Intellectual Property and International Trade

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Executive Summary

Subject:
The paper begins with a brief survey of the relationship of copyright to Canadian cultural policy, and the status of culture in international trade agreements generally. It then focuses on a series of agreements which deal specifically with intellectual property (IP) including the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) and the two recent agreements spearheaded by the World Intellectual Property Organization (WIPO), and considers the implications for creators of the new international regime.

These changes are then set in the context of the advent of the internet and electronic commerce, and government policies surrounding their development. Again the implications for creators and individual rights holders is considered along with the cultural issues raised not only by the TRIPs and the WIPO treaties but also the General Agreement on Trade in Services (GATS) which is currently under re-negotiation.

The paper concludes by identifying a non-exclusive list of issues which warrant sustained informed debate in the cultural community.

Themes:
The evolution of the copyright-based (cultural) industries has pulled copyright law into the orbit of business and corporately managed IP such that two classes of rights holders have developed as a result. These are the individual copyright owners who are typically the original creators, and corporate owners who are owners by acquisition only. The new regime governing IP internationally has been developed at the instigation of the latter class with scant attention given to the interests or situation of the first. Thus, whereas the struggle historically from creators' point of view has been to gain recognition for their copyright, now there is no question about IP being rigorously enforced. The question becomes economic: will creators be able to afford the cost of enforcement, will their interests be reflected in trade policies and international negotiations?

Creators represent an unrecognized asset in the debate on electronic commerce and the new economy, artists being a major source of new intellectual property. It is a sector, moreover, best understood as consisting mainly of self-employed individuals and small businesses, artists and independent producers who are responsible for producing the bulk of original Canadian content.

Issues:
The issues for creators and for arts councils involve anticipating the effects of the new IP regime coupled with the advent of the internet and e-commerce. The ramifications have to do with the additional costs of producing art, and the growing inaccessibility of information and cultural heritage reflecting the state of the public domain. The growth of IP-based industries world-wide has had an enormous and unequal effect on developing

countries and traditional and aboriginal cultures in comparison with the wealthy Western nations and cultures. Aboriginal and traditional cultures have, on the contrary, had little protection from IP law.

These technological and political changes represent a radical challenge to traditional concepts of IP and the situation will require some original thinking. The issue for artists and arts agencies is first to understand what the challenge is, who is left vulnerable in the circumstances, and what the potential is for the creative community. In responding to it, the first concern is to ensure the protection of creators' rights and the second is to seize the opportunity presented *for* artists.

Introduction -- What does IP have to do with art?

One of the earliest actions taken by the Canadian Government which might be described as constituting cultural policy was the passage of the Copyright Act, which came into effect in 1924. Both the National Gallery and the National Museum were in existence by then being dedicated to the collection, preservation and study of the country's material and artistic heritage, but the Copyright Act was the first endeavour which addressed the contemporary production of art, and therefore the working situation of living artists.

Based on British legislation enacted in 1911, the Canadian Copyright Act similarly provided creators with automatic protection in the form of the right to make a living from their creations (economic rights) and to protect the integrity of their work (moral rights). It superseded an earlier Canadian act which, concurrent with imperial legislation, provided some protection for Canadian works. The new act in 1924 thus represented the assumption of national responsibility for intellectual property. This was regarded as a significant and symbolic step at the time, one of several taken by Ottawa in the twenties and thirties in pursuit of greater independence from Britain.

Subsequently, the federal government took on the principal role in the evolution of the arts and culture in Canada, relying on three measures or instruments of public policy: public enterprise (for example, the Canadian Broadcasting Corporation -CBC and the National Film Board of Canada - NFB established in 1932 and 1939 respectively), public subsidy (the Canada Council, Telefilm Canada established in 1957 and 1967) and regulation (the Canadian Radio-television and Telecommunications Commission - CRTC). The strategy was simply to ensure the production of Canadian material for Canadian audiences.

As the Canadian market for cultural products grew in the seventies and eighties, Canadian business began investing in the infrastructure required by the development of local production, and the distribution of the ever-expanding mass media. Cable companies, private broadcasters, bookstore and cinema chains have become highly successful enterprises in the nineties, though they are largely engaged in the dissemination of non-Canadian content. (Newspapers and consumer magazine chains are an exception in this regard.) Consequently government began to regulate certain aspects of the emerging cultural industries, attempting to protect as well as to stimulate homegrown production. The ownership rules in book publishing are one example; these protect the Canadian-owned sector of the industry, which publishes 85% of the new Canadian authored titles brought out each year. Policy measures at federal and provincial levels have shifted in the last decade towards the cultural industries and the development of film/multi-media production which can both meet the domestic demand and be exported to the global marketplace. The focus has thus switched from assisting primary producers (artists, writers, composers) to nurturing companies capable of international trade.

It could be argued that up until the 1960s Canadian cultural policy focused mainly on the production of original content and thus supported the work of individual creators and performers. This is essentially true of the CBC and the NFB as well as the Canada Council.[1] However, this is not to say that creative artists have been the main beneficiaries of the cultural exchange. The economics of art move in the opposite direction; that is, the closer you are to the original creative act, the smaller the returns tend to be. With some magnificent exceptions, which we have seen many more of in Canada in the last fifteen years, the system rewards most favourably those who manage and administer, produce or distribute art and culture rather than those who make it.[2] At the same time, Canadian producers have traditionally found access to the domestic market severely limited, the networks of mass communication being dominated by a small number of transnational media giants who command most of the revenues and profits in the sector. Yet the bulk of original Canadian content is not produced by them but by small, independently owned firms and self-employed individuals.

A good deal of the activity supported by Canadian cultural policy consists of work that would never be undertaken by private business as a commercial proposition without public support. Measures such as tax rebates are critical to the feature film industry, for example. The partnership of public funds and private enterprise is in fact the norm in the cultural industries, and it is also the basis for public funding of the arts. Since the Canada Council was established in the 1950s, and provinces and cities across the country followed suit with their own funding programs, the project has come to depend on the existence of a vital and self-sufficient force of creators and small producers. By the same token, the long-standing financial contribution of federal and provincial arts councils to the budgets of non-profit art galleries and symphony orchestras, theatres, and opera and dance companies has effectively defined a public interest in the collaboration which is rarely expressed in ownership terms but is visible in the symbiotic relationship between the arts councils and their chief clients.

