really reflect on – since they didn't engage with the issue – we couldn't say exactly how they felt on it. So it wouldn't be fair to that kind of computation to include them in that area because they didn't actually say what they felt – so we didn't want to – it wasn't our place to interpret what they said.¹¹⁸

Those who did change the form letter, by adding a paragraph or by writing a submission in their own words based on it were included in the statistics where possible.¹¹⁹

This belief that individuals “didn't actually say what they felt” – that individuals were not truly representing *themselves* in their responses – is important. It raises the question: whom are the letters based on the Electronic Frontier Foundation form letter actually from? Do they really represent individuals, or do they represent the Foundation? Are they from individuals, or are they really from an organization? How thoroughly did individual contributors really agree with what was contained in the letters? How much do the letters represent their own interests? How many of the individuals who wrote in had a personal involvement in the manufacture, dissemination and use of any mechanism capable of circumventing copy-protection technologies intended to safeguard digital material? How many of them were simply advocating on behalf of others, known or

¹¹⁸ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

¹¹⁹ Department of Industry Canada and Department of Canadian Heritage, *Overview of Submissions on the Consultation Paper on Digital Copyright Issues*, 3.

unknown to the submitter personally, who did have such an involvement? We do not know. 34% of individuals' submissions clearly identify themselves as being involved in the computing field,¹²⁰ but many of the individuals who submitted do not identify the source of their personal interest in the issue.

What were the individuals' personal interests? Were they represented? They may all have been involved in the computing field in some capacity. Or, they may simply have been, for the most part, uninvolved personally in computing but interested in copyright issues because of the coverage of the Napster case, for example. If that is the case, the Internet-based leadership failed these Napster-interested individuals. Its focus on technological protection measures to the exclusion of the issues of rights management information and the making available right, two of the other issues raised by the consultation document, meant that a number of issues that would affect individuals at home were not discussed.

The problem of who exactly is being represented does not arise in the submissions from organizations; organizations' cause for interest in the issues are generally explicitly stated or clearly identifiable, their membership being specified in the name of the organization or in the organization's mandate, which was often included in their submission. Organizations were concerned with the ways that the issues would affect their own membership; next to none mentioned Dmitri Sklyarov.

6. Expertise

This brings me to the issue of how individuals go about making a submission to a public consultation and the question of expertise. Whereas organizations may have in-house expertise or the resources to hire expert consultants in order to make their

¹²⁰ Ibid., 2.

representation, individuals use the resources immediately available to them. This may be the news, Web sites, discussion forums, or form letters. As Jessica Litman notes many times in her book, *Digital Copyright*, copyright is a complex affair that is not easily comprehensible by the average individual. Should “the general public” be invited to participate in discussions of copyright that they are not adequately prepared to participate in? Should the experts, as Walter Lippmann suggests, be left to deal with the complexity of copyright law? Lippmann believed that government was best administered by those directly involved in particular affairs. In this case, “the public”, being directly involved in copyright insofar as copyright applies to their everyday actions on the Internet, has a proper role to play in public consultation. Individual members of “the public” should, in accordance with Lippmann, represent their own experience to the government.

In the past, the case may have been different. The individual at home was not placed as a subject of copyright law; he copied freely, whether or not it was legal. Individuals at home were not generally subject to prosecution under copyright law and were able to view their own actions under private moral codes without a great deal of concern about the law. It was logical that individuals at home would not see themselves as important participants in copyright reform, and it was logical that the departments would not see individuals at home as formal participants who should be actively framed as stakeholders in consultations. References to “general public” or “the public interest” in the past could be used to promote various goals: copyright exceptions for libraries and archives, or in efforts to promote industry competition and the availability cheap books through copyright. Because of the real potential of liability and prosecution under copyright law for private actions, such as downloading or activity on peer-to-peer

networks, individuals at home today have a more direct interest in copyright, an interest that cannot be channelled by libraries or other traditional copyright stakeholders.

Copyright's "public", its stakeholder groups, have changed.

7. The Importance of Organization

The 'real-life' story of Dmitri Sklyarov, a computer scientist, inspired many individuals in their submissions, but the "real-life" story of individuals themselves – individuals at home, not computer scientists – was somehow partially overlooked. Perhaps that is because the "real-life" stories of individuals did not make the news until a 12-year old girl was sued for copyright infringement in 2003.¹²¹ An organization is needed to help individuals represent their own new interests under copyright as much as an organization is needed to help represent academics and open-source programmers. There are two possible solutions to this problem of representation: one rests with organizing publics, and one with the government.

Organizations, more than individuals, have the capability and resources to represent interests effectively. The existence of an organization means that a certain level of commitment and resources exists to support a particular cause. Individuals may not realize that they have a day-to-day engagement with copyright issues; they may not be entirely aware that they have a potential liability before copyright. The outcome of copyright reform may affect some of their day-to-day actions in ways that might concern them. The engagement with these issues required to make an adequate representation to

¹²¹ "This is what a shocked Brianna LaHara, 12, of Manhattan learned when she was sued by the Recording Industry Association of America (RIAA). She and 260 others, many of them teenagers, faced fines of \$750 to \$150,000 (U.S.) per song.

'I got really scared. My stomach is all turning,' Brianna told the *New York Post*. "I thought it was okay to download music because my mom paid a service fee for it." Margo Varadi, "Is Brianna a criminal?" *Toronto Star*, 18 September 2003, P07.

a public consultation can take its impetus from organizing groups, just as organizing groups respond to the engagement of individuals with these issues. Individuals may agree with a form letter, but the issue of what their own interests are is more difficult to grasp without an organization to support them. Organizations representing a public of peer-to-peer file-sharers are only now beginning to form. The Canadian Internet Policy and Public Interest Clinic¹²² at the University of Ottawa was formed in the fall of 2003,¹²³ and the Canadian File-sharing Legal Information Network was created in February 2004 by law students at the University of Ottawa.¹²⁴

8. The Role of Government in Framing “The Public”

Having concluded that “the public” should indeed represent themselves in public consultations about copyright, and especially in light of the trend towards the view that users or “the public” generally have “rights” under copyright, it is clear that the “general public”, meaning “most Canadians” or even a more narrow “public” of “Internet users” or “computer users” must now be identified and included explicitly as a stakeholder under copyright. While organizations will help to define and represent this particular “public” to the government, there are also ways that the government can work to invite and improve the participation of this larger “public”, whether it is represented by organizations or by individuals. The departments of Industry and Heritage have already passed over one major hurdle in that process in hosting the 2001 public consultation on the Internet. It was one of the first Web-based consultations held by the Department of Heritage, whose Copyright Policy Branch faced a rather steep learning curve in the process and drew upon the past experiences of the Arts Policy Branch and the Canadian

¹²² <http://www.canfli.org/> Last checked 16 May 2004.

¹²³ <http://www.cippic.ca/about-us> Last checked 16 May 2004.

¹²⁴ Tyler Hamilton, “Law Students Rally to Aid Music ‘Pirates’,” *Toronto Star*, 14 February 2004.

Radio-Telecommunication Commission, who had hosted similar consultations before.¹²⁵

Because it was accessible on the Internet, it was one of the most open consultations ever held by that department.

The departments clearly believe it is important that the “general public” (all Canadians) have input to legislative processes. They see this as a “service” that it is necessary to provide. Loris Mirella spoke of Web-based public consultation as a “service”:

There’s a lot of stuff about e-government and providing services on the Internet and this is an extension of that kind of thinking where, in the same way that the government can deliver services through the Internet – well, this is a kind of service, I mean, participation in the legislative process is part of getting people to participate generally, and that’s a resource that makes it really easy to do that.¹²⁶

If public consultation is a service, the government needs to adapt to its changing customer base. As well, its customers need to learn to use the service.

8.1 The Role of Government in Framing “The Public” Through Advertising and the Discussion Paper

For the 2001 consultation, the departments used the methods they usually used to advertise the consultation. The ministers announced the consultation, and the departments issued a press release,¹²⁷ placed a notice on their Web sites and in the *Canada Gazette*, and initiated a mail-out to their stakeholder list:

we have a stakeholder list [that] usually includes rights holders and it includes other stakeholders that have participated in previous legislative processes – so it’s all the groups you could think of – all the organizations and then a bunch of individuals, if they’re academics who

¹²⁵ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

¹²⁶ Ibid.

¹²⁷ Department of Industry Canada and Department of Canadian Heritage, “Government to Modernize Copyright Legislation,” *Canada NewsWire*, 22 June, 2001.

are involved in copyright (because we have a lot of interchanges with academics, going to conferences and participate in different kinds of fora), then there's different kinds of lawyers connected to the copyright world, you know, the ones involved in representing clients, or just write articles for legal journals as well....¹²⁸

The advertising strategy used by the departments – the fact that they stuck to the traditional strategy that they normally used – indicates that this public consultation was seen as being largely similar to past consultations, that the stakeholder groups were seen as being similar to past stakeholder groups, that the methods of communicating their message used in the past continued to be appropriate.

Copyright's "public" had changed. It is clear that the departments did not see, for example, visitors to slashdot or the Electronic Frontier Foundation's Web sites as formal stakeholders who should be specifically notified of the consultation by the departments as other stakeholders on the mailing list were. The departments, although they were aware of the public interest in the issues, neither expected nor were completely prepared for the response they received from individual users of those sites. It is equally clear that certain users of those sites and other Internet forums did see themselves as stakeholders.

I have discussed how the alerts to the public consultation were placed in various Internet forums by individuals, and how the information (including the form letter) provided on those forums may have influenced the responses received to the consultation in ways that made it difficult for the departments to make use of the responses. In light of this, there are two ways of looking at the appropriateness of the traditional advertising strategy for the 2001 consultation. One can either say that the strategy was appropriate and reasonable, or that it should have been conducted in a way that would have elicited

¹²⁸ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

more useful responses from individuals and organizations that were not part of the “mailing list” stakeholder groups. For example, if the departments themselves had placed notices on various selected Internet forums, those postings could have used language designed to elicit a more useful response from users of those sites. Such postings might have elicited more balanced responses, responses that addressed more of the consultation paper’s four stated issues, responses that were less “Americanized”, and responses from a greater variety of groups rather than responses centred in the free-software movement.

The same is true of the consultation paper itself. One might ask whether it was written in language that would attract or seem intended for reading by individuals. Did it frame individuals, such as users of slashdot, as its audience? Was it written in language that invited users of Napster or consumers of compact discs or independent musicians to be its audience? If a response was desired from non-organized individuals who nevertheless saw themselves as stakeholders, there would have been ways to explain the issues for that audience, who would not likely have been able or willing to read and understand a 40-page consultation paper outlining several relatively complex issues in somewhat technical language. One simple thing that the departments could have provided is an executive summary of the discussion paper, written in language that individuals might understand and have time to read.

It might also have been possible to avoid some of the confusion around who was represented by individuals who wrote in using a form letter. The departments might have requested that submitters voluntarily identify themselves, their occupation or their reasons for being personally interested in the reform processes, and where they heard about the consultation. The departments could even have specifically requested that form

letters not be used. It would then have been possible for the departments to more clearly see, understand, and identify a non-organized or an organizing new stakeholder group.

However, it also may be that the advertising and consulting strategy used by the departments was entirely reasonable and appropriate. It could be argued that, despite the potential usefulness, it is not the role of the departments to “preen” submissions by selecting and advertising the submissions on various other organizations’ Web sites. It is also questionable whether the consultation would have remained useful if the consultation paper had been simplified for readability by individuals. The fact of the difficulties with some of the submissions received may simply be an unavoidable reality of dealing with changing stakeholder groups. I suspect that the departments primarily expected responses from experts and organizations. Perhaps, then, individuals must organize; organizations must form and evolve to represent various interests; and government must come to recognize new organizations as stakeholders and must develop its communications networks with those organizations. It is these organizations, perhaps, who must adapt to the consultation practices of the government, in order to be able to participate effectively. Loris Mirella notes that organizations are best tuned to be able to participate in consultations:

Anyone can make a submission. Sometimes it’s hard...they’re not well advertised. For example, CRTC public notices are published in the newspaper – and you know that they might decide licences for this or that broadcaster or cable company, so if you read the newspaper you might just flip over it, but the people in the industries, people with more direct interest, they’re going to be aware and they’re going to participate.¹²⁹

Organizations can develop the awareness, resources, and expertise needed to participate effectively in a consultation on complex issues. It may be as difficult for

¹²⁹ Ibid.

individuals to fully participate in a public consultation as it would be for government to identify all possible stakeholders, especially unorganized stakeholders. Indeed, the government may only have the resources to communicate with identified stakeholders. Unorganized individuals may not be able to participate as fully or as usefully as organizations might. Loris Mirella is aware of this dilemma:

“The public” would be defined [by the departments] in terms of the stakeholders who were organized to be interested. So, for example, in copyright the stakeholders are always the rights holder groups, and then the institutional user groups like libraries and archives and schools, and then sometimes there is a consumer angle, although it’s not prevalent and there’s not really an organization that addresses that, so that would be done more at an individual level. So, it’s hard for people that might not have the resources to follow and to participate more fully.¹³⁰

9. Conclusion

The submissions from individuals to the copyright reform consultation, useful and less useful, reflect a process of organization, a “public” in a state of transition to becoming an actively consulted stakeholder. In this light, the consultation allowed for effective participation from organized or semi-organized groups, but not really from “all Canadians.” If we take this perspective then we must acknowledge that “the public” in the copyright balance rhetoric is not the “general public” in the sense of being “all Canadians” or “most Canadians” or “individual Canadians”. Instead, it is a “public” composed of various stakeholder groups (some of which may actually represent a large number of Canadians) in various states of organization who must identify themselves as stakeholders. In this case “the public”, framed and made visible by the departments and the consultation process, consists of organizations, of specific stakeholders, and not of “individual Canadians” or “all Canadians”.

¹³⁰ Ibid.

Under this view, because a certain degree of proficiency is required to adequately respond to a “public” consultation and for proper representation to the departments, organizations should have the responsibility to be familiar with the issues, the stakes, and the law. It should be, under this view, organizations which are addressed by public consultation. Organizations, because they presumably have the leadership, the resources, and the expertise to represent stakeholders, may be best able to make that representation on the condition that they be directly engaged in the issues at hand. Walter Lippmann might approve of a situation like that.

