

## All Rights Reserved? Cultural Monopoly and the Troubles with Copyright

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THE NINTH ANNUAL HONORABLE  
HELEN WILSON NIES MEMORIAL  
LECTURE IN INTELLECTUAL PROPERTY

ALL RIGHTS RESERVED? CULTURAL  
MONOPOLY AND THE TROUBLES WITH  
COPYRIGHT\*

MICHAEL GEIST\*\*

INTRODUCTION<sup>1</sup>

Hello and welcome to the Ninth Annual Honorable Helen Wilson Nies Memorial Lecture. The Nies Lecture is the centerpiece of the Marquette University Law School's intellectual property and technology program. It is our main opportunity to get everyone together to discuss cutting-edge legal issues related to intellectual property. I appreciate you coming to join us for that. Over the last nine years that the lecture has been held, we have had a remarkable group of speakers. I am enthusiastic that today we will continue that tradition. Today, the lecture will be delivered by Dr. Michael Geist. Dr. Geist holds the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa. He has an LL.B. from Osgoode Hall Law School in Toronto, an LL.M. from Cambridge University, and an LL.M. and J.S.D. from Columbia Law School. Dr. Geist contributes to the academic and social dialog of technology and intellectual property law in a variety of formats. He has written books and numerous research articles. He has a syndicated newspaper column. He has a heavily-

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\* Audiotape of the Ninth Annual Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property Law, held at Marquette University Law School (April 5, 2006) (on file with the *Marquette Intellectual Property Law Review*). The lecture is delivered each spring semester by a nationally-recognized scholar in the field of intellectual property law. We have provided the various websites that were discussed in the lecture so that our readers could experience these websites for themselves; thus, the citations do not provide detailed citations.

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1. Professor Eric Goldman, Marquette University Law School, provided introductory remarks.

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trafficked blog that you might visit.<sup>2</sup> On a more personal note, he sends a daily email newsletter related to Internet law that most people in my field read religiously. In my case, it is one of the few emails that I actually read everyday on the day that I receive it. Usually, I read it first thing in the morning, even before I have breakfast. I go in and check the computer to see what Dr. Geist has to say. I hope that these credentials indicate that we are very fortunate to have here with us not only one of the leading experts in Canada on intellectual property and technology law, but also, I think, one of the leading experts in the world. Dr. Geist will share his thoughts today on the topic of *All Rights Reserved?: Cultural Monopoly and the Troubles with Copyright*. Please join me in welcoming Dr. Geist.

#### LECTURE

Thanks very much Eric. Thanks for the invitation. It is nice to come to Milwaukee. Eric did not mention that I have family in Milwaukee; thus, I had an opportunity to spend the afternoon with three of my nieces, which was a lot of fun. It is also a lot of fun to give this talk.

Eric sent the email invitation to come and give the talk sometime in the fall. A few weeks later, I received another email, on December 22, 2005, a couple of days before the holiday, in the middle of the national election campaign in Canada. The email was entitled *Sam Bulte: Democracy in Action*. It contained no text, but had an attachment. The attachment was an invitation to a fundraiser for Sarmite "Sam" Bulte, who no one here is going to know; in fact, many Canadians do not know her. She was a Member of Parliament from the Toronto area. It was a fundraiser being sponsored by five people: Douglas Frith, Graham Henderson, Jacquie Husion, Danielle LaBoissiere, and Stephen Stohn, with performance by Margo Timmins, who is the lead singer of Cowboy Junkies, a Canadian musical group.

So, if you had gotten this email, it might not mean very much to you. Frankly, if most Canadians had gotten this email, it would not mean much to them either. However, when I got it, it meant a lot to me. Sam Bulte was a Member of Parliament since the mid-90s. In Canada, she was the lead person on copyright and culture and a strong proponent of copyright laws. I should note that Canada has not yet ratified the World Intellectual Property Organization (WIPO) treaty or enacted a Digital Millennium Copyright Act (DMCA). Ms. Bulte was someone who was

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2. Michael Geist's Blog, [www.michaelgeist.ca](http://www.michaelgeist.ca).

certainly pushing very hard for those laws. When I saw that it was going to be a fundraiser for Sam Bulte four days before the national election campaign—with Margo Timmons (the wife of Graham Henderson, the head of the Canadian Recording Industry Association), Douglas Frith (the head of the Canadian Motion Picture Distributors Association), the heads of the Entertainment Software Association and Canadian Publishers' Council, and the producer of *Degrassi*—that did ring a bell. From a Canadian perspective, the notion that Ms. Bulte would hold a fundraiser just four days before a national election did create some cause for concern.

Now, these events came in an environment in Canada in which just months earlier we introduced Bill C-60, an important new copyright legislation. Bill C-60 was, in fact, Canada's attempt to implement the WIPO Internet treaties into domestic law. Sam Bulte led the charge in that regard. Just a year earlier, she chaired a standing committee, the equivalent of a congressional committee, which issued an interim report on copyright reform. The report advocated for very strong, DMCA-like copyright legislation. Someone from my perspective on copyright would say, "Wow, this is interesting," and somewhat troubling given the number of stakeholders concerned with this issue. To have someone so closely aligned with one group is a bit out of sorts in Canada. The fundraiser was not a secret, however. If you visited Sam Bulte's website, it was right there. Some of you may be thinking, "Two hundred and fifty dollars, what's the big deal?" In Canada, however, that seemed like a fair amount of money for a fundraiser because we have fairly strong caps on the amounts you can give to a campaign.

