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Constructing Copyright in the Digital Age: The Case of Canada

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Executive Summary

Copyright protection is in a state of transition. The change brought about by the digital age has rendered the traditional model of copyright obsolete. Digitization and the Internet have altered the very nature of intellectual property, by allowing it to be non-rival, intangible, and easily accessible. Breakdowns in traditional intermediaries, the rise of user generated content, and Peer-to-Peer file sharing have played a profound role in reshaping how intellectual goods are created, used and distributed. These technological advances have brought to light a series of important policy questions about intellectual property rights in Canada and around the world. Bill C-11, a series of Supreme Court decisions in the summer of 2012, as well as movements in international law have sought to address these technological shifts. However, these actions are only the first step in addressing an ever-evolving problem.

The original purpose of copyright sought to balance the protection of the holder and the user. In the simplest sense copyright gave creators a monopoly over their work for a fixed amount of time. This was beneficial to both the copyright holder and the user as it insured a reasonably equitable balance between protection and freedom of use. However, over time this balance became more and more heavily weighted in the direction of the copyright holder. While recent amendments to the Copyright Act have sought to rectify this imbalance and address the challenges of the digital age, the development of copyright law for modern times is still a work in progress. Issues such as copyright enforcement, the flexibility of the fair dealing clause, how to regulate user generated content, and technological neutrality remain contentious. All in all the Copyright Act is analog legislation operating in a digital world, and will require an in depth examination before it can evolve into effective policy. This study aims to clarify the issue that will continue to bedevil policymakers in Canada, as elsewhere.

Introduction

Innovation has a way of changing the world; the light bulb created artificial daylight, the steam engine enabled long distance travel, and the Internet changed the ways in which people communicate. With every technological development fundamental aspects of human life change, this has been and continues to be a central point of tension for copyright. The invention of flight changed the boundaries of physical property ownership, so that the landowner no longer owns the sky, and in a similar way the digital age has altered traditional conceptions of copyright.[1] The printing press enabled the commercial production of books, record players brought popular music into the home, television brought the theatre into living rooms, and the tape recorder allowed for the first mix tape, all of which altered the ways culture was consumed and thereby how intellectual property needed to be protected. However, no change has been as powerful as the transition into the digital age. The digital age, as it has come to be called, changed the very basis of information communication. Digitization and the Internet have not only altered the nature of intellectual property, but how society interacts with it. This shift created extensive problems for the traditional copyright model and raises questions about the fundamental design of copyright legislation. Intellectual property rights have entered uncharted territory; no innovation has ever moved so quickly or had such a dramatic effect on cultural production.

Before the printing press, intellectual goods were unregulated in the free market and were part of the public domain. After the printing press, the free market approach broke down. Free riding on intellectual goods in the public domain hindered the production of culture. The legislative response to the free rider problem was essentially pigouvian, assigning property rights over intellectual works. The first model of copyright had two purposes: 1) to protect the producers from competition for a specified period of time, and 2) to protect public consumption through such methods as "fair use" and "fair dealing." The first model of copyright has essentially remained unaltered. While legislation has developed to incorporate technological growth the basic components remain the same, establishing a balance between the interests of the producers and consumers. This is done through regulating both the copying and distribution of physical products (books, musical recordings, DVD's, CD's). However, digitization poses such a threat because it abandons the physical mediums that help to bind the rules of copyright. When a product no longer takes a physical form it becomes exceedingly difficult to control its production and distribution. The Internet and P2P file sharing exacerbate this problem, as they undermine traditional distribution channels. Not only are the products intangible, but also they are being traded across an intangible medium. The globalized nature of the Internet has also created problems for the legal jurisdiction of copyright between countries. As a result of this and growing ubiquity of digital editing software the lines between producer and consumer have been blurred. Content can be edited, created, or remixed and sent around the world, without authorization or permission. As such the traditional model of copyright is becoming increasingly obsolete, and while there are those that seek to maintain it, its unenforceability has brought copyright to the forefront of policy extinction. So what, if

[1] Lessig, Lawrence. The Future of Ideas: the fate of the commons in a connected world. New York : Random House, 2001.

anything, should be done to preserve the fragile balance between copyright and user rights? This study addresses that question in the Canadian context.

The study unfolds in several sections. Beginning with a brief historical account of the development of copyright law, I then consider in more detail the problems posed to copyright law by changing technology, particularly in the digital age. Against this backdrop, the study examines the development and current state of copyright policy in Canada, and sets the Canadian situation in the wider international context. Finally, the study analyzes the main issues facing Canadian policymakers.

A Brief History of Ideas – the Inception of Copyright

The first law that sought to assign property rights to intellectual products was the 1710 Statute of Anne in Britain.[2] The statute marked the first time that 'fixed' intellectual works were protected from duplication for a specified period of time, becoming private property instead of free-rein ideas that floated around the public sphere. Before the Statute all intellectual property existed in the public domain. Creators could have accreditation of authorship; they could buy and sell their intellectual product, but there was no legal barrier protecting the author from unauthorized reproduction. Indeed, before the invention of the printing press, there was no real need for copyright legislation. There was little profit in authorship or publication as only a few physical copies of a good could be made.

All this changed when the printing press made the widespread publication of single titles profitable. It is at this point in history that authorship and publication became lucrative. The Statute of Anne afforded the exclusive rights to publish a particular literary work to the enterprise holding its "publishing rights." This gave the publisher a monopoly over that particular work for a period of fourteen years, allowing the publisher to recoup the purchase cost of the work, as well as the production costs entailed in printing copies.[3] Without the establishment of such rights, publishing an original work was not a feasible business endeavor. While the printing press meant that enough copies could be made to make a profit for the author and the publisher, without any regulation it also meant that anyone with a printing press could make a profit off of any intellectual good. Because copies could be printed efficiently and for a lower cost, any publisher could capitalize on producing a successful work, and in the absence of any copyright protection, competing firms often undercut the first company to publish a successful work by slashing the prices on their replicas. Publishers could obtain a copy, replicate the contents, and publish the work for a lower cost, charging less to the consumer and avoiding royalty payments to the author.[4] For publishers the risk was in deciding which works would be lucrative; a popular work would generate good profits and unpopular work would cost the publisher money. There was always the incentive to cheat the system and have another firm purchase and publish the work first. Copyright was the solution to this moralistically unfair market. The

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[2] "Primary Sources on Copyright (1450 - 1900)." 1710 . Statute of Anne, London . Ed. L. & Kretschmer, M. Bently. 12 October 2012 <www.copyrighthistory.org/anne.html>.

[3] Ibid.

[4] Bannerman, Sara. Canadian Copyright and the Digital Agenda: From Radical Extremism to balanced copyright . Geist, Michael . New York : Irwin Law , 2010 .

kind of fixed copyright term pioneered by the Statute of Anne could reward the investment risk, and thus promote the creation of intellectual goods and property.[5] The risk in deciding what to publish remained the same but the assurance of an impermanent monopoly, as was achieved by the Statute of Anne, made publishing feasible.

In addition to protecting the publisher, copyright was also designed to protect the author.[6] That is, copyright from the beginning not only safeguarded the publisher against competition, but also protected the author from plagiarism.

But authors and publishers have never been the only concern of copyright law. Such law has also always had in mind the users or purchasers of copyrighted material. The long name for the Statute of Anne makes this clear:

> "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…"[7]

The act was for the "encouragement of learning," and learning entailed not only encouraging authors to produce and publishers to distribute but also "purchasers" to consume and benefit from the intellectual production. The Act "vests" books not only "in the authors" but also in the "purchasers." From the beginning, in other words, copyright law has attempted to balance the rights between user and producer.[8]

In the case of the Statute of Anne, this balance was achieved by defining the rights of authors and publishers – particularly through publisher's exclusive right to sell the work for a limited period of time – and saying nothing about the rights of the user. Given the general legal principle that what is not prohibited is permitted, this meant that so long as a consumer did not copy and sell the work, any other use was permissible, as it did not pose any harm to the publisher or author. Indeed, the balance of interests implied by the long title of the Statute of Anne arguably favors the user over the producer.

