# The Co-option of Copyright: An Evolution of Copyright Paradigms and the Forces Impacting Canadian Policy in the Digital Era

by

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A Thesis submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfilment of the requirements of the degree of

MASTER OF LAWS

Faculty of Law

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# ABSTRACT

Copyright is a legal concept based on the bifurcation of rights over the expression of ideas, granted by the legislature to connected stakeholders. The juxtaposition of rights form a framework designed to encourage dissemination of such products to further social and cultural goals while simultaneously providing incentives for innovation. Copyright shares a philosophical foundation with traditional property rights and ownership paradigms. Despite the dichotomies between tangible and intangible property, right-holders have gained support for, and control of, overarching monopoly protections using rhetoric based on their co-option of theoretical models. Control has engendered artificial scarcity of cultural products, and the emergence of new content delivery platforms have sustainedly challenged the control model. A global shift towards copyright policy uniformity has resulted in a universally skewed framework that is in need of attention.

It is suggested that to achieve optimality within copyright's parameters, a balancing of all stakeholder interests is crucial. While this view has been recognized by the Supreme Court of Canada, persistent challenges to a copyright framework constructed upon balance and inclusivity continue to arise. This includes Parliament's ongoing struggle to balance the public interest and creators' rights while aligning Canada's copyright law with emerging international norms. This thesis considers how the debate has become framed so as to deflect attention from the balance that is being lost through rhetoric, devolution of control and the commodification copyright.

# ACKNOWLEDGEMENTS

I am grateful to my supervisor Dr. Bryan Schwartz for his perspective and guidance throughout the process of writing my thesis. His sense of humour and verisimilitude were crucial in ensuring that my reflections were appositely translated onto the page. I also wish to thank Professor John Pozios, whose helpful suggestions and comments assisted me in completing this project. Sincere thanks and appreciation goes to my external reviewer Dr. Michael Geist for his thorough review and constructive critique of my thesis. His expertise and insightful feedback were invaluable.

Special thanks must be given to my family for their continuous encouragement; also, to my friend and mentor Dr. Andreas Philippopoulos-Mihalopoulos for his inspiration. I would also like to recognize Dr. Jennifer Schulz and Dr. Lorna Turnbull at the University of Manitoba Faculty of Law for their support throughout my LL.M. year, as well as the Marcel A. Desautels Centre for Private Enterprise and the Law for its generous financial assistance.

# DEDICATION

To my wife Jana-Rai.  Your patience, support and faith have enabled me to realize my dreams.

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# INTRODUCTION

The objective of this paper is to interrogate the forces that have played a role in the conceptual shaping of copyright as it is understood and applied today. Upon a deeper examination, it becomes apparent that, not unlike its historical roots, copyright as a social construct has been subject to external forces that play a substantial role in framing the way copyright is viewed by the public at large. As it stands, model based on balance and inclusivity which has been successfully sustained over time appears to be increasingly ill-equipped to withstand the stressors currently being exerted upon it. The answer to why copyright's normative balance is presently an issue that has our attention involves an examination of the theoretical origins of intellectual property justification and its extension to the current rhetoric employed to advance various stakeholder interests.

The reason why the 'copyright debate' - that is, the policy positions adopted by stakeholders which are rooted in language and ideology - has become a cause for concern is that in its current state, it appears to have the capacity to continue on an interminable journey. That is to say, finding a paradigm that will be accepted by all stakeholders is improbable. Rather than using nuanced and edifying approaches as a means to reaching measured and informed propositions, the copyright debate has become clouded by the use and adoption of tactics that not only affect our opinions on copyright, but also the way we think about and view each other, our culture and the law itself. By combining a series of chapters that examine individual forces impacting the manner in which copyright's

principles are interpreted and applied and by using the policy goals sought by the traditional copyright model as a benchmark, the power of rhetoric and the direction in which the copyright debate continues to flow as a result are considered as possible explanations for this concern.

Recent developments within the sphere of both Canadian and global copyright policy show that the parameters of traditional copyright have been tested and may no longer be tenable in meeting the needs of those whom it was meant to serve. Despite these developments, fundamental overhaul of copyright norms as they are currently understood may be premature as suitable institutional alternatives remain untested. In an era of single-song downloads and on-demand entertainment, contractual models are viewed by some as the natural and obvious replacement, although this is by no means a foregone conclusion. As a result, policy responses have struggled to adapt current copyright frameworks to technological advancement and innovation. What we may see is a gradual shift from a regulation model with the interest of the public as a central consideration to a direct copyright user-owner relationship. However, until there is a viable and acceptable solution, the seams that bind copyright's current balance together may continue to be tested. This paper takes the view that in light of the existing models and concepts relied upon within the copyright discourse, understanding the forces affecting copyright are vital in forging ahead in the digital era. Therefore, it would be advantageous in the copyright debate and ensuing policy making process to draw on a

more inclusive and balanced approach that considers all interests and provides due consideration to fairness.

A discussion of our current copyright model would be incomplete without considering the interplay between intellectual property and traditional property ownership rights theory, globalization and economics, and the shift towards internationally uniform copyright policies. By examining these influences it will be highlighted that what has resulted is a fragmented public understanding (but a public that is nonetheless eager to become involved in the debate) that has become driven primarily by rhetoric and the search for power and control emanating from actors who feel there is much to lose. Filtering through the mire of rhetoric has made it burdensome for stakeholders who, in the search for truth within the policy-making forum, are told they must pick a side.

Achieving an appropriate balance in meeting the needs of all stakeholders is a fundamental policy goal of copyright that is widely accepted regardless of ideological persuasion. Depending on where one happens to live or the nature of one's interaction with copyright content, this line in the sand is indeed highly variable and prone to change. No longer are policy responses towards copyright regarded as the domain of policy makers or legislators alone; on the contrary, the debate is open for all to participate in. The proliferation of the internet has, as with many other sectors, brought a level of transparency and accountability to the process. The public interest has become a key aspect of the copyright debate, as individuals are through the internet and social media

equipped with a voice that law making bodies are willing to consider. Moreover, authors and other copyright owners are equally a bloc capable of affecting broad policy responses. Globalization, with its supervening effects on technological development and the dispersion of information coupled with the commodification of copyright content has further empowered third party copyright owners to become involved in this tripartite rhetorical tug-of-war.

The methodology utilized in this paper is to approach the question in light of the theoretical principles dating back to Locke and Mill which have been used to justify the parallel treatment of intellectual property to that of tangible property. By demonstrating how mainstream acceptance of a natural property rights approach easily translates to an economic model where copyright's priority shifts focus from a system of incentivization for the creation and dissemination of cultural content to an emphasis on monetization and exploitation at the expense of the public interest and user rights, it will be submitted that copyright's commodified economic direction is ill-conceived. This is particularly true when left in the hands of Parliament, where economic considerations often influence policy.

The paper continues by highlighting how an economically driven business model has led to copyright becoming subsumed in a trend towards globalization and uniformity to better fit into global trade agreement frameworks. Although international copyright

agreements such as the *Berne Convention*[1] by most accounts served and furthered the ends of copyright's organizing principles in nations around the world, incorporation of copyright into the World Trade Organization (WTO) has left many nations pressured into disadvantageous agreements, both culturally and economically. The World Intellectual Property Organization's (WIPO) *Copyright Treaty*[2] of 1996 is highlighted as an example of the typical mechanism used to achieve uniformity across the spectrum. The rhetoric of copyright policy again surfaces as treaties such as the *WCT* are implemented into signatory nations. It is believed that like most international treaties, flexibility is required so as to take into consideration the political and cultural nuances of signatory nations. In practice this flexibility has proven to be much less concrete than imagined as the search for control and maintenance of the status quo in nations relying on net intellectual property exports remains highly influential in setting the overall direction to be taken.

Canada's role in the global debate is also considered by referencing recent changes to federal copyright legislation by way of Bill C-11[3] which has without doubt been impacted by the factors discussed above. Parliament's latent inability to withstand external diplomatic pressure, both real and perceived, has resulted in a shift towards the

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[1] *Berne Convention for the Protection of Literary and Artistic Works* (Paris, 1971), 9 September 1886, 828 UNTS 221 [*Berne*], online: WIPO <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>.

[2] World Intellectual Property Organization, *Copyright Treaty*, 20 December 1996, S. Treaty Doc No 105-17, 36 ILM 65 (1997) [*WCT*], online: WIPO <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>. Established in 1967, WIPO is an agency of the United Nations with a mandate "to promote innovation and creativity for the economic, social and cultural development of all countries, through a balanced and effective international intellectual property system." See World Intellectual Property Organization, online: WIPO <http://www.wipo.int/portal/index.html.en>.

[3] Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41st Parl, 2011, (received Royal Assent 29 June 2012, SC 2012 c 20).

alteration of the copyright landscape which stands in contrast to the approach taken by Canada's top court. Attention is called to decisions of the Supreme Court of Canada (SCC), most notably *CCH v Law Society of Upper Canada*[4] which endorsed a liberal interpretation of user's rights and provided another extremely persuasive dimension to account for within the copyright debate. Paradoxically, within weeks of each other in 2012 Canada's two highest law-making authorities demonstrated starkly contrasting intentions on how to appropriately usher Canadian copyright policy further into the digital era. In spite of strong resistance from both opposition MPs and the public against several controversial provisions, Bill C-11 received Royal Assent on June 29, 2012 solidifying Parliament's preference for a copyright model that includes increased protections afforded to copyright owners. Shortly after Royal Assent was given to Bill C-11, on July 12, 2012 the SCC released decisions in a pentalogy of several long-standing copyright related appeals[5] to provide a renewed and powerful authority that copyright, should be viewed from a balanced and inclusive perspective and may in fact be a salvageable institution when approached in this manner. The SCC decisions are used as a touchstone for establishing the ideal parameters of an inclusive and balanced interpretation of copyright law from both a domestic and international perspective.

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[4] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*].

[5] On 12 July 2012, the SCC released its pentalogy of decisions: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 (all available on CanLII) [collectively referred to as the "Pentalogy"]. The five highly anticipated appeals take great strides towards further entrenching a user oriented, education friendly and technologically neutral approach that has appeared to be elusive, or at least open to question in recent years. The above SCC decisions were released as this paper was going to print.

Nonetheless, as evidenced by the evident disparities between Parliament's ideals and those of the SCC, much work is required if a satisfactory overall balance is to be reached.

Where the discussion began with theoretical and property ownership paradigms offering a convenient although not entirely commensurate application to intellectual property, the ideologies come full circle. The advancement of rhetoric drawing little, if any, distinction between violent crime, theft or breaking a digital lock to access content for an otherwise legal use continues to be promulgated in such a way as to offend the guiding principles of copyright.

Through the literature, the views of theorists, commentators, academics and practitioners will be sought. It is hoped that a vision of the factors influencing the copyright debate and how they have been exploited and framed by stakeholders so as to correspond with an ideological viewpoint will be accurately and sufficiently portrayed. By accounting for the perspectives and other forces at play within the copyright debate, a view towards understanding the multidisciplinary tensions influencing us can be reconciled with the angles we as individuals approach copyright.

Chapter one seeks to to frame the current 'copyright debate' by looking at how the rapid rise in technological development has opened the door to potentially novel revenue streams, and how the dichotomy in policy rationales between the SCC and Parliament has only helped fuel the debate. The second chapter sets out to canvas the philosophic

foundations that frame modern copyright rhetoric. First in Part 1, the tendency of tangible and intangible property to be treated as sharing the same sweeping characteristics will be considered. Secondly, Part 2 seeks to demonstrate how international bodies and domestic governments have based economic policies upon flawed theoretical assumptions relating to copyright and how this has co-opted what was once a comparatively autonomous and neutral institution. Chapter three sets out to examine the economy of copyright policy and how despite the need to reward and provide incentive to the creator, a strict economic analysis of copyright does not necessarily lead to sound copyright policy. On a macro level, the results of such an approach will be shown to not be a 'one-size-fits-all' remedy, with the implications affecting the social and political growth of developing nations. Chapter four looks at how WIPO-mandated policies that rely on the natural rights rhetoric as discussed in the first chapter (including legal protection for technological measures), have generated a considerable amount of disagreement amongst proponents and critics alike in the literature. In chapter five comparative analysis of legislative responses from similar jurisdictions are examined to gain a sense of where Canada stands in relation to its trading partners. The experience of other legislative bodies in light of international copyright law and trade agreements is shown to be variable, demonstrating a level of substantive compromise in the ratification of international instruments that could have been imported into the Canadian experience. Bill C-11, Canada's legislative response to its international copyright law obligations is considered in chapter six. Chapter seven then draws a conclusion based on the appropriateness of the SCC's paradigm of balance

and inclusiveness, which appears to be the most rational route forward in ensuring copyright remains capable of meeting it primary organizing principles.

# CHAPTER I

## COPYRIGHT'S NORMATIVE PARADIGM

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*Unlike physical property, knowledge, ideas and creations are partial 'public goods'. Knowledge is inherently non rivalrous. That means one person's possession, use and enjoyment of the good is not diminished by another's possession, use and enjoyment of the good.*[6]

- Andrew Gowers

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### a. *Introduction: Changing Paradigms?*

For the last 300 years, copyright as an institution has been a faithful servant to society. It has rewarded innovation, encouraged learning and promoted cultural advancement. Although at times misunderstood and maligned by those impacted by its inherent limitations, by all accounts copyright has appeared quite able to continue uninterrupted along this trajectory by "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".[7] Like other technological advances throughout history such as the printing press or the VCR and the subsequent ramifications on society requiring reconciliation with evolving cultural norms the social, technological and economic effects of globalization (herein referred to collectively as 'effects of globalization') have had an acute impact on copyright policy. The rapid technological growth of the past decade has

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[6] Barry Sookman & Steven Mason, *Copyright Cases and Commentary on the Canadian and International Law* (Toronto: Carswell, 2009) at 11.

[7] *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336 at para 30, Binnie J [*Théberge*].

been no different, producing a "powerful and diverse spur into innovation"[8] of which byproducts have become a ubiquitous aspect of our everyday interactions. Our ability to cheaply access computation power and the internet[9] have precipitated developments in telecommunications devices including smartphones and tablets, which are capable of quickly connecting a user to digital online content have contributed to the alteration of the information landscape.[10] The foundations of copyright are under increasing pressure to either quickly adapt or give way as consumer voices challenge its exploitation as a mechanism to realize economic ends rather than the social goals it was designed to achieve.

The manner in which consumers can now interact with information has resulted in a twofold change. First, it is well documented in the literature that the effects of globalization have resulted in shrinking borders as consumers can increasingly access and enjoy creative content from literally anywhere in the world. With international trade agreements flourishing, legal copyright norms continue to progress towards harmonization. While this has served to substantially benefit a distinct cohort of the population it has equally created a strain on domestic copyright frameworks as the

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[8] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001) at 5.

[9] See Pamela Samuelson, "Digital Media and the Changing Face of Intellectual Property Law" (1990) 16 Rutgers Computer & Tech LJ 323.

[10] Data from the UN indicates that home access to the internet is high in developed nations, and increasing elsewhere. According to the latest data available (March 2012), 77.8 per cent of Canadian households have internet access at home. Other comparable nations include Japan (82.5 per cent), the United States (68.7 per cent) and the UK (76.7 per cent). The data does not include internet access via mobile device although one would expect the inclusion of such data to significantly affect accessibility rates across the globe, particularly increasing internet access in developing nations. See UN Statistics Division, "Core Indicators on Access To and Use of ICT by Households and Individuals, Latest Data Available", online: UNdata <http://data.un.org/DocumentData.aspx?q=internet+access&id=290#31>.

fundamental principles that consolidate the viability of copyright are challenged.[11] The second major change is that this has resulted in a growing volume of rhetoric purporting to dispel or intensify arguments in justification of the current system based on the intellectual efforts of an individual and the resultant ownership of new 'property' that has been created. It has been remarked that one reason for this perceived strain on copyright is down to the fact that its purpose and target audience has changed over time:[12] what used to be "a right traded by and enforced by professionals" has shifted to a business model directed primarily at individuals and consumers.[13] The consequences of this shift are vigorously disputed and appear to be juxtaposed precariously between stakeholders in an institution borne out of the benefits required to be bestowed upon the public while facilitating sufficient protection for those who have laboured in creation of cultural content worthy of dissemination.

b. *If You Can't Convince 'Em, Confuse 'Em*

The net result is well documented: there is a threat, an attack, an assault, a battle and a war. The war is waged upon you and me, yet the enemy is both you and me. As Harry S. Truman once quipped in regard to Republican electioneering, "If you can't convince 'em, confuse 'em."[14] This appears to be a strategy adopted by many of the

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[11] Paul Torremans, "Moral Rights in the Digital Age" in Irini A Statamoudi and Paul LC Torremans, eds, *Copyright in the New Digital Environment* (London: Sweet & Maxwell, 2000) 97 at 99.

[12] Daniel Gervais, "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content" (2009) 11 Vanderbilt J of Ent and Tech Law 841 at 848.

[13] *Ibid*.

[14] Steve Neal, ed, *Miracle of '48: Harry Truman's Major Campaign Speeches & Selected Whistle-Stops*, 1st ed, (Carbondale, IL: Southern Illinois University Press, 2003) at 72.

stakeholders who are involved in the copyright debate. Lobby efforts and rhetoric have been employed *on all sides* of the intellectual battlefield with a net result of confusion and manipulation, leaving consumers in a state of bewilderment wondering what to believe and who to trust. Some attack copyright itself, suggesting it is an outdated model.[15] Others vehemently defend the system.[16] Others would prefer to carry on without getting caught in the middle. Why are these arguments being made, and with such passion? Perhaps the most appropriate response is that all of these views incorporate an element of truth when viewed in isolation. This paper seeks to distill how theoretical paradigms have been exploited to support a property ownership model for copyright based upon characteristics associated with tangible property, and how doing so has provided a justification in some quarters for a shift towards increased commodification and protection. These occurrences will be discussed in light of the transposition of copyright, formerly employed as a mechanism to facilitate innovation, furtherance and dissemination of culture to a Western business model based on control leveraged by trade agreements and multilateral treaties that many believe runs contrary to the very organizing principles that copyright is designed to achieve. Canada's legislative response will be examined vis-à-vis what is possibly the foremost challenge to the traditional model of copyright: legal protection for technologies used to control copyright content.

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[15] See Michele Boldin and David K Levine, *Against Intellectual Monopoly* (New York: Cambridge University Press, 2008); and, Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2003).

[16] See Mihaly Fiscor, *The Law of Copyright and the Internet: The WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002); and, Barry Sookman and Dan Glover, "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations" online: <http://www.barrysookman.com/tag/wipo/>.

c. *Conflict of Authorities? Parliament v the SCC*

It is widely accepted by even the strongest critics of copyright that a system of incentives used to produce the public good is necessary and fair. William Patry qualifies this notion by stating "As a tax, copyright... is only good when the amount of the tax and the expenditures derived from it lead to good results".[17] A definition of these 'good results' may be open to some interpretation, but it is fair to say that a singular approach (one way or the other) will not lead to fair and inclusive results that benefit stakeholders according to the organizing principles of copyright. It is the manipulation of the system which should be called into question, and outdated business models and a growing trend towards a harmonized global copyright policy have precipitated this manipulation. As Patry so eloquently puts it: "Like cats, the copyright industries are always on the wrong side of the door"[18] pursuing reactionary measures to preserve the status quo.

There is perhaps no more apposite an illustration of this than the recent Pentalogy of appeals heard by the SCC.[19] The five cases highlight various aspects of Canada's copyright legislation, and how collective societies have tried at length to extricate every penny in royalties. While attempting to exploit new technologies that deliver the same content albeit in a different format, the standpoint of collective societies represents a maximalist approach to the protection of rights. It is submitted that the practical outcome of this type of approach is that copyright owners benefit at the expense of consumers

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[17] William Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009) at xviii.

[18] *Ibid*.

[19] See *supra* note 5 and accompanying text.

which does not represent an equitable end result. A clear example of this is offered by the first of the five decisions, *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*[20] where an additional royalty stream in the form of a new tariff from the Copyright Board was sought by the collective society for downloaded video games containing sound recordings as a communication to the public per s. 3(1)(f) of the *Copyright Act*[21]. Although there is no substantive difference between a game purchased from a box store (where the tariff would not apply) or one purchased and downloaded over the internet, the collective society was prepared to fight all the way to the SCC in their claim. While the *ratio* of relevant SCC decisions may not necessarily find their way into popular culture, it appears as though disobliging steps willingly taken by the copyright industry to oppress consumers empowers them to believe they have suitable reason to find other, possibly unauthorized, means of obtaining content.[22] Without a fair, balanced and appropriate solution this is the direction the digital era will allow consumers to take.

Pivotal developments in quick succession can have the effect of inducing strain on legal systems designed to regulate a population's interaction with the products of

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[20] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (available on CanLII) [*ESAC v SOCAN*].

[21] *Copyright Act*, RSC 1985, c C-42 [*The Act*]. The right to communicate a work to the public is one of the primary sole rights allocated to authors of works by *The Act* by s. 3(1).

[22] Jessica Litman, "The Breadth of the Anti-Trafficking Provisions and the Moral High Ground" (Report presented to the ALAI Congress, June 2001) [unpublished], online: ALAI <http://www.alai-usa.org/2001_conference/1_program_en.htm> at 9.

innovation.[23] In the case of the printing press mentioned above, just as its introduction to the mass market in the sixteenth century necessitated a revisitation of Europe's copyright laws, the exchange of intellectual property has today created a regulatory environment dictated largely by economics which is also in need of revision. Intellectual property has been commodified to a degree never seen before and as a result, attempts have been made to harness its great potential to generate capital. The case of *ESAC v SOCAN* and the accompanying decision in *Re:Sound v Motion Picture Theatre Associations of Canada*[24] provide consummate evidence that if left unchecked, economically driven copyright owners would invariably continue to elicit their perceived right to collect payment and increase control of content that uses new platforms. Using natural rights based rhetoric[25] to assert their claim, the public would have little choice but to submit, which is why the recent pentalogy of SCC decisions is such an important step in the direction of calming the rhetorical storm.

What distinguishes intellectual property from other forms of capital, however, is its ability to navigate and circumvent jurisdictional boundaries, often with little impediment. This characteristic - perhaps its greatest asset - has taxed the resources of domestic and international policymakers to make and oversee a regulatory framework viewed as fair and balanced by the stakeholders involved.

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[23] See Mark Stefik, *The Internet Edge: Social, Technical and Legal Challenges for a Networked World* (Cambridge, MA: MIT Press, 2000) at 1.

[24] *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 (available on CanLII).

[25] See discussion on the two primary models and their inherent limitations in the following chapter.

As a result, the pursuit of regulatory uniformity has been increasingly drawn under international remit through agencies such as the UN and trade agreements including the *North American Free Trade Agreement*[26] and the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[27] Although uniformity yields benefits by way of facilitating a streamlined trading process, problems have nonetheless arisen. Firstly, the rate at which many developing nations are able to apply and maintain the standards, which are often developed primarily for Western-style economies, is largely limited by their own developing economies and infrastructure. Secondly, when a set of global uniform standards are created although they may be voluntarily accepted, significant international pressure to accede may be exerted by by other stakeholders including trading partners or those with other common interests.[28] Thirdly, despite the high-level language of international agreements, norms vis-à-vis their application to any national legal framework may emerge and be imposed on others. For example the UN's intellectual property agency, WIPO, created in 1996 a set of treaties[29] designed to offer additional protections for copyright due to advances in technology. Conceptually, the

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[26] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 [*NAFTA*].

[27] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197 (1994) [*TRIPs*].

[28] An example of pressure to accede to an international treaty is the Kyoto Protocol, ratified by the Chretien government in December 2002. Arguments were made both for and against the treaty; some were based on the negative economic impacts that climate change would have on Canada if the treaty was not ratified, while others, particularly the energy sector, viewed ratification and the subsequent reduction of emissions as a likely precipitator of negative economic growth. See Jeffrey S Lantis, *The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective* (New York: Oxford University Press, 2009).

[29] *WCT*, *supra* note 2 and WIPO, *Performances and Phonograms Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) [*WPPT*], online: <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P141_21174> [referred to collectively as the "WIPO Internet Treaties"]. Canada became a signatory to both treaties on 22 December 1997.

international will to protect copyright by addressing lacunae created by technological advances in domestic copyright regimes is creditable. However, the ideological footprint behind the WIPO Internet Treaties has been criticized as being overly broad by purporting to reach beyond the limits of copyright. Similarly, adhesion to a singular copyright regime neglects to acknowledge the evident disparities in development around the world and that flexibility must be permitted to achieve, as William Patry put it, 'good results'[30].

d. *Seeking the Balance in Copyright*

In any discussion of copyright law, it is vital to lay the foundation upon which subsequent comment and criticism of copyright as an instrument of property, ownership, protection and exploitation can be based. This touchstone may be summed in one word: *balance*. The concept of balance in copyright has become recognized as one of its fundamental principles. From consumers to seasoned academics to policy makers, balance is cited as being crucial to the operational success of copyright.

When rights are swung too far in the direction of unrestricted access and use of materials, many argue the incentive to create is weakened. Alternatively, with strong monopoly-protecting measures the dissemination of information, freedom of expression and cultural development are hindered. With an effectively achieved balance, limits on both *use of* and *protection of* the expression of ideas remains widely acceptable to the

[30] See *supra* note 17 and accompanying text.

users (or other parties such as distributors) who ensure copyright remains a viable institution for themselves, and the creators and owners of content. This model has been proven as relatively successful in centuries past even in light of technological developments, although the rapid changes being experienced now have prompted some reconsideration.[31]

It is generally agreed upon by partisan critics on both sides of the debate that balance is required for copyright to serve a valuable social purpose, and that if managed effectively optimality can indeed be achieved.[32] However, the manner in which balance is understood differs markedly depending on the interests in question. In drafting *Berne* between 1884-86, the President of Conference observed that "Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my

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[31] Jessica Litman, *Digital Copyright* (Amherst: Prometheus, 2006) at 78-80.

[32] Despite a critically objective consensus that copyright serves an important social purpose, there are commentators with ideologies emanating further from the mainstream. For example, some believe that copyright and intellectual property in general, cannot be justified at all and should be abolished, see Michele Boldin and David K. Levine, *Against Intellectual Monopoly* (New York: Cambridge University Press, 2008) where the authors argue against the supposed benefits of the "copyright as a bargain" model while submitting that rather than stimulating innovation, granting monopolies over rights has a damaging effect on growth. Some commentators adopt a revisionist perspective, believing that while copyright serves an important societal function is in need of significant overhaul in order to avoid stifling emerging technologies. See Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2003); Samuel E Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16(2) Can JL & Jur 217; and Jessica Litman, *Digital Copyright* (Amherst: Prometheus, 2006). The views of Vaidhyanathan, Litman and Trosow are well-established in the academic mainstream, and generally support reforms reflecting the way individuals interact with the digital environment. The revisionist perspective may to some, seem the most realistic although at the policy level could pose significant conflicts with industry lobby groups, content providers and right holders in general. Finally, there are other commentators who argue that content protection can never be strong enough. See Mark Helprin, *Digital Barbarism: A Writer's Manifesto* (New York: Harper, 2009) [*Digital Barbarism*], a book precipitated by the response to his New York Times op-ed piece (see Mark Helprin, "A Great Idea Lives Forever. Shouldn't Its Copyright?" *The New York Times* (20 May 2007) online: New York Times Opinion <http://www.nytimes.com/2007/05/20/opinion/20helprin.html?pagewanted=all>). Helprin is critical of copyright reform movements, going so far as to compare the Creative Commons to a "kibbutz on the internet" (in *Digital Barbarism* at 51), drawing little distinction between tangible property and intellectual property, citing that both should theoretically be capable of bequest *ad infinitum*.

opinion, by the public interest."[33] The four corners of the boundaries necessary to achieve 'good results' or an optimal balance within the application of copyright law are, although alluded to in the *The Act*[34], insufficiently delineated so as to result in an unambiguous notion of the divide between the public interest and other stakeholder rights. It is perhaps understandable as a characteristic of statutory drafting that *The Act* does not provide fixed clarification of the conceptual subtleties required to be taken into account for its interpretation. This has caused inconsistencies that even the SCC has at times struggled to settle.[35] However, it is submitted that the SCC's attempts to distill the conceptual uncertainties that have fueled the copyright debate have proven to be valuable and insightful.

A liberal interpretation of user's rights and the concept of balance was affirmed as a fundamental principle of Canadian copyright law. The SCC in *CCH* upheld the importance of the balanced approach taken by the majority in *Théberge* where Binnie J. held that the framework of *The Act* presents a balancing act in advancing the "public

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[33] Mihaly Fiscor, "Balancing of Copyright as a Human Right with Other Rights" (Report presented at the International Conference on Copyright and Human Rights in the Information Age: Conflict or Harmonious Co-Existence? 25 February 2012), online: Fordham IP <http://fordhamipconference.com/wp-content/uploads/2010/08/Ficsor_BalancingCopyrightasHumanRight.pdf>.

[34] *The Act* enumerates various user's rights. Fair dealing in ss. 29 - 29.2, which although not defined permits use of copyright content for research or private study, criticism or review, or news reporting (the SCC took the opportunity in *CCH*, see *infra* note 33, to set out its scope. Other examples of user rights explicitly addressed by *The Act* are certain allowances for educational institutions (ss. 29.4 - 30), libraries, archives and museums (ss. 30.1 - 30.21), incidental inclusion of copyright material within another work (s. 30.7) and ephemeral recordings (ss. 30.8 - 30.9).

