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Defining the Public Interest in Canadian Intellectual Property Policy

by

David Anthony Fewer

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Graduate Department of the Faculty of Law
University of Toronto

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Defining the Public Interest in Canadian Intellectual Property Policy

LL.M. 1997
David Anthony Fewer

Faculty of Law
University of Toronto

Canadian intellectual property laws balance the competing claims of creators, publishers and users of intangible goods and services by granting creators exclusive statutory rights in those works and limiting these rights -- in both time and scope -- in the name of public interest considerations. In Canada, the last ten years have seen an unparalleled expansion in the reach of intellectual property rights, propelled largely by rhetorical claims of the absolute nature of property rights. Limitations on the scope of intellectual property should be grounded in widely accepted understandings of limitations on real property; with this in mind, this Thesis defines limitations on property as falling within three categories: efficient resource allocation concerns, distributive values and democratic governance values. This Thesis considers whether the Canadian intellectual property policy formation process accommodates this full range of interests, and concludes that it does not: to the extent that market forces fail to generate a champion for public interest considerations, government policy makers will always be presented an incomplete picture. Although this failure occurs across the spectrum of intellectual property rights, this Thesis reviews three specific sites of contestation:

- the decline of "access" as a priority for Canadian copyright law;
- the treatment of pharmaceuticals under Canadian patent law;
- the need for a *sui generis* form of protection for computerized databases.

This thesis concludes by recommending changes to Canada's intellectual property policy formation process that will help ensure that Canada's intellectual property policy makers have access to reasoned articulations of the public interest in intellectual property law.
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Chapter 1  Introduction

To have a flourishing literature, a country must have a strong Copyright Act. George Bernard Shaw once commented that judges did not recognize copyright as an exploitable property until those of them who kept canaries discovered that birds cannot sing unless they are fed. Having time to write comes down to having enough money to feed yourself. It is too often forgotten that intellectual property is property and that taking it without permission is theft.¹

The preceding quote is taken from Margaret Atwood's testimony on behalf of the Writers' Union of Canada before the Standing Committee on Canadian Heritage, sitting to consider the relative merits of Bill C-32, An Act to amend the Copyright Act.² Ms. Atwood, as chair of the Writers' Union copyright committee, eloquently advanced the interests of creators in a presentation that was both persuasive and textually rich.

Atwood's testimony invoked themes at the core of twentieth century Canadian values: the value of property ("property," "theft"), the worth of the Romantic Author³ ("canaries," "flourishing literature") and the centrality of economic individualism ("feed yourself"). Evidently, the Standing Committee found these themes persuasive, and wanting in the legislation as proposed.⁴ Following the close of public hearings, the Committee,

²2nd Sess., 35th Parl., Canada, 1996 [hereinafter Bill C-32].
³The author trope is a powerful icon of creativity deployed rhetorically in intellectual debate as the paradigm of creative labour deserving legal recognition and reward. However, not even creative literary authorship is as lonely and original an activity as the stereotype of the Romantic Author claims; therefore the deployment of author-reasoning in non-literary intellectual property policy forums (considering, for example, the legal protection to be afforded to computer software or trademarks) improperly stresses the creative contributions of the intellectual property owner over the contributions of the public domain and non-creative elements. For consideration of the "Romantic Author's" influence on intellectual property debates, see J. Boyle, Shamans, Software and Spleens: Law and the Construction of the Information Society (Cambridge: Harvard University Press, 1996) and M. Woodmansee and P. Jaszi, eds., The Construction of Authorship: Textual Appropriation in Law and Literature (Durham and London: Duke University Press, 1994).
⁴S. Riley, "Copyright Law Changes Create Storm in Cabinet: Prominent Authors Pitted against Public Libraries" Vancouver Sun (13 December, 1997) at A11 (noting that "Copps, who has taken up the cause of creators -- including prominent committee witnesses such as author Margaret Atwood and Quebec recording artists -- is being credited with a victory over Industry Minister John Manley." See also S.
supported by Heritage Minister Sheila Copps and a coalition of Liberal and Bloc Québécois members, introduced a series of amendments in a remarkable procedure that left members of Industry Canada's intellectual property policy team "in shock."5

While few claimed that Bill C-32 was perfect before it went to Committee, many claimed that it did reflect a balance between the interests of the creative community on the one hand and the public's interest in access to creative works, on the other.6 The Bill that emerged from Committee substantially reworked the amendments to the Copyright Act to favor proprietarial interests, scaling back defences and exemptions for libraries, academic institutions and other mechanisms of public access. However, what is so troubling about the amendments to Bill C-32 is not simply the fact that they were made, but rather the unsophisticated theoretical justification for amending the original Bill offered by the Standing Committee on Canadian Heritage. While mouthing the government's stated philosophical justification for the grant of copyright, namely, balancing the interests of creators with the public's interest in access,7 the Standing Committee nonetheless availed themselves of the same rhetorical techniques employed by Atwood and the Writers' Union in her testimony before them the previous month. Summoning the persuasive force of the Romantic Author and the authority of property entitlements, the Committee recharacterized the defences and exemptions proposed by

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5J. Vardy, "Commons Committee OKs Copyright Amendments" Financial Post (12 December, 1997) at 15 (citing "sources" close to the committee hearings).

6See, e.g., "Editorial - Cracks in Liberals' Copyright Bill" Financial Post (26 April, 1997) 22 (available in NEXIS Canada/allnews library) (characterizing the final version of Bill C-32 as the product of Deputy Prime Minister and Minister of Canadian Heritage Sheila Copps' efforts to champion the cause of Canada's creator community at the expense of students and educators, consumers, booksellers and broadcasters); J. Vardy, "House OKs Controversial Copyright Bill" Financial Post (21 March, 1997) 7 (available in NEXIS Canada/allnews library) (noting that interests opposed to the revamped Bill did so on the grounds that the original bill "struck the right balance between the rights of creators and the needs of those using their products. However, amendments by the parliamentary committee that reviewed the bill imposed too many constraints on students, educators and researchers").

7See, e.g., Committee Member Gaston Leroux’s response to Atwood's presentation: "If we want to achieve the goal sought by the bill, that is a balance between the copyright holder and the user, we must look at the way the bill has been drafted and to what degree such a balance, which takes into account the rights of all parties concerned, has been attained." Atwood Presentation, supra note 1 at 3.
Bill C-32 as "subsidies" and "unjustifiable invasions of property rights" which could serve to deny authors the capacity to earn a living. Accordingly, the Committee revamped the Bill in this image, substantially re-working in on week a piece of legislation that was nine years in the making and the product of extensive industry consultation.\(^8\)

The debate over Bill C-32 must be seen in the context of the government of Canada's long-term revision of Canada's Copyright Act. Bill C-32 comprised Phase II of a three part revision process. Phase I reforms, legislated in 1988, included the creation of moral rights for creators and the creation of collective bodies for the enforcement and licensing of protected works.\(^9\) Phase II was to address neighboring rights issues, as well as articulating affirmative defences and exemptions for educational institutions, libraries, and other public, non-commercial organizations that enhance public access to protected works. The promise of these defences and exemptions served as the "carrot" offered in exchange for acquiescence to the "stick" of copyright collectives. Instead, Bill C-32 seems to have reneged on the government promise: far from guaranteeing a zone of insulation from the financial pressures of collectives, the newly amended Copyright Act firmly places academics, students, public libraries and archives under the scrutiny of collectives. Phase III reforms to the Act, dealing with the challenges posed by digitally networked environments, promises to increase the financial and legal pressures faced by institutions serving the public's interest in enhanced access to works protected by copyright. Further, international trade agreements uncompromisingly forwarding the interests of capital in expanding both the scope and reach of intellectual property laws have pressured the Canadian government into modifying its intellectual property statutes, \(^---\)

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\(^8\)See Chapter 4 for a discussion of the Standing Committee on Canadian Heritage's treatment of access issues.

\(^9\)Minister of Canadian Heritage Sheila Copps made this point explicit in her presentation to the Standing Committee on the history and contents of Bill C-32: "the exceptions were not created today, but rather in 1988, at the request of non-profit organizations, among others, who wanted an exemption." The Hon. S. Copps, Deputy Prime Minister and Minister of Canadian Heritage, Presentation to the Standing Commission on Canadian Heritage on Bill C-32, 3 October, 1996 at 15 (available at http://www.parl.gc.ca/committees352/heri/evidence/21_96-10-03/heri21_blk101.html) [hereinafter Atwood, Testimony].
resulting in an expansion of rights enjoyed by creators, inventors, and the industry that benefits from their production. These same trade agreements have served to narrow the scope for defences and exemptions to infringement.

The trend of the past decade of Canadian intellectual property legislation is clear: the protection enjoyed by industries that benefit from intellectual property has expanded steadily, with a corresponding diminution of the importance and scope of public access to their products and services. These developments have occurred at the expense of consumers and non-market organizations with significant interests in the use of information and intangible goods and services with little or no public debate or scrutiny.

While the government's failure to undertake reasoned analysis of the distributional impact of these legislative amendments is troubling, even more disturbing is the sanguine response of Canada's elected representatives to public interest concerns, even on those rare occasions where public interest concerns are vocalized.

These developments reflect a disturbing trend in the manner in which the Canadian government formulates intellectual property policy. The chosen rhetorical tactic of those favoring stronger legal protection has been to employ the language of property, in both "weak" and "strong" forms. "Weak" property rhetoric advances unsophisticated and circular arguments favoring simplistic but stronger property rights for intangibles: intangibles must be granted strong property rights because intangible creations are the property of their creators. Of course, whether or not a given set of rights relating to an intangible comprise a property right is a conclusion which can only be

drawn from an analysis of those rights already attached to the intangible. Such arguments do not seek to persuade by logic: rather, they seek to tap into the normative weight of property rhetoric. "Strong" forms of property rhetoric seek to provide the normative content that "weak" property rhetoric lacks by identifying intellectual property with the same theoretical and philosophical justifications the law employs in granting property rights in real property and chattels. Although more intellectually persuasive than "weak" property rhetoric, arguments based on property theory run into the dual impediments of improper fit between intangible and tangible property, and the limitations on property rights inherent to normative theories of property itself. Regardless, all property rhetoric, whether "weak" or "strong" form, seeks to shift the focus of intellectual property legislators away from balancing the competing concerns of capital and users towards a respect for the property rights inherent to intangible capital. To the extent that such rhetorical tactics succeed, they threaten to supplant an established understanding of the functional nature of statutory law-making with the product of a political process susceptible to rent-seeking tactics.

Troublingly, these statutory amendments have often been implemented without explicitly articulated philosophical grounding: while the law reveals a one-sided agenda in outline, Ministers and bureaucrats have continued to mouth platitudes about balancing interests and mutual respect of rights. Two possible explanations emerge. First, it is possible that the federal government has decided that Canada's intellectual property laws have in the past skewed the calculus between public and capital interests in intellectual property to disproportionately favor the public (to the disadvantage of private capital). On this model, the federal government has deliberately discounted public interest concerns in reformulating Canadian intellectual property policy over the past decade as an industrial policy strategy. Alternatively, it is possible that the public's interest in the use of intangibles has not influenced legislative reform because it has not been articulated before legislative deliberators. On this model, the developments in Canadian intellectual
property over the past ten years may be seen as a species of "industry capture:" governments are subject to a number of inputs and commercial interests with powerful financial motivations can best mobilize powerful and persuasive lobbying efforts. This second possibility is less fatal to public interest concerns: it reflects not an abandonment of the public interest, but a failure of the democratic process.

A failed democratic process can be remedied. This thesis analyzes government policy formation with regard to contemporary issues in four diverse areas of intellectual property law: copyright, trade-mark, pharmaceutical patents and databases. All affect significant public interests which should find some articulation in government policy, and ultimately in legislative initiatives. Examination of government activities in relation to intellectual property in recent years reveals that this is not happening; rather, some strong public interest concerns do not even find voice before government policy makers, or if they do, the public viewpoint is only partially or poorly articulated. In contrast, vested commercial interests are well represented before Parliamentary Committees and Commissions charged with reviewing Canada's intellectual property laws. This contrast raises two fundamental questions: first, why does this system inadequately articulate public interests in intellectual property? Second, how can the Canadian government's intellectual property policy formulation process be modified to ensure that policy makers hear a clear and persuasive articulation of the public interest in intellectual property legislation?

I Defining the Public Interest

Before this inquiry can proceed, it requires a working definition of the "public interest" in intellectual property. Unfortunately, no single definition can suffice. Rather, intellectual property intersects with the public interest over a range of issues. These impacts can be imperfectly grouped into three categories: market distortions, distributional values, and democratic values.
On the one hand, intellectual property law itself can be said to serve the public interest at large, in the sense that these laws correct for market failures that would otherwise deprive the public of valued intangible products and services. At the opposite end of the scale, when intellectual property laws provide excessive protection, they have a debilitating effect on markets by unnecessarily sheltering commercial interests from downstream competition at the expense of consumers, other market participants, and the public interest in innovation and the dissemination of knowledge. Thus, over-protective intellectual property laws may serve to hinder rather than encourage innovation and the creation of intangible goods and services. At the national or global scale, overly-protective intellectual property laws may be allocatively inefficient, attracting capital to the sheltered monopoly rents of intellectual property protection that would have been invested more efficiently elsewhere in the economy. In other words, intellectual property laws -- a public intervention into the private market -- may actually serve as a drag on economic growth by precipitating excessive investment in widget production or the entertainment industry when that capital may have been better placed in, for example, the service industry.

Of more concern, perhaps, are the non-market impacts of intellectual property. Intellectual property interfaces with educational institutions, public libraries and archives, all institutions dedicated to the dissemination of knowledge and the improvement of the human condition, important values closely associated with both egalitarian (distributive) conceptions of justice and individual freedoms. These institutions represent massive government interventions into the free market: the majority of these institutions simply would not arise in a market economy. Intellectual property industries look to these institutions as publicly supported captive markets with relatively inelastic demand curves, and thus potentially lucrative revenue streams. However, to the extent that intellectual property law diverts capital from these institutions, it represents an impediment to the realization of some of Canadian society's most important collective goals. The creation
of property rights entails the imposition of new burdens, or at least the curtailment of liberties or legal privileges, and this cost may be borne disproportionately by the most vulnerable segments of society.

These egalitarian values are closely associated to a third grouping of public concerns with intellectual property touching upon democratic values. Intellectual property laws attribute to capital control over powerful textual and symbolic resources. This control can be used to influence both public and private discourse. When the government exercises this power, it is universally decried as censorship. Society places a heavy justificatory burden on such governmental activities. The exercise of such power on citizens by private parties involves similar concerns and has a similar effect on citizens: censorship in all its forms would seem to be a universally objectionable invasion of freedom of expression. Indeed, the proximity of freedom of expression to the core of values that liberal democracy purportedly serves instructs us to tread very carefully in granting property rights in the resources of speech itself. Perhaps this requirement of freedom is best captured in the concept of democratic dialogue: to make freedom a reality the state must promote discourse and understanding among all of its citizens. When intellectual property laws deny us the raw materials we require to express ourselves and contribute to state discourse, they strike at the very heart of the freedoms the state serves.

II Forum: National v. International

Recognizing the public interest in intellectual property laws is essential to a clear definition of the scope of and limitations on domestically defined legal entitlements relating to intangibles. However, the pressures behind the evolution of Canadian intellectual property laws over the last ten years have not originated solely with domestic corporate interests. We have already noted the impact of international trade agreements and international conventions on Canada's intellectual property laws. Canada has been relatively passive at international deliberations on intellectual property, and has at times
become a signatory to conventions and trade agreements that have required the modification of its intellectual property laws in ways that may not be in the best interests of the nation. These amendments are objectionable circumventions of domestic legislative forums; however, law reform by international treaty is problematic for more than mere process. The corporate interests that favor the expansion of domestic intellectual property laws are international in scope, and have been successful in co-opting national governments to take up their cause internationally. Organizations representing educational institutions, libraries, and other public interests do not have a similar international scope of activities nor access to capital, and have been correspondingly less influential in persuading national governments to defend public perspectives in international forums. It has been left to national governments (generally of newly industrialized or developing countries) and what few international organizations that do exist to resist international trade pressure for the expansion of intellectual property rights. Part of the problem is undoubtedly the tendency of Canada's industrialized trading partners to link Canada's trade goals with enhanced intellectual property protection. However, these developments have also taken advantage of the inadequate attention Canada pays to the non-market costs of intellectual property. Canada should be a voice of reason and moderation at international venues; as an industrialized nation with significant interests in intellectual property whose predominant trading partner is the single largest peddler of intangible goods and services in the world, Canada is uniquely placed to influentially articulate limitations on the scope of intellectual property justified by the public interest.

Part I of this thesis explores the theoretical issues raised in this introduction. The next chapter of this thesis engages the challenge posed by the deployment of property rhetoric in Canadian intellectual property reform venues. I consider both "weak" and "strong" form property rhetoric, and argue that both provide unsatisfactory accounts of intellectual property, and so should be rejected as supplying unqualified theoretical bases
for legislatively expanding the scope of intellectual property laws. I then turn to the
insights of the American legal realists of the early twentieth century and the early work of
the law and economics movement as supplying a more suitable framework for legislating
property rights. This framework regards intellectual property legislation as a state grant
of power in the form of an legal entitlement protected by a regime of enforcement rules.
Regarded from this perspective, the true, functional nature of intellectual property as a
series of defined legal entitlements of a scope limited by the legal rights and privileges of
others becomes apparent.

In Chapter Three I examine the Canadian legislative process itself. Given this
functional definition of intellectual property legislation, I consider whether the Canadian
government's policy formation and legislative processes operate to implement
government strategies along this functional model. In so doing, I examine two competing
theories of law-making: functionalism, and public-choice theory, and conclude that
Canada's intellectual property laws appear to conform disturbingly well to public choice
models of legislation. This would indicate that Canada's intellectual property laws suffer
from the welfare-skewing effects of "industry capture."

Part II explores some of the implications of this analysis for discrete issues in
three contemporary regimes of intellectual property law -- copyright, patents and
trademark -- as well as in databases, a recently proposed candidate for the creation of a
sui generis form of intellectual property rights. Chapter Four examines the treatment of
paradigms of access in copyright law, particularly in the context of Phase II's treatment of
exemptions for libraries, archives and educational institutions, before turning to consider
proposals for the expansion of the reproduction right in digital environments to embrace
all uses of a work. Chapter Five turns to consider the treatment of pharmaceutical patents
under Bill C-91, which outlawed compulsory licensing of such patents. I examine the
recent review of Bill C-91 by a Parliamentary Committee, and consider the rhetorical
tactics employed by parties appearing before the Committee and by the Committee itself
in declining to alter the framework established by Bill C-91. Chapter Six turns to consider Canada's potential response to proposals for the creation of new forms of intellectual property rights in databases. International proposals for database rights have provoked vigorous opposition from educational institutions, libraries, and other points of public access to information providers, who have criticized these proposals as unacceptably one-sided, over-inclusive, and unnecessary. These critiques are not without some merit; accordingly, this Chapter focuses on the Canadian government's treatment of these concerns.

Part Three concludes this Thesis with a summary of my findings in the previous Part, and with prescriptive recommendations for meeting the concerns I raise. If Canada's intellectual property laws are to serve Canada's interests, they must be crafted from legislative processes that consider all relevant interests. This includes market participants, public institutions, the public at large, and future interests unable to articulate their concerns in the present. This involves a more pro-active assessment of the needs and resources of stakeholders. Chapter Seven accordingly suggests some future directions for Canada's intellectual property policy makers and legislators for ensuring that they serve Canadians better.
Part I  Intellectual Property Theory and Policy Models

Chapter 2  Limits to Property: A Functional Approach

The rhetorical power of property is undeniable. As Sir William Blackstone noted so long ago, "[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property." Wherever competing claims to scarce resources arise, the competing parties invariably employ a common and sound strategy involving the characterization of the resource as "property," and so ground claims to the resource as "property rights." Of course, taken by themselves these claims are meaningless: "property" as a noun is not a part of the law's language of entitlements. Rather, at law "property" modifies "rights," and together these legal terms describe a legal conclusion. "Property rights" comprise a set of legal rules govern specific relationships between legal persons relating to a given resource. In other words, the law designates a given resource as "property" only after the initial entitlement has already been allocated. Property rhetoric provides neither a justification for that initial allocation, nor the only means for protecting an entitlement once granted.

These distinctions seldom inform popular attitudes towards the allocation of resources in society and the legal rules employed to give those entitlements effect. Rather, the public views "property" as an amorphous but potent -- and fundamental -- "right" to a "thing," Persons seeking to avail themselves of the power of property seek to claim the language of "fundamental" law, a tendency I will refer to as "property rhetoric." Property is seen on this view as either pre-law (and so enshrined with a superior claim -- perhaps a moral claim -- to rightness or justice), or as the end of law, in the sense that "good" law vindicates property rights, while "bad" law undermines property rights. These two views have much in common, although they are not identical. The second

property as an absolute, and so a trump on other claims to resources labeled "property." I view this rhetorical use of property as "strong" form property rhetoric. The first view of property, by default termed "weak" form property rhetoric, is more sophisticated, placing property among social institutions that pre-date the social order. In other words, this view defines private property as "natural law," and so grounds property rights in an ancient line of jurisprudential thought that traces its lineage through Aristotle, Thomas Aquinas, Hobbes and Locke.