Over time, the user's or consumer's side of the balance established by copyright law has been made legally more explicit in legal provisions and doctrines that outline in more detail the reasonable ways in which a consumer can fairly copy, use and publish material without either plagiarizing the author or unduly compromising the publisher's commercial

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[5] Ibid.

[6] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.

[7] "Primary Sources on Copyright (1450 - 1900)." 1710 . Statute of Anne, London . Ed. L. & Kretschmer, M. Bently. 12 October 2012 <www.copyrighthistory.org/anne.html>.

[8] Katz, Ariel. "Fair Dealing2 2.0: the Rebirth of Fair Dealing in Canada." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 93-156.

monopoly. Countries have addressed this issue through doctrines known as "fair use" or "fair dealing."[9] (The two labels signify differences that will be discussed below.)

However, as copyright extended its grasp beyond printed works unregulated uses began to disappear.[10] With every leap in technological innovation the conditions of copyrights were questioned. The invention of the printing press made the reproduction and dissemination of literary works more efficient and prolific. The ability to manufacture mass copies created the need for author and publisher protection. The invention of the tape recorder was accompanied by a blank tax levy; consumers were charged tariffs for a technology that enabled them to make unauthorized copies of audio tracks. The rise of the Internet challenged traditional distribution channels by eliminating the need for physical copies. This threw a curve ball at the legislators who had defined copyright law by the physical mediums intellectual property had fixed itself to. Is it possible that in the future purchasing Internet service will include a digital piracy tariff to account for online file sharing?

It seems that with every new transmission medium for intellectual creation, the existing notions of intellectual property rights were forced to change. Since intellectual goods are not a part of the free market, the question became how much protection should copyright provide? How long should copyright terms last before works enter the public domain? It is a topic that has been vigorously debated without any clear solutions. While paradigms of the debate shift, the discussion continues to this day. The Statute of Anne marks the first point in Western history that governments sought to regulate the production of 'culture.'[11] From this point, intellectual products, starting with books, underwent a perceptual change from communal culture to individual property. Ownership promoted innovation through the exclusive rights to compensation; good ideas were highly lucrative, bad ideas were quickly forgotten. The rights over the ideas in an intellectual work and their physical manifestation were split. While the author owned content, the publisher owned the rights to produce printed versions of their literary work.[12] This manner of split ownership would remain the predominant until the rise of the Internet.

There have been several definitive shifts in copyright history; most of these shifts can be directly correlated with successive innovations in technology. The change from publicly communicated ideas to claimable property marked the tipping point in how culture is produced and consumed. A street musician could earn a small profit for a performance but there was nothing to prevent another musician from replicating that very same performance. At its outset culture was unregulated, communal and subject to the free

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[9] Geist, Michael. "Fairness Found: How Canada Quietly moved from Fair Dealing to Fair Use." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 157-186.

[10] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004

[11] "Primary Sources on Copyright (1450 - 1900)." 1710 . Statute of Anne, London . Ed. L. & Kretschmer, M. Bently. 12 October 2012 <www.copyrighthistory.org/anne.html>.

[12] Lessig, Lawrence. The Future of Ideas: the fate of the commons in a connected world. New York : Random House, 2001.

market. The Statute of Anne reshaped the very base of cultural interaction. The process of fixation, innovations in technology and the allocation of property rights to intellectual creations have changed the way culture is consumed and produced.[13]

Culture, in this capacity, consists of the collective intellectual works produced by society. This includes all music, film, literature, logos, photos and other such intellectual creations. Traditionally culture is produced through a breakdown and buildup process, in which every new intellectual piece draws upon the existing to build new intellectual creations.[14] The fundamental assumption is that there is no divine inspiration; all ideas in some way emerge from a preexisting entity. One of the best examples of this can be seen in the early-animated works of Walt Disney. Disney utilized existing technology and culture to create new creative goods. Combining the technology used to synchronize sound and film with charming retellings of classic fairytales, Disney was able to take an existing intellectual good, remold, reshape and remix it to make it new.[15] For example, the original tale of Snow White written by the Grimm Brothers was transformed into a comedic happily-ever-after musical in film. The story becomes simultaneously new and old, identifiable with the brothers Grimm tale, yet distinct. This process represents Schumpeter's creative destruction approach to culture.

The creation of new culture is dependent on the amount of material in the public domain. In order to borrow from existing cultural products, they must be released from copyright protection. The public domain consists of all works that are no longer protected under copyright. The rights to produce these works no longer belong to an individual, company or entity, but are free to be utilized in the creation of something new.[16] Herein lies the problem of protecting intellectual property; it is a constant struggle between new and old. While protecting intellectual property favors existing works, an ever-growing public domain favors the creation of new works. The old tries to control and impede the new, and while old technology can hardly compete with new technology, the old retains its legal advantage, as statutory changes are not so elastic.[17] It can take years for copyright law to catch up with technological innovation.

The changing way that culture is being produced and consumed becomes a policy issue that affects people on a daily basis. Property can be defined, it can be bought and sold, ideas are intangible and in many ways uncontrollable. Transmitting intellectual property through temporal communication channels is liable to the free rider problem; physical copies can be traded the same way as a lamp, whereas any person within earshot can enjoy sound waves. For years copyright sought to ground intellectual property in physical forms, such as CD's, records, cassettes, and more. These forms tied intangibles such as radio waves to the tangible, which in the case of radio waves would be a radio. In doing this intellectual

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[13] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.
[14] Ibid.
[15] Ibid.
[16] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.
[17] Ibid.

property was conceptually regarded as a physical entity. A tangible fixation was a fairly clear way to outline rules of consumption on a simple yes/no basis.[18] Controlling the technology eliminated the free rider problem; purchasing a radio entitled the consumer to radio waves. 'Fixing' intellectual goods to a physical transmission medium created a medium based consumption approach. For example, a consumer purchasing an album would be of the opinion that they owned a vinyl record of an album, rather than the right to listen to that album. The design of mediums limited the uses.[19] Digitization and the Internet altered this physical conceptualization of intellectual property. Digitization shifted mediums from fixed to malleable; the Internet created a way to exchange intellectual goods without a physical transaction.[20] These changes marked a revelation in cultural production, and created a crisis for copyright legislation.

The Emerging Problems with Copyright

The intent of copyright was to balance the rights of the user and the rights of the creator and publisher. This model was accepted because it supported the financial risk involved with producing and distributing intellectual works. For example in the pop music industry most bands could only record albums if they signed a contract with a record label. The record label would pay the production costs to release an album in exchange for the rights to the artists' music. While artists retained their royalty for writing the album, the label owned the rights and therefore collected the profit and controlled usage.[21] The allocation of copyright to the record label was highly lucrative if the band was popular, but the label would suffer great financial losses if the band did not succeed. Similar processes were utilized throughout the creative industries. Production and distribution was often too costly for a creator alone, therefore most creators grew accustomed to swapping control for capital.[22]

While the cassette tape recorder posed the first real threat to the music industry because it facilitated bootlegs and mix tapes, the threat of the cassette tape pales in comparison to the ramifications of file sharing on the Internet.[23] The widespread usage of the Internet accompanied by the digitization of intellectual goods and other technological innovations have illuminated a multitude of problems with copyright legislation in a rapidly changing digital world. Together the Internet and digitization have broken down traditional distribution channels. It is no longer necessary for intellectual goods to exist in a tangible form. Intellectual property has become a non-rival good, where one individual's consumption of the good does not impede on another individual's consumption.[24] Intellectual goods may exist in an unlimited supply. From an economics perspective this

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[18] Lessig, Lawrence. The Future of Ideas: the fate of the commons in a connected world. New York : Random House, 2001. Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.

[19] Ibid.

[20] Wikstrom, Patrick. The Music Industry: Music in the cloud . Cambridge : Polity Press, 2009.

[21] Ibid.

[22] Wikstrom, Patrick. The Music Industry: Music in the cloud . Cambridge : Polity Press, 2009.

[23] Flew, Terry. New Media: an Introduction . 3rd edition . New York : Oxford University Press , 2008.