However, there is also something to be said (and I think Lippmann might agree) for the opposing view, that inviting participation from non-organized individuals remains necessary in cases like this, where individuals’ everyday actions can be affected. Participation in the public consultation is not simply a matter of representation. It is also a process that contributes to the assembly of communication networks, the construction of organizations and the composition of arguments. As well, some stakeholders to copyright – individuals at home being a prime example – are not already organized (as a result, for example, of being part of a common institution, corporation, or industry).

Consultations must be open to these unorganized or organizing groups as well.

Although the departments experienced difficulties with some of the submissions from individuals, especially those based on the form letter, overall they found many of the submissions to be quite useful:

We respected the submissions especially since most of the individuals who wrote were technologically savvy – and that was then a group that can stand up for itself as far as being able to contribute useful information... because they understand how the technology works.¹³¹

¹³¹ Ibid.

Not only were the submissions useful to the departments; the process of consultation also contributed to the construction of new organizations and networks of stakeholder groups:

Now, these individuals have met each other and they've organized and they can see they have some common cause – they've gone forward and they've set up these discussion forums... the University of Ottawa has a forum like that through [the Canadian Internet Policy and Public Interest Clinic]¹³² and lexinformatica¹³³ ...which is inspired by some of the places they have in the States like a Stanford or Berkman Centre at Harvard¹³⁴ – they have sites that are interesting people who are technologically savvy [and] who are also interested in intellectual property. So that combination is making new links between law students and technologically savvy people. For example [there is a new] Web site¹³⁵ dedicated to people being sued by [the Canadian Recording Industry Association] – that's [run by] the law students but it's got links then with the technologically savvy people as well. So there's a kind of organization being created as a result of this ability to communicate and identify each other and see each other – they're all visible to each other now.

...They would contact each other because they would read each others' submissions...some of them of course have their own Web sites, so they became focal points for their own discussion and saying, "hey, I wrote this here – check this out," – and so it went – and it's still going on.¹³⁶

The openness of the departments to receiving representations from a previously uninvolved individuals or groups meant that many more interests were represented than otherwise would have been. Groups that were still in the process of forming were able to participate. There may have been certain problems with the quality of that representation. Whether the solution to that problem of quality should be solved by actions taken by the departments in their own communications to elicit better-quality responses from unorganized individuals or whether it is a problem that should be solved

¹³² <http://www.cippic.ca/>

¹³³ <http://www.lexinformatica.com/>

¹³⁴ <http://cyber.law.harvard.edu/home/>

¹³⁵ <http://www.canfli.org>

¹³⁶ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

through the organizing that is done by the individuals themselves is something to consider.

The increased interest from unorganized individuals, and the linguistic focus on “users’ rights” and on “balance” indicate a change in the ways that these individuals perceive copyright to apply to them. More individuals, as a result of application of copyright to private use, are now perceived as subjects of copyright law in their everyday actions. This subjectivity, this explicit framing of the individual as being subject to copyright law as an infringer, has been a way of thinking that has grown stronger since the time of the consultations. It has led, not only to lawsuits against individuals by the music industry, but also to more individuals positioning themselves as a subject of copyright law and also a stakeholder in it, as users whose interests must be balanced into the equation, as user-subjects with rights. The framing of unorganized private individuals in copyright law has roused some individuals to demand rights within that frame. Individuals tended to place themselves in their submissions primarily as consumers and copyright infringers.

Government, organizations, and individuals, all have a role to play in ensuring that those framed by copyright are adequately represented at the table of legislative copyright discourse. This discourse can only be clarified by an acknowledgment that copyright’s “public” cannot always be seen as the “general public”, “all Canadians”, or “most Canadians”. More specific identification of stakeholders, and of groups’ and individuals’ interests, is necessary as publics and stakeholders are formed and change.

Chapter Four: Make Yourself at Home

1. Copyright-Infringers, Consumers, Users, and Creators

In this chapter I will discuss in more detail the four issues outlined in the consultation document, *The Consultation Paper on Digital Copyright Issues*. The four consultation issues were: making available rights, technological protection measures, legal protection of rights management information, and liability of network intermediaries. I will divide my discussion of each consultation issue into four categories. These categories represent four ways that individuals are placed, through copyright, as subjects. Individuals, under copyright, are copyright-infringers, consumers, users, and creators.¹³⁷ These are the four main roles for individuals at home under copyright. Although individuals at home are primarily framed as consumers and copyright-infringers, I want to show that the four consultation issues had many different implications for individuals at home.

Copyright is an especially threatening issue to individuals at home as copyright-infringers in a time when new, potentially illegal, practices become common through new technologies – practices where the applicability of copyright is uncertain. Copyright also affects individuals as consumers; it plays a role in the prices paid for products and services, and it can affect the quality or type of goods or services offered to consumers. It affects individuals as users, encouraging or discouraging various uses of copyrighted works by defining certain types of uses as copyright infringement, other types of uses as requiring remuneration through the payment of royalties or levies, and still other types of

¹³⁷ *Consumer issues* include those issues that affect the *consumption* of works – works that are offered commercially for consumption – *consumption* being a set of offered, accepted, or advertised uses. *User issues* include a broader set of issues which affect the *use* of works – works that may be available commercially or non-commercially, and that may be *used* – *use* being the set of offered, accepted, or advertised uses and *also* any uses beyond those that are offered, accepted, or advertised.

use as “excepted”, not requiring remuneration. Finally, it affects individuals’ rights as creators because it applies automatically to all applicable works, granting specific rights to creators in their works, including works created by individuals at home. These general concerns all come to play in the four issues raised by the consultation paper.

We might have expected responses from individuals in the consultation to address issues that affect them as copyright-infringers, consumers, users, and creators. The fact that few of these concerns were addressed in the submissions causes a question to be raised with regard to individuals’ ability to represent the issues that affect their everyday practices. It may be that a large number of the individuals who submitted were actually affiliated with the open-source software movement, for whom the main issue represented by individuals, the issue of legal protection of technological protection measures, may have been the most important issue. In that case, the submissions should not be taken as submissions representing “the general public” or individuals at home. It may also be that the individuals who submitted saw themselves, at the time of the consultation, primarily as subject to copyright as potential infringers of the legal protection technological protection measures, and therefore did not consider some of the other ways in which they could be affected. As well, it may be that individuals were placed primarily as copyright infringers and consumers by the consultation document, so that the aspects of the issues that would affect individuals as creators or users were not highlighted in individuals’ minds. It may also be that the issues presented in the consultation paper were not issues that individuals cared enough about to discuss.

2. Making Available Rights

According to the consultation paper, rights holders had been requesting a right that would allow them to authorize the appearance of copyrighted works on the Internet. This right is referred to as a *making available right* – it gives the copyright owner the exclusive right to make a work available to the public. The paper also states that the World Intellectual Property Organization (WIPO)'s *WIPO Copyright Treaty*, an international copyright treaty that has been signed by Canada but not ratified, requires the provision of a making available right to authors. The consultation paper argues that, according to a Copyright Board decision¹³⁸ and various experts, the existing right under Canada's *Copyright Act* to authorize "communication to the public via telecommunication" plays the same role that a making available right would.¹³⁹ Therefore, the consultation paper argues, there may be no requirement to modify the *Copyright Act* to assign a specific making available right to copyright holders; existing rights may already serve the purpose. However, the *WIPO Performances and Phonograms Treaty*, also signed but not ratified by Canada, also requires a making available right for performers and producers of phonograms. Because the *Copyright Act* does not provide such a right to performers and sound recording makers (the existing rights apply only to copyright holders), the consultation paper discusses the option of extending a making available right to performers and sound recording makers.

¹³⁸ *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22)*

¹³⁹ The paper notes that, according to the Copyright Board's Tariff 22 decision (*SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22)*), two existing authorization rights: the right to authorize the communication of the work to the public by telecommunication (*Copyright Act*, 3.(1) (f)) and the right to authorize reproduction of a work (*Copyright Act*, 3. (1)) apply to copyright holders and have been held to apply to on-demand communication (a situation where the public is accessing the work from a place and at a time individually chosen by them) via the Internet. The paper further argues that these two rights would fulfill the requirements of the *World Intellectual Property Organization Copyright Treaty*, Article 8.

Certain actions, such as copying a work for use in news reporting or for research purposes, currently fall under copyright “exceptions”, meaning that such actions are not violations of copyright law.¹⁴⁰ Although the paper does not devote an extended discussion to the issue of exceptions to the making available right, it poses the question, “In which respects might such a right require limitations or be subject to exceptions?”¹⁴¹

2.1 Making Available Rights: A Liability Issue

Individuals at home commonly make works available on the Internet. They may forward an email they receive to a Web-archived discussion forum, making that email available publicly. This would constitute an infringement of copyright based on the author’s making available right, if it were not already an infringement of existing rights. Individuals may post graphics or photos that they find on another Web site on their personal Web site. They may have files in a shared folder on their computer, making those files available on peer-to-peer networks. Insofar as this is not already illegal (much as the discussion paper states that it is, there are those who argue that it is not¹⁴²), a making available right would make these actions illegal, posing increased potential liability on individuals at home who, for example, use peer-to-peer networks to make music available to other network users. The issue of peer-to-peer networks is not mentioned in the discussion paper, despite the media coverage surrounding the issue at

¹⁴⁰ See the discussion of the making available right in: Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 15-20.

¹⁴¹ Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 20.

¹⁴² “Simply ‘making available’ copyrighted music by placing digital song files on a shared computer folder does not constitute illegal distribution, a public interest group argued before a federal judge yesterday.” Tyler Hamilton, “Lawyer Argues Lack of Evidence in Music Piracy Case; Says Internet Providers Shouldn’t Disclose Users’ Identities Recording Industry Has Tracked Down 29 Song Swappers,” 16 March 2004, *Toronto Star*, D03.

the time.¹⁴³ These potential liabilities are also not mentioned in submissions from individuals; only 7% (not including form letters) mention the making available issue at all.

2.2 Making Available Rights: A Consumer Issue

If we set aside the fact that current legislation has already been interpreted to mean that copyright holders have the exclusive right to make a work available to the public, if we assume for a moment that current legislation is still open to interpretation in this regard, or if we note that currently, some individuals still *feel* that they have or should have the right to make a consumer product, such as a recording of a popular song, available on a peer-to-peer network for example, then we can proceed to look at the making available issue from a consumer standpoint. The consumer might draw an analogy with previous non-digital types of work, saying that if they are able to make a CD that they owned available to whomever they wished to, they should also be able to make a digital music file available in similar ways. In this sense, the making available right affects consumers because it might take away their ability to do something with a consumer product that they currently are able to do. Of course, if it can be argued that consumers do not currently have this right over digital files, then the making available right would be moot in this case.

This, surprisingly, is an issue that is virtually ignored by individuals in their submissions in spite of the issue's importance to those who share or "make available"

¹⁴³ See Chapter Three, section one.

music on the Internet. The importance of the making available issue would later become apparent in the Canadian Recording Industry's lawsuits against file-sharers in Canada.¹⁴⁴

2.3 Making Available Rights: A Consumer Issue and a Creator Issue

It is possible that, were an exclusive making available right in existence, more works would be made available to consumers, either by traditional rights holders or by everyday individuals. It may be that individuals at home hesitate to post their personal photographs online, for example, for fear that other people will take them and put them up on other Web sites. Thus, the making available right could also benefit individuals at home, in much the same way that it benefits other copyright holders, by giving them greater control over their own works. Individuals, in their submissions to the public consultation, generally did not mention these issues.

3. Legal Protection of Technological Protection Measures (TPMs)

The consultation paper states that, again in response to the opportunities and threats posed by information communication technologies to copyright holders, some rights holders advocated the legal protection of copyright protection technologies (the legal protection of "technological protection measures" or TPMs). That is, they proposed that sanctions be imposed on people who circumvent technologies designed to stop people from making copies of a work or using the work in unauthorized ways. The World Intellectual Property Organization *Copyright Treaty* and the World Intellectual Property Organization *Performances and Phonograms Treaty* broadly require "adequate

¹⁴⁴ "Von Finckenstein said that downloading a song or making files available in the shared directories does not constitute copyright infringement under the current Canadian law." Angela Pacienza, "Cdn Music Industry Loses Federal Court Bid to Thwart Music File Swapping," *Canadian Press Newswire*, 31 March 2004.

legal protection”¹⁴⁵ against circumvention but, as the consultation paper notes, this requirement can be interpreted and implemented by national legislation in various ways and degrees. These sanctions could also be imposed on those who engage in the manufacture and trade of devices used for circumvention.¹⁴⁶

3.1 Legal Protection of Technological Protection Measures: A User Issue and a Consumer Issue

The proposal of the legal protection of technological protection measures raises several issues that the consultation paper identifies. It notes that such technologies can be used to block all use of a work, even uses specifically permitted under copyright, thus potentially altering the “balance” between rights holders and users.¹⁴⁷ The private copying exception would be one salient example. The consultation paper notes that “the *Copyright Act* includes a private copying regime that could be significantly affected by restrictions that impede the ability to make copies of sound recordings for personal use.”¹⁴⁸ It also notes that TPMs could block access to a work, which, under copyright, had entered the public domain.¹⁴⁹ The consultation paper asks, “to conserve the current contours of our copyright law, should rights holders be under a positive obligation to provide access to a person whose use falls within an exception to or limitation on copyright set out in the Act?”

Legal protection of TPMs, implemented without corresponding exceptions, could hinder access to both copyrighted works and works in the public domain. It would create

¹⁴⁵ *World Intellectual Property Organization Copyright Treaty*, Article 11; *World Intellectual Property Organization Performances and Phonograms Treaty*, Article 18.

¹⁴⁶ See the discussion of technological protection measures in: Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 20-25.

¹⁴⁷ Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 22.

¹⁴⁸ *Ibid.*, 25.

¹⁴⁹ *Ibid.*, 24.

a second layer of protection for works, limiting individuals' potential uses of a work not only to what is permitted under copyright law but also to what is permitted by privately administered TPMs, TPMs that may or may not provide exceptions or access provisioning in correspondence with those provided under copyright.

