

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 Ottawa, ON

2 --- Upon commencing on Wednesday, October 3, 2007
3 at 3:14 p.m.

4 MR. OXLEY: We are going to go
5 pretty much directly into the next session. It's
6 on Confidence and Competition in the Internet
7 Economy.

8 Stream B is just starting right
9 about now, and Hugh Stevenson, the deputy director
10 of the Office of International Affairs for Federal
11 Trade is leading a conversation on Confidence,
12 Privacy and Security.

13 Now, in this room, we have got the
14 luxury of having a great conversation which sort
15 of follows the user content creation with
16 Creation, Access and Competition.

17 The chair of this panel,
18 editor-in-chief, Intellectual Property Watch,
19 William New.

20 So make your way over to Session
21 B, for those that are going, and for those that
22 are staying, I turn you over to the lovely hands
23 of William.

24 Go ahead.

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 MR. NEW: Thanks very much.

2 I don't see any reason why we
3 shouldn't begin immediately. For those of you who
4 are leaving, you may get ensnared in the interest
5 of our panel.

6 I'm William New. I'm at
7 Intellectual Property Watch in Geneva,
8 Switzerland. It is a non-profit media
9 organization. We are covering international
10 intellectual property policy-making.

11 We are a new media method. We are
12 a fusion of blog and traditional journalism model
13 using creative comments licence. I'm happy to
14 talk more about our project in another forum or
15 after the event.

16 Let me tell you a little about the
17 panel you have today. We have a terrific panel.
18 I can't help, because I'm feeling it myself, to
19 throw out there that if I'm not mistaken, this is
20 a European, and further, much further, group and
21 I'm sure it must be at least closing in on, I
22 don't know, 10 or 11 at night for most of them.
23 For at least one of them, it's already tomorrow.
24 So I hope we will be lively, though, and I look

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 forward to a lot of participation from the
2 audience. I think we should not let this
3 opportunity go by.

4 You know, a topic doesn't really
5 become, it doesn't really exist, until the OECD
6 holds a conference on it, in my estimation. We
7 need to address the key elements of these issues,
8 and these issues for this panel are creation,
9 access and competition. These are three of the
10 core issues, I think, from a policy standpoint,
11 from a legal standpoint, from a consumer and user
12 standpoint and from a business standpoint, and
13 it's going to be very important that we try to hit
14 the key elements of these topics.

15 During this short time that we
16 have, I plan to ask each of the speakers with us,
17 I plan to introduce them before they speak and ask
18 each to speak for about 10 to 12 minutes, after
19 which we will take questions. We have possibly
20 some questions coming in on the web, but we will
21 see about that.

22 The topic of access, creation and
23 competition is fairly widespread. It definitely
24 involves intellectual property rights, but access

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 reaches far beyond that, and competition could be
2 seen as a business issue as much as a consumer
3 issue and reaching into technologies and beyond
4 intellectual property rights, so you will have a
5 wide range of ideas being presented to you.

6 I couldn't help but throw out one
7 or two quick anecdotes and then I'm going to move
8 on to the real speakers here. Today, actually,
9 was the conclusion of a world intellectual
10 property organization assembly. One of the issues
11 there was related to copyrights, and in that
12 committee they are going to address in the coming
13 year possibly new proposals, new ideas. I think
14 that this may be a turning point at the
15 international level for a discussion on some of
16 the new and other ideas that haven't been
17 addressed on the copyright front when it comes to
18 access to knowledge, and you might be hearing
19 more.

20 But a film industry representative
21 at that event told me, he's still there and he's
22 working hard to try to control the use of their
23 material that's showing up in user-generated or
24 user-created formats, but many of his colleagues

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 are leaving now to join companies or start
2 companies that are getting involved in mesh-ups,
3 and this was sort of the way it's going for him.

4 The old models seem to be under
5 some stress, but maybe there's enormous new
6 opportunities for those models. I hope some of
7 those questions come out today.

8 And then I couldn't help but paint
9 two other quick anecdotal images. One was in the
10 old days I recall that if you made a home movie
11 with famous brands or borrowing copyrighted
12 material, your only chance of widespread attention
13 there was with your family, friends and pets, as
14 you showed it on the livingroom wall. But now, of
15 course, you have the opportunity or the prospect
16 of massive popularity worldwide should it strike
17 the right kind of cord. Things have changed.

18 And the other thing I would point
19 out is we are going to, on this panel, also
20 address the concept of a generation of people for
21 whom living in an Internet environment, an
22 Internet-driven world, is their only reality.

23 I recall that my six-year-old, I
24 was worried that perhaps he was behind the curve

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 because he didn't send his first email until he
2 was almost four and he was already five before he
3 said, before I didn't know the answer to
4 something, Daddy, why don't we just Google it?

5 Anyway, I bring your our panel.
6 We are going to begin with a very distinguished
7 speaker. We have the vice-minister of Policy,
8 Coordination at the Ministry of Internal Affairs
9 and Communications in Japan, Vice-Minister Kiyoski
10 Mori.

11 Thank you.

12 MR. MORI: Thank you, Mr. Chair.

13 My name is Kiyoshi Mori, Vice-
14 Minister for Policy Coordination, Ministry of
15 Internal Affairs and Communications in Japan.

16 It is my pleasure to be here at
17 the Technology Foresight Forum on the
18 Participative Web with all of my friends from
19 around the world, friends who are among the most
20 influential in the ICT field. I really appreciate
21 the efforts taken by the OCED Secretariat and
22 Industry Canada in realizing this wonderful forum.

23 Today let me just briefly mention
24 the status of and the future issues facing the

1 participative web in Japan. The upper shows the
2 transition in the Broadband penetration rate in
3 Japan. Recently, while DSL services, shown as the
4 blue, are reaching a ceiling, fibreoptics shown by
5 the orange, which allow more high-speed and large
6 sized communications are rapidly increasing.

7 Also, as shown by the graph at the
8 bottom, the mobile phone use, specifically high-
9 speed Internet use by 3G, that means IMT-2000 is
10 also growing rapidly.

11 Under these circumstances,
12 participative web services such as SNS, blogs, on-
13 line games, and net auctions are also growing. For
14 the development of participative webs, as in the
15 case of video sharing sites, for example, a
16 Broadband environment is essential.

17 As participative web services
18 increase in quality and quantity their power to
19 affect the society becomes stronger.

20 The benefits of the participative
21 web are as follows:

22 Firstly, it leads to glutting of
23 the society. Everybody becomes able to possess
24 social and economical influence to a certain

1 extent through the interactive exchange of
2 information. Wisdom of crowds and collective
3 intelligence may change the society.