[35] For example, in *Robertson v Thompson Corp*, 2006 SCC 43, [2006] 2 SCR 363 the court dealt with determining where the "essence of originality" should be found in the reproduction of both a newspaper and newspaper articles that were originally published in *The Globe and Mail* print edition and subsequently added as part of online and CD-ROM databases. The right of reproduction hinged on a highly nuanced interpretation of the two media.

interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator in weighing the competing interests with respect to copyright holders and users."[36] The *CCH* affirmed *Théberge* and ostensibly enshrined in the Canadian copyright landscape the significance of a nuanced and inclusive approach for ensuring the copyright policies developed in Canada are fair and effective. *CCH* has become a prominent authority and is applied frequently by the courts in copyright disputes and also by other commentators weighing in on the value of a fair and balanced system.

e. *A Struggle About Rhetoric*

Under the balance model in policy development, continuous jockeying for position between interest groups has obscured the focus. As Laura Murray notes, "the copyright struggle is being waged not only by means of rhetoric, but about rhetoric."[37] It has become difficult to distill any objective reality from the subjectivity of stakeholder interests. Jessica Litman observes that by outwardly taking the "moral high ground" - that is, by making the debate about whether or not authors will get paid[38] rather than Hollywood movie studios, book publishers or software companies, issues about copyright law and its global overhaul become convoluted with consumers pitted against the well-

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[36] *Théberge, supra* note 7 at para 30, Binnie J.

[37] Laura J Murray, "Copyright Talk" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 17.

[38] See generally *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (available on CanLII) [*Access Copyright*].

being of authors rather than the real issue of the loss of balance.[39] The SCC decision in *CCH* has equally been used in light of the limitations of *The Act* by agents of the copyright industry to argue for a 'balance', although it is submitted that this effect is restrictive and not in the spirit of the SCC model.[40] Such tactics clearly conflict with the SCC's warning of the perils of a restrictive interpretation.[41] As such, although the reverberations of *CCH* have indeed been noticed within the overall copyright debate, the bona fide effects of *CCH* have not sufficiently found their way into the mainstream copyright discourse as there is counter authority in *The Act* to support a reading in of a restrictive interpretation.[42]

The fact leading theorists believe that users carry a set of rights of their own further complicates matters: David Vaver believes that "User rights are not just loopholes. Both owner rights and user rights should be given the fair and balanced reading that

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[39] Jessica Litman, *supra* note 22 at 2-3.

[40] For example, in a joint submission to Canada's 2009 Copyright Consultations authored by Barry Sookman and Dan Glover argued that an expansion of fair dealing would have undesirable consequences, notably "uncertainty, expensive litigation and important public policy decisions made by courts instead of Parliament." See Barry Sookman & Dan Glover, "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations" (2009) 22 IPJ 29 at 30 ["Joint Submission"]. It is notable that both are lawyers who make a living by acting for large players in the copyright industry, and the paper was submitted on behalf of 45 organizations that generally stand to benefit from increased copyright protections. By inverting the rhetoric and using language purporting to show that the "indigenous growth" (Joint Submission, above, at 30) of artists will suffer, counter arguments become complicated to assert. As the indigenous growth of artists is indeed a vital aspect of the cultural development that is sought by copyright, artist growth is being used as a shield to preserve the copyright industry's current licensing models. Furthermore, while Parliament is the supreme law-making authority in Canada and sweeping public policy decision should generally be left to elected representatives, it appears as though the SCC is more inclined to adopt the reasonable and balanced approach that copyright requires. This point becomes lucid in the context of Bill C-11, which has been subject to much scrutiny over provisions that do not adopt a balanced and inclusive approach to user and owner rights.

[41] See *infra* note 43 and accompanying text.

[42] See Fassen, Mark, "Amending Fair Dealing: a Response to 'Why Canada Should Not Adopt Fair Use'" (2010) Windsor Rev Legal Soc Issues 71.

befits remedial legislation."[43] If this is indeed the case, the exercise of determining the threshold of where user rights end and where copyright ownership an control should begin becomes highly charged. As it will be shown below in chapter three, conflicting jurisprudence in Canadian courts has provided a foundation in support of varying perspectives of the position of the threshold.[44]

Later in this paper, it will be emphasized that the framers of Canada's response to a much-needed update of its copyright legislation have faced significant external pressure in reconciling its own international obligations and have been stuck in the mire of an ideological battle, tasked with reaching a balanced compromise. It will be demonstrated below that this undertaking has been arduous leaving one to query whether, given the fundamental shift prompted by the internet and the resultant digital economy, there can ever be an appropriate compromise within copyright law.

f. *Balance Full Circle*

In particular, the competing interests of copyright owners, creators and the consumer juxtaposed with international treaty obligations all feature prominently in determining an appropriate domestic legal framework for copyright. Canada is no different. Seeking to balance the competing interests between the tripartite stakeholder

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[43] David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 171. Vaver's position received further backing by McLachlin CJ in *CCH*, where she held that "In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively." See *CCH*, *supra* note 4 at para 48.

[44] See David Vaver, *supra* note 43 at 170. Vaver's equation defining the allocation of rights in copyright, $R = O - E$, will be discussed in greater detail at 57-61, below.

interests has been a hallmark throughout the history of copyright. Myra Tawfik observes that the environment of copyright is not what it once was, and that delicate legislative balancing is now required between the various interests in order to meet the foremost policy objective of copyright, which is

> that of fostering an environment for the generation, dissemination and acquisition of knowledge. The focus was not on pitting creators against industry or industry against users as we are wont to do in this modern era. Rather, the law reflected a tripartite, integrated system that encouraged creators to generate knowledge, industry to disseminate it and users to acquire it and, hopefully, reshape it into new knowledge.[45]

As Professor Tawfik notes, determining a satisfactory balance was not historically based upon the party capable of producing the strongest rhetoric as it could be argued is the case now. As a mechanism designed to deliver security to an ailing book trade, statutory copyright embodied via the *Statute of Anne*,[46] the world's first copyright statute, established the legal foundations upon which subsequent applications of ownership and rights theories respecting copyright have since been based. As evidenced by the statute's long title (*An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*) its primary objective was to mandate an equipoise that promoted the encouragement of learning within eighteenth-century Britain while providing protection for right holders.

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[45] Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 70.

[46] *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned* (UK), 1710, 8 Anne, c 19 [*Statute of Anne*].

The *Statute of Anne* has been described as a social *quid pro quo*[47] with justifications that should still serve as guidelines.[48] It is evident from its statutory origin that balance was, and remains at the ideological heart of copyright.

g. *Conclusion*

This paper seeks to test the implications of a global copyright policy regime from the perspective that it has become overshadowed by the economic interests of the right-holder, leaving copyright's primary organizing objectives in question. The legal protection for technological measures mandated by the WIPO Internet Treaties will be treated as the manifestation of this policy shift. Sweeping interpretations that underpin such notions will be demonstrated as relying on a flawed philosophical foundation that has been utilized to generate support in the popular media.

While the SCC confirmed in *CCH*, *Théberge* and in the recent Pentalogy of decisions[49] affirming user rights that an inclusive interpretation of fair dealing and the importance of technological neutrality in interpreting *The Act,* there nonetheless remains a substantial amount of contrasting rhetoric. Indeed, rhetoric is used to support the notion that copyright law can be harnessed to authenticate increased monopoly protection for copyright owners. This is evinced in various ways including copyright term extensions, new layers of protection for copyright content and the fixation of flawed copyright norms

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[47] Ronan Deazley, *Rethinking Copyright* (Cheltenham: Edward Elgar, 2006) at 13.

[48] Jane Ginsburg, "From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law" (2002-2003) 50 J Copyright Soc'y USA 113 at 122.

[49] See *supra* note 5 and accompanying text.

within the international arena. The following chapter sets out to examine the philosophical basis of today's rhetorical conflict.

# CHAPTER II

## PROPERTY AND THEORY: RHETORICAL FOUNDATIONS

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*To call the story or the song or the image one's "property," while it may now seem intuitive, is an awkward and potentially problematic use of the term.*[50]

- Tarleton Gillespie

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### a. *Introduction*

The purpose of this chapter is twofold. Part 1 seeks to establish familiarity with the rationales that buttress the notion of property ownership and the rights that are understood to flow therefrom. The purpose is to illustrate how intangible property such as copyright content can easily become misconstrued and be assigned characteristics that should otherwise only be associated with tangible property such as land. What occurs as a result of this are strong justifications that are employed by stakeholders seeking increased monopoly protections for copyright owners.

Part 2 picks up where the first part ends by working to unpack the two fundamental theoretical platforms upon which today's copyright rhetoric emanates. By examining both Lockean natural rights and utilitarian approaches it is hoped that an understanding of how contemporary stakeholders are influenced as they apply ownership and rights paradigms to property and thus copyright in order to advance their interests. It

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[50] Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press, 2007) at 25.

is questioned whether such an approach today is appropriate given the limitations and contradictions in the two models.

It is hoped that initiating the discussion from a philosophical perspective will provide a basis in view of the theoretical conceptualization that is used in intellectual property law, allowing for a deeper foray into the realm of copyright and the tensions created by importing a relatively static concept (the constraints of tangible property) into a rapidly developing technological arena influenced by economic forces. Ultimately, by canvassing the various philosophical angles employable in advocating a particular policy objective within the copyright debate, the scope in which stakeholders can "forum shop"[51] for ideological support should be evident.

b. *Foundations of Copyright Policy Part 1: Property*

It has been remarked that "much ink has been spilled"[52] in discussing the influences of Canadian copyright. Indeed, there is a rapidly expanding body of scholarly literature that examines the historical traditions. In seeking to address a primary concern of this paper, that of establishing how ownership rights of an intangible good must collocate *ad rem* with a measured policy response in order to further social and cultural goals, an examination of the theoretical underpinnings of property and copyright will be

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[51] Paul Goldstein & Bernt Hugenholtz, *International Copyright: Principles, Law and Practice*, 2d ed (New York: Oxford University Press, 2010) at 9.

[52] Ian R Kerr, Alana Maurushat & Christian S Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 Ottawa L Rev 7 at para 111.

practical as a preliminary reference point with which to determine the appropriateness and needs of a modern framework.

c. *The Idea of Property: Intangible vs. Tangible*

In its simplest theoretical state, property has been said to manifest "a set of claim rights and powers held by individuals over material things, including land, which entail corresponding obligations and liabilities on the part of other individuals".[53] This is indeed a start, however, despite its ubiquity and social familiarity 'property' remains a highly abstract notion, especially in the context of ideas and expressions - the precise foundations of intellectual property. When linked to rights and protection, its far-reaching implications *in abstracto* are interwoven throughout law and politics and is summed up by Laura Underkuffler insofar as:

> The 'right to property' has been proclaimed by landowners who resist big government, activists who seek to preserve historic structures, feminists who demand reproductive control, privacy activists who fear an 'information society', and libertarians who demand protection for government-created largesse… In virtually any critical social issue, and from virtually any perspective, the protection of property is hotly contested and of extreme importance.[54]

This postulation, in reference to tangible property appears to be appropriate in its application to copyright. This idea, at least until recently, has been generally accepted. However, when creative expressions are viewed as property in the same light as a

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[53] David Miller "Property and Territory: Locke, Kant, and Steiner" (2011) 19(1) J Polit Philos 90 at 92.

[54] Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003) at 11.

wristwatch might be (as a fully excludable right with no corresponding obligations to society), particularly when applied to the very set of claim rights used to grant exclusivity in an intangible good, it causes tension with the normative values copyright is meant to further.

Indeed, despite its ambiguous appellation 'intellectual property' occupies a specific space within the legal landscape, pulling otherwise distinct concepts together. The linkages between 'intellectual' and 'property' and the inherent difficulties scholars have confronted in reconciling the two abstract notions have been well documented in the literature.[55] Perhaps the two concepts were not meant to be reconciled. In *Compo Co. v Blue Crest Music*[56] Estey J. declared copyright a law of neither tort nor property, as it "neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law."[57] The dicta of Estey J. may have been interpreted as benign in relation to the subject matter of the case at bar, although a second look offers profound insight demonstrating that perhaps copyright's historical association with property is ill-suited. Nonetheless, the rights and obligations created by copyright give rise to interpretive complexities as subsequent court decisions have not

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[55] See JE Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997); Ronan Deazley, *Rethinking Copyright* (Cheltenham: Edward Elgar, 2006); Stephen R Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001); Carys J Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's LJ 1; Brian Fitzgerald "Theoretical Underpinning of Intellectual Property: "I am a Pragmatist But Theory is my Rhetoric"" (2003) 16(2) Can JL & Jur 179.

[56] *Compo Co Ltd v Blue Crest Music Inc et al,* [1980] 1 SCR 357, (1979), 105 DLR (3d) 249, 45 CPR (2d) 1 [*Compo* cited to SCR].

[57] *Compo, ibid* at 372-73, Estey J. In this unanimous Supreme Court of Canada judgment delivered by Estey J, making mould and stampers from a master acetate was held to 'make' a record, thus infringing the rights of the copyright owner.

strictly adhered to the pronouncement of Estey J. in *Compo*.[58] Despite this realization, a global taxonomical overhaul of how brainpower is defined by society is an unlikely prospect.

Vaver observes that both the US and Canada treat copyright as personal property as a result of "respective perceptions of their economic and political welfare."[59] In spite of the broader social implications, products of the mind increasingly contribute to economic growth and the association with physical property, with its exclusionary characteristics benefit this alignment. Just as characteristics of copyright can be treated in the same way as a piece of land - for example it can be licensed, assigned or sold - it has been traditionally perceived in a similar manner possibly because there are few other options easily digestible by the mainstream. J.E. Penner, an eminent scholar on property, propounds the differences between intangible and tangible property[60] but remarks that comparing rights in ideas or books, to rights in labour does little to harm the distinction.[61] It is precisely this watering down that has caused a proliferation in rights-based rhetoric.

Although clearly not property in the same way personalty is, referring to copyright as property "should not close off debate about what rights attach or should

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[58] David Vaver, *supra* note 43 at 20.

[59] David Vaver, "Canada's Intellectual Property Framework: A Comparative Overview" (2004) 17 IPJ 125 at 135.

[60] Intellectual property rights are believed to be closer to *choses in action* as they are abstract legal rights without a clear connection to any other thing.

[61] JE Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997) at 119.

attach to a particular activity".[62] In fact, economist Harold Demsetz advanced the proposition that economic property rights could be applied to information in the same way they are to other tangible items. Demsetz states:

> ...if a new idea is freely appropriable by all, if there exist communal rights to new ideas, incentives for developing such ideas will be lacking. The benefits derivable from these ideas will not be concentrated on their originators. If we extend some degree of private rights to the originators, these ideas will come forth at a more rapid pace.[63]

While Demsetz's observation perhaps correctly asserts the gist of the nature of the copyright system, it lends support to the modern economization of copyright. It is based on the assumption that as copyright will be protected in the same way that tangible property might be, with the ability to extract profits from an effectively unlimited resource being maximized. This is indeed an approach befitting an economist, but by doing so the true essence is of copyright is lost. This will be discussed in greater detail in the following chapter.

The practical effects of the association between property and copyright are that the rights flowing from immovable property or personalty have been equally bestowed on copyright. WIPO defines and states its rationale for protecting intellectual property as:

> 1.1 Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons. One

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[62] David Vaver, *supra* note 43 at 7.

[63] Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57(2) Am Econ Rev 347 at 359.

> is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.
>
> 1.2 Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such. Intellectual property is traditionally divided into two branches, "industrial property" and "copyright."[64]

Despite intellectual creations being non-exhaustible resources in that they can be reproduced *ad infinitum* without any loss to the creator, they are given similar characteristics to exhaustible ones. Intellectual property laws provide exclusive rights to otherwise non-exclusive objects.[65] The advancement of technological protection measures (TPMs) via the *WCT* is an example of this outlook, as the ability to exclude *includes* the right to protect and defend.[66] The association between intellectual property and tangible property has become ingrained in the social conscience: what should be done now is to work within the parameters of the current framework to achieve and preserve the appropriate balance that thus far only the SCC appears willing to do. In the end the tripartite interests of the creator, the copyright owner and the consumer would all

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[64] World Intellectual Property Organization, *WIPO Intellectual Property Handbook*, 2d ed, (2008) WIPO Publication No 489 (E), online: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ip_handbook.pdf> at 3.

[65] Christopher May, "Thinking, Buying, Selling: Intellectual Property Rights In Political Economy" (1998) 3(1) New Pol Econ 59 at 64; DB Resnik, "A Pluralistic Account of Intellectual Property" (2003) 46 J Bus Ethics 319 at 321.

[66] Legal protection for TPMs are set to be included in Canada's copyright framework. See discussion in chapter four.

stand to benefit. As discussed in the first chapter of this paper, the dichotomy between the SCC and Parliament is illustrative of this struggle. While recent decisions of the SCC[67] have further elevated justifications of the importance of a balanced and inclusive copyright framework, the confines of *The Act* and Bill C-11 add a level of complexity that lends support to a model based on tangible property. In reality, distinguishing the two authorities has proven to be a formidable task.

d. *Conclusion*

What has been observed in the literature and mainstream media is an association of the unique characteristics of tangible property being imposed on society's conceptual understanding of copyright. The result has been a legitimization of the application of economic theory, as one might to tangible property, to copyright. With a perceived ability to utilize a copyright regime as a means to economic enrichment, copyright has increasingly become commodified with copyright's organizing principles becoming lost in the race to profit maximization.

e. *Foundations of Copyright Policy Part 2: Theory*

In the section below, the role of labour and utilitarian theory in the rhetorical arena will be discussed with the view to demonstrating how, while positing pragmatic and functional analyses of the relationships between individuals, goods and the public they cannot be relied on unilaterally to support an ideological perspective. As the foundation

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[67] *Supra* note 5.

for creative endeavour, the foremost purpose of copyright is to incentivize the creation and distribution of cultural substance and knowledge, while at the same time promoting access to this material.[68] As discussed above, the long title of the *Statute of Anne* suggests this is indeed the purpose of copyright.[69] As it suggests, the key is that the framework must be "properly calibrated".[70]

f. *Applied Theoretical Approaches to Copyright Policy*

Theoretical ideas emerging from the query of exactly what property is, how the ownership of property comes about, and arguments advancing its protection are perhaps best viewed in light of their origins. Subsequent advancement of justifications using these ideas have informed and influenced and many interests within the copyright debate throughout the years. While the ideas and concepts that have formulated the primary underlying theories may differ somewhat in interpretation and practical application, particularly between experiential and jurisdictional approach, theoretical rights-based notions of ownership and property tend to form the basis of the modern conceptualization of copyright.

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[68] Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada and Canadian Heritage, 2002), online: <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01101.html>.

[69] *Statute of Anne, supra* note 46. Prior to its enactment, members of the Stationer's Company would purchase the tangible manuscripts from writers and would effectively gain complete title to work. What made the previous scheme even more in favour of the Stationer's Company was that authors were precluded from membership in the Stationers's Company and as a result could only have their works published if they relinquished all of their 'rights' in the work. The new statutory scheme was capable of standing its ground, with the decision in *Donaldson v Beckett*, 4 Burr 2408, 98 Eng Rep 257 (1774), affirming that copyright was now entirely statute based, with all ownership interests and right contained within. This historic decision contrasts the extra-statutory movement that has been experienced to date.

[70] Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 UOLTJ 315 at 318.

There are two fundamental theoretical approaches for the justification and development of intellectual property policy that are typically used in conjunction with property: the labour, or natural-rights based theory of John Locke and utilitarian approaches advocated by Jeremy Bentham and John Stuart Mill.[71] Both ideologies possess their own strengths and weaknesses, which is evident as commentators and stakeholders alike search for justifications; equally, both frameworks provide a convenient theoretical backdrop, although it will be argued below that neither approach taken unilaterally fits comfortably within a "properly calibrated"[72] copyright framework. Both find their way into the contemporary rhetoric as copyright is generally spoken of in terms of social utility by policy makers, although behind closed doors in many judicial and academic circles natural rights justifications predominantly feature.[73]

Natural rights theory is embodied by the treatises of Locke, whose writings *prima facie* form the ideal justification for a rights-based ownership point of view: essentially, one owns the property he has created with his own labour. In contrast, utilitarianism is a potentially more acceptable approach to the overall needs of a fair and balanced copyright policy due to its rough and ready applicability to creators and consumers. The utilitarian approach, advocated by Bentham and Mill, seeks to determine a basis for morality (which can be applied to development or ideas) using a general scale based on

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[71] It is acknowledged that in addition to libertarianism and utilitarianism there are other relevant theoretical approaches that are deserving of inclusion. For the purposes of this section, the discussion will be limited to above mentioned two as they are most predominant in the rhetorical spectrum.

[72] Daniel J Gervais, *supra* note 70 at 318.

[73] Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1992-1993) 68 Chicago-Kent L Rev 841 at 849.

the happiness of the greatest number of people. Applying utilitarian theory, balancing property rights with society's level of benefit from the allocation of the rights with the greatest good for society as the desired outcome, may ideally appear an appropriate framework. However, substantial reliance on either of these approaches results in a skewed outcome that, it is submitted, does not further the balancing of interests required of a healthy copyright framework.

g. *Labour and Natural Rights Theory*

The works of John Locke have been described as the most powerful representatives of deontological liberalism.[74] Writing in the late seventeenth century, Locke's *Second Treatise of Government*[75] offered accessible thoughts on the acquisition of property and subsisting rights therein. Locke's basic thesis on property ownership is that the earth and its contents are available for all of mankind to exploit with one's own labour; reaping the fruits, which would now include a new object formed by the mix of one's own labour with another substance from the earth, form a new right in the object or property. This new object would become unilaterally appropriated as property of the creator:

> §. 27... The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it

[74] David Miller, *supra* note 53 at 91. Deontology generally describes ethics based on duties, rules, or obligations.

[75] John Locke, *Second Treatise of Government*, CB MacPherson, ed, (Indianapolis: Hackett, 1980).

> something that is his own, and thereby makes it his *property*... [N]o man but he can have a right to what that is once joined to...[76]

A libertarian application to property ownership effectively advocates an unlimited right to property ownership when derived from the products of one's labour mixed with material of the collective commons. The subsequent proviso of "at least where there is enough, and as good, left in common for others"[77] is often glossed over as it places a qualification over the absolute right while the role of the law according to this perspective is that it should only interfere in order to restrict the infringement or violation of an individual's right in his own property.[78] Copyright owners often resort to Lockean theory when justifying copyright as the natural rights philosophy "appeals intuitively to our sense of justice"[79] often drawing on notions of unfairness or moral iniquity when dealing with purported interference with the property of another. For example, "it is unjust to reap where others have sown"[80] and by Biblical reference - 'thou shalt not steal'.[81] Goldstein and Hugenholtz recognize that "[p]rotectionist natural right impulses, not rigorous utilitarian calibrations, have historically characterized the creation of new rights"[82]

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[76] *Ibid* at 19.

[77] *Ibid*.

[78] DB Resnik, *supra* note 65 at 322.

[79] Carys J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Northampton, MA: Edward Elgar, 2011) at 70. Craig indicates that while a natural rights approach fits well with Locke's analysis of property ownership, it remains underestimated - nonetheless, it's powerful ideological foundation makes it ripe for a 'hermeneutical free play' (note Craig's reference to Peter Drahos, *The Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing Company, 1996)) for advocates of a strong protectionist copyright regime.

[80] Simon Stokes, *Digital Copyright: Law and Practice*, 3d ed (Portland, OR: Hart, 2009) at 5.

[81] *Ibid*.

[82] Paul Goldstein & Bernt Hugenholtz, *supra* note 51 at 8.

although this approach used in conjunction to intellectual property rights has been criticized due to its intellectual incoherence.[83]

It is possible to critique a natural rights perspective as it tends to rely only on the efforts of the creator while ignoring the content that was necessarily drawn upon to create this new property. The new 'property' for which protection is sought may have relied on inspiration material that was 'sown' by others, which could accordingly be subject to like protections. Natural rights-based labour theory turns on the fact that there is a 'commons' from which to draw upon. Similarly, there also exists an 'intellectual commons' that repletes rather than depletes with use.[84] To claim that all new intellectual property only draws on material freely available in the public domain is doubtful, and circularly neglects to regard the protections deserved of the material drawn upon for inspiration whether consciously or unconsciously done. Robert Merges addresses this scenario in support of the relevance of a Lockean approach to intellectual property rights, by agreeing that the public domain is "an important, pervasive backdrop against which all IP rights are defined."[85] In addition to the public domain which is a social construct designed to regulate user rights Peter Drahos submits that the intellectual commons should be celebrated for its ability to contribute to freedom by "allow[ing] for a diversity of group life."[86] However, in the realm of intellectual property, and particularly

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[83] John Cahir, "The Moral Preference for DRM Ordered Markets" in Fiona Macmillan, ed, *New Directions in Copyright Law*, Vol 1 (Cheltenham: Edward Elgar, 2005) 24 at 24-25.

[84] Peter Drahos, "A Defence of the Intellectual Commons" 16(3) CP Rev 101 at 104.

[85] Robert P Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) at 35.

[86] *Supra* note 84 at 104.

copyright, any sort of bright line test in determining how much a particular work has influenced another can be difficult to apply in practice. Furthermore, a natural rights perspective presupposes entitlement to the commons ("God... *has given the earth to the children of men*; given it to mankind in common"[87]), however the link between mere labour and an automatic right in property requires a bold logical leap.

On an application to a finite resource Locke's ideals could collapse when tested against this underlying assumption. Miller submits that if appropriation of property is in fact tenable, as labour has had a value-added effect to what has been worked upon, permanent rights remain difficult to justify as the rights should correspond to the amount of labour invested.[88] One scholar objects to the notion that "some act of "creation" automatically leads to full-blooded and absolute ownership rights in the "intellectual" object that is created"[89] arguing that such an interpretation is not even consistent with the true Lockean philosophy.

Moreover, Rose points out that as appealing as Locke's labour theory is vis-à-vis new creations, there are fundamental problems with his presuppositions, or at least scholarly interpretation of it.[90] The first problem is that without a prior theory of ownership, it cannot be assumed that one even owns the labour. Even in the absence of

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[87] *Supra* note 75 at 18.

[88] *Supra* note 53 at 92.

[89] David Lametti, "How Virtue Ethics Might Help Erase C-32's Conceptual Incoherence" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 327 at 328-329.

[90] Carol M Rose, "Possession as the Origin of Property" (1985) U Chicago L Rev 73 at 73.

the first problem, a second flaw relates to the fact that if we are able to assume that the labour is owned, what is the scope of the right created when labour is mixed with the fruits of the collective process? Locke's theory does not provide an answer for this question, which may provide a clue as to why such contestation exists between real property rights and those related to creations, ideas, expression or intellectual property in general. This flaw could be reconciled from a policy perspective by doing more to enshrine a set of rights to users of the content, to benefit the public, further cultural development and promote innovation.

h. *The Only Answer?*

Carla Hesse points out that the concept of ownership of an idea is a "child of the European Enlightenment"[91] which grew out of the belief that knowledge, rather than emanating from the divine, was in fact a product of the human mind. While acknowledging that there are indeed justifications for intellectual property, Susan Sell observes that "a central tension is the one between romantic notions of authorship and invention on the one hand, and utilitarian conceptions of incentives for creation and diffusion on the other".[92] It may be arguable that the notion of literary property is not and cannot be intrinsically one's own. As the French philosopher Jean Marie Condorcet opined, ideas are informed by "the fruit of a collective process"[93] and it follows that

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[91] Carla Hesse, "The Rise of Intellectual Property: 700 B.C. – A.D. 2000: An Idea in the Balance" (2002) 131(2) Daedalus 26 at 26.

[92] Susan Sell, "Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement" (2004) 38 Loy LA L Rev 267 at 269.

[93] *Supra* note 91 at 26.

subsequent creations, as they are amalgams of the knowledge, work or experience of others, should remain to some extent freely accessible and within the social domain. An absolute right to the property would not exist, and any monopolistic advantages, if any, should be heavily restricted. There are indeed merits to each of these arguments, which in turn make the policy debate duly complex.

i. *Utilitarianism*

The utilitarian approach embodies a consequentialist sensibility in contrast to the deontological approach of Locke. While the latter Locke's efforts were focused on describing the process of the creation of property and the potential rights and obligations (or non-obligations) that were instituted as a result, the former presupposes the existence of property and attempt to deal with a primarily anthropocentric perspective which encompasses to a large extent relationships with oneself, with each other, and with the property itself. The utilitarian philosophy seeks to achieve a moral standing by assuming that individuals tend to seek their own happiness, as humans act "under the governance of two sovereign masters, pain and pleasure",[94] and act accordingly in response to their own interests. Jeremy Bentham's view was that "… it is the greatest happiness of the greatest number that is the measure of right and wrong"[95] while John Stuart Mill believed that

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[94] Jacob Viner "Bentham and J.S. Mill: The Utilitarian Background" (1949) 39 Am Econ Rev 360 at 365.