In this chapter, I seek to construct a realistic framework from which to articulate strong defences of public interest concerns in intellectual property. While both strong and weak forms of property rhetoric are employed by industries with vested interests in the expansion of the scope of intellectual property, property rhetoric also finds its way, disturbingly, into legislative reports and government advisory commissions. In examining the law's response to both strong and weak form property rhetoric, I draw heavily upon the work of the American legal realists of the first half of the twentieth century and from the law and economics literature of the second half of the twentieth century. In section one, I review the deployment of strong form property rhetoric in debates over Canada's intellectual property laws and elsewhere, and consider the response of the American legal realists to these absolutist visions of property law. In section two, I examine weak form property rhetoric, which tends to be grounded in theoretically complex justifications for property rights. It is unnecessary to choose between the various justifications selected; rather, by focusing on limitations on property rights inherent to all property theories, it is possible to construct a "space in the theory" for the assertion of powerful public interest limitations on the scope of intellectual property. The legal realists defined law functionally, as a human institution designed to perform some social function. That insight would seem to apply with particular force to intellectual property, which is at bottom statutory law, regardless of the employment of even the strongest natural law property justifications. In section three, I turn to the work of the
legal realists' prodigy, the law and economics scholars, to construct a functional framework for thinking about the allocation of entitlements to resources and the choice of legal rules for enforcing those entitlements. In constructing this framework, I draw heavily upon two of the most influential articles to emerge from that literature: Richard Coase's "The Problem of Social Cost,"2 and Guido Calabresi and A. Douglas Melamed's "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral."3 The creation of exclusive rights in intellectual property, as in any other resource, entails externalities or "social costs:" burdens borne not by the entitlement's beneficiary but by a public now forced to pay more for technology employing patented processes,4 or for school books sold in sheltered markets,5 or for internet service which must make use of Network Solution's domain name database.6 The processes of allocating entitlements and selecting legal rules to protect them must employ both efficiency and, significantly, distributive. In the Introduction, I identified the public interest in intellectual property as revolving around three related concerns: market-related goals, distributive goals, and ideals of democratic participation. Property rhetoric tends to distract us from the social cost of the unlimited expansion of intellectual property, at the expense of the realization of these valued economic, distributive and democratic goals. This analytic framework provides a mechanism for positively identifying and articulating public interest goals in intellectual property policy-making and legislating, and does so without challenging underlying philosophical justifications employed, often unconsciously, in all forms of property rhetoric. This framework therefore circumvents problematic and ultimately

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4See Chapter 5.
5Canada's Copyright Act has recently been amended to protect domestic textbook manufacturers from the importation of second hand texts (see An Act to amend the Copyright Act, 2nd Sess., 35th Parl., Canada, 1996, s. [hereinafter Bill C-32]). See Chapter 4 for a consideration of paradigms of access in Canada's Copyright Act.
6See Chapter 6.
counter-productive debates over the philosophical grounding of Canada's intellectual property statutes.

I Property as Absolute
A "Strong" Form Property Rhetoric

The most common understanding of the institution of property -- or, at least, the public's understanding of it -- experiences property as a monolithic "right" to a "thing." Property on this view is an absolute entitlement to a resource, and so a trump for deployment against others in allocative or enforcement disputes.

Intellectual property has a more fragile claim to the mantle of property than other forms of property, largely because of the difficulty we have in excluding others from accessing intangible resources. Once a literary work is published or an invention manufactured, the "property" is accessible for all the world to copy or imitate. Intellectual property statutes are designed to compensate for precisely this characteristic of intangibles. Perhaps it is also for this reason that strong form property rhetoric is so prevalent in Canadian debates over the scope and enforcement of intellectual property rights.

The Introduction to this thesis began with a quote from Margaret Atwood's testimony before the Standing Committee on Canadian Heritage in its hearings on Bill C-32, Phase II of the amendments to the Copyright Act. Atwood's testimony was rich

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8Indeed, as Madame Justice McLachlin has noted, "while we say ideas can be property, the claim is much more fragile than the moral underpinnings of other kinds of property..." The Honourable Madam Justice Beverly McLachlin, "Intellectual Property--What's It All About?", speech presented at the National Judicial Institute course "Intellectual Property: Trademark Law" (19 & 20 November, 1992); reprinted in Henderson, ibid. 391 at 393-4.


10Bill C-32, supra note 5.
with the unsophisticated, rhetorical language of property, consistently referring to intellectual property as "real assets"\textsuperscript{12} or simply "property,"\textsuperscript{13} and characterizing its reproduction as "theft"\textsuperscript{14} or "expropriation."\textsuperscript{15} Of course, Atwood, representing the Writers' Union of Canada, was not alone in employing weak form property rhetoric in advocating an expansion of the rights of creators.

Unfortunately, this rhetorical use of the language of property is not confined to advocacy groups and lobbyists. Sheila Copps, Deputy Prime Minister and Minister of Canadian Heritage, argued before the Committee that "Bill C-32 is above all a respect for property rights, a respect for creative ownership"\textsuperscript{16} and that "the right to own your own property is the same right whether you are a plumber or an artist."\textsuperscript{17} More troublingly, a 1985 government committee charged with the task of making recommendations for the overhaul of Canada's \textit{Copyright Act} rested the bulk of its recommendations on the premise that "ownership is ownership is ownership.' The copyright owner owns the intellectual works in the same sense as a landowner owns land."\textsuperscript{18} The protectionist bias of this particular committee was not unique: since the seventies, most Canadian

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\textsuperscript{11}Copyright Act, R.S.C. 1985 c. C-42, as amended [hereinafter Copyright Act].
\textsuperscript{12}Atwood, \textit{supra} note 9 at 1020 ("...[W]riters are small business people and our copyrights are often our only real assets.")
\textsuperscript{13}ibid. at 1007, 1020 ("As writers we are concerned about the loss of control over our own property once it is in electronic format.... It is too often forgotten that intellectual property is property is property...")
\textsuperscript{14}ibid. at 1007, 1010, 1020 ("...[I]ntellectual property is property and taking it without permission is theft."); "Reproducing intellectual property without permission from its owner amounts to theft, and I do not feel my government should legalize theft." "If copyright were cars, this would be car theft.")
\textsuperscript{15}ibid. at 1010, 1020 ("Exceptions to copyright are an expropriation of our property against our will."); "...legislated exceptions are an expropriation of intellectual property without any compensation.")
\textsuperscript{17}ibid. at 1130.
\textsuperscript{18}Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, \textit{A Charter of Rights for Creators} (Ottawa: Ministry of Supply and Services Canada, October 1985) at 9. The Sub-Committee continued by asserting that "[I]nfringement of copyright is analogous to trespass and the owner in real estate does not have to prove damages before asserting his rights against a trespasser;..." (\textit{ibid.})
copyright law reform commissions and advisory bodies have been criticized as excessively pro-creator in philosophical stance.19

Perhaps less surprisingly, this unsophisticated vision of property is one shared by the intellectual property bar, a major beneficiary of the expansion of intellectual property statutes. Simon Potter, a lawyer with a prominent Montreal law firm (concerned primarily with compulsory licensing of pharmaceuticals) argued that

willy nilly and without any principled discussion as to the consequences of doing so, the federal government of Canada has not only turned intellectual property into an asset which can be expropriated but has considered that expropriation as deserving no compensation, as if the property were never really an asset to begin with but a privilege which the State, having in its wisdom given, might in its unfettered wisdom simply take away.20

Of course, both trademarks and patents are statutory grants -- positive rights derived from either the whim or wisdom of government. As such, there is nothing remarkable about Parliament making legislative amendments to these laws. Potter juxtaposes the intellectual "asset" with the statutory "privilege" for rhetorical purposes, so as to blur the reality of the statutory bundle of rights that comprise the patent or trademark. Perhaps more surprisingly, the late Gordon Henderson, one of Canada's leading intellectual property practitioners, argued that intellectual property should be regarded, along with real estate and chattels, as "property" per se, because the touchstone of property is wealth.21 This argument is broader than any forwarded by even the most vested interests

19See, e.g., R. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 C.P.R. (2d) 33 (criticizing a report prepared by A. Keyes and C. Brunet for the Department of Consumer and Corporate Affairs Canada, entitled Copyright in Canada: Proposals For a Revision of The Law (Ottawa: Minister of Supplies and Services Canada, 1977)). See also the Economic Council of Canada, Report on Intellectual and Industrial Property (Ottawa: Information Canada, 1971).
21G. Henderson, "An Overview of Intellectual Property" in G. Henderson et al., eds., Trade-Marks Law of Canada (Scarborough: Thomson, 1993) 1 at 11 ("Property, when all is said and done, is for both economic and legal purposes, anything that can be bought or sold.") Henderson is not alone in embracing wealth as the key to property: Charles A. Reich, in his enormously influential article, "The New Property," argued that "property represents a relationship between wealth and its 'owner.'" Noting that "[g]overnment largess is plainly 'wealth,' but is not necessarily property," Reich argued for property-like rights to attach to certain forms of government created wealth. C. Reich, "The New Property" (1964) 73 Yale L. J. 734 at 739.
in intellectual property policy debates, while, curiously, is at the same time narrower.\textsuperscript{22} It simultaneously encompasses under the umbrella of "property" many things which we would pay money for but would not ordinarily consider subject to property rights, such as time, services, and pure ideas,\textsuperscript{23} or, normatively, should not consider subject to property rights (the most notable example being human lives). Similarly, worthless things, such as lint and garbage, qualify as property but could not qualify as wealth, and may in fact drain wealth.\textsuperscript{24} Felix Cohen noted that property and wealth may have an inverse relation to one another, in that "if there is no possibility of privation there cannot be private property."\textsuperscript{25}

All of these absolutist visions of property are of noble lineage, descending directly from a nineteenth century understanding of property grounded in real estate.\textsuperscript{26} William Blackstone defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any

\textsuperscript{22}As Felix Cohen noted, "not only is there valueless property, but there is also propertyless value." F. Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L. Rev. 337 at 364.
\textsuperscript{23}This distinction is a narrow one: time, for example, may be construed as an element of the definition of a property right. Life interests, rentals, and leases all undeniably qualify as property interests defined by temporal components. Similarly, ideas, because of their worth to firms, are often subject to elaborate protection regimes, including patent and trade secret laws. However, outside of the safe havens of these legal regimes, ideas are free to the world. Indeed, this distinction is fundamental to copyright law, and has been forwarded as one of the pillars of intellectual property that keeps it within the constitutional bounds of freedom of expression. See M. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" (1970) 17 U.C.L.A. L. Rev. 1180 at 1189 ("[t]he marketplace of ideas would be utterly bereft, and the democratic dialogue largely stifled if the only ideas which might be discussed were those original with the speakers."). See also P. Goldstein, "Copyright and the First Amendment" (1970) 70 Col. L. Rev. 983; Note, "Copyright Infringement and the First Amendment" (1979) 79 Columbia Law Review 320; L. Patterson, "Free Speech, Copyright, and Fair Use" (1987) 40 Van. L. Rev. 1; P. Samuelson, "Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases" (1983) 57 Tulane L. Rev. 836; D. Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 U. Toronto Fac. L. Rev. --. See also R. v. Stewart, [1988] 1 S.C.R. 963 at 982 [copyright infringement does not qualify as theft for the purposes of the provisions of the Canadian Criminal Code]; cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986 at 1002-1003 (1984) (trade-secret rights qualify as "property" under the Fifth Amendment, and so are subject to the protection of the Takings Clause).
\textsuperscript{24}Cohen notes that "an inalienable life estate in a piece of land for which I have no possible use... is a burden rather than an advantage to me." Supra note 22 at 563.
\textsuperscript{25}Ibid.
\textsuperscript{26}See Grey, supra note 7 at 73-4.
other individual in the universe." 27 Property, in Blackstone's England, is exclusive and absolute. Legal restraints on property can only be seen as departures from the norm. At the core of all of these arguments is a kernel of truth: most intellectual property laws do create a measure of exclusivity through the remedial application of property rules. However, without careful, reasoned analysis, the assertion, "this is my property" does not provide obvious aid in deliberations over the scope and limits of intellectual property. Careless property rhetoric is misleading and deceptive, and so ultimately a counter-productive approach to public deliberation.

B The Legal Realists

Of course, this absolutist view of property is entirely rhetorical; upon even only cursory examination it is self-evident that property as an absolute entitlement is a prescription for anarchy. 28 Indeed, the limitations civil society places on the exercise of property rights in the vast majority of cases are so obvious that most people would not recognize them as constraints on property rights at all: taxation, nuisances, standards of quality, and professional licensing regimes all subject private property to limitations based on the rights of others. Perhaps it is the everyday familiarity of these limitations on property rights which prevents their recognition by those employing the rhetoric of property in debates over the allocation and enforcement of rights in resources. Regardless, Blackstone's "absolute dominion" would seem to have little place in twentieth century property discourse, and even less in that of the twenty-first century.

27Blackstone, supra note 1 at 2.
28This insight is fundamental to contemporary conceptions of property, and to legal entitlements generally. As Coase noted in "The Problem of Social Cost:"
The rights of a land-owner are not unlimited. It is not even always possible for him to remove the land to another place, for instance, by quarrying it. And although it may be possible for him to exclude some people from using "his" land, this may not be true of others. For example, some people may have the right to cross the land. Furthermore, it may or may not be possible to erect certain types of buildings or to grow certain crops or to use particular drainage systems on the land. This does not come about simply because of Government regulation. It would be equally true under the common law. In fact it would be true under any system of law. A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire.

Coase, supra note 2 at 44.
This recognition of the limited and reciprocal nature of property rights -- of all legal entitlements -- has its roots in the writings of the American legal realists of the first half of this century. Among the foremost of those contributions was Wesley Newcomb Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning.*

Hohfeld's study of analytic jurisprudence ordered jural relationships into eight terms comprising four paired correlatives and four paired opposites:

<table>
<thead>
<tr>
<th>Jural Correlatives:</th>
<th>right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
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<tbody>
<tr>
<td>disability</td>
<td>no-right</td>
<td>duty</td>
<td>liability</td>
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<table>
<thead>
<tr>
<th>Jural Opposites</th>
<th>right</th>
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<td>disability</td>
<td>liability</td>
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Although common legal usage of these eight terms often varied -- the term "right," for instance, can be used in a wide variety of contexts to communicate a wide variety of meanings -- Hohfeld gave each term a distinct meaning, so as to both distinguish them from one another and to clarify legal analysis. Thus, Hohfeld identified a "right" as the opposite of a legal duty, or as a legal "claim." A "duty," as the correlative of a "right" (legal claim), is an obligation, backed by the law, to do or refrain from doing something; as Hohfeld noted, "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place." In contrast, the opposite of a right, where one possesses no legally enforceable claim against another, Hohfeld termed a "no-right." The jural correlative of a "no-right" is, logically,  

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30 Ibid. at 36.

31 Ibid. at 38.

32 Ibid.

33 Ibid. at 39. This term is the only one of the eight that Hohfeld found no appropriate legal usage to embrace.
a "privilege," or the absence or negation of a legal "duty." Hohfeld applied similarly precise analysis to the other four terms, as well.

Hohfeld's contribution to contemporary jurisprudence consists not so much of his classification of jural relationships (when was the last time a court pondered the meaning of a "no-right?") as his recognition that even complex legal institutions, such as property, could be reduced to a collection of jural relationships. Distinguishing between rights in personum and rights in rem, Hohfeld definitively demonstrated the "crude and fallacious" nature of Blackstone's absolute definition of property as "dominion... over the external things of the world." Hohfeld reasoned that "since the purpose of law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings." Property rights cannot be a right "against a thing," for "all rights, or claims, must avail against persons." Correspondingly, "all duties must rest upon persons." The distinguishing feature of a right in rem, including a property right, is that it is "one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person... but availing respectively against persons constituting a very large and indefinite class of people." [Emphasis in original.] On this view, the institution of property is nothing more than a bundle of distinct rights, privileges, powers and immunities, residing in a legally

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34 Hohfeld noted that "[t]he closest synonym of legal 'privilege' seems to be legal 'liberty' or legal 'freedom.'" Ibid. at 47.
35 Ibid. at 67-114.
36 Ibid. at 75.
37 Blackstone, supra note 1 at 2.
38 Hohfeld, supra note 34 at 75. Hohfeld noted that a man may indeed sustain close and beneficial physical relations to a given physical thing: he may physically control and use such thing, and he may physically exclude others from any similar control or enjoyment. But, obviously, such purely physical relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. [Emphasis in original.]
39 Ibid.
40 Ibid. at 76, note 30.
41 Ibid. at 72 [footnotes omitted]. Hohfeld preferred the term "multiple rights" to the term "rights in rem" to communicate this idea. Ibid at 71.
recognized person or persons, and imposing corresponding duties, no-rights, liabilities and disabilities on the public. This insight has come to dominate contemporary accounts of property.42

A. M. Honoré, in a classic treatment of the legal concept of ownership, catalogued the "legal rights, duties and other incidents" which comprise the "bundle of rights" that is property.43 In his words,

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.44

These eleven incidents comprise the "greatest possible interest in a thing which a mature system of law recognizes."45 Of course, not all of these incidents need be present to qualify as ownership; some lesser combination of them, or divided possession of them, may be present without extinguishing the property-like nature of the bundle of rights.46

Of great interest for the purposes of this inquiry is Honoré's inclusion of liability to seizure and the prohibition on harmful use as standard incidents of ownership.47 This

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43Honore, supra note 42 at 107.

44Ibid. at 113. Obviously, Honoré did not use the term "right" in the Hohfeldian sense of a "legal claim," but rather grouped privileges, powers, and legal claims under a common term, and threw a liability and a disability into the mix. For a more detailed examination of the interplay between Hohfeldian analysis and Honoré's catalogue of the incidents of ownership, see L. Becker, "The Moral Basis of Property Rights" in Nomos XXII: Property, supra note 42, 187 at 190-1.

45Ibid. at 108.

46Ibid. at 131.

47Ibid. at 123-4.
implies that ownership entails both rights and, in sharp contrast the Blackstonian vision of property as absolute, duties.48

The combination of Hohfeld's and Honoré's analyses provides a simple framework for the evaluation of intellectual property. Intellectual property is generally statutory law; that is, to the extent that they are (or are not) recognized by courts, copyrights, trademarks, patents, and data rights all derive their content from legislative enactments.49 Thus, the incidents of ownership of a copyright can be easily catalogued by an examination of the Copyright Act.50 As in Honoré's analysis, the Copyright Act, too, entails both benefits and burdens of ownership, the most glaring example being the Act's assertion that any "fair dealing" with a work for the purposes of private study, research, criticism, review or news reporting shall not infringe the exclusive rights of the copyright owner.51 The most rationale understanding of the fair dealing defence sees it as embracing socially desirable uses of copyrighted works that, but for the defence, the copyright owner might otherwise bar. For example, parodies and other critical uses of protected works are seldom welcomed by the targeted artist or author.52 Few would be

51 Supra note 11.
52 Ibid., ss. 29, 29.1, 29.2.
53 For consideration of the Canadian treatment of copyright parodies, see Ludlow Music Inc. v. Canint Music Co. (1967), 35 Fox Pat. C. 114 (Ex. Ct.) (parody found to infringe copyright of the Weavers' sanctioned, Canadian nationalist adaptation of Woody Guthrie's "This Land Is Your Land"); MCA Canada Ltd. v. Gillberry & Hawke Advertising (1976), 28 C.O. R. (2d) 52 (commercial adaptation of Petula Clark's "Downtown" in a car dealership advertisement found to infringe copyright in the latter). ATV Music
protected works are seldom welcomed by the targeted artist or author. 52 Few would be thick-skinned enough (or so desperate for the licensing fees) to allow the mocking use of one's own work; however, society has long valued this form of critique. The Copyright Act therefore takes the position that the property rights of the copyright owner shall not extend so far as to prohibit these uses, for to deprive the public of critical and parodical works is to harm the public.

A similar account may lie behind copyright's idea/expression dichotomy. Simply, copyright protection extends to the expression of an idea, but not to the idea itself, which remains free to the world at large. 53 Landes and Posner have suggested that the


prohibitive transaction costs that would be involved in a property rights regime governing ideas would vastly outweigh any potential benefits derived from property incentives. This is simply another way of saying that the reality of human thought and communications compels a natural limit on the scope of property rights granted to copyrightable works.