In short, while the cultural sector has been developed with public money and public spirit it remains a largely private sector consisting mainly of entrepreneurs; a galaxy of self-employed individuals and small and medium sized businesses, non-profit arts organizations and co-operatives. These are the people -- the artists and independent producers -- who are the primary investors in Canadian creation, and at the same time the primary producers of intellectual property in the cultural sector.

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1 This is not to gainsay the fact that much of the content in the arts in this period was derived from non-Canadian sources; the work of German, American, English, French composers, playwrights and artists was far more common than Canadian. The objective of cultural policies at the time was to ensure the production of theatre in Canada but not necessarily Canadian theatre.

2 While the cultural sector as a whole has experienced remarkable growth in the past two decades, the income of creative artists from their artistic work has remained static.

1. The Trade Agreements

a) The Status of Culture in International Trade:
Culture has played a significant role in the evolution of Canadian trade agreements over the past decade. It figured prominently in the negotiations leading up the Free Trade Agreement (FTA) with the United States in 1988 and was the subject of an explicit exemption in the final accord. The North American Free Trade Agreement (NAFTA,) which came into force in 1994, also dealt with culture separately by way of an exemption, repeating the language and the industrial focus of the earlier agreement. It should be noted that sectoral exemptions do not address the circumstances of most Canadian cultural producers as protecting the sector does not necessarily entail protecting the small business environment in which they operate. Nor do exemptions address the question of where culture intersects with intellectual property law.

Intellectual property rights have not figured in international trade discussions historically but this has changed quite dramatically as intellectual property (IP) has grown in economic importance. Today IP comprises 20% of world trade and is one of Canada's fastest growing exports. Moreover, since the early 1990s the international trade negotiation process has been driven by industries, such as the biotechnology industry and computer communications, which depend heavily on patents, copyright and other intellectual property rights. Governments along with global business interests have realized that the foundation of future wealth is IP, the most valuable capital of all because IP in the form of knowledge translates into industrial efficiency, because technological innovation is the basis of competitiveness, and because the physical barriers to the replication and distribution of products and services based on the new technologies are evaporating. These are the reasons why a sense of urgency has developed around the subject of intellectual property rights and why an agreement on trade-related aspects of intellectual property (TRIPs) was a priority for the World Trade Organization from the outset. The WTO including TRIPs came into being at the beginning of 1995 and the agreement was implemented in Canada a year later on January 1st, 1996.[3]

b) IP and Current Agreements:
International treaties are a familiar feature of multilateral co-operation in the field of intellectual property rights (IPR). Since the late nineteenth century when the Berne Convention was established to protect literary and artistic works, co-operation has been based on the principle of mutuality whereby signatories extend the protection granted to nationals in domestic law to the nationals of other signatory countries. The several additional treaties, conventions and accords attaching to Berne are administered by the World Intellectual Property Organization (WIPO), a UN specialized agency which has been particularly active in the development of new forms of protection (eg, layout design of integrated circuits) and applications to new technologies (eg, copyright protection for computer programs).

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3 For a background on the TRIPs process see Michael P. Ryan's *Knowledge Diplomacy -- Global Competition and the Politics of Intellectual Property* (Brookings Insitute, 1998).

The need for a revision of the international copyright standards covered by the Berne Convention (last revised in 1971), led to two new treaties concluded in 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The first deals with the rights of authors of "artistic and literary works", a phrase which extends more broadly to cover dramatic, musical and cinematographic works. The second deals with performers and producers of sound recordings. Meantime, the industrialized countries within GATT (the General Agreement on Trade and Tariffs) were pushing for an agreement on intellectual property in the context of trade. The TRIPs agreement was the result, negotiated during the Uruguay Round of the GATT and administered today by the WTO.

The WIPO treaties were intended to update existing international standards, particularly in relation to the dissemination of digitized material and to adapt existing copyright systems to new media. They did this mainly through the provision of a new right of communication to the public including the right of "making available to the public", and through the protection of technological devices and rights management systems. The first confirms the applicability of copyright to the internet together with the right to make material available to the public in such a way that it can be accessed by individuals at places and times chosen by them. Other provisions have to do with protecting security systems and copyright information identifying material.

The TRIPs is therefore the most comprehensive international agreement on IP. Building on the Berne Convention (1971) with which WTO members must now comply, it introduced an entirely new regime to the global management of IP. WIPO and the WTO have since signed an accord for co-operation and information sharing, but the fact remains that the TRIPs provides for the resolution of disputes and the imposition of sanctions, which is likely to improve enforcement by rights holders in WTO member states.

The TRIPs was specifically designed to "promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade," according to its Preamble. The need to reduce distortion and the impediments to trade is emphasized as well, as is the importance of Contracting States recognizing IPR as private rights, and "the underlying public policy objectives of national systems of protection of intellectual property, including developmental and technological objectives." Historically, intellectual property rights (IPRs) have not been burdened with objectives other than the protection of creators' rights and the public interest in access. The TRIPs would seem to have introduced new principles and purpose as well as procedures into the IP mix.

