CIPPIC/PIAC Response
to the May 2004 Standing Committee on Canadian Heritage
Interim Report on Copyright Reform

June 21, 2004

Background: Last year, the House of Commons Standing Committee on Canadian Heritage Committee (the Committee) was tasked with reviewing the operation and potential reform of the *Copyright Act* in light of the government's October 2002 report *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (the "Section 92 Report"). It held hearings in late 2003 and early 2004.

In May 2004, the Committee, chaired by Liberal M.P. Sarmite D. Bulte, issued its *Interim Report on Copyright Reform* (the "Bulte Report"). The Bulte Report contains substantial recommendations for short-term copyright reform in Canada. The recommendations in the Bulte Report are highly controversial and contrary to the views of many copyright experts and those in the Canadian public interest community. The report closely reflects the positions of a few stakeholders and ignores most of the submissions and evidence put forward by public interest groups.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) and the Public Interest Advocacy Centre (PIAC) are organizations with public interest mandates. More information on each can be obtained from their websites at www.cippic.ca and www.piac.ca . Both organizations participated in the Committee hearings that led to the Bulte Report. During the June 2004 federal election campaign, CIPPIC posed questions to political parties on some of these issues; the questions and responses can be accessed at www.cippic.ca/election2004.

The recommendations in the Bulte Report, along with CIPPIC's and PIAC's concerns, are set out below.

Bulte Report Recommendation 1: "*The Committee recommends that the Government of Canada ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) immediately.*"

CIPPIC/PIAC Concerns: Ratification of the WIPO treaties would require Canada to adopt much stronger copyright protection measures, including prohibiting the circumvention of technological protection measures used by copyright holders.

Through the use of legally protected technological protection measures, copyright owners stand to gain unprecedented control over the public's ability to access and use literary, musical, dramatic and other works in non-infringing ways. Public access to and use of works may become curtailed and largely fee-based. Copyright owners will also gain an unprecedented ability to invade individuals' privacy, including the ability to create, use and share highly detailed profiles of what users read, listen to and watch in the privacy of their own homes.

Librarians have also pointed out that the unrestricted use of technological protection measures (let alone legal protection of them) could cause cultural and scientific knowledge to be locked away forever, as technologies for accessing the protected data become obsolete. See http://www.copyright.gov/1201/comments/reply/034dillon.pdf

Laws similar to that recommended by the Bulte Report have proven to be highly problematic in the USA, both because they prevent entirely legal and desirable uses of copyrighted materials, and because they are being used by companies (*e.g.*, Lexmark) to shut down competition for products that have nothing to do with copyright (*e.g.*, printer cartridges, garage door openers). The USA is now having to backtrack and consider amendments to its anti-circumvention laws. See the CIPPIC backgrounder on the legal protection of technological measures at http://www.cippic.ca/technological-protection.

The Bulte Report appears to have recommended immediate ratification of the WIPO treaties in response to pressure from self-interested parties without undertaking any analysis of the implications for Canada of adopting anti-circumvention laws or a new "making available" right. Because these new laws would significantly expand the rights of copyright holders without any corresponding expansion of user rights, there is widespread concern that they would upset the balance between creators' and users' rights on which copyright is based. The Supreme Court of Canada recently affirmed the importance user rights in this balance in *CCH Canadian Ltd. v. Law Society of Upper Canada*.

Another concern with WIPO treaty ratification is that the treaty requirement of "national treatment" will force Canada to increase substantially the levies we currently pay on blank audio recording media, in order to compensate American as well as Canadian artists for the supposed effects of private copying. This concern, while raised before the Committee, appears to have been summarily dismissed. Evidence presented to the Committee on this point appears to have been ignored.

It is not clear why there is such a rush for Canada to ratify the WIPO treaties, how Canada would benefit from ratification, or what consequences Canada would suffer by not ratifying (at least until Canada has determined how and why it should ratify). The Bulte Report contains no analysis of these critical issues, and no rationale to support its recommendation that the treaties be ratified.

Canada should undertake a thorough and careful consideration of whether it is in the best interests of Canadians to ratify the WIPO treaties. Possible ratification of the WIPO treaties, including the form of the ratification, should only be considered after such an analysis is completed. Included in that analysis should be a consideration of the operation of similar laws in other countries.