Of course, the danger of the realist approach to property is that it can be used to create "a property" where none existed before: if property is nothing but a bundle of rights, then any bundle of rights might be reassembled as property. This rhetorical approach seizes upon a descriptive account of property to make a normative claim, usually for the expansion of the scope of rights associated with a given resource. A classic example of this rhetorical technique arose in the Stewart case before the Supreme Court of Canada.55 Stewart was hired to obtain a list of the employees of a hotel for the purposes of unionizing. This list was considered confidential; nonetheless, Stewart approached an employee to request a copy of the list, and was subsequently charged with counseling the commission of a theft under s. 283(1) [now s. 322(1)] of the Criminal Code.56 The Crown argued that although the list was protected by both trade secrets law and the Copyright Act, the Court should nonetheless extend the meaning of property for the purposes of the theft provisions of the Criminal Code to embrace information, a pure intangible. The Supreme Court refused to recognize that information per se could be the subject of a taking for the purposes of the Criminal Code, on the grounds that such a taking must result in the victim's deprivation.57 Looking beyond the facts of the case

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57Stewart, supra note 55 at 980.
before it, the Supreme Court correctly observed that the criminalization of the taking of information would have wide-spread effects in society, particularly for labour markets.\(^{58}\) The Court suggested that should such an extension of the law prove desirable, it is open to Parliament to amend the *Copyright Act* or the *Criminal Code* accordingly.\(^{59}\)

Although this decision has been criticized as "radically conservative" and "extraordinarily timid,"\(^{60}\) when viewed from the perspective of copyright law, it would seem to be an acute decision. The *Copyright Act* itself contains fairly onerous criminal and civil law provisions which activate upon a finding of copyright infringement. While the Act provides for contributory and secondary infringement, it does not include among its many prohibitions "counseling infringement." Were the court to have found against Stewart, it would have effectively introduced into the law of copyright a new offense that was a stranger to the *Copyright Act*.\(^{61}\)

The Crown's approach in *Stewart* was disingenuous: "property" is merely an aggregation of rights; persons possess a bundle of rights in relation to information; therefore, information is "property" for the purposes of the Criminal Code. Of course, the Crown was not asking the Court to enforce one of the rights in the bundle so much as to add a powerful new right to the bundle. From this perspective, the Crown's argument appears to be not so much a sensitive understanding of the changing nature of property in late twentieth century society as simply an ingenious assertion of strong form property rhetoric.

As my discussion of Hofeld and Honoré has demonstrated, Canada's intellectual property policy makers should be far beyond the influence of simple commandments to


\(^{59}\) *Ibid.* at 979.


\(^{61}\) The same analysis applies to the Court's treatment of the law of confidential information. While acknowledging that information has been treated as property in some common law cases, more cases dealing with those same issues have protected confidential information by finding breaches of fiduciary duties or obligations of good faith. *Stewart, supra* note 55 at 974-5.
respect the dominance of property. Nonetheless, as the Introduction's discussion of Margaret Atwood's presentation to the Standing Committee on Canadian Heritage also demonstrated, unsophisticated assertions of strong form property rhetoric may still prove influential. I do not believe that policy makers are swayed solely by the respect assertions of the absolutism of property commands; rather, these demands are most persuasive when accompanied by strong moral or philosophical justifications for property which, though unstated, may nonetheless underlie unsophisticated strong form property rhetoric. It is to these philosophical interpretations of property that I now turn.

II A Second, Sophisticated Take: Theories of Property Law

A Locke and Labour

The most powerful property theory for the provision of property rights in intangibles is undoubtedly Locke's natural right theory based on labour. In his *Two Treatises of Government*, Locke articulated a justification for private property that was independent of both the actions of the state (*i.e.*, positive law) and the common consent of others. Locke argued that man possessed a natural right to property, as it is among the rights that man brings into civil society with him. On this understanding, it is among the purposes of civil society to protect property rights, and beyond its competence to destroy them.

Locke's theory of property is based, fundamentally, on the premise that one has a natural property right in one's own body, and by extension, in the labour that one expends. Since God has given mankind in common the fruits of the Earth so that

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humanity might go "about his [God's] business," it follows that one has the right to use, or appropriate through one's labour, those fruits and so establish a right of property in them. Locke himself recognized the expansive tendencies of his labour theory, and so built within the theory three provisos with the intention of limiting the scope of labour-based property claims. These provisos are the requirement of productive use with its correlative prohibition on spoilage; the requirement that as good and enough be left for others; and finally, that all have a duty to share with others in times of great need.

The common denominator of the Lockean limitations on the scope of property claims is the public's right to be free of harm from the unchecked exercise of private property rights. These limitations thus translates, in Hohfeldian terms, into a corresponding legal duty on the part of property holders to abstain from harming the public in exercising private property rights.

Lockean discourse on private property right dominates European intellectual property forums, where copyright laws, in particular, rely on theories that the author embeds some essential aspect of his or her personality in his or her work. North America, in contrast, has not so clearly embraced this mode of thinking about intellectual property, although it is difficult to generalize across different types of intellectual property in both Canada and the United States. For example, while the U.S. is

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64Locke, *supra* note 62 at Bk II § 6. The divine donation of the Earth is a unique feature of Locke's account of property, and one that has no parallel in other contemporary accounts of property.
65Ibid. Bk II § 37.
66Ibid. Bk II § 27.
67Ibid. Bk I § 42. Locke clearly placed self-preservation above charity in his moral hierarchy, for he argued that "God hath not left one Man so to the Mercy of another, that he may starve him if he please..."
constitutionally bound to a utilitarian model for both copyright and patent, at least a portion of U.S. trademark law (governing dilution of marks) as well as recent proposals to create new rights in data seem motivated by natural rights arguments. In Canada, intellectual property regimes are less theoretically exact: while the Patent Act seems clearly motivated by utilitarian considerations, neither the Copyright Act nor the Trade-Marks Act enjoy an unambiguously precise theoretical underpinning.

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69 Article 1, s. 8, cl. 8 of the American Constitution empowers Congress to legislate in the areas of patents and copyrights to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."


72 As Industry Canada has recently asserted,

[Patent] protection enables inventors to benefit from their creations, providing an incentive to perform research and development and stimulating the advancement and diffusion of technology. Under Canada's Patent Act, the information in patent documents must be made public within a specific period of time. Thus, patents also promote the sharing of technical knowledge.


73 Canadian courts, policy makers, and law review commissions have forwarded a variety of inconsistent justifications for Canada's copyright laws. See, e.g., Information Highway Advisory Council Copyright Subcommittee, Copyright and the Information Highway: Final Report of the Subcommittee on Copyright, (Ottawa: Industry Canada, 1995) at 28 ("The Canadian Act is based on... the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors."); Le Nordet Inc. v. 82558 Canada Ltd., [1978] C.S. 904 at 905 (Que. Sup. Ct.) ("The Copyright Act and its related regulations attempt to reconcile the creator's right and the public's right to possess the work." per Dugas J. (translation)); McLachlin J., supra note 8 at 397 ("We must stop thinking of intellectual property as an absolute and start thinking of it as a function — as a process, which, if it is to be successful, must meet
The attractiveness of labour theories of property to intellectual property proponents is obvious: perhaps in no other area of law do we see a clearer example of the creation of something new and useful out of a single person's labour than we do in the classic intellectual property model of the literary author. Copyright infringement on this model is not simply unfair; it is also immoral, involving an invasion of the personality of the author. Not surprisingly, the model of the "Romantic Author" -- a creator and artist combined -- has proven attractive to those seeking to obtain property rights in intangibles.75 "Author reasoning" has been used to argue for expanded property rights in such diverse subject matter as human DNA sequences,76 celebrities,77 and raw data.78

diverse aims: the assurance of a fair reward to creators and inventors and the encouragement of research and creativity, on the one hand; and on the other hand, the widest possible dissemination of the ideas and products of which the world, and all the individuals in it, have such great need."). Perhaps the only theory of Canadian copyright law acceptable to all, barring judicial pronouncement or statutory clarification, is the goal advanced by the federal government in the recent hearings of the Bill C-32 amendments to the Copyright Act, namely, "to establish a balance between the rights of creators and the needs of users." (V. Rabinovitch, Assistant Deputy Minister, Cultural Development and Heritage, Department of Canadian Heritage, Comments before Standing Committee on Canadian Heritage Bill C-32, 21 November, 1996 at 1102 (available at http://www.parl.gc.ca/committees352/heri/evidence/3996-11-21/heri39_blk101.html). 74Canada's trademark laws originally incorporated British theories of marks as indicators of source. See, e.g., Bowden Wire Ltd. v. Bowden Brake Co. Ltd. (1913) 30 R.P.C. 385 at 395(H.L.) ("A Trade Mark after all, my Lords, is simply an intimation upon goods that they are the goods of the owner of the mark. That is in one compendious phrase the entire law of Trade Marks."); Trade Mark Law Revision Committee, Report of Trade Mark Law Revision Committee to the Secretary of State of Canada (20 January, 1953), reprinted in (1953), 18 C.P.R. 1 at 38 ("the focal point at which the system of trade mark protection should aim is the prevention of and elimination of confusion.... [T]his confusion may exist as to the source of origin of wares or services, or as to the person who guarantees their character and quality."). However, Parliament has recently amended Canada's Trade-marks Act, ostensibly to bring the law into line with "modern commercial realities," so as to depart from strict adherence to "source theory" in favour of a more "property-like" approach. See, e.g., S.C. 1993, c. 15, s. 69 (permitting trademark owners to license the mark); S.C. 1994, c. 47, s. 192 (introducing trademark-like rights in geographical indicators).


76See, e.g., Boyle, supra note 75 at 7-12 (describing efforts to patent cDNA sequences discovered through Human Genome Project research).

77See, e.g., R. Coombe, "Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders" in Woodmansee and Jaszi, supra note 75 at 101 (critiquing the expansion of property right in celebrity personas).
"Author reasoning" leads to an overly expansive view of intellectual property, which in turn tends to overcompensate creators. "Author reasoning" is also used in a second rhetorical technique: the "dummying down" of the author from the "creator" to the "investor." On this view, the state owes creators a property right in their creations, not as an inducement or reward, but as a consequence of the simple investment of capital into an intangible product; essentially, this argument transforms Locke's labour theory into a theory of the persistency of capital. The moral consideration behind this argument is the prohibition against reaping where one has not sown, and it is a powerful one: industrial interests behind the drive for property rights in data have explicitly embraced this rationale. However, the enforcement of this prohibition does not necessarily demand property rules; since the harm behind the reap/sow paradigm stems more from the fairness of the taking rather than the taking itself, it follows that concerns over the preservation of investment incentives are equally well met by liability rule regimes.

All Lockean theories of property rights suffer from some obvious limitations, the most obviously being that society doesn't ordinarily grant property rights according to labour expended. Widget makers don't get property rights in the widgets they assemble, and auto repair shops don't gain a property interest in automobiles they repair. Further, once one removes the element of divine intervention, it becomes unclear where neo-

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78See WIPO Draft Treaty, supra note 73, Article 4 (nominating an entity who compiles information into a database as its "maker").
80Note that the U.S. Supreme Court carefully limited the scope of the misappropriation doctrine in INS to cases between parties competing in the business of providing information: "[w]hile AP may not have the right against the public to maintain control over its data after dissemination, AP does have the right to prevent competitors from pirating the news until the economic value for the dissemination has been realized." INS, ibid. at 239-241.
81U.S. Supreme Court Justice Stephen Breyer made just this point in his landmark law review article, "The Uneasy Case for Copyright: A Study in Books, Photocopies, and Computer Programs" (1970) 84 Harvard L. Rev. 281 at 289.
Lockeans derive the initial grant of property in both one's body and one's labour.82 Secondly, presuming one does have a property right in one's labour, it is far from clear how mixing one's labour with "unowned" objects (tangible or intangible) creates a property right in that object. It would seem equally plausible that one would simply lose any possessory rights to one's labour. Robert Nozick makes this point effectively by questioning whether, if one pours a can of tomato juice into the ocean, does that create a claim to the seas themselves?83 Of course not -- one has simply wasted some perfectly good juice. Moreover, Locke's theory of property, particularly when applied in the context of intellectual property through "Author reasoning," ignores the contributions of others in the products -- both tangible and intangible -- that we create.84

These concerns, when combined with Locke's own limitations, provide a framework from which to construct clear boundaries on the scope of intellectual property. Building on the harm principle central to Locke's three provisos, this framework encompasses not only efficiency and distributive values, but also democratic concerns with intellectual property, as well. As Professor Wendy Gordon has noted, "[w]hen the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests."85

B Possession

The single most potent argument against the adoption of a Lockean justification for granting property rights is the observation that the expenditure of labour is not the ordinary justification for granting property rights between adverse claimants under the

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83 Nozick, supra note 42 at 175.
common law. In contrast, the common law has historically recognized possession as the touchstone of property. This contrast is brought to light in the classic property case of Pierson v. Post.86

The facts in Pierson are fairly straightforward: Post was pursuing a fox on unowned property and was close to taking his prize when Pierson intervened, shooting the fox and taking the carcass with him. Post sued on the grounds that in chasing the fox he had acquired a property right in the fox, and in intervening, Pierson had invaded those property rights. Thus, the issue facing the court pitted a Lockean labour theory of property against a more conservative theory based on possession: do we acquire a property right in an unowned res by merely investing time and energy into its acquisition, or do we rather require some clearer act, some unambiguous assertion of control over the res? The court in Pierson split over the issue. Judge Livingston in dissent argued, first, that the actual practice, or custom, of hunters is to leave off of the quarry of others, indicating that hunters respect a kind of property right in the chase itself; and second, that an opposite holding would undermine hunters incentives to hunt in the first place: who would invest the in the time, labour and expense involved in keeping hounds and hunting foxes if at the very moment it was anticipated to bear fruits, those fruits could be appropriated by a free-riding interloper?87 The majority, in contrast, held that property rights belonged to one who actually captured or killed the animal. On this view, the recognition of property rights depends on "possession," or bringing the res under "certain control" through a clear and unambiguous act that communicates to the world "an unequivocal intention of appropriating the animal to... individual use."88

The common law of property has since more or less developed in accordance with the majority's decision in Pierson v. Post. Consider, for example, the law of adverse

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863 Cal. R. 175 (N.Y. Sup. Ct. 1805).
87Ibid. at 179-81.
88Ibid. at 178.
possession, which upon first impression seems to reward uninterrupted and productive use of the land of another with title. In fact, the law does not reward labour so much as penalize an owner's failure to communicate his or her right of ownership to the interloper. In this sense, the common law requires a continuing declaration of possession by a title holder. Carole Rose has suggested that the common law recognizes not so much the fact of possession as its communicative aspect: possession is a form of declaration or notice to the world which effectively gives notice to others who might claim title.

Possession rules do not necessarily provide a normative account of property; that is, we cannot say that society should grant property rights because a given entity was first to claim an unoccupied resource. Rather, possessory rules seem an effective manner of deciding second- and third-order disputes over resources: once society has recognized some normative justification for property rights, possessory rules provide a clear and effective means of settling disputes over resources. To the extent that any normative framework may underlie possessory rules, both law and economics and utilitarian theorists have embraced possessory rules as consistent with their accounts of property.

Alfred Yen has argued that the common law of possession provides a compelling account of intellectual property. The attraction the common law of possession holds for Yen undoubtedly lies in the limits the law places on the scope of possessory rights. Yen notes that the law of possession originated not with English law, but with the Roman natural law of occupatio. Under Roman law, one could not claim a property right in what is by nature impossible to possess. Thus, the doctrine of res communes prohibited

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89 For a discussion of the law of adverse possession in the Canadian context, see Ziff, supra note 42 at 93.
91 Rose, supra note 42 at 14.
92 See A. Yen, "Restoring the Natural Law: Copyright as Labor and Possession" (1990) 51 Ohio. St. L. J. 517.
93 Ibid. at 522.
ownership of those things held common to all, such as air, the oceans, and by extension the sea shore. Similarly, the doctrine of *ferae naturae* prohibited ownership in wild animals, since undomesticated animals are by nature beyond the control of humans. Yen has argued that these limits suggest that the law of possession provides both a justification for the state's recognition of an author (or inventor) as the first owner of intellectual property, and a natural limit to the extent of these property rights.

At first, this claim seems far-fetched — how can one "possess" an intangible? The simple answer is that one cannot; however, through possession of the first physical manifestation of the work (i.e., the manuscript, the sound recording, the invention, or the compilation of information), one can generate a property claim that the common law can comprehend. Possession of all physical manifestations of an intangible property means effective control over even the intangible itself. However, publication or dissemination renders control over the intangible impossible. To maintain any semblance of control, a prospective owner must abandon claims based on possession and elicit the aid of the state, in the form of an intellectual property right of some sort. This would seem to be the approach accepted by early English courts, which recognized common law copyright in a work up until it was published, after which the author derived all of her rights in the work from statutory copyright. However, Yen argues that the common law of possession continues to inform judicial interpretation of statutory intellectual property, and in this process has introduced fundamental limitations into the scope of intellectual property which continue to this day. These limits include copyright law's idea/expression dichotomy; public domain concepts such as trite plots, facts, stock scenes, and scènes a

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97 Yen, *supra* note 92 at 551-2 ("[T]he point is not that possession provides a bright line between private property and the public domain. Instead, the lesson is that we should recognize the existence of inherent physical or metaphysical limits on the things a person can claim as property.").
faires; and a frank recognition of the reality of authorship as individuals who "live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision." To the extent that these limitations enable dealings with intellectual property that society finds desirable, accounts of intellectual property based on possession, like those based on labour, provide ample space for raising public interest concerns.

C Economic Accounts of Property

The economic account of property differs from most other accounts in its unflinching positivism: property law, like all law, exists to serve human needs. From an economic perspective, these needs may be summarized as the inter-related goals of efficiency and wealth-maximization. This approach is premised on a singular view of human nature: *homo sapiens* function as *homo economicus*, the rational wealth maximizer who orders resource allocation preferences in an unfailingly self-interested fashion. Given that individuals are best placed to determine where their interests lie, economists argue that goals of efficiency and wealth-maximization are best met by permitting individuals to satisfy their preferences through voluntary transactions in the market free of government intervention.

Economists view property as an institution for the management of resources. Particularly, economists regard private property as the solution to the rivalrous goods

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99 Ibid. at 552-3 (citing Litman, supra note 84).
100 Ibid. at 554 (characterizing much of the work of authors as "borrowing" and "restating.")
102 For a critique of the economic model of human nature, see Rose, *supra* note 42 at 25, 30-45 (noting amongst common law cases the presence of "Moms" (who prefer the well-being of certain other individuals to their own) and "Malice Aforethought" personas (who prefer the misfortune of another to their own well-being) whose preference orderings violate the model envisioned by economists).
103 The normative conclusion implied by these premises, known to economists as the Normative Coase Theorem, is that the law should be structured to remove impediments to private agreements. See Coase, *supra* note 2. See also R. Cooter & T. Ulen, *Law and Economics* (New York: HarperCollins Publishers, 1988) at 101.
problem known as the tragedy of the commons. Since we all need access to diverse resources to ensure our well-being, we all seek access to those resources. In a state of nature, with no mediating institution between those who utilize a resource, all have access to the resource, and none may be excluded from the resource, except by might. All face the danger that the resource will be exhausted by the activities of others, which creates incentives to cheat, and over-use the resource yourself. Further, since the costs of resource extraction are not re-visited upon those who create them, resources held in common suffer from the double danger of resource depletion and resource destruction. Attempts to mitigate these dangers through the forceful exclusion of others introduces high monitoring and enforcement costs.

Property law ameliorates these problems by introducing a legally enforceable exclusive right to use a resource. Property rights attack the problems of the commons in a number of ways: first, by restricting access to a resource to those permitted by the owner, property rules remove the incentives to cheat and over-use the resource. Second, by guaranteeing the present owner's future access to a resource, property correspondingly internalizes the costs of resource depletion or mismanagement to those who benefit from its use. Thus, property itself can be conceived of as a utilitarian institution: an attempt to overcome the tragedy of the commons in relation to scarce resources.

Property rules also attack the problems of transaction and enforcement costs in the state of nature. Humans need a variety of resources to satisfy their preferences; this necessitates at least some voluntary exchanges with others. Economists have used game theory to describe voluntary exchanges, or bargaining, as "cooperative games," in which both parties must assess the results of both a cooperative and a non-cooperative solution.

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104See G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243; Rose, supra note 42 at 105-162. A rivalrous good is a "private" good — one in which use by one precludes use by another, i.e., there is rivalry in the consumption of that good. This contrast with a purely public good, such as information, in which consumption of the good by one does not affect the capacity of another to consume that good also. Public goods are generally characterized by high costs of exclusion.

105Posner, supra note 101 at 32-5.
determine the "cooperative surplus" (the difference between the two), and agree upon some manner of splitting that surplus.\textsuperscript{106} The obstacles to reaching a co-operative agreement \textit{(i.e.,} to successfully trading) include confidently valuing the resource, communicating those values and monitoring and enforcing a successful bargain.\textsuperscript{107} Property rules seek to eliminate the first of these obstacles by clearly delineating the rights of the two parties with regard to the resource in question: "bargainers are more likely to cooperate when their rights are clear, and less likely to agree when their rights are ambiguous."\textsuperscript{108} Economists claim that this explains the law's preference for the clarity and simplicity of the possession rule for determining ownership: while claims based on labour have some moral force, their lack of transparency introduces complex elements into ownership rights which ultimately impose costs on bargaining and therefore on global welfare. The simplicity and clarity of property rules also lowers monitoring and enforcement costs, since those with property rights in a resource are best placed to supervise bargain performance and, if necessary, enlist the aid of the state.\textsuperscript{109}

Economic accounts of property rules apply equally persuasively to intellectual property. Intangibles are a public good: a creator cannot exclude a second comer from accessing an intangible, nor will the second comer deprive the creator of possession of the intangible. Nonetheless, the tragedy of the commons still strikes at intangible

\textsuperscript{106}For example, in a sale of a used car, both parties must value the car. If, for example, the seller values the car at $4000 and the buyer values the car at $5000 (and has sufficient financial resources), a mutually beneficial trade may occur if the parties can agree on a price between $4000 and $5000. See Cooter and Ulen, \textit{supra} note 103 at 92-99.

\textsuperscript{107}\textit{Ibid.} at 101. Cooter and Ulen also identify strategic behaviour as an obstacle to successful negotiation, \textit{i.e.,} the costs imposed by bargaining based upon unreasonable assessments of a trading partner's position. These costs introduce complexities into the economic model of bargaining, for "[r]ationality alone does not decide how the cooperative surplus will be distributed." \textit{Ibid.} at 101, note 10.