As the consultation paper notes, legislative provisions protecting the ability of users to access works protected by TPMs in correspondence with exceptions provided in the *Act* could "result in a new right of access".¹⁵⁰ Because TPMs can be used to block or allow access to a work, legal protection of TPMs under copyright would have strong implications for *access* to works, an area that the *Copyright Act* does not currently enter. The consultation paper suggests that access issues might "be more properly within the purview of contract law".¹⁵¹ A number of submissions to the public consultation address these access issues by saying that circumvention of TPMs should only be illegal if that circumvention is done in conjunction with a use that would violate the provisions of the *Copyright Act*.

If a new right of access were added to the *Copyright Act* as a measure to provide balance to the legal protection of TPMs, the outcome might, in fact, be increased rights for individuals who would gain the right to access, under certain predefined circumstances, works that are today protected from access by the public. It is likely that the circumstances under which a protected work could be accessed, and the type of works to which this right of access would apply, would have to be very strictly defined. In any case, the consultation paper recommends against the creation of a new right of access

¹⁵⁰ Ibid., 24.

¹⁵¹ Ibid., 24.

within copyright.¹⁵² Although the consultation paper makes note of this, the submissions from individuals do not take up the specific issue of an access right. They do, however, raise concerns about computer scientists' ability to circumvent TPMs for the purposes of research and reverse engineering. They also mention concerns about access to works in general – whether their ability to back up and access a work for which they had paid could be limited by TPMs, and whether TPMs could restrict access to works that are not covered by copyright.

3.2 Legal Protection of Technological Protection Measures: A Liability Issue

Legal protection of TPMs would impose increased liability on individuals who, in their everyday practices, circumvent technological protection measures. For example, individuals might use special software to copy music CDs that have copyright protection mechanisms built in. The 83% of individuals who addressed the issue of TPMs generally expressed the opinion that circumvention of TPMs should not be illegal, especially if the circumvention was performed in order to use a work in a way permitted by the *Copyright Act*.

3.3 Legal Protection of Technological Protection Measures: A Consumer Issue and a Creator Issue

It is also possible that, were TPMs legally protected, more works would be made available to the public, for sale or under a contractual agreement. This point is highlighted in the consultation paper. Moreover, more individuals might be encouraged to make their works available to the public if TPMs were available to them. It is virtually not mentioned, either as a consumer issue or as a creator issue, in the submissions from individuals.

¹⁵² Ibid., 24.

4. Legal Protection of Rights Management Information (RMI)

The consultation paper notes that rights management information (RMI), identifying information about a work such as a work's title, author, or copyright owner, or an identifying code, could be embedded in a digital work to assist a copyright owner in asserting their rights in a work, in tracking its movement, or in facilitation of online licensing.¹⁵³ It could be used in conjunction with TPMs where particular RMI would be required to enable authorized use. The paper notes that this embedded information would only be useful if it were kept up-to-date, and that the tracking of a work's movement could have implications for privacy.

The legal protection of rights management information against unauthorized change or removal is required by the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*.¹⁵⁴ The consultation paper notes that the departments are of the opinion that RMI should be legally protected and requests comment on how exactly to define RMI.¹⁵⁵

4.1 Legal Protection of Rights Management Information: A User Issue and a Liability Issue

The consultation paper notes that any terms and conditions of use that might be coded in RMI may not have legal validity in Canada. It questions whether RMI that is incorrect or invalid in Canada should be legally protected. Insofar as RMI that is not legally valid in Canada could inhibit the ability to legally use a work (for the purposes of news reporting, for example), an issue is raised: although RMI that is not legally valid

¹⁵³ Ibid., 25.

¹⁵⁴ *World Intellectual Property Organization Copyright Treaty*, Article 12; *World Intellectual Property Organization Performances and Phonograms Treaty*, Article 19.

¹⁵⁵ See the discussion of rights management information in: Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 25-30.

may not come to be legally protected, said RMI may still misinform users and may either cause the user to be at increased risk of infringing copyright based on misinformation or may inhibit a legal use by supplying false information to the user or to the technology that allows the user to use the work based on the information provided in the RMI. The consultation paper does not suggest any sanctions against those providing misleading terms and conditions of use in RMI. Individuals generally did not mention these concerns about RMI in their submissions. In fact, only 13% (not including form letters, which didn't mention it either) mentioned this issue at all.

4.2 Legal Protection of Rights Management Information: A Creator Issue

An additional issue pertains to the logistics of cataloguing and inserting RMI in works. Setting aside the issue of how to keep RMI accurate and up-to-date, the RMI proposal implies the existence or development of a system for inserting RMI into digital works and using RMI either to track or authorize the use or existence of works. This raises the question of access. Would such a system be equally available to and accessible for use by all authors, including casual and/or individual authors? Again, this is not a question that individuals addressed in their submissions.

4.3 Legal Protection of Rights Management Information: A Consumer Issue

The question of RMI implementation also raises a consumer issue: if RMI for a work owned as a copy or licensed to a consumer fell out-of-date or was inaccurate, could the use of the work by the individual be hindered? Would the consumer be required to update the RMI in order to continue using the work? Would the RMI system require or encourage the purchase of new products by individuals? Once more, individuals largely ignored these issues in their submissions.

4.4 Legal Protection of Rights Management Information: A Privacy Issue

The biggest issue affecting individuals with regard to RMI may be privacy. If we assume that the purpose of accurate RMI embedded in a product is to allow the work to be accurately identified in order that its use by a particular individual might be authorized, we implicitly assume that the individual in question must, in some form, be identified. This, of course, implies that the use of a particular work by a particular individual would be tracked and/or authorized either locally or over a network, in a way that could make the identity of the individual user available to various parties. These issues were generally not raised in the submissions from individuals.

5. Liability of Network Intermediaries

The consultation paper notes that the responsibilities of intermediaries, in particular Internet Service Providers (ISPs), under copyright may require clarification because the role of network intermediaries is not taken into account under the current legislation, although the legislation does exempt those who simply provide the means of telecommunication to others who might infringe copyright by communicating a work to the public.¹⁵⁶ It is not clear, however, whether ISPs simply provide the means of telecommunication, or whether they are liable under copyright law. Neither is it clear whether ISP functions actually entail the reproduction of a work, and if so, where the reproduction is made. To clarify this situation, the departments suggest a notice-and-take down regime whereby ISPs' liability would be limited with regard to copyright infringement and harm suffered on the condition that the ISP is in compliance with a requirement to block access to certain material upon receiving proper notice that the material was a potential copyright infringement. This limitation on liability would only

¹⁵⁶ *Copyright Act*, 2.1(1)(b).

apply to ISPs that represent themselves as ISPs to the world, and only to caching and hosting activities.¹⁵⁷

5.1 Liability of Network Intermediaries: A User Issue

The issue of ISP liability involves usage rights and freedom of expression because it could require an ISP to block access to a particular use or expression upon receipt of allegations that said use/expression was an infringement of the *Copyright Act*. It could leave the ISP with the duty of judging whether a particular use/expression was indeed an infringement – a heavy burden for ISPs and possibly a cause for concern for individuals expressing themselves through ISPs. Currently, the Canadian Association of Internet Providers (CAIP) blocks content only after legal action has been taken:

We have always taken the position that this commitment means CAIP members will remove content from web sites they host *when advised by the proper legal authorities, following proper judicial procedures*, that the material contravenes Canadian laws. This would include, for example, content that *is ruled by a court* to be in breach of the Criminal Code, to be libellous, or to be infringing someone's copyright.¹⁵⁸

This provides a measure of assurance to individuals that their ability to make use of a work and rights of expression will not be curtailed without due process of law. The process suggested by the consultation paper does not necessarily provide this same assurance; it does not require the authority of judicial proceedings or a court ruling. A few of the 7% of individuals (excluding form letters, which did not mention the ISP issue at all) who mentioned the ISP liability issue were concerned about privacy and the potential that their personal information might be made available to third parties by ISPs.

¹⁵⁷ See the discussion of ISP liability in: Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 30-38.

¹⁵⁸ Canadian Association of Internet Providers. *Response to the Consultation Paper on Digital Copyright Issues*, emphasis added.

5.2 Liability of Network Intermediaries: A Consumer Issue

A notice-and-take down regime could, as the consultation paper notes, remove any incentive for ISPs to take part in voluntary licensing regimes.¹⁵⁹ As such, it affects the likelihood of future business models and products offered by ISPs. For example, an ISP concerned about potential liability might contract a licence with copyright collectives, exempting itself from liability and also offering to its customers the ability to interact online with copyrighted works under a paid licence. On the other hand, as the consultation paper also notes, ISPs could pass on to its customers the costs of attempting to monitor its users, of processing infringement claims, or of legal fees and liability claims. As such, this issue affects individuals as consumers. The submissions from individuals generally mention neither concerns about potential service offerings from ISPs nor concerns about the price of services offered by ISPs.

5.3 Liability of Network Intermediaries: A Creator Issue

The consultation paper notes that notice and take down proceedings could be costly to individuals and organizations because they require the provision of notice to the ISP of the infringement. It notes, however, that this process is probably less expensive than the current alternative of court proceedings. The Canadian Association of Internet Providers currently operate a “notice and notice” regime, under an agreement with the Canadian Recording Industry Association, whereby, at the request of the Canadian Recording Industry Association, they notify clients of infringing content and request that it be removed. I assume that this process is similar to the proposed process in terms of what it would cost to individuals whose copyright was infringed. The expense of the

¹⁵⁹ A voluntary licensing regime would allow ISPs to pay a collective for content transmitted through its service in exchange for an exception from copyright liability.

process is especially important to individual creators because they usually do not have financial resources available to them that are comparable with the resources of a corporation. This concern about costs to individual creators is not taken up in the submissions from individuals. The Canadian Association of Internet Providers claims that at least one of its members found it to be effective 70-80% of the time.¹⁶⁰ This implies that a relatively effective process is already in place. This process is available officially to the Canadian Recording Industry Association and not to individuals. However, the Canadian Association of Internet Providers would likely respond in the same manner to an individual with a complaint of copyright infringement.¹⁶¹

6. Outline of Issues Not Presented by the Digital Copyright Paper

I have already noted that the consultation paper, in some ways – its length and language – was not designed to be used by individuals.¹⁶² In addition to this, there are a number of issues that have the potential to affect individuals at home that were not mentioned in the *Consultation Paper on Digital Copyright Issues*. Many of them are digital issues. The Blank Tape Levy¹⁶³ has come to apply to digital media and is a response in part to increased private copying by individuals on digital networks and media. Potential liability for transient copies is an issue, particularly because transient copies are often made during normal use of the Internet. Contractual overridability of copyright is especially important in online licensing agreements; long and complicated click-through agreements can ask an individual to surrender their copyrights in a work

¹⁶⁰ Canadian Association of Internet Providers. *Response to the Consultation Paper on Digital Copyright Issues*.

¹⁶¹ Tom Copeland, Chairman, Canadian Association of Internet Providers. Email correspondence, 23 March 2004.

¹⁶² Chapter 3, Section 8.1

¹⁶³ *Copyright Act*, Part VIII

that they have created, and might attempt to override traditional balances and exceptions in copyright. These are a few issues that might have been important to individuals.

However, for specific reasons, these were not the issues that the departments identified in the consultation paper. The departments' goal was not to consult on the issues that were most relevant to individuals. Rather, several issues were deemed pressing for other reasons; the departments identified three issues that had to be addressed if the World Intellectual Property Organization treaties were to be ratified (making available rights, the legal protection of technological protection measures, and the legal protection of rights management information), and a fourth issue (ISP liability) that was raised because other countries had addressed it in their legislation and because related issues were being addressed in other Canadian legislation.¹⁶⁴

7. The Consultation Paper's Publics

The consultation paper argues for the legitimacy of the changes it proposes in four ways. It refers to the interests of a public of rights holders, to the interests of "all Canadians", to the importance of businesses, and to the requirements of the World Intellectual Property Organization treaties. Thus, the consultation paper refers to three different publics and to international agreements to explain and justify its reasons for considering amendments to the *Copyright Act*.

It is interesting to note that the consultation paper refers many times to rights holders' requests for changes to the *Copyright Act*. It refers to rights holders' requests for a making available right,¹⁶⁵ for the legal protection of TPMs,¹⁶⁶ and for the legal

¹⁶⁴ Loris Mirella. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

¹⁶⁵ Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 15.

protection of RMI;¹⁶⁷ and it refers to Internet intermediaries' concerns about their liability.¹⁶⁸ According to the consultation paper, none of the initiatives outlined would seem to have resulted from the requests of users, consumers, or "the public". The departments demonstrate the need to make changes to the *Copyright Act* through reference to rights holders' specific requests. It is a reference to a "public" – a "public" made up primarily of businesses and rights holders. The paper, however, makes an assumption about rights holders: "Many rights holders wish to avail themselves of the potential benefits of digitizing their material and selling to the large markets now open to them via the Internet." This statement frames most rights holders – this particular "public" – as vendors rather than as individuals at home using the Internet creatively without the motive of gain. In fact, by 2003, 44% of Internet users were contributing content to the online environment.¹⁶⁹

The paper also refers to another "public" – a "public" of "Canadians". In its opening paragraphs, the paper refers to goals such as giving Canadians the ability to "communicate more easily with each other and with the world", the ability of creators to "share their works...with more Canadians", ensuring an Internet infrastructure from which Canadians can benefit, the availability of "diverse and accessible Canadian choices", and the ability to "tell the world about our country, our people and culture, our abilities and achievements, our history and hopes." Focusing on the "communication [and] cultural fabric of Canada", the paper situates its broad objectives in copyright

¹⁶⁶ Ibid., 20.

¹⁶⁷ Ibid., 26.

¹⁶⁸ Ibid., 12.

¹⁶⁹ Lenhart, Amanda, John Horrigan, and Deborah Fallows. *Content Creation Online*, 2.

reform as benefiting “Canadians”.¹⁷⁰ Some pages later, the paper raises a concern about a “chilling effect on legitimate uses of works” that unclear copyright law can have. It states that “stakeholders have informed us that a source of some infringement lies in misunderstandings or differences in opinion about the scope of certain rights and exceptions” and that “Our objective is to dispel confusion for all Canadians about the boundaries of legitimate uses of works on-line.”¹⁷¹ This particular paragraph places “all Canadians” as potential copyright infringers who misunderstand or are confused by copyright law.

