

File-sharing is an asset, not a problem

BY TOM FLANAGAN and GEMMA COLLINS

The recent federal election caused a lot of legislation to die on the order paper, including amendments to the Copyright Act known as Bill C-60. The most important part of C-60 was its attempt to outlaw P2P ("peer-to-peer") file-sharing of music and movies over the Internet. The new government should think twice before bringing this feature of C-60 back to Parliament.

C-60 would have given copyright holders a monopoly to "make available" protected material to the public via the Internet. The Orwellian term "making available" would actually render unavailable what has been freely available for years. Swapping music and movies over the Internet is legal in Canada, and thousands of people do it every day.

This freedom is protected by a 2004 federal court decision that P2P file-sharing is permitted under Canadian copyright law. However, that libertarian decision would almost certainly have been different if C-60 had been in effect at the time.

Ever since the days of John Locke, we have known that property rights are a response to scarcity. If there were always "enough and as good left in common for others," as Locke put it, we would not need an elaborate legal system to create and protect property rights.

The leap from Lockean real property to intellectual property has always been dubious because scarcity seems absent in the latter case. Making use of someone else's ideas is different from dipping into someone else's acorn pile. Acorns get con-

sumed, but ideas grow rather than diminish as they are borrowed. Nobel-Prize-winning economist Friedrich Hayek was a determined defender of property rights, but he called intellectual property "forced scarcity" and questioned whether copyrights and patents have actually increased literary creativity and technical inventiveness.

More recently, libertarian legal theorists have developed a critique of intellectual property based on the distinction between negative and positive externalities (side-effects). The sight of a well-tended flower garden is a positive externality, pleasant for passers-by to look upon. But a gallant viewer who stops to pick some of those flowers to give to his girlfriend imposes a negative externality on the owner of the garden.

In the case of material property, the externalities are mostly negative. CDs or seats in movie theatres are scarce physical resources that need to be defended against those who would take them without payment, and property rights provide that protection.

Intellectual property, in contrast, involves mainly positive externalities. You are not taking anything tangible from Mr. Green Thumb when you enjoy his garden, you are just taking a look. Similarly, uploading and downloading a CD so that someone else can listen to it does not mean that there is one less CD to sell, as if you stole it from a music store. P2P file-sharing is no more a threat to the movie and music industries than lending libraries are to the book-publishing business.

In 1998, a "make available" provision was introduced into U.S. copy-

right law. But the new legislation and 15,000 subsequent lawsuits have not curtailed file-sharing. BigCham-pagne On-Line Media Measurement, which conducts marketing research on file-sharing networks, reports that file-sharing in the U.S. doubled between 2003 and 2005. Here at home, Bill C-60's website cautions that file-sharing remains a challenge in other countries where "making available" has been legislated. Not only is "making available" shaky in theory, it seems ineffective in practice.

As Heritage Minister Bev Oda has noted, a balance between creators and consumers must be the goal of sound copyright legislation. But "making available" ignores the consumer in favour of the producer, to solve problems that don't exist. There is no crisis of creativity or profitability in popular culture that requires such draconian interference with personal liberty.

Canada signed the 1997 World Intellectual Property Organization Internet Treaties, but we have not yet ratified them by enacting their provisions into our domestic law. There is still time to draw back from a step that would create a new class of law-breakers and impose censorship on the Internet, without doing anything to foster genuine cultural vitality.

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