[24] Ibid.

should drive down costs, as copying is inexpensive and distribution is highly efficient. While the 'original' may still be costly to produce, all subsequent copies can be made for an insignificant price. Copies can be streamed, downloaded and shared online for free as Peer-to-Peer (P2P) networks enable the sharing of files directly from computer to computer.[25]

Parallel to the sharing capabilities of the Internet, software developments in production technology have begun to alter the dynamics in the creative industries. In the past the high costs and skill level required to produce creative products dissuaded amateurs from partaking in such activities. Now, good quality software for musical recording, filmmaking and editing are attainable and user friendly reducing the need for large studios and up front production costs.[26] These technological innovations have led to a rise in user-generated content, whereby those who would not traditionally produce cultural products are creating them. A remix culture has emerged, in which consumers rip, mix and burn, using pieces of existing culture to create new products.[27] The result is that culture is becoming less and less dependent on the large corporations that produce it. The best examples of this shift are the works that populate new media channels such as blogs, Youtube, Facebook, Reddit, Instagram (the list goes on and on) in which every culture consumer is also a culture producer.[28]

In this new context, copyright is losing traction due to the fact that it cannot be enforced. Consumers can easily maneuver around the traditional institutions and technological barriers that supported copyright. The common and political term for this is digital piracy. Digital piracy has become the foremost threat to copyright legislation. However, it is not solved simply by legally amending the Copyright Act. Any attempt to infiltrate online communication and file sharing can be considered a breach in Canadian citizens' privacy rights. Similarly, restricting the production of User-Generated Content (UGC) is difficult as it can be challenged under the Canada's Charter right to freedom of expression. In short, codifying digital piracy violations becomes a constitutional nightmare, one that the Canadian government cannot hope to successfully take on. However, the beneficiaries of copyright refuse to be beaten, most of them having built empires by collecting intellectual property.

In response to the growing threats of piracy, copyright legislation around the world has sought a tighter hold on copyright uses. Before the Internet there was a balance between what the creator had power over and what the user was allowed to do with the work. Since the Internet, all bets are off and no element of an intellectual work is off limits in terms of reproduction, distribution and re-mixing. According to Creative Commons License activist Lawrence Lessig, this sparked the phenomenon of copyright retaliation in

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[25] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004. Flew, Terry. New Media: an Introduction . 3rd edition . New York : Oxford University Press , 2008.

[26] Wikstrom, Patrick. The Music Industry: Music in the cloud . Cambridge : Polity Press, 2009.

[27] Flew, Terry. New Media: an Introduction . 3rd edition . New York : Oxford University Press , 2008.

[28] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.

many countries around the world.[29] Copyright terms have been extended, Internet sharing has been banned, and international copyright law has been tightened. Copyright terms that started at a length of fourteen years in the Statute of Anne, have been extended to the life of the author plus fifty years or more in most countries. In addition to extending copyright terms the 'fair use' of copyrighted materials has also been restricted. Overall, although its essential components remain similar, copyright law looks quite different now than it did at this origins. At its outset, as we have seen, copyright regulations only limited a handful of uses such as the right to publish a work, leaving all others uses unregulated. Regulations pertained to the production and dissemination of a work, not to how a consumer could use it.[30] Now, a work's uses are limited under the fair dealing doctrine, and any form of replication is highly restricted. If copyright continues in this way many intellectual products could be legally restrained to a read only, listen only, watch only approach. While digital piracy is a primary concern so are the dwindling rights of the user.

The problems copyright faces cannot be blamed on technology alone. From its inception copyright created a situation of market failure for intellectual products. The inclusive nature of copyright gives an assured monopoly to the holder, cutting out any direct competition. While there may be many films, books, or songs etc. competing with one another for viewership, they must remain conceptually distinct. For example, a film based on the popular comic book character of Superman can only be made with permission by the owner of Superman's copyright; any other person making a Superman film would quickly find himself or herself being sued by DC. Holders of successful works would thereby be disinclined to relinquish their monopoly. As such, rent-seeking behavior is emerging in powerful copyright holders. The holders are lobbying the government for longer copyright terms, and restricted uses as compensation for the increased loss of revenue due to piracy. However, as copyright becomes more restrictive piracy becomes more ubiquitous, suggesting but not proving a cyclical causation.

Overall these technological innovations have resulted in cultural shifts that in many ways have rendered the traditional conception of copyright obsolete. While the aims of copyright remain the same, the means to achieve these aims must be modified to account for an ever-changing cultural climate. Developments in copyright legislation have also prompted moral questions regarding the commoditization of ideas. How long should a work be protected? What is considered fair compensation? How much of a work can be replicated before it is considered copyright infringement? The fine line between what is considered copying and what is considered inspiration has emerged as a matter of debate for the courts. Furthermore, copyright has been faced with unique jurisdictional issues making it even harder to control.

The Canadian Approach

The Canadian approach to copyright has been significantly influenced by external forces. Canada's British-model statute is indicative of the nation's colonial roots; however, the British Empire was not the sole influence on copyright legislation. Canada's southern

[29] Ibid.
[30] Ibid.

neighbor also played a part in shaping copyright policies and later amendments. These external pressures have had a unique effect on the development of copyright legislation in Canada, slowly molding it into the laws of today.[31]

The imported Statute of Anne was the first legal codification of copyright in Canada. Subsequent to the primordial Statute of Anne was the Copyright Law in 1842 following the unification of Upper and Lower Canada into the Province of Canada. *"An act for the protection of copyright in this province, 1842"* granted copyright to books, maps, charts, musical compositions, prints, cuts and engravings.[32] It based grants on a registrar system in which all artifacts wishing to be protected had to be documented before publication. A false or plagiarized entry into the registrar was chargeable with a misdemeanor and all grievances could be taken to the courts.[33] The Act signified a trend in expansion from book publishing rights into other fields.

During the development of copyright, Canada was in a unique geographical position between the generally unregulated United States model and the highly regulated model of the British Empire. After confederation, Canada was able to draft copyright legislation independent of British intervention.[34] The1868 legislation was built upon the existing laws of the province of Canada, while borrowing from the American model. However, throughout Canada's history there has been British motivation to impart their imperial laws internationally, and to gain influence over the United States through Canada. This turned Canada into a copyright battleground between Britain and the United States, in which Britain sought a copyright treaty and publishers in the United States sought cheap publishing material.[35] As British publishers expanded into the North American market, mainly Canada, The United States, who at the time did not recognize international copyright, were importing copies across the border without honoring author royalties.[36] Between the onslaught of British imports and the influx of low cost American prints, the Canadian publishing industry was failing. Britain sought to capitalize on the young publishing industry in Canada and have British works infiltrate the United States. The United States capitalized on popular British imports to Canada by reprinting them for cheap, as they did not observe international copyright treaties. In an attempt to support the Canadian publishing industry the government proposed a tariff on British imports. The Bill passed in Canada but was not granted royal assent as Britain feared that prints made in

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[31] Bannerman, Sara. Canadian Copyright and the Digital Agenda: From Radical Extremism to balanced copyright . Geist, Michael . New York : Irwin Law , 2010.
[32] Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[33] Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[34] Bannerman, Sara. Canadian Copyright and the Digital Agenda: From Radical Extremism to balanced copyright . Geist, Michael . New York : Irwin Law , 2010.
[35] Ibid.
[36] Ibid.

Canada would be cheaper than in Britain.[37] This would set the theme for Canadian copyright policy as a balance between international defiance and compromise.

Currently, Canadian copyright policy is outlined in the *Copyright Act*. The Act outlines all domestic and international laws pertaining to 'copy-rights' in Canada. Bill C-11 amended the Copyright Act in July of 2012, taking effect in November of 2012. While the update remedied many of the outdated sections of the Act, it also altered the restrictions on user rights. Different legal scholars and interest groups all have contradictory opinions on these user right changes, some claim they are still too restrictive others claim they are too lose. It is quite possible that under the pressure to 'catch up' with outdated legislation, parliament may have been too hasty in pushing Bill C-11 through.