Bulte Report Recommendation 2: "*The Committee recommends that the Copyright Act be amended to grant photographers the same authorship right as other creators.*"

CIPPIC/PIAC Concerns: The Committee appears to have ignored submissions made by CIPPIC about why the default rule in the case of photographic and portrait works commissioned and paid for by consumers *for personal and domestic purposes* should give copyright to the consumer (the weaker party to the bargain) by default. As a repeat player, the artist/photographer is in a much better position than is the consumer to change the rule by contract. Default rules should favour contract-takers, since contract-makers can always change the default rule in their contracts.

The recommendation in the Bulte Report would mean, for example, that Canadian couples who hire a photographer to take photos of their wedding do not own copyright in their photos, unless they have negotiated such ownership with the photographer. This means that they would not be able to make copies of their photos or send them to friends. It would also mean that the photographer would have the right to copy and make use of the photos as the owner of copyright in them.

Canadian consumers who hire and pay for a photographer to take photos *for personal or domestic purposes* (*e.g.*, a wedding or portrait) should, by default, own copyright in their photos. This default rule could also apply to other types of works commissioned for personal or domestic purposes. Photographers and other creators can always change this default rule by contract. The onus should be on the creator, not the consumer, to raise the issue of copyright in personal and domestic situations.

Bulte Report Recommendation 3: *"The Committee recommends that the Copyright Act be amended to provide that Internet service providers (ISPs) can be subject to liability or copyrighted material on their facilities. The Committee notes, however, that ISPs should be exempt from liability if they act as true "intermediaries," without actual or constructive knowledge of the transmitted content, and where they meet certain prescribed conditions. ISPs should be required to comply with a "notice and takedown" scheme that is compliant with the Canadian Charter of Rights and Freedoms, with additional prescribed procedures to address other infringements*."

CIPPIC/PIAC Concerns: Recommendation 3 suggests that Internet Service Providers (ISPs) should be subject to liability for copyrighted material on their facilities, unless they act merely as conduits for the material and comply with a "notice and takedown" regime under which they must remove allegedly infringing material after notice from the copyright holder.

This recommendation would put ISPs in the costly and difficult position of censoring content on the Internet on the basis of mere allegations by others. ISPs would pass on the costs of these new responsibilities to their customers, thus increasing the cost of Internet access to the Canadian public. Moreover, perfectly legal material posted on the Internet could be forcibly removed, allowing copyright holders to shut down legitimate expression. Innocent citizens would effectively be treated as guilty and forced to defend themselves at significant cost or to give up their right to free speech.

The risk inherent in this kind of approach is that in an attempt to avoid liability, ISPs will simply remove content every time they receive a notice of any kind (whether justified or not) from a copyright holder. In fact, the Bulte Report recommendation encourages ISPs to remove content by promising them immunity if they do. Once the content is removed, it is questionable whether the ISP or affected subscriber will challenge the validity of the allegations in court, given the cost of doing so. Hence, the recommendation would have a negative effect on freedom of expression in this country.

As a general principle, ISPs should not be liable for infringement of copyrighted material on their facilities where they act as mere conduits. Just as would be required for any non-copyright dispute, a court order should be required before any ISP is obliged to remove content at the request of a copyright owner. There is no reason to provide special rights and treatment to copyright owners. ISPs should only face potential liability if they fail to comply with a valid court order to remove content or where they deliberately collaborated in an infringement.

Instead, Canadian law should reflect the "notice and notice" approach currently taken by Canadian ISPs, rather than the "notice and takedown" approach taken in the USA. Under the "notice and notice" approach, when an ISP receives a notice from a copyright holder, the ISP gives notice to its affected customer, and confirms to the copyright holder that the notice was given. The dispute is thus left as a matter between the copyright holder and the affected customer, except where the ISP is required by court order to take other action.

Bulte Report Recommendations 4 & 5: "*The Committee recommends that the Government of Canada amend the Copyright Act to allow for extended licensing of Internet material used for educational purposes. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report)" AND "The Committee recommends that publicly available material be defined as material that is available on public Internet sites (sites that do not require subscriptions or passwords and for which there is no associated fee or technological protection measures which restrict access or use) and is accompanied by notice from the copyright owner explicitly consenting that the material can be used without prior payment or permission*."