[95] Jeremy Bentham, "A Fragment on Government", in J Bowring, ed, *The Works of Jeremy Bentham*, Vol 1 (New York: Russell & Russell, 1962), at 227 as cited in Robert McGee, "Property Rights v. Utilitarianism: Two Views of Ethics" (2004) 27 Reason Papers 85 at 91, online: <http://www.reasonpapers.com/pdf/27/rp_27_4.pdf>.

"actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness."[96]

The utilitarian 'greatest happiness' principle seeks to encourage actions that promote happiness, and discourage actions that cause the reverse of happiness.[97] The actions are either right or wrong, respectively, depending on the level of happiness or unhappiness they create. Mill generally believed in freedom of the individual – however, freedom unchecked would, inevitably, lead to a state of anarchy. To adapt to this limitation, rules seeking to guard an individual's rights would therefore be justified on the grounds that overall social good would be promoted.[98] In his later work, Mill recognized that within utilitarianism there existed "a novel element… one which many moral philosophers h[e]ld to be incompatible with it".[99] This novel element was the recognition of a non-homogeneity of pleasures, and therefore qualitative differences could be observed. This created a hierarchical structure within pleasures including rules of expediency and rules of justice, of which rules of justice were more absolute as they sought to protect individual interests and liberties.[100] Mill believed that an inequity arose

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[96] John Stuart Mill, *Utilitarianism*, George Sher, ed, (Indianapolis: Hackett, 1979) as cited in Robert McGee, "Property Rights v. Utilitarianism: Two Views of Ethics" (2004) 27 Reason Papers 85 at 91, available at http://www.reasonpapers.com/pdf/27/rp_27_4.pdf.

[97] DB Resnik, *supra* note 65 at 323.

[98] *Ibid* at 324.

[99] *Supra* note 94 at 377.

[100] DB Resnik, *supra* note 65 at 324.

when an individual was divested of "personal liberty, his property, or any other thing which belongs to him by law".[101]

It may be of little surprise that from a policy perspective, utilitarian approaches have informed the legislative rhetoric, with the United States Constitution exemplifying this approach: "Congress shall have the power… To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective discoveries."[102] In this text incentives, protection and user benefit are promoted. It appears, at least superficially, to meet the fundamental copyright objectives.

Utilitarianism contrasts the natural-rights point of view, at least in terms of how to best approach the distribution of rights flowing from property, although both can be viewed in light of their respective justifications of rights in property. Both Locke and Mill were proponents of property rights, however, Mill believed that injustice occurred when someone was deprived of liberty or property guaranteed by law.[103] How a deprivation fits into a scheme of a non-rivalrous good like copyright is uncertain. To achieve an appropriate level of social utility, created rights should not exist in perpetuity. Therefore, to achieve a balance of justice a creation should be entitled to a level of protection to ensure that innovation and creation remain viable; nonetheless, this may come at the expense of the public. Concerns then arise in the fact that utilitarianism may

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[101] John Stuart Mill, *supra* note 96 at 42.

[102] United States, House of Representatives, *The United States Constitution* (1787), Art 9 § 8 Clause 8, online: <http://www.house.gov/house/Constitution/Constitution.html>.

[103] DB Resnik, *supra* note 65 at 324.

lend sufficient support to justify increased monopoly protection measures, and actions that may harm individuals as qualification of the 'greatest happiness' is not defined.[104]

Regarding policy-based decisions, the theoretical foundations of labour and utilitarianism create the forum where rights arising from the expression of an idea are debated. Should an individual's idea or creation remain permanent property, capable of being bought, sold or bequeathed ad infinitum? Or should policy considerations inform how the law treats rights in incorporeal property as opposed to real property - a certain threshold of protection engenders continued incentive for creativity, promoting development which in turn benefits society. In contrast, with the availability of a public domain, and set limitations such as an enforced patent or copyright term, the ability of the creator to withhold knowledge or creation to stifle competition or produce inaccessibility is reduced.

j. *Conclusion*

The ideological positioning of both natural rights and utilitarian theories make them archetypal candidates in policy justifications for ownership rights in intangible goods. While Locke exhorts exploitation of the commons through labour, Bentham and Mill similarly advocate rights in property and sanction them provided there is a greater public good. The result is ill-defined parameters of the greater good. Despite flaws in

[104] Sara K Stadler, "Forging a Truly Utilitarian Copyright" (2004-2005) 91 Iowa L Rev 609 at 628.

both approaches they have consolidated their status within the scholarly, legislative and judicial rhetoric of intellectual property.

The competing interests illustrated above form the foundation at the heart of today's intellectual property debate - that is, what (if any) is an appropriate level of protection to be afforded to the creator of a work and how should it be quantified? Should different types of works be treated differently? Should there be a public interest proviso? As any question that has become politicized will be, the 'right' answer is contingent upon one's own theoretical persuasion, and by their very existence have created the difficulties in finding appropriate solutions to these issues.

## CHAPTER III

THE ECONOMICS OF COPYRIGHT POLICY

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*Intellectual property piracy is truly a global problem that harms not only U.S. industry but has economic implications for other countries developing and supporting their own entertainment industries... The United States and its trading partners rely heavily on investments in intellectual property to drive our economies.*[105]

- Congressman Howard Berman

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### a. *Introduction: The Economy of Copyright*

We all love movies, and so it could follow that challenging the business model of an industry that generates the very material, one blockbuster after another, for one of the continent's favourite avocations might make little sense. Perhaps for this reason, a soft spot for the preservation of the entertainment industry's ability to lobby in Washington and Ottawa, and play a substantial role in devising copyright policy has remained possible to overlook. Indeed, there is a mutual benefit. The manner in which influential policy makers like Howard Berman have used calculated language drawing on the importance of Hollywood's well-being to frame intellectual property issues and the copyright debate is thus of little surprise. The debate is framed by supposing that challenges to the status quo pose a threat to the economy and in turn, our lifestyles to

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[105] *Sinking the Copyright Pirates Global Protection of Intellectual Property: Hearing before the House of Representatives Committee on Foreign Affairs*, 111th Cong (Washington, DC: United States Government Printing Office) at 3 (Howard Berman), online: House Committee on Foreign Affairs <http://www.internationalrelations.house.gov/111/48986.pdf>.

appeal to public sympathy. Professor Myra Tawfik's statement in the first chapter,[106] which draws attention to the manner in which rhetoric has become the *end* rather than the *means* within the copyright debate helps emphasize the actuality that there is a great need to open the debate up to the real possibilities and solutions available. The crux of the copyright debate will continue to be overshadowed if the rhetorical tactics continue to be focused on while stakeholders are pitted against each other. Should it remain unchecked the diversion of attention away from the real issue, the importance of balance in sustaining *all* stakeholder interests, has the capability to create inescapable and permanent harm to our copyright framework. The SCC has recognized the possibility of this outcome, and the relevant decisions will be unpacked below.

The domination of rhetoric comes of little surprise, as economic considerations have moved to the forefront of the policy agenda regarding copyright, both globally and domestically and there are now major interests at stake. Professor Carys Craig submits that the dominance of Lockean justifications within the Canadian copyright law context favours the interests of the right-holder over those of the public.[107] Both 'originality' and 'authorship', concepts of fundamental importance to the interpretation and application of *The Act*, do little to ameliorate the perpetuation of a Lockean natural rights, *fruits of thy labour* notion. Emphasis on the right to earn money from one's efforts - what has been termed the *propertization of labour*[108] - has become central. While appropriate rewards

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[106] See *supra* note 45 and accompanying text.

[107] Carys J Craig, *supra* note 55 at 7.

[108] *Supra* note 85 at 197.

are necessary for copyright to maintain its functional balance, the result to a large extent has been a shift in balance away from the original purpose of copyright, which is to further the public interest by creating a system of incentives, towards the interests of the right holder.

Although it has become evident that high-level global copyright policy decisions are increasingly being influenced by by economics,[109] economists have not played a consequential role in copyright policy formulation.[110] This has lead to a reactive international copyright framework based largely on financial and market-based opportunities, as discussed above, with policies designed to support them. A concentrated and financially liquid industry lobby has supported this movement, whereas consumers of content (who are an integral element of copyright viability) are are faced with a choice between having policy determined for them, or developing other means by which to access content.

Among the possible additional reasons for this incremental shift are the range of international treaty obligations that are quickly becoming part of domestic copyright frameworks. The value of intellectual property, in particular copyright, and its role in the global economy has dictated that its value be measured more in economic terms as opposed to the intangible benefits conferred upon society. Congressman Berman's

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[109] One need only look at the treaties where sweeping international copyright policies are found: the *WTO Agreement* and *NAFTA* are examples. These, and other treaties that have informed (or rather, mandated conformity) Canadian copyright policy are discussed in the following chapter of this paper.

[110] Pamela Samuelson, "Should Economics Play a Role in Copyright Law and Policy?" (2003-2004) 1 UOLTJ 1 at 3.

statement above is an apposite illustration of the how value of intellectual property is often determined exclusively by its input to the economy.

With the link between intellectual property and the health of the economy now firmly established in the faculties of the public by the entertainment industries and policy makers alike, the next logical step is to incorporate regulatory measures within larger economic frameworks. As with other aspects of trade, it is thought that increased harmonization in copyright policies facilitates efficient trade relationships. In Europe, the trade relationships between many nations have become harmonized through the single market. What will happen with respect to a uniform copyright policy remains to be seen, although the possibility of a Community-wide copyright law has been suggested.[111] If successful, there will doubtless be calls for a move towards global harmonization. However, while uniformity may serve to benefit the economies of developed nations that are net exporters of cultural products, there is evidence to suggest that by seeking unitary global copyright policies cultural and economic development of net-importing nations may actually be hindered.[112] It must not be forgotten that the copyright balance consists of two parts, with stimulus for innovation met with dissemination of creative works to the public. Yet, as the treatment of copyright continues to be driven by economic considerations, commentators have noted that a sound economic analysis has not had a profound influence in the policy making process.[113]

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[111] See Mireille van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Alphen aan den Rijn: Kluwer Law International, 2009) at 316-325.

[112] See discussion at 68-72, below.

[113] *Supra* note 110 at 2.

This paradoxical situation may exist for several reasons, with Samuleson citing several contributing factors including the impact of industry lobby groups on the writing of copyright policy, the insularity of the copyright profession in general and the different terms in which economists and lawyers speak.[114] Perhaps most importantly however, is that strict economic analysis may not always precipitate policy decisions that best meet the desired objectives of copyright. Samuelson discusses how the mix of concentrated benefits (to right holders) and distributed costs (across the public or consumer) that could result from lobby efforts for higher pricing over copyright may, at least in economic terms, appear to be sound. It may be true that content-producing industries significantly contribute to the economy, however regulators must be careful not to wring the institution of copyright dry through a model of control and power over content. Stronger legal protections over content are not in the best interests of either the public or the copyright industries.

There is no dispute against the importance of protections being granted in favour of copyright owners. Indeed, they play an integral role in ensuring the viability of authors and creators. In *Théberge*, Binnie J. noted the necessity of fairly compensating the producers of cultural content:

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[114] *Supra* note 110 at 2-4. Samuelson notes the degree to which Parliament relies on industry testimony, including lobby efforts, to determine copyright policy. Additionally, she notes that the "revolving door" between government positions, law firms representing major rights-holder interests and positions within industry associations contributes to insularity in copyright policy analysis. Samuelson also cites cultural and language differences as enhancing the divide between policymakers and economists. The mathematical language used by economists who study copyright can be inaccessible to copyright policymakers, who often come from a legal background. Furthermore, publications by economists are often published in venues where policymakers are not likely to read it.

> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.[115]

Similarly, Lawrence Lessig observes that

> [e]veryone, of course, concedes that some regulation of markets is necessary - at a minimum, we need rules of property and contract, and courts to enforce both. Likewise, in this culture debate, everyone concedes that at least some framework for copyright is also required. But both perspectives vehemently insist that just because some regulation is good, it doesn't follow that more regulation is better. And both perspectives are constantly attuned to the ways in which regulation simply enables the powerful industries of today to protect themselves against the competitors of tomorrow.[116]

In plainer terms, increased protection does not necessarily lead to increased innovation[117] but rather in the short-term serves to meet the needs of the rights-holder's bottom line while in the long-term perhaps leading to no net benefit for any stakeholders. The notion holds equally true in the Canadian experience, with Binnie J. warning of the pitfalls of overprotection:

> Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and

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[115] *Théberge, supra* note 7 at para 31, Binnie J.

[116] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004) at 188.

[117] In terms of patents, increased protection has shown to stimulate innovation. Patent protection is gained only after a lengthy process to demonstrate and certify the unique attributes of the subject matter, which differs significantly from Canadian copyrights which arise through mere originality and fixation, both with very low thresholds (see generally *Tele-Direct (Publications) Inc v American Business Information* [1997] FCJ No 1430, (1997) 154 DLR (4th) 328). The correlation between protection and innovation in the patent realm has led to an misapplication by proponents of increased protections over copyright material by using the patent model in a blanket effort to seek increased protections over copyright.

> embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.[118]

Pamela Samuelson cites "path-dependent historical reasons" for this disconnect stating that traditionally in the US, intellectual property policy has been developed by House and Senate Judiciary Committees, instead of Commerce Committees.[119] A distinction should be made between the balanced economic analysis based on and supply and demand that Samuelson observes has been lacking, versus a race to the bottom economic approach where industry lobby efforts play a significant role in determining copyright policy.

The following discussion seeks to canvass the progression and evolution of ideals that influenced copyright policy development from its statutory origins through to the twenty-first century. It will examine the unique juxtaposition of copyright as an institution motivated by economic ends yet under-influenced by true economic theory.

b. *Evolution of Ideals*

Dating back to its origins, the desired outcome of the monopoly granted by copyright was founded in economic theory, as a way in which to restrict what would inevitably occur otherwise. The theory goes that without any protection, the market value of public goods (such as books, which were becoming increasingly easy to replicate at low cost) would be pushed down to their marginal cost of production.[120] This result

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[118] *Théberge, supra* note 7 at para 32, Binnie J.

[119] *Supra* note 110 at 3.

[120] Anne Barron, "Copyright infringement, 'free-riding' and the lifeworld" in Lionel Bently, Jennifer Davis and Jane C Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (New York: Cambridge University Press, 2010) 93 at 96.

would leave little margin for the creator to recoup any costs involved with production, or to go beyond that and make a living. When this is the case, economists predict that those who would have otherwise invested in creations would then turn to other exploits known to yield a higher return. Anne Barron states that "from an economic perspective, the function of copyright is to deal with this problem."[121] Copyright (and other intellectual property laws) prevents the market price from being driven down in order to allow money to be generated - this notion is visible in the 'progress-promoting' ethos of the American constitution, and the general sense of balance that is submitted, is vital in a successful copyright theory.

While the role of economics in copyright will be brought into the discussion to frame the influence it has had on copyright's evolving dominant metaphor, it should be noted that these issues are not addressed from an economic background. Rather, the broad policy objectives that can be derived by applying a law and economics perspective will be examined.

c. *Expansion of Copyright*

Nowadays and particularly in the digital era as exploitation options for the owner of a copyright have grown, so has the ability to monetize this intellectual capital. As with any new source of wealth generation, greater control over its availability, access and use have been sought by stakeholders who stand to benefit. It will be submitted that this has

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[121] *Ibid*.

led to an Anglo-American copyright model where the current framework seeks to gain control over aspects of copyright not historically associated with it. This creeping expansion of creating new rights is known as *paracopyright*, where "even an attempt at accessing a copyrighted work that sits behind a technological protection measure"[122] can trigger potential liability for copyright infringement. It may be defensible to suggest that Canadian copyright policy is in need of updating in some areas to account for the fact that consumers are choosing other (often unauthorized) means to gain access to digital content. Critics have suggested that the current Western model of simply attaching new rights and protections to copyright is not be suitable for global exportation; it certainly appears to have created more uncertainty within the domestic framework. Furthermore, this is similarly often the case for developing countries as this approach does not match their respective individual needs for appropriate development in both cultural and economic senses.

d. *Metaphoric Evolution: From Quid Pro Quo to Neoliberalism*

While they may be ubiquitous now, the business models supported by copyright have not always existed in their present form, Litman observes. Recent decades have ushered in changes to the dominant metaphor attached to copyright. Initially, the social "quid pro quo"[123] notion where the public granted specific limited rights to creators in exchange for public distribution of the work was the working model. With technological

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[122] Sandro Ocasio, "Pruning Paracopyright Protections: Why Courts Should Apply the Merger and *Scènes à Faire* Doctrines at the Copyrightability Stage of the Copyright Infringement Analysis" (2006-2007) 3 Seton Hall Cir Rev 303 at 305.

[123] Jessica Litman, *supra* note 31 at 78. See also Ronan Deazley, *supra* note 47 at 13.

and societal advancement, in addition to the invention of the printing press, this comparatively equal exchange of granting rights in return for dissemination soon evolved into the 'copyright as a bargain' metaphor, which was based on compensation for creators. The possibility of being compensated for their efforts provided a means for creators to earn a living, which in turn encouraged the creation and dissemination of new materials.[124] Litman describes this model as being rooted in a bribery of sorts, as the public effectively paid creators to generate new works for public consumption - the creator received limited control over the work while the public were entitled to the many benefits above and beyond any enumerated rights enjoyed by the creator such as resale or private performance.[125] However, as rudimentary as it perhaps sounds, this model was nonetheless effective in meeting the needs of both creator and consumer, a precursor to the intentional balance that is now sought.

Litman asserts that traditionally, the copyright bargain was appraised "by asking whether it provides sufficient incentives to prospective copyright owners".[126] This may indeed be true to a certain extent;[127] however, the equation must be viewed as a proportion. Consumers are the driving force behind any resultant viability of copyright - without a will to use a creator's expression, copyright ceases to serve any purpose

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[124] Jessica Litman, *supra* note 31 at 78.

[125] *Ibid* at 78-79.

[126] Jessica Litman, "Revising Copyright Law for the Information Age" (1996) 75 Or L Rev 19 at 31.

[127] Litman discusses how conventional wisdom would have the public believe that creators and entrepreneurs, without any form of protection for their works, would lack the incentive to further create or invest. She submits that this may be a premature supposition, as a various new media platforms have flourished and become lucrative even when production and distribution was done first, and protection of intellectual property rights was taken into account after appropriate markets had been found.

whatsoever. Jonathan Aldred appropriately observes that "[t]here is no such thing as optimal creation of information in isolation, independent of use or access, because, at least in mainstream economics, information has no value unless it can be accessed."[128] Aldred's statement supports the notion that from an economic perspective, innovation is encouraged by allowing would-be creators to use and access cultural products. Rights-allocation concepts that include fair dealing and Vaver's equation, discussed below, assist in demarcating the appropriate boundaries.

Vaver's equation of $R = O - E$ is helpful in quantifying and understanding this model, and the corresponding distribution of legal rights.[129] Under the 'copyright as a bargain' model, at no point subsequent to the actual expression of the idea, the time at which the copyright comes into existence, is the creator entitled to the full bundle of rights granted by the copyright. This does not always sit well with right-holders and proponents of creator/owner rights, who are often of the mistaken belief that the full bundle of rights are the 'property' of the creator/owner *ab initio*. This propensity flows into creator/owner rights rhetoric which seeks to expand its legal boundaries.

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[128] Jonathan Aldred, "Copyright and the limits of law-and-economics analysis" in Lionel Bently, Jennifer Davis and Jane C. Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (New York: Cambridge University Press, 2010) 128 at 133.

[129] David Vaver, *supra* note 43 at 170. In the equation $R = O - E$, "O" equals the entire allocation of rights created upon expression of the idea; "E" equals user rights (or exceptions), whereby usage falling under a statutory exception will not infringe the right holder's copyright. What remains is "R" equalling the residual rights, which are allocated to the the creator and can be exploited as such. Usage not falling within "E" will therefore amount to an infringement of the right.

e. *Owner Rights Do Not Exist in a Vacuum*

The Vaver equation which holds that rights allocated to 'R' are not *ab initio* the unabridged bundle is not universally agreed upon, though support for it can be found in several SCC decisions. In *CCH* McLachlin C.J. affirms Vaver's position by holding that "in order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively".[130] In the same paragraph, the Chief Justice alludes to Vaver's sentiment, that "[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[131] Furthermore, in *Théberge* the importance of recognizing the "limited nature"[132] of creator's rights was acknowledged by Binnie J. More recently in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,*[133] a case from the SCC Pentalogy, Abella J. affirmed that "users' rights are an essential part of furthering the public interest objectives of the *Copyright Act*."[134] Bearing in mind the above three SCC decisions it would appear that there is authoritative support behind the notion that copyright owner rights cannot effectively exist in a vacuum without detriment to the overall achievement of copyright's organizing principles. Despite the cases discussed above, the notion of a liberal and unrestricted interpretation of user's rights can be contrasted with a more restrictive interpretation, albeit in a lower court, found in

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[130] *CCH, supra* note 4 at para 48, McLachlin CJ.

[131] David Vaver, *supra* note 43 at 171.

[132] *Théberge, supra* note 7 at para 31, Binnie J.

[133] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [*SOCAN v Bell*],(available on CanLII).

[134] *Ibid*, at para 11, Abella J.

*Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*[135] where Teitelbaum J. states that "[t]he exceptions to acts of copyright infringement are exhaustively listed as a closed set in paragraphs 27(2)(a) to 27(2)(m) and subsection 27(3) of the Copyright Act. They should be restrictively interpreted as exceptions."[136]

The conflicting jurisprudential analysis on the correct interpretation of user's rights has unfortunately served to add undue complexity to this debate, fueling the rhetoric of advocates of strong protections over copyright. Notwithstanding the opposition found in *Michelin*, which should be treated with caution, the SCC's support for Vaver's position found in *CCH* and *Théberge* should comfortably establish it as the appropriate approach. The problem remains that the courts possess limited ability to actually make copyright law in Canada - this task has largely been left to Parliament, where extra-legal influences (such as lobby efforts) and an array of other considerations are all at play in the policy making arena.

As such, it is submitted that the Vaver equation remains the correct interpretation today. However, as it will be discussed below, heightened pressure to further limit the rights allocated to 'E' may be attributed to the successor economic model that has

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[135] *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996), 71 CPR (3d) 348, [1997] 2 FC 306 [*Michelin* cited to CPR].

[136] *Ibid* at para 65, Teitelbaum J.

become the root of the modern approach to copyright; that of economic incentive. The fact that the 'copyright as a bargain' model, which turned out to be extremely effective as the pervasive model until recently, was abandoned is understandably disconcerting.[137] Modern copyright's current metaphor, as described by Litman, has shifted to bases in economics. Arising in the last thirty years, a system of incentives for creators has developed that

> posits a direct relationship between the extent of copyright protection and the amount of authorship produced and distributed - any increase in the scope of subject matter or duration of copyright will cause an increase in authorship; any reduction will cause a reduction.[138]

As Binnie J. forewarned in *Théberge*, the model of seeking increased protections in the name of profit is beginning to manifest its unsustainable characteristics. Under the economic incentive model, which loses sight of copyright's original approach, only materials that can be made to be profitable or remunerative in some manner will be pursued by creators and right holders. The need to remain in profit has become a fundamental coefficient within the copyright owning industries' business model, with co-option of select aspects of both Lockean ownership and utilitarianism doctrine used to build upon the rhetoric and tactics used to manipulate and harness the favour of the public.

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[137] Jessica Litman, *supra* note 31 at 78.

[138] *Ibid* at 80.

f. *Modern Economic Models*

The disconnect between the economization of copyright and the lack of influence of economic theory in policy development has been cited by Samuelson as having potentially negative impacts on copyright.[139] The argument could be made that copyright policy and economic theory do not necessarily square well with each other, and that a *de facto* preference has already been made. Economists Anne Barron and Jonathan Aldred contrast two competing paradigms in an economic analysis of copyright policy, namely 'absolute protection' and 'incentives-access'. The two competing economic paradigms are illustrative of the divide that exists between stakeholders today.

Absolute protection advocates generally advance the view that increased protection correlates to increased innovation and productivity,[140] while the incentives-access paradigm proposes that there exists a balance where creators will be incentivized to invest their efforts when they recognize that recoupability of part of the value placed on that information by consumers does indeed exist.[141] The two models can both be economically viable, although Aldred ultimately dismisses the former as having no defensible rationale while Barron criticizes the absolute protection paradigm stating that "the 'ex post' justification for very broad IPRs [intellectual property rights] is in fact profoundly anti-market in that it favours central (albeit private) control rather than free

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[139] See *supra* note 119 and accompanying text.

[140] Although increased protection may contribute to increased innovation, it is submitted above that this approach does not necessarily fit within the copyright paradigm. See *supra* note 117 and accompanying text.

[141] Anne Barron, *supra* note 120 at 105.

competition".[142] Paul Goldstein, elucidates the theoretical objective of the absolute protection paradigm in that "[t]he logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works."[143] Favouring the absolute protection paradigm, the choice of many copyright owners and policy makers today, means accepting the dangers that are considered to flow alongside overprotection to the point of minimal utilization. This was notably considered by Binnie J. in *Théberge*.[144]

From a policy perspective, an application of absolute protection would invariably dictate that to extract maximum value from a copyright material, projecting rights and protections beyond their traditional boundaries, such as is the case with paracopyright and technological protection measures for example, is necessary to achieve its goal. With essentially zero marginal cost to the creator or right holder, new uses and accessibility models available to a right holder in the digital era allows each use or access (for the same product) to be licensed or assigned.

The incentives-access model provides a contrast to the absolute protection model, although it is not without its own pitfalls. As with absolute protection, innovation can too, be stifled. Barron makes the point that an unbalanced model can equally inhibit the social goals sought through copyright:

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[142] Anne Barron, *supra* note 120 at 110.

[143] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 2d ed, (Stanford: Stanford Law and Politics, 2003) at 146, as cited in Jonathan Aldred, *supra* note 128 at 134.

[144] See discussion at 51-3, above.

> Copyright - the very mechanism that should stimulate the production of information goods - can itself limit their production. In particular, to the extent that copyright hinders follow-on creators from taking elements from protected works and building upon these to create new ('derivative') works, it necessarily raises the costs faced by these subsequent innovators: they must find the right-owner and negotiate and pay for licenses to use these elements; and this may be impossible.[145]

Landes and Posner question economic viability of limited copyright terms,[146] however Barron compellingly qualifies the paradigm by stating that "[s]ome producer controls over the copying activities of others [are] necessary to incentivize the right level of production, but it is also recognized that these controls should be limited."[147] The arguments made by Landes and Posner which include lower transaction costs and increased ability to recoup, while perhaps effective from a purely economic standpoint, do not square with a socially equitable copyright model that furthers innovation of cultural products. Barron's view of the incentives-access paradigm is indeed an appropriate interpretation of the model. It squares well with the inclusive SCC model that is most suitable for copyright if it is to continue to evolve and adapt to modern challenges.

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[145] Anne Barron, "Copyright Infringement, 'Free-Riding' and the Lifeworld" in Lionel Bently, Jennifer Davis and Jane C. Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (New York: Cambridge University Press, 2010) at 105.

[146] William M Landes & Richard A Posner, "Indefinitely Renewable Copyright" in Ruth Towse & Richard Watt, eds, *Recent Trends In The Economics of Copyright* (Cheltenham: Edward Elgar, 2008) 52 at 56-65.

[147] Anne Barron, "Copyright Infringement, 'Free-Riding' and the Lifeworld" in Lionel Bently, Jennifer Davis and Jane C. Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (New York: Cambridge University Press, 2010) at 105.

g. *Deconstitutionalization of Copyright*

Many intellectual property rights are not held by their creators; for example *The Act*[148] allows the creator of a work to assign or license the copyright in that work.[149] It can be divided vertically or horizontally to further the economic objectives of copyright, a hallmark affirmed by Abella J. in *Euro-Excellence v Kraft Canada*.[150] In itself, this is not detrimental to the goals of copyright. Assignability provides benefits to creators and to other right holders in that the remunerative possibilities of the work of a creator become greater when exploited by an organization capable of effectively doing so.[151] Perhaps in theory it would then make sense that the more protection afforded to a copyright owner, for example by increased restrictions on use and access or by extending the length of protection, the remunerative possibilities will increase linearly. This was the part of the logic behind the US Supreme Court's decision in the case of *Eldred v Ashcroft*.[152]

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[148] The ability of a creator to exploit the expression of her idea often depends on its exposure to the public and distribution capabilities of the assignee. For example in the case of a musician, selling enough records to make a living may not be possible without the assistance of a record company or publisher willing to exploit the product; however, assignment of the copyright is often required in order to do so.

[149] Section 13(4) of the *Copyright Act* allows the owner of the copyright to "assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence". For a valuable copyright, such a broad scope for assignability creates the potential for revenue streams from around the world.

[150] *Euro-Excellence v Kraft Canada Inc*, 2007 SCC 37, [2007] 3 SCR 20 at para 117, Abella J.

[151] This could be a record company or film studio, entities that possess the means to allow greater dissemination of a work.

[152] *Eric Eldred, et al v John Ashcroft, Attorney General*, 537 US 186 (2003), 123 S. Ct. 769, [*Eldred*]. The US Supreme Court held that twenty-year retroactive copyright extensions did not violate US law or the First Amendment.