\textsuperscript{109}Cooter & Ulen, \textit{ibid.} at 100-1.
resources. Suppose, for example, that it costs $10 million to invent some new product, while it costs $50 to manufacture the product. If consumer demand (assumed constant) is estimated at one million items, then an inventor must charge $60 per item to recoup the costs of production and of research and development for the invention. Meanwhile, competitors will be able to copy the invention’s design and market a competing product at a price that reflects only the marginal costs of manufacturing (i.e., $50). Faced with this product, what rational manufacturer would invest the costs of R & D? To the extent that we value innovation, creativity, and investment in intangible goods and services, this phenomenon will result in a market failure: the chronic under-production of intangibles. Intellectual property laws correct for this failure by carving out a clear and simple bundle of legal rights held by the creator in relation to the intangible. The precision with which the law delineates the scope and duration of the rights also fulfills property law’s trade-enhancing function: the statutory nature of intellectual property informs potential consumers, licensees or purchasers of the exact nature and scope of the rights held by the creator, who may then bargain accordingly.

This utilitarian account of intellectual property is in fact the dominant mode of thinking about intellectual property in common law jurisdictions, and provides the normative content for much of the world’s intellectual property laws. The one distinction between a purely economic account of intellectual property and other utilitarian accounts lies in the end intellectual property law serves: where economic analysis dictates that intellectual property laws fulfill the twin goals of wealth-maximization and efficiency, non-economic utilitarian accounts argue that the law should

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111The following example is taken from Posner, supra note 101 at 38-9.
112This analysis assumes that proprietors of intangibles will be unable to exclude competitors from appropriating their creations through other methods, such as trade secrets law or contract law.
113See discussion on the purposes of Canadian intellectual property statutes, supra notes 72-74 and accompanying text.
promote a different goal of the state, such as dissemination of knowledge and the promotion of learning. These principles have considerable overlap; however, to the extent that they diverge, they introduce space for disagreement in normative debates over the scope of intellectual property.

The current debate over the normative content of American intellectual property law demonstrates this danger. The U.S. is constitutionally tied to a broadly utilitarian rationale in legislating intellectual property protection: "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Historically, American courts have interpreted that limitation broadly, as serving the interests of the public in the dissemination of knowledge and the advancement of learning. This interpretation accommodates Constitutional concerns such as freedom of expression, acknowledges the value of intangibles to public education, and values an informed citizenry. On this understanding, the Intellectual Property Clause of the U.S. Constitution embraces the core of what it means to live in a democracy, while simultaneously remedying the failure of the market to safeguard the interests of creators and inventors. Recently, however, alternative accounts of this clause have emerged, which tend to ignore the limiting aspects of the Intellectual Property clause, or at least circumvent it by relying on Congress' power to enact legislation under the Commerce Clause. These interpretations seek to maximize domestic (U.S.) investment in information industries.

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114 U.S. Constitution, Article 1, s. 8, cl. 8.
116 The Commerce Clause states that "Congress shall have Power... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes..." U.S. Constitution, Art. 18, cl. 3. For an analysis of the U.S. Implementation of the TRIPS Component to the Uruguay Round Agreement of the WTO which adopts precisely this position, see D. Nimmer, "The End of Copyright" (1995) 48 Vand. L. Rev. 1385 at 1411-1419 ["The conclusion is that two centuries of rooting copyright enactments in the Copyright Clause now appears, from the present perspective, to have been simply a phase.... [C]opyright has been transformed into an instrumentality [of]... the law of trade."
117 This is clearly the position of the controversial report of President Clinton's Information Infrastructure Task Force Working Group on Intellectual Property Rights, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights" (September,
or (less charitably) maximize the economic welfare of current (U.S.) information industry participants.\textsuperscript{118} On this view, the purposes of the Intellectual Property Clause are either fulfilled as a by-product of intensive investment in domestic information industries,\textsuperscript{119} or irrelevant.\textsuperscript{120}

It is precisely because of this turn of events that this thesis has directed its defense of the public interest in intellectual property towards an understanding of the limits of property rather than embracing broadly utilitarian account of intellectual property. If the constitutional guarantees of the U.S. Constitution are insufficient to safeguard public interest concerns in the U.S., then it is far from clear that utilitarian arguments would have any influence in Canada, where intellectual property enjoys no similar constitutional grounding. Even on a narrow, economic understanding of property premised on efficiency ad wealth-maximization goals, property is not an absolute. Indeed, economic

\textsuperscript{118}Peter Jaszi has argued that recent modifications to U.S. intellectual property law can only be understood as an abandonment of policy grounded in the Intellectual Property clause of the U.S. Constitution in favor of a policy intended "to improve the competitive position of [American] companies that have significant investments in inventories of copyrighted works." Peter Jaszi, "Goodbye to All That--A Reluctant[and Perhaps Premature] Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law" (1996) 29 Vand. J. Trans. L. 595 at 598-599. Jessica Litman has maintained for some time now that intellectual property policy discourse in the United States suffers from a severe case of "industry capture." See J. Litman, "Copyright Legislation and Technological Change" (1989) 68 Ore. L. Rev. 275 at 357 ["The inquiry relevant to copyright legislation long ago ceased to be 'is this a good bill?' Rather, the inquiry has been, and continues to be 'is this a bill that current stakeholders agree on?' The two are not the same."]; J. Litman, "Copyright, Compromise, and Legislative History" (1987) 72 Cornell L. Rev. 857.

\textsuperscript{119}This was apparently the position of the White Paper, supra note 117. This report has been scathingly critiqued on precisely this grounds that it is little more than a give-away to strong American intellectual property industry interests; see J. Litman, "The Exclusive Right to Read" (1994) 13 Cardozo Arts & Entertainment L. J. 29; P. Samuelson, "The Copyright Grab" 4(1) Wired (January, 1996) at 5; P. Samuelson, "Legally Speaking: The NII Intellectual Property Report" (1994) Communications of the ACM (on-line version, on file with the author) at 2.

\textsuperscript{120}Peter Jaszi has written that the U.S. Database Investment Act (supra note 71) "isn't governed by the important limiting language of the constitution's Intellectual Property Clause.... To the contrary, its goal appears to be to promote the economic well-being of the information industries." P. Jaszi, "Some Public Interest Considerations Relating to H.R. 3531 Database Investment and Intellectual Property Antipiracy Act of 1996" (available at http://arl.cni.org/info/fm/copy/peter.html) at 1. For other critiques of the U.S. database proposals, see P. Samuelson, "Legally Speaking: Legal Protection for Database Contents" (Nov. 1996) 39 Comm. of the ACM at 4-5; J. Reichman and P. Samuelson, "Intellectual Property Rights in Data?" (1997) 50 Vanderbilt L. Rev. 51.
analysis of property accommodates Hohfeld and Honore's "bundle of rights" and benefit/burden account of legal obligations in relation to property.

The limits implied by economic analysis of property are threefold: first, where resource utilization is non-rivalrous -- that is, where the commons is free of tragedy -- property rules are inappropriate. Second, where costs associated with negotiation and enforcement exceed the value of property rules, then property rules may be inappropriate. Thirdly, where non-economic goals of the state intervene in the resource allocation, it may be inappropriate to invoke property rules.

Recall that the economic model for property is premised on the tragedy of the commons; that is, the assumption that rivalrous use of a resource will result in its depletion (through overuse) and its destruction (through the externalization of costs). Therefore, where these use in non-rivalrous, these conditions will not be met and property rules may be out of place. Non-rivalrous use arises more commonly than one might think. Oceans, navigable waterways and the breathable atmosphere are all essential resources whose utility is maximized when they are held in common, rather than privately owned: they are inherently plentiful or boundless in that it would be folly to attempt to implement a system to manage the resource: a second-comer could always access the resource without depriving the "manager" of that resource.121

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121Public property claims staked to these resources usually apply one of three theoretical bases: (1) under "public trust" theory, the public has always had rights of access to the property which trump any private rights that property owners might assert; (2) prescription or dedicatory theory holds that a period of public use amounts to an implied gift or grant from the private property owner; or (3) under the law of "custom," public rights arise through ancient and regular usage. The resurgence of public property jurisprudence in the U.S. can largely be attributed to case law involving public claims of access rights to beach front property: see D. Degnan, "Public Rights in Ocean Beaches: A Theory of Prescription" (1973) 24 Syracuse L. Rev. 935; J. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right" (1980) 14 U. C. Davis L. Rev. 195; Note, "Public Access to Beaches" (1970) 22 Stan. L. Rev. 564; cf. J. Huffman, "Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work" (1987) 3 J. Land Use & Env'tl L. Rev. 171; Note, "Assault on the Beaches: 'Taking' Public Recreational Rights to Private Property" (1980) 60 B. U. L. Rev. 933. For intriguing arguments for extending the scope of public trust doctrine, see J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention " (1970) 68 Mich. L. Rev. 471; R. Johnson, "Public Trust Protection for Stream Flows and Lake Levels" (1980) 14 U. C. Davis L. Rev. 233; A. Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a
Elements of intellectual property would seem to fall into this category of resources. Non-rivalrous uses of intellectual property -- those uses that do not undercut the creator's incentives to exploit the resource (i.e., create, invent, collect, etc.) -- should logically fall clear of the proprietarial interests of the rights holder. To the extent that non-rivalrous uses of intellectual property currently fall within the scope of intellectual property rights, intellectual property laws may be inefficient. Intellectual property is already a form of subsidy. The rallying cry of rights-holders that they should receive "every royalty possible and every possible royalty" is little more than a plea for state subsidization which would result in supra-competitive returns that, while possibly maximizing investment in information industries, would do so at the expense of global economic welfare, attracting capital away from other sectors of the economy -- an allocatively inefficient interruption of market forces. Moreover, by imposing costs on non-rivalrous uses, IP laws can raise the costs of creation and innovation. Indeed, the value of creation and innovation to the economy at large dictates that the law should tolerate and preserve some small scope for potentially rivalrous use where the use fulfills some vital economic function, such as experimental use or in educational facilities, arguably institutions who serve the public good in a broad way and so function to maximize general welfare.

This latter point is closely connected to the problem of transaction costs in the creation and enforcement of property rights. A second category of public property includes those suffering from market failures -- resources such as "natural monopolies,"122 "public goods"123 and entities producing "externalities"124 -- that justify

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122 Natural monopolies involve private goods or services whose use involves economies of scale such that a monopoly position inevitably results. In such circumstances, government intervention or management is required to restrain monopoly pricing and its associated debilitating welfare losses. See A. Hadley, "Legal Theories of Price Regulation" (1892) 1 Yale L. Rev. 56; Posner, supra note 101 at 314-19.
public intervention in what would ordinarily be considered exclusively private property rights to attain socially optimal uses. The central justification for state intervention, management or ownership of these goods is that the transaction costs associated with establishing, monitoring and enforcing associated property rules is prohibitive, and so best undertaken collectively. These considerations again arise in intellectual property, particularly in the context of copyright’s public domain and fair dealing doctrines. If the public domain is a commons upon which all creators draw, it follows that each and every work owes a debt to those creators who have gone before. Indeed, the reality of the creative process follows just this path: we are all influenced by all that we have seen, heard and experienced. It would be impossible (or at the very least numbingly complex) to locate and seek permission from every resource we might draw upon in creating. Similarly, under the doctrine of fair dealing, if one makes a socially valued use of a work, but that use nonetheless infringes upon the rights of the copyright owner, the law will excuse that use if the value of the use exceeds the costs of identifying and receiving permission from the copyright owner.

Of course, these efficiency rationales are not the only justifications for removing these sorts of activities from the scope of property rights enjoyed by a copyright holder. A far more compelling case can be made for the assertion of non-proprietary rules based on the goals of distributive justice. The most obvious example of such an intervention is the prohibition against slavery: people should not be property. The underlying rationale is, from an economic perspective, that we are all better off if liberty (or at least some

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123See discussion of public goods, supra note 110-113 and accompanying text. Public goods, or collective goods, may require public supervision to counter the owner’s inability to exclude others, and so ensure that those who benefit from the exploitation of a resource contribute to its maintenance. Classic examples of public goods in the context of governments include armed forces and police and fire fighting services.

124The classic example of a market failures in the face of externalities produced by a private party is the problem of pollution: since the affected public is dispersed so broadly, it is difficult for the public to collectivize. The government is then justified in stepping in and brokering an agreement between the polluter and the pollutees.
minimum entitlement) is enjoyed equally.\textsuperscript{125} Of course, this account of liberty and equality rights is not the account shared by most of us, who see them more as a component of fundamental human dignity and as inalienable, constitutionally guaranteed rights. Simply, this perspective places the "deification of property" into perspective by noting that claims of property may be subjugated to more highly placed social objectives. As Kevin Gray has noted, "'[p]roperty' in a resource stops where the infringement of more basic human rights and freedoms begins."\textsuperscript{126}

Do distributive values work their way into intellectual property regimes? I argue that in fact they do. Returning to the economic account of the public domain and fair dealing, I would argue that a far more compelling account of both doctrines arises from their proximity to expression itself. Expression is, of course, a fundamental freedom guaranteed by the \textit{Canadian Charter of Rights and Freedoms}.\textsuperscript{127} The public domain is the repository of the tools of expression: it contains the elements that we all use everyday in communicating, writing, and creating. Similarly, the fair dealing doctrine was not crafted to apply wherever search costs are high. Were that Parliament's intent, the statute could have been written in that fashion. Rather, fair dealing applies to otherwise infringing acts that are (1) "fair," or non-rivalrous, and (2) for an enumerated purpose: "private study, research... criticism, review, ... [or] news summary."\textsuperscript{128} These non-rivalrous uses all revolve closely around the activity of expressing oneself in a positive fashion that contributes to society at large in some fashion. I have argued elsewhere that these values are encapsulated in the Charter's defence of freedom of expression, a view that I continue to hold. This framework is one that I will return to shortly. The

\textsuperscript{125}The philosopher John Rawls has suggested that redistributive schemes which guarantee the worst off in society some minimum entitlement might be justified as the sort of social contract that, hypothetically, we would all agree to enter into \textit{ex ante}. See J. Rawls, \textit{A Theory of Justice} (Cambridge: Belknap Press of Harvard University Press, 1971).

\textsuperscript{126}Gray, \textit{supra} note 42 at 297.


\textsuperscript{128}\textit{Copyright Act, supra} note 73, s. 29-29.2.
combination of concerns over efficiency and distributive justice provide a powerful framework for considering the limits to property.

D Summary: The Consistency of Limits

My explication of these three philosophical justifications for property rights does not purport to give an authoritative account of late twentieth century property theory. Indeed, that all three accounts continue to find favour with legal thinkers in the late twentieth century, despite their mutual inconsistencies, confirms only the instrumental nature of even philosophical accounts of law. Other accounts of property that I have not canvassed here, including liberty-enhancing justifications,129 consent theories130 and pluralist accounts which combine elements of diverse theories of property law,131 fall into this same pattern of carving out space for the institution of private property while simultaneously articulating limits. It is this communality of limits that I seek to explore, rather than relying on a single theory of property for considering the limits of intellectual property protection.

Why this focus? These varied accounts of property differ in a fundamental fashion, reflecting a split in jurisprudential philosophy that has preoccupied legal philosophers for the better part of this century. Very roughly, this debate pits positivists against natural rights theorists. Legal positivism is a species of analytical jurisprudence which seeks to describe law "as it is," and traces its lineage through Austin,132 Holmes133

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131See Munzer, supra note 42 (describing property as the unity of preference satisfaction, justice and equality, and desert. See Rose, supra note 42 at 49-70 for a critique of this approach to property.

and the Legal Realists, Kelsen and H. L. A. Hart. Positivism seeks to give an account of law as a human activity. Natural law theorists, in contrast, see law as reflecting an underlying morality that supersedes law. On this view, positive law is good law when it most closely approximates the law of nature. This is an ancient strain of jurisprudence stretching from Aristotle and Aquinas to Lon Fuller and Ronald Dworkin.

As the discussion of this part reveals, both positivist and natural rights accounts of intellectual property surface in debates over the scope of intellectual property law. Clearly, natural rights theories of Canadian intellectual property are alive and well and appearing before Canadian Parliamentary Committees. Although they often seize upon absolutist arguments, the underlying natural rights position is clear: it is just that creators be compensated for their labour. That natural rights arguments continue to hold sway in Canada is somewhat surprising, given the thoroughly positivist environment they appear in: most intellectual property laws find their authority as law from statutes, and to

134 The American Legal Realist movement of the early twentieth century was a group of legal scholars who shared a concern over the continuing influence of "classical legal thought" on American law. Some of the most significant contributions from the movement include: Hohfeld, supra note 34; K. Lewellyn, "A Realistic Jurisprudence -- The Next Step" (1930) 30 Columbia L. Rev. 431; F. Cohen, supra note 22; F. Cohen, "Transcendental Nonsense and the Functional Approach" [1935] Columbia L. Rev. 809; J. Frank, Law and the Modern Mind (New York: Brentano's, 1930); W. Wheeler Cook, "Scientific Method and the Law" (1927) 13 Am. Bar. Ass'n J. 305; J. Dewey, "Logical Method and the Law" (1924) 10 Cornell L. Rev. 17; R. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 Pol. Sci. Quart. 470. The law and economics movement, including Coase, supra note 2, Posner, supra note 101, and Calabresi and Melamed, supra note 3, can be described as among the prodigy of the legal realists.
141 See WIPO, supra note 73 and accompanying text.
vindicate their natural rights convictions, natural rights advocates must convince Parliament to act.

The fundamental nature of this dispute cautions against attempting to reconcile the two solitudes of the intellectual property debate with one another. These considerations lead me to conclude that if no single theory of property sufficiently describes the law of real and chattel property to command general acceptance by the law, the same holds true for intellectual property. It may well be impossible to craft intellectual property laws which satisfy the demands of both camps, because they may conceive of just law differently. If this is the case, then it is unlikely that even Parliamentary or judicial intervention into the debate over the philosophical underpinnings of Canada's intellectual property laws could satisfy either camp, for the "losing" camp would likely reject this new justification as unjust. A more pragmatic approach, then, would be to focus not on philosophical niceties, but on the inherent limitations common to all approaches to property.

Keith Aoki has observed that "while Western notions of 'property' in general have undergone significant disaggregation during the twentieth century, legal protection and characterization of intellectual property rights have gone in precisely the opposite direction."142 This phenomenon holds true for Canada. The disaggregation of property over the twentieth century has revealed the finite nature of property rights. Perhaps not surprisingly, the limits to property identified in this Part fall under the three categories of public interest concerns identified in the Introduction to this Thesis, namely market distortions, distributional values, and democratic values. A pragmatic examination of Canada's intellectual property laws should therefore consider mechanisms by which the law realizes these three goals.

III A Pragmatic Take on Property Rights

A The Realist Revolution and the Functional Approach

In Part I of this Chapter, I looked at absolutist property rhetoric and considered the response of the American legal realists.143 This response was two-fold: first, Wesley Hohfeld's study of analytic jurisprudence disaggregated legal entitlements into a series of legal relations between individuals.144 For every right (legal claim), another person (or a set of them) is under a corresponding legal duty.145 Thus, even "property" is a relational concept: it is a "bundle" of rights (legal claims), privileges, powers and immunities that is also subject to the legal interests of others.146 Second, picking up on this strain of reasoning, Honoré sought to enumerate the incidents of ownership, and among them included two obligations that property holders owe others: the prohibition of harmful use and liability to execution.147 This finding should not today be regarded as a startling insight; at least since the publication of Coase's "The Problem of Social Cost"148 in 1960, the question of resource entitlement has been charged with an awareness of the reciprocal nature of entitlement allocational problems. However, this awareness contrasts starkly with the curious and regretful persistence of absolutist property rhetoric in contemporary intellectual property debates. This persistence surely has more to do with the rhetorical power of absolute claims to property than with its logical persuasiveness; nonetheless, the continuing influence of strong form property rhetoric in claiming expansive entitlements to intangible resources poses a severe challenge to those who see statutory intellectual property law as serving the best interests of the public rather than the narrow pecuniary interests of private parties.

143See Part I, supra.
144See Hohfeld, supra note 34.
145Ibid. at 38.
146Ibid. at 76.
147Honoré, supra note 42 at 113.
148Coase, supra note 2.
Part II of this Chapter considered more sophisticated claims to property grounded in some reasoned account of property as a human institution.149 That inquiry canvassed three different theoretical approaches to property: Lockean labour theory, the common law's use of possession, and economic justifications for private property. These accounts differ markedly, and yet all three converge in acknowledging the need for rational limits on the scope and reach of property. What is more, the rationales behind these limitations does not differ from one theory to another: property is a human institution that exists to serve human needs; when assertions of private property undermine human needs, the state is justified in placing some limitation on those property claims. Under all three theories, property claims reach these limitations in three distinct spheres: where property rules prove inefficient; where property claims undermine distributive goals; and finally, where proprietal rights undermine democratic values. Unfortunately, the vocabulary of property rights does not easily accommodate all three of these values. While we often think of property in terms of economic efficiency, we seldom consider the role of property in enhancing distributional values (primarily because property rights generally enhance those values by their absence); similarly, although property and the franchise have a long history with one another,150 we generally do not consider property as serving democratic values. Yet, upon reflection, it is clear that property is intimately tied to both distributional and democratic values.