4 Secondly, it leads to a change in
5 the business model. User-generated, or user-
6 created contents may well make the market more
7 user-oriented.

8 Lastly, services like SNS and
9 websites that share video clips allow the
10 simultaneous and interactive exchange of valued
11 information. They enable the realistic
12 communication and close long distances.

13 To expand these benefits of the
14 participative web I think the following issues
15 will be considered:

16 The first issue is an increase of
17 traffic. It comes to a matter of traffic
18 congestion. I'll explain this in the next slide.

19 The second is the need to build a
20 new registrative scheme. Discussions have just
21 started in Japan whether and how to introduce so-
22 called layer-type regulations which would open up
23 the platform functions of the network and also
24 could respond to the emergence of new business and

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 the convergence of telecommunication and
2 broadcasting.

3 The third is to ensure the
4 information distribution legally. To expand the
5 participative web free flow of information is
6 important. However, there is a concern of
7 infringing copyrights or intellectual property
8 rights and disclosing personal information. And
9 there is also a concern that illegal and harmful
10 contents are distributed to the youth. To cope
11 with these issues appropriate legislative and
12 technological measures should be considered.

13 Concerning traffic congestion, I
14 have some data to show. The left graph shows the
15 amount of downstream traffic of a major provider
16 during 24 hours in November 2005.

17 The right graph is that of April
18 2006, six months later.

19 I can point out four things:

20 First, there was a significant
21 increase in overall traffic over the six months.

22 Second, according to the data of
23 April 2006 its traffic occupancy rate sometimes
24 reached nearly 90%.

1 The third, peer-to-peer, so called
2 P2P traffic -- the colour is red, purple and
3 brown, was larger than streaming and web surfing -
4 - that is blue and green. This means that P2P
5 traffic has a major significant impact on network
6 than streaming and web surfing.

7 The fourth, the average P2P
8 occupancy rate increased by 30% at the peak level
9 and the at 10% at off-peak level for the half
10 year.

11 Next shows upstream data. We see
12 that there was network congestion in both upstream
13 and downstream traffic. And the P2P occupancy
14 rate was higher in upstream than in downstream.
15 And it is almost clear that P2P users was a major
16 cause of network congestion.

17 Maybe movie sites such as u-Tube
18 and fibreoptics enabled and accelerated the growth
19 of upstream P2P data flow.

20 How should be cope with this
21 problem? The advisory study group submitted the
22 report to the government on the network neutrality
23 on September 20th this year. It covered a wide
24 range of matters on the telecommunication

1 competition policy. As for the equitable cost
2 allocation of networks it reported the easing
3 network congestion by the active use of P2P was a
4 powerful way to make efficient content delivery.
5 It also recommended that in order to keep a
6 certain level of quality of service of the network
7 some guidelines for a basic framework on packet
8 shaping should be developed.

9 As for the equitable access to
10 network, it recommended to make interconnection
11 dues regarding energy and developed my MTT and to
12 review the existing dominant regulations.

13 So, we are now planning to do a
14 joint experiment between government and industry
15 on P2P to find the best way to disperse traffic,
16 and also other necessary measures will be taken
17 soon.

18 The participative web, due to its
19 nature, causes problems out of the traditional
20 regulatory framework and that close quarters. To
21 solve these problems I believe it is necessary for
22 people to consider and cooperate at forums such as
23 the OECD. I would like, therefore, to recommend
24 two ideas:

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 The first point is that we should
2 include program awareness and the policy
3 challenges in dealing with the participative web
4 in the Seoul Declaration which will adopted in the
5 Ministerial Conference next June and to facilitate
6 program awareness in OECD member states and non-
7 OECD countries.

8 The second point is that we should
9 continue to hold this forum to encourage future
10 discussions and to create a global scheme for
11 cooperation.

12 I hope that we can move on with
13 the things we have discovered and the
14 relationships we have built that this forum, and
15 we can build participative relationships in the
16 future.

17 Thank you all for listening.

18 --- applause

19 MR. NEW: Thank you, Vice-
20 Minister. That was very interesting. Thank you.

21 I would like to invite Professor
22 Urs Gasser, the Director for the Research Centre
23 for Information Law at the University of St.
24 Gallen in Switzerland and a Fellow at the Harvard

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 Berkman Centre for Internet & Society, to address
2 us.

3 MR. GASSER: Good afternoon,
4 everyone.

5 Please let me take two steps back
6 and approach this panel's topic from a slightly
7 different perspective by reporting about joint and
8 ongoing research project between the Berkman
9 Center at Harvard Law School and University of St.
10 Gallen, Switzerland, called the Digital Natives
11 Project.

12 If you want to learn more about
13 the project, we're here with a stand.

14 This project aims to explore how
15 the first generation of kids born digital,
16 children who don't know or couldn't imagine a life
17 without Google, live their lives on how they use
18 the Internet.

19 So my remarks are more about the
20 question: What kind of issues are emerging once
21 children got access to the Web, because these
22 experiences in turn will also affect a kid's
23 willingness to go online in the first place, as we
24 know from several surveys.

1 At the core of the lives of
2 digital natives is, to one extent or another, as
3 Shenja van der Graaf pointed out today, what we
4 discussed today, an increased level of
5 participation.

6 In our view, and I believe also in
7 the OECD's view, it is important to frame
8 participation in a broad way. Participation is
9 not only about creating fancy mashups featuring
10 George W. Bush or creating your own Web blog or
11 contributing to Wikipedia. It is also a story
12 about increased social participation, as we
13 learned today, and social networking sides, as
14 well as virtual worlds and social spaces are
15 probably only the tip of an iceberg.

16 It also means increased
17 opportunities for economic participation of young
18 people. The key word here might be young digital
19 entrepreneurs who are coming up with probably the
20 next wave of cool applications. Maybe we will
21 have an opportunity to discuss that later on.

22 And, as we heard in this morning's
23 session, of course it also means new forms of
24 political participation and activism.

1 This broad understanding of
2 participation also makes clear that the challenges
3 associated with the participatory Web go far
4 beyond intellectual property rights issues and
5 competition law issues. These two issues,
6 especially IPR issues, have gained so much
7 attention in the past and they are still such a
8 dominant theme in the room, but I think in the
9 years to come we need to shift our attention a
10 little bit to other very important issues as well.

11 In our research on digital natives
12 we propose three clusters of issues.

13 The first one is to question how
14 the participatory Web changes the very notion of
15 identity, security and privacy. This was
16 mentioned in the previous panel. If you talk to
17 kids, they have a completely different relation to
18 personal information and a different understanding
19 what it means to disclose personal information.