I therefore did what many people do now when they have something to say and want to share it with the world: I posted it on my blog. The posting was entitled *That's What Friends are For*. In the posting, I made very clear, right from the outset, that there was nothing unlawful about this fundraiser, because it was well within Canadian election laws. However, I did not think that holding this fundraiser just days before the election was good. Now, a number of other bloggers picked up the story as well. Frankly, because this occurred just prior to the holidays, I thought that the story might have died for lack of interest. Until New Year's Day when Boing Boing,<sup>3</sup> one of the most popular blogs on the Internet with a daily readership of about 1.7 million people, ran this story: *Canadian Bulte Gets Big Entertainment Bucks, Promises New Compromises*. From there on, suddenly, this story picked up a lot of

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3. BoingBoing: A Directory of Wonderful Things, [www.boingboing.net](http://www.boingboing.net).

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steam. Mainstream media in Canada, *Globe and Mail*,<sup>4</sup> a leading Canadian newspaper, *Hollywood Reporter*,<sup>5</sup> and *Toronto Star*,<sup>6</sup> the largest circulating paper in the country, all picked up the story. It was starting to attract some real interest. CTV<sup>7</sup> and CBC,<sup>8</sup> the two national television networks in Canada, decided to run the story.

However, it is not the mainstream media that I think is interesting. In addition to the running of the story by Ms. Bulte's main competitor, this was a story that was being run and carried on by people with blogs. Mainstream media blogs, such as *Globe and Mail*, *Maclean's*,<sup>9</sup> and *Toronto Star*, picked up the story. In addition to the mainstream media blogs, there were law professor blogs<sup>10</sup> and local blogs written by people who live in Ms. Bulte's district, such as the Accordion Guy<sup>11</sup> and Random Bytes.<sup>12</sup> There were copyright blogs,<sup>13</sup> political blogs,<sup>14</sup> and music blogs.<sup>15</sup> There were also online petitions. I had suggested something called a "copyright pledge," suggesting that someone who took money from the copyright lobby should not sit in a position like Minister of Canadian Heritage or Parliamentary Secretary. Hundreds of people signed this petition. There were also bumper stickers for the "pro-users zealots." There were also lots, and lots, and lots, of parody websites that wrote all about Sam Bulte.

I have to admit that I did not fully appreciate the extent to which it captured the interest of the online community until I learned that at the various local all-candidates meetings people were raising this issue. The video of one of these instances appeared on a website called YouTube,<sup>16</sup>

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4. [globeandmail.com](http://globeandmail.com), [www.globeandmail.com](http://www.globeandmail.com).

5. [The Hollywood Reporter.com](http://TheHollywoodReporter.com), [www.hollywoodreporter.com](http://www.hollywoodreporter.com).

6. [Toronto Star](http://TorontoStar.com), [www.thestar.com](http://www.thestar.com).

7. [Canadian Television](http://CanadianTelevision.com), [www.cta.ca](http://www.cta.ca).

8. [Canadian Broadcasting Corporation](http://CanadianBroadcastingCorporation.com), [www.cbc.ca](http://www.cbc.ca).

9. [Maclean's](http://Maclean's.com), [www.macleans.ca](http://www.macleans.ca). *Maclean's* would be the Canadian equivalent of *Time* or *Newsweek*.

10. [Lawrence Lessig](http://www.lessig.org), <http://www.lessig.org>.

11. [The Adventures of Accordion Guy in the 21st Century: Joey deVilla's Webblog](http://TheAdventuresofAccordionGuy.com), <http://accordionguy.blogware.com>.

12. [Random Bytes . . . by Ross Nader](http://RandomBytes.org), <http://www.byte.org/blog>.

13. [CopyrightWatch.ca](http://CopyrightWatch.ca), <http://www.copyrightwatch.ca>.

14. [Progressive Bloggers](http://ProgressiveBloggers.ca), <http://www.progressivebloggers.ca>.

15. Some examples include the blog of the Barenaked Ladies, another Canadian group, and one of its singers, Steven Page. [BNL blog.com](http://BNLblog.com), <http://www.bnlblog.com>. Another Canadian singer, Matthew Good, who won a couple of Juno awards, which is Canada's version of a Grammy, also discussed this issue on his blog. [Matthew Good](http://www.matthewgood.org), <http://www.matthewgood.org>.

16. [YouTube](http://YouTube.com), [www.youtube.com](http://www.youtube.com) (click on "Video" hyperlink and search for "Sam

where, within a couple of hours, it was downloaded literally thousands of times.<sup>17</sup>

I think it was around that point in time when I started to appreciate the effect of disseminating this type of content online as well as what was going on from a blog perspective. It was also about this point in time when the media decided that the story was not so much about the fundraiser as it was about the bloggers who were carrying this story along. In the last week of the campaign, there were stories about how bloggers were now influencing the election. These stories were available in *Maclean's*, *Financial Post*,<sup>18</sup> Canada's major financial paper, and *Globe and Mail*. The focus of the story in *Globe and Mail* was no longer about the fundraiser: It was "look what's happening out in the blogosphere." *Globe and Mail* informed Canadians that the country was heading for a conservative minority on election night. If you happened to look at the website at a particular time just after eleven o'clock, you learned: *Bloggers United: Sam Bulte Defeated*.

