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The Memory of the World in the Digital Age: Digitization and Preservation

Session C: Intellectual Property and Digitization Issues

Rights, not gifts, for trusted intermediaries

for 1st Theme:

Access, Identification, Circulation & Re-Use -

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The debate as presented to us by many
Rights Holders and Rights Users



There are those who advocate **free, unfettered access** to all the world's information resources...

- 1. This approach ignores the evidence of the beginnings of the information age, born out of the industrial age, that creativity and innovation need to be nurtured in individuals and in nations.**
- Intellectual property, including copyright, emerged as part of Europe's response to its industrialization and reflects the reality that**
 - ∞ individuals are more likely to be innovative and creative if they can be financially rewarded for their efforts and
 - ∞ nation states benefit from the artistry and ingenuity of their residents.

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2. Another incentive for art and innovation is often the recognition that can come from these efforts and the subsequent control over one's creativity that

∞ can allow an artist or innovator to control her or his oeuvre and

∞ can give society the confidence that the information or product being received is reliably and authoritatively that which the creator or inventor originated

- **In copyright, these latter have been accomplished through moral rights since the 19th century**

In an age where information is increasingly economically valuable and yet exploding in volume, it is unlikely that either individuals or nations will wish to lose all economic incentives from it or will wish to be without recourse should information be manipulated into misinformation or otherwise distorted from its original creation...

There are those who believe that all information needs can be satisfied through the **licensing** of copyrights...

- This approach ignores the complexity of the interests involved in any given work or other matter which the subject of any economic interest under the copyright regime (sound recordings, broadcasts, performers' performances)
- Under the current internationally agreed copyright regime, both economic rights in copyright **AND moral rights are to be attached to works by nation states**

There are those who believe that all information needs can be satisfied through the **licensing** of copyrights...

- **Moral rights cannot be licensed!**
- **Because moral rights and economic rights are very often held in different hands, those who license the economic rights cannot guarantee that a moral rights holder will not object to a use for which the economic rights holder has given a license**
 - ↳ so no regimes based purely on licensing arrangements can deliver the security that users expect in terms of their subsequent actions...

Why can users' rights not be ignored completely in favour of the rights of the economic and moral rights holders?

- The values of **freedom of expression** and its embedded corollary, **access to information**, are guaranteed under international law, just as intellectual property rights are recognized as a human right – so a balance must be achieved between them
- While in the United States, the highest court in the land has held, in *Eldred v Ashcroft* in 2003 that, for all practical purposes, the Constitution gives Congress the right to balance the values of intellectual property and freedom of expression, in no other country has this determination been made – and the term of the Constitution on which the USSC made its determination is unique to the US
- In Canada, for example, the Charter right (s.2(b)) to freedom of expression has not been examined in terms of its possible limitation on the power of the federal government to regulate “copyrights” (s.91 of the Constitution Act, 1867).

The Good News: A middle ground solution is possible

- The Supreme Court of Canada, in 2004, enshrined the notion of **“users’ rights”** in Canadian law – but it represents an aspect of the copyright regime that has existed throughout the life of this intellectual property device in the form of exceptions to the rights held by the rights holders of the economic rights in copyright
- These are the rights to use material in copyright which are given by governments to those who do not have any part of the economic rights interests in the material
- Certain of these rights have been given by governments directly to any member of their public – as is the case, for instance, with the fair dealing rights in Canada or fair use rights in the United States
- Other rights are given to members of their publics only where those individuals have established relationships with intermediary institutions which are entrusted by their governments with certain rights – as is the case in Canada, for instance, for rights associated with defined “Educational Institutions” or defined “Libraries, Archives and Museums.”

There is a middle ground that can and should be created:

- The best way to ensure appropriate access, identification, circulation and re-use of information in society is for governments to universally **recognize, and, if necessary, expand, the role of trusted intermediaries**, such as libraries, as vehicles through which universal access to information can be assured to their citizens -- without ignoring or destroying the fabric of the balance between moral rights and economic rights in works and other subject matter which has been developed over the past centuries.

How can this middle ground be implemented?

- **At the international level, adopt the instrument currently being considered by WIPO which would guarantee users access through their libraries in every country**
 - Limitations and Exceptions for Libraries and Archives on the Draft Agenda for the 25th session of WIPO's Standing Committee on Copyright and Related Rights (Nov. 19-23, 2012, Geneva), see http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=214186
- **In Canada, where users' rights have been enshrined through a number of provisions which override the economic rights of rights holders under certain conditions, consider making explicit the relationship between these users' rights and the rights that authors hold through their moral rights; these relationships can then be considered for implementation by other countries and then be considered by the nations for adoption through the relevant international organizations (WIPO and the WTO).**

...related writing by Dr. Wilkinson

“Access to Digital Information: Gift or Right?,” chapter 14 in Mark Perry and Brian Fitzgerald (eds) *Knowledge Policy for the 21st Century: A Legal Perspective* (Toronto: Irwin Law, December 2011), pp.313-340.

“Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries,” in Michael Geist (ed.) *From “Radical Extremism” to “Balanced Copyright”*: *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), pp.503-540. Also available online at <http://www.irwinlaw.com/pages/content-commons/copyright-collectives-and-contracts--new-math-for-educational-institutions-and-libraries---margaret-ann-wilkinson>.

Margaret Ann Wilkinson and Natasha Gerolami, “The Author as Agent of Information Policy: the Relationship between Economic and Moral Rights in Copyright,” (2009) 26 *Government Information Quarterly*, 321-332.

“The Public Interest in Moral Rights Protection,” [2006]: 1 *Michigan State Law Review*, 193-234.

“Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries,” in Michael Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) pp.331-374. Also available online at http://209.171.61.222/PublicInterest/two_9_wilkinson.htm.

“National Treatment, National Interest and the Public Domain, ” (2003-2004)1(1&2) *University of Ottawa Law and Technology Journal*, 23-48.