20 Second, the second cluster is
21 about the implications of the participatory Web
22 for creativity, for creative expression, for free
23 speech, but also for the business of creativity.

24 Third, we are interested in

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 how digital natives navigate cyberspace, how
2 they get their way through billions of Web sites,
3 how they find the information they are looking
4 for, how they access the quality, the credibility
5 of information.

6 The role of governments in these
7 three clusters is very different from cluster to
8 cluster and even from issue to issue. It may even
9 change over time.

10 So what we are looking into right
11 now is, how could we define the role of
12 governments based on a case-by-case analysis? I
13 will give you a couple of examples.

14 Today we learned that digital
15 natives have multiple identities. They have their
16 profiles, for instance, on MySpace or Facebook,
17 but they also have their virtual representations
18 in Second Life, and so forth. All these profiles,
19 these virtual representations are parts of their
20 identities.

21 Now, in this area of multiple
22 online identities, we currently don't see an
23 obvious need for governments to step in and
24 regulate. However, this morning someone mentioned

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 that there is probably an emerging regulatory
2 issue there, for instance to ensure the
3 interruptability between different platforms that
4 provide identity.

5 In the area of online privacy,
6 another very important policy area, we see a clear
7 role of the government in contrast. Probably the
8 role is less about making additional laws,
9 enacting new laws protecting privacy, but about
10 implementing and enforcing existing rules about
11 international collaboration and also harmonization
12 to a certain extent.

13 In the creativity cluster we
14 generally believe in the power of market forces
15 and bottom-up approaches. Innovative business
16 models, as well as new and more permissive
17 licensing regimes such as creative commons, to
18 name just one example, are key elements of this
19 bottom-up approach.

20 However, there may be a very
21 specific role of governments at the margins. For
22 instance, when governments legislate about
23 technological protection measures, so-called
24 anti-circumvention legislation, they may use their

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 leeway under the different international contracts
2 to create the conditions for a more participatory
3 environment.

4 Or when it comes to
5 limitations and exceptions to copyright, there too
6 governments may play an important role in shaping
7 the legal framework.

8 My colleague, Professor
9 Senftleben, will talk in great detail about the
10 options and possibilities regarding limitations
11 and expectations in a few minutes.

12 With regard to information quality
13 issues and the participatory Web, identified
14 actually in this OECD report, we see only a very
15 limited role of governance, for instance by
16 providing some minimum quality requirements,
17 either the ban of child pornography or certain
18 forms of hatred speech, or a more active role by
19 providing high quality information in the context
20 of digital service publique.

21 But otherwise, as far as
22 information quality is concerned, the emphasis
23 should be on education, on learning, on media and
24 information literacy.

1 Here of course the private sector
2 plays a very important role too. It can make
3 important contributions.

4 These few remarks also
5 illustrate certain trends when it comes to policy
6 issues in the context of the participatory Web on
7 the one hand side and digital natives on the other
8 hand side.

9 First, multiple stakeholders are
10 shaping our kid's online experiences in the
11 future, ranging from peers, parents, teachers,
12 coaches, the companies and policy-makers. The
13 challenge of course is to coordinate the different
14 roles and contributions of each group of
15 stakeholders.

16 The second point is the challenges
17 we have identified and discussed during this day,
18 and will continue to discuss, are global in scope,
19 which calls for a harmonized legal framework in
20 some instances and in other instances for other
21 forms of coordination.

22 I hope we will get the chance to
23 talk a little bit about the question as to what
24 extent do we want to harmonize legal frameworks

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 and as to what extent is it a bad idea.

2 Third, I believe that we need a
3 more flexible approach in understanding what
4 regulation means in this place. I use the term
5 "regulation" in a very broad sense. It goes far
6 beyond command and control regimes.

7 Someone mentioned today,
8 incentive-based regulation which is an important
9 element in the policy mix I think, but the
10 emphasis in our research is currently education
11 and learning with special attention to media and
12 information literacy.

13 I think if we map these challenges
14 and trends it becomes clear that the OECD's work
15 is increasingly important because I think, as you
16 pointed out, Bill, OECD has an awareness-raising
17 function and an agenda-setting function and
18 contributes to our understanding of the digital
19 environment and of the use of the Internet by
20 different populations.

21 It also clearly plays an important
22 role in international coordination and
23 harmonization efforts and makes great
24 contributions to alternative forms of regulations

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 such as soft law by providing recommendations,
2 guidelines and best practice approaches.

3 That's it for my side. Thank you.

4 --- Applause

5 MR. NEW: Thank you, Urs.

6 I would like to invite Anne
7 Bucher, head of unit for the Information Society
8 and Media Director-General of the European
9 Commission, to give us her remarks.

10 MS BUCHER: Good afternoon.

11 I'm going to take the general
12 question on the role of governments and I will say
13 some words on competition.

14 On the role of governments, I'm
15 not going to present a European Commission line
16 because we don't have one. I mean, what I will
17 tell you is what I tell my bosses internally when
18 they ask me: what should we do about
19 participative web?

20 Basically, if you take that
21 question, my reply is policy-makers have largely
22 not anticipated the development of participative
23 web, they have not anticipated the business
24 models, the size of the communities, the purpose

1 of the exchanges that take place. This has
2 happened with the current legislation. This has
3 happened with the current legislation on IPR, on
4 privacy, on protection of minors, on liability of
5 service providers.

6 When governments are confronted
7 with disruptive trends and with things which
8 change very quickly, it is wise and cautious to
9 try first to understand the long-term implications
10 before rushing into legislation and policy
11 changes.

12 In the meantime, what you see is
13 that a lot of the social networking which is
14 happening is basically ruled by self-regulation,
15 and self-regulation has a role to play, and will
16 probably keep a role in the future development of
17 the participative web.

18 Self-regulation is a fairly
19 adequate tool. I mean, if you think, it is able
20 to respond very fast. It is innovative. If you
21 think of the creative common licence, it is an
22 innovative way of licensing content specific to
23 the participative web. It is coping with millions
24 of users, spread across different jurisdictions,

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 with different legislation and you can say one
2 thing is that we do not have massive court cases.

3 So my recommendation is be very
4 cautious before moving. It doesn't mean do
5 nothing. I mean, there's a certain number of
6 areas, and it's been mentioned. I mean, I have
7 heard several advisors and warnings from the
8 audience this morning and this afternoon, as well,
9 we have to. IPR is certainly an area where there
10 are long-term challenges.