In *Eldred*, an online publisher of works in the public domain challenged the constitutionality of the US *Copyright Term Extension Act*[153] which extended the life of a copyright by twenty years, to the life of the author plus seventy years. This had the effect of preventing works that would have otherwise been entering the public domain at specified time, from entering. By retroactively extending copyright terms the court's decision in *Eldred* provided additional distance between the historical ideals that helped establish copyright as a successful institution. Some commentators have referred to this as the deconstitutionalization of copyright, which undermines prior democratic safeguards.[154] The impacts of the decision have, as might be expected, made their way into the Canadian sphere. However, as held in *Eldred*, the early ideals of copyright have become obfuscated in an era where the ability to control content has become commensurate with power.[155]

h. *Business Models Based On Controlling Access*

Typically, the value of a business model is intrinsically linked to the intellectual capital of its assets, and the ability of a business to restrict or regulate use of its intellectual capital can correlate to its ultimate viability.[156] In following, the ability to control access to intellectual capital almost always favours the corporation over the consumer due in part to the inequality of bargaining power at the table. Ginsburg takes

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[153] 112 Stat 2827 (1998), Pub L 105-298 (27 October 1998).

[154] See Siva Vaidhyanathan, "The State of Copyright Activism" (2004) 9(4) First Monday, online: First Monday <http://firstmonday.org/issues/issue9_4/siva/index.html>.

[155] *Ibid*.

[156] See Mikko Välimäki & Ville Oksanen, "DRM Interoperability and Intellectual Property Policy in Europe" (2006) 26(11) Eur IP Rev 562, online: SSRN <http://ssrn.com/abstract=1261643>.

the view that more control over copyrightable material, especially access controls, facilitates increased viability for business models that rely on usage rather than the consumer retention of a copy of the item.[157] While this may be true, it has titled the balance of copyright toward right holders as seen in *Eldred*. Access controls may actually be more important than copy controls, as most consumers simply wish to view or listen to material rather than keeping a copy for themselves.[158] It is thus no surprise that Ginsburg advocates for increased access controls, as such controls are the most direct method of income generation.

The landscape of Canadian copyright is no exception. As a result, there has been a move from the commercial sector to secure, protect and regulate their intellectual assets, including copyright.[159] Charlie Angus, the NDP Member of Parliament for Timmins-James Bay observes that in the US there has been pressure from the copyright industries to lock down every available right, stating that "it becomes a question of whether we are updating copyright for the twenty-first century, or are we using the fear of copyright to bring forward a radical re-writing of copyright, so that we now have copyright in areas where it would have never been before."[160] As Angus notes, this is occurring in Canada as well.

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[157] Jane Ginsburg, *supra* note 48 at 115.

[158] It should be noted however that digital downloads from platforms such as iTunes are built upon user retention. The issue in this context becomes the transferability of the content onto other devices, and the number of times transfer is permitted, etc.

[159] Mikko Välimäki, "Strategic Use of Intellectual Property Rights in Digital Economy - Case of Software Markets" (2001) Helsinki Insitute for Information Technology, online: CiteSeer <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.196.5665>.

[160] *Rip! A Remix Manifesto*, Dir. Brett Gaylor, DVD: (Toronto: Kinosmith, 2009) [*Rip!*].

Professor Robert Merges believes the practice of 'locking down rights' should be justifiable by citing that the copyright industries, particularly the large companies that Angus accuses of pursuing using fear-based tactics to advance their own bottom line, are indispensable as they provide the backbone for the creative professions and employment to a large number of people.[161] Merges observes that

> the paradox [is] that these large companies support the conditions that make it possible for more creative professionals to work independently, or at least in small creative teams. One reason large companies thrive in some cases is that individual ownership creates significant transactional costs. Thus, lowering transaction costs is an important corollary goal of any effective IP system.[162]

Credit should be given to Merges, who attempts to maintain a pluralist and objective perspective throughout his analysis of creative professionals and corporate ownership. While Merges does make valid observations with respect to the role played by large companies vis-à-vis employment and support of smaller enterprise, he neglects to consider the fact that many of the copyright owning industries continue to employ bureaucratic, top-down business models including litigation-based strategies and push marketing that put the needs of a small few before those of the consumer. As William Patry observes, "Consumers are king - not control, not copyright, and not content. Without consumers, copyrights and content have no economic value."[163]

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[161] Robert P Merges, *supra* note 85 at 222-23 & 225.

[162] *Ibid* at 235.

[163] William Patry, *supra* note 17 at xx.

i. *US Market Development Strategy of the 1990s and its Exportation*

While wealth prior to and during the twentieth century was based largely on real property and land, in the twenty-first century it is based on the economy of intellectual property and ideas. According to Bruce Lehman[164] who has been referred to as the "architect"[165] of the WIPO Internet Treaties and the US *Digital Millennium Copyright Act*,[166] "[i]n a modern economy, wealth lies in products of the mind."[167] This sentiment is reflected in large part by the market development policy choices of the US in the 1990s that were overseen in part by Lehman. The US saw the potential for the generation of wealth, however in pursuit of this may have overstepped the mark in its 'all-or-nothing' approach. This approach involved abandoning low-wage manufacturing jobs (which were outsourced to developing markets like China) and attempting to compensate for the losses by replacing them with higher paying, technology or information-based jobs. However, to retain jobs the value of the information on which they were based required maximization hence the drive toward the commodification of cultural products.

Part of the US strategy to encourage the global adoption of policies prohibiting the copying of American ideas without American permission was simply to make imports

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[164] Between 1993 and 1998, Bruce Lehman served as Assistant Secretary of Commerce for Intellectual Property and was the Commissioner of the United States Patent and Trademark Office during the Clinton administration. Lehman was responsible for orchestrating many of the broad policy choices of the US during that time including the WIPO Internet Treaties and US copyright legislation.

[165] Michael Geist, "DMCA Architect Acknowledges Need For A New Approach" (23 March 2007), online: <http://www.michaelgeist.ca/content/view/1826/125/>.

[166] United States, *Digital Millennium Copyright Act*, 112 Stat 2860 (1998), Pub L 105-304 (28 October 28 1998), online: <http://www.copyright.gov/legislation/dmca.pdf>, [*DMCA*].

[167] *Rip!, supra* note 160 .

or exports of manufacturing products contingent of the adoption of these policies. Professor Helle Porsdam of the University of Copenhagen suggests that "we are presently watching the US moving toward hegemony by adapting international law for its own purposes."[168] Commentators have pointed to the *Agreement Establishing the World Trade Organization,*[169] an agreement that has permitted the US to pursue such a distinctly unilateral agenda, as contributing to the teeth behind this strategy.[170] By disregarding existing legal norms or customary international law, selectively avoiding other agreements that may counter its goals and valuing domestic law above international law, a build-up of private power over cultural (and other) output has become possible.[171]

Cory Doctorow believes that the viability of this policy was contingent on other countries following the intellectual property model set out by the US, but points out that developing countries are simply unable to do so. The point is made that when the US was a developing nation after its own revolution, it did not honour the copyright of non-American authors; rather, foreign authors like Charles Dickens were "widely and enthusiastically" pirated by the American presses who used the proceeds to subsidize the establishment of homegrown authors like Mark Twain.[172] Doctorow goes on to state that the "notion that developing nations like Brazil, India or Burundi need a copyright law

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[168] Helle Porsdam, "From *Pax Americana* to *Lex Americana*: American Legal and Cultural Hegemony" in Fiona Macmillan, ed, *New Directions in Copyright Law* (Cheltenham: Edward Elgar, 2005) 91 at 92.

[169] *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994) [*WTO Agreement*].

[170] *Rip!*, *supra* note 160.

[171] Helle Porsdam, *supra* note 168 at 92 & 105.

[172] *Rip!, supra* note 160.

like US in order to compete with America is wrong. What American history has shown us is that such countries need a copyright law like America had in 1776."[173] While Doctorow may be somewhat overzealous in his observation, his point is well-taken. The concept of a growing need to 'compete' with other nations is intensified by efforts to harmonize global standards for the treatment of products of knowledge. This will be discussed below with reference to international trade agreements, and how they can become disruptive to well-functioning national orders.

Lehman, while still an advocate of strong protections for intellectual property, believes that the US policies have not achieved the results they had hoped for when they were originally developed. At a conference at McGill University in 2007 Lehman revealed his doubts on the pursuit of a control model based on digital protections as an appropriate strategy, as "teens have lost respect for copyright."[174] Moreover, Lehman pointed to the failure of the entertainment industry to adapt their control-based business model to emerging platforms facilitated by the internet as a key reason as to why the US policies did not work.[175] Since enacting its market development strategy based on intellectual property rights the US trade deficit has nearly tripled, and Lehman questions whether the US should have opted instead for other means of building the economy such as labour standards or the environment.[176] Critics of this approach point out that the US

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[173] *Rip!, supra* note 160.

[174] Michael Geist, *supra* note 165.

[175] *Ibid*.

[176] *Rip!, supra* note 160.

has tried to build an economy that simply cannot be built. As the global economy continues into recession, one can only query where it might be at this time had the US opted for a stronger, more foundational approach to its economy.

The current metaphor has outgrown and become misaligned with the current framework, and rather than seeking a balance it seeks control. Any indication of a social 'like-for-like' exchange, or arrangement producing benefits for all stakeholders as the precursor metaphors have demonstrated are non-existent. Perhaps in the digital era, where even a copyright model based on 'enlightened shareholder value'[177] would seek a measure of balance between control and access if for no other reason than to appear balanced, the desire to control content appears to be insuperable. Despite the surprising admissions of Bruce Lehman, cultural products appear set to continue towards increased commodification and monetization. The framework of international norms that play such an influential role in copyright policies around the world will be discussed in the following section.

j. *Exporting Ideals*

The customary international legal principle of state sovereignty allows a state the freedom to enact legislation to enable the pursuit of societal objectives. For example, across Canada the act of prostitution is not illegal; alternatively, in the US this is

[177] To borrow a phrase from securities law, enlightened shareholder value continues to keep an eye on the bottom line while seeking sustainable growth and attention to the complete range of stakeholder interests. See David K Millon, "Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law" (16 June 2010) Washington & Lee Legal Studies Paper No 2010-11, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750>.

generally not the case.[178] While this distinction may push observers to query the varied approaches taken by the respective states, international norms do not necessarily dictate specific outcomes with respect to prostitution. In the end however, the net outcome is effectively equivalent as Canada has pursued other means to discourage and make it difficult to engage in prostitution. Drawing on the concepts of sovereignty and prostitution in a discussion of copyright, while perhaps unorthodox, serves to illustrate the point that while copyright policy making is free to the individual state, there is a growing body of international norms and resultant pressure to conform to specific outcomes. States adhering to modern copyright ideals face such pressure, and are often constrained in the pursuit of routes to reach their legislative objectives.[179]

Nevertheless, in the case of copyright a dichotomy results as legislative freedom becomes subject to several exacting international obligations. David Held writes that

> the classic regime of sovereignty has been recast by changing processes and structures of regional and global order - states are locked into diverse, overlapping political and legal domains... National sovereignty and autonomy

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[178] Industry Canada, Crime Comparisons Between Canada and the United States by Maire Gannon (Ottawa: Canadian Centre for Justice Statistics, 2001) at 3, online: Statistics Canada <http://publications.gc.ca/collections/Collection-R/Statcan/85-002-XIE/0110185-002-XIE.pdf>.

[179] Copyright is provided by the vast majority of countries in the world, although terms and enforcement varies. International conventions such as *Berne* mandate specific minimum terms to which signatory countries must abide. There is no customary international legal obligation to provide copyright, although countries choosing not to face significant international pressure to strengthen laws. For example, Laos does not have any copyright law; see International Intellectual Property Alliance, *2007 Special 301 Report Special Mention: Laos (Lao People's Democratic Republic* (12 February 2007) at 511, online: IIPA <http://www.iipa.com/rbc/2007/2007SPEC301LAOS.pdf>. In Albania copyright is provided for the author's life plus seventy years, although recently it has come under pressure as there have been complaints from the film and software industry noting severe enforcement problems; see International Intellectual Property Alliance, *2011 Special 301 Report on Copyright Protection and Enforcement* (15 February 2011) at 286, online: IIPA <http://www.iipa.com/rbc/2011/2011SPEC301ALBANIA.pdf>. Albania serves as an important example, and a parallel may be drawn with other domestic enforcement regimes, including Canada. Outdated copyright laws fail to meet the quid pro quo character of the *Statute of Anne*; likewise, copyright serves little purpose without effective enforcement.

> are now embedded within broader frameworks of governance and law, in which states are increasingly but one site for the exercise of political power and authority.[180]

The fact that approximately 80 per cent of the world's sovereign states are *WTO Agreement* members serves to illustrate a shift towards meta-harmonization carrying with it a subtle erosion of state sovereignty in their respective policy goals.[181] This shift is based upon three primary forces: first, intellectual property as a fundamental component of global economies; second, the use of technology to access content; and third, the effects of globalization have all but eradicated the territoriality component necessary in copyright regimes of old.[182]

Copyright regimes are made increasingly complex in that despite *prima facie* law-making autonomy, there exists a backdrop of international agreements and treaties available to deliver a degree of international uniformity to what would be an otherwise erratic global copyright regime. It has been remarked by Dr. Mihaly Fiscor, an influential policy maker at the WTO and WIPO, that changes in international norms are necessary to ensure that the fundamental organizing principles of copyright do not change.[183] However, changes in norms do not necessarily precipitate ideal circumstances in which to ensure copyright remains relevant. The norms the Dr. Fiscor references are

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[180] David Held, "Law of States, Law of Peoples: Three Models of Sovereignty" (2002) 8 Legal Theory 1 at 17.

[181] World Trade Organization, *Members and Observers*, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>. This figure is accurate as of 10 May 2012.

[182] David S Evans, "Who Owns Ideas? The War over Global Intellectual Property" (2002) 81(6) Foreign Affairs 160 at 162.

[183] Mihaly Fiscor, *supra* note 33.

manifested in trade agreements, where cloaking intellectual property within a larger trade remit is viewed by policy makers as vital to maintaining the success and efficiency of other aspects of global trade. Indeed, the digital economy has necessitated another look at copyright although whether the fundamental organizing principles have remained the same is questionable.

Greater uniformity carries obvious benefits to a particular class of stakeholders, as globalization has strengthened the viability of a range of business models utilizing the internet as a means of distribution. Rights management and 'fencing' aspects of electronic activity have become a large part of such models and as a result, significant steps have been taken to mandate protection of access and copy control mechanisms available to right holders. While even critics of copyright agree that a flexible system is vital to maintaining a healthy social and cultural environment,[184] this robust shift in power must be questioned as it appears to distance itself from the 'balance' maxim that is vital to copyright from the Canadian perspective, particularly as advocated by the SCC.[185] Vaver asserts that Canadian copyright law appears to be designed "by big business for big business"[186] drawing more benefits from the system than the actual creators of the material itself.

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[184] Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008) at xvi. Professor Lessig is an eminent critic of the evolution of modern copyright, but nonetheless agrees that when a copyright regime is balanced, it facilitates and inspires various forms of creativity.

[185] There may be no stronger evidence of the purported importance of balance in Canadian copyright as the federal government's media campaign for its copyright reform process, which is called "Balanced Copyright". See Industry Canada and Canadian Heritage, *Balanced Copyright*, online: Government of Canada <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/home>.

[186] David Vaver, *supra* note 43 at 292.

In contrast to the conceptual outcomes that are envisioned by the international treaty framework, the potential for greater standardization is in fact mitigated by the piecemeal fashion in which international agreements are signed and ratified. Sara Bannerman writes that "[d]omestic and international demands often conflict, and there is often significant resistance within Canada to demands for reform coming from outside the country".[187] This potential for conflict was encapsulated during the copyright consultations conducted by Industry Canada and Canadian Heritage in 2009 as part of the government's bid to update *The Act*, which encouraged members of the public to make submissions that spoke to how copyright affected them, how it should be modernized, and the role played by Canadian values in updating the legislation. As the digital economy is not restricted by domestic boundaries,[188] international copyright law becomes disparate as the level of implementation of the treaties, which are often couched in high level language, need not conform to any other domestic interpretation so long as they are given appropriate legal effect. In spite of the piecemeal ratification process and the conflict between domestic and international copyright norms as referred to by Bannerman above, the sheer inertia behind these powerful trade agreements makes it extremely difficult to integrate substantially different outcomes other than those mandated by the agreement itself, into domestic law. The Royal Assent of Bill C-11 is illustrative of how

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[187] Sara Bannerman, "Copyright: Characteristics of Canadian Reform" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 17 at 17.

[188] See Paul Torremans, *supra* note 11 at 99.

despite domestic resistance[189] to changing international norms the end result was little more than a foregone conclusion.

The agreements discussed in the following section were designed to provide guidance for national copyright frameworks, while ensuring as many nations as possible ratified as this guaranteed the protection of the works of its citizens. While perhaps less controversial in that they were developed during a period where the working copyright metaphor was *quid pro quo*, where authors were granted with a set of limited rights in exchange for promulgating their work to the public based on the understanding that at some point in the future the work would be freely available to the public in the public domain,[190] they nonetheless remain rooted in the discriminatory features of copyright that permit its enforceability; namely citizenship and place of publication.[191] The justification for the discrimination was encouragement to ratify the agreement. Tactics like this are now used frequently, as it is thought by copyright industry that by decreasing the number of outstanding countries that do not offer like protections they become increasingly easier to enforce on a large scale.[192]

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[189] The resistance in Canada was made especially clear in Parliamentary debate over Bill C-11, with NDP and Liberal MPs voicing their concern over parts of the Bill. Any concerns held by Conservative MPs (and there can be little doubt of their existence) were drowned out by party whips. For further discussion on Bill C-11 see chapter six, below.

[190] Jessica Litman, *supra* note 31 at 78.

[191] Adrian Sterling, "Current Issues: National, Regional and International Perspectives" in Brian Fitzgerald & Benedict Atkinson, eds, *Copyright Future Copyright Freedom: Marking the 40 Year Anniversary of the Commencement of Australia's Copyright Act 1968* (Sydney: Sydney University Press, 2011) 200 at 201-202, online: <http://eprints.qut.edu.au/41716/1/CopyrightFuture_TEXT.pdf>.

[192] David S Evans, "Who Owns Ideas? The War over Global Intellectual Property" (2002) 81(6) Foreign Affairs 160 at 162.

k. *Treaties, Trade Agreements and Domestic Effects*

*The Act* ratifies or is aiming to ratify a series of Canada's foremost international obligations. For example, the *Berne* provides protection for "traditional" works such as literary, dramatic and artistic works including films, computer programs[193] and mandates "national treatment and high minimum standards of protection for copyright and moral rights, without registration or other formality".[194] Under *Berne* Article 5(2), copyright arises when a work or sound recording is made, or when a performance or broadcast occurs copyright arises without formal registration. Presumably, the provision is intended to allow anyone, without disadvantage, to express an idea and receive protection for it - a proviso that made *Berne* popular internationally. *Berne* has been ratified by 165 countries, making it a ubiquitous force within the domain of global copyright law.[195]

The *Rome Convention for the Protection of Performers, Producers of Phonograms & Broadcasting Organisations*[196] was established as a response to technological developments enabling the capture of sound, and extended standardized protection for sound recordings, performances and broadcasts.[197] *Rome* provides a degree of flexibility for national implementation with respect to private use, use of

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[193] David Vaver, *supra* note 43 at 31.

[194] David Vaver, "Canada's Intellectual Property Framework: A Comparative Overview" (2004) 17 IPJ 125 at 129.

[195] WIPO, *Treaties and Contracting Parties*, online: <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>.

[196] *Rome Convention for the Protection of Performers, Producers of Phonograms & Broadcasting Organisations*, 26 October 1961, 496 UNTS 43 [*Rome*].

[197] David Vaver, *supra* note 43 at 67.

excerpts for reporting current events, ephemeral fixation, and a non-exhaustive list including teaching and scientific research.[198] Contrasting *Berne*, *Rome* has significantly fewer contracting parties and remains to be ratified by several others making it relatively less significant.

*Berne* was an early example of the success that could be gained from an agreement establishing a degree of uniformity for the international treatment of copyright content. The above discussion highlights the manner in which *Berne* brought works that are still considered traditional together and developed a set of standards to be applied to each category of work. It sought to create standards that furthered the organizing principles of copyright, that of engendering the inducement for a nation to export cultural content, which would have the effect of stimulating innovation on a larger scale, while providing an incentive for importing countries to offer protection to foreign creators. Although by most accounts not controversial and not discussed in any depth in the literature, *Rome* expanded the boundaries of copyright as it brought protection to new content. While *Berne* and *Rome* are outwardly anodyne conventions that strive to create reasonable parameters for copyright rights and protections, the same cannot be said of the rise of the trade agreement as a vehicle for exporting intellectual property policy.

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[198] WIPO, *Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)*, online: <http://www.wipo.int/treaties/en/ip/rome/summary_rome.html>.

The *North American Free Trade Agreement*[199] is an example of a multilateral agreement that included intellectual property rights (IPRs). Chapter 17 of *NAFTA* provides for the protection of intellectual property rights, enumerating in Article 1701(2) several international agreements, including *Berne*, that must be given effect. Article 1701(1) mandates effective protection of intellectual property rights while not going so far as to inhibit trade relations between parties to the agreement. Article 1705 addresses copyright in a *Berne*-plus manner focusing primarily on equality of application in trade relations. The net result for Canada insofar as its treatment of IPRs was concerned was that the infrastructure to meet the requirements of *NAFTA* were already in place. Therefore, while *NAFTA* largely consolidated standards that were already in effect in its member countries thus not provoking a substantial amount of controversy,[200] it serves to substantiate the purported efficacy of including IPRs in a trade agreement and is an early model and precursor toward a shift for larger, more expansive multilateral agreements.

Although the discussion of intellectual property (which was then viewed as "information with a commercial value"[201]) under the auspices of the *General Agreement on Tariffs and Trade*[202] began as early as the mid-1970s, it was not until the Uruguay

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[199] *NAFTA*, supra note 26..

[200] That is, at least for its inclusion of intellectual property rights within the agreement. The social implications and resistance towards *NAFTA* as a whole are well documented in the literature.

[201] Carlos A Primo Braga, "Trade-related intellectual property issues: the Uruguay Round agreement and its economic implications" in Keith E Maskus, ed, *The WTO, Intellectual Property Rights and the Knowledge Economy* (Cheltenham: Edward Elgar, 2004) 3 at 3.

[202] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, Can TS 1947 No 27, 61 Stat pt 5 (entered into force 1 January 1948), online: WTO <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>.

Round where IPRs were considered in earnest.[203] Prior to the Uruguay Round, IPRs only arose in the context of counterfeit trading.[204] The agenda for copyright expansion that was to follow was initiated via a stipulation requiring that member states must protect computer programs and databases.[205] As the value of these innovations was becoming readily apparent, subsequent inclusion into a large multilateral agreement was viewed as a viable method of capturing and controlling their value and at the same time legitimizing enforcement mechanisms, while attempting to minimize the perceived weakening of control by including as many nations into the agreement as possible so as to avoid 'watering down' the agreement.[206]

The *Agreement on Trade-Related Aspects of Intellectual Property Rights*[207]*,* which is annexed to the *WTO Agreement* mandates "national and most-favoured nation treatment and high levels of protection for all intellectual property rights globally".[208] This language is somewhat reminiscent of the above discussion of *NAFTA*, in that it favours a maximalist view of protection for right holders. Furthermore, as *TRIPs* brings

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[203] S*upra* note 201 at 3.

[204] *Ibid*.

[205] Pamela Samuelson, "The U.S. Digital Agenda at WIPO" (1996-1997) 37 Va J Int'l L 369 at 378.

[206] Christopher May, *The Global Political Economy of Intellectual Property Rights*, 2d ed (New York: Routledge, 2010) at 71.

[207] *TRIPs*, *supra* note 27. As Annex 1C of the *Marrakesh Agreement Establishing the WTO*, Articles 9-14 of *TRIPs* mandates compliance with *Berne*, provides protection for computer programs and compilations of data (Art. 10), rental rights (Art. 11), limitations of the ability of a signatory to limit or confine the rights of a right holder (Art. 13).

[208] *Supra* note 193 at 129.

most of the *Berne* provisions[209] within the remit of the *WTO Agreement*, it has the effect of extensively widening the scope for enforcement as there are many *WTO Agreement* members that did not sign on to *Berne*. For example, the US has pursued an aggressive enforcement strategy of filing *WTO Agreement* complaints against nations having allegedly violated a provision of *TRIPs*.[210] The demanding nature of compliance for developing nations within the *TRIPs* framework is made increasingly onerous as substantive standards of review that were previously bifurcated to fit the needs of developing nations were now brought under one umbrella. A primary target of the US in developing the *TRIPs* agreement was to eliminate the previously applied concept of substantive special and differential measures for developing countries to bring all nations accountable to the same standards.[211]

As the *TRIPs* agreement arose from the Uruguay round of *WTO Agreement* meetings and effectively brought the international treatment of intellectual property to a level never before experienced there has been extensive criticism of a tactic that has been used in "an attempt to establish new opportunities for revenue gathering (without additional investment) for global corporations."[212] What was previously a specialized

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[209] Article 6bis of *Berne*, regarding author's moral rights is not included in the *TRIPs* agreement, however it maintains that *Berne* shall be complied with.

[210] Susan K Sell, "Life After TRIPS - Aggression and Opposition" in Keith E Maskus, ed, *The WTO, Intellectual Property Rights and the Knowledge Economy* (Cheltenham: Edward Elgar, 2004) 72 at 80.

[211] Judith H Bello, "Some Practical Observations About WTO Settlement of Intellectual Property Disputes" (1996-1997) 37 Va J Int'l L 357 at 363-364.

[212] Christopher May, s*upra* note 206 at 72.

legal concept became a reality capable of drastic social implications.[213] Under the above umbrella of provisions, Canadian copyright protection widely extends to copyrightable material emanating from a *Berne*, *WTO Agreement*, *Universal Copyright Convention*[214] or other Commonwealth country, and to foreign material so far as Canadian material is protected in its country of origin.[215]

The inclusion of IPRs within *TRIPs* has prompted concerns over the appropriateness of using a multilateral trade agreement to harmonize and mandate the national treatment of IPRs for reasons ranging from the mere fact that the subject of intellectual property (and thus of course, copyright) itself may not be "sufficiently closely related to trade liberalization"[216], to the more abstract reason that it lowers the welfare of many countries involved.[217]

One scholar makes the point that subsuming intellectual property within trade agreements is extremely beneficial for countries with a net-export of intellectual property products.[218] By incorporating external items previously dealt with through other agreements such as *Berne*, the crystallization of intellectual property in a trade agreement gives an increasing level of control to net-exporting countries over weaker nations.

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[213] Roya Ghafele, "Perceptions of Intellectual Property: a review" (Report presented to the Fordham IP Conference, 16 April 2009), online: Fordham IP <http://fordhamipconference.com/wp-content/uploads/2010/08/Roya_Ghafele_Perceptions_of_Intellectual_Property.pdf>.

[214] *Universal Copyright Convention* (Paris, 1971), 6 September 1952, 943 UNTS 178 [*UCC*].

[215] David Vaver, *supra* note 43 at 67.

[216] Arvind Panagariya, "TRIPs and the WTO: An Uneasy Marriage" in Keith E Maskus, ed, *The WTO, Intellectual Property Rights and the Knowledge Economy* (Cheltenham: Edward Elgar, 2004) 42 at 42.

[217] *Ibid*.

[218] William Patry, *supra* note 17 at 247.

While it may seem illogical that net-importing countries would agree to offer protections that do not provide any true benefit to their own intellectual property innovation, uneven trade agreements such as *TRIPs* are often formed around an exchange. It is pointed out that the only rational explanation for allowing the incorporation of IPR protections into the *WTO Agreement* which subsequently ensures developing countries are held to the same standards as developed nations is that they gained something in return.[219] This was precisely the carrot that developed nations could dangle in front of their counterparts, to entice participation in *TRIPs*. Developed countries in the *WTO Agreement* agreed to end the Multi Fibre Arrangement (MFA) which has been described as a "gigantic beast, requiring a weapon of exceptional power."[220] The MFA was a system of quotas designed to limit the export of textiles to developed nations from developing ones, as they traditionally enjoyed an advantage in producing a labour-intensive product through cheap labour. The MFA had a general detrimental impact on developing nations, with estimates of $40 billion in lost exports each year.[221] Thus, it is not difficult to see why the discontinuation of the MFA was what developed nations needed to ensure developing ones were on board, although removal of the MFA has been cited as an unequal bargain in that it consisted of an exchange of trade concession for a non-trade concession whereby developed nations benefitted from both aspects while developing nations had to accept the trade-off.[222]

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[219] Arvind Panagariya, *supra* note 216 at 43.

[220] *Ibid*.

[221] KM Chandrasekhar, Address (delivered at the EC Conference on the Future of Textiles and Clothing after 2004, Brussels, 5 May 2003) [unpublished], online: European Commission <http://trade.ec.europa.eu/doclib/docs/2005/may/tradoc_123170.pdf>.