Now, the question for me is what to take from all of this. The online community in Canada has given this a lot of thought. Some suggest that the bloggers have exaggerated the impact they had on the outcome. It should be noted that only two ridings in the greater Toronto area, out of about forty to fifty ridings, actually changed hands on election day. Sam Bulte's riding was one of them, and no ridings had as many votes change as hers. In fact, hers was one in which there had just been an election eighteen months earlier and in which the same contestants were running. In this election, we had the same contestants eighteen months later with a dramatic switch. Now, in a sense, I do not think it matters whether bloggers had an impact here or not. Some people think they did; some people think they did not. Either way, I think there are some more important lessons that it can teach us about what is happening online today, especially about the kind of copyright and cultural policies and the choices that we make. These are choices that we are certainly in the midst of making in Canada, but also as a global community. I want to focus on three lessons: New Voices, New Stakeholders, and New Copyright.

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Bulte").

17. Dr. Geist played a media clip from one of the meetings in which one attendee asked the panel, including Sam Bulte, to agree to the "copyright pledge." She declined. (Ed.).

18. National Post, Financial Post, <http://www.canada.com/nationalpost/financialpost/index.html>.

*A. New Voices*

Let me start then with new voices. I think this is a good news story; in fact, I think it is a great news story. Rather than focusing on how incredible it is that this new technology provides us with these new voices, there is a tendency, especially with the media, to focus on the negativity associated with the Internet. Whether it is child pornography, spyware, or peer-to-peer file sharing, which some people think is negative, and the like.

This is the Technorati<sup>19</sup> blog search engine. When I took this screenshot about a week and a half ago, they were tracking about 31.5 million blogs with over 2 billion hyperlinks. They are growing by about 75,000 new blogs per day and predominantly in languages other than English. In January, the number one language that Technorati tracked was actually Japanese. This is happening from a global perspective in that a lot of new voices are suddenly out there, even though none of us have the time or really the interest or inclination to read them all. However, a lot of stuff out there becomes very valuable because it becomes the place some people get a lot of their information.

Now, a large part of this comes from the fact that technology has made this so easy. If you can use a word processor, you too can blog. When Blogger<sup>20</sup> tells us that you can “create a blog in three easy steps,” there is truth-in-advertising. It does not take much more than three easy steps, and suddenly you too are broadcasting to the world. Of course, it does not really matter if you are just one more voice, one more ripple that no one is hearing.

Another aspect to this, and many of you will be familiar with this, is that blogs can effectively be broadcast using feeds. Really Simple Syndication (RSS) is really simple syndication. This allows your feed to sit alongside your local columnist, favorite source of information, or whatever source of information to which you typically look. Suddenly, for many people, within their feed readers, they have a series of bloggers and a series of mainstream media sources.

I think we are seeing a great many mainstream media websites increasingly looking a lot like blogs. They are becoming very “bloggy” in the type of presentation they provide, but it is not just blogs. Through music-orientated websites, literally hundreds of thousands of musicians are no longer confined to their own garage. They can go to

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19. Technorati, <http://www.technorati.com>.

20. Blogger, <http://www.blogger.com>.

websites like GarageBand<sup>21</sup> to find an audience and provide their information or content. There are also websites like MySpace,<sup>22</sup> which is very popular on college campuses, where literally millions of people come together for social networking, blogging, and participating in the music scene.

PostSecret,<sup>23</sup> an incredible website, started about eighteen months ago as a community art project. The creator of the website said, “Send me a secret, something you might not be willing to tell your family or your friends and put it in some sort of art form. So express yourself in a unique and anonymous way.” Today, it ranks as one of the thirty most popular blogs on the Internet. Each Sunday, a series of new secrets are posted. Frankly, most of them are heartbreaking. It has many stories of people who are very lonely, getting over addictions, struggling, and literally feeling like they cannot confide in the people closest to them. However, they feel comfortable using the veil of anonymity to tell the world and express themselves in new and unique ways. It has been the source of community art programs today on display in museums and the subject of a bestselling book that brings all of this together.

Fan fiction, which I must admit that I still do not quite get, energizes thousands of people. People for whom the characters they see—whether on television or in the movies or otherwise—as truly part of their culture. They want to live and experience that culture in ways that extend beyond just watching it on television. For instance, if you are someone who “loved Raymond” (we are told that *Everybody Loves Raymond*) and are sad that there are no new episodes, you can create new episodes. I have to admit that I thought all of the episodes were the same, which to me did not seem particularly entertaining. Ray would get into something silly and his wife would be smiling at the end of the day. Nevertheless, there are people out there that just love Raymond. In fact, there are people out there that love just about every show from *Growing Pains* to *Happy Days* and the like. If you go to a website like Fanfiction.net,<sup>24</sup> you will find literally dozens, sometimes hundreds (not just for *Star Trek*), of ideas for scripts. Some of which contain thousands and thousands of words. Even more amazing than finding the scripts, you will find dozens and dozens of people talking about the scripts and saying, “Well, no, the person really would not have done

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21. GarageBand.com, <http://www.garageband.com>.

22. MySpace.com, <http://www.myspace.com>.

23. PostSecret, <http://www.postsecret.blogspot.com>.

24. FanFiction.net, <http://www.fanfiction.net>.



that,” or “You might consider changing that.” It is people for whom this culture—whether it is a television show or otherwise—is something to which they truly connect with.