The challenge for Canadian intellectual property policy makers, then, is to consider a framework for considering both entitlements to intellectual property and mechanisms for enforcing those rights which can accommodate all of these values. This would obviously entail adopting a strongly instrumentalist approach to intellectual

149See Part II, supra.
150For many years, a citizen was barred from exercising his or her democratic right to vote in elections if he or she did not hold property in that electoral district. Obviously, the distributional impacts of such deliberately disenfranchising tactics was phenomenal.
property statutes. However, this is in keeping with the nature of intellectual property, which is, after all statutory law.

Intellectual property is a resource. Like any other resource, policy makers must consider certain fundamental resources concerning entitlements. Who gets the entitlement to the resource? How do we enforce it? What are the effects of these allocations? What considerations go into these decisions? To answer these questions, let us return to the early work of the law and economics movements, who continued the work of the American legal realists.

B Intellectual Property as Pollution: The Problem of Social Cost

Consider the reciprocal nature of the problem of entitlements. Hohfeld recognized that legal entitlements carry with them legal obligations, which of course impose some costs on the obliged party. Ronald Coase carried this insight further in his paper, "The Problem of Social Cost." Consider the example of the polluting factory: arguably, the privilege of pollution flows from the property rights enjoyed by the factory owner, namely, the right to use the property free of the claims of others. However, the pollution interferes with the ability of surrounding landowners to enjoy their property -- an invasion of the property rights of others. An arbitrator faced with these competing claims is faced with a dilemma: who is entitled to the resource (in this case, the quality of air surrounding the factory)? Coase argued that "[w]hat answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it." Coase, concentrating solely on efficiency objectives, argued that where competing claimants face no transaction costs, regardless of the value of competing uses, the initial allocation of the resource's entitlement will not determine which use will ultimately prevail: the parties will simply enter into voluntary transactions until the optimally efficient outcome has been reached. However, since

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151Coase, supra note 2.
parties in reality are never free of transaction costs, the social goal of maximizing the efficient use of resources dictates that entitlements should be allocated to the most efficient uses at the outset.

Does this analysis apply with any force to intellectual property? Although we seldom analogize intellectual property rights to pollution, the analogy is both useful and surprisingly accurate. Consider an abstract intellectual property right to ideas: one choice available to policy makers is to entitle the "producer" of a given idea (an "idea factory") to impose a "cost" on "neighbours" who come into contact with that idea. This "cost" could take the form of remuneration for use of the idea, or exclusion from the idea entirely. Alternatively, the state could entitle the "neighbours" to "impose" that cost on the producer; arguably, this mirrors the present state of the law in that we generally are not liable to anyone for using their ideas. Idea producers must therefore absorb the costs of idea production themselves. The Coase Theorem holds that, providing transaction costs are non-existent, it does not matter whether the "idea factory" or its "neighbours" receive the entitlement -- whoever values the resource most will bargain for the right to exploit it. In our hypothetical model, where idea producers do not hold an entitlement yet value their ideas more than their "neighbours," they will bargain for the entitlement. This would seem to be the model of trade secret law, in which the law requires the trade secret's "proprietor" to take positive steps, including contract, to ensure the integrity of the secret. Conversely, where the idea producer does hold the entitlement and the "neighbours" value it more highly than the producer, they will contract for access, usually via some licensing mechanism. This would seem to be the model for the proposed new database rights.

Of course, Coase's analysis is limited by his initial premises: by definition, Coase concerns himself solely with efficiency considerations in entitlement allocation, assuming

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152 The condition of "no transaction costs" must be understood broadly as including both perfect information and the absence of bargaining costs, including insulation from free-riding third parties.
away both distributional and democratic goals. This is interesting, because although the Coase Theorem demonstrates that in the absence of transaction costs allocational decisions do not affect efficiency outcomes, they clearly affect distributional outcome: the relative wealth of one of the parties improves under an entitlement. Moreover, while Coase might assume away distributional and democratic goals, such goals are significant factors in political decisions over resource allocation. The veracity of this claim would seem clear from the implications of our model of the "idea factory" and its "neighbours:" copyright law has long sought to distinguish author's rights in expression from any purported right in ideas, per se. Yet, to the extent that we value the production of ideas, why do we not grant idea producers a right to remuneration for the use of their ideas as an incentive for their production? The answer is that society is better served by the free flow of ideas, since the exchange of ideas plays a fundamental role in liberal notions of liberty and democratic rule. Given these realities, can we construct a more useful model for allocating and enforcing intellectual property entitlements?

One such model is Guido Calabresi and A. Douglas Melamed's "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." The Cathedral examined the process of assigning rights and duties by asking two distinct questions: "(1) In what circumstances should we grant a particular entitlement? and (2) In what circumstances should we decide to protect that entitlement by using a property, liability, or inalienability rule?" A property rule is a requirement that an entitlement may only be removed from its holder through a voluntary transaction in which the seller agrees upon the value. Liability rules, in contrast, permit a second-comer to take or destroy

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153See Posner, supra note 101 at 51.
154Melville Nimmer has argued that the First Amendment value of "democratic dialogue... is adequately served if the public has access to an author's ideas." See M. Nimmer, supra note 23 at 1196. One obvious exception to this rule is patent law, which protects new and useful inventions — industrial ideas.
155Calabresi and Melamed, supra note 3.
156Ibid. at 1093.
157Ibid. at 1092.
the entitlement without the permission of its holder, but require that compensation be paid at a value determined by the state.\textsuperscript{158} Liability rules obviously involve a greater degree of state intervention than property rules do: not only does the state allocate entitlements, it also determines its value.\textsuperscript{159} An inalienable entitlement contrasts with both of these entitlement protections by not permitting the transfer of the entitlement at all.\textsuperscript{160} This rule obviously involves the highest degree of state intervention, by which the state not only determines its allocation and value if destroyed, but also regulates or limits the grant itself.\textsuperscript{161} "The Cathedral" argued that the choice of remedial regime should depend largely upon the degree of transaction costs interposed between competing parties: where transaction costs are low, property rules provide the most efficient process of exchange; conversely, where transaction costs are high, liability rules are more likely to promote efficient exchanges. "The Cathedral" is still important today for this economic insight into remedies law.\textsuperscript{162}

\begin{thebibliography}{99}
\bibitem{158}Ibid.
\bibitem{159}Ibid.
\bibitem{160}Ibid. at 1092-3.
\bibitem{161}Ibid. at 1093.
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However, the contribution of "The Cathedral" goes much deeper than this. The questions of entitlements that interested Calabresi and Melamed go beyond the property rules/liability rules distinction and their relationship with efficiency considerations to include the grant of the entitlement itself and non-economic considerations (such as distributive and fairness criteria) as to both that grant and its enforcement. Specifically, "The Cathedral" argues that "economic efficiency, distributional preferences, and other justice considerations" all play a role in questions of both resource allocation and the enforcement of entitlements.

Efficiency concerns include transaction costs and administrative costs; in this, Calabresi and Melamed essentially included Coase's "the Problem of Social Cost" by reference, arguing that in the absence of other concerns, efficiency goals dictate that the state should "choose the set of entitlements which would lead to a [Pareto optimal] allocation of resources."164

"Distributional preferences," in contrast to efficiency considerations, are a more complex variable in allocational debates, as they "cannot usefully be discussed in a single conceptual framework."165 Calabresi and Melamed identified two particular distributional concerns which may affect allocational decisions: wealth distribution preferences and merit goods.166 Wealth distribution preferences depend on a wide variety of societal values, including notions of equality (Aristotle's "distributive justice") and justice (i.e., that labourers deserve to enjoy the fruits of their labours, etc.). While "wealth" includes money and resources, it also includes less concrete entitlements, such as social preferences for beauty, intelligence, or even peace and quiet; although we do not ordinarily think of these qualities as entitlements, they do effect our well-being and so

163Calabresi and Melamed, ibid. at 1093.
164Ibid. "Pareto optimality" refers to that state of affairs in which, given any initial allocation of resources, no further voluntary transactions may be undertaken which will make both parties better off. See Posner, supra note 101 at 13.
165Calabresi and Melamed, ibid. at 1098.
166Ibid.
our state of preference satisfaction. These latter entitlements reflect inequalities that society could not redistribute equally, even if it wished to.\textsuperscript{167} Therefore, since perfect equality is impossible, society must make choices about entitlements on the basis of some criteria, and those criteria chosen will inevitably promote a distribution of wealth that society favours.\textsuperscript{168}

Merit goods are specific goods that society deems necessary to the well-being of citizens, and so endows citizens with a minimum entitlement to those goods.\textsuperscript{169} Generally, such entitlements are inalienable entitlements, since if society preferred that acquisition of the entitlement be left to individual choice, it would be more efficient to grant citizens means of acquiring the entitlement -- money -- rather than the entitlement itself.\textsuperscript{170} Therefore, inalienable entitlements to merit goods are a form of paternalism. This paternalism may be of two kinds: self paternalism, or true paternalism. The classic example of self paternalism is the voluntary drafting of a constitution establishing fundamental rights and freedoms.\textsuperscript{171} These rights protect citizens from the harmful long-term effects of certain short-term voluntary transactions.\textsuperscript{172} True paternalism, in contrast, is based on the notion that "at least in some situations the Marshalls know better than Taney what will make Taney better off."\textsuperscript{173} Examples include prohibitions against certain activities by minors, the incapacitated and the inebriated or insane.\textsuperscript{174} However, it also embraces prohibitions on the sale of certain entitlements, such as exculpatory clauses which seek to place the harm caused by dangerous goods on the backs of injured

\textsuperscript{167}\textit{Ibid.} at 1099.
\textsuperscript{168}For example, society clearly values individual labour, and so grants individuals an entitlement to his or her labour. But this need not be so: society could instead grant each an entitlement to a basic income, and regard labour as a recreational activity, so that none are entitled to be paid for the labour one performs.
\textsuperscript{169}\textit{Ibid.} at 1100.
\textsuperscript{170}\textit{Ibid.}
\textsuperscript{171}\textit{Ibid.} at 1113.
\textsuperscript{172}To the extent that self paternalism embraces a long-term view of the collective best interests of citizens, it is not truly a detraction from Pareto efficiency. \textit{Ibid.}
\textsuperscript{173}\textit{Ibid.}
\textsuperscript{174}\textit{Ibid.} at 1113-4.
consumers. Such prohibitions have obvious distributional aims: by barring the sale of the right to seek redress for such harms, consumers are made comparatively better off than manufacturers of dangerous goods. A third category of inalienable entitlements are those justified by what Calabresi and Melamed term "moralisms:" entitlement valuations that by their nature preclude monetization, and may in fact find such cost-benefit analysis offensive. Moralisms include religious beliefs and beliefs about the sanctity or integrity of the human body.

Calabresi and Melamed's third factor in allocational decision making is "other justice considerations." Central among these concerns are the "relative worthiness" of the competing claims to an entitlement and the "consistency" of the allocations relative to other societal entitlements. The problem Calabresi and Melamed have with these categories is that they ultimately reintroduce efficiency and distributional criteria into the allocation process. Of course, this assertion returns to ancient debates over the content and meaning of "justice" itself; for example, do we grant individuals a right to the fruits of their labour because (in the positivist tradition) it is efficient to do so, or because (in the natural law tradition) it is just to do so? That is a debate beyond the scope of "The Cathedral" (and of this thesis) and so the authors leave "justice considerations" as a third set of allocational criteria.

"The Cathedral" can be applied with interesting results to the field of intellectual property. The distinction between property and liability rules has been a favorite target of those favouring increased access to informational tools such as software and databases. At least one author, Robert P. Merges, has applied the literal framework of

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175 Ibid. at 1114.
176 Ibid. at 1112.
177 Ibid. at 1102.
178 Ibid. at 1104.
"The Cathedral" to intellectual property law, with curious results. Merges argues that the public goods aspect of intellectual property calls for strict application of property rules -- the "strong preference for injunctions" -- and a rejection of liability rules except under strict circumstances such as market failures. Deficiencies in Merges' analysis, particularly its selective application of "The Cathedral's" allocation criteria, undermine the value of Merges' conclusions. Merges concentrates on the role of transaction costs in the choice of allocation and enforcement to the complete exclusion of distributional goals.

I will take as my example the entitlement to works of authorship: standard copyright law. Merges correctly points out the efficiency concerns driving society's allocating to authors an entitlement to their work -- namely, its public goods aspect. This dictates that authors be granted an entitlement to the products of their labour.

However, copyright does not do this exactly: rather, it grants authors an entitlement only to substantial portions of their labour. Consumers receive a corresponding entitlement to insubstantial portions of authors' works. Further, copyright does not grant authors an entitlement to the ideas embodied in their labour, nor to aspects of their work "borrowed" from others. Thus, copyright infringement's requirement of substantial similarity, the idea/expression dichotomy, and the public domain are all a public entitlement to the products of authors. One explanation for this split entitlement rests on

180 Merges, supra note 162.
181 Ibid. at 2655.
182 Ibid. at 2668.
183 The only account of distributional concerns that Merges touches upon is society's preference for creators over infringers. Ibid. at 2660-1.
184 Ibid. at 2658.
185 Copyright law's "substantial similarity" requirement states that an infringing use of another's work must be quantitatively or qualitatively significant before a court will find an appropriation infringing. See Caron v. Association des Pompiers de Montreal (1992), 42 C.P.R. (3d) 292 (F.C.T.D.), and Francis, Day & Hunter Ltd. v. Bron, [1963] 2 All E.R. 16 (C.A.).
186 For discussion of copyright's "idea/expression dichotomy," see supra notes 53-54 and accompanying text.
187 For discussion of copyright's "public domain" doctrine, see supra notes 127 and accompanying text.
the transaction cost thesis: the influences of others' works and ideas is so pervasive, and so much a part of creativity itself, that it is literally impossible to track down and compensate each creator who influences our own work. To do so would impose significant social costs on society. A competing -- and more logical -- account of these entitlements regards them as justified on distributional grounds. Return briefly to our discussion of Coase and the problem of externalities. I argued that "idea factories" do not exist because society is better served by the free flow of ideas than by an incentives-based property regime. These values are protected by inalienable constitutional guarantees of equality and free speech, rights best accounted for as entitlements paternally selected by society as a distributive judgment. On this view, derogations from the grant of copyright are best accounted for as correcting copyright's otherwise unacceptable limitations on freedom of expression.

Turning to the question of the appropriate remedial regime for intellectual property, "The Cathedral" suggests that, distributional and justicial concerns aside, the presence of significant transaction costs, few parties, or difficult valuation problems dictates the utilization of property rules. Conversely, low transaction costs, many parties, and simple valuation dictate the preferability of liability rules. Merges argues that intellectual property fits the criteria for property rules:

(1) there are only two parties to the transaction; (2) the costs of a transaction between the parties are otherwise low; and, most importantly, (3) a court called on to set the terms of the exchange would have a difficult time doing so quickly and cheaply, given the specialized nature of the assets and the varied and complex business environments in which they are deployed.

These arguments seem somewhat specious. First, Merges limits the number of parties to the enforcement interaction to two people. Why does he do so? The products of creators

\[\text{188} Supra\text{ note } 151-154 \text{ ad accompanying text. "Inventive" ideas are an exception to this rule, so society protects them by patent law.} \]

\[\text{189} Calabresi \text{ and Melamed, supra note } 3 \text{ at } 1106-10. \]

\[\text{190} Merges, supra note } 162 \text{ at } 2664. \]
are designed to reach many prospective users, with many potential applications. Second, Merges' claim that the costs of transactions between creators and users is low flies in the face of the development of copyright collectives, whose only purpose is to minimize detection and enforcement costs. Third, Merges' claim that "[c]ourts are simply not well situated to make difficult valuations of this sort" is hardly convincing given the relative expertise courts have with liability rules: tort law is, after all, the *sine que non* of liability rules. The fact that such valuation is difficult is no answer -- courts do this all the time. A much more compelling case for enforcing intellectual property entitlements under property rules stems from the public goods aspects of intangibles: second comers can utilize intangibles without their owner suffering deprivation. In other words, high detection and enforcement costs may dictate the adoption of property rules, not negotiation costs. This conclusion is supported by the tendency for licensing collectives to transfer enforcement regimes from property rules-based to liability rules-based: to remove detection and enforcement costs as issues, creators *voluntarily* adopt liability rules.191 This would seem to argue for the utility of liability rules regimes in the form of mandatory collective licensing.

Distributive concerns with intellectual property add weight to this tentative conclusion. If constitutional rights to free speech play a role in the allocation of entitlements to intangibles, they also play a role in selecting the appropriate regime of enforcement. Simply, where the utilization of intangibles involves an activity that revolves closely around the core of values protected by freedom of expression, property rules -- injunctions -- are *always* inappropriate remedies.192 Property rules in these cases

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191 Merges, in contrast, argues that the ability to contract into liability rules stems from the incentives provided by strong property rules: "the presence of high transaction costs does not halt exchanges but encourages both producers and users to invest in institutions that lower the cost of certain types of exchanges." *Ibid.* at 2662.

192 This theme has been picked up by at least one prominent American authority: Judge Pierre Leval of the Second Circuit Court of Appeals. See, e.g., P. Leval, "Toward a Fair Use Standard" (1990) 103 Harvard L. Rev. 1105 at 1131-34.
undermine democratic values by stifling critique and the dissemination of knowledge. Similarly, property rules are inefficient where they tend to consistently fail to expedite licensing. This may occur where uses are critical or uncomplimentary, such as in parodical works and criticism. In these cases copyright law often grants the entitlement itself to the second comer, in the form of the "fair use" or "fair dealing" defence; however, in those cases in which it does not do so, a property rule may inappropriately bars the creation of a valuable new work. Therefor, a liability rule is preferable.

The analytic framework of "The Cathedral," then, would seem to confirm the conclusions reached in my analysis of property theory in Part II of this Chapter: property is not an absolute, and is in fact commonly limited by over-arching societal concerns. These concerns revolve around efficiency concerns, distributive goals, and democratic values. To summarize, this analysis indicates that while the division of entitlement in most intellectual property law is correct, protection of that entitlement via a property rule is a only justified where the public goods problems of intangibles cannot be overcome by the adoption of liability rules. Even in those cases, the rule favouring injunction should be relaxed where the use revolves closely around superior constitutional values or would prove inefficient.

IV The Public Interest as Policy Input

If this inquiry has done anything, it has rejected absolutist visions of intellectual property as unhelpful, and ultimately harmful. Even a cursory glance at the social cost of intellectual property reveals that property rights in intangibles involve the interests of more than creators and those who benefit from their production. Sophisticated property theories regard both public and proprietarial interests as functions of a common process, a process which places the public interest, defined broadly, as the ultimate end of the property right itself. Just as the public interest justifies property as an institution, so does it inherently limit the scope and ambit of property law.
This conclusion would apply with special vigor to statutory forms of property. Ideally, statutory law tries "to do something:" the interesting question, for our purposes, is what does the government of Canada seek to accomplish by its intellectual property laws? How do public interest limitations manifest themselves before Government intellectual property policy makers? The answers to those questions depends upon the model of governance that one believes the Canadian government operates under.

What in reality occurs when the laws are changed is some form of utilitarian calculation which benefits some at the expense of others -- every benefit has its corresponding burden. Canada's intellectual property laws have for some time now been expanding to the benefit of commercial interests; the public has, in some form, clearly been losing -- we now paying for what was once freely available (or we pay more, or longer, etc.). Two possibilities emerge. First, it is possible that the federal government has decided that Canada's intellectual property laws have in the past skewed the calculus between public and capital interests in intellectual property to disproportionately favour the public (to the disadvantage of private capital). On this model, the federal government has been deliberately discounting public interest concerns in reformulating Canadian intellectual property policy for the past ten years as an industrial policy strategy. Alternatively, it is possible that public interest concerns have not made their way into legislative reforms because they have not found their way before legislative deliberations. On this model, the developments in Canadian intellectual property over the past ten years can be seen as the product of industry capture: governments are subject to a number of inputs, and commercial interests with powerful financial motivations can mobilize powerful and persuasive lobbying activities. This second possibility is less fatal to public interest concerns, although it is certainly more problematic from a political perspective: it reflects not an abandonment of the public interest, but a failure of the political process.

I argue that the intellectual property policy makers must adopt a strongly pragmatic approach to intellectual property reform. As a society we face no other choice:
we either act purposively or arbitrarily. Moreover, while Parliamentarians may be sympathetic to creators' assertions that they have a right to remuneration for their intangible works, they seldom feel that they are bound to legislate absolute rights by a higher law.

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193 Even Richard Epstein, one of the most extreme advocates of an absolute approach to property rights, advocates a functional or instrumental approach to intellectual property rights: "The basic social choice is strictly functional and instrumental. We must decide whether the incentives for the creation of these inventions and discoveries are large enough to justify the restrictions on output that follow..." R Epstein, "Property Rights in cDNA Sequences: A New Resident for the Public Domain" (1997) 3 U. Chi. L. School Roundtable 575 at 577.
Chapter 3 Political Models

How does Canada formulate its policies on intellectual property laws? This thesis has identified a number of competing public and private concerns with intellectual property laws. The public interest in intellectual property revolves closely around three distinct public goals: the efficient deployment of scarce resources, distributional goals, and democratic goals (where the latter are not wholly embraced by the concept of egalitarianism). For our laws to be effective, they must attend to all of these values to the greatest extent possible. Of course, intellectual property legislation is itself a product of a process, and so can be only as good as that process is effective. Therefore, we must look at the policy formation process itself. How do public interest goals find voice before policy makers? Do public interest goals enjoy formal or informal inputs? What role do market and non-market actors play in the policy formation process? The answers to these questions reveal much about the democratic process itself.