The fundamental purpose of Canadian Copyright protection is to entitle the holder control over their work. Canada copyright term or length is the life of the author plus fifty years (Copyright Act, s 6). Protection under the *Copyright Act* is given only to Canadian citizens, residents, refugees or members of the Berne Convention or the Rome Convention. The rights provided by copyright include control over production, performance, reproduction, publishing and translation. Copyright also warrants the creator control over specific conversions from one artistic medium of their work to another. For example, permission from the copyright holder is required to turn a novel into a cinematic feature film. Specific Copyright holder rights can be found in section 3, 15, 18, 21, and 26 of the *Copyright Act*. Independent from Copyright are Moral Rights; these are afforded to the creator of a work to assert control of its use. These include the preservation of their works integrity, preventing modification or mutilation without the creators consent (Copyright Act, s 14 & 28). Moral rights insure when permission to use the work is granted by the copyright holder, the holder does not lose control of their work. The complement to the heavily fortified creators rights are the user rights, specified in section 29 under the fair dealing doctrine which are less comprehensive and far more restrictive. The fair dealing doctrine outlines the legal uses a consumer has over intellectual property.

The current version of copyright is facing many technological issues; the main points of issue in the copyright act are sections 27 and 29 pertaining to copyright infringement and fair dealing. Section 27 attempts to address threats of piracy by outlining specific copyright infringements. Section 29 outlines the legally allowable uses of copyright works. In addition to the overarching concerns of the fair dealing clause is the dichotomy between technological protection measures and technological neutrality. Section 41 outlines the definition of technological protection measures and what uses undermine the intended purpose of a technological device. In contrast technological neutrality is a principle of fair dealing, based on the transmission form of an intellectual good that prevent the double charging of royalties. The Internet, digitization and available editing software have led to the growth of user-generated content. User generated content has created its own unique set of problems for the courts and legislators as the level of originality in user generated materials is often a matter of interpretation without a systematic principle, making it variable and unpredictable. Overall it is the scope of

[37] Bannerman, Sara. Canadian Copyright and the Digital Agenda: From Radical Extremism to balanced copyright . Geist, Michael . New York : Irwin Law , 2010.

copyright that is being questioned, and this will continue to be pertinent policy issue so long as technology continues upon its innovative course.

Digital Piracy

Piracy is addressed in section 27, specifying the infringements of copyright. While the word "piracy" or "digital piracy" is never directly mentioned in the Copyright Act, recent amendments have focused on outlining digital infringements. The most recent addendums in Bill C-11 built upon existing infringement regulations. The law did not repeal any of the outdated laws forbidding traditional piracy such as bootlegs. Instead parliament chose to build a new technological approach upon the existing doctrine. This means that outdated provisions such as the blank tax levy on cassette tapes are still in effect, even though a consumer would have a difficult time finding a retailer that still sold cassette tapes. This suggests that parliament will be taking a comprehensive approach to all future copyright amendments.

The most basic infringement of copyright consists of utilizing the rights explicitly given to a copyright holder. In basic terms, all of the rights afforded to the copyright holder such as the right to produce copies, convert mediums or perform the work in public can only be done by the copyright holder or with the expressed permission of the copyright holder. All activities in violation of the rights in section 3 of the Copyright Act are for all intents and purposes copyright infringements (except if they are permissible under the fair dealing clause, but that comes later).

Digital piracy focuses on the infringements that take place through the use of the Internet. Digital piracy through the Internet is primarily addressed in section 27 subsection 2.3 forbidding networks with the sole purpose of providing access to infringement. It appears in the clause that the burden and the blame for digital piracy are being placed on the network providers (Copyright Act, s 27(2.3)). This would be deeply concerning as it suggests network censorship as an answer to Internet piracy. However, this provision is designed only for networks in direct violation of copyright protection such as Napster and Limewire who provide a service for the purpose of sharing files, most of which are under copyright protection. Basic service providers will be exempt from this burden based on the language in section 2.3 specifying that the purpose of the network must be evaluated (according to standards set out in subsection 2.4) in order to constitute an infringement. Since the purpose of most networks is not to infringe on copyright, the majority of networks will be alleviated from the burden of proof. The purpose of Section 27 subsection 2.3 is to provide a way to target major violations of Internet piracy, but it does not address the overall issue of online P2P sharing. Section 31, Digital Networks, alleviates the piracy burden from digital network providers for simple reasons of enforcement (Copyright Act, s 31). If network providers were liable for the actions of their clients, the Internet would become highly censored in Canada. As it is individual digital piracy cannot be enforced without censorship of the Internet. While Internet censorship is a possibility from a technological standpoint, enforcement is highly unlikely as it violates section 8 of the Charter of Rights and Freedoms, which protects individuals from unreasonable search and seizure. Therefore, while steps have been taken to control the intent of Internet networks, digital piracy remains an ever-present threat.

Fair Dealing

Section 29, the Fair Dealing provision, outlines what is considered to be the fair uses of copyrighted work, or rather what a user is allowed to do with a copyrighted work. The fair dealing doctrine provides specific exceptions to copyright for private study, research, education, and parody/satire. Criticisms, reviews and news reporting are also exempt from copyright protection so long as they name the source of the work. Under Section 29 works can also be copied for private use, broadcast signals can be fixed for later viewing, and back up copies can be made for the purpose of preservation (Copyright Act, s 29). From a strictly legal interpretation these are the only allowable uses of copyright under the fair dealing doctrine. Comparatively, these five uses are a vast expansion from what they were before the amendments of Bill C-11. Despite the fact that the fair dealing doctrine has become less restrictive, however, there is still some debate about how user rights should be regulated in Canada. As a commonwealth nation and a former British colony, Canada was essentially born with the British model fair dealing doctrine, but is it still the most effective way to regulate user rights?

The original intention of Fair Dealing was meant to be the codification of an evolving common law principle. However, in reality fair dealing has only highlighted a few limited exceptions to copyright protection. The Modernization Act did add several exceptions including education, parody, user generated content, private copying, time shifting, and temporary copying. However, the language in the Canadian fair dealing provision means that the above list is interpreted as exhaustive.[38] Any conceivable use outside the exceptions outlined in provision would be considered a copyright infringement even if a judge considered it fair in principle. It seems highly illogical to legislate a strict list of tolerable uses without any room for technological expansion.

Not only does the restrictive, exhaustive-list approach to fair dealing seem illogical, it is arguably inconsistent with the original purposes of copyright legislation established in the foundational Statute of Anne .[39] Consider again the long name of that statute.

> "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…"

To repeat, this name reveals the attempt to balance rights between user and producer, and as explained above user exceptions at the time clearly outweighed the limited rights of the creator and publisher. However, this balance appears to have been lost over time. This could be because the notion of fair dealing was not a primary concern at the inception of copyright. At the time there were more unregulated than regulated uses therefore the idea of having explicit user rights had to be cultivated. Such cultivation occurred initially

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[38] Katz, Ariel. "Fair Dealing2 2.0: the Rebirth of Fair Dealing in Canada." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 93-156.
[39] Ibid.

through judge-made common law, an evolving process that might have flexibly accommodated new developments, including new technologies. Statutory codification, however, appears to have introduced a static narrowness. From the time fair dealing was incorporated into the statutory codification of copyright law, it has consistently seen as a limited, and exhaustive list of exceptions from the copyright protections accorded to creators and publishers. In this way, the original balance of the Statute of Anne, which treated the rights of copyright holders as exceptions from the more general freedom of users, was reversed. As Katz suggests, the recent addition of exceptions to the fair dealing clause remained consistent with this tradition.[40]

This tradition may have been altered somewhat in 2004, however, when the Supreme Court decided *CCH Canadian Unlimited Vs. Law Society of Upper Canada*.[41] In that case, Justice McLachlin defined the fair dealing doctrine as a protection of "user rights." Perhaps this – and other precedents discussed below – will help shift the balance between copyright holder and users in subsequent copyright cases.

Another way to evaluate Canada's fair dealing doctrine is to compare it to its southern counterpart "fair use." There are two models that outline user rights in copyright legislation around the world, Fair Use and Fair Dealing. While Canada is one of the countries that subscribe to the fair dealing model, the United States prefers fair use.