There is what public broadcasters are doing now in the United Kingdom through the Creative Archive Licence Group,<sup>25</sup> a group affiliated with the British Broadcasting Corporation (BBC). Their slogan is the following: “Find it, Rip it, Mix it, Share it, Come and Get it.” Residents in the United Kingdom pay a license fee for television programming that goes back into their public broadcasting funds. BBC is of the view that the public has paid for this content; thus, it is making hundreds of hours of content available to the public online such that users can literally rip it, mix it, come and get it. They can recreate or create new content for programs that they have already paid for and have appeared on the BBC; thus, it is not just a creative archive. Similarly, the BBC program Backstage<sup>26</sup> has my new favorite slogan: “Use Our Stuff to Build Your Stuff.” The sense is that it is our stuff, but it is also your stuff. So go ahead and build with it.

While there is a tendency to think of content-sharing largely in peer-to-peer terms, I think there is far more than that going on. There is Flickr,<sup>27</sup> a website started by a Vancouver couple as a place for people to share their digital photographs. Today, if you go to Flickr, now owned by Yahoo, you will find literally tens of millions of photographs. Frankly, just about anything that you could ever want is out there. Much of it is made available so that people can use it freely for personal or non-commercial purposes, such as community projects. It is an incredible repository for creativity.

Larry Lessig at Stanford started this idea of a repository for creativity, which is tied, in part, into the Creative Commons<sup>28</sup> movement. Essentially, it is the notion that we do not necessarily need an “all rights reserved” approach. Instead, a “some rights” reserved system will work for a great many creators. It just started a few years ago, but today there are more than fifty million works that are licensed under Creative Commons licenses. Frankly, there are far more than that because the fifty million figure is only the number of linkbacks that Yahoo is tracking. If you go to Yahoo or Google, they offer search engines to find Creative Commons-licensed work, work that is certainly

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25. Creative Archive Licence Group, <http://creativearchive.bbc.co.uk>.

26. BackStage: Performing Arts Resources, <http://www.backstage.com>.

27. Flickr, <http://www.flickr.com>.

28. Creative Commons, <http://creativecommons.org>.

still subject to copyright.

In the last month or so in Europe, there have been two cases that have examined the enforceability of Creative Commons licenses. Both courts came to the conclusion that they are enforceable and that Creative Commons licenses actually build on copyright. The licenses specify that you have all of these rights, but you are not necessarily interested in retaining all of these rights. Creative Commons facilitates sharing by allowing you to say that others can use your work for other purposes. Creative Commons led to the creation of what was known as International Commons,<sup>29</sup> now known as Worldwide Creative Commons, in which literally dozens of countries are modifying the licenses so that they are appropriate within the local jurisdiction. My law school, the University of Ottawa, has led the initiative in Canada. Science Commons<sup>30</sup> is trying to do much the same thing from a science perspective, which has led to things like ccMixer.<sup>31</sup> The ccMixer website allows people to do mash-ups, pick apart various songs, and create new songs. This one website hosts sound clips with which you can run a search and see more than two hundred thousand Creative Commons-licensed songs.

In one of those two European cases that I made brief reference to a moment ago, a bar was playing music, and a copyright collective came and said, "You have to pay your royalty for playing music in your establishment." The response of the bar was, "Well, hold on a second. We are playing Creative Commons-licensed music, and that is not actually part of your repertoire." This is because the collective, at least now, will not accept Creative Commons-licensed music into its repertoire. The collective sued, and the court found that the establishment was fully within its right to play this music because it is outside the repertoire; thus, they need not actually pay the typically applicable fees.

The first thing that comes to mind from a knowledge-sharing perspective for me is Wikipedia,<sup>32</sup> a resource to which *Encyclopedia Britannica* certainly does not like to be compared. Nonetheless, I do not think Wikipedia needs to be compared to *Encyclopedia Britannica*. As a top thirty or forty website on the Internet, it is for a large number of people now the first place that they turn to when they are looking for

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29. Creative Commons Worldwide, <http://creativecommons.org/worldwide>.

30. Science Commons, <http://sciencecommons.org>.

31. Ccmixer.com, <http://www.ccmixer.com>.

32. Wikipedia, <http://www.wikipedia.org>.

information online. While some of it is accurate, some of it is not quite so accurate. Nevertheless, for many people, it is a great starting point. It is a global phenomenon. There are more than one million entries in English alone and hundreds of thousands of entries in other languages. In fact, there are tens of thousands or even hundreds of thousands of entries in other languages. Some entries are in languages that I had never heard of. In fact, there were a number of websites that my computer is not even familiar. It is important to understand that all of this content on Wikipedia—millions of entries—is user-generated by a community with no expectation of remuneration. They are people simply willing to share their knowledge with others. Wikipedia is leading to other projects, such as WikiNews,<sup>33</sup> which is doing the same thing with the news perspective as we have with the encyclopedia perspective.

WikiBooks<sup>34</sup> is a terrifically important project, because it brings educators together to create modules for the texts that we all know are quite costly in North America. In developing nations, many times the people simply cannot afford the books. Projects like WikiBooks seek to bring together online creative books by others so that students around the world can use them. Similarly, Project Gutenberg<sup>35</sup> has been scanning books that are in the public domain for a number of years now. There are more than seventeen thousand free books—books that if you go to the Project Gutenberg website, you can download and view.

When Public Library of Science<sup>36</sup> was launched a few years ago, many in the scientific community questioned whether someone with any kind of credibility would be willing to publish in this online scientific journal even if the articles were peer-reviewed. Today, it stands as one of the more important journals within many scientific communities. It is growing so fast that they cannot accommodate all of the articles. In fact, in Canada, we have had an interesting incident just over the last few months with the Canadian Medical Association's *Canadian Medical Association Journal*. The journal is ranked as one of the top five cited medical journals in the world, and yet there has been a considerable amount of editorial interference. In fact, all of the advisory board editors have resigned due to pressure coming from a number of parties. Many people have said that the way to restart this project is to recreate

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33. Wikinews, <http://www.wikinews.org>.