The TRIPs compels members of the WTO to conform to the basic provisions of the Berne Convention. A major sticking point during the negotiations was the resistance of developing countries to the timetable imposed on implementation (four years for

developing countries, eleven for the least developed was the formula finally agreed to). A political divide was drawn between the have and have-not nations in other words, and indeed one motivation for the harmonization of IP enforcement globally has been the desire of transnational corporations for "certainty", and a way to crack down on piracy which is particularly prevalent among poorer and developing nations. It has been noted that while there has been movement in every other dimension of the global economy towards liberalization and deregulation, in the area of IP the trend has been towards stricter enforcement and greater coverage.

c) Creators and the New Regime:
Although copyright was conceived of as a right accruing to individual authors, the evolution of the copyright-based industries in the last decade has pulled copyright legislation and now international enforcement into the orbit of business and corporately managed IP. It is evident that two classes of IP rights holders are developing as a result, and that the emerging system and its designers are paying scant attention to the interests of the second class (i.e., individual creators). For example, the TRIPs agreement specifically exempts members from incorporating the moral rights provisions under Berne. These are rights adhering to individual creators, and are often difficult for producers to deal with. Television and recording contracts routinely ask writers to waive their moral rights, for example; producers frequently require the latitude to edit work without the author's approval, and this is the mechanism used.[4]

It is worth noting here that while the definition of copyright has expanded (notably to include computer programs), it nevertheless flows from individual activity. Many individuals work for corporations which acquire their IP rights through the terms of employment, but this does not alter the fact that corporations and companies never create IP, they can only acquire, own, manage and/or exploit it.

2. Electronic Commerce and Culture

The efficiency of production and the creation of innovations are what enable industry to compete. Electronic commerce has a great deal to do with both. It is a cost efficient way to transact business and it makes possible the development of new kinds of products and services. Countries see themselves as competing in terms of productivity and innovation in this arena and most have strategies which look to private business to lead the way.

In 1996 Canada's Information Highway Advisory Council made its report to the federal government appending some 300 recommendations. These led to the "Connecting Canadians" strategy announced by the Prime Minister in 1997. It also led to the formation of a high level task force on electronic commerce which produced a strategy for this

4 Moral rights cannot be assigned in Canadian law, only waived; they don't exist specifically in the American federal copyright law.

component of the information society in late 1998. Like the strategies of other countries, this one addresses three forms of electronic commerce: the internet, data exchange on closed networks, and electronic transactions involving credit and debit cards.

The internet is the most important component of the information society, particularly in the form of electronic commerce. The internet distributes text, data, software and audio and audio- visual products which encompass much of the knowledge, values and ideas of our time. It functions as a world wide catalogue of goods and services and is becoming a significant medium for advertising. It links buyers and suppliers, information providers and users, and everyone in the world who has access to e-mail. While many companies, especially in the recording industry, are betting that content can be sold directly on the internet, some expert observers like John Perry Barlow (member of the Grateful Dead, and more recently of the Electronic Frontier Foundation) and Esther Dyson (computer expert, and chairperson of ICANN, the Internet Corporation for Assigned Names and Numbers)[5] have claimed that maximum returns for intellectual property will come indirectly on the net. They argue that on the internet intellectual property sells the creator, and for this reason should be given away as a loss leader; the creator makes his or her return on the sale of public appearance, consulting contracts, and/or other goods and services. As Barlow has repeatedly said, he didn't care if fans taped his music so long as they paid to go to Grateful Dead concerts.

Another form of indirect remuneration, of course, is advertising. Consider the example of the Encyclopaedia Britannica, which tried to sell electronic access to its encyclopaedias over the internet on a subscription basis and found few consumers were prepared to pay this way. As an alternative it was decided to offer access free but to carry commercial messages. Demand after the changeover was so intense that the web site crashed and stayed down for some weeks. By the same token but with very different results, other content providers such as the Wall Street Journal are finding that their text will sell on the internet. Some suggest that people are only prepared to pay for information that is current or relevant to their business. Indeed, though there is not necessarily any connection between popularity and people's willingness to pay for content on the internet one thing is clear: people will pay for what they feel they must know, and which they can obtain in no other way.

We should remind ourselves that these are the early days. Television in its infancy was funded by user licenses, then by advertising, then it was sold as a service delivered by coaxial cable, and finally it was multi- plexed as specialty channels (with or without advertising) and occasionally marketed on a pay-per-view basis. In the long run, we can expect to pay for many things which are free today on the internet. The overall challenge, however, is to move forward cautiously, keeping irrevocable decisions to the minimum, and open debate about the social, political, and cultural implications to the maximum.

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5 ICANN, the Internet Corporation for Assigned Names and Numbers, was formed after the US Government decided in 1998 to end its direct administration of internet names and addresses.

Notwithstanding these uncertainties, the game plan of governments and business, within the OECD in particular, is to get in there first and lead the pack. According to the White House framework paper on electronic commerce, the Americans believe that the internet will become their most important and active instrument of trade within just a few years. Canadian leaders are equally enthusiastic. In December 1998 Industry Minister John Manley told the Parliamentary Standing Committee on Industry that internet traffic was doubling every 100 days. He repeated this figure to the Trilateral Commission in the Spring of 1999, saying his goal was to make Canada a "location of choice for developing e-com products and services."[6]

Since the Spring of 1996, the Canadian government has undertaken a series of initiatives in support of its information strategy and in anticipation of the advent of e-commerce.

a) Money and expertise have been invested by government in consort with private industry to build the technological infrastructure on which high speed digital networks depend. Canada is not unique; this has happened in countries around the world and the investment totals in the trillions of dollars. In Canada's case the federal government put $55 million into CANARIE's Ca*net-3, which will be the world's speediest optical fibre network.

b) The telecommunications sector has been deregulated in order to stimulate competition and innovation in the emerging IP industries. This instigated the race to provide one-stop entertainment and communications service to consumers (i.e., who gets to control the wire into the house which will provide it). The CRTC first forced telephone and cable companies to open themselves up to competition with each other, and now it is forcing the cable companies to sell access to their high speed internet facilities to other internet service providers at 25% beneath their retail prices.[7]

c) In addition to deregulating the existing industry, the CRTC has also decided not to regulate the internet. In May, 1999 it announced that it would keep hands off the digital

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6 Mr. Manley is so committed to this vision that when IBM Canada announced plans to move a program for developing software for electronic commerce out of the country he allocated $33 million to persuading it to the contrary.