Fair Use is construed as a more open-ended exception to copyright protection than the restrictive, exhaustive-list, fair-dealing approach described above. If a use can be justified as fair it is not in violation of copyright. The use must also comply with a criterion of reasonable limits. This criterion attempts to adhere to international copyright law such as the Berne convention or is developed through judge made case law or statutory provision and is based on a series of legal precedents.[42] The Fair Use model is used not only in the United States but in several other countries such as Israel and the Philippines. The more restrictive fair dealing model – based on predetermined exceptions to copyright protection is found mostly in commonwealth nations such as Canada, Australia and the United Kingdom.[43] In theory, at least, the flexible fair use doctrine gives greater weight to user rights than does the constrictive fair dealing doctrine. One should be careful not to overstate the difference, however. In the United States rulings for what is considered a reasonable use have become tighter, while, if Michael Geist is right, there has been a

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[40] Katz, Ariel. "Fair Dealing2 2.0: the Rebirth of Fair Dealing in Canada." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 93-156.

[41] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, http://canlii.ca/t/1glp0

[42] Geist, Michael. "Fairness Found: How Canada Quietly moved from Fair Dealing to Fair Use." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 157-186.

[43] Ibid.

liberalizing reinvention of the fair dealing doctrine in Canada.[44] For Geist, the recent addition of such exceptions as education, research and parody/satire to the fair dealing doctrine have expanded Canadian user rights to the point where the list of exceptions can be considered comprehensive; that is, from a moral stand point there would be very few 'fair' uses that could not be included in the revised fair dealing doctrine. In addition, the courts have begun to give reasonably generous interpretations to fair dealing provisions. In the aforementioned *CCH Canadian Ltd vs. The Law Society of Upper Canada*, (2004) for example, the Supreme Court defined fair dealing as the users right and as such of equal importance to copyright protection.[45] Under this ruling users have the right to a substantial amount of copyrighted material without the permission of the owner in certain circumstances. Similarly, in *Alberta (Education) v. Canadian Copyright Licensing Agency* (2012), the Court found that copies of copyrighted material provided by teachers to students fell within the fair dealing clause. Other cases in the same vein include *Bell v. SOCAN*, and, most recently a 2012 set of five rulings in one day that have become known and the copyright pentalogy, and which are also seen as having a liberalizing effect on the fair dealing doctrine.[46]

Technological Neutrality

Another developing issue with intellectual property is the technology-based circumvention of copyright. As quickly as technological protection measures are invented, they can be circumvented. Section 41 of the Copyright Act seeks to address emerging digital uses of intellectual products and problems such as decoding, decrypting, or bypassing digital protection measures. Digital products are easy to copy; therefore it becomes difficult to decide where to draw the boundaries on when it is permissible for an intellectual good to be copied and when its duplication should be prohibited. The fair dealing clause stipulates that an individual can copy purchased intellectual goods for private use. However, reproduction for private uses only extends in so far as it does not infringe upon section 41, a technological protection measure (Copyright Act, s 41). Copying an intellectual product becomes a balance between the legal user rights outlined in section 29 (Fair Dealing Clause) and the digital protections engrained in intellectual goods. The definitions outlined in section 41 are not always compatible with the rights awarded in section 29 Fair Dealing. Section 41 restricts actions that are considered to be in violation of the technological protection measures. This means that duplication of a work, specifically a sound recording, for personal use is not technically permitted under an interpretation of section 41. Therefore the balance between users rights and copyright protection falls in favor of the copyright holder. In addition it prevents the unlocking of devices that have the

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[44] Geist, Michael. "Fairness Found: How Canada Quietly moved from Fair Dealing to Fair Use." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 157-186.

[45] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, http://canlii.ca/t/1glp0

[46] Reynolds, Graham. "Of Reasonableness, Fairness and the Public Interest: Judicial Review of copyright board decisions in Canada's copyright Pentalogy." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 1-36.

potential to infringe on copyright ensuring forcible restrictions of use (Copyright Act, s 41). The most recent problem with digital locks has been seen in the telecommunication industry. Certain types of mobile phones will be locked to specific networks, thereby constraining the consumer into the network of specific service providers. This digital protection measure limits the choices of the consumer as well as restricting competition within the industry, allowing network consumer costs to skyrocket due to a forced monopoly.

Attached to the issue of digital protection measures is the issue of technological neutrality. Digitization has led to transformation capabilities of intellectual goods. This means that intellectual goods can shift mediums or forms creating the problem of double royalty charges.[47] For example, purchasing a copy of a film does not entitle the purchaser to a copy of the soundtrack within the film. The film is treated as a holistic work and even though the licensing fees for the songs have been paid, the musical works cannot be separated from the film context. To obtain a copy of a soundtrack consumers must also purchase a copy of the films soundtrack. However, if a consumer purchases a CD copy of a song they should not be charged an additional royalty for the use of a digital copy. This is the principle of technological neutrality, and the idea that copyright protection should not be based on the method of delivery.[48] Therefore in any area where protection is not legislated disseminators should not receive double royalties for a more efficient or alternative method. Technology should not be used to create exclusive uses for which a fee is charged every time the intellectual good is changed to another form.

The courts view on technological neutrality is that copyright law should not impede technological innovation, nor should it create a barrier for the information being transmitted through the Internet. Currently, the question is whether or not technological neutrality can be achieved with such strict technological protection measure regulations. The issue of technological neutrality was first tested in *Théberge v. Galerie d'art du Petit Champlain* (2002).[49] Claude Théberge, a well-known painter gave a license to produce a limited number of poster copies of his works. The Galerie d'art du Petit Champlain purchased the poster copies but used technology to lift the ink from the poster onto canvas, leaving the original poster blank. Théberge then filed an injunction against the Galerie claiming a copyright infringement. According to the decision of the Supreme Court the practice was not a reproduction but a modification of the original work as no new copies were created.[50] Therefore under a copyright claim Théberge was not entitled to any copyright compensation, however, if Théberge had considered the infringement from a moral rights approach the case may have had a different outcome. The dissenting opinion

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[47] Hagen, Gregory R. "Techological Neutrality in Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 307-334.

[48] Ibid.

[49] Théberge v Galerie d'Art du Petit Champlain inc., 2002 SCC 34, [2002] 2 SCR 336.

[50] Théberge v Galerie d'Art du Petit Champlain inc., 2002 SCC 34, [2002] 2 SCR 336.

was that the term reproduction was too narrowly interpreted and the main purpose of copyright, to protect the creator, was overlooked.[51]

Théberge is a case where a technological loophole thwarted the rights of the creator; however, it also depicted a confined interpretation of copyright. This confinement established greater freedom for user rights and precedence for technological neutrality. While the Galerie d'art du Petit Champlain may have taken unfair advantage of its technological edge the case results also sparked efforts to promote an innovative environment. In contrast *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* (*ESA v. SOCAN*)(2012) looked at how protection efforts can lead to unfair double royalty charges.[52] When a copyrighted work is used in a video game the ESA must negotiate a licensing agreement with SOCAN, after the game is published SOCAN can no longer claim rights to it. In 1995 the Copyright Board created a tariff collected by SOCAN for any musical work that was being telecommunicated. The ESA distributes their video game copies over the Internet; therefore the Copyright Board concluded that SOCAN was entitled to a tariff in addition to the pre-negotiated license fees. ESA appealed the Copyright Boards decision on the grounds of what constituted communication. The Federal Court of Appeal held the decision saying that downloading a file from the Internet is considered telecommunication under Section 3(1)(f) of the Act.[53] ESA then appealed to the Supreme Court of Canada who found the decision in violation of technological neutrality and not applicable to section 3(1)(f) of the Act. The Supreme Court overturned the Copyright Boards decision, classifying SOCAN's claim as double dipping into the author's rights.[54] *ESA v. SOCAN* highlighted the importance of technological neutrality and how specifically Internet distribution is in principle the same as all other methods. Furthermore, it sets a precedent for ensuring that technology will not serve to trap the user.

User Generated Content

User generated content (UGC) has moved to the forefront of copyright issues since the digitization and the Internet. Scassa believes that coupled with the expanded fair dealing clause and recent jurisprudence by the Supreme Court UGC has been given a wider berth accepting of greater interaction with copyrighted works.[55] However, the complexity

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[51] Théberge v Galerie d'Art du Petit Champlain Inc., 2002 SCC 34, [2002] 2 SCR 336. Hagen, Gregory R. "Techological Neutrality in Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 307-334.