34. Wikibooks, [http://en.wikibooks.org/wiki/Main\\_Page](http://en.wikibooks.org/wiki/Main_Page).

35. Free eBooks: Project Gutenberg, <http://www.gutenberg.org>.

36. Public Library of Science, <http://www.plos.org>.

this journal using an open access approach. In this way, the journal would retain peer review but without this kind of editorial pressure.

The Internet Archive<sup>37</sup> has been archiving the Web for about the last ten years. You can see the evolution of websites as they go from really poor websites back in the mid-90s, to the pretty poor websites now, and the really good ones too. You can even use the website in litigation. For instance, in some domain name cases, someone argues that they used the website for a particular purpose. The Internet Archive can verify those claims. The website also features a large amount of video, such as the Prelinger Archive with nearly two thousand films that are all in the public domain.

Google Scholar<sup>38</sup> provides terrific access to scholarly journals. The somewhat more contentious Google Book Search<sup>39</sup> program, which is subject to litigation in the United States, is great, at a minimum, for public domain stuff. You type in something, such as "Dickens," and the first thing you can see are Charles Dickens books. Beyond that, you get references to literally hundreds of other scanned books that discussed Dickens. Many people have described it, I think accurately, as a card catalog for the twenty-first century. It is certainly an amazing repository of knowledge.

Then, there is the software that we all use when we start thinking about knowledge-sharing: Firefox,<sup>40</sup> an open source browser; Thunderbird,<sup>41</sup> an email tool; Apache,<sup>42</sup> a program that runs the majority of web servers on the Internet today; Linux,<sup>43</sup> an operating system; OpenOffice,<sup>44</sup> a tool for office applications; and Joomla,<sup>45</sup> a program used to make websites. There is an incredible amount of open source software out there, all of which is available if you go to websites such as SourceForge.<sup>46</sup> SourceForge has more than 1.2 million registered users who are working on over 150,000 open source software projects. Over 116,000 open source project programmers are coming together in their spare time for the benefit of all. I think this is not only an incredible

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37. Internet Archive, <http://www.archive.org>.

38. Google Scholar, <http://scholar.google.com>.

39. Google Book Search, <http://books.google.com>.

40. Firefox: Rediscover the Web, <http://www.mozilla.com/firefox>.

41. Thunderbird: Reclaim your Inbox, <http://www.mozilla.com/thunderbird>.

42. The Apache Software Foundation, <http://www.apache.org>.

43. Debian: The Universal Operating System, <http://www.debian.org>.

44. OpenOffice.org, <http://www.openoffice.org>.

45. Joomla!, <http://www.joomla.org>.

46. SourceForge.net, <http://sourceforge.net/index.php>.

good news story but also an amazing amount of creativity, new voices, and new knowledge that is suddenly available.

I do not think it ends there. There is more good news even if one looks at the more so-called conventional or mainstream media sources. Admittedly, some of my data is more Canadian-focused. Print media, which is actually declining in the United States, is flat in Canada. There is the growth, of course, but the growth is online. In Canada, the largest circulating paper, *Toronto Star*, now has blogs, podcasts, and RSS feeds. By next year, its online readership will probably exceed its paper-based readership. There are already leading papers in the United States that have online readership outnumbering its print-based readership.

Consider, for example, the four leading, on a global basis, financial news sources: *Wall Street Journal*, *Financial Times*, *Fortune*, and *Forbes*. Back in 2002, these sources had roughly the same number of unique visitors on a monthly basis, ranging from 1.0 million to 1.7 million. Interestingly, each of them adopted a different approach around this time in terms of how they were going to attempt to tackle the online market.

Table 1. Print Media Comscore (unique users/month)

<b>Financial Website</b>	<b>2002 (in millions)</b>	<b>2005 (in millions)</b>
Wall Street Journal Online	1.0	3.3
Financial Times.com	1.3	1.8
Fortune.com	1.7	1.3
Forbes.com	1.7	7.8

The *Wall Street Journal* has done quite well through the subscription-based online market; thus, many of its readers are paying for the privilege of reading online. As you can see, they are doing quite nicely. *Financial Times* has grown marginally given the growth in Internet usage between 2002 and 2005. One of the reasons may well be that you never know quite what to expect. You go there and some content is free; some content is behind a pay wall. Some content starts out as free and ends up behind a pay wall. In contrast, you do know what you are going to get at *Fortune*, which I think is actually the most interesting of all of these numbers. In an era of widespread online growth, they declined. You do not decline online. It just does not happen, yet *Fortune* did. Largely, all they were doing was selling their print-based articles online. They are not really providing much content.

Then there is *Forbes*, which has more readership than the other three combined. Back in 2002, they decided that they were in the advertising game. In the advertising game, you are paid based on the number of eyeballs that see your content. It made sense to get more eyeballs looking at their content. Their approach back then was to take as much content as possible and make it available. In an environment in which Google is going to earn at least six billion dollars this year in Internet advertising revenues, it is clear who adopted the best approach.