11 The other challenges which we are
12 coping with is the fact that self-regulation
13 interacts with legislation, and in some cases it
14 potentially could raise problems. I mean, you go
15 on SecondLife. Now SecondLife has started to give
16 copyrights to the creators under the U.S.
17 legislation. I mean, enforcing this for users who
18 are not in the U.S. will be an interesting issue.

19 I mean, there are some cases, for
20 instance, and it happens on games online, where
21 users invest a lot of time in defining their
22 identities and in creating virtual objects, and
23 then suddenly, I mean, they could be expelled from
24 this community by the service provider just

1 because they are suspected of having breached the
2 rules. In that case, they are still on their
3 objects, but they have no right to use them and
4 they have no system of appeals.

5 So there are some areas where the
6 legitimate interest of the users will need to be
7 protected. But as I said, it's a bit prospective
8 because we do not have real cases, not that many.
9 Therefore, the recommendation in the short term is
10 try to figure out what are going to be the
11 long-impacts of what we are seeing now as
12 innovations, and then think how to integrate this
13 into the policy.

14 As I said, I wanted to say a word
15 on competition. Competition is definitely an area
16 where policy-makers might have to step in earlier
17 than they think. The participative web, it's
18 true, it's really a typical case for network
19 effect. I mean, if we believe that the value of
20 the network is the square of its size and if you
21 see the business model relying on capturing
22 advertising income, there will be continuous
23 incentives for developing horizontal or vertical
24 integration and further concentration.

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 We saw it from the beginning. I
2 mean, Yahoo! and Google had a first move advantage
3 when they developed the business on search
4 engines. They diversified the services available
5 with the chatting, with the videos, and maybe they
6 will move into IPTV and other services, and this
7 will carry on.

8 The way we see it in the European
9 Commission is that it's not new compared to the
10 other networks' effects we have seen, and we know
11 that anti-trust policy has the means of restoring
12 competition. I think, on participative web, I
13 mean, our first test is in fact already there
14 because last week we have been notified of the
15 takeover of DoubleClick by Google, and it's one of
16 the first cases of, really, vertical integration
17 in that business. So we can rely on anti-trust
18 policy, and these are rather classical network
19 effects.

20 At the same time, I wanted also to
21 say that maybe we should not underestimate the
22 competitive forces which are also at work in this
23 area, and I would mention two.

24 One is the long-tail argument, and

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 the second one is the demand of users for open
2 environments. On the long-tail arguments, I think
3 the long-tail argument definitely applies to the
4 participative web. In Europe, we are very keen on
5 cultural diversity, on multilingualism, and we see
6 a lot of the communities which exist are in fact
7 local, with local cultural preferences and local
8 languages.

9 Similarly, you can say that the
10 participative web has not extended very much yet
11 to professional purpose. I mean, we see some
12 medical communities, some education communities,
13 but just think of the communities which could
14 develop with specific interest.

15 It's not obvious when you look at
16 these communities that there would be an interest
17 for one or two major players to put all these
18 communities on one platform to channel, for
19 instance, advertising revenues. I mean, the logic
20 is not very strong on this.

21 The other argument here on the
22 demand of users for openness, I think we have
23 heard this morning that all this marvellous
24 participative web exists because they are all open

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 standards and they are open-sourced. True, but it
2 is not unusual in our environment, as well, to
3 have had more innovation models which have
4 developed on the basis of walled gardens.

5 And the participative web operates
6 on the basis of walled garden. You belong to a
7 platform and you exchange your communities within
8 that platform and you are not exporting your
9 community outside and you are not exporting your
10 profile outside that platform.

11 But this is a rather typical form
12 of innovation. And then when the market develops
13 and then it reaches a level of mass market,
14 there's an increasing pressing of users for
15 interoperability and for openness. I think what
16 we have seen in the last 24 months, for instance,
17 on the music industry, the music download, is
18 quite representative of this.

19 I mean, Apple has been very
20 successful with the iTunes Store as an innovative
21 model, but there has been some resistance of the
22 users to the lock-in of the model. Now what you
23 see, you see the competition of the music service
24 providers being exactly on business models, DRM

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 Free or with other types of DRM, but responding to
2 the demand of the users to be able to migrate
3 content from one platform to the other. So this
4 model for interoperability exists.

5 And we see the trend in the
6 participative web happening. I mean, the
7 technology is there for having open identities,
8 for having social graphs. Facebook, for instance,
9 has announced that they will make the profile of
10 the users public. Google will probably follow.
11 So there is a trend for making this environment
12 more open, and that should favour competition in
13 the medium term.

14 I see have zero minutes left, so
15 I'll stop there.

16 I didn't talk about net neutrality
17 which I think has more important implications for
18 competition than just the participative web as
19 such, but I assume that will come in the
20 discussion.

21 Thank you.

22 --- Applause

23 MR. NEW: Thank you very much. I
24 wonder what double-click Google's chances are? I

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 won't ask you that.

2 Finally, wrapping us up before we
3 move to questions I would like to invite Martin
4 Senftleben, Professor of Intellectual Property at
5 the Free University of Amsterdam, to join us.

6 Thank you.

7 MR. SENFTLEBEN: Thank you, Mr.
8 Chair. Ladies and gentlemen, good afternoon.
9 Welcome to the fascinating world of intellectual
10 property.

11 We already touched upon this issue
12 today, already in the first presentation, when I
13 remember it correctly. So, I would like to add
14 some thoughts to the general questions regarding
15 intellectual property rights, and the
16 participative web.

17 I would like to place this issue
18 in a broader context in order to approach it. In
19 fact, many of the questions that I discuss now, at
20 the moment, are not necessarily new. From the
21 very beginning when the Internet emerged, there
22 have been two approaches:

23 The first approach saying well,
24 listen, the Internet is a perfect medium for

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 collaborative efforts for increased autonomy,
2 participation, diversity. So, an instrument of
3 the free flow of information. And this argument
4 is a valid one, I submit.

5 Another argument was that if we
6 really want to encourage content providers, the
7 media industry, the information industry, to offer
8 content on-line, then, of course, we have to offer
9 protection as well, otherwise this will never
10 happen. And this is a valid argument, as well.

11 So, the question here is how to
12 reconcile these two approaches, and the
13 participative web is just another phenomenon
14 raising this issue another time.

15 How to reconcile the two
16 approaches? I think participative web is rather
17 about the freedom and the free flow of information
18 part. So what are potential interfaces of this
19 new instrument with the protection of IP rights?

20 To approach this question, let's
21 first look at the stakeholders, what is at stake
22 in this context?

23 First of all, we have on the
24 Internet, of course, right-holders, copyright

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 holders are very prominent and then, again,
2 database rights, people holding rights in
3 databases. And, there, again, we see that we
4 can't draw a black and white picture.