[52] Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34 (CanLII), [2012] 2 SCR 231, <http://canlii.ca/t/fs0v7>

[53] Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34 (CanLII), [2012] 2 SCR 231, <http://canlii.ca/t/fs0v7>

[54] Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34 (CanLII), [2012] 2 SCR 231, <http://canlii.ca/t/fs0v7>

[55] Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the

involved in UGC makes it full of copyright grey areas. Defining UGC is in no way straightforward, but the most commonly accepted definition is content created by someone who would not usually be considered a producer.[56] The Internet allowed for easy accessibility to digital works, software tools capable of editing digital content accompanied digitization and the Internet. This created concern for the typical cultural producers as masses of people began participating in the creation of intellectual goods. Since the Internet led to the most prolific UGC ever seen, many corporations blame it for the increase in copyright infringements. However, UGC was not created by advances in technology it has always existed in the forms of fan fiction, parodies and forums. Nevertheless, while UGC has always existed, the ease of reproduction that came with digitization of works has increased UGC production. Now there are fewer gatekeepers, anyone can 'publish' their work, and all UGC can interact with copyright materials.[57]

The functional taxonomy of UGC created by Trosow outlines three types: creative content, small-scale tools (apps) and collaborative projects such as wikis. This breakdown seeks to define user-generated content by its function rather than by who created it. On the legal side Gervais offers another taxonomy of classification for UGC: content authored by users, content altered by users and content copied by users. This classification, which incorporates copyrighted works, is the one utilized in Canada. At the end of the day it appears that the level of effect determines how UGC is classified. If a UGC work has adverse effects on the original source work, or if it gains commercial popularity it is considered more parasitic and problematic than the UGC that goes unnoticed by the masses.[58] UGC was originally considered economically neutral, with examples such as the "Youtube exception." The user-generated content on Youtube often violates copyright, however these violations were ignored because they appeared to have no commercial benefit. Copyright holders turned a blind eye to amateur home made videos that happened to utilize portions of copyrighted content as they were only exposed to a small audience, but not all user content exists without profit or widespread popularity.[59] The rise of 'viral' UGC meant that works originally considered economically neutral were achieving commercial success, something that had not been accounted for in earlier versions of the Copyright Act.

Bill C-11 currently restricts UGC to non-commercial dissemination; however, this exception makes the assumption that commercial disseminators do not borrow from other

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foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 431-454.

[56] Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 431-454.

[57] Ibid.

[58] Ibid.

[59] Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 431-454.

works.[60] Basically the distinctions between user and creator are starting to blur and the law has been unable to account for this change. Furthermore the exception for UGC is only extended to individuals and not corporations. Even though things such as Wikis are clearly UGC, they are not considered UGC from a legal perspective because of their collaborative nature. There are other conditions to the fair dealing exception for UGC one of which is originality, the new work must be considered more than a simple copy but exude skill and judgment in its creation. This may finally legitimize the "mix tape," crediting a compilation of different songs for a particular occasion as an original work.[61] However, it may not necessarily support an anthology, which merely collects a number of existing works. Furthermore the creators of UGC cannot profit from their work, but the network disseminators like Google and Facebook can.[62]

Section 29.21, Non-Commercial User-Generated content specifies that an individual can use an existing work to create something new so long as it is non-commercial, copyright subsists, and it does not harm the gains of the original creator (Copyright Act, s 29). Already this provision is counterintuitive, for under section 3 in order for copyright to subsist the copyright holder has control over the reproduction of all or a "substantial" part of the work including multiple specified conversions to other artistic mediums (Copyright Act, s 3). Even if the interpretation of "substantial" were to be lenient, section 29.21 could still be considered an infringement on section 28, Moral Rights. The re-creation would be in violation of the integrity of the original work and therefore an infringement (Copyright Act, s 28). However, under the Charter citizens have a fundamental right to expression therefore there can be no certainty over the enforceability of section 28 on non-commercial, user generated content.

In the United States artist UGC that has become commercially popular is being harshly pursued by copyright enforcement. The artist Girltalk who specializes in creating complex remixed songs has been taken to court numerous times over his uses of copyrighted work. In this case the question of originality becomes paramount, especially when culture is based upon the collaborative interaction of ideas.[63] An artist cannot claim copyright over a musical note, but there are only so many notes and only so many ways in which notes can be arranged. As editing and production software tools become more advanced and more accessible the legal issues with UGC will continue to ask tough questions of the courts and the law.

International Implications

Although the Copyright act is a domestic law, piracy is an international problem. There are multiple institutions and treaties designed to control breaches in copyright in the

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[60] Ibid.

[61] Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law." The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Copyright Law. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 431-454.

[62] Ibid.

[63] Wikstrom, Patrick. The Music Industry: Music in the cloud . Cambridge : Polity Press, 2009.

international sphere. The Berne Convention, The World Intellectual Property Organization, the World Trade Organization and the TRIPS agreement all function as the existing international law institutions. All of these institutions impact how copyright is legislated in Canada.

All of these institutions face the same problem, jurisdiction. While each member of the Berne Convention is held to the same standard there is no way to enforce these laws across every country and more importantly every computer. While the World Intellectual Property Organization (WIPO) was created by the United States to replace the United International Bureau for the Protection of Intellectual Property (BIRPI) as the modern international enforcement body there is no way to accomplish its stated mandate other than to place international pressure on defiant countries.[64] While countless countries have joined the Berne Convention domestic copyright laws reign supreme and a nation's sovereignty over its own law is always paramount. At the end of the day the majority of international laws and agreements are irrelevant in the day-to-day enforcement of copyright in individual countries. However, this does not prevent the major powers such as Britain, the United States and Western Europe from attempting to influence the legislation of middle powers.[65] Present discussions of international copyright give the impression that developments in modern technology are the reason for international tension in copyright law. Surprisingly this is not the case, these issues have been around for a long time in various forms; tension has existed since the inception of international copyright regulations.

According the Sara Bannerman's article, The Middle Powers and International Copyright History: The Case of Canada, our nation has followed the international example from the beginning. Originally copyright was drawn directly from British Law, and Canada entered the Berne Convention in 1886 as British Colony despite having nothing to gain from protecting international works.[66] This decimated the publishing industry in Canada and was met with disdain by emerging cultural industries. Internal pressure from constituents resulted in domestic laws that were incompatible with the agreements of the Berne Convention, an international agreement that Britain had agreed to on Canada's behalf.[67] This set a precedent in Canada for Copyright policy that favored Canadian creators over foreign imports. In the end Canada bowed to the terms of the Berne Convention so as to give the impression that Canada was a progressive society to the international community. This did no favors for the developing cultural industries, and simply sought to satisfy Canada's desired international image.[68]

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[64] World Intellectual Property Organization. Treaties and Contracting parties: WIPO Copyright Treaty. 21 March 2013 <www.wipo.int/treaties/en/ip/wct/trdocs_wo033.html>

[65] Bannerman, Sara. "Middle Powers and Copyright History: the Case of Canada." Fitzgerald, Brian & Atkinson, Benedict. Copyright Future; Copyright Freedom. Sydney: Sydney University Press, 2011

[66] Bannerman, Sara. "Middle Powers and Copyright History: the Case of Canada." Fitzgerald, Brian & Atkinson, Benedict. Copyright Future; Copyright Freedom. Sydney: Sydney University Press, 2011.

[67] Ibid.

[68] Bannerman, Sara. "Middle Powers and Copyright History: the Case of Canada." Fitzgerald, Brian & Atkinson, Benedict. Copyright Future; Copyright Freedom. Sydney: Sydney University Press, 2011.

In the late 1960's the Berne Convention was challenged again. The high cost of copyrighted materials proved too much for developing countries. This presented a dilemma for the international community, which had a strong interest in injecting their ideas into these developing nations during the height of the Cold War period. For Canada this was an opportunity to lessen the imperialistic and monopolistic hold over copyright. Provisions were made in the Berne convention to lessen the expense of copyright to developing countries. Canada then took the position that despite having the third highest per capita income, it was a developing nation in the context of copyright.[69] This argument was based on the amount of intellectual property imported per capita. This was problematic for the international community, which had already allotted Canada middle power status politically and no longer considered Canada as a developing former colony.[70] However, concerned that other countries would follow Canada's example and threaten to leave the treaty, the convention was amended to account for different levels of development. The last alteration of the Berne Convention occurred in 1971 and placed Canada as a class B country under the rule of the shorter term. This means that Canada need only observe a copyright term of 50 years after the death of the author for foreign works as opposed to 70 or 100 hundred years in class A countries.[71] While twenty years does not seem like a significant length of time in the scope of hundreds of years, a shorter copyright term can have a significant economic impact.