The book market has remained relatively stable in Canada, yet there are some amazing opportunities for book publishers as well. Part of it may be the “long tail,” with which you may already be familiar. The story of the long tail, which will be the subject of a book coming out this summer, started out as a *Wired Magazine* news article.<sup>47</sup> One of the statistics that really jumps out at everybody is that your typical book superstore, your Barnes & Noble or Borders, carries about 130,000 titles. Amazon carries far more than that, with upwards of 500,000 or more. A significant percentage of Amazon’s sales come from titles that are outside of their top 130,000 sellers. In other words, there is an enormous market for books that are not carried by Barnes & Nobles or Borders stores because there is not enough physical space to carry them. Now, there are many more sales for authors like Dan Brown than there are for authors like Michael Geist. As it turns out, there are many authors like Michael Geist, that is, authors who might only sell five or ten books a year. If you combine all of those books, suddenly, you will find that this is a bigger market than the market for big sellers like *Harry Potter*, which you would find in the typical book superstore. For so many publishers and authors, this is a great story.

There are also publishers who are embracing the new opportunity presented by the Internet. One small little plug for my book that I edited, to which nineteen professors from across Canada contributed, *In the Public Interest: The Future of Canadian Copyright Law*.<sup>48</sup> The book was published by one of Canada’s leading legal publishers, Irwin Law, and was also made available under a Creative Commons license. You can go to Irwin Law’s website and freely download the entire book, all six hundred pages, or you can choose specific chapters. The publisher,

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47. Chris Anderson, *The Long Tail*, WIRED MAG., Oct. 2004, available at <http://wired-vig.wired.com/wired/archive/12.10/tail.html>.

48. IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (Michael Geist ed., 2005), available at [http://www.irwinlaw.com/books.cfm?series\\_id=3&pub\\_id=120](http://www.irwinlaw.com/books.cfm?series_id=3&pub_id=120).

who was admittedly somewhat skeptical at first, eventually came around to the view that we would sell more books by allowing people to have access to the whole text up front than we would have using the traditional approach. In fact, you get the book exposed to far more people than would normally be exposed to the book.

Television viewership has remained roughly static; however, there are many differences in terms of demographics right now. Younger people are not watching as much television, yet older people are watching a bit more. Television broadcasters are seeking new ways to reach the younger demographic. For example, the iTunes<sup>49</sup> television webpage for the United States did not even exist one year ago. You could not even download any television shows a year ago. Today, when you go to the iTunes website, you find literally dozens of television shows. They started with *Desperate Housewives* and *Lost* and moved to other shows, including *March Madness*, *Conan O'Brien*, and *The Daily Show*. All of this costs about \$1.99 per show. I would venture to say that, within about a year, virtually every television show will be available. Because it is on-demand, you can watch the show between the time you could see it for essentially free on television to the time you decided to fork out another \$29.99 for it on DVD.

*Guiding Light*, another television show that never changes and has not changed for even longer than *Everybody Loves Raymond*, started life as a radio broadcast many years ago and then became a television show. I am told it is still a television show, but no one ever admits to actually watching it. You can go to CBS's<sup>50</sup> website, which features *Guiding Light* as a podcast. You can download any episode to your iPod and catch up on what you have missed.

YouTube, part of what I have described as the clip culture, is an incredible story. In the last four or five months, this website has been streaming out twenty-five million video clips a day with tens of millions of clips available. Admittedly, some of the clips have been pulled off television; however, this has only led to better ratings for the shows that are clipped. The most popular sources of information are, in fact, not the broadcast stuff, but the individually-created content: people making their own somewhat strange videos that literally millions of people are watching. It is today the best timewaster on the Internet.

Video games have shown amazing growth throughout Canada, approaching television-like numbers. For example, in Canada, the

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49. Apple: iTunes, <http://www.apple.com/itunes>.

50. CBS.com, <http://www.cbs.com/netcast>.

number of videogame consoles is approaching the number of television sets. In Canada, this is a good news story. We may not have a DMCA, but that has not stopped company after company after company after company from setting up shop in Canada. They are certainly setting up shop in a lot of places, because Canada has skilled programmers. Thus, the issue is not just about copyright; it is about finding the talent in the first place.

The movie industry, which last year struggled somewhat, continues to enjoy significant revenue, not because of people who go to the theater but rather due to DVD sales and other innovative licensing. Cinema Now,<sup>51</sup> which is not available in Canada, just announced this week that they are going to be making movies available for download on a more permanent basis. CineClix,<sup>52</sup> a Canadian service, focuses on the independent movie market. They make the movies available for about \$5.00 per download.

One need only walk around campuses to see the number of people who have the white ear buds from their iPods to know that people are not listening to radio. Radio, however, is trying to strike back not just with webcasting but also with podcasts. One of the most popular Canadian music shows, "Ongoing History of New Music," is broadcasted through the radio network,<sup>53</sup> but it is also made available through a podcast that is bundled together with some advertising. KYou Radio,<sup>54</sup> from San Francisco, podcasts user-generated radio all of the time. The content is not something that I would necessarily want to listen to, but, if you do, you can go and download their broadcasts or contribute to their broadcast. It is an Infinity radio network so it is a mainstream network.

The music industry has unquestionably suffered a decline since 1999. The Recording Industry Association of America (RIAA) argues that has a lot to do with peer-to-peer file-sharing. I have written a fair amount on the issue, arguing that there are many other reasons that ought to be considered. DVD sales provide one example. DVDs were not even a consumer product when Napster first hit the market. Yet in Canada today, you cannot walk into a music store without tripping over DVDs and video games in your search for music.

The number one seller of music in this country today is Wal-Mart.

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51. Cinema Now, <http://www.cinemanow.com>.

52. CineClix, <https://www.cineclix.com>.

53. 102.1: The Edge, <http://edge102.com>.