[222] Arvind Panagariya, *supra* note 216 at 44.

l. *Conclusion*

When control supersedes the consumer's willingness-to-pay, consumers and users will turn elsewhere to access information. This consumer/user reaction has occurred, for example, through online file-sharing websites like Napster, and currently through more advanced sites like isoHunt, The Pirate Bay, and Torrentz.eu which do not host any material at all but rather point the way to it. These websites continue to operate under the threat of legal action.[223] This begs the question: Why do these sites continue to operate, knowing that large fines or other penal sanctions are possible, or even likely? Moral reservations regarding the impacts of such services notwithstanding, surely they exist in part to underline an ideological belief. This belief may be rooted in the 'E' in Vaver's rights allocation equation as discussed above, and that its systematic erosion has manipulated and extended copyright beyond its the scope it was intended to cover. Lessig points out that if we continue along this course of hyper-controlled information, by continuing to restrict use and access, we may create an entire generation of criminals.[224]

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[223] In *A&M Records, Inc v Napster, Inc* 239 F.3d 1004 (2001) the United States Court of Appeals for the Ninth Circuit held that the file-sharing website Napster was liable for copyright infringement. The list of plaintiffs in that case included a long list of record labels, all of whom were members of the Recording Industry Association of America (RIAA). In the US the RIAA has used civil lawsuits, many of which commentators claim have been malicious, to make a point against online file-sharing. Although the entertainment industry usually comes out on top in these legal battles, by continuing to view the issue strictly as a legal problem and not a business model problem, the cycle of malicious and ineffective lawsuits will simply continue to spiral in no particular direction at all. See Mike Masnick, "Pirate Bay Loses a Lawsuit; Entertainment Industry Loses An Opportunity" *Tech Dirt* (17 April 2009), online: <http://www.techdirt.com/articles/20090417/0129274535.shtml>.

[224] *Rip!, supra* note 160. Also in this film, Brett Gaylor and Lawrence Lessig move outside the realm of copyright while staying within intellectual property to discuss how Brazil defied US intellectual property law by breaking multiple international patents on HIV/AIDS medication. Brazil produced its own copies for a fraction of the price, thus enabling those in need but who would otherwise have had no means of access, to use the medication. The international pharmaceutical industry perceived this as an act of war, and while Brazil's Minster of Health admitted that the policy was controversial, it was essential to providing life for Brazilians living with HIV/AIDS. Using the Brazilian model, Lessig co-founded the Creative Commons movement with the objective of setting culture free and to take and build upon it.

What has driven the ongoing debate in Canada is the notion that use extends beyond privilege, and that there are rights attached their use of the material *ab initio*. But how far do the rights, if they exist, go? It is important to look objectively at the role served by the institution of copyright, how it might maintain its relevance in Canadian society, and whether it is possible for Canada's copyright legislation to manifest Canadian values in light of Canada's international treaty obligations, and pressure from trading partners.

# CHAPTER IV

## MOBILIZING RHETORIC: PROTECTING AN OUTDATED BUSINESS MODEL

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*The struggle that rages just now centers on two ideas: "piracy" and "property."*[225]

- Lawrence Lessig

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### a. *Introduction*

This chapter endeavours to carry on from ideas established in the previous chapter. The manner in which cultural products have taken on unprecedented levels of value in the global marketplace, and how this calculated tactic seems to have backfired does not seem to have dissuaded the copyright-owning industries to adapt their approach to ownership and control. Now more than ever, the mediascape has become filled with theory based on a fragmented interpretation of Lockean and utilitarian models. The public has become subject to forces seeking dominance and control over cultural content, and to accomplish this, rhetoric has become a tool used to distract stakeholders from the key issues that must be resolved if institutional copyright can move forward into the digital era.

The value of copyright content is such that there is a great deal of money and control at stake and because of this, new techniques used to preserve and protect investments in content are brought forward. Trade agreements were highlighted above as

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[225] Lawrence Lessig, *supra* note 116 at 13.

a mechanism used to bring greater uniformity to copyright frameworks around the world, making its commodification increasingly streamlined and easy to fit within economic models. In this chapter, examples including the use of language to invoke feelings of moral ambiguity and uncertainty in how the copyright debate is viewed will be considered. Building on from this it will be established that support for instruments of copyright expansion, including the legal protection of digital controls, through both natural rights and utilitarian logic has become an accepted, although highly controversial direction taken by copyright's global administrators.

b. *Stretching the Limits*

One of the concerns facing current global copyright law policy makers is how to best accommodate its subtle expansion - both legally and socially - which has been rapidly noticeable in recent years. This expansion should not be confused with the need for technological neutrality within copyright law - a malleability that is necessary for the law to address novel circumstances. It is essential for the law to be able to adapt to and embrace emerging technologies, a point not lost on Rothstein J. in the SCC Pentalogy case of *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,[226] a decision that emphasized the importance of a technology-neutral application of the law to downloading and streaming of music files from the

[226] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (available on CanLII) [*Rogers v SOCAN*]. See especially paras 35-8, where Rothstein J. affirms the neutrality of *The Act*. Although a sound regulatory framework should be capable of addressing and adapting to technological development, there are invariably situations that are not envisioned or foreseen at the time a law is enacted. An example is ISP liability which was uncertain until *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 where it was held that in respect of file-sharing or illegally downloaded copyright material from the internet, the content-neutral function of an ISP could not itself attract liability.

internet. Rather, the limits that are being stretched are in fact issues stemming from developments that have already been unearthed in this paper. For example, the inclusion of copyright in trade agreements that allow pursuit of a hegemonic agenda and as a sub-issue, the legal protections sought over the digital protection of content. Although this expansion has not gone unnoticed by commentators, the rhetorical battleground has fast become a means of influencing copyright policy changes. As Jessica Reyman puts it, "language not only works to persuade and convince audiences to act in a particular manner but... it also constitutes knowledge and perceptions, including complex legal concepts such as copyright"[227] which are manoeuvered very particularly to influence a specific outcome. Indeed, over time right holders have experienced an increasing, and what some would believe unwarranted, windfall of protection that benefits certain aspects of the content they control.[228] An example is the copyright term extension in the US which was discussed in the previous chapter. It is thus no surprise that the right holder lobby has harnessed this particular influential ability with a view to stretching the limits of protection as far as possible. With large sums of money now in the balance, it follows as a result of this discovery that copyright has tilted in the direction of expanding owner rights.

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[227] Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (New York: Routledge, 2010) at 28.

[228] In Canada, any additional protections received by owners have arguably been counterbalanced by the expansion of fair dealing and other consumer uses. However, an example of increasing right-holder protections are the statutory damages found in s 38.1 of *The Act*, allowing damages of up to $20,000 against an individual. Although this provision has been amended by Bill C-11, it bears the hallmarks of an era rooted in right-holder control, as exemplary punishment rather than measured sanction.

c. *Stopping the Pirates*

William Patry emphasizes the growing disconnect between the needs of copyright-owning industries in maintaining their status quo, and the true flexibility of a free market.[229] The industry has sought to retain control over the products available to consumers and what platforms are capable of hosting the product, with technology advancement viewed and presented as a threat. The 1984 case of *Sony Corp. of America v Universal City Studios, Inc.,*[230] where manufacturers of video-recording technologies such as the Betamax introduced the capability of recording live television which could be viewed at a later time (now more commonly known as time-shifting), did its part to briefly stem the rising tide of control as recording for the purposes of time shifting was held not to constitute copyright infringement. The Betamax represented a new way in which consumers could engage with content - the ability to watch programs of their choice, when they wanted to, with the ability to skip past commercials represented a small shift in control back to the consumer. However, when the *Sony* decision was released nearly three decades ago, to comprehend the rapidly changing manner in which consumers are now able to engage with content would have undoubtedly required some imaginative thinking. Despite the small consumer victory that was achieved by *Sony*, in the interim the control-based business model of the copyright industries has continued to progress. Effectively, the copyright industries have overturned the *Sony* decision, in part through digital lock provisions that are mandated in high level international treaties.[231]

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[229] See William Patry, *supra* note 17 at 2-11.

[230] *Sony Corp of America v Universal City Studios, Inc*, 464 US 417 (1984), 104 S Ct 774 [*Sony*].

[231] William Patry, *How to Fix Copyright* (New York: Oxford University Press, 2011) at 43.

Patry observes that the general business model employed by copyright-owning industries has been challenged by the internet, which has permitted experimentation with content delivery. Each new platform has provided another rung on the ladder from which to build upon. For example, iTunes would likely not be the streamlined juggernaut it is today without early incarnations of digital music delivery such as Napster, a platform that boasted 70 million users at its peak, drawing attention to the potential market for digital music.[232] The copyright industries have ardently resisted new technologies, in the same way they did with the Betamax, by describing them as *threats* to their way of business. Napster experienced the resistance of the copyright industry through its own share of litigation along the way. Consumers were told that downloading music through peer-to-peer (P2P) services was theft, and that artists were suffering through the decline in CD sales. Without delving into the ethical issues that our culture have been taught arise in a discussion on P2P sharing,[233] the decline in CD sales was more a function of market exhaustion than an either/or choice for consumers between digital or hard copy formats. It is probable that many of the consumers who had started to download music

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[232] Karla M O'Regan, "Downloading Personhood: A Hegelian Theory of Copyright Law" (2009) 7 CJLT 1 at 3.

[233] File sharing is an issue that we have been taught to view as theft or piracy. It is without doubt an important consideration that must be addressed, as unauthorized file sharing undeniably does not represent a balanced approach to copyright law. Commentators including William Fisher, Neil Netanel and Lawrence Lessig believe that some lateral thinking is required to tackle this situation. They are of the view that decriminalizing non-commercial file sharing is the most effective route forward, and by implementing a tax or license scheme to cover a reasonable royalty to the artists these ends could be fairly achieved. Lessig states that "a decade of fighting p2p file sharing has neither stopped illegal sharing nor found a way to make sure artists are compensated for unauthorized sharing. In short, the strategy of this decade has failed to advance the objectives of copyright law - providing compensation to creators for their creative work." Lawrence Lessig, *supra* note 184 at 271. Lessig's comments are on the mark, as it is clear that a strategy of inducing fear into consumers through threat of legal action has been unsuccessful. Netanel points out that "over 20 million audio files and as many as half a million video files were being exchanged each day." Neil Weinstock Netanel, "Impose A Non-Commercial Use Levy To Allow Free Peer-To-Peer File Sharing" (2003) 17 Harv JL & Tech 1 at 3. See also William W Fisher, *Promises to Keep* (Stanford: Stanford University Press, 2004).

online had likely purchased copies of CDs, or even cassettes of their favourite artists at some point. By downloading music online, the consumer was not so much making a choice (in the way someone might make the decision to walk into an HMV store and steal a CD) as he or she was simply keeping up with the cultural direction society was moving in (in the same way driving on a busy freeway necessitates assertive awareness to keep up with traffic). The true consequence of penalizing the individual consumer through the record companies' litigious business model was not to scare away the masses but to enshrine a loss of respect and sense of deep-seated distrust in consumers towards the record companies.[234]

By employing this type of rhetoric the copyright industries' business interests are conveniently glossed over while stark metaphors such as *war*, *piracy* and *theft* are used to invoke conflicting emotional responses, causing contrasting feelings of wrongdoing and patriotism (due to the alleged impact on the country's economy), while the *perils of copying* are *pilfering* and *assaulting* the economy.[235] This type of 'protection rhetoric' is not uncommon, and is generated in Canada primarily from arts organizations, the federal government and the cultural industries.[236] Copyright owners refer to online piracy, most commonly file-sharing through P2P networks, in the same sentence as other cybercrimes

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[234] See note 174, above, and accompanying text for a discussion on the market-development choices of the US, which played a large part in the reason why the copyright industries have been reluctant to give up their current business model, which previously saw extremely high returns.

[235] See William Patry, *supra* note 17 at xxi. See also William Patry, *supra* note 17 at 139-142 and the text on Motion Picture Association of America chairman and CEO Jack Valenti's 2002 testimony to Congress, and previous statements where Valenti draws on his military past going so far as to compare the digital shift to a "terrorist war" and making reference to September 11, 2001.

[236] Laura J Murray, "Protecting Ourselves to Death: Canada, Copyright and the Internet" (2004) 9(10) First Monday, online: <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1179>.

such as dissemination of hate propaganda, identity theft and paedophile networks.[237] As discussed earlier, P2P sharing does indeed raise ethical questions; however, elevating file sharing to the same level as the morally detestable acts mentioned above is a questionable tactic.[238] Jessica Litman remarks that the copyright industries have successfully co-opted the debate by pursuing other strategies as well. By appearing to take the moral high ground[239] through attempts to convince consumers that the reason for increased restrictions that limit access and use of content, the abilities of artists, authors and creators to make a living is being protected. However, the dominant purpose of the digital protection provisions of the WIPO Internet Treaties is not to further the protection of artists to make a living but rather to protect economic interests of distributors and copyright owners.[240] The ratio of royalties received by artists to the net profit made by its record company reveals that its pennies on the dollar - clearly helping artists make a

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[237] See Loraine Gelsthorpe, "Copyright Infringement: A Criminological Perspective" in Lionel Bently, Jennifer Davis and Jane C Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (New York: Cambridge University Press, 2010) 389 at 390.

[238] The appropriation of the word 'theft' by drawing the concept into the copyright debate is dubious, although indeed, the copyright industries use notions of stealing and theft to evoke emotional responses. Per the definition of theft in Canada's criminal legislation: "322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it..." *Criminal Code*, RSC 1985, c C-46. It follows that there must be a dishonest appropriation of property belonging to another with intent to deprive for there to be a theft. While this definition could artificially be interpreted in light of intellectual property, the fact that intellectual property is not property *per se* but rather a grant of statutory monopoly makes such comparisons somewhat misguided and overambitious.

[239] See Jessica Litman, *supra* not 22 where Litman indicates that several high profile cases have adversely affected the perceived legitimacy of the copyright industry's efforts to protect artists, authors and creators, and has significantly diminished as consumers have started to become that this is merely an illusory effort to protect bottom lines.

[240] Jeremy F deBeer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 89 at 97.

living and thus furthering innovation and culture is only a pretense for the desire for increased copyright protections over cultural products.[241]

In his 2002 testimony provided to several Congressional committees, Motion Picture Association of America (MPAA) chairman and CEO Jack Valenti maintained that the copyright industries generate "more international revenues than automobiles and auto parts, more than aircraft, more than agriculture."[242] The parameters used to determine those figures were not provided by Valenti. Although, notwithstanding how they are calculated, they would be difficult to challenge as their speculativeness would certainly invite a rebuttal to any challenge.[243] Valenti's sentiment pulls on patriotic heartstrings, and is enough to provoke slinking feelings of thievery within anyone. If that is not sufficient, Valenti goes on:

> Brooding over the global reach of the American movie and its persistent success in attracting consumers of every creed, culture and country is thievery: the theft of our movies in both analog and digital formats.
>
> Let me explain. Videocassettes, the kind we all use and enjoy, are in the analog format. Worldwide, the US movie industry suffers revenue losses of more than

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[241] See Steve Albini, "The Problem With Music" in Thomas Frank & Matt Weiland, eds, *Commodify Your Dissent: Salvos From The Baffler* (New York: WW Norton, 1997) 164, for an insider's perspective on how the record industry works.

[242] *A Clear Present and Future Danger: The Potential Undoing of America's Greatest Export Trade Prize, Testimony Before the Senate Foreign Relations Committee*, 107th Cong (Jack Valenti), online: Open Democracy <http://www.opendemocracy.net/media-copyrightlaw/article_58.jsp> ["Valenti"].

[243] Robert Merges has compiled an overview of the employment statistics a wages generated by members of the American copyright industries, however he does not attempt to quantify "international revenues"; see Robert P Merges, *supra* note 85 at 203-211. In the Canadian context it is estimated that copyright-based industries grew twice as fast as the economy between 1991 and 2002 while employment in the industry grew nearly four times as compared to the national economy; see Barry Sookman & Steven Mason, *supra* note 6 at 23-4. Notwithstanding the parameters used to determine the above figures, indeed it is safe to conclude that the copyright industries contribute significantly to the economies of the US and Canada.

> three billion dollars annually through the theft of videocassettes. That is a most conservative estimate.
>
> We are every day vigilant in combating this analog thievery because, like virtue, we are every day besieged. We are trying to restrain this pilfering so that its growth does not continue to rise to intolerable levels.
>
> But it is digital piracy that gives movie producers multiple heartburn. It is digital thievery, which can disfigure and shred the future of American films. What we must understand is that digital is to analog as lightning is to the lightning-bug.[244]

Valenti's passion for the preservation of American jobs is indeed commendable. Unfortunately, it is a last gasp in an attempt to preserve a business model that, although having made many people very wealthy, is not dictated by consumer demands. The 'push' marketing employed by copyright industries is driven not by true supply-and-demand market conditions but by an artificially created environment of control-and-command that has been likened to Soviet-era communism where "consumers will have what the Politburo decides they can have, when they can have it, in what quantities, at what price, where they can buy it, as well as how long it will be available".[245] Although presented in terms of the American film industry, this type of mindset is equally applicable to other content industries reliant on top-down business models including the record and book publishing industries.

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[244] *Supra* note 242.

[245] William Patry, *supra* note 17 at 6.

In contrast to the 'push' model, 'pull' marketing is represented by the internet's ability to meet the immediate needs of consumers by allowing for innovation and creativity. Digital music downloads is an example of pull marketing. Copyright owners have often claimed that the availability of single-song downloads (even legal ones) have contributed to the downfall of the record industry. Patry counters that assertion with an unassumingly obvious observation: the reason why CD sales have fallen so drastically is not because of the availability of digital downloads, but rather because CD sales have run their course.[246] Purchasers of CDs (many of whom already owned the cassette or LP of the same album they repurchased on CD) had exhausted all the CD purchases they were willing to make, and hence the market for CDs substantially diminished. It is reliance on a 'push' marketing mentality and need for control that continues to permeate contemporary regulatory frameworks.

Patry continues his analysis of how a pre-digital business model based on control of physical production and distribution must seek other avenues in order to remain viable:

> The transition from selling analog physical goods to digital, non-physical consumption is not one incumbent gatekeepers favor, for obvious reasons: It eliminates their traditional role in creating artificial scarcity, and thereby receiving monopoly profits. In an effort to create scarcity in the digital environment, copyright owners have obtained rights that give them the power to regulate technologies developed by third parties and to control access to their works. Neither of these rights previously existed. Previously, the copyright laws were technology neutral: They did not regulate technologies,

[246] *Supra* note 17 at 4-5.

> but rather they regulated uses of copyrighted material, regardless of the technology employed. Use of copyrighted works was the essence of copyright, not technology. The exercise of these new rights over new technologies has placed consumers at a comparative disadvantage from their experiences in the hard copy, analog world.[247]

As copyright was originally designed to regulate physical copying, it has expanded into the realm of technological controls which include substantial statutory and civil remedies available to copyright owners. Although not a new concept, the bolstering of protections for digital rights management information (RMI) systems, "data that provides identification of rights related to that work, either directly or indirectly"[248] and the more controversial technical protection measures (TPMs)[249] evidence the manifestation of mechanisms enabling the copyright industries to maintain and control artificial scarcity in the digital environment.

The paradoxical agglomeration of tangible and intangible property together as "property" represents a convenient albeit misleading way to perceive the two very distinct concepts. Simplistically viewing the two ideas as one construct has opened the door to the application of fragmented theoretical paradigms becoming attached to intangible property, an idea that was explored in chapter two of this paper. By taking concepts that ordinarily flow with tangible property rights and ownership and applying them to cultural products, the creation of scarcity becomes justified. Below, TPMs are

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[247] William Patry, *supra* note 231 at 43.

[248] Mark Perry, "Rights Management Information" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 251 at 251.

[249] TPMs and TPM policy concerns are explored in further detail in the following section of this paper.

highlighted as a technique that has been adopted to maintain artificial scarcity in digital products. Just as NDP MP Charlie Angus noted - with every new technology or platform to deliver cultural content, a new way to 'lock down' and control access follows suit.[250]

d. *Protecting Digital 'Property': TPMs*

With the widespread availability of digital content users have found replication, modification and transmission of works to be increasingly easy and cost-free - this has posed a problem for copyright owners who wish to maintain control over their content.[251] Proponents of increased legal protection for TPMs believe that without robust systems of protection in place the internet will become (or has already become) a digital 'wild-west' environment, ripe for theft of copyright materials with little scope for copyright enforcement. In a 1995 statement made before Congress Bruce Lehman advocated for the legal protection of TPMs:

> The ease of infringement and the difficulty of detection and enforcement will cause copyright owners to look to technology, as well as the law, for protection of their works. However, it is clear that technology can be used to defeat any protection that technology may provide. Legal protection alone will not be adequate to provide incentive to authors to create and to disseminate works to the public. Similarly, technological protection likely will not be effective unless the law also provides some protection for the technological processes

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[250] See note 160, above, and accompanying text.

[251] Pamela Samuelson, *supra* note 9 at 324.

> and systems used to prevent or restrict unauthorized uses of copyrighted works.[252]

Hearings of this nature in the US were running concurrently to the development of the WIPO Internet Treaties as officials at the US Patent and Trademark Office (USPTO) pursued additional layers of copyright protection. In contrast to the view taken by the USPTO, those in opposition believe that legally protecting TPMs will upset the balance that has traditionally been sought in copyright.[253] It should already be established through the tone of this paper that *any* policy position taken is unlikely to please all stakeholders. Lessig and other commentators are of the view that protection is necessary to achieve the aims of copyright - arguments for zero protection are spurious, and do not fully appreciate the multilateral nature of a healthy copyright framework. Digital protections for cultural products have the potential to be an essential part of maintaining the balance in copyright. Unfortunately, despite the available flexibility in treaty interpretation the trend in global TPM legislation appears to favour overarching protections over nuanced delivery.

Ginsburg suggests that access and copy control mechanisms are necessary in order to deter or prevent consumer cheating.[254] By permitting the use of, and offering legal protection from circumvention to TPMs, the 'self-executing' nature of copyright

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[252] US, *Statement of Bruce A Lehman Assistant Secretary of Commerce and Commissioner of Patents and Trademarks on S 1284 and HR 2441 before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary*, 104th Cong (1995), online: United States Patent and Trademark Office <http://www.uspto.gov/web/offices/com/doc/ipnii/nii-hill.html>.

[253] Dan L Burk & Julie E Cohen, "Fair Use Infrastructure for Rights Management Systems" (2001) 15 Harvard JL & Tech 41 at 42.

[254] Jane Ginsburg, *supra* note 48 at 117.

control shifts in favour of the copyright owner, and further from the consumer. The net effect is to create an additional right for the copyright owner - the right to control access.[255] While acknowledging the criticism that legal protection of TPMs may have the effect of taking precedence over established user rights, Ginsburg feels this reaction is justified as it mitigates the deleterious effects of mass-market devices capable of copying.[256] Ginsburg sees TPMs as a solution to restore a balance that was lost to easy digital replication; critics view it as an underhanded method of increasing control and shifting the balance in favour of the copyright owner. Nevertheless, a "synergy between law and technology"[257] is needed to ensure that in developing and legislating TPM systems, an appropriate balance is struck - one that sufficiently protects the ability of a copyright owner to exploit their creative endeavours while not unduly restricting the rights of consumers to fairly benefit from and build upon.

Naturally, copyright owners have sought to develop strategies to protect their work. One such strategy has been the use of international agreements, particularly through the design of the WIPO Internet Treaties. Outlined in an earlier chapter discussing the range of international agreements that shape Canada's copyright policies, *WCT* Article 11 and *WPPT* Article 18 provide a general mandate that contracting nations shall provide adequate legal protection and effective legal remedies against persons who

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[255] *Ibid* at 118.

[256] *Ibid* at 118-119.

[257] Gervais, Daniel J, "Electronic Rights Management and Digital Identifier Systems" (1999) 4(3) Journal of Electronic Publishing, online: JEP <http://quod.lib.umich.edu/j/jep/3336451.0004.303?rgn=main;view=fulltext>.

circumvent technological protection measures or alter rights management information without obtaining authority to do so.

In response, technologies aimed at combatting such practices have been developed and harnessed by the copyright industries. It is essential to acknowledge for the purposes of this discussion that the ability to control use or access to copyright content should not be portrayed as negative itself. As discussed above, copyright protection is generally accepted as an effective and fair mechanism to encourage innovation while at the same time allowing for the dissemination of content to the public. There is a sliding scale of what restrictions consumers are likely going to be willing to accept in exchange for the ability to use and access content on new platforms or other technologies. Simply because content is available online should not mean that is free for the taking and indeed, it would be incorrect to argue that consumers should reject outright the fact that protection measures exist to manage copyright content. Professor Lessig agrees that technology can and should be used to protect content, but that the 'war' about copyright would eventually burn out on its own.[258] However, policy makers and lobbyists continue attempts to protect an outdated business model by applying techniques that may have worked with the old format, to the new. In the era of hard copy music and film delivery the creation of real scarcity was precisely what dictate the prices paid by consumers; at times upwards of $25 for a CD in the late 1990s was not uncommon.[259] Perhaps this pricing model was too good to be true for the entertainment industries.

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[258] Lawrence Lessig, *supra* note 116 at 211-12.

[259] If you were unfortunate enough to be a collector of imports, the price effectively doubled.

Quite understandably, the resistance against relinquishing control over the ability to dictate and monopolize the delivery of culture was incredibly powerful, and it persists to this day.

The emergent issues associated with the protection of the outdated business model begins to develop in the manner in which protection measures have been introduced and eased into global regulatory frameworks - currently, the *WCT* is in force in 89 countries, with nine signatories yet to ratify.[260] The fact that the *WCT* is in force in much of the developed world serves to highlight a number of points. Firstly, it is an indicator that traditional copyright is becoming increasingly incapable of addressing the needs of the digital era and that a different approach is needed.[261] Secondly, it shows the power and range of international agreements. Thirdly, contrasting rates of *WCT* implementation between the developed and developing world again raises the issue discussed in a previous chapter, that traditional notions of property ownership and protection do not offer a one size fits all solution to copyright, particularly in the digital era.[262] The importation of legal protection for TPMs into the umbrella of copyright law is not without problems.

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[260] World Intellectual Property Organization, *Contracting Parties WIPO Copyright Treaty*, online: WIPO <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16>.

[261] Although some commentators suggest wider reforms of copyright are required rather than piecemeal attempts to address new challenges. See William Patry, *How to Fix Copyright* (New York: Oxford University Press, 2011), Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus, 2006).

[262] It should also be acknowledged as a reason for lack of support in the developing world is that digital infrastructure is not a prominent economic feature, and as such the protection of IP does not require the attention it does in other parts of the world.

e. *Policy Ramifications of TPM Legislation*

The following discussion seeks to examine the nature of the technology that has been developed to protect digitized content. It does not attempt to formally unpack the technicalities of the various kinds of TPMs or how they function; rather, a general overview is sought in order to evaluate the role of TPMs alongside copyright law from a policy standpoint.[263]

Technological protection measures are methods that advance the 'authorized usage' of digital content.[264] Although the vernacular may differ slightly from time to time (they can be known as 'technical' or 'technological' protection measures), the objective ultimately remains the same. TPMs are designed to act as a control measure for digitized content that cannot otherwise be policed, and can regulate access and, or use of copyright content. In Bill C-11 technological protection measures are defined as:

> [A]ny effective technology, device or component that, in the ordinary course of its operation,
>
> (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
>
> (b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in

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[263] For a technical evaluation of TPMs, see Canadian Heritage, Technical Protection Measures: Part I - Trends in Technical Protection Measures and Circumvention Technologies by Ian R Kerr, Alana Maurushat, & Christian S Tacit (Ottawa: Department of Canadian Heritage, Copyright Policy Branch, 2002), online: SSRN <http://ssrn.com/abstract=705003> ["Technical Protection Measures: Part I"].

[264] Technical Protection Measures: Part I, *supra* note 263 at para 2.0.

> section 3, 15 or 18 and any act for which remuneration is payable under section 19.[265]

The Bill C-11 definition provides a fairly broad ambit for TPM classification, and accordingly the legal protections that are given to TPMs could thus be applicable to a wide range of technologies provided they reach the definitional threshold. This is alarming, as it follows that any circumvention of the TPM will run contrary to the statute.[266] The definition of circumvention in Bill C-11, "to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner", does not account for legal uses of protected copyright content including fair dealing or other basic user rights.[267] The consequence is the imposition of a blanket ban on any act of circumvention even if the use falls entirely within the law.

TPMs function commonly by using passwords or cryptography technology.[268] TPMs are generally categorized as protecting use or access, and there are many different types of each. They offer an ability to control a range of outcomes including the number of times content is used or accessed, what aspects of content can be used or accessed, or if content can be used or accessed at all. Examples might be a digital download of an e-book with built-in technology that limits the number of devices it can be uploaded onto,

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[265] Bill C-11, *supra* note 3 at cl 47.

[266] There are enumerated exceptions to the TPM protections, although civilian non-copyright practitioners will likely have little familiarity with the provisions of the legislation.

[267] See discussion at 57-61, above.

[268] Technical Protection Measures: Part I, *supra* note 263 at para 2.0.

regional encoding on DVDs, or allowing some parts of an application to be accessed free while other parts require payment. It is indeed true that protection for copyright material is necessary to prevent copyright infringement in the digital era, however, the manner in which protection of TPMs has been brought into law has caused controversy.[269] When a paperback book is purchased, it is mine to use and access without restriction. I can read it, let my wife read it, lend it to my neighbour, or even sell it. In contrast, an e-book equipped with TPM technology may only permit the book to be viewed a limited number of times, or it may restrict the number or type of devices it is uploaded to (not necessarily good if I wish to take my wife's e-reader with me on holiday). With the advent of TPMs, a new era of 'property' rights is being defined.