Canada was at a disadvantage in the realm of international copyright law from the very start. Forced entrance into the Berne Convention placed extreme limitations on the nature of the legislation Canada could pass without violating the treaty. Furthermore the cut and paste enactment of British copyright laws while Canada was still a colony set a legal precedent that took no notice of the unique Canadian situation. These provisions ignored the young nature of the publishing industry in Canada, as well as the heavy influence of foreign copyright imports. Under the international burden Canada has continued to struggle for sovereignty over domestic laws whilst maintaining the acceptable international standard.[72] This is the concern for the Canadian government, the balance between international diplomacy and national interest.

While the international situation was not started by modern technological advancement it was certainly exacerbated by it. The fact is that from the invention of the printing press illegal copying of intellectual property has posed a problem to copyright holders. The question now is how a collection of international nations will regulate the Global Internet Infrastructure (GII). The proficiency of Internet communication and distribution has made domestic laws irrelevant. While the Berne Convention is the most

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[69] Ibid.
[70] Ibid.
[71] Bannerman, Sara. "Middle Powers and Copyright History: the Case of Canada." Fitzgerald, Brian & Atkinson, Benedict. Copyright Future; Copyright Freedom. Sydney: Sydney University Press, 2011.
[72] Ibid.

widely adhered to copyright treaty in the world it has not, for reasons too complex to be treated here, been considered an enforceable international law.[73]

As a consequence, the United Nations eventually attempted to direct international intellectual property rules through an alternative means. In 1986 the World Trade Organization met for the eighth round of the General Agreement on Tariffs and Trade (GATT) in Uruguay.[74] There were several important issues on the agenda including agriculture, foreign investment regulations, insurance, banking, and of course, copyright violation. In the meetings between 1986-94 the WTO negotiated the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement, providing an enforcement process to an otherwise irrelevant Berne Convention.[75] In its most basic form the TRIPS agreement stands as a threat to copyright defiant nations. Under the agreement failure to adhere to the minimum standards of protection set forth by the Berne Convention results in being brought before a WTO panel on the threat of trade retaliation.[76] Other than providing a more credible threat, the TRIPS agreement does nothing more than embody the principles set out in the Berne Convention. However, in addition to legitimizing copyright protection the TRIPS agreement provides blanket coverage for all intellectual property including industrial designs, trademarks, patents and trade secrets. In addition to honoring the national treatment clause set out in the Berne Convention the TRIPS agreement applies the most-favored-nation treatment. This is an attempt to restrict nations from making under the table free-trade agreements that undermine international copyright provisions. It further stipulates that those nations without existing treaties must be treated equally, exempting Canada and the US under NAFTA.[77] Before the enactment of the TRIPS agreement the harshest punishment available to members of the Berne Convention was withdraw international copyright privileges from the defiant country.[78] The threat of trade sanctions is a far more damaging consequence than rescinding international copyright, this shifted power from the World Intellectual Property Organization (WIPO) to the World Trade Organization (WTO.)

Embedding the Berne Convention in the TRIPS agreement under the WTO has jurisdictional implications. Despite the fact the WIPO was created as the administrative body of international copyright protection, the power of enforcement is shifting to the WTO due to their enforcement capabilities. In terms of international politics the WTO has more bargaining power and influence. However, the WIPO has clung to its administrative

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[73] Fraser, Stephen. "The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure." Journal of Computer Information and Law (1997).
[74] World Trade Organization . Intellectual Property: Protection and Enforcement . 21 March 2013 <www.wto.org/english/thewto_e/tif_e/agrm7_e.htm>
[75] Ibid.
[76] Fraser, Stephen. "The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure." Journal of Computer Information and Law (1997).
[77] World Trade Organization . Intellectual Property: Protection and Enforcement . 21 March 2013 <www.wto.org/english/thewto_e/tif_e/agrm7_e.htm>
[78] Fraser, Stephen. "The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure." Journal of Computer Information and Law (1997).

mandate based on the fact that most copyright infringement occurs over the GII.[79] For the WTO the Internet is a grey zone, dealing partially with international trade but also with information and expression. In response to the growing threats of the Internet the WIPO then drafted two treaties also embodying the Berne Convention, The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The WIPO Copyright Treaty and performances and phonograms treaty hammered user restrictions pertaining to Internet and the digital consumption of intellectual goods. Article 7(1) was the most contentious of these provisions as it threatened the very way in which the Internet functions.[80] Under article 7(1) the temporary copies that a computer makes while browsing the Internet would be in violation of copyright protection.[81] Article 7(1) caused widespread controversy and almost threatened the defeat of the WIPO Treaty. However, persistent pressure from the United States, and stipulations that the Berne Convention this activity was already disallowed allowed it to pass.[82] This provision offers little chance of being prosecuted, due to the high cost of litigation and the widespread use of the Internet.[83] However digital blocks on Internet browsing copies have been and continue to be discussed by the international community.

Needless to say that the pressure to find a solution to intellectual property rights infringement is mounting in the international community. Various institutions have sought to do this through different jurisdictions. However, to this point various treaties have amounted to no more than a set of guidelines rather than international rules. While these institutions have had only a marginal impact on the issue itself they have had a much larger impact on national legislation. Canada has been bound to every international agreement severely limiting policy and legislative options. The question remains as to whether it is within the right of the WTO to sanction trade retaliation over Internet piracy, an area that most every country struggles to control. Furthermore, should the WIPO as an international institution, be able to regulate freedom of expression around the world?

Perhaps more than international organizations like the WTO or WIPO, the United States has had a profound effect on Copyright laws in Canada. In recent years the United States has placed a significant emphasis on the amendment of the copyright act in Canada. As a result of the United States rent seeking, Canada's latest amendments have brought the Canadian copyright protection closer and closer to the American model. In the beginning the United States refused to join the Berne Convention choosing to champion fair utilization rights rather than the rights of the author.[84] This is a 360-degree switch to today's copyright law in the United States. The United States, despite having a flexible fair

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[79] Fraser, Stephen. "The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure." Journal of Computer Information and Law (1997).
[80] Ibid.
[81] World Intellectual Property Organization. Treaties and Contracting parties: WIPO Copyright Treaty . 21 March 2013 <www.wipo.int/treaties/en/ip/wct/trdocs_wo033.html>.
[82] Pietsch, Matthew. "International Copyright Infringement and the Internet." 2002. 21 March 2013 <www.heinonline.org/HOL/Landingpage?collection/journals&handles>.
[83] Ibid.
[84] Bannerman, Sara. "Middle Powers and Copyright History: the Case of Canada." Fitzgerald, Brian & Atkinson, Benedict. Copyright Future; Copyright Freedom. Sydney: Sydney University Press, 2011.

use doctrine, is among one of the most protective countries in the world when it comes to their copyright protection abroad. Canada as the United States northern neighbor remains under significant pressure to uphold the standards set by America. Despite having recently amended the Copyright Act in November 2012, to accommodate the threats posed by the digital world, Canada remained on the America's Priority watch list. Canada has been on the United States special 301 watch list since the United States Trade representative (USTR) placed Canada there in 1995.[85] While the official report for 2013 won't come out for some time, lobbyist groups and media are suggesting that Canada will remain on the list. The United States has expressed their concerned over Canadian border enforcement pertaining to counterfeits as well as the Canadian ability to persecute digital piracy.[86] While the concerns of the United States have not yet resulted in WTO threats of trade retaliation, they have strained United States Canada relations. In addition, Bill C-11, which sought to appease the United States by drafting some of the strictest digital lock legislation in the world, does not appear to be enough to satisfy the American government. To this point Canada has a walked a fine line between complete appeasement and national interest, the question is how far is the Canadian government willing to go to secure the United States approval?