5 Platform providers in the field of
6 user-created content, for example, are very keen
7 on intellectual property protection when it comes
8 to protecting their databases. So we can't just
9 say intellectual property protection is something
10 that is not valid in a participative web context.

11 Then we have lots of trademark
12 issues arising here, as well. I do not
13 concentrate on this one, the issue gets too
14 complex. I only raise certain issues like giving
15 the false impression of sponsorship or offering
16 inaccurate information about certain branded
17 goods. But, as I said, I don't focus on this
18 issue here. So, this is the side of right-
19 holders.

20 Then we have users who want to
21 transform, not themselves, but content, pre-
22 existing works, material. I submit that these
23 users are predominantly private users.

24 And then we have users who add

1 value to something that is already there. Users
2 that build some new services on pre-existing work,
3 some material that is there that might be
4 protected by intellectual property rights, like
5 search tools, content aggregators, recommendation
6 engines. And, here, we have also a mix of users.
7 Some of them might be private users, others will
8 certainly be commercial users.

9 And then finally we have platform
10 providers and, as the slide indicates, we cannot
11 draw a clear boundary line. Platform providers
12 might, to a certain extent, also end up offering
13 something that can be regarded as a value-added
14 product. So, in this sense they are users that
15 add value themselves.

16 So, what is the answer? The
17 answer to the question I raised: How to reconcile
18 the world, the fascinating world of the
19 participative web with the protection of
20 intellectual property?

21 Let's answer the question step-by-
22 step. The first group, transformative use.
23 Users who transform pre-existing material want to
24 know "Can I be sued for infringement? Copyright

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 infringement, for example?"

2 What are the factors to be
3 considered?

4 I think there are three main
5 points to make here:

6 These users engage in an activity
7 that is related to freedom of expression and
8 democratic participation, so we have a very strong
9 human rights underpinning here.

10 Then we have the idea of inter-
11 general equity among creators. In fact, we can
12 say that every creator, every author, builds to a
13 certain extent upon pre-existing material as a
14 source of inspiration, or he uses building blocks
15 from something that is already there. So, this
16 idea of inter-general equity also adds a strong
17 argument.

18 Then, finally, as we got to the
19 participative web we have to admit that there is a
20 promising creative potential out there, a
21 promising creative potential of individuals who
22 just wait for a platform to offer their ideas, and
23 I think we should try to use and realize this
24 potential. And so I think we have strong

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 arguments in favour of saying there should be
2 copyright limitations.

3 These users, transformative users,
4 should be exempted from copyright liability, and
5 they also have traditional solutions, traditional
6 answers to this problem, limitations for
7 quotation, parody criticism review. We find that
8 in international conventions that have been in
9 place for more than a hundred years. So this idea
10 is not new.

11 I think what we can do now is to
12 broaden and diversify the already existing rules
13 in this area. And, also, this idea is not
14 necessarily new, if we look at the UK Gowers
15 Review, there we find similar recommendations.

16 I want to add another point. All
17 these limitations, quotation parody, are based on
18 one basic idea, and this is that intellectual
19 debate takes place. A quotation necessarily
20 implies that the user adds some critical comment.
21 That he uses the reference to a work as a
22 reference point. And I think this is the criteria
23 that should necessarily -- that should in any case
24 be maintained because this can also help to solve

1 the problem of content quality. So, in order to
2 qualify for this kind of limitations, users should
3 really make an effort to enter into an
4 intellectual debate and not just to free write on
5 pre-existing work and not just to engage in mere
6 copying.

7 The second group: Value-added
8 products. Also, these users want to know is there
9 infringement. And the factors to be considered
10 here, according to my insight, is:

11 First, these value-added products
12 are important engines of competition and
13 innovation. They create more and more demand and
14 so they are important players in the field of the
15 participative web.

16 A second argument is they are
17 important because they help to disseminate
18 information. We see that information is diverse
19 and fragmented in the participative web, so we
20 need services who filter, who bundle information.

21 And, thirdly, and this is the most
22 important point, you may not overlook that it is
23 about the distribution of markets. Basically, a
24 valued added product is the new secondary market

1 that is built on the primary market of the
2 original product. So, in any case, value-added
3 products should not kill demand for the original
4 product. This is one of the basic rules.

5 We find traditional solutions also
6 in this area. There have for a long time been
7 limitations for press summaries, press reviews,
8 library services who offer value-added products as
9 well. So, the recommendation here would be that
10 limitations for value-added products are a good
11 thing, but only if they do not erode the primary
12 market, the demand for the original work, and if
13 equitable remuneration is paid, because many of
14 these users are commercial users and in this case
15 I think it is fair to impose an obligation to give
16 some payment in the form of a flat rate or levies,
17 to the content providers.

18 Finally, platform providers, they
19 want to know "Am I liable?" There might secondary
20 liability, contributory liability factors to be
21 considered here. They are indirect beneficiaries
22 of limitation. If a limitation exempts the user
23 from liability, then of course the content -- the
24 platform provider is also not liable.

1 Then I already mentioned this
2 connection with value-added products. Many of the
3 platforms may be regarded as a value-added product
4 itself, so in this case, the rules for value-added
5 products should apply. But then the hot potato
6 here is the heavy burden of general monitoring.
7 Who should spend time and money on sifting through
8 all the material that is placed on the
9 participative Web every day?

10 There is a traditional solution,
11 this is notice and take down procedures.
12 Basically it says that the platform provider in
13 this case would only have to take action if he
14 receives a notice saying "Listen, on your platform
15 there is some content that is infringing".

16 These notice and take down
17 procedures have been used in the field of Internet
18 service providers, to a certain extent also in the
19 field of trademarks, the uniform dispute
20 resolution policy refers to this one. I think
21 that to platform providers this mechanism applies
22 only to certain extent.

23 I think notice and take
24 down procedures should be introduced only if

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 the platform plays a rather passive role, so
2 the closer the platform provider is to the
3 content offered on the platform, the more it
4 should be under an obligation to check what is on
5 the platform.

6 If there is a platform provider
7 who redistributes, who restructures the Web page
8 anyway, I think then it is fair to say he should
9 have a look at the material that he finds and, in
10 any case -- this goes for all platform
11 providers -- proper precautions should be taken.
12 I think it's fair as a minimum standard to offer
13 information to users pointing out the risk of
14 infringement, and in case some kinds of use are
15 typically infringing the platform providers could
16 take action.