54. KURadio.com, <http://www.kuradio.com>.



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This has had a huge impact on catalog sales, because they only stock about 5,000 titles compared to about 60,000 in a usual record store. There has also been a huge impact on the bottom line. Prices on CDs have declined about ten percent based on pricing pressure coming from low cost retailers such as Wal-Mart, Costco, and Target.

Of course, the music industry is offering up online services as well, not just in this country, but in many other countries as well. Emusic,<sup>55</sup> a service focused on the independent market, has done quite well without using any digital locks, also known as digital rights management.

There are also new ways to find music. Through the Pandora website,<sup>56</sup> you input an artist that you like or a favorite song and, through its music genome project, it identifies other music that you might like as well and streams it out for you. There are even musicians, such as Jane Siberry, who have adopted a self-pricing model. Ms. Siberry says download her songs and pay what you think is appropriate. People laugh; however, the reality is that if Jane Siberry is someone you like, you are likely to pay. She is willing to trust you.

In some ways, I am inclined to say that the message here is that we have a great news story here. I believe the Bulte story showed us some of that. However, I think there is more going on here.

### *B. New Stakeholders*

One is new stakeholders. For many of these new stakeholders, copyright law matters. The old stakeholders in Canada include copyright lobby groups, the industry associations, copyright collectives—who in Canada are far more powerful than they would be in some other jurisdictions because we have a lot of them—the education groups, and the librarians. I recognize that in the United States I should probably add technology companies, such as Internet services providers (ISPs), because technology companies play a big role in the United States. In Canada, our technology companies are typically just branches of U.S. or foreign companies that are not as actively involved. I have not mentioned creators or users. Creators are in some ways indirectly represented by or through the copyright lobbies. Users are indirectly represented through education and through libraries. I do not think that all their interests are adequately represented. I think the Bulte story illustrates how there are new stakeholders.

In Canada, these new stakeholders are the hundreds of new people

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55. Emusic.com, <http://www.emusic.com>.

56. Pandora.com, <http://www.pandora.com>.

who, back in 2001, responded to a consultation that the Canadian government launched on digital copyright. There were literally hundreds of responses and the government did not quite know what to do with them. The new stakeholders are the thousands of people in Canada who signed petitions calling on the government to adopt balanced copyright reform before we even had a bill introduced. This petition was not about a bill, but about the prospect for a bill. The new stakeholders are the hundreds of thousands who were engaged on the Bulte story by posting, reading, or becoming aware of this issue.

More important than the hundreds of thousands in Canada who I am going to guess did not read the story are the nine members of the Supreme Court of Canada. In 2002, the Court set copyright law in Canada on a new course in a case called *Théberge v. Galiere d'Art du Petit Champlain*.<sup>57</sup> The Court held that “[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation.”<sup>58</sup> In Canada, our Court has articulated a vision of copyright that says there are user rights and creator rights, and that copyright policy must remain in balance. We must account for these new stakeholders.

In Canada, we have not done so well at that. For example, we had a bill labeled the Lucy Maud Montgomery Copyright Extension Act,<sup>59</sup> which extended the copyright term for a small sliver of unpublished works by authors who died at a given point in time. It was apparently promoted by the estate of Lucy Maud Montgomery who, at least in Canada, is a well-known author for having written *Anne of Green Gables*. She had written ten volumes of unpublished works that would have fallen into the public domain; thus, her estate sought the term extension. We did not account for all the new stakeholders. Four groups were called into a room much smaller than this and hammered out a deal. The deal they hammered out was a twenty-year extension to these works, which incidentally includes unpublished works of several former Canadian prime ministers and many other notable figures. Ultimately, the government did not pass the extension as some of the new stakeholders you have heard about protested.

The 2004 Bulte report, which called for U.S.-style DMCA reforms, included dozens of people before the committee. However, at some

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57. *Théberge v. Galiere d'Art du Petit Champlain*, [2002] 2 S.C.R. 336.

58. *Id.* ¶ 32.

59. Library and Archives of Canada Act, R.S.C., ch. 21 (1997).

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points, committee members would turn to people representing user interests and acknowledge, “You seem a bit outnumbered here today.” Thus, those stakeholders representing user interests were not heard from. Further, Bill C-60 did not represent those interests either. Without getting into the minutiae of Canadian copyright law, I will briefly describe the events leading up to the creation of this Bill C-60. According to a document obtained under a Canadian Access to Information request, the Canadian equivalent of a Freedom of Information Act request, policymakers in Canada met with Access Copyright, one our leading collectives, fifteen times, with music collectives fourteen times, with the Canadian Recording Industry Association (CRIA) seven times, and with publisher groups five times. Incidentally, they met with technology groups twice, with public interest groups twice, and with education groups twice.

Now, I would argue that that is not going to give us the kind of balanced copyright reform that even Canada’s Supreme Court has called for. When people see Bulte fundraisers, they think they see more of the same. This helps explain why there was concern about that particular incident. Now, in the United States, of course, there are more voices. The United States has far more groups, such as the Electronic Frontier Foundation<sup>60</sup> and the Center for Democracy and Technology,<sup>61</sup> than we have in Canada. Further, in the United States, people have demonstrated to support user interests, such as those that stood outside of the Supreme Court during arguments for the *MGM v. Grokster*<sup>62</sup> case. I am not going to pretend that these groups are the people that got up in the morning to stand outside Grokster with a placard. However, the notion that people would stand outside of a courtroom hearing a copyright case is illustrative of the desire for the new voices to be heard. What do those new people want to say?