Canada's Copyright Act has been shaped by external pressure from the beginning. At first it originated in British Law such as the Statute of Anne 1710, while Canada was still a colony.[87] Britain even determined Canada's entrance into the Berne Convention, an international agreement that remains embedded in the Copyright Act even today. From the failures of the Berne Convention sprouted a myriad of international institutions all with proposed answers to the intellectual property rights struggle. The WIPO, the WTO and NAFTA have thus far been unable to eliminate the challenges posed to copyright by the GII. However, these institutions have constrained the policy and legislative options of the Canadian Government. It is true that copyright infringement is both a domestic and international problem, but does that justify interfering in national laws? The United States seems to take very little issue with using mechanisms such as a priority watch list to suggest to Canada that they don't like what the government is doing. Just because the United States has clamped down on copyright does not mean it is the best legislative choice. In the end copyright is still about balancing the rights of the user with the protection of the creator. Why should Canada force through legislation that is restrictive to Canada's basic democratic freedoms? There is no doubt that digital piracy is a problem domestically and abroad, but how best to deal with this problem is yet to be seen. What can be concluded is that the international pressure placed on Canada has shaped copyright law.

Policy Analysis

[85] Embassy of the United States . Special 301 Report (Intellectual Property Rights). 21 March 2013 <www.canada.usembassy.gov/key-reports/special-301-reports.html >.
[86] Ibid.
[87] Tallmo, Karl-Eril. The History of Copyright . 1 April 2013 <www.copyrighthistory.com/anne.html>.

Copyright protection is in a state of flux. Large technology based cultural shifts have altered the production and consumption of intellectual property in Canada and around the world. The Canadian Copyright Act is subject to the influence of technology, international treaties, cultural practice, and court decisions, all of which have played a role in establishing current copyrights and user rights. The balance between the two sides continues to waiver, as the nature of intellectual goods continues to change. Intellectual property is now non-rival, intangible, digital, easy to edit and even easier to access. The traditional intermediaries that supported copyright design have crumbled in favor of Internet dissemination. Intellectual goods exist in a struggle between the rent-seeking behaviors of copyright holders and the limited user rights supported by the courts.

Technology has had the most drastic influence on copyright. The Internet has facilitated the growth of commercial user generated content, circumvented traditional intermediaries, placed copyright on the international agenda as well as increasing the efficiency of digital piracy. Digitization and advances in software tools have made it possible to for users to become creators and consumers to participate in the production of culture. Calling into question the extent of creators' moral rights, and the terms of fair dealing. All factors considered, copyright has become an everyday issue full of complex policy questions. However, the turbulent issues of copyright can be narrowed down to five main policy focuses; piracy, fair dealing, user generated content, technology, and international influence.

Piracy

Copyright, especially on a digital level is not enforceable. To fully enforce copyright law would require nationwide Internet surveillance. Not only does the government lack the resources to execute such an extensive surveillance network it would also pose a direct violation to the Charter. Section 8 of the charter protects against unreasonable search and seizure, and invasive Internet monitoring certainly constitutes an unreasonable search method. To monitor the Internet to such an extent would be a breach of privacy. Back in the days when intellectual goods took a fixed form, such as a record, tape, or CD, the government accounted for copyright violations through regulating the medium. While individual acts of piracy could not easily be monitored, the government came up with a blanket solution to account for piracy by enacting a blank media levy. Any form of technology (generally cassette tapes and videocassettes) that could be used for the purposes of copyright infringement was compensated through a tax placed on the consumer. This practice was unfair from a user perspective; even though the levy compensated the creators, there was no certainty that the blank media was used for infringement purposes. Therefore a blanket solution such as a blanket tax on Internet usage would be extremely unfair to the user.

In addition to issues of copyright enforceability is the issue of copyright intent. Copyright assumes that creators do not want their work to be utilized in the creation of new works. The copyright act forms the only legally recognizable protection for intellectual property. As copyright terms continue to be extended and the works within the public domain remain limited, the incentive to utilize and potentially abuse copyrighted material grows. The more restrictive copyright becomes the more incentive there is to cheat. By

placing too many bars and holds on intellectual property we are limiting innovation. The wildly successful film hub known as Hollywood only came into being because it violated strict copyright law. Thomas Edison held a monopoly on copyright and patents of his film technology. Edison made it so that only his film supplies could be utilized in motion picture production in the United States. To import film supplies from Europe was considered a copyright violation, making it possible for the monopolistic Edison to charge high prices for film production. In order to escape Edison's control filmmakers moved from New York to California where copyright enforcement had not become legally entrenched or regulated. Thus enabled to use cheaper imports from Europe, more studios were able to make more films, growing the motion picture industry.[88] Culture builds upon culture, it remains the duty of the legislator to decide how culture should be free to evolve and how it should be protected. As such, copyright is only formidable so long as it is enforceable. As technology changes the landscape of intellectual property uses, it should also reexamine the legal structure of copyright protection.

Fair Dealing

The latest amendments to the Copyright Act did expand the scope of the fair dealing clause. In addition to legislative expansion, the Supreme Court showed significant support for the new fair dealing exceptions in the Bell, Alberta (Education) and ESA decisions. However, while the Copyright Act depicted an expansion of fair dealing, and recent court rulings have supported this expansion, they have also set rigid legal precedents with the potential to bind the interpretation of fair dealing. The approach outlined in CCH is still the benchmark for establishing reasonableness and fairness in user exceptions. In CCH the court emphasized the balance between user rights and copyright protection; however, it appears the courts weighted copyright decisions on preset questions rather than on a case-by-case basis. The fair dealing clause should be continually updated to reflect the potential freedom of a fair use doctrine. However the question remains; which model is better for Canada, the fair use doctrine of the fair dealing doctrine? This could only be assessed by an in depth comparison between Canadian and American fair dealing and fair use cases. Regardless of the model, the intent of fair use/fair dealing remains clear; it serves to balance the rights of copyright holders.

User Generated Content

Stipulations on UGC in the copyright act focus heavily on non-commercial content, and ignore the fact that the natural creation of culture comes from ideas building on ideas. To support UGC would be to encourage innovation. As a collective, the Internet has allowed for mass social networking, culture and information databases, these resources have been invaluable in building culture and collective knowledge. Furthermore, legislation cannot hope to constrain UGC as technology can easily out-maneuver the rules. UGC poses the same problem as copyright enforcement, as limiting the generation of UGC proves to be a herculean task. Therefore it becomes best to define, in the simplest terms possible what constitutes copying and what constitutes UGC under Fair Dealing. This would at least

[88] Lessig, Lawrence. Free Culture: How big media uses technology and the lock down culture and control creativity. New York : Penguin Press, 2004.

provide an outline to an otherwise grey area. In addition the conditions of economic neutrality should be reexamined. Disallowing individuals from earning a profit from UGC but allowing corporate entities to capitalize on the resulting products undermines the very principle of copyright protection.

Technology

Technology has and will continue to have a dramatic effect on the consumption of copyrighted works. Bill C-11 amended the Copyright act to reflect the pace of changing technology by inserting a mandatory review of the act every five years. This is an admirable acknowledgement of the effect technological innovation can have on intellectual property rights. What is not so admirable is the inclusion of technological protection measures in the statute that support practices such as digital locks. The principles of technological neutrality should be enforced in order to assure a balance between the holder's rights and user rights. Technological neutrality seeks to return intellectual property to its work status rather than its fixation. It is important to remember that intellectual property is not a physical good but non-rival and intangible entity and therefore should not be bound by regulations that pertain to fixation.

International Influence

Copyright has become an issue of international jurisdiction. Borders cannot hold the Internet and thereby the dissemination of intellectual property. The global powers have sought to control copyright through international treaties such as the Berne Convention. However, the guiding rules of the Berne Convention are restrictive and quickly becoming outdated. Filing injunctions internationally is extremely problematic, as it requires political negotiations between countries and an expedition of some type. In most cases, due to the fragile nature of international relations very little is accomplished from country to country. Even international governing institutions such as the UN and WIPO can do little about international copyright infringement.

The main goal of copyright is to protect the rights of the creator while supporting the rights of the user. For years the copyright holder has asserted dominance over their work by limiting the users interaction, however that balance is beginning to shift towards equilibrium. It becomes the position of policy makers to define a balance between user and creator without depriving the copyright holder of their legal rights. This is in no way an easy fix, as technology continues to develop and change the landscape of intellectual property.

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