The paper also refers to another group: businesses. In the paragraphs following the section outlining cultural and connectivity objectives, the consultation paper refers to business objectives: “the sale and dissemination of many different kinds of goods and services, including copyrighted works”, online advertising, online delivery, Canada’s multimedia sector, Canada’s software sector, Canada’s copyright industries, and 1999 Internet sales of \$4.2 billion.¹⁷² The paper also goes on to mention the role of the private sector in producing technologies to help protect and clear digital rights “in order to better foster recognition of and respect for copyright”.¹⁷³

The fourth way that the consultation paper legitimizes the need for reform is through reference to the requirements of the World Intellectual Property Organization treaties. This particular reference provides the opportunity for double-legitimation; first, the reform is legitimized because the reforms are intended to resolve inconsistencies between Canada’s legislation and international treaties that Canada has signed; and,

¹⁷⁰ Ibid., 1-2.

¹⁷¹ Ibid., 13.

¹⁷² Ibid., 2-3.

¹⁷³ Ibid., 4.

second, rights holders have requested and will benefit from the resolution of these inconsistencies: “Some rights holders,” the paper notes, “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.”¹⁷⁴

These references are indications of who the departments see as “copyright’s public” and where they derive legitimacy for copyright reform.¹⁷⁵ The consultation paper frames several different groups as “copyright’s public”: rights holders, Canadians, and businesses.

8. Summary of Submissions

In the last chapter I asked whether the issues affecting individuals at home with regard to copyright reform were represented in the submissions. It is difficult to know. Why the individuals who submitted did so is unknown. Who they were – what groups they were affiliated with, what their occupation was – or whether they wrote comprehensively about the ways that the four presented issues would affect their copyright-related practices, is not known. Whether they understood the issues that were presented in the consultation paper is not known. The individuals who submitted may all have been involved in the computing field in some capacity. Or, they may simply have been, for the most part, uninvolved personally in computing but interested in copyright issues because of the coverage of the Napster issue, for example. If that is the case, the Internet-based leadership failed these Napster-interested individuals. Its focus on the legal protection of technological protection measures to the virtual exclusion of the other issues raised by the consultation document meant that a number of possible concerns,

¹⁷⁴ Ibid., 4.

¹⁷⁵ See a further discussion of the World Intellectual Property Organization treaties in Chapter Five.

many of which I have highlighted above, went largely unrepresented. Indeed, Napster, peer-to-peer services, and music-downloading issues are scarcely mentioned in the submissions from individuals. In this regard, the submissions from individuals likely cannot be considered to represent the 3.3 million Internet users who used Napster at the time. If a large number of the individuals who wrote in were Napster users, for example, and not in the computing field, they threw themselves behind the cause of a Russian programmer, behind the cause of those with an interest in the dissemination and use of mechanisms capable of circumventing copy-protection technologies intended to safeguard digital material. Although circumvention is an issue that is important to those who might circumvent copy protection on CDs in order to make digital copies of music for use on services like Napster, many of the submissions leaned towards discussing academic freedom and research, focusing not on Napster but on the Dmitri Sklyarov case. Those who wrote in may have truly believed in this cause, but they may also have sacrificed an opportunity to represent themselves and to address the ways that proposals in the discussion paper could affect them personally.

In summary, individuals often represented concerns that affected them as users and sometimes as consumers. They had opinions on what should or should not be illegal under copyright with regard to circumvention, although they focused a great deal on this issue as it would affect computer programmers rather than individual users or creators at home. They did not substantially address issues that could affect individuals at home as creators. As well, the consultation paper did not raise a number of issues, outlined above, that might have been of more interest to individuals at home. That may be because the government derives its legitimacy for copyright reform not from individuals at home but

from other conceptions of its “public”: publics of rights holders, businesses, and Canadians – Canadians waiting to be “connected” to each other and the world, Canadians as potential copyright infringers who may misunderstand copyright law or find it confusing, Canadians who will benefit from the wide range of online Canadian products that will proliferate under copyright protection.

9. Conclusion

This chapter demonstrates that copyright issues can generally be said to affect individuals at home as copyright-infringers, consumers, users, and creators. However, neither the *Consultation Paper on Digital Copyright Issues* nor the submissions to the public consultation in the summer of 2001 reflect this full range. Individuals’ subjectivity to copyright law has undergone significant change since home copying technologies and the Internet have become available. New technologies emphasize the role of individuals as creators, giving individuals opportunities to create and publicize their works in new ways. New technologies also change individuals’ everyday practices in ways that do not fall into the regular patterns familiar to copyright law. It seems, looking at the consultations, however, that most parties – individuals, organizations, and the government – continued primarily to see individuals at home as copyright infringers and consumers, but not as legitimate users or creators of works.

For individuals to “make themselves at home” within “copyright’s public”, they must have a public relations strategy that encourages parties to see them specifically and clearly as legitimate users, consumers, and creators. They must specifically state what they want as users and consumers, and what they want as creators. There is plenty of work to be done for organizations and individuals who will take up these tasks of

representation. It would be helpful if the organizations and individuals taking up these tasks were to focus specifically on the issues that affect individuals in each of the roles outlined; this would avoid situations where organizations that are tailored to represent consumers, for example, or civil liberties, claim to represent *all* of the varied interests of “the public”. It is not enough for individuals at home to be “the public”, because “the public” is a term that does not make transparent their situation or their interests.

Chapter Five: Copyright in the World

1. Copyright and the Global Good?

The internationalization of copyright has taken place via a number of different regimes, including regimes specifically focused on intellectual property such as the World Intellectual Property Organization (WIPO) (now incorporated into the larger group of United Nations forums), and regimes focused on trade, such as the World Trade Organization (WTO), the *North American Free Trade Agreement (NAFTA)*, and the Free Trade Area of the Americas (FTAA). Viewed at this international level, the scope of the meaning of a word like “public” broadens. No longer referring only to all Canadians or most Canadians, or users; an international “public” can refer to all citizens of the world, or most citizens of the world; or it can refer to all non-state parties, all non-state interests, industry, or interest groups. Do international copyright agreements refer to “the public good” for their legitimacy? If international copyright regimes do refer to “the public good” (I will argue that they do) what is the nature of the “public good” that they refer to? The term “global welfare” is one international equivalent to the term “the public interest”. What is global welfare? Is it the natural outcome of states competing in international trade? Is it the maximization of the national economic welfare of nations in general? Is it the proliferation of other types of welfare norms, such as human rights?

The shift from the use of the word “public” in a domestic context and the use of the word in an international context highlights the multiplicity of concepts that such a term can express. The shift from the idea of “public good” to “global welfare” also highlights the flexibility of a reference to a “general good” or “public interest”; such a reference can point to a number of different conceptions of “good”, some calling to mind

what is “good” for “average”, relatively powerless, private individuals; and others calling to mind what is “good” in terms of economic goals that imply not only the welfare of individuals but also the welfare of corporations and nations.

In this chapter I will argue that international regimes dealing with copyright – those dealing primarily with intellectual property and those dealing with trade – do refer to “the public good”. International regimes of both types also incorporate references to “the public” in their organizational practices by creating mechanisms for “the outside public” (those external to the usual decision-making practices of the organization) to interact with them. These discourses and mechanisms are part of the necessity of public relations. Beyond simple public relations, there are mechanisms that allow non-governmental organizations (NGOs) to interact with international regimes in various ways. There are a variety of arguments made by the “inside public” (those internal to the decision-making of the organization) that are also made by the “outside public”. These internal parties can use references to the “public good” and its varying meanings to advance their particular interests simultaneously with the interests of whatever particular “outside publics” who share those interests. However, as I will argue, they can also use the more powerful and less problematic reference to “rights”. Pre-existing references to “the public good” and similar concepts assist the entry of “rights” language into international regimes. Finally, I will argue that parties’ interests can be more powerfully represented if they are expressly identified, whether in rights language or in the language of economic welfare – rather than simply as the interests of “the public”.

2. References within Copyright Regimes to “The Public Good”

The World Intellectual Property Organization administers and supports international intellectual property treaties. It administers the *Berne Convention*,¹⁷⁶ the *WIPO Copyright Treaty*, and the *WIPO Performers and Phonograms Treaty*, the three most important international copyright treaties today.¹⁷⁷ WIPO succeeded the United International Bureaux for the Protection of Intellectual Property (BIRPI), who originally administered the *Berne Convention*.

Two objectives are stated in WIPO’s 1979 founding convention. They are:

- (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,
- (ii) to ensure administrative cooperation among the Unions.¹⁷⁸

Notably, the language of balance and “the public interest” is missing. In fact, the emphasis on protection indicates a *droit d’auteur* tradition of copyright. However, WIPO’s objective “for the new century”, as stated in its *Medium-Term Plan*, is the “promotion of the effective protection and use of intellectual property throughout the world” by:

creating an environment and infrastructure conducive to an enhanced understanding of *the contribution of IP to human life through economic*,

¹⁷⁶ Canada, as a colony of Britain, was subject to the *Berne Convention* since its inception. Canada also ratified the 1928 revision of *Berne* independently after a number of copyright amendments in 1931. *NAFTA* later required Canada to comply with the 1971 revision of *Berne*. (Handa, *Copyright Law in Canada*, 398-399.) Canada has not yet ratified the *WIPO Copyright Treaty* or the *WIPO Performers and Phonograms Treaty*.

¹⁷⁷ One additional treaty, the *Universal Copyright Convention*, was created as an alternative to the *Berne Convention* because the United States objected to several elements of the *Berne Convention*, including its requirement of support for moral rights and its disallowance of formalities (such as making the deposit of a work at a national library a requirement for copyright protection). Canada ratified the *Universal Copyright Convention* in 1962. However, the *Universal Copyright Convention* gives a lower standard of protection than does *Berne*. The United States did eventually join *Berne*, submitting to its requirements in 1989, making the *Universal Copyright Convention* somewhat redundant. (Handa, *Copyright Law in Canada*, 403-404.) For that reason, I have decided to limit my discussion in this chapter to the other treaties.

¹⁷⁸ World Intellectual Property Organization. *Convention Establishing the World Intellectual Property Organization*, Art. 3.

social and cultural development, and, in particular, by assisting developing countries in their capacity building for greater access to, and use of, the IP system.¹⁷⁹

For WIPO, the “public good” is the protection and use of intellectual property. The “public good” is established through that very protection and use; the protection and use of intellectual property serves economic, social, and cultural development. Thus, WIPO’s “public good” is economic, social, and cultural development within an intellectual property model.

The *Berne Convention*, the first international copyright treaty, which entered into force in 1887 and is now administered by WIPO, does not have a preamble stating its overall goals. It does not mention “access” or “users” or the “public” at all in its text. It does, however, provide for “certain free uses of works”, stating that it “shall be permissible” to make quotations from a work, as long as proper attribution is given.¹⁸⁰ It also provides that countries may allow other free uses, such as for the purposes of teaching¹⁸¹ or news reporting.¹⁸² Other than that, the *Berne Convention* is entirely about promoting the protection of intellectual property.

The more recent WIPO *Copyright Treaty* does contain a preamble. In a notable change from the *Berne Convention*, this preamble recognizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”¹⁸³ The *WIPO Performers and Performances and Phonograms Treaty* preamble also recognizes “the need to maintain a

¹⁷⁹ *Medium-term plan for WIPO program activities – Vision and Strategic Direction of WIPO*, Item 7. Emphasis added.

¹⁸⁰ World Intellectual Property Organization. *WIPO Copyright Treaty*, Article 10.

¹⁸¹ *Ibid.*, Article 10.

¹⁸² *Ibid.*, Article 11.

¹⁸³ *Ibid.*, Preamble.

balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information...”¹⁸⁴ This reference to “balance” places “the public interest” as being separate from, or even in conflict with the interests of authors, performers, and producers of phonograms – as being separate from the treaty’s main objective: the protection of intellectual property. This is a divergence from the WIPO master narrative, contained in its *Medium-Term Plan*, that conflates the “public good” with the protection of intellectual property.

3. References within Trade Regimes to “The Public Good”

International copyright treaties “have reached a point of saturation where achieving consensus from members to amend the treaties has become extremely difficult.”¹⁸⁵ This has meant a move towards a trade-based approach to intellectual property; intellectual property has begun to be addressed under trade agreements.

For several reasons the internationalization of copyright, especially in trade regimes, leads to a perception that the “balance” between the interests of copyright holders and the interests of “the public” (not copyright holders) has shifted to favour the interests of copyright holders. It is sometimes thought that, within trade regimes, the interests of “the public” in the “copyright balance” is more often set aside or exchanged for other trading advantages as parties make concessions on intellectual property, strengthening intellectual property protections without balancing those protections with provisions for access. A fair amount of concern has been raised over this apparent trend because of the perception that trade regimes can be used to pressure countries to strengthen protection of intellectual property in ways that are not in the “national

¹⁸⁴ World Intellectual Property Organization. *WIPO Performances and Phonograms Treaty*, Preamble.

¹⁸⁵ Handa, *Copyright Law in Canada*, 404.

interest”, and because trade regimes “have teeth”; they have binding dispute-resolution and enforcement mechanisms. Thus, for those who do not identify increased intellectual property protection as being synonymous with the “public good”, the negotiation of intellectual property standards within trade regimes raises important problems.

If the objective of trade regimes with regard to intellectual property is the protection of intellectual property to facilitate mutually beneficial trade between countries, one might not expect to find any references to “the public good” in trade regime documents except those signifying “the public good” of trade or economic welfare. There are, however, a number of references to other types of “public good” in the *North American Free Trade Agreement*, in current drafts of the *Free Trade Area of the Americas Agreement*, in the World Trade Organization’s establishing *Marrakesh Agreement*, and in its 1996 *Agreement of Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs)*.

3.1 NAFTA

The *North American Free Trade Agreement*, between Canada, the United States, and the United Mexican States, was implemented in Canada in 1994. It contains a full chapter (Chapter Seventeen) on intellectual property. *NAFTA*’s reference to the “public good” is not as emphatic as the references made in the other trade agreements that I will discuss. *NAFTA*’s preamble, in which it states the goals of the agreement, refers mostly to trade-related concepts such as the “expansion of world trade”, “expanded and secure market for the goods and services”, reducing “distortions to trade”, and ensuring “a predictable commercial framework for business planning and investment”.¹⁸⁶ However,

¹⁸⁶ Government of Canada, the Government of the United Mexican States and the Government of the United States of America. *North American Free Trade Agreement*, preamble.

it does resolve to preserve “their [the Government of Canada, the Government of the United Mexican States and the Government of the United States of America] flexibility to safeguard the public welfare.”¹⁸⁷ This particular phraseology does not, as do other agreements, imply that the provisions of the agreement itself are considered to be synonymous with the public welfare. It implies, instead, that flexibility (from the terms of the agreement or within the terms of the agreement) may be required to safeguard public welfare.