17 I think YouTube for example
18 reduced the time for video clips that can be
19 placed to 3.5 minutes, so you can't find entire
20 Hollywood movies any longer one week in advance on
21 YouTube. This is a very basic measure that could
22 be used as a precaution.

23 Finally -- I'm already at zero
24 minutes -- two horizontal issues.

1 Technological protection measures.
2 These are a good thing also in the field of the
3 participative Web, but in any case limitations
4 should prevail. If they don't, then there is no
5 need in introducing new limitations. There are
6 rather bad examples in current legislation. I
7 refer to article 6.4 of the European Copyright
8 Directive where we don't find the means for
9 beneficiaries of quotation and parity limitations
10 to assert these limitations against rightsholders,
11 whereas other types of limitations, for prisons
12 for example and for hospitals, can be asserted
13 against rightsholders.

14 I think that core limitations like
15 these freedom of expression limitations in any
16 case should give a strong position and in this
17 case limitations should in any case prevail.

18 Second, we have to enhance legal
19 certainty in order to have limitations be
20 efficient so we can encourage contractual
21 solutions, solutions like creative comments
22 licences, and we should in any case reduce the
23 impact of abstract control mechanisms, abstract
24 legal rules that are imposed as an additional

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 control on limitations. An example here is the
2 famous three-step test of international law.

3 The influence of these kinds of
4 regulatory means should be reduced in order to
5 have more legal certainty.

6 Thanks for your attention.

7 --- Applause

8 MR. NEW: Thank you, Martin.

9 Well let's move to questions.

10 Unfortunately, we don't have a
11 great deal of time. I would put it at about
12 20 minutes, if I'm not mistaken. So I would ask
13 the floor if there is anyone who would like to ask
14 a question at this time and, if not --

15 Oh, sorry. Yes, please.

16 QUESTION: Jonathan Taplin from
17 the University of Southern California, directed
18 Minister Mori.

19 I was astonished by your slides of
20 the growth of bandwidth. If you pardon the pun I
21 might posit a new Mori's law that the amount of
22 content expands to the amount of bandwidth
23 possible in the network.

24 Obviously we all look to Japan as

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 the leader in fiber optic, but to see that
2 astonishing growth in content leads me to wonder:
3 Do you feel that the principles of new network
4 neutrality are still possible given this
5 experience that you have in Japan with the amount
6 of streaming video, peer-to-peer traffic and yet
7 you can still allow open access to various
8 networks by anybody who is a content provider so
9 to speak?

10 MR. MORI: Thank you very much.

11 Just I mentioned the discussion in
12 Japan of net neutrality has just begun. The
13 advisory group's report said the same principle as
14 the FCC said for -- FCC four principles and our
15 country has three principles -- and the discussion
16 will be in the future maybe, but at least the more
17 we install fiber optics or broadband environment,
18 the more the network condition happens.

19 How should we cope with that
20 is a very big problem. Tomorrow I will talk to
21 this matter with Martin so I will find an extreme
22 answer later.

23 MR. NEW: Thank you.

24 I think we have a question at the

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 back.

2 QUESTION: Hi there, my name is
3 Danielle Par(ph) and I am from the Entertainment
4 Software Association of Canada, so I represent
5 video game publishers in Canada.

6 One of the issues I guess we
7 touched on a little bit in some of the
8 presentations was about technological protection
9 measures and digital rights management and the
10 ability of content creators to control access to
11 content and I would be interested to hear a little
12 bit more from the panellists about the concept.

13 Because I know our industry I
14 think has taken a fairly innovative approach in
15 terms of, you know, having technological
16 protection measures but allowing some user
17 manipulation I guess of the intellectual property.

18 MR. NEW: Would anyone like to
19 take that?

20 Perhaps, Martin, you could say
21 little something on this.

22 MR. SENFTLEBEN: I'm not sure
23 whether I understood the answer correctly. So
24 it's about the question of digital rights

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 management technological protection on the one
2 hand and creating new content on the other or
3 transforming content?

4 QUESTION: No. I was just saying,
5 I would be interested to hear your views about the
6 rights of the creator to control access to their
7 own content.

8 Because we have talked a lot about
9 the participative Web and all the benefits, you
10 know, from being able to manipulate content, but
11 what about the rights of the creator and their
12 ability to control access to that content.

13 MR. SENFTLEBEN: Well, I think
14 this is a fair claim.

15 As I pointed out there have been
16 traditionally two cultures, the free flow of
17 information culture and also the traditional
18 approach of protection of works of creative
19 effort, and I think both sides are valuable and
20 there is a good point on both sides.

21 I think creators should have the
22 choice and nowadays you have the choice. You can
23 opt for a creative commons licence if you want to
24 make your content available, also for informative

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 use and other sources.

2 But there are also users who
3 just want to exploit their works. I think
4 this is perfectly understandable and should also
5 be accepted.

6 So what I was proposing are
7 certain limitations, offering transformative use
8 options, but to the extent that intellectual
9 debate takes place and that you really depend on
10 pre-existing works in order to express your own
11 thoughts.

12 MR. NEW: Madam Bucher, do you
13 have a remark on this?

14 MS BUCHER: Yes, maybe an
15 additional remark.

16 I mean, first of all, in a lot of
17 game environments users own their content only on
18 the platform and it's not something they can
19 export to other platforms. So already this
20 problem of how a user -- what are the real rights
21 of using his own creation.

22 What is the right of using your
23 own creation? It's not very clear always in the
24 terms of use of the end user licence agreements of

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 games. So it's something which needs to be
2 clarified before even thinking of DRM solutions
3 which would be more for cases where you would
4 really be able to make your content freely
5 available everywhere.

6 I mean, on the DRM aspect, I think
7 there were -- we still have to have the debate on
8 DRM's, yes? There was a lot of hopes that the DRM
9 technology will enable the migration of
10 traditional content online and this is not
11 happening. This might happen maybe for films, but
12 now DRM have lost their credibility. They are
13 seen as very rigid technologies.

14 I'm not an expert in technology,
15 but what I understand from my colleagues who do
16 with that is that there are some forms of DRMs
17 which are quite more flexible than what we have
18 been seen used by the traditional content owners,
19 that in fact you could have solutions and some
20 software providers have thought about that, of
21 having a DRM, which you would have as part of your
22 normal package of software in your office, on your
23 desktop, where you could decide to DRM any
24 document you wanted to define the conditions of

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 use.

2 I mean, if such a solution
3 existed, and apparently it is technologically
4 feasible, it would be wonderful and would solve, I
5 mean, partly the problem you mentioned for content
6 creation in a games environment.