This Chapter will examine two economic models of law-making that will aid this analysis: market failure theory and public choice theory. Under the traditional view of law-making, the public interest is safe-guarded by Parliament, which is, after all, composed of the elected representative of the public. On this view, Parliament intervenes in the market to correct for failures of the mechanisms of commerce to advance the public good. For example, competition laws represent a justified intrusion of the state into a market that has become non-competitive due to the evolution of firm arrangements or behavior that harms consumers. Similarly, major public works, such as infrastructure development and military defence, may be beyond the means of private enterprise, and so require state activity. While this approach to legislation may give an adequate account of justifications for state action, it does not accurately represent what law-making actually

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1 See generally Chapter 1, supra.
looks like. An alternative account, based on public choice theory and interest group analysis, seems to present a more compelling and accurate account of Canadian intellectual property law.

This Chapter will first examine these two accounts of the law-making process and consider their applicability to intellectual property legislation. Section two will explore the potential for public interest concerns to manifest themselves as a formal or informal input in the law reform process. Section three will consider the implications of this analysis for international venues in which intellectual property policy is generated. This Part of this Thesis will conclude by arguing that public choice analysis presents a powerful tool for analyzing Canada's intellectual property policy formation process. The prevalence of commercial interest group activity in intellectual property policy formation venues, and the relative exclusion of strong actors representing public interest considerations, poses a danger to the integrity of Canada's intellectual property laws.

I Economic Models of Law-making

A Instrumental Theories of Governance: Market Failure

Traditional economic accounts of governance envision legislation as correcting for market failures -- gaps in the market's supply of goods and services necessary for civil society. Legislation, on this account, is a justified political intrusion into the market to enhance global welfare. This approach mirrors public conceptions of what politics actually does: it is the job of the politician to advance the common good. This view sees statutes as functional -- they seek to implement some strategy which is in the interest of the public. The market failure account of legislation is based on the assumption that pluralism -- the healthy competition of a diversity of interests -- leads to legislation that generally furthers the public good. Applying this approach to intellectual property

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legislation, traditional economic accounts of legislation look very much like the economic justification for property rights, including intellectual property, which is premised on the need to overcome a classic market failure -- the tragedy of the commons.3 On this model, intellectual property laws accommodate the public interest in the efficient allocation of intangible resources (through attention to the tragedy of the commons problem), but also implicitly through Parliament's mandate to safeguard the public interest in the democratic process and to implement distributional goals.

The strength of this approach lies in its characterization of positive law as functional, in that at the very least legislation aims to benefit the community in whose name it has been enacted. The central weakness of the market failure approach is that it has little bearing on the reality of the regulatory state. Consider intellectual property legislation: under a market failure approach, it would seem fairly straight-forward that most intellectual property laws address at some level the common pool problems associated with the tragedy of the commons. One would think that if this functional basis would ever shine forth, it would be in the law reform process. In fact, this has not been the case. Few intellectual property legislative initiatives enjoy so simple a mandate. Rather, the majority of reform initiatives assert a much more general approach, such as a "balance... between the interests and needs of creators, producers and users of creative works."4 Attractive as market failure rationales sound, legislative reform in Canada simply does not resemble the purposive approach it implies.

B Public Choice Theory

Dissatisfaction with the traditional market failure oriented approach to legislation led some economists in the to suggest an alternative account of the policy formation

\(^3\)See Chapter Two's discussion of the economic justification of property rights, \textit{supra}.
process, which came to be known as "public choice theory." Public choice can be defined as "the economic study of nonmarket decision making, or simply the application of economics to political science." Public choice grew out of the writings of Kenneth Arrow and Duncan Black in the post-war period. Arrow's *Social Choice and Individual Values* focused on the dynamics of collective decision-making and the tension between ensuring both fairness and rationality in legislative decision making. Black's article, "On the Rationale of Group Decision-Making," considered the disproportionate influence interest groups exercise over the legislative process. These two related topics parallel the manner in which public choice scholarship has evolved over the intervening years.

Today, public choice theory has two branches, "social choice" and "interest group theory". Social choice scholarship, flowing from Arrow's analysis of rational decision-making, has focused on the dynamics of voting patterns and the problems of voter preferences and disinterestedness, and is predominantly of normative character. Interest group theory, in contrast, focuses on the influence of concentrated interest groups on the political process, and is a predominantly positive account of politics. While the two branches of public choice theory overlap to a significant degree, it is the contribution of interest group theory to legislative analysis that has particularly fruitful application to Canada's intellectual property policy formation process.

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6 A third precursor to modern public choice theory is A. Bergson, "A Reformulation of Certain Aspects of Welfare Economics" (1938) 52 Quart. J. Econ. 314.
The fundamental insight of interest group theory is its characterization of the legislative process as an alternative source of wealth for otherwise private commercial actors. Where profit maximization strategies pursued in the open market create wealth, those pursued before legislative venues do no more than transfer wealth from one group of stakeholders -- usually taxpayers -- to another. These transfers are termed "rents," and their procurement "rent-seeking." Of course, this approach assumes that there are "rents" to be had; on this view, "legislation is a good, demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare." Those citizens with more at stake regarding a given issue and organized into groups based on commonality of interests will be better placed to procure favorable legislation. The forms rents may take are diverse. Legislators employ

taxes, subsidies, regulations, and other political instruments to raise the welfare of more influential pressure groups. Groups compete within the context of rules that translate expenditures for political pressure into political influence and access to political resources. Legislators do not create these benefits; rather, they are transfers of wealth from "individuals who do not find it cost effective to resist having their wealth taken away.... The supply of legislation is, therefore, grounded in the unorganized or relatively less-organized members of society." The question remains as to why legislators are willing to provide these rents. Cynical accounts of this variety of political behavior suggest that politicians can themselves be purchased as commodities by interest groups. A more sympathetic

11 Thus, Robert Tollison distinguishes rent-seeking behavior, a zero-sum gain at best, from profit-seeking behavior, which aims to expand production. R. Tollison, "Rent Seeking: A Survey" (1982) 35 Kyklos 575 at 576.
account of political life recognizes that politicians require both political and financial support to get elected or re-elected. Regardless of the reasons politicians answer the call of public service, be it the power of office for its own sake or for a grander vision of contributing meaningfully to society, in a majority-rule voting system politicians must assemble coalitions of voters to successfully attain office. This logically exposes the political process to the influence of well financed and well organized groups sharing a commonality of interests. The end result is the exchange of support for the transfer of wealth.

While these transfers have obvious distributional implications (which may run counter to government policy in other legislative venues, such as health care), they also entail economic inefficiencies which decrease global welfare. Jonathan R. Macey has included among economic costs:

(1) the costs that the interest group must incur to obtain the transfer, (2) the costs that other groups must incur to block legislation that threatens their interests or saddles them with new taxes, (3) the costs that arise as firms divert their resources from more valued to less valued -- but unregulated -- uses in order to avoid the consequences of interest group activity, and (4) the costs that groups and firms in unregulated markets must incur to keep their markets free of interest group wealth transfers.\(^\text{15}\)

The societal costs of rent-seeking behavior are perhaps more significant. Mancur Olson has included among these (1) a reduction in economic efficiency and aggregate income, (2) increasingly divisive political life, (3) reduced societal capacity to adopt technology and reallocate resources in response to changed social conditions, and (4) the economic drags associated with excessive governmental regulation and intervention in the market.\(^\text{16}\)

Earlier in this Chapter's discussion of traditional economic accounts of law-making, I quoted Danielle Bouvet of the Intellectual Property Directorate of Industry


\(^{16}\) Olson, supra note 10 at 74.
Canada as asserting that the Canadian government's purpose in amending the *Copyright Act* was to attempt to "balance" the interests of creators, producers, and users of copyright materials.17 This account is peculiar for two reasons: first, we do not ordinarily allocate rights and obligations between parties over goods and services on the basis of balancing the interests of those parties. For example, we do not ordinarily think of property rights in consumer goods such as cars as distributed amongst dealers, consumers and manufacturers on the basis of some equitable "balance;" moreover, if they are, why have those property rights remained essentially unaltered over the past one hundred years? Simply, the allocation of rights to consumer goods such as cars is not up for grabs. This is clearly not the case in intellectual property. Second, Ms. Bouvet's description of the government's purpose in reforming Canadian copyright is peculiarly uninformative: the government aims to "balance" competing interests, but gives no indication as to how it is to judge this balance. How do we measure diverse claims? Are these interests even comparable? The impossibility of answering these questions indicates that something else is going on. The answer lies within Ms. Bouvet's description of the government's legislative purpose: the government seeks to balance interests, not maximize some social function. This is the very language of public choice.

Few areas of law encounter interest group activity to the extreme experienced by intellectual property policy-makers. During the recent hearings over the Bill C-3218 revisions to the *Copyright Act*,19 broadcasters, author’s collectives, publishers, software companies, performing rights collectives, educational institutions and libraries poured millions of dollars into efforts to persuade policy makers to take their interests into account in amending Canada's copyright laws.20 Similarly, the recent review of Canada's pharmaceutical patent policy precipitated an intense lobbying effort on the part of

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17*Supra* note 4.
18*An Act to amend the Copyright Act*, 2nd Sess., 35th Parl., Canada, 1996 [hereinafter Bill C-32].
20See, generally, the discussion of the Bill C-32 hearings in Chapter 4, *infra.*
international drug firms and their domestic generic drug manufacturing counterparts, which included flashy advertisements in journals and newspapers and slick television spots. These efforts at persuasion were as much towards the public as they were towards policy makers.\footnote{See, generally, the discussion of the Bill C-91 hearings, Chapter 5, infra.} The evolution of a \textit{sui generis} regime of property rights attaching to databases has been driven entirely by the industry legislators intend to benefit from these rights.\footnote{The European Union's Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March, 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20) evolved as a strategy to give European database producers a strategic advantage over their American counterparts. The WIPO Draft Treaty (Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases, Memorandum Prepared by the Chairman of the Committee of Experts, August 30, 1996, to be considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Switzerland, December 2-20, 1996, WIPO Doc. CRNR/DC/6 (available at http://www.loc.gov/copyright/wipo6.html, March 23, 1997)), which was driven largely by American interests, can be seen as a direct response to the European challenge. See, generally, Chapter 6, infra.} These advocacy efforts may be distinguished from similar activities in other economic areas by the nature of the objective, which is different in kind: Parliament doles out property rights in intellectual property venues, enforceable against the public at large. In contrast, more traditional entitlements to government largesse, such as subsidies, tax shelters, tariff protection and government contracts, are much more vulnerable to fiscal and political pressures. Property rights, once granted, quietly disappear from the current accounts of government bean counters.\footnote{In this fashion, intellectual property rents function as a form of direct taxation which by-passes government coffers. However, governments cannot entirely evade the costs of increased intellectual property protection: publicly supported institutions such as libraries and educational institutions are heavily hit by expansions in the scope of rights that attach to materials that they deal with, and pass those costs along to governments in the form of increased operational costs. Of course, to the extent that governments fail to modify these budgets in accordance with these increased costs, the impact of the expansion of I.P. rights on publicly funded institutions is to decrease the efficacy with which they perform valued public service functions.}

The government's intellectual property policy formation process is vulnerable to the influence of interest groups. While the government (in consultation with the relevant Ministries) ultimately formulates policy, interest groups enjoy relatively open access to decision makers and are frequently consulted on matters affecting their interests. One of the hallmarks of the Canadian legislative process is the notice and comment procedure.
regarding new legislation (and sometimes policy) available to stakeholders. Additionally, the government often holds public hearings into matters that may prove controversial, or that pit significant stakeholders against one another. Intellectual property law amendments invariably enjoy prolonged and controversial hearings before enactment. Finally, many players in intellectual property based markets are powerful national and international commercial entities, with significant financial and organizational resources to contribute to these processes, as well as to the coffers of favored political parties and candidates. The end result is that Canada's policy formation and legislative processes inevitably favor the interests of those industry stakeholders with significant financial and organizational resources to invest in non-market activities. In short, rent-seeking is a potentially lucrative activity in Canada.

This observation is not meant as a criticism of Canada's legislative and policy formation processes. Far from it, the relative openness with which these processes are conducted is vastly superior to the alternative: a closed-door procedure, in which the public cannot know of the inputs and resources employed by policy-makers, or a simple paternalism, in which policy-makers simply decide for themselves what is best for the nation, based on what limited resources and knowledge policy-makers have on hand. However, all of these procedures present opportunities for rent-seeking behavior, and create inputs to the law-making procedure that are based on wealth and power. Without careful analysis of both the origin of interest group advocates and the diversity of stakeholders present, public consultation procedures can produce skewed representations of the public interest. Moreover, the influence these procedures seem to have on government policy dictates that policy-makers should ensure that a full range of public concerns are in fact represented in consultative bodies. Where the market fails to produce a champion for such causes, policy-makers should ensure that some mechanism exists for organizing and financing public interest associations. This is not a controversial claim, as the government does this for a number of vulnerable groups, such as women's groups (the
National Action Commission), individuals concerned with privacy issues (the Privacy Commission), and, interestingly, the public interest in affordable health care (The Patented Medicines Prices Review Board).

Public choice theory supplies a powerful tool for analyzing Canada's intellectual property policy formation process. By analyzing the role played by interests groups, and their ultimate influence on legislation and policy, public choice theory offers both a descriptive account of Canada's intellectual property environment and suggests possible prescriptive measures for attending inappropriate imbalances of power and influence.

II International Developments and Public Choice Theory

Many of the revisions to Canada's intellectual property legislation in recent history has been driven by international trade obligations. For example, Canada's participation in the *North American Free Trade Agreement*\(^\text{24}\) entailed the recognition of an exclusive right to rent computer software.\(^\text{25}\) Similarly, Canada's adherence to the *World Trade Organization Agreement*,\(^\text{26}\) the latest round of GATT tariff reductions, brought with it for the first time within the GATT framework obligations with regard to intellectual property,\(^\text{27}\) including the creation of a new neighboring right for a "performer's performance."\(^\text{28}\) Public choice theory posits that interest group activity may have undesirable effects on public legislation, even in national venues with relatively open processes and unimpeded access. These same interest groups operate even more effectively in alternative venues, in which access is restricted and which operate under


\(^{27}\) See the *Agreement on Trade-Related Aspects of Intellectual Property* (being Annex IC to the Uruguay Round Agreement, *ibid.* [hereinafter TRIPS Component of the GATT].

less than ideally transparent conditions. These conditions perfectly describe international trade bargaining.

Developed nations, led by Europe and the US, have over the past decade demanded heightened international levels of protection and enforcement of intellectual property rights, often on the basis of a "property model" of intellectual property.29 Moreover, the utilization of trade venues by industrialized nations intent on broadened intellectual property laws has not been inadvertent. The TRIPS Component of the GATT came about as a result of the desire of industrialized nations to remove responsibility for international intellectual property standards from the World Intellectual Property Organization (WIPO) -- an international bodies charged with the oversight of international agreements -- to the GATT negotiations. The strategy was ingenious, and ultimately successful: developing countries were encouraged to trade-off heightened levels of intellectual property protection for lowered tariff barriers for manufactured goods. The international trade venue provided by the GATT encouraged this sort of "horse-swapping;" WIPO, as a stand-alone agency affiliated with the United Nations, does not. As illustration, contrast the success enjoyed by the industrialized nations' strategy at the GATT with their relative failure at the 1996 Geneva Conference on the Berne Convention. In Geneva, the industrialized nations sought to create an international obligation for member nations of the Berne Convention to alter their copyright laws to confirm that the temporary reproduction of a digital work in a computer's random access memory constitutes an infringing reproduction. This interpretation of the law is still somewhat controversial, and is the subject of considerable controversy, even in developed nations.30 Given the implications of the "RAM copy" for the cost of accessing


30The claim that the reproduction of a digital work in a computer's RAM constitutes an infringement originated in the Clinton Administration's Information Infrastructure Task Force Working Group on Intellectual Property Rights White Paper, "Intellectual Property and the National Information
digitized works, it is not surprising that developing countries refused to accede to the Berne Convention's adoption of this interpretation of the reproduction right. It was subsequently dropped from the Geneva Conference agenda.\(^{31}\) The Geneva Conference differed from the Uruguay Round negotiations in a distinct fashion: the GATT negotiations were trade negotiations, conducted between states at the highest levels, granting interest group access only to commercial interests with their governments' ear; the Geneva Conference, in contrast, was diplomatic in nature, and allowed relatively open access to a wide range of interest groups and lobbyists. Accordingly, the digital agenda of the developed nations encountered resistance in Geneva not only from developing nations, but also from user groups and public institutions originating from their own countries. The resulting Convention signed at Geneva has been acclaimed by most as a success.\(^{32}\)

The public interest in intellectual property does not end at the nation's borders. The relative success of the expansionist agenda at the GATT argues that in the future, developed nations will likely utilize trade venues to press for changes in international intellectual property norms. The GATT accord on intellectual property is prefixed by the phrase "Trade-Related;" however, that merely reflects the reality that intellectual

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\(^{31}\) See P. Samuelson, "Copyright Cartel: How a Grab for Copyright Powers was Foiled in Geneva -- Big Media Beaten Back" 5.03 Wired (February, 1997) (available at http://www.wired.com/wired/5.03/netizen.html) (Arguing that the Clinton administration was dealt a significant defeat at Geneva when delegates rejected an expansive definition of the reproduction right in the context of electronic environments). See WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996 (available at http://www.wipo.org/eng/diplconf/distrib/94dc.htm).

property law is primarily commercial law. If publicly-minded values are to remain within the core of our intellectual property laws, they must be advanced at international venues as an essential aspect of those laws. This challenge raises a number of questions about Canada's role in international discussion over international norms of intellectual property. How does Canada represent itself in Geneva, and before the World Trade Organization on intellectual property matters? Does Canadian international intellectual property policy reflect domestic policy? This naturally leads us back to the question of domestic policy formation, and the question of policy inputs. Canadian delegates at international Conventions contemplating extending the scope of intellectual property rights internationally should press for levels of protection that reflect Canada's national interest in intellectual property, which includes efficiency, distributive, and democratic values.

III Conclusion: Public Interest as Policy Input

The implications of public choice theory for the public interest in sound intellectual property laws are clear: efficiency concerns, distributive values, and a sensitivity to democratic values must all find a voice before intellectual property lawmakers. Unfortunately, the reality is that the intellectual property law reform process benefits current industry participants, with very little explicit concern shown for the public's interest in intellectual property. Jessica Litman has maintained for some time now that intellectual property policy discourse in the United States suffers from a severe case of "industry capture." Canadian intellectual property laws do not seem to have fared any better. The reasons for this state of affairs are both obvious and subtle: obvious, in that while the pecuniary interests of commercial entities tend to produce well-

33 See J. Litman, "Copyright Legislation and Technological Change" (1989) 68 Ore. L. Rev. 275 at 357 ("The inquiry relevant to copyright legislation long ago ceased to be 'is this a good bill?' Rather, the inquiry has been, and continues to be 'is this a bill that current stakeholders agree on?' The two are not the same."); see also J. Litman, "Copyright, Compromise, and Legislative History" (1987) 72 Cornell L. Rev. 857.
organized and well-financed interest groups, the interests of the public in freedom of expression and the integrity of democratic dialogue is much more diffuse, and so seldom articulated by a persuasive, self-interested organization; subtle, in that we do not ordinarily associate the textual resources necessary for the fulfillment of expressive and democratic values with intellectual property laws.

Public choice analysis of interest group activity is a potentially powerful tool for investigating Canada's intellectual property policy formation process. The Canadian government's policy of consulting stakeholders within the interested community as a component of the law-making process itself, while commendable, nonetheless exposes the process to the influence of well organized and financed interest groups. Lobbying and politicking is to be expected in a majority-rule democratic system; the problem with the Canadian intellectual property policy formation process is that it does not implement a coherent system for ensuring that commercial interest group activity is balanced by the presence of strong actors representing public interest considerations. The problem is one of proportion rather than absence, and as we shall see in the coming Chapters, it is also one that varies across venues and subject matter.

This first Part of the Thesis has examined the legitimate scope of intellectual property claims in the face of public interest defences and limitations, and concluded that absolutist conceptions of property, including intellectual property, have no place in the laws of Canada, and particularly no place in the policy formation process itself. Rather, vigorous public interest limitations on the scope of intellectual property laws comprise an essential component of the law itself. However, the danger identified by this analysis is that the importance of these limitations may be easily lost amid the policy formation process. Public choice theory contends that Canada, as a majority-rule democracy, is vulnerable to the influence of well organized and financed interest groups. A quick examination of Canada's policy formation process bears this contention out: the
government takes few explicit measures to ensure that the public interest receives adequate representation.