7 Note the CRTC's commitment in its 1995 report on hearings on the information highway to "fair, effective and sustainable competition in communications facilities and services" and to the removal of "barriers to competition resulting from the dominant position of cable and telephone companies." The CRTCs recent ruling that cable carriers must sell their high speed internet services to other service providers at a rate 25 percent below their lowest retail prices ends the duopoly of cable and telephone companies. The Competition Bureau, on the other hand, decided not to prevent Bell Canada from pricing access to its high speed internet service using asymmetric Digital Subscriber Line technology to residential customers at rates lower than those charged to other internet service providers for access to the Bell network. (See speaking notes for an address by K. Von Finkenstein, Commissioner of the Competition Bureau to the Canadian Bar Association, 30 September 1999.)

networks for at least four years on the grounds that any other course of action could detract from the competitiveness of Canadian business.[8]

d) Other regulatory regimes which bear on electronic commerce have begun to review their procedures and in the case of the Competition Bureau, a draft set of guidelines for intellectual property enforcement was issued in June, 1999.[9]

e) The government has taken steps to establish a consumer protection "framework," by setting up a working group to devise principles for privacy and consumer protection. The goal is to provide consumers with the same protection on-line that they have in a retail store. Minister Manley told a parliamentary committee that he hoped Canada would establish a standard for the world in this regard. Bill C-6, passed in the Fall of 1999, establishes the Canadian rules for the security of personal information on the internet. The bill is expected to bring Canadian law into line with a European Union directive prohibiting the transfer of personal data to jurisdictions without adequate levels of IP protection.[10]

f) Canada (and other countries) have postulated a neutral tax regime for electronic commerce because, as the OECD director general Donald Johnston has said, taxes could kill the goose that everyone expects to lay the golden egg.

g) The government's information program has been modified in order to stimulate electronic commerce. As a result of the final report of the Information Highway Advisory Council, for example, a deputy minister level task force was set up to arrange for the digitization of the government's information holdings, and to put them on-line. The government has declared its intention to be an exemplar in this process, in the

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8 A recent report of the federal Task Force on Electronic Commerce indicates that the Canadian government will not control spamming (junk mail) on the internet either. The fear is that too many laws surrounding the use of the internet will discourage the blossoming on-line community and those making a living from it.

9 According to the draft the critical fact about intellectual property rights for the Bureau is that they create something tradeable. For transactions involving intellectual property, the Bureau will likely define the market in terms of "the intangible know-how or knowledge which constitutes the IP, processes which are based upon the IP, or the final or intermediate goods resulting from or incorporating the IP inputs." Evidently the Bureau will not challenge conduct unless a firm or group of firms has a market share in excess of 35 percent. In particular the draft notes that "if an IP owner licenses, transfers or sells the IP to a firm or group of firms that, absent the arrangement, would have been actual or potential competitors, and if this arrangement creates, enhances or preserves market power, the Bureau may seek to nullify the arrangement." As big companies begin to negotiate cross licensing deals such as one which allows Xerox and Canon to exploit each other's patents, this aspect of competition law could become critical and is one reason why Canada and most European countries desire a WTO agreement on competition - and the Americans do not. Note that the Bureau will assess mergers not only in terms of anti-competitive effects but also in terms of efficiencies gained in the allocation of resources: for the Board, the latter offsets the former and it is up to the Board to decide what the efficiencies are.

10 According to Ann Cavoukian, Information and Privacy Commissioner for Ontario, the privacy provisions of Bill C-6 are built upon the Canadian Standards Association's 1996 Model Code for the Protection of Personal Information. The bill is expected to bring Canadian law into line with the 1998 European Union directive that prohibits the transfer of personal data to jurisdictions without adequate levels of privacy protection. The US has no such protection and thus Canada has secured a competitive advantage in electronic commerce.

determination of which materials are to be digitized, which need copyright clearance, and in its treatment of rights generally.
h) Canada has advanced its digital agenda in international forums, notably WIPO and the WTO. In October, 1998, Ottawa hosted the OECD's ministerial conference on electronic commerce which produced, among other things, agreement on the principles to be followed in the application and authentication of electronic signatures, and how to apply OECD privacy guidelines to the internet.

a) Implications for Creators:
Intellectual property rights are the lifeblood of electronic commerce. They are also the lifeblood of art and the cultural industries as they constitute the legal basis on which all art and culture is produced. The principal rights holders affected by the legislation and policies enacted in support of electronic commerce thus far are the owners of copyright for software, text, databases, sound recordings, images and audio-visual products. All of these rights holders, both individual and corporate, can rely on a strengthening body of intellectual property law to defend their interests. As more nations sign on to the various WIPO treaties, piracy should diminish; people whose business it is to create intellectual property in all its forms can anticipate an expanding market for their wares and increasingly effective means to protect and monitor their rights and to make money online.

But there are problems. Digital technology has erased the distinction between means of transmission and the means of reproduction.[11] On the internet IP can be manipulated and distributed by agents over which rights holders have no control. The cultural community in Canada is attempting to deal with this issue, mainly through licensing agencies and collective societies to obtain agreements and collect revenues from users, and, in the case of freelance writers of newspaper and periodical articles, through the courts.[12] Furthermore, exploiting the internet requires packaging material according to the technical standard people have become accustomed to; speed, navigation, ease of manipulation and other factors necessitate ever greater reliance on technical middlemen who are, of course, creators of IP themselves and often among the most prosperous cyberspace tenants. Creators must either develop proficiency in these new fields or contract out an expanding array of tasks which are essential if IP is to realize its market value. In other words, for primary creators there is a chance that the internet will present

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11 The core technology is digital communication that reduces all information to sequences of 1s and 0s which can be communicated by any transmission system which recognizes two possible states, such as an electric current which can be on or off. The technology reduces signal distortion, is capable of compression through the use of algorithms, and permits extra information such as copyright information to be encoded. It is digital communication on closed networks that permits $1.4 trillion every day to be traded through the world's computer networks. (See Arun Kundnani, "Where Do We Want To Go Today? The Rise of Information Capital," Institute of Race Relations, 29 April 1999.)