The WIPO Internet Treaties mandate that legal protections for TPMs must be *adequate*, while *effective* legal remedies must be in place. Lacking any further clarification on precisely what the terms mean, on the face of it 'adequate' and 'effective' would appear to permit a degree of flexibility in their interpretation. By leaving the terms undefined, WIPO has followed the sovereignty principle that allows a nation to bring in high level treaty language to best suit domestic requirements. Despite the available

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[269] This has occurred globally including in the European Union with *Commission Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, [2001] OJ, L 167/10, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> [*Commission Directive*], and perhaps most visibly in the United States where provisions of the *DMCA* have come under substantial scrutiny for exceeding the purpose initially sought by WIPO, primarily by failing to tie the broad legal protections for TPMs to actual copyright infringement. The *DMCA* enacted a new category of copyright violations which included the circumvention of technological measures used on digital products for both access and copying purposes. §1201(a)(1)(A) provides a ban on circumventing access controls; §1201(a)(2) provides a ban on trafficking access control circumvention devices; §1201(b) provides a ban on copy control circumvention devices; §1202(b) prohibits individuals from removing information related to access or use device rules. The *DMCA* also provides for significant civil and criminal penalties. See also Samuelson Law, Technology and Public Policy Clinic, "Frequently Asked Questions (and Answers) about Anticircumvention (DMCA)", online: UC Berkeley Law <http://chillingeffects.org/anticircumvention/faq.cgi>.

flexibility, this mandate has been interpreted and implemented into domestic copyright frameworks in binary solecisms by viewing tangible and intangible property as synonymous concepts, and by applying theoretical principles derived from the works of Locke and Mill out-of-context, principles that when viewed fragmentally, justify maximalist protections over property. For example, what has been observed in Canada is a blanket ban on technologies that can potentially be used for circumventing TPMs, despite equally providing legal uses. The net result is a double-edged blow to consumers: while the definition of TPM bans devices capable of circumvention, and the indiscriminate nature of TPMs has the effect of locking out legal uses. These concerns will be expanded on in the discussion below.

The fact that in Canadian law circumvention is not tied to the actual infringement of copyright opens the door to questions surrounding the legal legitimacy of TPMs. Additional controls that have very little to do with copyright, and more to do with property rights will drastically change the way consumers interact with cultural products. There can be little doubt that the architects at WIPO, including Bruce Lehman and Mihaly Fiscor, realized that even with perceived flexibility of the provisions it would be countered in the practical application by pressure to conform to the US lead of strong protections and punitive enforcement.

There are three primary issues arising in regard to anti-circumvention laws: firstly, the fact that copyright law may not be the optimal or possibly even constitutionally

appropriate forum to implement the WIPO Internet Treaties arises. Secondly, TPMs often do not have the capacity to differentiate between legal and non-legal uses; this is where users's rights including fair dealing may be adversely impacted.[270] Thirdly, as international instruments the WIPO Internet Treaties leave sufficient leeway for domestic regimes to implement them in a way that is suitable to the needs of their specific country. It has been suggested that via Bill C-11, Canada's response goes much further than necessary or even required by WIPO, begging the question why Parliament felt it necessary to do so especially given the that the SCC has pronounced that a balancing of stakeholder interests is the purpose of *The Act*.[271]

Professor Michael Geist believes that TPMs are flawed to begin with - they are man-made technologies, which can usually be cracked. Touting them as 'uncrackable' often only serves as an invitation to an attempt.[272] There exists a great deal of information on the internet providing techniques to break TPM systems, and with the issue now firmly situated as an oft-discussed restriction to consumer access, one might expect this niche area to grow.[273] Furthermore, it could be asked whether TPMs are

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[270] Jeremy deBeer suggests that legislation that deals with this issue would help to restore the "delicate balance" that seeks to generate incentives for the production and distribution for the benefit of the public while heeding other rights including freedom of expression, freedom of contract, privacy and traditional private property rights. See Jeremy F deBeer, *supra* note 240 at 101.

[271] See *CCH*, *supra* note 4; *Théberge*, supra note 7; the SCC Pentalogy, *supra* note 5.

[272] Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An examination of the Anti-Circumvention Requirements" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 204 at 209. See also *infra,* note 275 and accompanying text on the discussion of the SDMI initiative, a purportedly uncrackable TPM which was quickly circumvented by a Princeton professor and his team.

[273] See The Citizen Lab, *Everyone's Guide to Bypassing Internet Censorship For Citizens Worldwide*, *A Civisec Project University of Toronto*, (September 2007), online: <http://www.nartv.org/mirror/circ_guide.pdf>.

developed sufficiently to be introduced into domestic copyright frameworks. Professor Kerr points out that TPMs cannot distinguish between different types of use, legal or not legal, resulting in an all-or-nothing approach.[274] Perhaps it is overly obvious, but there is no legal or policy reason whatsoever that requires this outcome. Why should fair dealing and other user rights, which have stood up to judicial scrutiny over the years, be surrendered? For example, if circumvention is necessary for a perceptual disability purpose enumerated in *The Act*, the consumer must somehow attempt to circumvent the digital lock. Moreover, the fact that digital locks are designed with the primary purpose of keeping people out suggests that a legal circumvention would likely require more than a vestigial effort from the consumer; after all, a TPM would be of little use if it was easily circumventable. This could provide an added layer of frustration to ordinary consumers who are wondering how to proceed. In any event, these features have not discouraged efforts led by copyright industries to lobby for their introduction as the introduction and overarching protection of TPMs is presented as the only viable short term solution to counteract online theft and piracy.

f. *Legal Ramifications of TPM Legislation*

i. Expansion of copyright beyond its constitutional limits

Statutory protection for TPMs offers an additional level of protection for copyright content which has become known as 'paracopyright'. As discussed above, William Patry has observed that the borders of global copyright legislation have been

[274] *Supra* note 52 at para 89.

gradually moving outward and into other areas of law; this movement has edged well beyond the boundaries originally envisioned for copyright. Uncertainty surrounding the constitutionality of TPMs has been echoed by Professsor Jeremy deBeer insofar as Parliament's legislative competence to make laws for the protection of TPMs. A jurisdictional conflict potentially arises between Parliament and the provincial legislatures over areas of law such as the regulation of contracts (falling under the provincial 'Property and Civil Rights' head of power) which are ostensibly becoming enveloped by federal copyright legislation..[275] Legislative authority for copyrights has always been reserved for Parliament, and *The Act* and other areas of intellectual property such as patents are within the jurisdiction of the federal government. Section 91(23) of *The Constitution Act*, 1867[276] simply states 'Copyrights' with no further elaboration. While historically, copyright did not involve the contractual scenarios observed today and was thus not a concern, the advent of digital content's ability to be delivered in a more direct owner-to-consumer relationship has resulted in other heads of power shading aspects of copyright legislation.[277]

The constitutionality of TPMs in the US has been raised for other reasons. In the US, where anti-circumvention provisions have been in place since 1999, court cases involving an expansive interpretation of §1201 of the *DMCA,* while narrowly reading

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[275] See Jeremy F deBeer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) for a constitutional analysis of the potential overlap of new copyright protections and other heads of provincial jurisdiction.

[276] *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3.

[277] Section 92(13) which allocates 'Property and Civil Rights in the Province' is the most commonly cited provision that has the potential to conflict with the federal head of power.

down exceptions, have been queried as potentially unconstitutional under the first amendment as a restriction on free speech.[278]

One US judge made no reservations about the fact that copyright was expanding beyond its traditional legal parameters. In *United States v Elcom*,[279] Whyte J. recognized the actions of Congress in ratifying the *WCT* via the *DMCA* "as an expansion of traditional copyright law".[280] The facts of *Elcom* illuminate the murky legal waters that TPM legislation permits law enforcement to enter. During a visit to the US Dmitry Sklyarov, a Russian national and employee of Russian software company ElcomSoft, was arrested and jailed for alleged violations of the *DMCA*. Adobe Systems had complained to authorities that ElcomSoft was trafficking software that could be used to circumvent its e-book applications. Although the company's activities were completely legal in Russia and did not take place in the US, US Department of Justice prosecutors proceeded to move ahead with four charges under the *DMCA* and a two-week federal jury trial

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[278] Jessica Litman, *supra* note 22. See especially *Universal City Studios v Remeirdes*, 111 F Supp 2d 294 (SDNY 2000) [*Remeirdes*]; aff'd sub nom *Universal City Studios v Corley* 273 F 3d 429 (2d Cir 2001), discussed below. Another well-documented example is the case of Princeton University Professor Edward Felten, where he and his team of researchers accepted a public challenge issued by the Secure Digital Music Initiative (SDMI) to attempt to overcome the SDMI's technological security system. Felten's team successfully broke the digital lock however refused to accept a monetary award and sign a confidentiality agreement; rather, Felten wished to publish his research. The SDMI and the Recording Industry Association of America (RIAA) issued a cease and desist to Felten, warning him of the potential legal consequences under the *DMCA* of publishing material relating to the circumvention of a technology that was on the market. Interestingly, the act of circumvention itself was not illegal - it was the subsequent publication of information that would have been, which is what triggers first amendment concerns. Felten then sued (*Felten et al v Recording Industry Association of America,* No. 01 CV 2669 GEB (EDNJ 28 November 2001) [unreported], online: Electronic Frontier Foundation <https://www.eff.org/sites/default/files/filenode/20011128_hearing_transcript.pdf>), however the case was dismissed for lack of standing. The United States Department of Justice has since given assurances that research would not be subject to legal action under the *DMCA*. Were this to occur in Canada, the results would likely differ as new legislative provisions provide exemptions for encryption research.

[279] *United States v Elcom,* 203 F Supp 2d 1111, 62 USPQ 2d 1736 (2002) [*Elcom* cited to USPQ], online: <http://digital-law-online.info/cases/62PQ2D1736.htm>.

[280] *United States v Elcom, supra* note 243 at 1739, Whyte J.

ensued.[281] Although Sklyarov and his employer were eventually acquitted, the actions of US prosecutors raised strong objections over the censure of first amendment free speech rights and the impudent overreaching of its jurisdiction. Whyte J. does not opine on the practical outcomes of this expansion, but rather simply remarks that the it is necessary to protect unauthorized copying. The judge acknowledged that the digital age necessitates commensurate methods of protection for creators of cultural products - however, this is not the issue in dispute as the vast majority of copyright scholars and commentators believe that protections are needed. Lessig and Netanel have put forth alternative models that involve decriminalizing file sharing in exchange for other revenue sources to allow continued innovation, thus offering a new protection model through revenues.[282] Although realization of such a drastic departure from traditional copyright protection is very possible for the future, policy makers are unlikely to accept that it is necessary to move in such a radical direction until other avenues have first been exhaused. Currently, TPMs are the mooted solution, but they must be implemented equitably for there to be any successful impact. The Sklyarov case illuminates the manner in which broad TPM protections can be misused to exact exemplary measures and punish seemingly unrelated activities, rather than justly protecting the interests of copyright owners.

As TPMs directly affect the relationship between the consumer and the copyright owner, they "simultaneously implicate issues typically reserved for provincial legislators,

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[281] The Russian company, ElcomSoft, was found not guilty by a federal jury on all four charges laid under the *DMCA*. See "US v. ElcomSoft & Sklyarov FAQ" (19 February 2002), online: Electronic Frontier Foundation <https://www.eff.org/pages/us-v-elcomsoft-sklyarov-faq#Jurisdiction>.

[282] *Supra* note 233.

such as contractual obligations, consumer protection, e-commerce, and the regulation of classic property".[283] With limited regulation on the design and application of technological protections, the practical effect is that the rules are left to be made by the copyright owner rather than an appropriate statutory authority. Burk and Cohen remark that

> Once constraints on behaviour are built into the technical standards governing a technology, the technical standards effectively become a new method for governing use of that technology - in essence, the technical standards become a type of law... By implementing technical constraints on access to and use of digital information, a copyright owner can effectively supersede the rules of intellectual property law.[284]

Goldstein and Hugenholtz observe that "[c]ontract law has rapidly become a regular companion to copyright protection as the structure of the Internet enables the formation of contract relationships between information producers and end users, either directly or through intermediaries."[285] The positioning of contract law alongside copyright law is of less concern than the fact that the resultant contractual relationships between content providers and consumers will be regulated by Parliament under the guise of copyright legislation. The boundaries of copyright law have not remained static, and because of the increasing overlap between *The Act* and other areas of law Parliament has assumed authority. This approach, while raising questions of a jurisdictional nature, may be the only reasonable solution, at least for the short-term, due to a shortage of other

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[283] Jeremy F deBeer, *supra* note 240 at 90.

[284] *Supra* note 253 at 50.

[285] *Supra* note 51 at 334.

alternatives. Were the provinces to be handed the authority over consumer-copyright owner interactions with respect to TPMs, a jurisdictional conflict similar to what is now being observed is probable. Furthermore, provincial regulation opens the door to dissimilar laws between provinces. Given the shift toward uniform national standards this outcome is likely to be viewed as defeating the purpose of the treaty, and may even have the effect of putting Canada offside of its treaty obligations. Professor deBeer suggests that "provincial Attorney Generals and other provincial policy-makers ought to actively participate in the debate"[286] as he believes that increasingly broad anti-circumvention provisions stretch the limits of federal jurisdiction over copyrights.

ii. Restricting lawful uses

Both the SCC and *The Act* affirm user rights not as mere exceptions but as a set of rights that complement rather than carve out of owners' rights. Fair dealing, in addition to other statutory rights authorizing the use of otherwise protected material for certain purposes firmly establish the value of this perspective in furthering the principles of copyright. The *CCH* decision along with *Access Copyright*, *SOCAN v Bell*, and *ESAC v SOCAN* from the SCC Pentalogy also echo this view in practical application. Technological protection measures have the ability to restrict how content is used, which can cause problems in some cases especially when they restrict the manner in which content that would otherwise be legally accessible if it were in hard copy format is used. A familiar example of a TPM that has been in use for a number of years is regional

[286] *Supra* note 240 at 124.

encoding on DVDs, which allows them to be played only on devices designed for the corresponding region. This type of restriction was developed by the copyright industries in Hollywood to protect their ability to stagger the release dates of box-office and DVD releases around the world.[287] The decision to begin encoding DVDs has indeed caused concern,[288] although it has not prompted the significant levels of adverse reaction now seen by current uses of TPMs. However, an interesting example of the consequences of circumventing a TPM is the DeCSS case. Content Scramble System, or CSS, is a type of TPM using encryption to restrict the devices on which a DVD can be played, and also to prevent copying of the content on the disc.[289] In 1999 a Norwegian named Jon Johansen developed a utility to counter CSS, called DeCSS, that was part of an open source design to allow the Linux operating system to save on a hard drive and allow playback on devices that were not CSS compliant, the content from a DVD from any region. The result was a test case[290] resulting in the granting of permanent injunctions in favour of eight major film studios.

DVD encoding, while a simplistic example of how the use of legally purchased content can nonetheless be restricted by the owners of its copyright. Litman makes the

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[287] See Emily Dunt, Joshua S Gans & Stephen P King, "The Economic Consequences of DVD Regional Restrictions" (2002) 21 Economic Papers 32.

[288] *Ibid*.

[289] Technical Protection Measures: Part I, *supra* note 263 at para 3.2.3.

[290] *Remeirdes, supra* note 278. In this case the film studios sought damages and injunctive relief, claiming that by posting DeCSS online the three defendants were "trafficking" an anti-circumvention device which was an illegal act under the DMCA. Issues of free speech and the constitutionality of the DMCA were raised however even on appeal the court upheld the earlier decision of the district court granting the injunction and ruling that limiting of this type of speech was constitutional as the questions were not raised as to its content but rather its functionality.

point however, that people who have licenses to access the DVD content either through purchase or rental might not legitimately expect any limitations on their license to view the DVD.[291] This type of restriction occurs nowadays with digital content: use restrictions may prevent a legally purchased copy of a music file from being uploaded onto more than one device. This has the potential of negatively affecting a consumer who uses a home computer, a mobile phone and a tablet from gaining the full range of uses possible for the purchased content.

The protections mandated by WIPO effectively prescribe the ability to 'protect property' by means of digital locks, in effect blocking all use of access including uses falling under the rights of users, including uses falling under fair dealing. Recalling Vaver's $R = O - E$ equation which demarcates the boundaries between user and owner rights, strong judicial support has nonetheless given rise to considerable disagreement on its validity. In *Muzak Corp v Composers, Authors, and Publishers Association of Canada*[292] Rand J. reasoned that the owner of a device should not be responsible for the manner in which it is used, holding that "[i]t would be as if a person who lets a gun to another is to be charged with "authorizing" hunting without a game license."[293] This assertion finds scholarly support, in that merely providing the means of infringement is not the same as authorizing it.[294] In the same way that internet service providers (ISPs)

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[291] Jessica Litman, *supra* note 22.

[292] *Muzak Corp v Composers, Authors, and Publishers Association of Canada* [1953] 2 SCR 182 [*Muzak*].

[293] *Ibid* at 189, Rand J.

[294] David Vaver, *supra* note 43 at 142.

do not implicitly authorize infringement by letting users upload or download copyright content (as they are entitled to assume users will act lawfully),[295] this reasoning should similarly apply to circumvention devices. Outlawing them entirely is a restraint on business, and does not consider the other legitimate and legal uses of such mechanisms. Simply because a device can be used for a range of purposes should not require a blanket prohibition.

Professor Carys Craig reinforces the nature of the debate in the context of fair dealing:[296]

> [W]hen conceptualized as a privilege, fair dealing establishes only the liberty or freedom to act: the owner has no right to prevent the privileged activity, and the user owes no duty to refrain from the activity. But conceptualized as a right, fair dealing establishes a corresponding *duty* on behalf of the owner to honour the user's right: in this analysis, the user has a *positive* claim-right against the copyright owner to be permitted to deal fairly with a work. Where fair dealing is recognized as a "user right," it can be argued that copyright owners have a correlative obligation to permit user's fair dealings with their works.[297]

Affording blanket legal protection to TPMs by prohibiting circumvention devices with no specific reference to whether the purpose is for access or copy effectively overrides the

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[295] David Vaver, *supra* note 43 at 142. See also *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 3 SCR 427, 240 DLR (4th) 193, 32 CPR (4th) 1.

[296] Although fair dealing is not defined in *The Act*, the *CCH* judgment provides a detailed analysis of how fair dealing is determined, illustrating that in order to be fair the dealing must satisfy a number of criteria.

[297] Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright" Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 181.

legitimate and legal use rights of a consumer, as private contractual regimes in which the consumer has little if any bargaining power effectively removes the balancing effect copyright law is meant to achieve. When a consumer purchases a digital music download, there is little room for negotiating its terms of use. One scholar suggests that under current copyright modernization in Canada, the provisions protecting digital locks do not come with a proviso indicating that uses already deemed to be fair or falling within a user's rights are exempt,[298] which raises concerns of whether Parliament is actually making a concerted attempt to strip back user's rights (which a skeptic would view as not inconceivable), or whether the likely restrictions are merely collateral damage necessary in preventing a larger problem of large-scale copyright infringement using the current copyright framework. Either way, "TPMs deny users the ability to exercise their rights and thereby tip the balance away from users and the public interest."[299] This does not have to be the case. If large scale infringement or infringement for commercial purposes was addressed separately, or by implementing a two-tiered TPM protection system - which it is safe to assume would be meet with considerably less public resistance - would still allow Canada give due effect to copyright protections while meeting its WIPO obligations. Bearing that in mind, while seeking a solution rather than dwelling on the rhetoric, *it is possible* for TPMs and consumers to co-exist peacefully.

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[298] Sara Wei-Ming Chan, "Canadian Copyright Reform -- 'User Rights' in the Digital Era" (2009) 67 UT Fac L Rev 235 at 258.

[299] Carys Craig, *supra* note 297 at 192.

iii. Beyond scope mandated by *WCT* and *WPPT*

Proponents of the stronger copyright protections offered by TPMs feel that protecting them legally is the only way to maintain order within the copyright system; in contrast, critics believe that TPMs only act to strengthen the grip maintained by the copyright industry over consumers and cultural content as their business model of control is sought.[300] This pattern is demonstrated by the drafting process of the *WCT* and *WPPT*.

A central aggravating factor to the situation is that the final language chosen for Article 11 *WCT* and Article 18 *WPPT* was the subject of protracted debate and systemic disagreement within participating national delegations during the drafting process.[301] The outcome of the sessions that took place between 1994 and the concluding Diplomatic Conference in 1996 when the *WCT* and *WPPT* were finalized[302] was high level provisions capable of interpretation from numerous angles.[303] What has been observed

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[300] *Supra* note 52 at para 90.

[301] Michael Geist, supra note 272 at 212-221. Professor Geist shows how countries such as Ghana, Brazil, South Africa, Nigeria and China were vocal about foreseeable harm to the public interest and innovation that would be caused by choosing vague and non-specific language without providing definitions of terminology used in the text. Moreover, the countries expressing concern over the potentialities of an imprecise treaty are either BRICS countries or from the developing world. There is clearly a correlation between the protections sought by Western economic forces and the expense paid by the rest of the world. See discussion on the economic implications of copyright policy determined by trade considerations earlier in this paper.

[302] See Pamela Samuelson, *supra* note 205.

[303] Professor Geist suggests that the WIPO Internet Treaties may even run afoul of Article 31 of the *Vienna Convention on the Law of Treaties* (opened for signing 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, online: United Nations <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>, which requires a "good faith" interpretation. It could be argued that the US, EU and Canada have taken an approach that rather than acting in good faith, seeks to further the commercial value of copyright content. Article 32 provides that if ambiguous, obscure or leading to a result that is manifestly absurd or unreasonable "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31". Surely the lack of certain definitions in the text (*i.e*. what are adequate legal protections?) give rise to the need for greater clarification.

thus far, particularly in the US - a nation that fought hard to secure favourable terms, is a calculated piece of legislation that has been used to the advantage of the copyright industries.[304]

Professor Kerr suggests that language employed in the WIPO Internet Treaties does not give rise to a requirement that mere circumvention should be penalized, as we have seen in the US and potentially in Canada; rather, a better interpretation of Article 11 *WCT* would link circumvention to actual copyright infringement. A slightly more flexible approach such as the one advocated by Kerr would, while giving full legal effect to the *WCT* and thus providing the copyright industries with the protection they so desire, leave adequate room for the rights of user's to continue to interact with content in a manner that strives to meet copyright's main organizing principles.

Pamela Samuelson has commented that the implementation of the *WCT* and *WPPT* into United States domestic law via the *DMCA* is "ambiguous and overbroad."[305] Viewed cynically, this may be an intentional tactic as it has been noted as being one of the most elaborate and inscrutable pieces of copyright legislation ever seen as it "delves into details to an unprecedented degree."[306] By leaving people in the dark as to what

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[304] Pamela Samuelson, *supra* note 205 at 379. Bruce Lehman, whose involvement in the copyright lobby industry was part of the US effort at WIPO to secure terms beyond what even Congress was willing to allow at the time.

[305] Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised" (1999) 14 Berkeley Tech LJ 519 at 524.

[306] Ysolde Gendreau, "A Technologically Neutral Solution for the Internet: Is It Wishful Thinking?" in Irini A Stamatoudi & Paul LC Torremans, eds, *Perspectives on Intellectual Property: Copyright in the New Digital Environment* (London: Sweet and Maxwell, 2000) 1 at 15.

constitutes violations of the law,[307] the transparency required of good governance is lacking. As the US has had over a decade in which to test, review and tinker with how consumers and the *DMCA* interact, it is curious that Canadian legislators did not pay greater attention to the US experience to date. Nonetheless, it appears as though the TPM provisions of Bill C-11 were constructed with the *DMCA* as a blueprint, and US approval as the ultimate goal.[308] As was the issue with the lawsuit against Professor Felten and the DeCSS case discussed above, the US legislation has provided a legal basis for hair trigger arrests for alleged violations of the law.[309]

The same criticism may be leveled towards Canada in view of the language in Bill C-11 giving effect to the treaties, which is seemingly even more inflexible than the *DMCA*.[310] Clause 41.1(4) opens the door to potentially sweeping interpretations of its

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[307] See discussion of *Elcom* at 109-110, above.

[308] Michael Geist, *supra* note 272 at 206.

[309] In *Elcom,* the presentation giving rise to a complaint by a software company and subsequent charges was on research into the potential vulnerabilities of of e-book software. By giving the presentation Dmitry Sklyarov allegedly violated the *DMCA* by trafficking a product that could be used to circumvent a TPM. This is another example of how the high level terms of the *WCT* and *WPPT* translated into an opportunity to develop stringent and possibly unreasonable domestic legislation. Litman notes that instances such as *Felten*, *Remeirdes* and *Elcom* have resulted in extremely wide public disapproval of the way the legislation is applied, (see Jessica Litman, *supra* note 22). While under Bill C-11 it would be an offence to offer to the public or provide services if the primary purpose is for circumvention (s. 41.1(1)(b) under cl. 47), it is unlikely although not entirely impossible to envision exemplary remedies being used as they are in the United States.

[310] Michael Geist, *supra* note 272 at 206.

descriptive elements[311] by allowing a copyright owner "all remedies - by way of injunction, damages, accounts, delivery up and otherwise - that are or may be conferred by law for the infringement of copyright against the person who contravened paragraph (1)(b) or (c)" if it "has been or could [have] be[en] circumvented as a result of the contravention of paragraph (1)(b) or (c)".[312] Allowing the open-ended language "*could be circumvented*" would allow a copyright owner to seek the same remedies available for copyright infringement against a person possessing technology capable of being used for circumvention, but has or is not being used for those purposes, or serves another purpose entirely even though it may be effective for circumvention purposes. This is an example of the unnecessary and overbroad language that Samuelson has observed in the *DMCA*. Furthermore, failure to define 'primarily for the purposes of circumvention' in Bill C-11 illustrates the ambiguity of the Canadian TPM provisions.

Although the strong monopoly protection approach taken by Bill C-11 appears to be beyond the scope required by the WIPO Internet Treaties, there is strong evidence that

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[311] The text of Bill C-11 clause 47 which adds a new s. 41.1(1) is: "No person shall (a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure" in section 41;
(b) offer services to the public or provide services if (i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure, (ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or (iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or (c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if (i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure, (ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological protection measure, or (iii) the person markets the technology, device or component as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market the technology, device or component as being for those purposes."

[312] Bill C-11, *supra* note 3 at cl 47.

this is the result of significant pressure from the US to conform, rather than a unilateral decision by Parliament.[313] This may not affect sympathies of consumers, however, during the the consultation period in 2009 for Bill C-11, Industry Canada and Canadian Heritage asked Canadians a series of questions. The questions asked how to best frame copyright laws to reflect Canadian values and interests, to foster creativity and innovation within Canada and to establish Canada as a leader in the global and digital economy. Perhaps the most convincing evidence that in spite of the ambiguity of the WIPO Internet Treaties, the form of Bill C-11 is not the true substance of what is desired by Canada to maintain a fair and balanced copyright framework. During the WIPO drafting sessions the Canadian delegation did not support any of the proposals submitted by the EU or the US.[314] The Canadian delegation, although appearing to support the general overall mandate of the *WCT* and *WPPT* raised concerns about the possibility of TPMs offering

[313] See Mark Kohras, "USTR Special 301 Report: Canada in US Hall of Shame for the Third Year Running" (15 May 2011), Osgoode Hall Intellectual Property Law & Technology Program, online: IP Osgoode <http://www.iposgoode.ca/2011/05/canada-in-us-hall-of-shame-for-the-third-year-running/>.

[314] Michael Geist, *supra* note 272 at 216.

new protections for public domain works and perhaps more importantly, questioned how the existing legal rights of users would be affected by the proposals.[315]

g. *Conclusion*

Policy makers have reacted to what they view as provocation to the status quo not by seeking to integrate emerging technological platforms into copyright frameworks, but rather by adopting a systematic pattern of language and rhetoric to instill a sense of moral ambiguity in users. Moreover, while the introduction of measures to protect digital content has been accepted into many domestic copyright frameworks worldwide there is by no means consensus on their suitability to the current copyright model. This has left many unanswered questions on their capability to deal fairly and appropriately with the perceived challenges posed by technological development. Nonetheless, despite questions relating to the constitutionality and compatibility of this approach with the SCC's balanced and inclusive model demonstrated in *CCH* and the recent Pentalogy,

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[315] WIPO, *Committee of Experts on a Possible Protocol to the Berne Convention (7th Sess Report)*, (Geneva 22 -24 May 1996), WIPO Doc BCP/CE/VII/4-INR/CE/VI/4 at para 26, online: WIPO <http://www.wipo.int/mdocsarchives/BCP_CE_VII_INR_CE_VI/BCP_CE_VII_4_INR_CE_VI_4_S.pdf>. The report is only available in Spanish, although an English overview containing the provisions for "technical protection devices" may be found at: WIPO, *Committee of Experts on a Possible Protocol to the Berne Convention (7th Sess Report)*, (Geneva 22 -24 May 1996), WIPO Doc BCP/CE/VII/4-INR/CE/VI/1, online: WIPO <http://www.wipo.int/mdocsarchives/BCP_CE_VII_1_INR_CE_VI/BCP_CE_VII_1-INR_CE_VI_1_E.PDF>. The provisions for TPMs drafted for the seventh session are arguably more fair as they require that TPM circumvention be for commercial purposes in order for their to be an infringement. By roughly translating the document, the general scope of Canada's opposition can nonetheless be easily detected. Many other countries expressed strong concerns over the provisions of the treaty pertaining to the legal protection of TPMs. For example, the South African delegation expressed concerns over the vagueness of the provisions, particularly the lack of definitional clarity for "reasonable grounds", "principal purpose" and "main effect" of devices that could potentially be used for circumvention purposes while the delegation from Singapore feared the impact of TPMs would be to harm the industry acting as a brake on innovation while affecting legitimate users. Interestingly, the US delegation did not address the issue of TPMs in their statement, rather focusing on incorporating long-term *sui generis* database protections into copyright law. Presumably this is due to the large investment value of databases.