7 MR. NEW: Yes, Urs.

8 MR. GASSER: I will jump in here
9 and be a little provocative.

10 I believe DRM and technological
11 protection issues are dead. It just failed as a
12 response to piracy. So if you look around, even
13 industry representatives are acknowledging today
14 that the role of DRM is no longer about the fight
15 against piracy rather than supporting new business
16 models, but more like the accounting part of it,
17 to measure the use and, you know, to do some price
18 discrimination and so forth, so....

19 But as a means to an answer to
20 piracy, I believe, I strongly believe, DRM's dead.

21 MR. NEW: Okay, thank you.

22 It raises a question that I'm
23 going to try to fit in quickly, but I will ask it
24 after this, to discuss just for a moment what are

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 these new business models. Maybe we can get that
2 out in the open a little bit more.

3 Please.

4 QUESTION: Eddan Katz, from the
5 Information Society Project at Yale Law School.

6 I wanted to ask the question about
7 who owns this stuff or, better put, who should own
8 the stuff, or whether we should be thinking about
9 it differently entirely. Especially from the
10 Europeans, we heard three different perspectives,
11 one of which is about the liability of the
12 platform, sort of underlying that an assumption
13 that the platform would probably own everything
14 that takes place on these networks.

15 There's also moral rights, which I
16 would expect, especially from a largely European
17 panel, that this is owned individually by people
18 contributing to these networks, and for it to be
19 taken away from them is sort of degradation of
20 their rights.

21 Then we hear from Urs that people
22 have multiple identities and exist in this
23 post-modern world where they are a mix of self and
24 community, and all of that, and I'm wondering if,

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 in trying to address the intellectual property
2 part, whether there's some real big challenge here
3 going on in regards to authorship that requires a
4 fresh look and whether or not government
5 regulation can contribute and nudge along in one
6 way or another.

7 MR. NEW: Did you get that
8 question? It looks like Martin.

9 MR. SENFTLEBEN: Well, this is, in
10 fact, a very good question, who owns the stuff.

11 I think it's basically a problem
12 of bargaining power as regards certain platforms.
13 If you want to have your material placed on a
14 specific platform, then you certainly have to
15 subscribed to the terms you find in the licence
16 that is offered by that platform. This is, of
17 course, a big problem, potentially, if there are
18 only specific platforms for the kind of use you
19 want to offer in the participative web.

20 But, again, this is a problem
21 which we also have in the traditional world: the
22 kind of buyout contracts where authors just simply
23 throw away their works and all the rights that
24 have been given to them, originally by law, and

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 then with only one signature everything is gone.
2 But government policies could perhaps step in
3 here, to a certain extent, as regards laws.

4 As regards laws in Europe, for
5 example, one way would be to ask how to control
6 these general contractual agreements which you
7 find, and there we have already, if I'm not
8 mistaken, some European legislation, at least in
9 the member states, you find legislation. I think
10 in the U.S. this could be a question of preemption
11 and doctrines in the different states.

12 Of course, there you can say that
13 some very specific issues, where you really give
14 away, for example waive your moral rights in the
15 field of copyright, that this should be reserved,
16 that you can't give that away just by subscribing
17 to a general contractual agreement, that this can
18 only be achieved on an individual basis. So this
19 could save some ground for the users.

20 Then another possibility is, of
21 course, the switch. I mean, the participative
22 web, as far as I understood, is evolving every
23 day, new services every day, so if there is one
24 platform offering really bad conditions, then

1 perhaps the next day somebody will offer another
2 platform that offers more generous conditions.

3 I think this is, then, a more
4 market-based approach, that you say, Well,
5 finally, we will end up with many different
6 platforms, offering different contractual
7 solutions.

8 MR. NEW: Anne.

9 MS BUCHER: Yes, this is a general
10 problem on the ownership of the virtual objects or
11 identities.

12 Users sign end user licence
13 agreements. It is our experience in the Union
14 that a lot of these end user licence agreements do
15 not conform to the legislation on licensing, but
16 users still sign them. So if they would go to
17 court, they could make their case, because that
18 would make the provisions of a licence not valid.
19 In practice, they never go to court, so this is
20 not seen.

21 And his is a problem which is not
22 specific to the participative web. It is
23 something which also is seen for software
24 licences, it is seen for services online. I mean,

1 there has been a recent study by the German
2 consumer organization, which has reviewed end user
3 licences for more than 50 services of music
4 online, and they have found that none of them was
5 compliant.

6 Then what is the role of
7 government for this? I think, then, the role of
8 government is really to educate people, is really
9 to tell them what are their rights. I think we
10 are coming back to what Urs was saying, you need
11 to tell people what are their rights: rights to
12 privacy, rights to ownership, and then afterwards,
13 when they sign a licence, they know what they are
14 doing.

15 I think that's the main action at
16 that stage that we can take. I mean, you could
17 think of, also, some guidelines which could be
18 given. But in areas where there's much more
19 experience, like in the area of software, I mean,
20 the software providers tell us, But what's the
21 problem, there's no case law, after how many years
22 of using software. They are right, there's no
23 case law.

24 So this also applies to this

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 problem of ownership. We can anticipate the
2 problem. We can know the problem is there in the
3 terms of condition of the licences. It doesn't
4 mean that the users will not accept the rules and
5 live with them.

6 My additional point is when you
7 start giving rights to the creator in an online
8 environment, like it is done, for instance, now
9 with SecondLife, then the creator has a right, and
10 a copyright you have it in the place where the
11 content is.

12 Where is the content? Is it on
13 the server? Is it where the user is? I mean, you
14 will get into discussions which are also very
15 complicated, which we need to have, but it's very
16 early in the process for identifying completely
17 the implications.

18 MR. NEW: It seems like it must be
19 difficult to communicate to the public what their
20 rights are, and to encourage them to work within
21 their rights and not to be afraid to do these
22 things when there are so many questions revolving
23 around these issues. But nobody wants to be the
24 case law.

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 Do we have any other questions?

2 Yes, please.

3 QUESTION: My name is Taylor
4 Reynolds, from the OECD. I have a follow-up
5 question from Mr. Katz here.

6 I have stopped putting my own
7 content on uTube just recently after reading
8 through the end user agreement that I agreed to,
9 because I felt like I was giving too much control
10 to Google for the videos of my own children that I
11 was posting on the web.

12 What I would like to do instead,
13 is actually host that content at home, on a home
14 server, so that I maintain copyright and control
15 over that, but I can still send it out to people.

16 The problem is most ISPs limit me
17 and I'm not allowed to run server software from my
18 home, and the other problem is I don't have a very
19 fast upstream.