12 There are three class action suits, one against the Thomson newspapers, one against Southam and CEDROM-SNI, and the third against French language newspapers and magazine publishers in Quebec including CEDROM-SNI.

financial opportunity, but this will come with the necessity of forgoing returns in the short term, and the requirement of involving more services and/or people in the enterprise.

The exploitation of intellectual property rights tends to require middlemen. Asserting and defending rights often means going to court. The world of electronic commerce is no golden goose for those creators who lack the technical or financial resources to make the legal profession work for them.[13] The irony is as IP protection is getting better in theory, it is not necessarily getting better in practice for individuals who still find their work being used without permission. Often the infringing users are other, larger IP holders: newspaper chains who do not want to pay extra for the electronic rights, database owners who do not want to pay fees to the creators of the published materials they have amassed and yet seek copyright protection for their own product. It is unclear how these rights will shake down, and how much the new international regime of IP will benefit creators as opposed to the corporate and transnational players.

Along with its growing economic importance the ownership and management of IP has tended to concentrate to a remarkable degree.[14] Since it is easier to acquire rights than to create original IP, and since the easiest way to acquire rights is to buy the companies which own it, big companies keep getting bigger. Needless to say, the circumstances of creators in small markets, many of whom live at or below the poverty line, is vastly different than those of large corporations. Big companies can afford to litigate, and they likewise have a better chance of accessing the WTO system which, being at one remove, requires citizens to go through government, government being far more likely to respond to corporate interests than to individual artists.

In the emerging world of e-commerce, small creators may find it more difficult to obtain access to intellectual property, some of which may formerly have been in the public domain and because of mergers and acquisitions and the privatization of databases now come with a fee attached.[15] Artists can thus expect to be whipsawed between the prohibitive cost of enforcing their own rights and the rising incidence of IP charges.

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13 Note that because content for digital works is produced, distributed and consumed in an interactive and networked environment distinctions between types of intellectual property are difficult to make. "This increasing ambiguity may involve companies in complex and expensive legal disputes." (OECD Working Party on the Information Economy: Policy and Regulation Issues for Network-Based Content Services, p 10.)

14 Consider the Chapters example. In the last two years the book company has spun off a stock market financed online company and set up a distribution division called Pegasus. The company has become so dominant in the book trade that the Competition Bureau has been examining its operations. In the US anti-trust regulators forced Barnes and Noble, parent of Barnesandnoble.com, to scrap its proposed $600 million (US) purchase of the eleven distribution centres of wholesaler Ingram Book Group. Ingram supplies books to both Barnes and Noble and Amazon.com. (Globe and Mail, 4 June 1999)

15 Microsoft boss Bill Gates has been collecting digital rights to art works purchased from museums and private owners through his privately held Corbis Corporation. As of 1999 he owned 1.3 million images, with options on 16 million more.

Government has participated enthusiastically in the raid of the public domain, mainly through the imposition of user fees (for example, to much of Statistics Canada material) and the contracting out of the management of databases and information resources of all kinds.[16] From the independent artist's point of view the trend is towards ever greater costs for access to the same basic information, this being attributable solely to the private sector manipulation of the material as content.

Changes to the process of domain name registration on the internet will pose similar problems for small, independent creators. In the early days of the internet, the big companies were vexed by the profilerating use of their names and trademarks for sites. Eventually WIPO was instructed by its members to make a report on the matter including the question of establishing a non-commercial domain name registry.[17] WIPO's interim report was roundly criticized by Barlow's Electronic Frontier Foundation, and others who objected to the positioning of IP rights ahead of the public's right to free expression and access to the means of communication, to the weighting of the system so that the top domain categories would be occupied by corporations, and to the prejudice to small operators in the requirement that everyone register. In its final report, WIPO declined to make any recommendation on a non-commercial system, and proposed instead a domain naming system, now in place, which would put trade-mark protection first. This is one of the ways that the internet was transformed into a virtual mall.

In the mall what matters is location. In cyberspace this translates into recognizability which can itself be a form of IP (as in trademarks).[18] For this reason the biggest companies which own the most famous trademarks have the prime sites. Managing the internet in this way is understood by many as an infringement of basic human rights because commercial communication is privileged over all other kinds. For this reason, ICANN may eventually develop one system for officially registered sites (a commercial domain) and one where registration would be unnecessary (a public domain.) Until this happens, artists and cultural producers will have to settle for the most part for names that position them in the shadows and on the margins of e-commerce out of fear of litigation.

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16 One example is the British Columbia Government's contracting out of its BC Online databases for $55 million plus future royalties to American-owned Macdonald Detweiler and Associates. The database provides access to land titles, property taxes and company registries. Transaction costs rose immediately after the contract was signed, from $10 to $11.50.

17 The USA made the proposal that WIPO should engage in a consultative process and produce its report on domain naming. The final report was published in May, 1999. The purpose of the WIPO Process was to make recommendations to the corporation established to manage the domain name system, ICANN, on certain questions arising out of the interface between domain names and intellectual property rights. Seventeen consultation meetings were held in 15 different cities throughout the world in the course of the WIPO Process, and written submissions were received from 334 governments, intergovernmental organizations, professional associations, corporations and individuals.

18 The core business of some of the most successful internet companies, no matter what they sell, is conceptual. Companies like Amazon.com which began with no assets at all are sometimes referred to as Attacker companies because their main business has been to develop a way to attract customers for foods and services produced by others.

On the plus side, the technology of digital communications is spawning whole new industries where many individual creators and independent cultural enterprises are flourishing. In British Columbia where the film business has become a potent economic force in recent years, the "new media" sector is already as large as the film industry was in 1997.