The next Part will examine the current expansion of Canada's intellectual property laws with a view to identifying the roles played by the diverse interest groups active in how intellectual property laws are being expanded in Canada. It will examine three substantive issues: the treatment of "access" in modern copyright law, the interplay between affordable health care and patents on pharmaceuticals, and the possibility of the creation of a new form of intellectual property right for creators of databases. Each of these three Chapters will consider the merits of positions forwarded by competing interest groups, and the government's engagement in the policy formation and legislative processes. They will also consider how well these positions encompass the full range of the public's interest in effective, democracy-enhancing intellectual property laws. "higher law." It is to this pragmatic approach to policy making that I now turn.
Part II  Three Issues

Chapter 4  Copyright: Access and the Capture of "Use"

Of all forms intellectual property, copyright comes closest to embodying on its face those values this Thesis has defined as "democratic" and "distributional." One branch of copyright theory, utilitarianism, identifies copyright law as solely an instrumentality for the furtherance of certain essential social goals, such as the dissemination of knowledge and the advancement of learning. Indeed, these grandiose aims comprised the early understanding of copyright law: the first copyright statute, England's Statute of Anne, was premised on the understanding that the grant of copyright was to benefit the public, rather than the private interest of the copyright holder. Even today, American copyright law is constitutionally grounded in a requirement to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," a purpose essentially lifted from the Statute of Anne. Natural rights theories of copyright do not exclude this understanding of the functionality of copyright: even the Charter of Rights for Creators, the 1985 Government Report on the revision of copyright which unabashedly advocated the expansion of copyright property rights, noted that this was justified because of the "special contribution creators make to Canadian society."3

Above all else, copyright is about the protection of expression. Fundamental to copyright law is the "idea/expression dichotomy," the distinction between what copyright law does not protect -- ideas -- and what it does -- the expression of those ideas in a

18 Anne c. 19 (1709).
2United States Constitution, Article 1, s. 8, cl. 8.
3Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, A Charter of Rights for Creators (Ottawa: Ministry of Supply and Services Canada, October 1985) at xii.
tangible form. Expression is also the subject of a constitutionally guaranteed right in Canada. Section 2(b) of Canada's Charter of Rights and Freedoms guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" as "fundamental freedoms." Therefore, the very subject matter of copyright law, expression, is also a universally guaranteed right of all citizens. This universality indicates that clearly, freedom of expression is regarded by our constitution as a distributive value: it is something to which the fundamental law of our nation guarantees that all citizens must have some minimum entitlement. Moreover, the Supreme Court of Canada has held that this expressive right attaches not just to expression, but to its communication, and so to both speaker and recipient. The Charter therefore acts as the paradigm of distributional values relating to access to information.

The Supreme Court of Canada has recognized that freedom of expression serves three important and interrelated goals. These are first, to sustain "intelligent and democratic self-government:" second, to guarantee "an open exchange of views, thereby creating a competitive market-place of ideas which will enhance the search for the

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5Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 2(b) [hereinafter Charter of Rights and Freedoms or simply Charter].

6In Rocker v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232 at 247 [hereinafter Rocker], the Supreme Court of Canada accepting the rationale of the US Supreme Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) and approved of the constitutional protection of commercial advertising as serving "an important public interest by enhancing the ability of patients to make informed choices," and suggested that constitutional scrutiny is merited if "this regulation denies or restricts access of consumers to information that is necessary or relevant" to their consumer decisions. See also Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265.

truth;

and third, "for its own sake,... as an aspect of individual autonomy.... essential to personal growth and self-realization." The first of these rationales ties freedom of expression to democratic values. As Alexander Meiklejohn has argued,

The welfare of the community requires that those who decide issues shall understand them.... As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

Thus, just as freedom of expression fulfills fundamentally distributive social goals, so too does it address those goals most closely associated with democratic self-government. Where uses of materials protected by copyright law revolve closely around these values, copyright law itself inevitably touches upon the constitutional protections of freedom of expression.

This understanding of copyright law is a relatively novel one, and is not clearly reflected in the Canadian case law nor in the legislative history, beyond a general adherence to principles of user access and an occasional nod toward copyright's need to balance incentives to create new works with rights of access to those works. To the extent that interest groups advocating increased intellectual property protection do deploy

8 Ibid.
9 Ibid.
11I have elaborated more completely on this troubling intersection elsewhere. See D. Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 U. Toronto Fac. L. Rev. ---.
12See, e.g., The Queen v. James Lorimer & Co. (1984), 77 C.P.R. (2d) 262 at 273 (F.C.A.) ("If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them"); Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada (1997), 71 C.P.R. (3d) 348 at 395 (F.C.T.D.) ("I agree with the Plaintiffs argument that use of its private property, the "Bibendum" copyright, was hardly consistent with all of the purposes informing free expression.")
13 See, e.g., V. Rabinovitch, Assistant Deputy Minister, Cultural Development and Heritage, Department of Canadian Heritage, Comments before Standing Committee on Canadian Heritage Bill C-32, 21 November, 1996 at 1102 (noting that Bill C-32 sought "to establish a balance between the rights of creators and the needs of users.") (available at http://www.parl.gc.ca/committees352/heri/evidence/39_96-11-21/heri39_bik101.html).
incentive-based rationales for this expansion, they do so in an unsophisticated fashion, linking the dissemination of knowledge directly to the incentive effect of an ever-expanding scope of protection for intellectual property. Susan Crean, former vice-chairperson of the Canadian Copyright Institute and former Chair of the Writers' Union of Canada, has perhaps stated this position most frankly: "[t]o promote the free flow of ideas and the creation of new ones, writers ought to be paid every possible royalty and every royalty possible." The greater the return on investment in expressive works, the argument goes, the more expressive works will be created. The more expressive works created, the greater the benefit to society. To this end, the call for increased protection often takes the form of a demand for royalties from an ever-expanding range of uses of expressive works. Often, the demand for royalties attaches to the very use of the work itself, as opposed to one of the rights specified in the Act. That no other goods or services are accorded a property right in use, per se, does not occur to either those making these claims nor to those policy makers who accept them. The result is a remarkable drift in the scope of intellectual property laws to recognize property rights in all uses of a work, whether public or private. Thus, while the Copyright Act grants to rights holders no exclusive right to read a book or listen to a sound recording or sing a musical work, or at least not in private venues, the normative claim of this tendency is that the Act should grant such rights.

As the potential for tracking uses of protected works expands, rights-holders invariably call for an expansion in the scope of rights statutorily protected. In this way, copyright owners seek to actually create new markets through the capture of old uses of protected works, regardless of the fact that these uses have historically been beyond the

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14 S. Crean, "Copyright Quarrels: Why Won't Librarians Listen to the Writers?" (February 1988) Quill & Quire at 18, quoted in C. Lind, "The Idea of Capitalism or the Capitalism of Ideas? A Moral Critique of the Copyright Act" (1992) 7 I.P.J. at J. 65 at 67. This assertion seems somewhat troubling, in that copyright does not promote the creation of new ideas, but rather acts as an incentive to create new works embodying ideas.

15 R.S.C. 1985, c. C-42, as amended [hereinafter Copyright Act].
range of rights granted under the *Copyright Act*.\textsuperscript{16} The argument is essentially normative, but in recent years has rhetorically evolved into a *positive* argument: creators have a right to remuneration for all uses of a work, whether the law formally recognizes those rights or not. This conclusory argument is evidently persuasive: courts and policy makers are becoming willing to extend rights to regions which in the past were unambiguously beyond the scope of the copyright holder's rights.

This Chapter will consider the recent manifestation of this approach in Canadian copyright policy makers, and consider the implications of the continuing expansion of the scope of copyright in the future. In section one of this Chapter, I review the fallout of *Bill C-32*,\textsuperscript{17} the most recent round of revisions to the *Copyright Act*,\textsuperscript{18} for paradigms of access to works protected by copyright law. Particularly, I examine the treatment afforded educational institutions, libraries, museums and archives -- publicly-minded institutions concerned with conditions of access to knowledge and the dissemination of information. I also look at the special treatment afforded publishers under Bill C-32, who gained the power to exclude parallel imports of works protected by copyright, and to exclude the importation of used textbooks. All of these provisions favour the rights of creators over those of the public's interest in access. In section two of this Chapter, I consider the next round of revisions to the *Copyright Act*, Phase III, which will tackle the challenge posed by digitally networked computer environments to copyright law. I review the proposals of the US White Paper\textsuperscript{19} and the Canadian Information Highway Advisory Council Copyright SubCommittee\textsuperscript{20} on intellectual property and the Information Highway with

\textsuperscript{16}*Ibid.*
\textsuperscript{17}*An Act to amend the Copyright Act*, 2nd Sess., 35th Parl., Canada, 1996 [hereinafter Bill C-32].
\textsuperscript{18}*Copyright Act*, supra note 15.
\textsuperscript{20}Information Highway Advisory Council Copyright SubCommittee, *Copyright and the Information Highway: Final Report of the SubCommittee on Copyright* (Ottawa: Industry Canada, 1994) [hereinafter Copyright SubCommittee, Final Report].
regard to the future of the reproduction right. The White Paper (and the SubCommittee, following the American lead) argued that reproductions of a digital work in a computer's Random Access Memory (RAM) constitutes a reproduction for the purposes of copyright. On this interpretation, it is impossible to read text, view an image, or listen to music over a computer network without infringing the exclusive rights of the copyright holder, regardless of whether the use is public or private, commercial or non-commercial. It is difficult to think of a use of a digital work which does not involve a computer's RAM. To the extent that the RAM-copy extinguishes rights and privileges currently enjoyed by citizens in a world of atoms (as opposed to bits), the "RAM-copy" represents a "land-grab" of astonishing breadth. The RAM-copy, if it becomes law, will represent a fundamental re-allocation of entitlements to information resources. The policy environment that the RAM-copy emerged from, in both Canada and the US, was one which favoured proprietarial interests over rights of public access. Therefore, before accepting this interpretation of the law as final, intellectual property policy makers, courts, and citizens should take a long hard look at what the RAM-copy might do to distributional values, democratic dialogue, and the economic efficiency of information markets.

I Phase II: Dissipating Access

Bill C-32, An Act to amend the Copyright Act, embodied the second significant effort to modernize the Copyright Act in recent history. The First such effort, known collectively as the "Phase I" reforms, resulted in the Copyright Amendment Act. Phase I introduced into the Act, among other things, collective rights administrations. Many of

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21 The White Paper, supra note 19 at 33.
22 Bill C-32, supra note 17.
the exemptions and defences originally part of Bill C-32 comprised a response to the introduction of collectives into the Act, a deal between publicly minded institutions, such as universities and libraries, and the copyright industry. The Bill C-32 review process proved a harsh environment for this *quid pro quo*: not only were these defences significantly modified, but publishers also gained powerful new rights which will likely add greatly to the operating costs of these institutions.

**A. Educational Institutions, Libraries, Archives and Museums**

Bill C-32 as it was originally drafted granted educational institutions, libraries, museums and archives a long-sought after exemption from liability for dealings with protected works. For example s. 29.4 exempts an educational institution from liability for making "a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material."24 Educators across the nation are undoubtedly sleeping easier. The Bill as initially drafted also permitted educators to reproduce works onto transparent overheads for teaching purposes; however, the Standing Committee on Heritage considered this privilege excessive, and subsequently restricted the exemption to those cases in which the work is not "commercially available," defined as

(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
(b) for which a license to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;25

Apparently, the Standing Committee felt that the commercial market for transparencies is significant enough to seriously deprive creators of just compensation for the infringing activities of public institutions in relation to transparent overheads. Moreover, this notion

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24 Copyright Act, *supra* note 15 s. 29.4
of "commercial availability is "new and untried," and "will effectively eliminate some of
the exceptions for educators, researchers and students."26

The Committee's treatment of vicarious liability issues constituted a much more
serious revision to Bill C-32. As originally drafted, educational institutions, libraries,
archives and museums were exempted from liability for reproductions of protected works
on reprographic machines installed on their premises, so long as "there is affixed in the
prescribed manner and location a notice warning of infringement of copyright."27 The
Standing Committee did not approve of this exemption, and added that it would only
apply if

(a) the educational institution, library, archive or museum has entered into
an agreement with a collective society that is authorized by copyright
owners to grant licenses on their behalf;
(b) the Board has, in accordance with section 70.2, fixed the royalties and
related terms and conditions in respect of a license;
(c) a tariff has been approved in accordance with section 70.15; or
(d) a collective society has filed a proposed tariff in accordance with
section 70.13.28

As Howard Knopf, a respected intellectual property lawyer in Ottawa, notes, "Canadian
educational institutions will now effectively be liable for activities undertaken at
'convenience' copiers, eliminating a long-standing common law tradition."29 Not
surprisingly, representatives of educational institutions, archives, museums and libraries
felt "betrayed"30 by the government's about-face, and refused to support the Bill.31 "Bill
C-32 amounts to a tax on learning and literacy," argued Matthew Hugh, national director
of the Canadian Alliance of Student Associations.32 "We're putting barriers in place to
protect the poet that are going to limit the ability of our researchers to compete

26H. Knopf, "Stakeholders Divided over Copyright Bill" Financial Post (29 March, 1997) at 27.
27Bill C-32, supra note 17 s. 30.3 (as originally drafted).
28Copyright Act, supra note 15 s. 30.3(2).
29Knopf, supra note 26 at 27.
30E. Morton, "CLA Opposes Amended Copyright Bill" 43(4) Feliciter (April, 1997) at 14 (quoting Jules
Larivière of the Association pour l'avancement des sciences et des techniques de la documentation.
31Ibid. See also "The Last Thing You Want is a Tax on Knowledge" 60(7) Quill & Quire (July, 1994) at 8.
internationally, and that entire issue has been lost" noted Sally Brown, senior vice-president of the Association of Universities and Colleges of Canada. "We're treating all creators the same. They're not. Their motivations are different."33

Educators were apparently not the only parties involved with Bill C-32 that were taken aback by the Standing Committee's revisions to the Bill. Jill Vardy, a reporter with the Financial Post, wrote in reference to this amendment that

A key amendment approved by the committee yesterday was, according to reports, recommended by Heritage Minister Sheila Copps last week but was later shot down by the cabinet.

The amendments passed the committee yesterday anyway, approved by Liberal and Bloc Québécois MPs. Sources said Industry officials sat 'in shock' in the committee room as the changes were approved.34

Reporters familiar with Parliament Hill's inner workings reported that Copps was "being credited with a victory over Industry Minister John Manley."35 Reform party members left the committee hearings in protest.36

Copyright has long been a field rife with disagreement, but this dissension has seldom reached the level of national politics, let alone to the Cabinet itself. What could be behind this remarkable turn of events? The answer would appear simple: politics. At the same time as the Standing Committee on Canadian Heritage was hearing submissions from stakeholders regarding Bill C-32, an international trade panel was reviewing Ottawa's cultural industries practices, specifically Ottawa's preferential tax treatment of domestic magazines targeting the American practice of publishing "split-run" editions. Canada eventually lost that decision, and this loss came as no surprise.37 Copps, as

33 Ibid.
34 J. Vardy, "Commons Committee OKs Copyright Amendments" Financial Post (12 December, 1997) at 15. See also "Business Caught in Ottawa's Inter-Ministry Shootout" Financial Post (28/30 December, 1996) at 22.
35 S. Riley, "Copyright Law Changes Create Storm in Cabinet: Prominent Authors Pitted against Public Libraries" Vancouver Sun (13 December, 1997) at A11.
36 Ibid.
Heritage Minister, was the government official that the domestic publishing industry would look to for alternative support. In an age of government cost-cutting and budgetary frugality, Copps could not look to direct support or subsidization. Instead, Copps looked to copyright.

The rights granted publishers and creators under the Copyright Act provided Copps with an ideal solution to her dilemma: how to provide Canadian cultural industries with financial support without running awry of the Minister of Finance. Copyright is a species of property right: it touches upon the public at large, and does not require the intervention of the government to enforce, except to the extent that all property rights are ultimately enforced by the state. Moreover, Copps could respond to the criticism that the vast majority of royalties collected under the Act will flow out of the country by pointing to the system of neighbouring rights created by Bill C-32, which operate on the basis of reciprocity (as opposed to national treatment like most other elements of copyright). The government's siding with creators also gave the Liberal government an opportunity to gain popular support in Quebec, which tends to favor a stronger creator's rights regime than English Canada.

B Captive Students: Educational Books and Parallel Importation

Bill C-32 contained a special plum for the publishing industry: an exclusive distribution right. This right is directed at preventing the parallel importation of books, particularly those emanating from the big publishing houses in the United States. It's effect is to require domestic residency for the distribution of books in Canada. The new s. 27.1(1) of the Act provides:

it is an infringement of copyright in a book for any person to import the book where
(a) copies of the book were made with the consent of the owner of the copyright in the book in the country where the copies were

38"US Launches Two-Front Trade Attack on Canada" Financial Post (1 May, 1997).
made, but were imported without the consent of the owner of the copyright in the book in Canada; and
(b) the person knows or should have known that the book would infringe copyright if it was made in Canada by the importer.

(3) Subsections (1) and (2) only apply where there is an exclusive distributor of the book and the acts described in those subsections take place in the part of Canada or in respect of the particular sector of the market for which the person is the exclusive distributor.
(4) An exclusive distributor is deemed, for the purposes of entitlement to any of the remedies under Part IV in relation to an infringement under this section, to derive an interest in the copyright in question by license.39

Thus, s. 27.1 creates a new breed of rights holder, the exclusive distributor, and opens all of the remedies of the Act to the distributor. Section 27.1(2) also creates a secondary infringement in parties who sell, rent, or trade books and know or should have known that the distributor did not possess a domestic license to do so.40 However, remarkable as all of this is, the Standing Committee on Canadian Heritage was not satisfied that this new right was sufficient to protect the interests of the Canadian publishing industry.

Therefore, in recognition of the considerable contributions made by Canadian students to the coffers of publishers, the Standing Committee extended the exclusive book distribution right to used educational books:

45. (1) Notwithstanding anything in this Act, it is lawful for a person (e) to import copies, made with the consent of the owner of the copyright in the country where they were made, of any used books, except textbooks of a scientific, technical or scholarly nature for use within an educational institution in a course of instruction. [Emphasis added].41

Regardless of the wisdom of sheltering the domestic book distribution industry from foreign competition, the rationale of the Committee in legislating this new right targeting students has to be questioned. Not surprisingly, the educational community has not taken

39Copyright Act, supra note 15 s. 27.1.
40Ibid. s. 27.1(2).
41Ibid. s. 45(1)(e).
kindly to being singled out as a captive of the domestic book distributor industry.\textsuperscript{42} Indeed, this may well be the one measure of Bill C-32 which beyond question does not pass constitutional muster.

The Supreme Court of Canada in \textit{Rocket} held that s. 2(b) rights attach to the communication, not simply to the expression.\textsuperscript{43} Therefore, an "offer for sale or rental" of an imported used educational book to a student will surely attract constitutional protection. Moreover, the prohibition on the importation of used educational books is not content neutral: s. 45(1)(e) explicitly excuses from liability the importation of all used books except books intended "for use within an educational institution."\textsuperscript{44} This would seem to be a \textit{prima facie} violation of s. 2(b), and so unconstitutional unless "demonstrably justifiable in a free and democratic society" under s. 1.\textsuperscript{45} The s. 1 test, known as the \textit{Oakes} test, asks among other things whether the legislation in question minimally impairs the offended constitutional right.\textsuperscript{46} The goal of this provision of the Act would seem to be the support of the domestic book distributor industry. The Act places the burden of this objective on students -- a group collectively unsuited to bear this burden. Given the availability and ease of direct subsidies, it is difficult to see how this measure could possibly pass even a relaxed s. 1 analysis.\textsuperscript{47}

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\textsuperscript{42}See "Big Fight on Campus: The Lowly Used Textbook is the Focus of a War Between Booksellers and Publishers Tussling Over a New Provision Tacked onto Bill C-32" Globe and Mail 13 February, 1997) at C2.
\textsuperscript{43}See \textit{Rocket}, supra note 6.
\textsuperscript{44}\textit{Copyright Act}, supra note 15 s. 45(1)(e).
\textsuperscript{45}\textit{Charter of Rights and Freedoms}, supra note 5 s. 1.
\textsuperscript{46}Under the \textit{Oakes} test, the court first asks whether the government action in question has a "pressing and substantial" objective. The court then considers a proportionality test comprising three parts: first, is the government action rationally connected to its stated purpose; second, does the government action impair the Charter right in a minimal fashion; and third, is there proportionality between the government purpose and the effects of the government action. \textit{R. v. Oakes}, [1986] 1 S.C.R. 103 at 133-34.
\textsuperscript{47}Subsequent to \textit{Oakes}, the Supreme Court has raised the possibility of a relaxed s. 1 analysis, particularly in those cases in which the government is balancing competing social interests. See, e.g., \textit{Irwin Toy Ltd. v. A.-G. Quebec}, [1989] 1 S.C.R. 927; \textit{RJR-MacDonald Inc. v. Canada (Attorney General)}, [1995] 3 S.C.R. 199.
\end{flushright}
C Access

The brief s. 1 analysis of the ban on the parallel importation of used textbooks above raised the question of why the federal government does not simply turn to direct subsidies and cultural grants if we want to support the domestic information industry, on the one hand, and Canadian creators, on the other. Indeed, an editorial review of Bill C-32 in the Financial Post raised just this point. Calling the new Act "a step backwards," the editorial suggested that

Rather than messing around with copyright laws, creating economic inefficiencies and risking trade battles, let's put money directly into the hands of creators.
That way we know it at least got there.48

Other commentators noted that the big winners of Bill C-32 were not the artists, writers, and performers in whose name so much rhetoric was delivered, but rather "the publishers, distributors, collectives and other middle persons of the copyright world."49

Undoubtedly, the greatest single beneficiary of Bill C-32 was the United States. This may explain why "many of the strongest proponents of the bill have been American-based or influenced organizations."50

Regardless of who "won" the Bill C-32 review, it is clear who lost: educators, libraries, archives and museums, the institutions of public access to information.