The preamble further resolves to foster “creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.”¹⁸⁸ One of *NAFTA*’s six objectives is to “provide adequate and effective protection and enforcement of intellectual property rights in each Party’s territory.”¹⁸⁹ The emphasis is on protection, not on a balance between protection and access.¹⁹⁰ However, it is interesting to note that the agreement itself, and the protection of intellectual property that it requires, is not equated with “public welfare”. Other agreements that emphasize protection do, to a greater degree, equate protection with “the public welfare”.

3.2 FTAA

The preamble in the *Third Draft Free Trade Area of the Americas Agreement* contains a phrase similar to the “flexibility clause” in *NAFTA*: the parties also resolve “to preserve their flexibility to safeguard the public welfare.”¹⁹¹ However, the preamble goes further and *does* relate the terms of the agreement itself as being consistent with, or

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ The word “adequate” might be taken to indicate that protection should, at a certain point, be limited.

¹⁹¹ Free Trade Area of the Americas. *Third Draft Free Trade Area of the Americas Agreement*, Preamble. Square brackets are contained in the original text of the Third Draft.

necessary for, “public welfare”; it states that the parties are determined “to promote higher standards of living and improve working conditions [in the Americas] through the creation of new and higher-paying employment opportunities, including, through increased economic integration and free trade, and the building of a democratic and just society based on solidarity.”¹⁹² The preamble also states that the parties are committed to “advancing towards economic prosperity, strengthening ties of friendship [and cooperation] and democratic values and institutions, [and] protecting fundamental human rights and the security of persons, and promoting social development among the Parties.”¹⁹³ Indeed, the parties are committed to undertake the implementation of the agreement “in a manner consistent with international human rights norms and principles”.¹⁹⁴ The draft FTAA preamble goes further than did *NAFTA* in its references and commitments to public welfare and human rights, as well as in implying that the terms of the agreement are consistent with public welfare and human rights.

The intellectual property chapter of the draft FTAA agreement continues this trend. It provides that:

Each Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, or to promote public interest in sectors of vital importance to their socioeconomic and technological development, *provided that such measures are consistent with the provisions of this Chapter*.¹⁹⁵

It would appear that the draft FTAA treaty optimistically assumes that, in all instances, adopting measures necessary to protect public health or promoting “public interest” in sectors of vital importance *would be* consistent with the provisions of the chapter. What

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects, Art. 3:General principles, 3.1 Emphasis added.

if such measures are not consistent with the chapter? The treaty appears to indicate that they may not be undertaken. The agreement also states that the provisions of the chapter for the protection and enforcement of intellectual property rights *should* foster social and economic welfare, and should work to the advantage of users:

The protection and enforcement of intellectual property rights covered in this Chapter should contribute to the promotion of technological innovation and to the transfer and dissemination of technology in the Americas, to the mutual advantage of producers and users of technological knowledge, with a view to fostering social and economic welfare and a balance of rights and obligations.¹⁹⁶

As well, the intellectual property chapter states that, “each Party shall ensure that measures to protect and enforce those rights do not themselves become barriers to legitimate trade [nor socioeconomic and technological development].”¹⁹⁷ While it is somewhat interesting that, while “legitimate trade” does not appear in brackets, “socioeconomic development” does, the FTAA draft goes further than did *NAFTA* in its references and commitments to public welfare. It would seem, however, that, under this draft FTAA agreement, “legitimate trade” and the “provisions of this Chapter” take precedence over “the public interest” or “social welfare”; “legitimate trade” is not bracketed out, though “social welfare” is; and promoting “the public interest” is only permissible when it is consistent with the terms of the intellectual property chapter.

It is interesting, also, to note that a reference to “balance” appears in the text (“with a view to fostering social and economic welfare and a balance of rights and obligations”), not as a balance between the interests of creators and the interests of the public, but as a balance between “rights and obligations”, between unspecified parties,

¹⁹⁶ Ibid., Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects Article 2: General objectives, 2.1

¹⁹⁷ Ibid., Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects, Article 1. Nature and Scope of Obligations, 1.1

between rights generally and obligations generally. This particular balance is, in fact, so general that it cannot be considered to be of the same species as the usual intellectual property balance between protection and access or between the interests of copyright holders and non-copyright holders. It could be used to indicate human rights and social obligations of various sorts, just as it could be used to indicate author's rights or the obligation to comply with the terms of the treaty. Therefore, although the draft FTAA agreement takes certain steps towards an Anglo-American conception of copyright in the language that it uses, there are several significant ways in which it maintains a distance from that tradition.

3.3 WTO

The *Marrakesh Agreement*, which established the World Trade Organization in 1995, contains a number of references to "the public good". Its preamble states that "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services...." The "public good", here, is higher standards of living, full employment, increased income, increased demand, and increased trade. It also mentions the objectives of protecting the environment and ensuring that developing countries also share in the growth of international trade.

The World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* came into effect in 1996. The *TRIPs* preamble also refers to

the “effective and adequate protection of intellectual property rights.”¹⁹⁸ However, this agreement also explicitly recognizes “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives” and “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.”¹⁹⁹ *TRIPs* suggests that the public policy objectives of intellectual property are developmental and technological; it does not refer, as a public policy objective or in its own objectives, to balance between protection and access. However, it is notable that the agreement recognizes public policy objectives at all. As well, it does not, in its language, limit its recognition only to developmental and technological policy objectives; it merely “includes” them.

TRIPs mentions balance again when it states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.²⁰⁰

TRIPs here – as did the draft FTAA agreement – recognizes the interests of users, and takes social welfare as an objective along with economic welfare. Parties are not permitted, however, to deviate from the principles of the agreement to protect the interests of users or public interest:

¹⁹⁸ World Trade Organization. *Agreement Establishing the World Trade Organization, Annex 1C: Agreement of Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs)*, Preamble.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, Article 7; emphasis added.

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement.*²⁰¹

3.4 Summary

Most of the references to “the public good” in multilateral copyright and trade agreements conflate “the public good” with intellectual property protection and with growth in trade. Of the trade agreements I examined, *NAFTA* was the only one not to explicitly do this; rather, it provided for “flexibility” from or within the terms of its agreement to accommodate “public welfare”.²⁰² Although there are some references to “the public good” in terms of “human rights” and “security of persons”, and “social development” (draft FTAA),²⁰³ “public health and nutrition” (draft FTAA agreement and *TRIPs*),²⁰⁴ “socioeconomic and technological development” (*TRIPs*),²⁰⁵ “economic, social and cultural development” (*WIPO Medium-Term Plan*)²⁰⁶ and “social and economic welfare” (draft FTAA agreement and *TRIPs*),²⁰⁷ these forms of “public good” are subordinate to the main “public good” that the treaties focus on: the protection of intellectual property and, in the case of trade agreements, the promotion of trade.

²⁰¹ Ibid., Article 8: Principles; emphasis added.

²⁰² Government of Canada, the Government of the United Mexican States and the Government of the United States of America. *North American Free Trade Agreement*, preamble

²⁰³ Free Trade Area of the Americas. *Third Draft Free Trade Area of the Americas Agreement*, Preamble.

²⁰⁴ Ibid., Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects, Article 3: General principles, 3.1 and *TRIPs*, Article 8: Principles

²⁰⁵ Ibid., Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects, Article 1. Nature and Scope of Obligations, 1.1 and Third Draft Free Trade Area of the Americas Agreement: Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects, Article 3: General principles, 3.1

²⁰⁶ World Intellectual Property Organization. *Medium-term plan for WIPO program activities – Vision and Strategic Direction of WIPO*.

²⁰⁷ Free Trade Area of the Americas. *Third Draft Free Trade Area of the Americas Agreement*, Chapter XX: Intellectual Property Rights, Article 3, Section A: General Aspects Article 2: General objectives, 2.1 and *TRIPs* objectives: Article 7

TRIPs and the draft FTAA agreement recognize the interests of users (as being advanced by the protection and enforcement of intellectual property rights). The *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* recognize a balance between the rights of authors, performers, and producers of phonograms and the “larger public interest”. The draft FTAA agreement recognizes a balance between “rights and obligations”. Only the draft FTAA agreement mentions human rights.²⁰⁸ The *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* copyright regimes, therefore, might be able to recognize an “imbalance” between the rights of copyright holders and the interests of the “larger public” (particularly education, research, and access to information)²⁰⁹ but trade regimes generally conflate the interests of copyright holders with the interests of the “public” and users, whether stated in terms of public health or in terms of social welfare, understanding the interests of “the public” as being consistent with intellectual property protection and enforcement. Trade regimes would therefore be more equipped to incorporate notions of “public good” in terms of trade or the economy, or, in the case of the draft FTAA agreement in particular, notions of “public good” stated in terms of human rights.

4. Mechanisms Within Regimes for Interaction with “The Outside Public”

The “outside public” has few mechanisms for interacting with international regimes to influence or shift dominant notions of “the public interest”. While WIPO allows non-state organizations meeting certain criteria to apply for observer status, the World Trade Organization, *NAFTA*, and the FTAA do not. The World Trade Organization, for example, states:

²⁰⁸ The *NAFTA* preamble mentions workers’ rights.

²⁰⁹ World Intellectual Property Organization. *WIPO Copyright Treaty*, Preamble.

As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.²¹⁰

The responsibility for taking “the public interest” into account is therefore placed, primarily, at the national level. However, the World Trade Organization has initiated a number of efforts to interact with the “outside public”:

This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.²¹¹

A number of forums are available on the World Trade Organization’s Web site where the “outside public” can participate in discussion. The World Trade Organization also accepts and posts on its Web site the titles of position papers submitted to it by the “outside public”, posts a list of NGOs who attend ministerial conferences on its Web site, and holds an annual public symposium on World Trade Organization-related issues that is open to the public.²¹² These transparency mechanisms are, perhaps, primarily public relations techniques. That does not detract from the fact that the necessity of maintaining good public relations has required the World Trade Organization and other organizations to be more transparent, to consult with “outside publics”, to incorporate “outside publics” at some level into their meetings and events.

²¹⁰ World Trade Organization. *Guidelines for Arrangements on Relations with Non-Governmental Organizations*: Article VI.

²¹¹ *Ibid.*, Article IV.

²¹² <http://www.wto.org> Last checked June 11, 2004.

Beyond these means, the “outside public” (in particular, NGOs) can participate actively in alternate forums that are also involved with intellectual property issues, such as the UN Commission on Human Rights, the UN Sub-Commission on the Promotion and Protection of Human Rights, The UN High Commissioner for Human Rights, or the Committee on Economic, Social and Cultural Rights. The non-binding declarations, resolutions, recommendations and reports generated by these groups can then be brought to bear on the more powerful regimes by sympathetic “internal publics”; arguments can be made that the declarations or resolutions of one regime are inconsistent or in conflict with those of the other and that a revision is required to correct the inconsistency.²¹³

Laurence R. Helfer refers to this as “regime shifting” – selecting to work within certain intellectual property regimes or alternates according to shifting practical interests and sympathies. Helfer observes that, “regime shifting can be a potent method for creating counterregime intellectual property norms.”²¹⁴ “Initially,” he says, “these norms may ‘circulate in the realm of rhetoric or lie dormant as long as those who dominate the existing regime preserve their power.’”²¹⁵ But the move to a different negotiating forum – whether or not the original forum is abandoned – provides new opportunities for states and NGOs to contest established normative orthodoxies.²¹⁶ The various types of references to balance and rights, and the varied conceptions of “public good” implied in each of the different regimes may make one regime more suitable for a particular interest than another.

²¹³ Helfer, “Regime Shifting,” 45-52.

²¹⁴ Ibid., 58.

²¹⁵ Puchala and Hopkins, “International Regimes: Lessons from Inductive Analysis,” in *International Regimes* 1, 5, 11 (Stephen D. Krasner ed., 1983) at 61, 66, cited in Helfer, 14.

²¹⁶ Helfer, “Regime Shifting,” 14.

Regime shifting has been used to mobilize opposition to *TRIPs*:

Implementing *TRIPs* has proven to be time consuming, expensive, and controversial for many developing countries. States and NGOs have responded to these developments by sponsoring resolutions and reports critical of *TRIPs* within the U.N. human rights system.²¹⁷

These sorts of moves allow:

governments and NGOs to coordinate their efforts around hard and soft law proposals first vetted and refined in other international venues. This integrationist approach also allows states to justify their demands for reform by invoking rules and principles endorsed by officials of intergovernmental organizations and by legal and technical experts. Support from these seemingly neutral actors gives the demands the imprimatur of legitimacy. And it allows proponents to frame their arguments as rational efforts to harmonize potentially inconsistent treaty obligations and soft law standards that many states have agreed to, rather than as self-interested attempts to distort trade rules or to free ride on foreign creators or inventors.²¹⁸

5. The Utility of References to “Rights”

The shift to “rights language” that was seen in some of the submissions to the 2001 public consultation on copyright reform is also taking place in some international policy forums. Opposition to *TRIPs* has motivated an increased use of “rights language” in international forums:

Intellectual property protection rules codified in the *TRIPs* Agreement have been framed by NGOs, independent experts, and developing states as a threat to economic, social, and cultural rights. In response, U.N. human rights bodies have developed an antagonistic approach to *TRIPs*. This antagonism has led to the adoption of nonbinding declarations and interpretive statements that emphasize the public’s interest in access to new knowledge and innovations and assert that states must give primacy to human rights over *TRIPs* where the two sets of obligations conflict.²¹⁹

This rights language is less open to interpretation than the language of “the public interest” and is therefore more useful for those who wish to promote specific interests

²¹⁷ Ibid., 49.

²¹⁸ Ibid., 61.