Many creators think of themselves as being liberated by the instant feedback from consumers that is possible because of the system of communicating computers. Such loops can link creators and consumers of IP and enable rights holders to customize products and services. Consider the example of the alliance between Cinram International of Toronto and MP3.com of San Diego. Cinram manufactures pre-recorded CDs, videos and computer software. Now internet users can select songs to which MP3.com, an on-line distributor of music, has the rights and Cinram will then compile then on customized CDs and deliver then within two days of the order being received.[19]

Another current example, "garageband.com", demonstrates both interactivity and the internet's potential as a market research tool. This is a British company which invites musicians to upload their songs for review by visitors to the company's site. Reviewers receive points which can be exchanged for goods and services in return for answering questions about themselves and the music they are given. Their answers are subjected to computerized analysis and the ensuing database works out which kind of music appeals to which demographic group. Garageband.com signs the creators of winning songs to recording contracts and in this way intends to steal the march on the big music distributors.

These examples illustrate the potential for small, independent IP rights holders in electronic commerce. True, the cyberspaces that are managed by very large corporations like Yahoo! attract a significant proportion of internet use and according to recent press reports 35% of American users confine their time on the Web to the fifty most popular sites. But there are a great many users, nevertheless, whom these sites fail to attract. As the internet expands so too does the universe of minority tastes and interests; the technologies of E-commerce are uniquely able to match these tastes and interests to the output of independent creators. The internet continues to be celebrated for providing "an historically unprecedented level of diversity and choice compared to every preceding mass medium."[20] The peripheries of the electronic mall could, in the end, prove to be neither ill-lit nor particularly marginal.

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19 Another ingenious example is NAPSTER, a browser service which navigates MP3 files on the internet but takes no responsibility for copyright clearance by users.

20 See Scott Rosenberg's column in Salon.com, 10/23/99.

b) Cultural Issues:

Electronic commerce is a revolutionary technology and will profoundly affect the ways in which people learn and entertain themselves, how they communicate, and buy and sell their property including intellectual property.[21] Historically, carriage and content were separated in telecommunications policy, but digital electronics has caused them to converge. In the future most Canadian cultural material will likely be disseminated digitally and in this mode it is liable to be considered a value-added telecommunications service as opposed to a cultural good. Negotiations on telecommunications services now underway at the WTO could result in all symbolic content traded on the internet being defined as value-added services.[22] Telecommunications are covered by the General Agreement on Services (GATS) and in the existing GATS signatories must specify those services which they wish to be covered by the treaty. Canada has made a point of not committing cultural services. However, if audio-visual content on the internet is defined as a telecommunications service, that strategy would be compromised. In any case in the new GATS, it seems that countries will have to identify and negotiate exemptions. Since cultural content is the main content of so-called value-added telecommunications services, exempting culture would likely be out of the question to Canada's trading partners, much less our own telecommunications industry.

Moreover, the new GATS will include provisions for enforcement as is the case now for GATT. Enforcement in the past has generally been invoked in instances where countries subsidize goods for export and no one has taken issue with support for production meant for domestic consumption. Certainly grants to individual artists and non-profit cultural organizations have not been at stake or even on the radar screen at trade negotiations.[23] Although the internet has yet to be defined as an export activity, because e-commerce is global in reach it may ultimately be regarded as such. To the extent that this proved to be

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21 Sympatico, Canada's largest internet service provider, has surveyed its subscribers and learned that they spend an average 48 hours a month on-line. The survey found that 22 percent of respondents read fewer newspapers now, 19 percent read fewer magazines, and 13 percent listen less to radio than they used to. According to Globe and Mail technology reporter, Mark Evans, a survey in the U.S. found that 78 per cent of internet subscribers were watching less television.

22 The 1998 Ottawa OECD conference on electronic commerce concluded that "virtual products delivered electronically should be treated as services." According to Ivan Bernier in "Cultural Goods and Services in International Trade Law" (from *The Culture/Trade Quandary: Canada's Policy Options*, edited by Dennis Browne, Centre for Trade Policy and Law, Carleton University, Ottawa), it is not always the case that there is a clear distinction in trade law between cultural goods and services. He cites the fact that cinema has been considered a service in the GATS, in the OECD *Code on Invisible Current Transactions* and in the United Nations Classification of Industries. However a 1998 WTO paper on trade policy issues in electronic commerce suggests that electronic deliverables be treated as goods, since the mode of delivery does not change them. On the other hand, the OECD's Working Party on the Information Economy, in its 1999 report Policy and Regulation Issues for Network-Based Content Services argues in favour of the application of measures developed for data transmission and telephony markets.

23 Cultural programs of all kinds were of course implicated in the aborted OECD Multilateral Agreement on Investment.

the case, government grants to home grown cultural activity for digitization, multi media and anything else that could be seen as related to content on the internet could be interpreted as an export subsidy and disallowed.

Whatever happens with the GATS, electronic commerce will change culture. It will turn the attention of cultural entrepreneurs toward export markets. It will change institutions, for instance, turning libraries into navigators of information rather than sources of knowledge (and into technological consultants of last resort as they are now becoming). It will move universities off the lawns and into nodes in cyberspace. Part of the transformation will be the changed attitude towards information which will be seen increasingly as a resource to be developed and exploited. This implies that progressively larger proportions of the information commons will be privatized. In the short term, it will be difficult to access information without subjecting oneself to a barrage of advertising. In the longer term, it may be hard to obtain information without paying for it and this will have enormous implications for independent scholarship, documentary film-making and alternative journalism, for example. As the synergies of computer-communications unfold, e-commerce will bridge the space that separates consumer desire from gratification. The market economy has accustomed our generation to the commodification of popular culture; electronic commerce has the potential to extend the process to human knowledge, to ideas and to art.