Parliament has indicated willingness to move forward and yield to the pressures presented by the powerful actors in the copyright world.

# CHAPTER V

## TPM PROTECTION: THE LEGISLATIVE RESPONSES OF COMPARABLE JURISDICTIONS

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*It is a very popular idea among lawyers that the vagueness of the language they use guarantees that inevitably there will be no right answer to certain legal questions. But the popularity of this idea is based on a failure to discriminate between the fact and the consequences of vagueness in canonical legal language.*[316]

- Ronald Dworkin

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### a. *Introduction: Comparing Legislative Responses*

The purpose of the following chapter is to consider how other nations have approached ratification of the WIPO Internet Treaties. Given the flexible nature of the language of the treaties, so long as the protections are 'effective' and 'adequate' the WIPO mandate should in effect be satisfied. Although it would follow that satisfaction of the treaties' requirements could be successfully attained by adopting different approaches, the effect of leaving the terms open-ended has caused "much strife during the implementation process since different interest groups each seek to have the balance shift their way."[317] The legislative responses of the US, Japan, Australia and the EU - jurisdictions with comparable social and economic dynamics to that of Canada - demonstrate a range of different approaches. They affirm that there is scope for

[316] Ronald Dworkin, "No Right Answer" (1978) 53(1) NYUL Rev 1 at 12.

[317] Urs Gasser, "Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model" (2006) 17(1) Fordham IP Media & Ent LJ 39 at 50.

flexibility within the language of the treaties, an important finding given the perceived need to conform to the expansive approach advocated by the US. Bearing in mind that much of the developed world has ratified the WIPO TPM provisions, Canada's Parliament was in the advantageous position of having the experiences of counterparts to learn from, particularly how other countries given effect to the provisions. Why there was not more focus on this approach is unclear, as it would have allowed Parliament to tailor the law based on social, cultural and economic needs.

b. *United States*

The US was one of the first nations to pass legislation giving effect to the WIPO Internet Treaties by adding a new section to Title 17 of the US Code via the *DMCA*. Much has already been said in this paper referencing the the strong protectionist design of the *DMCA*, and negative public perception.[318] Of course, one's ideological persuasion determines much about how one approaches intellectual property protection - it should not be overlooked that there are indeed a great many supporters of the legislation.[319] However, in general the *DMCA* has come under criticism for its convoluted provisions and draconian punishments.[320] Those applying the *DMCA* have likewise been censured

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[318] It is fathomable that the the *DMCA*, its negative public perception, and the subsequent litigation was the tipping point that thrust the copyright debate into the mainstream.

[319] Nicola Lucchi, "Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection, Technological Measures and New Business Models under E.U. and U.S. Law" (2005) bepress Legal Series Paper No 615 at 31, online: The Berkeley Electronic Press <http://law.bepress.com/expresso/eps/615>.

[320] See *Elcom, Remeirdes*, and *Felten* as examples of the heavy-handed approach taken by US regulators.

for taking an inflexible interpretive approach.[321] Section 1201(a)(1)(A) completely prohibits circumventing a TPM to *access* content:

> (a) Violations Regarding Circumvention of Technological Measures.—
>
> (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title.[322]

Paradoxically, fair use in the US has a broader scope than fair dealing in Canada in that it is illustrative rather than exhaustive.[323] However, the *DMCA* approach entirely overrides a user's fair use right and "encumber[s] educational and cultural uses of the works."[324] As the legislation sets out, any digital work equipped with a TPM may not be circumvented. There are limited exceptions in section 1201(d) - (j) although these are arguably unlikely to provide any practical benefit to consumers; rather, the exceptions appear to be in favour of commercial research interests with the likely effect of enabling the development of stronger TPMs.

US copyright policy makers, including Bruce Lehman, have provided a twofold admission stating that the provisions of the WIPO Internet Treaties are in fact flexible, and that despite this flexibility the US provisions intentionally exceed what is mandated

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[321] It has been observed that while the ideological form of the North American copyright model may be utilitarian in nature (to' benefit the public', 'promote innovation' and 'further cultural development', etc.) it tends to take on a Lockean-based natural rights in practice when applied by the judiciary and other law enforcement. See generally, Samuel E Trosow, "The Illusive Search for Justification Theories: Copyright, Commodification and Capital" (2003) 16 Can JL & Jur 217; Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1992-1993) 68 Chi-Kent L Rev 841; Rajen Akalu & Deepa Kundar, "Technological Protection Measures in the Courts" (2004) 21(2) IEEE Signal Processing 109.

[322] *DMCA*, *supra* note 166 at § 1201(a)(1)(A).

[323] Canadian Heritage, Fair Dealing After CCH by Giuseppina D'Agostino (Ottawa: Department of Canadian Heritage, Copyright Policy Branch, 2007).

[324] J Carlos Fernandez-Molina, "Laws Against the Circumvention of Copyright Technological Protection" (2003) 59(1) J Doc 41 at 50.

in hopes of convincing other nations to follow suit.[325] The framework of the *DMCA* TPM provisions does not appear to be an appropriate or favourable legislative template for Canada. Based on the US admission of treaty flexibility, it would appear that Canada is not obligated to follow the direction of the US. Nonetheless, as the two countries are closely linked by trade countless other social, cultural and economic aspects, Canada has faced pressure to implement a framework that parallels the US approach.

c. *Japan*

TPMs are used widely in Japan, particularly for television broadcasts and films while most Japanese music is also protected.[326] The Japanese decided on a TPM protection approach that somewhat resembles the two-tiered system suggested in an earlier chapter in this paper. By choosing to legislate for particular outcomes that correspond to the area of law best equipped to deal with it, the Japanese resist the normative expansion of copyright law *per se* into other areas of law. The Japanese law is two-tiered in that the Japanese *Copyright Act*[327] focuses on TPMs used for copyright infringement while the *Unfair Competition Prevention Act*[328] is aimed at moderating TPMs that regulate access for other, often legal, purposes. Japanese competition is

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[325] Michael Geist, *supra* note 272 at 225-226.

[326] Centre for Content Promotion Asia Pacific, "Use, Abuse and Perception of Technology Protection Measures' (TPM) in Japan" (2009), online: <http://www.contentpromotion.net/index.php?option=com_dm_orders&task=show_item&id=20&Itemid=99999999> at 10.

[327] Japan, *Copyright Act* (Act No 48 of 6 May 1970, as last amended by Act No 65 of 3 December 2010), online: WIPO <http://www.wipo.int/wipolex/en/text.jsp?file_id=214839>.

[328] See Japan, *Unfair Competition Prevention Act* (Act No 47 of 1993, as last amended by Act No 30 of April 30, 2009), online: WIPO <http://www.wipo.int/wipolex/en/details.jsp?id=11485>.

designed to prevent the trafficking of circumvention devices, as they are viewed as causing anti-competitive behaviour.[329]

Allowing Japanese copyright law to address TPM circumvention for purposes of copyright infringement makes the distinction between access and copy control more plausible in that there is a direct link between circumvention and infringement. This dualistic approach would appear to respect the idea that users' rights form a critical part of the copyright balance equation. In Japan's *Copyright Act* TPMs are defined by the purpose they seek to achieve,[330] in contrast to Bill C-11 where they are defined by prohibited acts. In Japan, a TPM is a measure "to prevent or deter such acts as constitute infringements on moral rights of authors or copyright".[331] Japanese law iterates that circumventing for statutorily permitted reasons is not a violation.[332] It is noted in one study that the general consumer perception of TPMs is accepting of restrictions provided they are equitable, and there is yet to be a civil or criminal court case on TPMs although this may be in part due to the high threshold for TPM illegality set by the *Unfair Competition Prevention Act*[333], as the sole purpose of the TPM must be for circumvention

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[329] Naoki Koizumi, "The New or Evolving "Access Right": Comments for Panel Session 1D1" (Report presented to the ALAI Congress, June 2001) [unpublished], online: ALAI <http://www.alai-usa.org/2001_conference/1_program_en.htm> at 2.

[330] Jacques de Werra, "The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws (Japan, Australia)" (Report presented to the ALAI Congress, June 2001) [unpublished], online: ALAI <http://www.alai-usa.org/2001_conference/1_program_en.htm> at 33.

[331] Copyright Research and Information Centre, "Copyright Law of Japan", trans by Yukifusa Oyama et al, (2009) at Article 2(xx), online: Copyright Research and Information Centre <http://www.cric.or.jp/cric_e/clj/>.

[332] Michael Geist, *supra* note 272 at 233.

[333] *Supra* note 328.

in order for there to be grounds for an action.[334] This would ostensibly allow devices with circumvention capabilities to pass the test.

The Japanese ratification of the WIPO Internet Treaties represents successes in several regards as a distinction is made between general circumvention and circumvention specifically for infringing purposes. By doing so copyright and and the preservation of user interests is kept. By adopting a tiered approach to TPM protection, Japan has avoided the confusing overlap of copyright law into other areas of law.

d. *Australia*

The initial Australian approach to TPM protection was to attempt to implement a comparatively user friendly interpretation[335] of the WIPO Internet Treaties through the *Copyright Amendment (Digital Agenda) Act 2000*[336] which amended the Australian *Copyright Act 1968*.[337] The *DAA* allowed circumventions for permitted purposes,

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[334] *Supra* note 326 at 17.

[335] Jacques de Werra, *supra* note 330 at 36.

[336] Austl, *Copyright Amendment (Digital Agenda) Act 2000* (Cth), online: AUSTLII <http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/num_act/caaa2000294/index.html#s1> [*DAA*].

[337] Austl, *Copyright Act 1968* (Cth), online: AUSTLII <http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/consol_act/ca1968133/index.html#s1> [the "Australian Act"].

provided that some qualifying criteria were met.[338] This was inevitably short-lived, as pressure from the US resulted in stronger protections being introduced via another international trade agreement,[339] the US-Australia Free Trade Agreement.[340] Now, section 116AN(1) of the Australian Act allows the owner or exclusive licensee of a TPM-protected copyright to bring an action against a user who knowingly circumvents an access control TPM, with the burden on the user to demonstrate that the action falls into an enumerated exception. As usual, there are token exceptions for interoperability and encryption research although affirmed or existing legal user's rights are not addressed. This approach to TPM circumvention bears similarities to the *DMCA*, with outright prohibitions on circumvention.

The Australian experience resemblances what has occurred in Canada in recent years. After unsuccessful attempts to implement balanced, user-friendly provisions, pressure from the US has resulted in a scenario involving little room for compromise. It would be naive to think that Canada, despite the political and social resistance to

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[338] Jacques de Werra, *supra* note 330 at 37-38. The text of section 116(3) *DAA* reads: *(3)This section does not apply in relation to the supply of a circumvention device or a circumvention service to a person for use for a permitted purpose if: (a) the person is a qualified person; and (b) the person gives the supplier before, or at the time of, the supply a declaration signed by the person: (i) stating the name and address of the person; and (ii) stating the basis on which the person is a qualified person; and (iii) stating the name and address of the supplier of the circumvention device or circumvention service; and (iv) stating that the device or service is to be used only for a permitted purpose by a qualified person; and (v) identifying the permitted purpose by reference to one or more of sections 47D, 47E, 47F, 48A, 49, 50, 51A and 183 and Part VB; and (vi) stating that a work or other subject-matter in relation to which the person proposes to use the device or service for a permitted purpose is not readily available to the person in a form that is not protected by a technological protection measure.* Despite the bureaucracy involved in clearing TPM use, some credit must be given for Australia's attempt to preserve existing user's rights.

[339] Michael Geist, *supra* note 272 at 230.

[340] *Australia-United States Free Trade Agreement*, Australia and United States, 18 May 2004, [2005] ATS 1, online: Australian Government Department of Foreign Affairs and Trade <http://www.dfat.gov.au/fta/ausfta/index.html>.

overarching copyright laws, would not have faced similar pressures to conform if a comparatively flexible approach to TPM protection was taken.

e. *European Union*

The WIPO Internet Treaties have been brought into European law through various EC Directives which although directly applicable, are not directly effective and must therefore be implemented into the national law of each individual EU Member State.[341] Intriguingly, in addition to the EC interpretation of the WIPO Internet Treaties, national implementation requires a second rung of interpretation. In some cases, this has resulted in definitions and provisions even further removed from the treaties themselves.[342] The most important Directive with respect to TPM protections is currently the *Commission Directive*.[343] The definition of a "technological measure" in Art. 6(3) is broad, covering

> any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC.[344]

Article 6(1) provides further obligations concerning the protection of technological measures:

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[341] John Fairhurst, *Law of the European Union*, 7th ed, (Harlow, UK: Pearson Education, 2010) at 792.

[342] See Guido Westkamp, "Part II: The Implementation of Directive 2001/29/EC in the Member States" (2007) Queen Mary Intellectual Property Research Institute, online: <http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf>. At page 96 of Westkamp's study, France is highlighted as an example illustrating text that is significantly different from that of the EC Directive.

[343] *Commission Directive*, *supra* note 269.

[344] *Ibid* at art 6(3).

> Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.[345]

The language here bears strong resemblance to that of the *DMCA* in that it mandates an outright ban on circumvention, regardless of the purpose thereby criminalizing circumvention irrespective of the rights protected.[346] The knowledge component does little to benefit consumers except to provide a safeguard over unintentional acts of circumvention. It has been noted that including an intention requirement is not necessary as an unintentional circumvention is not probable if a TPM is effective.[347]

Comprehensively, the *Commission Directive* appears to resemble a rigid *DMCA*-styled approach to TPM protection. However on closer examination of individual Member State implementation, a more flexible approach appears to have been utilized by several nations. For example, Austria and Belgium, among others, have linked the act of circumvention to copyright infringement.[348] As several Canadian scholars have noted, the proposed Canadian legislative response does not take this approach.[349] With the precedent set by these similarly developed European nations, there is a strong case to

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[345] *Ibid* at art 6(1).

[346] Nicola Lucchi, *supra* note 319 at 35.

[347] *Supra* note 52 at para 191.

[348] Guido Westkamp, *supra* note 342 at 95.

[349] See generally, Barry Sookman, "Copyright Reform for Canada: What Should We Do?" (2009) 22 IPJ 1; Ian Kerr, "Digital Locks and the Automation of Virtue" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 247; Sara Wei-Ming Chan, "Canadian Copyright Reform -- 'User Rights' in the Digital Era" (2009) 67 UT Fac L Rev 235.

made that despite the uncertainty and vagaries of the WIPO provisions, an interpretation linking circumvention to copyright infringement is indeed possible and even favourable.

f. *Conclusion: Lost in Translation?*

The above analysis evidences the availability of a variety of approaches in the ratification of the WIPO Internet Treaties, while remaining onside. Even as the treaties set out to establish greater uniformity in international norms there appears to be no contention that signatories are bound to take the same approach. Bearing in mind the differences in copyright traditions between the Anglo-American model, the continental *droit d'auteur* tradition and other deviations observed in developing countries, copyright cannot be rigidly compartmentalized to be effective. A one-size-fits-all approach has no objective advantages over a nuanced interpretation that meets treaty obligations. What has been observed thus far particularly with respect to Bill C-11, is a debate based less on the realities of framing a copyright bill that addresses the primary organizing principles of copyright and more on political ideologies, party lines, and economic considerations. Ostensibly, there is sufficient scope and precedent for a Canadian model that protects TPMs while maintaining a balance that adheres to Canadian values by not restricting beyond common sense a user's ability to legally interact with copyright content. In actuality, the experience of Australia is a reminder that even the sovereignty of a nation will not necessarily permit true autonomy in the copyright policy making arena.

# CHAPTER VI

## CANADA'S LEGISLATIVE RESPONSE: BILL C-11

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*The issue is not whether to provide legal protection for digital locks, but rather how to do so in a manner that supports businesses and retains the copyright balance. The Canadian approach goes far beyond international requirements and raises legitimate fears about its impact on consumer property rights, free speech, and privacy.*[350]

- Michael Geist

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### a. *Introduction: The Debate*

The preceding chapters have sought to establish how copyright law has become removed from its original organizing principles. The role of rhetoric and economics in shaping public perceptions and copyright policies around the world have proven to be substantial, acting as a powerful influence over the space occupied by copyright law in the lives of individuals worldwide. In recent years, few federal legislative initiatives have polarized partisan corners in Parliament and generated the level of public debate as have Canada's attempts to update its copyright law. The focus of this chapter is to examine aspects of the legislative journey of Bill C-11 including the public consultations, the Parliamentary debates and other factors that played a role in shaping its final text. Bill C-11 was Canada's fourth attempt to update *The Act* and ratify the WIPO Internet

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[350] Michael Geist, "Bill C-11 Is No SOPA: My Response" (8 February 2012), online: <http://www.michaelgeist.ca/content/view/6307/125/>.

Treaties.[351] This fact is likely to have stimulated the urgency felt by the governing majority in ensuring the relatively quick passage of the bill, which is evidenced by the largely mechanical debate process.

b. *Shifting the Balance*

It is widely agreed upon that Canada's copyright law was in need of some updating. References to overhead projectors and other obsolete technologies in *The Act* back up this fact. Many of the provisions of Bill C-11 are non-controversial updates to address the needs of various stakeholder interests. However, following up the previously unsuccessful Bill C-32[352] where "many groups and individuals welcomed the good faith attempt to broker a compromise on many contentious copyright issues",[353] the still-unresolved language that would form the TPM provisions gave rise to concerns that Parliament's majority would ensure the result was a foregone conclusion. The fact that ratification experiences of other nations were available to Parliament appeared as though it would be of little influence to the process.

As predicted Bill C-11 came under strong criticism for the manner in which ratification of the WIPO Internet Treaties was sought, an outstanding obligation since the treaties were signed in 1997. It was feared that by acceding to US pressure and

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[351] Parliamentary Information and Research Service, Legislative Summary of Bill C-11 (Publication No. 41-1-C11-E) by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: Library of Parliament, 2011), online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c11&Parl=41&Ses=1&source=library_prb>.

[352] Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess, 40th Parl, 2010, (First Reading 2 June 2010).

[353] Michael Geist, *supra* note 272 at 204.

surpassing the requirements of the treaties, broad TPM protections without a direct link to circumvention for infringing purposes would negatively affect Canadian consumers and fundamentally upset the balance in Canadian copyright. Therefore, it is not ratification of the treaties *per se* that is the primary concern - it is the language chosen by Parliament to give effect to the treaties that faced scrutiny.

As referred to throughout this thesis, the SCC provides a strong paradigm for maintaining balance in copyright law in the digital era. Viewed by proponents of user rights as vital to maintaining an equipoise between all stakeholders, the principles for which the cases stand for have caused a divide in Parliament particularly with respect to TPM legislation. The Conservative majority government under Prime Minister Stephen Harper sought to push the bill through with opposition parties echoing the sentiment held by supporters of a balanced copyright framework that necessarily places checks and balances on the power of copyright owners. *CCH*, *Théberge* and the SCC Pentalogy[354] offer support for an inclusive framework that seeks to balance the need to compensate creators while allowing the use of content to sustainably encourage innovation, but what occurred by Parliament's ratification of the WIPO Internet Treaties lies in contradistinction.

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[354] Notable issues found in Pentalogy decisions include the importance of an unrestricted interpretation of fair dealing (leading commentators to suggest that Canada is shifting from fair dealing to fair use), which is found in *Access Copyright* and *SOCAN v Bell Canada*; and, technological neutrality, heralded in *ESAC v SOCAN* (where an extra tariff was sought by SOCAN for downloaded video games containing music - effectively an attempt to 'double-dip' for royalties - was not allowed).

c. *Legislative History of Bill C-11*

Bill C-11 is Canada's fourth copyright modernization bill since 2005. In each of the three previous Parliamentary sessions, legislation was introduced and at least given first reading, however, no bill successfully proceeded past Committee stage.[355] A long-standing federal awareness of the need for copyright modernization resulted in a substantial body of studies, reports and commentary addressing various aspects of *The Act* that were most in need of updating. Ratification of the WIPO Internet Treaties was treated as one of the primary goals of Bill C-11, and thus it was no surprise to find that TPM discussions took up most of the debate time allocated to the bill. Although further review of the TPM provisions would have been seen as positive by the many scholars and commentators who view aspects of the bill as untenably flawed, Parliament undoubtedly felt pressure to push the bill through at any cost. Another failure to ratify was likely regarded by the Conservatives as having the potentiality to push Canada into the position of being labelled 'weak' on copyright protection. Pressure from the US, and the prospect of a 'weak on IP' label influencing potential investors to stay out of Canada would have been the measured reasons behind the Conservatives robust approach to ensuring passage of the bill. While this may seem unrelated to the passage of a bill, the political

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[355] Bill C-60 was sponsored by the Minister of Canadian Heritage, Hon. Liza Frulla (Jeanne-Le Ber). The bill was Canada's first significant attempt to update *The Act* since 1997 and was an effort to implement the *WCT* and *WPPT*. It was introduced and received first reading on June 20, 2005 but was not able to proceed further as Parliament was dissolved after a motion of non-confidence was passed in November 2005. Bill C-61 was sponsored by the Minister of Industry, Hon. Jim Prentice (Calgary Centre-North). It was introduced and received first reading on June 12, 2008. Bill C-61 was amended from its counterpart Bill C-60 in several respects, including slightly expanding the applicability of the fair dealing defence, making allowances for time and format shifting, and new provisions for technological protection measures, also knows as 'digital locks'. However, after a Federal election was called in September 2008, the bill died on the order paper. Bill C-32 was sponsored by the Hon. Tony Clement (Parry Sound-Muskoka). Introduction and first reading took place on June 2, 2010 with second reading commencing on November 5, 2010. Bill C-32 was referred to Legislative Committee, however due to the Federal election being called in April 2011, was unable to proceed past Committee.

ramifications, economic impacts by way of trade sanctions[356] or loss of investment in Canada's IP industries would be viewed by many as detrimental to the interests of the country. Not surprisingly, these permutations influenced the manner by which the current government proceeded to ensure that ratification of the WIPO Internet Treaties was achieved by Bill C-11.

d. *US Pressure*

The Office of the United States Trade Representative (USTR) has listed Canada in its *Special 301 Report* which is specifically designed to draw attention to countries that the US believes are deficient in their treatment of intellectual property rights.[357] A place on this 'blacklist' does not carry direct sanctions, although identification alongside China and Thailand (countries known to have relatively relaxed rules on copyright protection) is probably a repercussion in itself. Canada's placement on this list was designed to have precisely this effect, fitting into the rhetorical tactics advanced by the US.[358] What is evident from this technique is that pressure exerted in the name of international trade is being used as a tool to manipulate and coerce nations into aligning their intellectual property policies with those of stronger nations. Some domestic practitioners that represent large corporate interests in the copyright industries have followed by

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[356] The likelihood of trade sanctions being imposed on Canada are always going to be remote, although any measurable difference between the US and Canadian approach to copyright protection is apt to draw continued criticism and veiled threats by way of rhetoric until the two approaches coincide.

[357] Mark Kohras, *supra* note 313.

[358] See the discussion of Jack Valenti at 93-4, above, and the tactics used to manipulate public perception of itself and others.

condemning Canada as a "weak link".[359] Trade agreements like *TRIPs* and *NAFTA* have firmly enshrined intellectual property policy as a part of their ambit. It may be wondered, had this been foreseen in the 1990s when many of these policies were designed, if signatories would have been as inclined to join such trade agreements. In any event, the pressure appears to have achieved the desired outcome as Parliament was unwilling to consider amendments that would have lessed the restrictions provided by legal TPM protection.

Successful implementation into Canadian law mandates providing "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" which is a requirement from Article 11 *WCT*. As discussed earlier in this paper, there are concerns that the provisions of Bill C-11 exceed what is actually required by the WIPO Internet Treaties. Other nations, while nonetheless opting for stronger protections, have demonstrated that there is scope for implementation in a manner that causes less disruption to users' rights. Clause 41.1 of Bill C-11 has the effect of mandating a blanket ban on circumventing a TPM regardless of whether it is for a lawful use or not. This shifts the power in the direction of copyright holders, and many critics feel this is unfair.

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[359] James Gannon, "5 Steps to Understanding Bill C-11 and 'Digital Locks'" *James Gannon's IP Blog* (November 2, 2011), online: <http://jamesgannon.ca/ 2011/11/02/5-steps-to-understanding-bill-c-11-and-digital-locks/>. Gannon urged Parliament to opt for strong copyright protections. The rhetoric is propped up by reference to the fact that of 89 signatory countries, Canada occupied a position along with Venezuela, Nigeria and Namibia - supposedly nations with relaxed IP policies - as one of only nine unratified nations (See WIPO, "WIPO-Administered Treaties", online: <http://www.wipo.int/treaties/en/>.

As with international instruments, the text of the obligations carried by the WIPO Internet Treaties is drafted at a high level to allow signatory countries flexibility to implement the requirements into domestic law in such as way that acquiesces with cultural and law making traditions. A body of scholarly work has developed in response to questions relating to the extent to which Canada is required to legislate to successfully implement the treaty obligations, and there is by no means a consensus. Much of the literature highlights the importance of creating laws to address and support the needs of Canadians while ensuring that the viability of new online business models is not outweighed by old ones (as the copyright industries have demonstrated through consistent reluctance to adapt to new technologies). This entails finding the balance between protecting copyrighted materials while not eroding the rights of lawful users.

e. *Government Consultations*

Sara Bannerman writes that over time, the focus of administrators of Anglo-American copyright has shifted from what used to be a passive 'tip-of-the-hat to the public interest' to the real involvement of the public in policy-making decisions.[360] Canada is no exception and in 2001, to tackle the growing concern the *The Act* did not adequately address the "chameleonic and almost elusive technology that... has put the general public in direct daily contact with copyright law"[361] Industry Canada and

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[360] Sara Bannerman, "Canadian Copyright Reform: Consulting with Copyright's Changing Public" (2006) 19 IPJ 271 at 272-3.

[361] Ysolde Gendreau, "Vox Pop: Public Participation in Canadian Copyright Law" in Irini A Stamatoudi, ed, *Copyright Enforcement and the Internet* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010) 321 at 326.

Canadian Heritage[362] launched a nationwide consultation process to align copyright modernization with Canadian values while striving to satisfy the needs of all stakeholders involved. Since 2001, the legislative process for copyright reform "has been filled with studies, suggestions, consultations and the occasional *contretemps*. Continual attempts to resolve differences have most recently resulted in still further public consultation".[363] The exhaustive groundwork that was done points to a government desire to ensure that when the time came for statutory amendment, Parliament would get the balance right. As the WIPO Internet Treaties still needed to be ratified, issues around TPM protection formed a significant aspect of the growing debate. Willingness to allow stakeholder voices to be heard appears to indicate Parliament's acknowledgement of the importance of copyright on the everyday activities of Canadians. From this perspective there can be little doubt that the government wanted to allocate substantial space for the views and opinions of Canadians to be heard as the process unfolded. However, questions have been raised over certain aspects of the consultation process which begs the question of whether the decision to involve the public was a mere 'tip of the hat' or a genuine interest in the views of the public.

Between 2001 and 2004 Industry and Heritage laid the groundwork for an inclusive copyright reform process by releasing two discussion papers to provide "a first

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[362] Industry Canada and Canadian Heritage are the departments responsible for oversight of intellectual property (Industry, via the Copyright and Intellectual Property Policy Directorate) and copyright (Heritage, via the Copyright Policy Branch).

[363] Richard C Owens, "Noises Heard: Canada's Recent Online Copyright Consultation Process" (19 April 2010), *Osgoode Hall Intellectual Property Law & Technology Program*, online: IP Osgoode <http://www.iposgoode.ca/2010/04/noises-heard-canadas-recent-online-copyright-consultation-process/>.

step in initiating discussion on a copyright framework."[364] The papers appropriately highlighted the drastic changes the previous decade had ushered in to the digital environment, while drawing attention to Canadian society's increasing reliance on the internet as a forum for conducting business by discussing implications for e-commerce and copyright. Another aspect of the process involved the use of the internet as a forum to hold discussions; the result was hailed as one of the most open consultations ever held by the department as it allowed the "general unorganized public"[365] to participate. Despite the evolving consultations and growing involvement of the public, political interruptions necessitated delays in updating *The Act*.