CIPPIC/PIAC Concerns: Recommendations 4 and 5 suggest that teachers should have to pay a licensing fee in order to reproduce for educational purposes material that is publicly available over the Internet, except where such material is accompanied by a notice from the copyright owner explicitly consenting to such reproduction, or where copying of the material is restricted by technological or other measures.

The Copyright Act already contains user rights provisions which state that using copyright materials for private study, criticism, review or research is permitted and is not an infringement of copyright. It is difficult to differentiate between those activities and the activities of teaching. Moreover, it can be argued that those who post material on the

Internet without any copyright notice or technological restriction on copying are implicitly consenting to its reproduction by teachers and others.

Teachers and schools asked that the law be clarified to allow them to reproduce publicly available Internet material for use in the classroom. Instead, the Committee recommended that teachers should have to pay for freely available Internet material. This approach will result in either increased expense to educational institutions or reduced learning opportunities for students, despite the fact that much of what is available on the Internet is either in the public domain or is material for which the copyright owner does not expect to be compensated.

There is a strong public interest in facilitating educational use of Internet materials. In keeping with the Supreme Court's broad interpretation of user rights under the *Copyright Act*, educational use of unprotected and non-explicitly licensed material freely available on the Internet should not be treated as copyright infringement and should therefore not be subject to any remuneration scheme. Teachers should be permitted to reproduce and use material that is freely available on the Internet, without having to pay for it and without being afraid that they are infringing copyright.

See the May 31, 2004 Toronto Star article by Michael Geist on this point.

Bulte Report Recommendation 6: "*The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report*)."

CIPPIC/PIAC Concerns: Recommendation 6 suggests that teachers should have to pay a fee in order to deliver copyrighted materials over the Internet for distance learning applications. CIPPIC's concerns here are the same as for Recommendations 4 and 5.

Bulte Report Recommendation 7: "*The Committee encourages the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study. Where appropriate, the introduction of an extended collective licensing regime should also be considered*."

CIPPIC/PIAC Concerns: Recommendation 7 suggests that libraries should have to pay a fee to rights holders in order to deliver copyrighted material to library patrons by electronic means, for the purpose of research or private study.

Research in Canada is currently inhibited by a prohibition against libraries providing patrons with a digital copy of material obtained electronically from another library via

inter-library loan. Instead, the library must make a single print copy of the material for the patron. The rule is meant to prevent unauthorized distribution of the material by library patrons. It has the effect of putting Canadian researchers at a disadvantage to those in other jurisdictions where electronic delivery of copyrighted material is permitted.

Libraries should be permitted to deliver electronic copies of electronic materials to library patrons, without having to pay for the right to do so. Libraries should not have to pay for the right to distribute electronic copies of materials to patrons that they are permitted to distribute in hard-copy form for free. Increasing the cost of access to library materials by Canadians is not in the public interest.

Bulte Report Recommendations 8 & 9: "*The Committee urges the Government of Canada to take immediate and decisive action on the issues raised in this report. The Committee is convinced that the modernization of Canadian copyright law is of the utmost importance; consequently, it sees it as essential that the federal government work in partnership with Parliament to ensure that all necessary legislative changes to the Copyright Act are made immediately" AND "The Committee recommends: (a) that a memorandum to cabinet incorporating the recommendations made in this interim report on copyright reform be ready for cabinet approval no later than 15 August 2004; and (b) that legislation to permit ratification of the WIPO treaties be introduced in the House of Commons by 15 November 2004*."

CIPPIC/PIAC Concerns: The fact that the issues addressed by the Committee have been under consideration for a number of years is not reason in itself to put them on a fast track. There is good reason why these issues have been under consideration for years and why Canada been hesitant to ratify these treaties and expand copyright protection. Many public interest concerns have been raised. It is not clear how WIPO treaty ratification, or the other recommendations in this report, would benefit the Canadian national interest or the public interest more generally. The Committee hastily arrived at its conclusions in a matter of weeks and appears not to have considered the public interest perspectives presented to it.

The recommendations made in the Bulte Report call for sweeping fundamental changes to Canadian copyright law that reflect the positions of certain vested interests rather than the public interest. They ignore key evidence and submissions provided by public interest groups. They lack reasoning in some key respects. The Bulte report should be rejected and a more balanced approach to copyright reform adopted by the new government of Canada.

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