The trouble with cyberspace is that it is no place at all. As Jack Faris, head of the National Federation of Independent Business in the U.S., told delegates to the International Small Business Congress in Toronto in 1999, e-commerce obliterates the one advantage that small businesses have always enjoyed, which is the trust of the people who live in the communities where the enterprise is based. Business on the internet has no locus, trust is entirely earned and the basis for it has to do exclusively with the price and quality of a good or service delivered. The competition, whether it is down the road or across the border, or even over the ocean, is just a click of the mouse away. There are few advantages to being local. Of course, cultural businesses in Canada are mostly small, as they are the world over, even in the U.S. where the National Writers' Union has complained bitterly about the tendency of information society advocates to ignore the realities of creators.[24] The report of the Standing Committee on Canadian Heritage notes that "many creators including writers, designers, craftspeople and musicians are self-employed" and also recommends that a federal task force be appointed to review self-employment in the cultural sector. The point is that the cultural expression that matters here is expression that is rooted in some "where." Presumably this is why the House of Commons Standing Committee entitled its June, 1999 report "A Sense of Place: A Sense of Being." Undeniably, the internet will make it possible for entrepreneurs to identify and respond to market demand. But this may occur at the expense of viable expressions of physical place and of the community which resides here and nowhere else.

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24 See National Writers Union critique of the 1995 report of the White House Information Infrastructure Task Force.

As we have seen, coincident with the rise in economic value of IP has been the headlong rush to acquire it for the purpose of speculation and commercial exploitation. The frontrunners in this race are the rich countries of the world who have not resisted the opportunity of looting the storehouse of traditional knowledge by patenting sacred plants, copying native design and appropriating native stories.[25] Native communities and individuals have explored ways to protect their collective heritage under existing IP laws with some success but not a great deal. The systems of intellectual property rights developed in Canada and most of the developed world do not easily entertain the concept of collective ownership. Some aboriginal communities (mainly in the U.S.) have set up permit systems for visitors wanting to photograph native villages or ceremonials as one way of controlling exploitation. However, little can be done about the phenomenon of non-native artists and designers appropriating native styles and traditions and profiting from them without any benefit accruing to the original communities. Such appropriation has become endemic, but intellectual property law has offered no redress. Recently, however, the Snuneymawx (Nanaimo) First Nation on Vancouver Island took an innovative step in establishing a number of the petroglyphs found on Gabriola Island as marks under the Trade-Marks Act. These images were being widely exploited by artists and entrepreneurs without reference to the native community. The Band did this on the basis of its being a public authority not a commercial operation and this is indicative of its intent to preserve a limited commons rather than create a private interest.[26] What is innovative about the move is that it advances a method for the collective ownership regime operating in native culture to be recognized.

3. Some Conclusions about Cultural Policy in the Wired World

1) We should be cautious, especially about changing laws. Notwithstanding their phenomenal growth, the internet and its offspring the world wide web are infant technologies. Prognostication is fraught with pitfalls but so too are campaigns which would speed electronic commerce into being. Back in the months before the US Congress passed the Digital Millennium Copyright Act[27] to prepare the way for electronic commerce, thoughtful commentators such as I. Trotter Hardy were saying that we should hold our horses, that existing IP laws could be made to work for digital formats, and that

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25 For an exhaustive analysis of this trend, see Seth Shulman's *Owning the Future* (Houghton Mifflin, 1999).

26 For a provocative treatment of the concept of the limited commons, see Carol M Rose, "The Several Futures of Intellectual Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems," in the *Minnesota Law Review*, November, 1998.

27 The Digital Millennium Copyright Act makes it illegal to manufacture or distribute devices which circumvent technological measures intended to protect the rights of copyright owners. It also clarifies the liabilities of on-line service providers by providing them, subject to certain conditions, from responsibility for user infringement of copyright law.

problems as well as solutions (long-term problems and short-term solutions) were bound to emanate from hastily made law.[28] Indeed in the rush to protect intellectual property rights, the policies being put into place in Canada and many other countries may already have compromised the public right to free expression and access to the common store of knowledge and information. No one will be more acutely aware of this trade-off than small, independent creators, especially those (writers, artists, composers, poets, playwrights) who are dependent on being able to research, but whose vocation it is to express in a primary way the conditions of human being.

2) The creative community needs to be proactive as well as reactive in the process of policy formation. Government is approaching the advent of e-commerce with a great deal of seriousness and a comprehensive strategy, drawing on the efforts of senior bureaucrats in several departments to produce it. The resulting program has been given priority attention and resourcing. However, in consulting the communities affected (outside of business which is exceeding well connected to the trade policy making process nationally and internationally), the government has taken a piecemeal approach which has masked the larger issues involved.[29] It has, in effect, blindsided everyone in the cultural sector by not alerting us to the massive and profound character of this impending change -- which is doubly true for creators, who will be more directly affected than most. Furthermore, the government has not asked for or facilitated an informed and considered response from Canadians although the situation obviously demands it. A case in point: the Competition Bureau takes twenty months to produce its proposed guidelines for IP and then asks the community to respond in six weeks.[30] A major part of the IP community (the arts and culture) is having to deal with the whole area of competition law for the first time, and thus has had to prepare its response from a standing start. What various government departments have been doing over the last several months, in other words, may be described as consultation but from the point of view of the arts and culture it has been largely uninformed consultation. We note the Standing Committee on Heritage quotes the Status of the Artist Act including "the right of the artists to have access to advisory forums in which they may express their views on their status and on any other questions concerning them."

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28 See *Project Looking Forward: Sketching the Future of Copyright in a Networked World* by I. Trotter Hardy, College of William and Mary School of Law, for the US Copyright Office, 1998.

29 High level business lobby groups such as the Global Business Dialogue on Electronic Commerce and the Transatlantic Business Dialogue between the U.S. and the EU contribute directly to the formulation of government policy for electronic commerce and they have taken it upon themselves to alert the WTO to the degree of compliance of various countries who have signed on to WTO treaties for intellectual property. The White House Framework for Electronic Commerce is uncompromising about the role of business and Canada's strategy is the same: "The Internet should develop as a market driven arena, not a regulated industry. Even where collective action is necessary, governments should encourage industry self-regulation and private sector leadership."

30 The deadline for July, 1999 was not only extended, a second draft of the Guidelines was produced in April, 2000. Under pressure from the community, the Bureau has thus extended its consultation process.