²¹⁹ Ibid., 46.

that are in conflict with the dominant view of “the public interest” within intellectual property regimes. If a particular “public interest” is redefined in opposition to the dominant conception of “the public interest”, that being the protection of intellectual property, then a fundamental concept is not held in common between the opposing parties to the discussion. “The public interest”, in this way, can be the object of dispute. Human rights, on the other hand – generally understood as belonging to “all” humans, to individuals – avoid this difficulty. They are perceived to be fundamental and basic, rather than being debatable as to their nature and the method of their achievement. They are seen to express “the will of the international community”:

In the UN charter there was a recognition of the existence of universal human rights, which transcended the sovereignty of the nation-state. International law was no longer confined to agreements between nation-states but was seen as expressing the ‘will of the international community’.²²⁰

The language of “human rights” can be more powerful, for these reasons among others, than the language of “the public interest” or “global welfare”. On the other hand, because “human rights” are seen as a fundamental set of requirements for human dignity, they are primarily powerful only when used to argue for things that can be framed as fundamental rights. “Public interest” arguments can advance causes that are less basic, causes that pertain to industries and groups rather than to individuals.

6. Utility of Representation as a “Public”

While trade works to advance public welfare, there are instances where perceived differences or conflicts arise between the types of public welfare that international trade provides and public welfare otherwise defined or provided. “The public good”, defined as “free access”, for example, is often not easily compatible with concepts of trade.

²²⁰ Ibid., 527, citing Held, *Democracy and the Global Order*, 84-86.

References already existing to “the public good” and similar concepts – within trade agreements, copyright treaties, discourse, and the concepts of modern government itself – assist the entry of “rights” language and other normative discourse into international regimes. “Public good” arguments, in their various forms, allow space for an argument that human rights are in support of the given “public good”. The language of “the public interest” is useful because of this flexibility. Because it can be coherently used by a range of publics, both “outside” and “inside”, to signify a range of conceptions of “the public good”, it allows new types of discourse, new norms, and new voices to enter into legitimacy in the eyes of States and international regimes.

At the international level, because the language of “the public good” or “welfare” can be used in such a broad way, and because “the public interest” is a more powerful motivator at the national level than at the international level, this language is more problematic in terms of its ability to connect one conception of “the public interest” with another. It becomes necessary, once the phantom public has passed through the door – once a connection with a member of an “internal public” has been obtained, to use concepts that are consistently and commonly held, rather than concepts that are contested. It becomes necessary to identify, in consistent and commonly held terms, a party’s identity and interests.

7. Globalizing “The Public Interest”

In a world of internationalized copyright law, concerns are raised about the status of national sovereignty. The Canadian government raises this concern in the 2001 consultation paper: “The challenge for the departments is to develop copyright policies that are consistent with and promote international standards of protection, but that

continue to validate Canadian priorities, choices and values.”²²¹ It would seem, however, from the arguments put forward in the discussion paper and the issues that were chosen, that the Canadian government is taking the steps necessary to ratify international treaties, which are designed to protect the interests of its rights holder “public”.

The “Canadian priorities, choices, and values” cited in the above statement from the consultation paper are not defined. Therefore, those who believe that “Canadian priorities, choices, and values” (“the public interest”) are in conflict with international standards of protection are provided, in reading this statement, with a rationale for why the Canadian government is “challenged” in validating those “Canadian priorities, choices, and values” that are in conflict with international standards. Those who believe that “Canadian priorities, choices, and values” are consistent with international standards of protection may see, in this statement, a comment on the challenges that have been overcome successfully by the Canadian government. In this way, international standards can offer a pretext to escape from the responsibility to represent a “public interest” that is in conflict with other, more dominant, “public interests”.

The ability to use the term “the public interest” can add strength to dominant claims that are in conflict with a disenfranchised party’s alternate conception of “the public interest”. However, the dominance of a particular conception of “the public interest”, promoted within international regimes, is not as much the dominance of a supra-national body as it is the dominance of one way of thinking, of one type of discourse, over another. Trade interests may dominate over access to information interests if trade organizations and networks are stronger. National sovereignty is not

²²¹ Department of Industry Canada and Department of Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, 14.

sacrificed by international regulation, which is in fact guided and controlled by national representatives. Once conception of “the public interest”, however, may be sacrificed in light of another, one conception of an appropriate “balance” may take precedence over another, but it is only with the collaboration of national representatives and possibly NGOs who control international organizations that this can occur. The “will of the international community” may come to be conceived in certain dominant ways. The existence of human rights, for example, have now come to be recognized, under the UN, as being part of the “will of the international community”.

National governments are still bound by their “public relation” – by their relationship with their publics. With the reconfiguration of copyright’s “public” – with the entry of new players – comes the reconfiguration of communication networks, the integration of new stakeholders and new publics. These new configurations lead to new dynamics in the various voices that are perceived to represent “the public interest”. The fear is that dominant existing systems and narratives will blind individuals and governments to other possibilities, to other notions of “the public interest.”

Communications and public relations provide one means of addressing this potential problem.

On the negative side, communications and public relations may also provide a method of reinforcing dominant notions of “the public interest”, working against efforts to resubjectify individuals as creators or as users under copyright and retrenching positions of subjectivity as consumers and copyright-infringers. John Shiga documents some of the powerful anti-piracy propaganda that has been promulgated in efforts to re-

establish these traditional copyright positions.²²² However, other organizations such as the Creative Commons, Canadian Internet Policy and Public Interest Clinic (CIPPIC) and The Canadian File-sharing Legal Information Network (CanFLI) have also been forming powerful alternative messages.

The word “public”, because of its inclusiveness, should allow a point of entry for new narratives, new ideas, alternatives, and alternate ideologies. At a certain level, a great deal of the subjectification of individuals must come from individuals and organizations communicating various ideas, ideologies, and narratives to the national and international levels. Transnational organizations and social movements can play a role in this type of communication:

The new social movements challenge the authority of the nation-state by appealing to universal values and human rights. They have used information and communication technology to create networks that extend across national boundaries and enable them to spread their messages and mobilise international opinion against the regimes, policies and actions of particular states. They have attached themselves through Non-Governmental Organizations (NGOs) to the UN and promoted their causes through its programmes and conferences. They have used the global media to generate publicity by staging spectacular dramas....²²³

In fact, “the public interest” and concepts like it have taken up prominent positions in international copyright discourse, competing with more strictly *droit d’auteur*

²²² John Shiga documents the massive communications effort undertaken by copyright industries in response to the threat of downloading. “Both the MPAA [Motion Picture Association of America] and CVOMC [Canadian Value Of Music Coalition] determined that complacency and dissent stemmed from a vast misunderstanding about the ‘realities’ of the contemporary digital marketplace and about the impact of on-line consumption habits on artists and workers. The solution was to be found in communication, excommunication and education. In both Canada and the US, significant investments were thus made into quasi-educational videos and programs that were distributed to thousands of schools across the continent. In Canada, the approach has been to communicate to the average young person that if musical creation is desired, then copyright must be respected. The MPAA’s communication plan, on the other hand, was designed to re-establish the connection between theft of material goods and downloading cultural works.” Shiga, “The Empathy Test,” 3.

²²³ Fulcher, “Globalisation, the Nation-State and Global Society,” 532.

conceptions, through these very means.²²⁴

“Public relations” require nations and corporations to “balance”, at least to some extent, their own interests with “the public interest”, insofar as it exists, in its many varieties. However, this “balance” discourse is limited, whether it is applied to nations or corporations. “Balance”, after all, is just a metaphor. There is no point of “balance” *per se*. There are many ways to “balance” competing interests. Does “balance” mean considering all sides and choosing one? Does it mean finding a middle ground? Nevertheless, the “balance” metaphor is useful because it requires, or should require, a consideration of both “inside publics” and “outside publics”. The “balance” discourse is, along with the “public interest” discourse, a sort of “door” that allows the “outside public” a point of entry into the larger discussion.

8. Conclusion

Publics can interact with international copyright regimes in various ways. However, to gain the legitimacy required to act as a party to a debate or decision-making body, publics must “materialize”; they must demonstrate knowledge, involvement, and investment, and must use language that has legitimacy and credibility within the body they choose to enter. They must perform a “public relation”. It may be useful for publics to examine their relative standing in various international copyright regimes: international regimes recognize “the public interest” in various ways. These references to “the public interest”, to an extent, indicate an Anglo-American view of copyright, but because the element of “balance” is missing – because international agreements typically conflate

²²⁴ Sunny Handa notes that the conceptions of balance in the *TRIPs* agreement are “reflective of an Anglo-American understanding of copyright. It ignores the author-centred philosophy found in *droit d’auteur* schemes of protection.” Handa, *Copyright Law in Canada*, 408.

“the public interest” with copyright protection, rather than balancing protection with “the public interest” – it is evident that the Anglo-American tradition is not fully dominant.

Sometimes “the public interest” is included in agreements, stated in the terms of human rights. This language of human rights has certain advantages and disadvantages; the nature of human rights is less contentious, less open to redefinition or multiple definitions, than the nature of “the public interest”. On the other hand, the usefulness of a framework of human rights is confined to the promotion of interests that can be framed as basic and applicable to all. In any case, a number of different avenues and terms allow the entry of new interests into international copyright discourse.

Conclusion: Copyright at Home

1. The Public Relations of Copyright

Through an examination of historical writings on “the public”, an analysis of submissions to a Canadian public consultation on copyright reform, and a study of the text of international copyright agreements, I have argued that copyright’s references to “the public” and “the public interest” have taken on multiple meanings throughout history, in recent years, and in international trade and copyright regimes. As the roles, makeup, and expectations of “copyright’s public” change, differing relationships between copyright and “the public” are indicated as well as required. “Public relations” keeps copyright law flexible and requires it to adjust to the various publics it serves. Copyright philosophies that use “balance” and “rights” to legitimize and explain copyright can allow new groups to promote their interests within governing copyright discourse: these groups can claim that copyright must “balance” their interests with the interests of other stakeholders, and that their “rights” – whether creator “rights”, user “rights”, or human “rights” – must be considered. It is up to publics, both inside and outside of governing discourse, to represent themselves well and to promote their own narratives and interests within the frameworks that exist.

The strengthening of the position of “the public” under copyright – the strengthening of the Anglo-American copyright philosophy versus the *droit d’auteur* conception – is important to document. It has implications for how we understand “copyright’s public” and who we understand to be a member of that “public”; who is addressed in public consultations about copyright, and how they are addressed.

I have suggested, in Chapter One, that “the public” has not been unjustly excluded from copyright reform discussions, but rather, that this “public” was, in the past, an “outside public”, neither envisioned by the government nor by itself as an active stakeholder to copyright, as “copyright’s public”. In Chapter Two I suggest that this may be because the public domain was as yet invisible. Before the Internet, the public domain, one of the major resources created and protected by the Anglo-American tradition of copyright, was transparent; most works in the public domain were generally accessed, paid for, and used in the same way as any other work not in the public domain. The accessibility of the public domain and the capacities of new technologies that allow private copying have increased the incentive for publics to become interested in copyright law and for various other parties to consider those publics to be subject to it.

The publics of individuals that did become engaged with copyright law in the 2001 public consultations were largely organised to do so by online networks which included Green Party and free/libre open-source software advocates. I noted in Chapter Three that, despite the media coverage and large user base that Napster had at the time, Napster is scarcely mentioned in the submissions to the public consultation on copyright reform. In fact, as I note in Chapter Four, many of the issues that could affect individuals at home were not mentioned in the submissions. After all, copyright’s relationship with individuals has changed. No longer simply consumers and copyright-infringers, individuals are now also more prominently subject to copyright as users and creators in copyright’s networked interactive world. The fact that many issues affecting individuals at home as users and creators were not addressed may mean that individuals at home are satisfied that their interests are not threatened by copyright reform, or it may mean that

individuals are unprepared and/or unorganized to represent their own interests, or it may mean that individuals at home are unaware of the ways that they could be affected by copyright reform.

The increasing emphasis on “the public interest” manifests itself at the international level in agreements referring to “public welfare”, “social welfare”, “economic welfare”, “the protection of public health and nutrition”, “security of persons”, “social development”, and “human rights”. Rather than attempting to “balance” opposing interests, international agreements often conflate public interest goals with the goals of intellectual property protection. However, rights language is making its way into international forums. Human rights, because they belong to individuals rather than to a group, and because they are seen as fundamental and basic, are less in dispute than conceptions of “the public interest”. Rights language will likely continue to increase in importance in copyright regimes.

2. Bruits Publics

Voices of copyright’s “outside public” – individuals at home, here – have traditionally argued primarily for the right to consume how and what they want. Today, however, some members of “the outside public” want something more: they want the ability to participate in copyright reform processes. Others want to be recognized as creators along with the powerful rights holders that belong to copyright’s “inside public”. Since the Internet has brought people, information, and tools closer together – stars closer to their fans, individuals closer to interest groups, information closer to researchers – new

forms of freedom have become accessible. Conceptions of freedom, in the minds of some “external publics” have changed to include the freedoms that the Internet brings.²²⁵

Siva Vaidhyanathan, focussing on peer-to-peer networks, points out that these new forms of freedom (direct communication over distance) are amplifications of everyday peer-to-peer expression:

What we call ‘p2p’ communicative networks actually reflect and amplify – revise and extend – an old ideology or cultural habit. Electronic peer-to-peer systems like Gnutella merely simulates [sic] other, more familiar forms of unmediated, uncensorable, irresponsible, troublesome speech....What used to occur only across fences or on park benches now happens between and among members of the Chinese diaspora, who might be in Vancouver and Singapore, Shanghai and Barcelona....²²⁶

While Vaidhyanathan compares the new possibilities for direct communication to speech “across fences or park benches”, to everyday talk, networked direct communication also provides amplified venues for other forms of communication – the communication of creative works – some of which do not as easily occur in the everyday, over fences and park benches.

Along with consumer demands for instant access to information and works, many individuals want other forms of direct access; they want their money to flow more directly to artists, they want to be able to participate in markets for their own creations. Many also want to be able to participate in decisions regarding copyright reform. Just as they were in the events that led to copyright’s creation, many consumers’ voices are impatient with the monopolies held on copyright products. A new impatience has also

²²⁵ As one example, see John Perry Barlow’s famous *Declaration of the Independence of Cyberspace*: “These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty....” (John Perry Barlow is a former lyricist for the Grateful Dead, and co-founder of the Electronic Frontier Foundation.)

²²⁶ Vaidhyanathan, “It’s a Peer-to-Peer World,” section: “Listening to Napster.”

become visible: impatience with monopolies over access to copyright markets, impatience with the slow development of systems that will allow or require payment for works that are currently available on the Internet for the asking, and impatience with the dominance of existing stakeholders in governmental copyright debates. This is a desire for a certain kind of freedom – the ability to interact uninhibited. Whether this interaction is commercial or not, political or not, it is a voluntary giving up of privacy and of “private citizenship”, an offering-up of private works, opinions, and thoughts to a distant and often unknown reception.