20 So in countries like Japan, where
21 we do now see 100 megabits per second upstream and
22 we see home servers that are being developed, it
23 seems like this could be an answer to making more
24 content available to other people. I was

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 interested to see how that's happening in Japan;
2 if having 100 megabits per second and a home
3 server is actually putting mor content up on the
4 web for people to see.

5 MR. MORI: Yes, I first thought
6 that if we install fibreoptics or a wider
7 Broadband environment the flow of information will
8 go on very smoothly, but the result was different.
9 The more we install, the more condition happens,
10 not only downstream, but upstream also.

11 But, as I said, there is a -- we
12 are now going to make experiments how to make
13 active use of P2P. That may be the result or may
14 be a good answer to that question, because there
15 are so many P2P softwares, and to make over a
16 network, maybe it will help this kind of question.

17 But, one more thing is, how to
18 make package shaping. We have to admit that each
19 carrier or ISP's have the right to limit their
20 Bandwidths, because -- and the problem is that on
21 what condition the limitation is done from the
22 consumer protection point of view. That's the
23 problem. And we will discuss this matter from now
24 on, in Japan.

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 MR. NEW: Thank you. Yes?

2 QUESTION: Michael Hennessy(ph)
3 with Telus.

4 Just to follow up with Vice-
5 Minister Mori, a question on, you had suggested
6 that there were two recommendations from the
7 September 20th report, one being, as you
8 discussed, the packet-shaping guidelines and the
9 other being interconnection tariffs, non-
10 discriminatory interconnection tariffs. But I
11 didn't understand quite who is to pay the
12 interconnection tariffs? Is this the idea that it
13 would be on large Bandwidth users? Is that the
14 idea?

15 MR. MORI: Yes. In a short word,
16 the person who uses the network should pay much
17 more. But there is a problem. How can we measure
18 the charges? And, the program is that Internet is
19 -- best efforts service, itself. So, on what
20 condition is the service good or not? But,
21 anyway, the network carrier has to pay -- has to
22 invest their networks, so someone should pay for
23 that. So we are now -- began discussion what kind
24 of payment, charging, is suitable for this

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 situation.

2 Thank you.

3 MR. NEW: Thank you. Yes?

4 QUESTION: Good afternoon. My
5 name is Michael Shapiro. I'm with US Patent and
6 Trademark Office. But in this informal, non-
7 deliberative session, my views are my own and do
8 not necessarily reflect those of the United States
9 Government.

10 I'm always delighted to hear from
11 eminent professors of law from the European Union
12 and other nations in Europe, that the US notion of
13 transformative use is being embraced so
14 wholeheartedly -- delighted, but also somewhat
15 confused.

16 I think it is fair to say that
17 notion took US courts by storm, since the seminal
18 Acuff-Rose case in 1994, the results have been
19 somewhat uneven and certainly uncertain and
20 unpredictable.

21 In the words of one leading
22 commentator "a transformative use is largely a
23 beauty in the mind of the beholder."

24 Given this background, I'm curious

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 how this notion would comfortably map onto
2 European Union law that is largely a more
3 categorical approach. The transformative use
4 doctrine under US law is part and parcel of our
5 fair use doctrine, which I take it is rather open-
6 ended and quite different from the European
7 categorical notion of enumerated exceptions and
8 limitations.

9 Moreover, I'm curious, given the
10 US experience on unpredictability and uncertainty
11 of this doctrine, how perhaps you've given some
12 thought, that this would build the stable and
13 certain legal environment necessary to continue
14 this flourishing of user-created content?

15 Your thoughts would be welcome.

16 MR. NEW: Thank you. Who would
17 like to take that question? Okay, Martin?

18 MR. SENFTLEBEN: Well, as regards
19 the first part of your question, how can this
20 idea, this concept of transformative use be
21 translated into EC legislation or the European
22 Copyright tradition? Well, the answer is, it has
23 already been there for quite a long time.

24 If we look at international

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 treaties that underlie European legislation, the
2 Berne Convention, for example, we find that in
3 Article 10 the right to quotation is really
4 regarded as a right. "Member states shall prove
5 for limitations for quotations." So, what you
6 find in EC legislation and also in the legislation
7 of Continental European Member states is, of
8 course, not the transformative use doctrine in the
9 shape of a fair use doctrine. Instead, you find
10 clearly stated limitations, statutory limitations
11 saying that it is not an infringement of copyright
12 to make quotations, or to engage in parody.

13 And the requirements that have
14 been developed in this context then are, as I
15 pointed out, that really something like
16 intellectual debate takes place. For example, the
17 High Court in Germany, the Bundesgerichtshof has
18 stated that if you want to make a quotation then
19 you have to show that you really need the other
20 work to make reference to this work in order to
21 make your own statement. And the same goes for
22 parody. And you would be surprised at solutions
23 that have been found by judges in Germany, come
24 very close to what we have seen in US court

1 decisions like Acuff-Rose.

2 So, we have the transformative use
3 doctrine already for quite a long time in
4 Continental Europe, I would say, but of course in
5 the shape of Continental European laws.

6 And, as regards your second point,
7 I think at the moment Continental European laws
8 are becoming more and more fair use type laws
9 because of European legislation, and this is a
10 topic that is very dear to my heart, it's about
11 the three-step test at the international level
12 that is a very open-ended norm, very close to the
13 use of fair use doctrine, and what EC legislation
14 has done is it has translated this international
15 norm directly at the community level, and now we
16 find it at the national level. So, I would say
17 what we see in Europe at the moment is an emergent
18 EC unfair use doctrine because these flexible
19 norms are used not to determine whether a use is
20 fair, but whether a use is unfair.

21 So, if you want, we have two
22 approaches: The fair use doctrine in the US, and
23 the unfair use doctrine in the EC that end up in
24 the middle, and the middle is legal uncertainty

OECD-Canada Technology Foresight Forum
Session 4a
Creation, access and competition

1 that users seeing something in the law just don't
2 know how courts will finally apply the rules.

3 So, I think, for the time being,
4 we face very much the same problems here in the
5 US, in Canada and also in Europe.

6 MR. NEW: Well, I don't think I
7 see -- oh, would anyone else like to answer this?

8 I don't think I see any other
9 questions in the audience. And, in fact, we, I
10 believe, have come to the end of our time. And,
11 so I would like you to please thank the panel.

12 --- Applause

13 MR. OXLEY: That was wonderful,
14 William. Thank you so much.

15 We've come to a really good part
16 of the day, a nice coffee break. It's getting to
17 the end of the day and I'm not sure if everyone is
18 feeling the same way I am; I could really use that
19 cup of caffeine right now.

20 --- Upon recessing at 1630