### *C. New Copyright*

That is where new copyright law comes in. There is, of course, one choice—a choice that is best articulated through WIPO and, of course, in the United States through the DMCA.

Although there are several stories about the effects of the DMCA, I would like to talk about Edward Felten, who is a professor at Princeton

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60. EFF: Homepage, [www.eff.org](http://www.eff.org).

61. CDT: Main, [www.cdt.org](http://www.cdt.org).

62. Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al., 125 S. Ct. 2764 (2005).

University. Professor Felten is best known as a person who was part of an RIAA contest to see if anyone could defeat the encryption standard known as SDMI. Professor Felten managed to do so with a number of graduate students. Then, when he wanted to disclose his research, he was threatened with a prospective lawsuit that prohibited him from doing so.

I was at a conference at the University of Michigan about a week and a half ago with Professor Felten. He told the audience that for every two hours that he spends in the lab, he now spends one hour with lawyers. I would argue that at a time when computer security research for so many is paramount, the notion that we have our leading scientists spending a third of their time with lawyers is clearly not time well spent.

Professor Felten also disclosed that, with the exception of the RIAA study, he has self-censored every single one of his research papers. He has never disclosed all for fear of potential suits against himself and against Princeton University. This was true self-censorship in terms of what he felt that he could appropriately disclose.

On top of that, we talked a bit about the Sony Rootkit case, with which you may be familiar. In the fall of 2005, Sony faced considerable heat because some of their CDs were imbedded with technology that went right to the root of the computer and created security vulnerabilities. Professor Felten was at the forefront of the issue, even though he was not the first person to disclose this problem; it was another computer security researcher named Mark Russinovich. Professor Felten disclosed that he had known about this for a number of months before it was publicly disclosed. Thus, literally hundreds of thousands of people bought this product and put it into their computers when the problem was well known not just to the company, but to computer science researchers as well. Yet, Professor Felten held off because he was in negotiations with his lawyer to talk about what he could disclose. He says it took someone—who did not know better and who decided not to talk to a lawyer—to disclose it and bring this to the world. I think that the experience has shown that the WIPO approach is one that raises serious questions about copyright balance, privacy free speech, innovation, and competition. In many respects, it is one issue that has brought together those that are seen to be on the left, such as the Electronic Frontier Foundation, as well as those on the right, such as the CATO Institute. Both of which have criticized the DMCA.

Indeed, many countries are now starting to rethink these issues. For example, Australia last month released a unanimous parliamentary report that examined new circumvention legislation. The committee

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identified thirty-seven different exceptions that they thought were necessary in order to meet other public policy goals and achieve an appropriate balance. Now creating exceptions is, of course, one choice. I think, however, there is another choice. I want to close by arguing for a choice I have been running around Canada arguing can be Canada's choice, but I think that on a global level can be all of our choices. It is a choice in which there are now some rights reserved, which is very promising, and one in which we choose a balanced approach to WIPO implementation. The Australian High Court has ruled that there is great flexibility in implementing the WIPO treaties. For example, clearly linking technological protection measures to copyright so that we do not take away some of the underlying fundamental rights that we might have otherwise have.

We can choose education, thereby embracing the opportunity for digital libraries. Certainly, you are seeing that in the private sector in the United States, whether it is through Google's initiative, the Open Content Alliance, and others. We are certainly seeing it even more in Europe. The European Union has undertaken a plan to digitize millions of books by 2010.

We can choose access to knowledge as part of those policy choices, thereby embracing what I think is one of the most interesting developments at WIPO: WIPO Development Agenda. Through the Agenda, large numbers of developing countries are suddenly reaching out and saying that they are concerned with some of these approaches and want to ensure that the global approach to intellectual property meets some of their needs as well.

We can choose free speech, adopting not the "notice and takedown" approach of the United States, but instead the "notice and notice" approach that has been proposed in Canada as part of our legislation. In this approach, a rights owner will present a notification to the ISP. The ISP then sends the notification on to the subscriber. A court order is necessary to eventually take the content down. We use the system for child pornography in Canada. I would argue that if it is good enough for child pornography, it ought to be good enough for an allegedly infringing song. Most of the notices involve peer-to-peer files, which are not residing on an ISP server anyway; thus, the alternative does not work effectively.

We can choose privacy so that we do not use either copyright or some of these technologies to circumvent privacy protection, which ought to be an important policy goal as well.

We can choose innovation, which is something Professor Felten has

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chosen to use, to provide the freedom to tinker so that we think about protection not just for digital rights management, but also protection from digital rights management.

We can choose research by adopting open access models particularly for government-funded research at the National Institutes of Health. A number of other government-funded research institutions around the world are starting to think about this issue. The scientific advisor to the former prime minister of Canada described this as “a culture of sharing.” A culture in which scientists, not just in my country but countries around the world, suddenly have access to research that has been publicly funded.

We can choose culture as part of our policy. I would argue that countries should freeze copyright terms at life plus fifty years as opposed to extending the terms to life plus seventy years.

We can choose balance with respect to copyright or, as our Supreme Court has described, user rights that are treated truly as a full partner.

In short, or perhaps not so short, we can choose a copyright and cultural policy that I think looks ahead rather than looking behind. That can be our choice. So whether you are a creator, a blogger, a teacher, a writer, a musician, a historian, a researcher, a filmmaker, a freelancer, a student, a scientist, an activist, an archivist, a consumer, an entrepreneur, a publisher, a programmer, or even a pro-user zealot, this is your issue. This can be our choice. We have to choose wisely.