Individuals have been seen at home chatting, listening, surfing, arguing, agreeing and disagreeing with each others’ opinions; which is, of course, what individuals do as individuals; but individuals have not often banged their hands on the public table as interactive stakeholders under copyright, have not raised their voices as creators who must be represented in copyright law. They have been situated, primarily, as consumers. Their voices are not rights-conscious and policy-aware, but are simply those of individuals. Vaidhyathan observes: “What we are hearing when we listen to peer-to-peer systems are ‘bruits publics’, or public noises – not the reasonable, responsible give and take of the bourgeois public sphere”.²²⁷

3. Copyright and Public Relations

New publics must become visible in the portal of government interface: they must add their various self-representations to the debate over copyright legislation. Concepts of privacy, liberty, and freedom; creator, consumer, and user; public opinion and the public domain; balance and “the public interest”, are all important to the discussion.

²²⁷ Vaidhyathan, “It’s a Peer-to-Peer World,” section: “Listening to Napster.”

Governments and international forums must be prepared for this continued interface with “the public” on copyright. The departments of Industry and Canadian Heritage, along with international trade and copyright regimes, have already shown an openness to accepting new publics into discussions. Indeed, they have taken steps, in launching online public consultations, discussion forums, symposia, and other interactions, to include new publics from outside their own traditional communication networks. Insofar as these steps are simply public relations moves, publics may only gain form enough in these portals to rattle their chains. However, some argue that public relations is powerful stuff. Jane Ginsburg, for example, argues that the copyright system is constantly performing its balancing act; that in the United States the 1998 *Sonny Bono Term Extension Act*, which added 20 years to the term of copyright in the United States, “put pressure on the [copyright] system to offset the gain in years with a diminution in the scope of protection, for example, through a more vigorously implemented fair use exception.”²²⁸ This balancing is, in a sense, an act – a system of public relations. Ginsburg notes that whenever copyright holders are perceived to “overreach” they get negative publicity:

In this debate, appearance counts a lot; and, whatever their conduct in fact, many copyright owners appear – or are portrayed by some vigorous detractors in the academy and in the popular press – as hell-bent on stomping out both new technology and the scientists and entrepreneurs behind it.... Using copyright to suppress information does not cast copyright owners in an attractive light.²²⁹

The very principles of modern Anglo-American copyright are a result of negative public relations received by the Stationers’ Company in the late seventeenth century because of their monopoly on the rights to copy books and their powers of censorship: “It

²²⁸ Ginsburg, “How Copyright Got a Bad Name for Itself,” 65.

²²⁹ *Ibid.*, 66.

seems clear that growing resentment against the monopoly – much more than against censorship – led to Parliament’s refusal to renew the *Licensing Act*.²³⁰ After the *Licensing Act* of 1662 expired in 1694, this negative view of copyright remained until the Stationers’ Company took a new public relations tactic: they argued that the rights of authors, rather than the rights of the Company itself, required protection. As a result, the *Statute of Anne* was created. Copyright thereafter belonged first and foremost to authors.

“Public relations” are important, but the relations between “internal publics” will, in all but extreme cases where there is a destabilizing outcry from “external publics”, be more powerful than relations with “external publics”. That is why it is essential for publics to “materialize” once they get through the “public portal” – to refer to themselves not as “the public” but as a specific interest group.

4. Individuals at Home as “The General Public”

We must be clear that the “public” of individuals at home is also an interest group – various interest groups, in fact. To refer to this group as “*the public*” or “the general public” would be to adopt a common usage of the term “general public”, but it would also, I think, in some ways and in certain forums, disenfranchise these individuals even further. Although referring to a particular group of people as “the general public” brings a certain status to the group and a certain moral authority to one’s words (which is why so many groups do it), it also implies a group so vast, so wide, so *mythical*, that it cannot be brought to the table, cannot be closely examined, cannot be seen for what it is or the interests it represents. “The public” – implying “all Canadians” or “most Canadians” – is always a mixed group with varying interests. Only when it is broken down into various interest groups (creators groups, users’ groups, and consumers’ groups, to name a few

²³⁰ Patterson, *The Nature of Copyright*, 27.

broad examples) are those interests more manageable – only then can they be brought to the table. “The general public” – “most Canadians” – cannot organize politically or be represented as one massive group. Particular common issues must be identified by specific organizations with specified mandates. The term “the general public” and terms like it should only be used in certain contexts, such as in forums of public discourse where the term and its meanings are less likely to be contested.

5. “The Public Interest”

Copyright will and should continue to refer to “the public interest”, as should all legislation. As a broad and organizing principle, this reference gives new interest groups a foothold. New groups, without being recognized as a stakeholder before copyright, can claim to represent “the public interest” and thus be incorporated in the discussion, where their more specific interests can be recognized and where, eventually, the group may achieve status as a stakeholder. The entry of new groups into discussions can lead to the entry or dominance of new types of words and narratives which can generate changes in ways of thinking and ways of arguing:

Change is produced when a vocabulary takes hold to the extent that its ways of elaborating the world become normative and are unreflectively asserted in everyday practices...change just creeps up on a community as a vocabulary makes its unsystematic way into its every corner.²³¹

Changes can lead to certain new freedoms and certain new forms of dominance, the opening of certain doors and the closing of others. The shining reflection of these various portals – various words that open doors: “public”, “public interest”, “public domain”, “balance”, “rights” – create a network of doors that outline and invite various

²³¹ S. Fish, *Doing what comes naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durham, NC: Duke University Press, 1989, 24, in Halbert, *Intellectual Property in the Information Age*, xii.

phantoms, various publics; some portals proclaiming themselves to be the way to creative freedom, some offering untold creative variety, some with a door-to-door salesman illuminated within their frame, some marked with signs: *no soliciting*, some protecting and defining a darker private space, some calling that space out. These various walls and doors, the figures they frame... this is copyright at home.

Appendix A: Electronic Frontier Foundation Form Letter²³²

EFFector, Vol. 14, No. 23, Sep. 7, 2001 editors@eff.org

A Publication of the Electronic Frontier Foundation ISSN 1062-9424

Introduction:

Canadian citizens, and others, are urged to contact the Canadian government and express their opposition to legislation, similar to the Digital Millennium Copyright Act (DMCA) in the U.S., that would outlaw circumvention of technological restrictions put in place by copyright holders. The Canadian government is accepting public comment until September 15, 2001 on its proposed "Consultation Paper on Digital Copyright Issues" which considers such measures.

These anti-technology bans violate the Canadian Charter of Rights and Freedom's guarantee of freedom of speech, and similar guarantees in the UN Universal Declaration of Human Rights, since such tools are necessary to exercise lawful uses, including fair dealing and other uses that have never been and never should be criminalized. They would turn scientists, fair users, journalists, programmers, and archivists into criminals. While protecting copyright is important, passing measures that also censor much lawful speech goes too far, without ever achieving its objective.

Canada is considering adopting anti-circumvention legislation in response to the World Intellectual Property Organization's (WIPO) 1996 Copyright Treaty. This treaty, however, does not require enacting national legislation that outlaws technology with many lawful uses. Given the dismal US experience with the DMCA, other countries should learn from and steer clear of the U.S. Congress's mistake.

What YOU Can Do:

EFF calls upon the citizens of Canada, and other interested parties around the world, to submit comments by Sept. 15, urging the Canadian agency Intellectual Property Policy Directorate to remove the provisions of the Consultation Paper on Digital Copyright Issues that outlaw the act of circumvention and forbid providing tools for circumvention of technological protection measures restricting use of copyrighted works.

Comments, to be received by the government by September 15, 2001, should be submitted to:

Comments - Government of Canada Copyright Reform
c/o Intellectual Property Policy Directorate

Industry Canada

235 Queen Street

5th Floor West

Ottawa, Ontario K1A 0H5 Canada

fax: (613) 941-8151

copyright-droitdauteur@ic.gc.ca (text, HTML, WordPerfect and MSWord formats accepted)

²³² Reproduced with the permission of the Electronic Frontier Foundation.

<http://www.eff.org/effector/HTML/effect14.23.html> Last checked 13 July 2004.

Sample Letter:

This is just an example. It will be most effective if you send something similar but in your own words.

To Industry Canada, the Department of Canadian Heritage, the Intellectual Property Policy Directorate and other concerned agencies:

I write to express my grave concern regarding the extreme intellectual property provisions of the Consultation Paper on Digital Copyright Issues (CPDCI). These measures, based on the US Digital Millennium Copyright Act (DMCA), give far too much power to publishers, at the expense of individuals' rights. The DMCA itself is already under legal challenge in the US, has gravely chilled scientists' and computer security researchers' freedom of expression around the world for fear of being prosecuted in the US, and resulted in the arrest of a Russian programmer. The CPDCI provisions, which serve no one but (largely American) corporate copyright interests, are just as overbroad as those of the DMCA.

These provisions would amend the Canadian Copyright Act to ban, with few or no exceptions, software and other tools that allow copy prevention technologies to be bypassed. This would violate the Charter of Rights and Freedoms guarantee of freedom of speech, and similar guarantees in the UN Universal Declaration of Human Rights, since such tools are necessary to exercise lawful uses, including fair dealing, reverse engineering, computer security research and many others.

I urge you to remove these controversial and anti-freedom provisions from the CPDCI language. The DMCA is already an international debacle. Its flaws should not be imported and forced on Canadians.

Sincerely,
[Your full name]
[Your address]

Background:

For more information about the Canadian Copyright Act amendment process, including the proposed digital copyright measures and how Canadian citizens can become involved, see the following Web site:

<http://strategis.ic.gc.ca/SSG/rp01100e.html>

Works Cited

Books and Articles

- Barlow, John Perry. *A Declaration of the Independence of Cyberspace*.
http://www.eff.org/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration
 on Last checked 18 June 2004.
- Bettig, Ronald V. *Copyrighting Culture: The Political Economy of Intellectual Property*.
 Boulder, Colorado: Westview Press, 1996.
- Burke, Edmund. *Burke's Politics: Selected Writings and Speeches on Reform, Revolution and War*, edited by Ross J. S. Hoffman & Paul Levack. New York: A. A. Knopf, 1949. Quoted in Habermas, Jürgen, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Mass.: MIT Press, c198), 94.
- Calderisi, Maria. "Music Publishing in Canada: 1800-1867." Master's thesis, McGill University, 1976.
- Canada. Department of Consumer and Corporate Affairs Canada and Department of Communications. *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*. Ottawa, c1984.
- Canada. Department of Industry Canada and Department of Canadian Heritage. *Consultation Paper on Digital Copyright Issues*. Ottawa, 2001.
http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01102e.html Last checked 20 June 2004.
- . *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet*. Ottawa, 2001.
- . *A Framework for Copyright Reform*. Ottawa, 2001.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01101e.html> Last checked 20 June 2004.
- . "Government to Modernize Copyright Legislation." *Canada NewsWire*, 22 June, 2001.
- . *Overview of Submissions on the Consultation Paper on Digital Copyright Issues*. Ottawa, n.d. <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00842e.html> Last checked 20 June 2004.
- . *Supporting Culture and Innovation*. Ottawa, 2002.
http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01106e.html Last checked 20 June 2004.
- Canada. Parliament. House of Commons. Standing Committee on Communications and Culture. Sub-Committee on the Revision of Copyright. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright*. Ottawa: Queen's Printer, 1985.
- Canadian Association of Broadcasters. *Response to Consultation Paper on Digital Copyright Issues*.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00257e.html> Last checked May 17, 2004.

- Canadian Association of Internet Providers. *Response to the Consultation Paper on Digital Copyright Issues*.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00314e.html>. Last checked 18 June 2004.
- Canadian Copyright Licensing Agency. *Response to the Consultation Paper on Digital Copyright Issues*.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00344e.html> Last checked May 17, 2004.
- Canadian Copyright. N.p.: Canadian Copyright Association, n.d.
- Coombe, Rosemary J. *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. London: Duke University Press, 1998.
- Doern, Bruce and Markus Sharaput. *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests*. Toronto: University of Toronto Press, 2000.
- Electronic Frontier Canada. *Response to the Consultation Paper on Digital Copyright Issues*, September 14, 2001.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00559e.html> Last checked May 17, 2004.
- Electronic Frontier Foundation. *EFFector Online Newsletter*. Vol. 14, No. 23, September 7, 2001.
<http://www.eff.org/Misc/EFF/Newsletters/EFFector/HTML/effect14.23.html> Last checked May 17, 2004.
- Fish, S. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham, NC: Duke University Press, 1989, 24, in Debora J. Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights*, (London: Quorum Books, 1999), xii.
- Foucault, Michel. "Afterword." In *Michel Foucault: Beyond Structuralism and Hermeneutics*, by Hubert L. Dreyfus and Paul Rabinow. Chicago: University of Chicago Press, 1982.
- Fraser, Nancy. "Rethinking the Public Sphere." In *The Phantom Public Sphere*, edited by Bruce Robbins. Cultural Politics, Volume 5. London: University of Minnesota Press, 1993.
- Fulcher, J. "Globalisation, the Nation-State and Global Society." *Sociological Review* 48 no. 4 (2000): 522-543.
- Ginsburg, Jane C. "How Copyright Got a Bad Name for Itself." 26 *Columbia Journal of Law and the Arts* 61 (Fall 2002).
- Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. New York: Hill and Wang, 1994.
- Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Translated by Thomas Burger. Cambridge, Mass.: MIT Press, c1989.
- Halbert, Debora J. *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights*. London: Quorum Books, 1999.
- Handa, Sunny. *Copyright Law in Canada*. Markham: Butterworths, 2002.
- Harris, Lesley Ellen. *Digital Property: Currency of the 21st Century*. Toronto: McGraw-Hill, 1998.