This changed in 2009, when the most significant phase of the consultation process took place. Between July and September of 2009, Industry and Heritage launched a second nationwide consultation. In a news release, the sponsor of the forthcoming Bill C-32, the Minister of Industry Jim Prentice remarked that the government was "committed to ensuring Canada's copyright law is up to date"[366] and the extensive consultation planned was part of that meeting that commitment. In addition to the online submission method used in previous consultations, the 2009 consultations involved town

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[364] Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, (Ottawa: Intellectual Property Directorate and Copyright Policy Branch, 2001) at 1 online: <http://www.ic.gc.ca/eic/site/crp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf> [*Consultation Paper*]; see also Industry Canada and Canadian Heritage, *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet*, (Ottawa: Intellectual Property Directorate and Copyright Policy Branch, 2001) online: <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00008.html>.

[365] Sara Bannerman, *supra* note 360 at 278.

[366] Industry Canada and Canadian Heritage, News Release, "Government of Canada Proposes Update to Copyright Law: Balanced Approach to Truly Benefit Canadians" (12 June 2008) online: Balanced Copyright <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01176.html>.

hall meetings and public roundtables in ten Canadian cities. Contrasting the open-ended online submission request in the former round of consultations a set of five questions were posed in an online discussion board.[367]

The results of the 2009 consultations received mixed reviews, particularly from critics of the government's position on TPM legislation. The roundtable discussions[368] appear to have had a constructive impact, opening up the dialogue between a cross-section of stakeholder interests and the government. Transcripts from the roundtables reflect a balance of input from participants, and the hosts of the discussions appear to have genuinely engaged with the concerns presented. The outcome of the online submission and discussion process which accounted for over 8,300 participants[369] proved to be somewhat more ambiguous.[370] The government pledged to at the end of the consultations "take stock of the submissions that Canadians have made and the

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[367] The questions were as follows: (1) How do Canada's copyright laws affect you? How should existing laws be modernized? (2) Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time? (3) What sorts of copyright changes do you believe would best foster innovation and creativity in Canada? (4) What sorts of copyright changes do you believe would best foster competition and investment in Canada? (5) What kinds of changes would best position Canada as a leader in the global, digital economy?

[368] The roundtable discussions were hosted by at least one of the following MPs: the Minister of Industry Tony Clement, the Minister of Canadian Heritage James Moore, the Parliamentary Secretary to the Minister of Industry Mike Lake (Edmonton-Mill Woods-Beaumont) and the Parliamentary Secretary for Official Languages Shelly Glover (Saint-Boniface).

[369] Michael Geist, "10,000 Consultations for Bill C-11? Tories Listened to Only One" *Huffington Post* (29 May 2012), online: Huff Post Politics Canada <http://www.huffingtonpost.ca/michael-geist/bill-c-11_b_1545501.html>.

[370] See Simon Doyle, "Industry Canada Responds to Consultation Criticism, Says Process Was a 'Tremendous Success'" *The Wire Report* (23 April 2010), online: Wire Report Copyright <http://www.thewirereport.ca/news/2010/04/23/industry-canada-responds-to-consultation-criticism-says-process-was-a-tremendous-success/20686>; See also Richard C Owens, *supra* note 363. Owens criticizes the online forum for several reasons including: the lack of identity verification in submissions and potential for duplication, potential for submissions to originate from non-Canadians outside of Canada, and the over-reliance on English and male submissions.

discussions that took place. With these in mind, the government will draft and table new legislation."[371] While the organizers heralded it as a success, critics questioned whether sufficient consideration was given to the views of individual Canadians. The balance of submissions reflected consensus on the fact that the digital lock provisions went too far.[372] Furthermore, the copyright industries attempted to attack the validity of the online consultations by trivializing the use of form letters as a primary submission method.[373] Attacks on individual submissions points to a larger issue that has formed a part of the subject of this paper: the efforts of the copyright industries to exclude the voices of those most significantly impacted by broad copyright protections - the consumer. It was noted that 70 per cent of all individual submissions were form letters either based on, or containing substantial elements of a form letter generated by the Canadian Coalition for Electronic Rights (CCER), a user-rights organization. This partisan critique fails to consider the form letters used by copyright industry stakeholders, and serves to show the attempt to muffle the voices of non-experts. Form letters should not be discounted and are an important part of providing a means to individuals who might be otherwise unsure of how to appropriately voice their views. It would be difficult to dispute the perspective of the cynic who argues that providing a platform for individual submissions was merely

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[371] Industry Canada and Canadian Heritage, *General Questions on the Copyright Consultation* (10 August 2010), online: Copyright Consultations <http://www.ic.gc.ca/eic/site/008.nsf/eng/h_04025.html>.

[372] See generally Althia Raj, "Bill C-11: Copyright Legislation And Digital Lock Provisions Face Opposition In Canada" *Huffington Post* (17 June 2012), online: Huff Post Politics Canada <http://www.huffingtonpost.ca/2012/06/17/bill-c-11-copyright-modernization-act-canada_n_1603837.html>; John Lutz, "The CHA opposes the Digital Lock provision in Bill C-11" *Canadian Historical Association* (22 November 2011), online: Canadian Historical Association <http://www.cha-shc.ca/en/Homepage_69/items/4.html?print=true&>; "National Library Association Acknowledges Passing of the Copyright Modernization Act: Bill C-11 Contains Positive Elements but Digital Lock Amendments Still Needed" (29 June 2012), online: Canadian Library Association <http://www.cla.ca/AM/Template.cfm?Section=Home&CONTENTID=13144&TEMPLATE=/CM/ContentDisplay.cfm>.

[373] See Richard C Owens, *supra* note 363.

a token gesture by the government to individual concerns, and that well-funded submissions were the ones that counted. Many voices were made public throughout the consultations. Notwithstanding the significant investments of time and taxpayer dollars, the voices with the true capability to affect Bill C-11 were those of three politicians - Stephen Harper, Tony Clement and James Moore. Below it will be highlighted that despite widespread opposition from MPs, Bill C-11's most controversial provisions would remain unchanged.

f. *Parliamentary Debate*

As discussed in the Consultation Paper on Digital Copyright Issues, the landscape of the global digital economy has changed drastically since Canada signed the WIPO Internet Treaties in 1997, which was also the last time the *The Act* received major amendments. This proved to be a double-edged sword as even though the extra time has provided opportunities to study the implications and experiences of other nations, the lack of any update has admittedly left lacunae in *The Act* as technology evolves. Lacunae have helped fuel the rhetoric that Canada is weak on copyright protection.[374] In a bid to push the bill through[375] Bill C-11 was introduced with virtually no amendments to its

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[374] See John Ivison, "Boring copyright bill belies importance of the issue" *National Post* (8 February 2011) online: National Post Full Comment <http://fullcomment.nationalpost.com/2011/02/08/john-ivison-boring-copyright-bill-belies-importance-of-the-issue/>. The author cites a 2005 OECD study that found Canada with more people per capita engaging in illegal peer-to-peer (P2P) file-sharing. Furthermore, the author claims that EU-Canada trade relations are being hindered by the 'wild west' status of Canada and that Canada is considered an 'international pariah' by the US.

[375] Industry Canada and Canadian Heritage, News Release, "Harper Government Delivers on Commitment to Reintroduce Copyright Modernization Act" (29 September 2011) online: Balanced Copyright <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01238.html>.

predecessor Bill C-32, which had the effect of allowing elements of the prior debate to carry over from earlier sessions.

The second reading debates focused primarily on TPMs. Throughout the debates there was significant disagreement between MPs on how the sweeping language of the TPM protections would affect Canada's consumers, educators, students and creators especially in terms of locking out legal users by negatively impacting fair dealing and other users' rights, and ensuring that compensation reached the creator rather than being swept up by collective societies or other aspects of the copyright industry. Early in the debate Liberal Industry Critic Hon. Geoff Regan moved that the House should decline to give second reading to the Bill, as it did not:

> (a) uphold the rights of consumers to choose how to enjoy the content that they purchase through overly-restrictive digital lock provisions;
>
> (b) include a clear and strict test for "fair dealing" for education purposes; and
>
> (c) provide any transitional funding to help artists adapt to the loss of revenue streams that the Bill would cause."[376]

Mr. Regan's striking motion to scrap the bill altogether evidences the concern held by constituents and MPs alike over the direction taken by the Conservatives. Despite being the most significant amendment proposed throughout the second reading debates, it was later negatived in a vote pattern which correlates closely with the majority divide in the House.[377]

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[376] *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 031 (18 October 2011) at 1145 (Geoff Regan).

[377] House of Commons, *Journals*, 41st Leg, 1st Sess, No 79 (28 November 2012) online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=55&Parl=41&Ses=1&Language=E&Mode=1&DocId=5279422&File=0>.

The TPM provisions are arguably the most contentious in the bill. They attract the most media attention and have prolonged the debate in Parliament. The issues created by digital locks can be approached from several different angles. They range from the ostensible flexibility provided by the language of the *WCT* and *WPPT*, to the pressure exerted by the US to enact broad *DMCA*[378] restrictions over copyrighted materials and how deferring to the US may have a negative impact on the interests of the artistic and creative communities of Canada.[379] Driving the debate was the stringency of the TPM provisions and the penalizing effect they would have on consumers.[380] A further problem with the way Canada has addressed circumvention protection is the lack of direct link to actual copyright infringement. Previous attempts to update *The Act* dealt with TPMs in different ways. Why this is the case is unclear although changes in government may provide some explanation. In 2005 Bill C-60[381] was introduced by the Liberal government and arguably adopted a more balanced approach by directly linking

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[378] The *DMCA* enacted a new category of copyright violations which included the circumvention of technological measures used on digital products for both access and copying purposes. §1201(a)(1)(A) provides a ban on circumventing access controls; §1201(a)(2) provides a ban on trafficking access control circumvention devices; §1201(b) provides a ban on copy control circumvention devices; §1202(b) prohibits individuals from removing information related to access or use device rules. The *DMCA* also provides for significant civil and criminal penalties. See also Samuelson Law, Technology and Public Policy Clinic, *Frequently Asked Questions (and Answers) about Anticircumvention (DMCA)*, online: UC Berkeley Law <http://chillingeffects.org/anticircumvention/faq.cgi>.

[379] *House of Commons Debates*, *supra* note 376 at 1140 (Geoff Regan). Mr Regan revealed that diplomatic cables released through WikiLeaks indicated that Conservatives requested the US to place Canada on its piracy watch list in order to have the effect of scaring Canadians into supporting the bill, that much of the Bill was drafted to meet American expectations, particularly in terms of the digital lock provisions, and that an advance copy of the Bill was offered to the US before Parliament had an opportunity to debate it.

[380] See *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 065 (12 December 2011) at 1645 (Tarik Brahmi) where Mr. Brahmi (Saint-Jean) said: "We are not against the idea of protecting people, but we are against the adverse and unintended effects of digital locks. When a digital tool has more adverse and unintended effects than the original purpose for which it was created, we could end up preventing someone who legally acquired music rights from changing the platform or format. What we are against are the adverse effects of certain tools, which are not controlled and are not seen today."

[381] Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2005, (First Reading 20 June 2005).

circumvention to copyright infringement. Since then, Parliament's approach has changed with circumvention for any prohibited reason triggering all the available remedies for copyright infringement.[382]

A survey of Hansard from the ten second reading debates indicates that the Conservatives became weary of the ongoing inability of the House to reach a consensus, and simply wanted to push the bill through. Based on the tone of the debate, it seemed as though the opposition parties would have been willing to compromise on the digital lock provisions had Bill C-11 allowed for a little more flexibility. For example, the entirely legal application of format shifting[383] is acceptable under the bill, however should a manufacturer wish to apply a TPM to content a user's ability to format shift would be entirely lost. Judy Foote perhaps summed it up best when she quoted a letter from a constituent, who noted that "[t]he anti-circumvention provisions... unduly equip corporate copyright owners and distributors in the music, movie and video game industries with a powerful set of tools that can be utilized to exercise absolute control over Canadians' interaction with media and technology..."[384] This perspective proclaims the gravity of legislating broad TPM protections. This view, echoed in many of the individual

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[382] It should be noted that Bill C-11 does provide exceptions to TPM circumvention, although a user who is dealing fairly with copyright content would not stand to benefit from any of the exceptions enumerated in ss. 41.11 - 41.18.

[383] An example of format shifting would be purchasing a compact disc, and creating a copy for personal use on a portable digital device such as an iPod; another example would be buying an e-book for personal use on an e-reader, and making a copy for your own computer.

[384] *House of Commons Debates*, *supra* note 380 at 1535 (Judy Foote).

submissions in the consultations appears to have gone unnoticed by Industry and Heritage.

Although an expansion in the area of fair dealing is included,[385] the new TPM provisions could have the effect of overriding the expansion of fair dealing and other user rights.[386] Jinny Jogindera Sims, citing Professor Geist, noted that "[t]he foundational principle of the new bill remains that any time a digital lock is used - whether on books, movies, music, or electronic devices - the lock trumps virtually all other rights."[387] In response, Dean Del Mastro[388] conceded that his colleague's heart was "in the right place"[389] but that important facts were left out, including how during the Committee hearings and consultations conducted in the previous Parliament, many industry groups made submissions and individuals gave testimony in support of the bill. Del Mastro pointed to the support of, among others, the Canadian Council of Chief Executives, the Canadian Chamber of Commerce, the entertainment software industry, and MusicCanada. Unfortunately the substance of the points repeatedly raised by opposition MPs is completely overlooked by Del Mastro. The support referred to is concentrated in larger

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[385] Parody and satire are now included in the enumerated statutory list. When incorporated with the SCC decision in *Access Copyright*, fair dealing in Canada is a significant triumph for users' rights.

[386] See Carys Craig, *supra* note 297 at 178 where she states that "[t]hese potential improvements do not go far enough, in my view, but there is a larger problem looming than the definitional boundaries of fair dealing: the proposed protection of technological protection measures... or "digital locks" threatens to undermine the significance of fair dealing and other exceptions by making them ineffectual in the fact of technological controls."

[387] *House of Commons Debates*, *supra* note 376 at 1530 (Jinny Jogindera Sims).

[388] Parliamentary Secretary to the Prime Minister and to the Minister of Intergovernmental Affairs.

[389] *House of Commons Debates*, *supra* note 376 at 1545 (Dean Del Mastro).

right-holder organizations including publishers, film studios and record industry groups. Later in the session, Randall Garrison stated:

> The concept of digital locks... does not help the original producer. It only protects those big distributors who probably already undervalued that content and allows them to protect their huge profits at the same time, when most of the artists receive very little in terms of income for their work.[390]

What opposition MPs like Garrison were keen to point out in the debate is that despite the Conservatives' claim that the provisions of Bill C-11 are balanced, the stakeholders that stand to benefit are large companies rather than the artists, creators or innovators themselves. As a former musician, the NDP's Charlie Angus was unequivocal in voicing his party's inability to support Bill C-11 in the form it was in as it did not strike an appropriate balance. Mr. Angus stated that "unless the digital lock provisions change, the New Democratic Party will not support the bill because it is not balanced"[391] and Alain Giguere said that the "spirit of its content is flawed."[392] Striking an appropriate balance was a recurring non-partisan notion echoed by other MPs throughout the debate, although the best way to do so was far from agreed upon. Preservation of culture, the creation and retention of jobs in Canada's music and film industry, and fair compensation for artists were cited as reasons why the bill was inadequate.

A unifying theme between members of the NDP was that developing provisions to fairly compensate artists was going to be a key factor in establishing an appropriate

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[390] *Ibid* at 1705 (Hon Randall Garrison).

[391] *Ibid* at 1115 (Hon Charlie Angus).

[392] *Ibid* at 1610 (Alain Giguere).

balance from their point of view. Jogindera Sims highlighted a report by the Conference Board of Canada finding that in 2008 the cultural sector generated over $25 billion in tax revenue at all levels of government, with an investment of only $7.9 billion.[393] Attention was drawn to the fact that despite the significant contribution to Canada's economy, the average annual income of an artist in Canada was $12,900.[394] By using these figures to establish the imbalance of the provisions of Bill C-11 with respect to artist compensation, the NDP's dissatisfaction of the bill regarding the protection of artists, innovators and creators was made clear. According to Alain Giguere Bill C-11 was a misguided attempt to strike a balance, and had the effect of denying copyright protection and fair compensation where it is due:

> With this bill, the Conservatives are giving the digital industry complete ownership of Canadian culture. It has all the rights, all the resources, and the financial sacrifices made for it. Canadian artists are... no longer entitled to any financial compensation for their works.[395]

Ensuring that artists are fairly compensated for their efforts indeed fits into a balanced copyright framework. However, while the sentiments coming from Giguere square with an ethos one might expect from a member of the NDP, by stating that the copyright protections provided by Bill C-11 inadequately protect artists, it neglects to consider that in order to exploit their works many artists must assign rights over to a film studio or a record company. In a sense, their compensation stream derives from how effectively their assignee is able to exploit the work for them. This is the nature of revenue

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[393] *Ibid* at 1525 (Jinny Jogindera Sims).

[394] *Ibid*.

[395] *Ibid* at 1555 (Alain Giguere).

generation through copyright. Giguere pointed out that the levy on blank recording media such as compact discs, was becoming substantially reduced as compact discs are quickly becoming obsolete. Mr. Del Mastro followed up on Mr. Giguere's comments by countering:

> [I]t would be so helpful if before members rose to speak to a bill they would actually do some work to understand the issue at hand... Does the member know what is an attack on artists? The fact that wealth destroyers like isoHunt and Pirate Bay allow people to copy works by artists as much as they want onto their hard drives and never pay a dime for it. That is an attack on artists... Why does he not just come out and say that an iPod tax is what he wants, instead of talking in tangential comments that do not even make sense? ... This is a support for artists. It is a support for industry.[396]

This type of exchange illustrates the ideological disagreements over how provisions of the Bill should affect stakeholders, and how the rhetoric has reached the debate floor of the House.

g. *A Dubious Resolution*

The outcome to which all MPs would have been alive to during the House and Committee debates was that invariably, they would conclude on the strength of the Conservative ability to carry and adopt motions, or defeat opposition amendments. Despite amendments proposed by the Liberals and NDP that would have positively impacted the education sector, including removing a destruction requirement on digital lessons and time restrictions on digital library loans, only minor technical amendments

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[396] *Ibid* at 1605 (Dean Del Mastro).

from the Conservatives were incorporated into the final draft of Bill C-11.[397] The underlying issue of broad TPM protection remained as per the status quo and appeals to link circumvention to copyright infringement were not considered. On the strength of the Conservative majority, the proposed amendments were defeated and the bill was ushered through Committee and Senate to receive Royal Assent on June 29, 2012. It is incongruous that a government eliciting the merits of a balanced copyright system would not afford greater consideration to such a small change (linking circumvention to copyright infringement) that could go a long way toward settling the struggle between stakeholders, and moving in the direction of the SCC model.

h. *Flaws with the New Law*

Despite agreement between proponents and critics alike that the Ministers responsible for the bill are well-intentioned, there still exists an element of disagreement on how key provisions will realized in a practical application.[398] The TPM provisions raise the most concern at this time, although it remains to be seen how the new law will be interpreted by the courts and other law enforcement agencies.

First, the fact that the new law arguably goes beyond the scope of the WIPO Internet Treaties will always be a concern. The prospect of a constitutional challenge is

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[397] Michael Geist, "Proposed Bill C-11 Amendments: Gov Says No Changes to Digital Locks, Fair Dealing or User Provisions" (12 March 2012), online: <http://www.michaelgeist.ca/content/view/6374/125/>.

[398] Howard Knopf, "Bill C-11: Locks, Limits, Levies, Litigation & Now RIP "Rip, Mix & Burn"" (6 October 2011), online: Excess Copyright <http://excesscopyright.blogspot.com/2011/10/bill-c11-locks-limits-levies-litigation.html>.

even possible.[399] Professor Geist argues that the treaties are flexible, and by not linking circumvention to infringement the government has exceeded what is technically mandated. This has the potential effect of allowing copyright owners and other right-holders to restrict usage of materials, even though a consumer may be within his or her statutory right to do so.

The second concern relates to balance in copyright, and that when appropriately balanced the needs of users is met with the incentive to create. Howard Knopf, a technology law practitioner, believes that the potential of making devices and content 'finicky' to use may actually discourage innovation overall. Knopf queries how the inability to bypass a regional code on a legitimately imported Bollywood DVD not available in Canada will foster creativity.[400] This example can be applied to any creative outlet, as creativity relies on a number of factors including inspiration and cultural influence.

Finally, like the *DMCA* in the US Bill C-11 has been criticized for being overly complex and difficult to interpret. As Knopf states, "[a]n ordinary Canadian household... should not require a resident copyright lawyer to get through the day without risk of

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[399] Michael Geist, "Are the Canadian Digital Lock Rules Unconstitutional?' *Huffington Post* (27 June 2012), online: Huff Post Politics Canada <http://www.huffingtonpost.ca/michael-geist/bill-c-11_b_1627604.html>.

[400] *Supra* note 398.

serious litigation."[401] Notwithstanding the hyperbole of Knopf's assertion, it is not difficult to envision the reality of this problem.

i. *Conclusion*

It is prudent to recognize that while this is the first step for Canada in a journey towards developing a copyright framework that is suitable for Canada, much of what the future holds is likely to be beyond the direct control of Canadian legislators as globalization and the proliferation of multilateral trade agreements will only intensify. The success of Bill C-11 will be determined in part by its utility in addressing technological advancement and novel situations by not creating legislative gaps while at the same time allowing for flexibility in interpretation. Furthermore, there is a mandate for review after five years at which point we will have a clearer picture of how the law has developed on the ground.

[401] *Supra* note 398.

# CHAPTER VII

## CONCLUSION

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*If our goal is to encourage creativity, we must adapt copyright laws to the actual ways people create and to the actual markets for that creativity. Copyright laws should not act as a bulwark shoring up outdated business models against the new tide of new technologies and business models offering consumers what they want.* [402]

- William Patry

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Copyright is a set of ideas and principles that have been subject to various normative interpretations over time. Historically, despite brief resistance from affected stakeholders the copyright models of the day were capable of adapting to the nuances of technological development while continuing to achieve the objective of promulgating cultural content. In recent times, external forces have begun to push the boundaries traditionally recognized as vital in maintaining a healthy copyright policy. The organizing principles embraced by our conceptual understanding of copyright have been challenged by the rapid technological change that has become a hallmark of this generation. While this paper has sought to consider responses based on the continuing acceptance of copyright as an appropriate model that values the tripartite relationship between the public, consumers and the right holder - the potentiality remains that copyright may simply be incapable of withstanding the external pressures currently being exerted upon it. One may query why this should be the case when it has been observed

[402] William Patry, *supra* note 17 at 40.

that although many technological advancements over time have been met with resistance by certain stakeholders who stand to be impacted in some way, there has been a robust institutional adaptability exhibited by copyright that has enabled it to respond to cultural demands and changes in priorities.[403]

Perhaps the copyright debate has been elevated to the current level of public hyper-awareness in a false-positive manner, similar to those technological advances that have come before. While each change has been mooted by some as having disastrous consequences, the reality remains that such consequences never really materialized. Disputing the enormous impact the internet has had on commerce, culture and social interaction would be dubious however we must take a moment to consider the modern-day advancements that are perhaps equally neoteric for their time. While it may seem that the discourse keeps building on its overwhelming presence, through more literature and more media exposure perhaps in taking a degree of 'cultural inflation' into account what we see today is no more than what John Philip Sousa observed during the advent of new technologies such as the phonograph capable of novel methods of music distribution.[404]

Looking back, it seems almost trifling and absurd to consider that someone believed a record player would be an impediment rather than a stimulus to the cultural

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[403] Jessica Reyman, *supra* note 227 at 44.

[404] See Lawrence Lessig, *supra* note 184 at 23-25 for a detailed discussion of Sousa's efforts to discourage Congress from allowing public reproductions of his music.

development of society - of course at the time, such a level of foresight would have been nigh on unfathomable, if not entirely impossible. Sousa, who indeed stood to benefit from his copyrights, went to lengths to encourage Congress to weigh the deleterious effects of the phonograph. Nonetheless, if we pause to consider the scenario faced by Sousa and extrapolate it to today we can observe similar features. Today we are faced with new technologies that do not easily square with traditional models of copyright protection. It must be remembered that it is not the protection of copyright content that has caused controversy, as it is almost universally agreed upon that protection is an imperative in facilitating a balanced copyright model. Indeed, even in contractual scenarios certain protections and guarantees provide the stimulus to enter into the agreement - there must still be value for both parties. Rather, it is the manner in which those stakeholders who like Sousa, are of the view that they stand to lose, who are placed on notice and have reacted not by adapting, but by going to great lengths to persuade law makers to preserve antiquated ideals.

What has been seen is a shift towards a commercially driven contractual model based upon the direct binary relationship between the consumer and the right holder. While this change has been resisted by many scholars and commentators for reasons discussed in this paper, it has been suggested by some that technological development may be eliciting a need for a doctrinal overhaul of institutional copyright as it is understood today. In fact, this could be the direction we are facing, although it appears as though many fear the inherent uncertainties and legal implications that may arise should

there be a change toward an entirely new construct designed to achieve what copyright was once able to do so effectively.

When balance is accepted as the lynchpin of copyright's viability, a utilitarian approach has often been viewed as support for the overall advancement of innovation and culture for the benefit of society over the lesser inertia necessary for efforts and reorganizations required by a smaller number of copyright owners. While possibly satisfying the 'greatest happiness' test, creators of culture themselves may still stand to lose out as the benefit of many would theoretically trump a creator's need to be fairly compensated under a balanced approach. Carrying this reasoning a step further, ultimately a free-for-all system would provide the means to satisfy the utilitarian approach to the greatest extent. This exploitation of the utilitarian perspective is embodied by the ability to access and freely download virtually any desired content by using, for example, P2P or bitTorrent websites. If consumers feel they are not receiving what they should be or are being taken advantage of, there will inevitably be a route conceived to enable access the content.[405] However, this approach is clearly not

[405] This is evidenced by the sharp decline in CD sales in recent years discussed in this paper, which was incorrectly attributed by the copyright industries to theft and piracy rather than the fact that consumers had grown weary of paying high prices for albums purchased for the one or two songs the user wishes to listen to. Before the advent of the single-song digital download on iTunes, platforms such as Napster provided users with the opportunity to freely download music track-by-track rather than purchase an entire full-length album to subsidize mediocre music. The record industry practice of tying-in filler tracks to the purchase of a CD on the basis of one or two good songs would possibly even be considered anti-competitive in some markets, but carried on for a long while as the conventional business model. While Napster's original strategy may have been disagreeable, it provided a voice to consumers that prompted the copyright industries to listen and take action. The litigation approach that ensued illustrates the resistance of the record industry and depicts fear of losing a business model that had always been viewed as a bargain for them - but not for the consumer.

sustainable if the goal is to encourage people to pursue jobs in the creative sector, to further culture and innovation.

On the other hand, a labour-based natural rights ownership paradigm lends support to commodification, control and exploitation. Viewing copyright through a rights-based economic lens has enabled it to become integrated within a globalization movement towards uniformity and unrestricted trade to the benefit of a few. Again, in this scenario theory-reliant rhetoric comes up short of a balanced solution as it has had the effect of alienating and restricting its very lifeblood - the consumer.

Nonetheless, the public at large tend to have the power in numbers to dictate methods to achieve what they want and the platforms they want it on. History also teaches us that resistance does eventually become exhausted. The challenge now lies in working towards a sustainable model. As the volume of literature continues to expand and as the external forces that will undoubtedly play a role in any new framework become better understood, attempts must be made to offer practical solutions.

While there are social and cultural commentators who have offered opinions, their efforts are by no means a panacea and they remain beyond the realm of practicability. We are still in a period of resistance, of tension between the tug-of-war relationship between consumers, creators and the copyright owning industries. We continue to be pitted against each other as thieves or greedy creators. Speculating as to what the future may

specifically bring in replacement is beyond the scope of this paper, but a sea change may be imminent and we must prepare to embrace change.

Current business models of control and exploitation coupled with the effect of international copyright law have permitted many copyright issues in Canada to be litigated, frequently to the highest judicial level. While sea change may loom on the horizon, the SCC's incumbent model has provided a bona fide route forward embracing the inclusivity, balance and technological neutrality[406] that is so vital to maintaining copyright's contemporary functionality. In 2004 the SCC asserted in *CCH* that the courts must strive to interpret *The Act* bearing in mind the dual objectives of "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator"[407] while recognizing the "limited nature of creator rights"[408]. This model was again attended to in 2012 by the pentalogy of SCC decisions[409] which not only provided affirmation for the balancing of interests paradigm, but appears to endorse lateral thinking in respect of contentious issues like fair dealing.[410] While the SCC model indeed provides compelling grounds to believe that copyright is

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[406] The importance of technological neutrality was reiterated in *Rogers v SOCAN, supra* note 226 at para 39, per Rothstein J: "[T]his court has long recognized in the context of the reproduction right that, where possible, the Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting".

[407] *CCH*, *supra* note 4 at para 10.

[408] *Ibid*.

[409] Pentalogy, *supra* note 5.

[410] For example, the decision in *Access Copyright* seems to suggest a model closer to the American fair use regime may be appropriate for Canada which until now, has remained an exhaustive list of acceptable uses.

capable of adapting yet again to the torrent of external forces upon it, the ultimate direction will be contingent upon Parliament's ability to welcome such an interpretation.

We must as a society consider whether we are, for better or worse in the interim, ready to effectuate acceptance within copyright's inclusive paradigm or to continue in our efforts to resist its adaptability by attempting to square it with traditional archetypes of protection and current patterns of cultural detachment.

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