3) We should be realistic. Business and governments have a great deal at stake in electronic commerce. Employment in entertainment related production and services in the U.S. alone doubled between 1988 and 1998 and much of that gain was due to the proliferation of new media opportunities and the internet. It will certainly be difficult to exempt culture from international agreements given that much of the audio-visual and audio content on the internet comprises culture, and given that culture cannot be carved out of IP law. Although the CRTC has stated its view that video-on-demand is a broadcasting service, and although it has declined to regulate the internet for now, the European Commission for one considers it to be a telecommunications service and therefore not liable to content regulation.[31] The scope for cultural exemptions is not only limited, but likely to be an empty gesture.

4) Cultural support programs should be founded on principles which will not be obviated by forthcoming trade negotiations. This is to say we should recognize that the liberalization of trade means first that subsidies must be aimed at production for domestic consumption not for export, and second, that they should increasingly go directly to creators as opposed to the indirect route via tax credits and grants to producers. The mantra of trade liberalizers is transparency and direct subsidies are the most transparent way to support culture. In strategizing cultural policy for the future we should therefore be building on past success and experience in the use of direct subsidies to creators. This means recognizing the extraordinary accomplishments effected internationally in some cultural fields, writing, popular music and comedy, for example.

5) The producers of Canadian culture (excluding crown corporations and public agencies) are best understood in terms of their independence, that is, they are individuals and firms who own what they operate or produce and usually live where they create. They may be companies, but they are rarely publicly traded corporations, and often they are non-profit organizations. In view of the fact that culture is initially produced by self-employed individuals and micro business, creators should explore the possibility of alliances and communalities with independent business in other fields.

6) We should keep in mind that the most important effects of the world wide changes in the way intellectual property is defined and defended in the era of e-commerce will be structural. What we have to worry about are the consequences for Canadian creators of corporate mergers, vertical integration, and rising production costs. A June 1998 paper on audiovisual services which was produced by the secretariat of the Council for Trade in Services at the WTO demonstrates that trade negotiators certainly expect these effects.

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31 Note that the May 1999 report of the Department of Foreign Affairs and International Trade's Sectoral Advisory Group on Culture, "Canadian Culture in a Global World," confines itself regarding this issue to a single observation: "Because many of our cultural industries involve services, the government will have to develop a negotiating strategy." (p. 22) In the June 1998 issue of the Institute for Research on Public Policy journal, Policy Options, Matthew Fraser points out in "Digital Delivery of Cultural Products on the Electronic Highway" that the CRTC has defined video-on-demand as broadcasting and that this is highly contentious.

The paper notes that with the digitization of audio-visual production, content creation is now often outsourced to small, specialized firms but the high cost of such specialization is rapidly raising average film production costs. "Faced with declining market share, producers in the EU are consolidating into larger groups controlling distribution and/or production facilities. Increased concentration has been accompanied by greater vertical integration." An OECD report on issues for network-based content services states "Concentration may deter content production and innovation if large distribution companies or publishers can monopolize content resources. Within the new digital environment the rate of return from economies of scope may produce greater aggregate wealth generation than economies of scale. Even where small companies exist on the content producing side...their growth could be stunted by the prevailing vertical integration of larger companies.…" Recognizing this, the Standing Committee on Heritage report says, "the challenge for Canadian cultural enterprises is how to form new and creative partnerships and alignments.…" The government's role is to help make this happen just as it has for scientific and technical research through the program known as Networks of Centres of Excellence. Its role is to recognize, fund and facilitate the creation of cultural IP.

7) Culture gets a lot of lip service but not much real attention. The vaunted idea of culture being the third leg of foreign policy is one example. The Standing Committee has made a long list of fine recommendations but we have heard nothing in the way of a response to the notion, for example, that artists should receive funding comparable to academic researchers, and that their interaction with the internet should also be subsidized. The cultural community should call politicians to task. In regards to intellectual property, since the federal task force on digitization has enunciated that the government will set an example in determining, clearing and protecting IPRs, someone should check to see a) what the models are like, b) how IP rights holders have reacted, and c) whether the models get noticed and emulated.

8) The best way for governments to address culture in the arena of international trade is to enable creators to speak and act in the interest of cultural expression. If business is to lead the development of the information highway, creators should be at the forefront of strategies to permit that highway to serve the needs of those who thirst for originality, authenticity and diversity. If e-commerce is to be designed by transnational business groups and the WTO through international trade agreements, then artists and small scale IP producers must be able to meet in similar fashion, and must be privy to the information and expertise which will make their participation, and government consultation, meaningful. To date the creator's voice has not been part of the debate or analysis on which our government representatives at the WTO have based their positions and negotiation strategy. For this to happen, government will have to cease regarding artists' and cultural producers' associations as special interest groups and part of the political problem. In actuality they are key resources and essential to the government effort. We note that international and regional cooperation in cultural activities "to tackle the challenges of urbanization, globalization, and ongoing technological change" is part of the Action Plan on Cultural Policies Adopted in Stockholm in April, 1998 by

UNESCO’s Intergovernmental Conference on Cultural Policies for Development. Canadian artists and artists' organizations should participate directly.

9) The community must come to grips with the notion that there may be such a thing as too much copyright protection, that too much of the world's storehouse of knowledge is being privatized for the purpose of making money for large commercial IP holders, and that the Western concepts of intellectual property are being imposed on Third World communities and aboriginal cultures. We also have to recognize that the balance between individual rights and public freedoms as well as that between individual creators and corporate rights holders has been disrupted by the TRIPs agreement ushering in a new international regime of IPR management which appears for the most part to favour the interests of the largest and most dis-placed cultural producers.

10) Initiatives such as the proposed international cultural instrument are worth pursuing as the process will provide an extraordinary opportunity for precisely the kind of international dialogue that is needed. However, if this process occurs at the expense of (rather than in support of) artists and artists' organizations engaging and collaborating the world over, the real opportunity for establishing the basis of long-term international cooperation among creators will have been lost.