- Held, David. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Cambridge: Polity, 1991. Cited in James Fulcher, "Globalisation, the Nation-State and Global Society," *Sociological Review* 48 no. 4 (2000): 527.
- Helfer, Laurence R. "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking." *29 Yale Journal of International Law* 1 (Winter 2004).
- Herrington, TyAnna K. *Controlling Voices: Intellectual Property, Humanistic Studies, and the Internet*. Carbondale: Southern Illinois University Press, 2001.
- Jaszi, Peter. A. "Goodbye to All That - A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law." *Vanderbilt Journal of Transnational Law* 29, no. 3 (May 1996): 595-611.
- Kaplan, Benjamin. *An Unhurried View of Copyright*. New York, Columbia University Press, 1967.
- Lenhart, Amanda, John Horrigan, and Deborah Fallows. *Content Creation Online*. N.p.: Pew Internet & American Life Project, 29 February 2004.
<http://www.pewinternet.org/reports/toc.asp?Report=113> Last checked 28 May 2004.
- Lessig, Lawrence. "Artful Dodges: Record Execs are Crying for the Rights of Artists. But the Real Issue is Innovation, Not Pay." N.p.: n.d., June 11, 2001.
<http://www.lessig.org/content/standard/0,1902,26946,00.html> Last checked 17 December 2003.
- Lippmann, Walter. *The Phantom Public*. New York: Harcourt, Brace & Co., 1925.
- Litman, Jessica. "The Public Domain." 39 *Emory Law Journal* 965 (Fall, 1990).
- . "Copyright Law as Communications Policy: Convergence of Paradigms and Cultures: War Stories." 20 *Cardozo Arts and Entertainment Law Journal* 337 (2002).
- . *Digital Copyright*. New York: Prometheus Books, 2001.
- Locke, John. *An Essay Concerning Human Understanding*. London: Symon, 1731.
Quoted in Habermas, Jürgen, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Mass.: MIT Press, c1989), 91.
- Lyotard, Jean François. *The Postmodern Condition: A Report on Knowledge*. Translated by Geoff Bennington and Brian Massumi. Minneapolis : University of Minnesota Press, c1984.
- McKeown, John S. *Fox Canadian Law of Copyright and Industrial Designs*. Scarborough: Carswell Thomson Professional Publishing, 2000.
- McSwite, O. C. "Postmodernism, Public Administration, and the Public Interest." In *Refounding Democratic Public Administration: Modern Paradoxes, Postmodern Challenges*, edited by Gary L. Wamsley and James F. Wolf. London: Sage Publications, 1996.
- Negt, Oskar and Alexander Kluge. *Public Sphere and Experience: Toward an Analysis of the Bourgeois and Proletarian Public Sphere*. Minneapolis: University of Minnesota Press, c1993. Cited in Robbins, Bruce. "The Public as Phantom." In *The Phantom Public Sphere* (London: University of Minnesota Press, 1993), vii.
- Parker, George. "The Canadian Copyright Question in the 1890s." *Journal of Canadian Studies* 11, no. 2 (May 1976): 43-55.

- Patterson, L. Ray and Stanley W. Lindberg. *The Nature of Copyright: A Law of Users' Rights*. London: University of Georgia Press, 1991.
- Public Interest Advocacy Centre. *Response to the Consultation Paper on Digital Copyright Issues*, September 15, 2001.
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00173e.html> Last checked May 17, 2004.
- Puchala, David J. and Raymond F. Hopkins, "International Regimes: Lessons from Inductive Analysis." *International Regimes* 1, 5, 11, edited by Stephen D. Krasner, 1983 at 61, 66, Quoted in Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking," (29 *Yale Journal of International Law* 1 (Winter 2004)).
- Rice, Grantland S. *The Transformation of Authorship in America*. Chicago: University of Chicago Press, 1997.
- Robbins, Bruce. "The Pubic as Phantom." In *The Phantom Public Sphere*, edited by Bruce Robbins. Cultural Politics, Volume 5. London: University of Minnesota Press, 1993.
- Rose, Mark. *Authors and Owners: The Invention of Copyright*. Cambridge, Mass.: Harvard University Press, 1993.
- Samuelson, Pamela. "Copyright, Commodification, and Censorship: Past as Prologue - But to What Future?" N.p.: n.d.
http://www.sims.berkeley.edu/~pam/papers/haifa_priv_cens.pdf. Last checked 28 May 2004.
- . "Mapping the Digital Public Domain: Threats and Opportunities." 66 *Law & Contemporary Problems* 147 (Winter/Spring 2003).
- . "Toward a 'New Deal' for Copyright in the Information Age." Review of Digital Copyright, by Jessica Litman." 100 *Michigan Law Review* 1488 (2002).
- . "Toward a New Politics of Intellectual Property." N.p.: n.d.
<http://www.sims.berkeley.edu/~pam/papers/CACMNewPolitics3.pdf> Last checked 20 June 2004.
- Shiga, John. "The Empathy Test: Communication and Excommunication in Anti-Piracy Propaganda." Ottawa: n.d., 2004.
- Sills, Susan. "The Role of the Canadian Authors Association with Respect to the Licensing Clauses of Early Copyright Legislation and Canada's Adherence to the Berne Convention." Master's thesis, Carleton University, 1977.
- Slashdot.com "The Government of Canada is looking for submissions into their public consultation process of Copyright reform....," Posting by "michael" on *Slashdot.com Announcing the Public Consultation on Digital Copyright Issues*, 6 September 2001.
<http://yro.slashdot.org/article.pl?sid=01/09/06/2028226&mode=thread&tid=99>
 Last checked May 17, 2004.
- Tawfik, Myra J. "Copyright as *Droit d'auteur*." 17 *Intellectual Property Journal* 59 (September, 2003).
- United States. The Copyright Protection Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm., 104th Cong., 1st Sess. 23 (1995)(testimony of Hon. Bruce Hehman, Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office)(transcript provided by Federal News Service). Quoted in

- Peter. A. Jaszi, "Goodbye to All That - A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law," *Vanderbilt Journal of Transnational Law* 29, no. 3 (May 1996): 611.
- Vaidhyathan, Siva. *The New Information Ecosystem: Cultures of Anarchy and Closure, Part I It's a Peer-to-Peer World*.
<http://www.opendemocracy.net/debates/article-8-101-1319.jsp> Last checked 3 January 2004
- . *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York: New York University Press, 2001.
- Vaver, David. *Copyright Law*. Toronto: Irwin Law, 2000.
- Walterscheid, Edward C. *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*. New York: William S. Hein & Co., 2002.
- Whale, Royce Frederick. *Copyright: Evolution, Theory and Practice*. London: Longman, 1971.
- World Intellectual Property Organization. *Medium-term plan for WIPO program activities – Vision and Strategic Direction of WIPO*.
<http://www.wipo.int/about-wipo/en/dgo/pub487.htm> Last checked 14 July 2004.

Interviews and Correspondence

- Copeland, Tom. Chairman, Canadian Association of Internet Providers. *Email correspondence*. 23 March 2004.
- Mirella, Loris. *Interview by author*. Department of Canadian Heritage, 275 Slater St., Ottawa, ON, 31 March 2004.

Newspaper Articles

- Akin, David. "Canadians Love Free Napster Music Files: Highest Penetration: 3.3 Million Utilized Web Site in January, Report Says." *The Financial Post (National Post)*, 23 February 2001, C7.
- Austen, Ian. "New Electronic Book Software Makes Lending Out Impossible." *The New York Times*, 22 February 2001, G3.
- Beato, G. review of *The Perfect Store: Inside E-bay*, by Adam Cohen, *The Washington Post*, 7 July 2002, T06 (F).
- Bloomberg News. "MP3.com, Online Music Provider, Is Fined." *The New York Times*, 7 April 2001, C3.
- . "Musicians Sue MP3.Com." Compiled by Alan Krauss. *The New York Times*, 9 May 2001, C4.
- Flynn, Laurie J. "Despite Microsoft's Best Efforts to Kill It, the Free-Software Movement Shows no Sign of Quietly Rolling Over and Dying." *The New York Times*, 4 June 2001, C4.
- Fraser, Matthew. "JumpTV Takes On Vested Interests: Copyright Board To Decide Fight With Broadcasters." *The Financial Post (National Post)*, 29 January 2001, C2.
- Geist, Michael. "Low-Tech Case has High-Tech Impact." *Toronto Star online*, 22 March 2004.
http://www.torontostar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1079910611083&call_pageid=968350072197&col=969048863851 Last checked May 14, 2004.

- . "Will copyright reform chill use of Web?" *Toronto Star online*, 31 May 2004.
http://www.torontostar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1085955306392&call_pageid=968350072197&col=969048863851, Last checked 16 June 2004.
- Hamilton, Tyler. "Lawyer Argues Lack of Evidence in Music Piracy Case; Says Internet Providers Shouldn't Disclose Users' Identities Recording Industry has Tracked Down 29 Song Swappers." 16 March 2004, *Toronto Star*, D03.
- . "Law Students Rally to Aid Music 'Pirates'." *Toronto Star*, 14 February 2004.
http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&call_pageid=971358637177&c=Article&cid=1076713810651 Last checked 16 May 2004.
- Harmon, Amy. "Judge Asked For Ruling On Copyright," *The New York Times*, 7 June 2001, p. C5.
- Harmon, Amy and Jennifer Lee. "Arrest Raises Stakes in Battle Over Copyright." *The New York Times*, 23 July 2001, C1.
- Ibbitson, John. "Welcome to a new era of liberal democracy." *The Globe and Mail*, 12 January 2004, A13.
- Jack, Ian. "Ottawa to Probe Internet Feeds on Television: Consultation on Law. Debate Pits Broadcasters Against Web Streamers." *Financial Post (National Post)*, 22 June 2001, C7.
- Levere, Jane. "A Campaign Seeks Out Works by Unknown Writers and Wants to Publish Them – Digitally." *The New York Times*, 21 May 2001, C13.
- "Non-Napster Users in Canada Support US Court Ruling Against Music Swap Service." *The Financial Post (National Post)*, 6 March, 2001, C9.
- "Ottawa Launches Review Process." *Globe and Mail ME*, 23 June, 2001, B6.
- Pacienza, Angela. "Cdn Music Industry Loses Federal Court Bid to Thwart Music File Swapping." *Canadian Press Newswire*, 31 March 2004.
- Restivo, Kevin. "Shaw Fights to Keep Web Client Names Private: Music Sharing Suits Loom." *Financial Post (National Post)*, 13 February 2004, FP04.
- Richtel, Matt. "MP3.com Offers Music From Unknowns." Compiled by Alan Krauss. *The New York Times*, 11 May 2001, C4.
- Thompson, Robert. "ISPs Refuse to Hand over Downloaders: Court Battle Adjourned." *Financial Post (National Post)*, 17 February 2004, FP01.
- Harmon, Amy. "Judge Asked For Ruling On Copyright," *The New York Times*, 7 June 2001, C5. "Thousands of Users Turn to Napster Alternatives: Similar Sites Abound. Pioneering Service's Future in Doubt." *The Financial Post (National Post)*, 6 March 2001, C9.
- Varadi, Margo. "Is Brianna a criminal?" *Toronto Star*, 18 September 2003, P07.
- Viega, Alex. "Music Swapping Not All Bad for Recording Industry: Consumers Tracked in a Whole New Way." *Calgary Herald/Associated Press*, 15 November 2003, D4.

Cases

- CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (2004).
Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers, 2002 FCA 166 (2002).
SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet)(Re). (1999) 1C.P.R. (4th) 417 (Copyright Board).
<http://www.cb-cda.gc.ca/decisions/m27101999-b.pdf> Last checked 20 June 2004.

Statutes and Treaties

- Canada. *Copyright Act*, R.S.C. 1985, c. C-42
 Free Trade Area of the Americas. *Third Draft Free Trade Area of the Americas Agreement*, November 21, 2003.
http://www.ftaa-alca.org/FTAADraft03/Index_e.asp Last checked 14 July 2004.
 Government of Canada, the Government of the United Mexican States and the Government of the United States of America. *North American Free Trade Agreement*.
<http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp> Last checked 14 July 2004.
 United Kingdom. *An Act for the Encouragement of Learning, the 1710 Statute of Anne*.
http://press-pubs.uchicago.edu/founders/documents/a1_8_8s2.html Last checked 15 July 2004.
 United Nations Educational, Scientific and Cultural Organization. *Universal Copyright Convention, as revised at Paris on 24 July 1971*.
http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml Last checked 14 July 2004.
 United Nations High Commissioner for Human Rights. *Charter of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948*.
<http://www.unhchr.ch/udhr/lang/eng.htm> Last checked 14 July 2004.
 United States. *An Act of the Encouragement of Learning, January, 1790*.
<http://earlyamerica.com/earlyamerica/firsts/copyright/> Last checked 15 July 2004.
 World Intellectual Property Organization. *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, and amended on September 28, 1979*.
<http://www.wipo.int/clea/docs/en/wo/wo001en.htm> Last checked 14 July 2004.
 World Intellectual Property Organization. *Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979*.
<http://www.wipo.int/clea/docs/en/wo/wo029en.htm> Last checked 14 July 2004.
 World Intellectual Property Organization. *WIPO Copyright Treaty, adopted in Geneva on December 20, 1996*.
<http://www.wipo.int/clea/docs/en/wo/wo033en.htm> Last checked 14 July 2004.
 World Intellectual Property Organization. *WIPO Performers and Phonograms Treaty, adopted in Geneva on December 20, 1996*.
<http://www.wipo.int/clea/docs/en/wo/wo034en.htm> Last checked 14 July 2004.

- World Trade Organization. *Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.*
http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm Last checked 14 July 2004.
- World Trade Organization. *Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. Annex 1C: Agreement of Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS).*
http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm Last checked 14 July 2004.

Internet Sites

- Berkman Centre for Internet & Society At Harvard Law School.*
<http://cyber.law.harvard.edu/home/> Last checked 20 June 2004.
- Canada. Department of Industry Canada. *Submissions in Response to the Consultation Paper on Digital Copyright Issues.*
http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html Last checked May 17, 2004.
- Canadian File-sharing Legal Information Network.*
<http://www.canfli.org/> Last checked 16 May 2004.
- Canadian Internet Policy and Public Interest Clinic.*
<http://www.cippic.ca/about-us> Last checked 16 May 2004.
- Lexinformatica.*
<http://www.lexinformatica.com/> Last checked 20 June 2004.
- McOrmond, Russell. *Opening Message to the Canada DMCA Opponents forum.*
<http://www.digital-copyright.ca/discuss/1> Last checked 17 May 2004.
- World Trade Organization.*
<http://www.wto.org> Last checked 11 June 2004.