Although the members of the Heritage Committee often committed themselves to the principle of a "balance" between the interests of owners in benefiting from their intellectual labours and the interests of users in reasonable access to those works, in practice the Committee tended to operate under a very refined sense of "access." The

48Editorial, "Cracks in Liberals' Copyright Bill" Financial Post (April 26-28, 1997) at 22. See also responses: B. Roberts, President of Canadian Recording Industry Association, "Copyright Bill a Step Forward" Financial Post (3 May, 1997) at 18-19 (supporting Bill C-32); at Weber, Chairman, Canadian Recording Media Association, "Serious Problems with Copyright Bill" Financial Post (3 May, 1997) at 19 (endorsing the Post's critique of Bill C-32).
49Knopf, supra note 26 at 27.
50Ibid.
Committee reasoned that a work was accessible if it was available at a fee. This interpretation of access is not without merit -- collectives form a vital link in the chain of streamlined access to protected works. However, Canadian copyright law's historical understanding of access to information has not been equivalent to available for a fee. This understanding of access disregards the very real contribution made by public institutions to our society, and undermines the scope of the fair dealing defence.

Fair dealing is an equitable defence excusing from liability those who engage in dealings with a protected work that would otherwise infringe copyright in that work. The Copyright Act does not define fair dealing, but rather simply asserts that "[f]air dealing for the purpose of research or private study does not infringe copyright."51 Fair dealing for the purposes of "criticism or review"52 and "news reporting"53 does not infringe copyright if the source and the name of the rights holder are mentioned. Two competing visions of the policy underlying fair dealing have emerged. The first, offered by those supporting an expanded scope of rights, argues that fair dealing essentially overcomes the problem of search costs: many socially valued of works that otherwise infringe copyright would never occur if users were forced to undertake expensive searches for rights holders in order to obtain permission. Since the costs of this search in many cases outweigh the benefit derived from the use, the use would likely never occur in the first place, and society would be the worse off for it.54 Those fair dealings not accounted for on this understanding, such as criticism, are privileged dealings that the market is unlikely to accommodate -- few people willingly allow themselves to be criticized, particularly if

51 Copyright Act, supra note 15 s. 29.
52 Ibid. s. 29.1.
53 Ibid. s. 29.2.
54 A recent American case. Princeton University Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996), aff'd, 855 F.Supp. 905 (E.D. Mich. 1994), came to precisely this result in the context of the American fair use provisions, despite the literal entrenchment within the fair use provision of "multiple copies for classroom use" as a use that qualifies for the fair use provision. The 6th Circuit court, sitting en banc, was swayed by the fact that the University outsourced the actual copying to a more efficient private copy agency, who could make a profit off of the service, as well as by the fact that a mechanism existed by which a license to copy could be paid.
that criticism might have an adverse impact on profitability. Thus, the market fails.\textsuperscript{55} To avoid this inefficient result, the Act simply grants the entitlement to use the resource to the user. A competing claim, and arguably the dominant historical understanding of the defence, posits that the Act permits fair dealing not because of prohibitive search costs, but for the value society places on the dealings themselves. We value criticism and private study for the contributions these dealings make to the marketplace of ideas. As such, fair dealing might be said to operate in close proximity to freedom of expression.\textsuperscript{56}

Bill C-32's treatment of access clearly embodies a transaction cost conception of fair dealing. The Heritage Committee, in re-writing the public institution exemption to exclude those works which could be licensed, has concluded that reproductions made by the public at those institutions could not avail themselves of the fair dealing defence. This presumes, of course, that a market exists for reprographic reproduction of works protected by copyright. While undoubtedly some users will infringe copyright through use of reprographic technologies at public facilities, many, if not most copies made would fall under the fair dealing defence as for private study or research. Although Bill C-32 does not definitively answer the question, it would seem that the Heritage Committee took the position that once a licensing mechanism is in place, institutional liability follows. Access issues are satisfied by the availability of a license. However, while pay-per-use has many advantages associated with it, the implications of this model for those who lack financial resources is troubling. This concern takes on even more importance as the world moves into digitally networked environments.

\textsuperscript{56}For a more complete treatment of this contention, see Fewer, \textit{supra} note 11.
II The RAM Copy

A The Digital Agenda

Both the American and Canadian governments recently appointed bodies to examine the implications of digital technology for copyright law, and to suggest ways in which copyright law might be modified to "enhance the Information Highway." Both reviewing bodies concluded that copyright law is capable with only moderate alterations of protecting digital works in networked environments. However, the alterations these bodies proposed are far from "moderate," and serve to fundamentally rework the balance copyright law strikes between the interests of copyright proprietors in profiting from copyright works and the interests of users in the ideas and information those works...

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58 In 1994 John Manley, Minister of Industry, convened the "Information Highway Advisory Council" (IHAC) to investigate and make recommendations to the Ministry on the creation of a Canadian Information Highway. The IHAC in turn convened an SubCommittee to examine the specific issues involving digital technology and copyright. The SubCommittee issued its preliminary report in December of 1994 (Copyright and the Information Highway (Ottawa: Industry Canada, 1994) [hereinafter Copyright SubCommittee, Draft Report], and submitted its final report in March of 1995 (Copyright SubCommittee, Final Report, supra note 20)). The SubCommittee's report was incorporated with minor changes into the Final Report of the Information Highway Advisory Council (Connection, Community, Content: The Challenge of the Information Highway, (Ottawa: Industry Canada, 1995) [hereinafter IHAC, Final Report].

59 Copyright SubCommittee. Final Report, ibid. at 3.

60 The Copyright SubCommittee concluded that, for the most part, the current copyright legislative and policy framework is sufficiently flexible to provide the means of effectively enforcing copyright on the Information Highway and, at the same time, providing users with reasonable access to protected works.

Copyright SubCommittee, Final Report, supra note 20, at 6. The White Paper came to a similar conclusion:

Throughout more than 200 years of history, with periodic amendment, United States law has provided the necessary copyright protection for the betterment of our society. The Copyright Act is fundamentally adequate and effective. In a few areas, however, it needs to be amended to take proper account of the current technology. The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.

White Paper, supra note 19, at 103 (footnotes omitted).
embody. If adopted, the recommendations of these bodies will render simply viewing a
document on-line an infringement of the copyright in that work. This is tantamount to
granting copyright proprietors an "exclusive right to read,"61 a sweeping alteration in the
balance between the interests of copyright proprietors and users that must be resisted.

Both the Canadian and American revisory bodies asserted that their goal was to
maintain that balance between copyright proprietors and users. The fact is that corporate
proprietary interests secured victories on almost every issue that these bodies considered.
What is more distressing is the rhetorical slight of hand and misrepresentation by which
these bodies articulated their recommendations that copyright law be altered to favor
proprietal interests. Controversial topics in copyright law, with authority on both sides
of the issue, were dismissed as having already been decided in favor of proprietorial
interests.62 At times the reviewing bodies misrepresented the state of the current law to
fit their agendas more congruently. The end product of both the Canadian and American
inquiries is a skewed vision of copyright law as it stands today, and tomorrow's copyright
revisioned as commercial and exclusionary and characterized by the dissemination of
information under the shadow of the law.

1) The RAM-Copy

At the core of the Copyright Act lies the copyright holder's "sole right... to
produce or reproduce the work or any substantial part thereof in any material form
whatever."63 The Copyright Subcommittee was of the view that:

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62 The most crucial of these was the sweeping conclusion by both revisory bodies that the electronic representation of a digitized work in the random access memory (RAM) of a computer constituted a reproduction of the work, despite the novelty of the claim, the vast implications for use and the existence of authority on both sides of the issue. See Copyright Subcommittee, Final Report, supra note 20, at 10 ("it is the Subcommittee's view that accessing a work constitutes a reproduction"), and the White Paper, supra note 19, at 33 (citing Advanced Computer Services v. MAI Systems Corp., 845 F. Supp. 356 (E.D. Va. 1994)).
63 Copyright Act, supra note 15 s. 3(1).
a work would be subject to the reproduction right where it is electronically reproduced. A fixed copy is considered to be reproduced when it is downloaded from a BBS [Bulletin Board System] to a hard drive, disk or any other storage device.64

This is hardly controversial. The storage of a work in the permanent memory of a computer is even more threatening to a copyright proprietor than the reproduction of that work by photocopying (or by producing a "hard copy" of a digital work), since a "pirate" can infinitely reproduce and distribute perfect copies of the original with much greater ease than is possible if the pirate were to work with atoms instead of bits. Much more troubling is the SubCommittee's conclusion that "accessing a work constitutes a reproduction."65 In other words, any use of a computer for a purpose involving a substantial part of a work protected by copyright, by necessity, will infringe upon the copyright proprietor's exclusive right to reproduce the work, even if no permanent copy of the work is retained by the user. The White Paper recommends a similar expansion of the rights of copyright proprietors.66

The activity of accessing a work in an on-line environment is known as "browsing". The Information Highway Advisory Council had more difficulty with this aspect of the SubCommittee's Report than it did with any other.67 That is not surprising: the SubCommittee's recommendations on "browsing" exhibit a callous disregard for the public interest in learning and the dissemination of knowledge in favor of the copyright industry's desire to control and seek potential for all potential uses of a work.

64Copyright SubCommittee, Final Report, supra note 20, at 10.
65Ibid.
66White Paper, supra note 19, at 33. Pamela Samuelson notes that "(u)ntil the NII Report... no one had ever thought to declare that merely browsing a copy of a copyrighted work could be regarded as an act of copyright infringement." (Samuelson, "Legally Speaking: The NII Intellectual Property Report" (1994) Communications of the ACM (online version, on file with the author), at 2.)
67A. Taylor, Department of Canadian Heritage, "Copyright and the Information Highway, (text for Report on 'Measures in Support of Canadian Content an Culture', Internal Communication of the IHAC SubCommittee on Copyright) at 1.
The SubCommittee's sole recommendation regarding browsing was that "(t)he act of browsing a work in a digital environment should be considered an act of reproduction."\textsuperscript{68} The Advisory Council could not bring itself to accept this recommendation unmodified. The final report stated:

6.4 a. It should be left to the proprietor to determine whether it should permit browsing. Proprietors should identify what part of their work is appropriate for browsing.
b. Amend the \textit{Copyright Act} to include a definition for "browse": "Browse" means a temporary materialization of a work on a video screen, television monitor or similar device, or the performance of the audio portion of such a work on a speaker or a similar device by a user, but does not include the making of a permanent reproduction of the work in any material form.
c. The \textit{Copyright Act} should define "publicly available work."\textsuperscript{69}

Recommendation 6.4 a. does not address the fundamental problem, since that is the \textit{de facto} situation under the current law, even with written works; after all, if an author does not wish the public to "browse" his or her work, he or she always has the option to contractually restrict access to it.\textsuperscript{70} This may seem a strange way to state the current law, since we ordinarily do not think that when we pick up a book off the shelf of a book store that we are acting with the permission of the copyright owner. The difference between the current law and the Copyright SubCommittee's recommendation on browsing is that under the current law, when we read a protected literary work as it is represented in a book, we do not violate any of the copyright owner's exclusive rights under the \textit{Copyright Act}. Even if the copyright owner has sought to restrict or even deny access to the work entirely, by contract or otherwise, when we lay our eyes upon the protected work we still

\textsuperscript{68}Copyright SubCommittee, Final Report, \textit{supra} note 20, at 14.
\textsuperscript{69}IHAC Final Report, \textit{supra} note 58, at 115.
\textsuperscript{70}Further, by not explicitly exempting users of "open-access" works from the threat of infringement, the Advisory Council leaves open the possibility that the proprietor may bring suit at a later date for a use of the work with which the proprietor disagrees. Unless the right is explicitly waived, it is still an exclusive right, and potentially enforceable.
do not violate any of the author's rights under the Copyright Act.\textsuperscript{71} The SubCommittee turns this state of affairs on its head as soon as the medium is bits instead of atoms. Instead of having the copyright proprietor take measures under private law -- contract -- to restrict access to a protected work, the SubCommittee's recommendation would have the public law -- the Copyright Act -- do all the work for him. Instead of enjoying a presumption of right, reading a work in a digital environment would now entail prima facie infringement. If the recommendation of the SubCommittee on this point becomes law, anytime we access a substantial part of a protected work through the use of a computer, we will infringe the copyright proprietor's exclusive right to reproduce the work. The White Paper contains similarly expansive reading of the reproduction right.\textsuperscript{72}

The mechanism by which the SubCommittee and White Paper deny users the right to read works in a digital environment is a legal fiction: since an accessed work's digital representation temporarily resides in a computer's random access memory (RAM), this temporary or ephemeral but machine-readable state constitutes a sufficiently fixed reproduction of the work to attract the protection of the Copyright Act.\textsuperscript{73} The Copyright SubCommittee maintained that its recommendation on "browsing" reflects the current state of the law, ignoring both the history of the Canadian law's treatment of ephemeral

\textsuperscript{71}Although we may be liable for breach of contract, trespass, theft, or worse, depending on the security measures the author has taken and the actions we have taken to evade those measures!

\textsuperscript{72}The White Paper argues that:

\begin{quote}
when a computer user accesses a document resident on another computer, the image on the user's screen exists -- under contemporary technology -- only by virtue of the copy that is reproduced in the user's computer memory. It has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material (because the work in memory then may be, in the law's terms, "perceived, reproduced, or... communicated... with the aid of a machine or device.").
\end{quote}

White Paper, \textit{supra} note 19, at 33.

\textsuperscript{73}The SubCommittee stated that it was

...of the view that browsing on the Information Highway entails the making of a copy; in order to browse, the work must be accessed. It is the SubCommittee's view that any act of accessing a work constitutes a reproduction, even if it is a temporary or ephemeral fixation. As such, browsing a work or a substantial portion of a work is subject to the right of reproduction.

Copyright SubCommittee, Final Report, \textit{supra} note 20, at 13.
recordings and fixation and competing interpretations of RAM fixity. The SubCommittee treated the issue as closed, when in fact it is very much a controversial and open question.

The Act states that "'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever." Copyright does not protect against immaterial reproductions; a work must be fixed in a tangible medium before it will attract the protection of the Copyright Act. Section 2 of the Act requires a "dramatic work" and "musical work" to be fixed before rights attach, and the Act implicitly requires the same for other works. Works transmitted by broadcast are not subject to copyright unless they are fixed prior to or simultaneous to transmission. Accordingly, the SubCommittee "is of the view" that "temporary or ephemeral" recordings are also "material" recordings. The Committee seemed particularly influenced by the decision of the American court in MAI Systems v. Peak Computer

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74 Copyright Act, supra note 15 s. 3(1) (emphasis added).
75 See Canadian Admiral Corp. Ltd. v. Rediffusion Inc. [1954] Ex. C. R. 382 (Exch. Ct.).
76 "dramatic work" includes
(a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise,
(b) any cinematographic work, and
(c) any compilation of dramatic works. Copyright Act, supra note 15, s. 2.
77 "[M]usical work' means any work of music or musical composition, with or without words, and includes any compilation thereof;" Ibid.
78 "A work that is communicated in the manner described in paragraph 1(f) [to the public by telecommunication] is fixed even if it is fixed simultaneously with its communication." Ibid. s. 3(1.1). This requirement is usually met by videotaping at the source.
79 The SubCommittee reported:
In reaching this conclusion, the SubCommittee reviewed the current case law related to the issue. In MAI Systems v. Peak Computer Inc. (April, 1993), the U.S. Court of Appeals ruled that the transfer of a work from a permanent storage device into the random access memory (RAM) constituted a reproduction, even though the reproduction was temporary and not permanently fixed by being downloaded onto a hard drive or floppy disk. Although the copy may be ephemeral in nature, if it exists for a sufficient duration to be viewed, it should be considered a reproduction. Copyright SubCommittee, "Copyright and the Information Highway, text for Report on 'Measures in Support of Canadian Content and Culture'" (18 August, 1995) at 4 (draft on file with the author) [hereinafter Copyright SubCommittee, "Measures in Support of Canadian Culture"]).
Inc., which concluded that a program stored only in random access memory is sufficiently fixed to constitute a work protected under the U.S. Copyright Act. The SubCommittee also noted that the English have statutorily amended their Copyright Act to accommodate "transient" or "incidental" copies such as are produced in RAM.

The quirk of digital technology that the SubCommittee latches on to in justifying the expansion of the reproduction right is its "transitoriness": although the work exists in RAM in the form of electrical impulses, a work stored in RAM will stay there until it is erased, over-written, or the computer is turned off. Once it is gone, there is no trace of the work; but while the computer is on, the work can be stored in RAM indefinitely. Pamela Samuelson points out that "[b]y this logic, holding a mirror up to a book would be infringement because the book's image could be perceived there for more than a transitory duration, i.e., however long one has the patience to hold the mirror."

Such an interpretation of copyright law seems strained at best, and encounters difficulties in the face of the clear language of the Copyright Act. The requirement of

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80991 F.2d 511, 519 (9th Cir. 1993). See also Advanced Computer Services of Michigan Inc. v. MAI Systems Corp., 845 F. Supp. 356 (E.D. Va. 1994); Triad Systems Corp. v. Southeastern Express Co., 1994 U.S. Dist. LEXIS 5390 (N.D. Cal. March 18, 1994) ("[C]opyright law is not so much concerned with the temporal 'duration' of a copy as it is with what that copy does, and what it is capable of doing, while it exists. 'Transitory duration' is a relative term that must be interpreted and applied in context.").


82U.K. Copyright Act (1988), s. 17(6) states "Copyright in relation to any description of works includes the making of copies which are transient or are incidental to some other use of the work." It may be argued that far from confirming the SubCommittee's position, the requirement of a statutory amendment to capture RAM fixations within the body of English copyright law is evidence that the current Canadian Act should not treat temporary storage in RAM as a reproduction.


84The logical absurdities of the position taken by the SubCommittee can be seen in judicial interpretation of the U.K. statute. In Bookmaker's Afternoon Greyhound Service Ltd. v. Wilf Gilbert (Staffordshire) Ltd. (1994), 21 F.S.R. 723, the court held that a reproduction in a material form included even the appearance of a broadcast work on a television screen. Academic response to the decision in MAI Systems and those cases that have followed it have been highly critical: see R. Katz & J. Arnold, "MAI v. Peak: An Unprecedented Opinion with Sparse Analysis" The Computer Lawyer (May 1993) at 18; T. Arriola, "Software Copyright Infringement Claims After MAI Systems v. Peak Computer" (1994) 69 Wash. L. Rev. 405; M. Johnson, "The Uncertain Future of Computer Software Users' Rights in the Aftermath of MAI Systems" (1994) 44 Duke L. J. 327; J. Sigall, "Copyright Infringement was Never this Easy: RAM Copies and their Impact on the Scope of Copyright Protection for Computer Programs" (1995) 45 Cath. U. L. Rev. 181.
simultaneous fixation for broadcasts indicates at least to some extent that purely electrical signals are insufficient in themselves to constitute a fixed work. More troubling is the failure of the SubCommittee to admit that it was arguing one side of a very live debate. A Canadian study on new media and Copyright by NGL Nordicity commissioned by the government just one year earlier had studied the "browsing" problem, and apparently come to the opposite conclusion. The Nordicity study stated that "the problem is more with material that is 'downloaded' from a network or a CD-ROM than with users who 'browse' material. In fact, 'downloading' would be a reproduction (for the purposes of copyright)." The SubCommittee failed to indicate that it had given any consideration to cases in which courts had come to the opposite conclusion. In Australia, the Federal Court of Appeal held that a computer program displayed on a computer screen did not constitute a reproduction of the work. Most perplexingly, U.S. government documents accompanying the passage of the 1976 Act explicitly state that Congress had considered and rejected the possibility that a display on a terminal or screen should constitute a reproduction.

The Copyright SubCommittee dismissed the impact of this interpretation of the reproduction right on the ability of users to access and use works on the Information Highway, because "[c]opyright owners are able to authorize, in advance, the reproduction of their works in a digital environment and negotiate fees accordingly." Again, this represents an inversion of the law as it exists in the world of atoms. Instead of having to take measures to restrict access to protected works, the copyright proprietor now must affirmatively act to waive rights and allow non-infringing access.

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85 Copyright Act, R.S.C. 1985, c. C-42, s.3(1.1).
86 NGL Nordicity, Study produced for Industry Canada, "Study on New Media and Copyright: Final Report" (April, 1994).
87 Ibid., at 29.
90 Copyright SubCommittee, Final Report, supra note 20, at 13.
2) Reading: Whose Right?

So there is the bill of goods. The question is, does Parliament buy it?

The answer to that question partly depends on the answer to another question: what problem do these recommendations address? The SubCommittee has stated that it was guided by a concern to see that the balance between the interests of copyright proprietors and users should be maintained; it is submitted that what in effect occurred constitutes a recalibration of that balance, or worse, its dismissal. User interests at every turn were construed as an impediment to the ability of the copyright industry to control every use of a work it holds rights in, and to exact a tithe on every use it permits. If this is the solution, then the problem must have been that the copyright industry is in danger, struggling economically and threatening to retire comfortably to the United States. However, economic evidence shows that this is not the case: the copyright industry includes some of the strongest economic interests in the nation.

The problem with browsing is that it uses the work. And it must be recalled that the use of the work we are talking about is reading: there is no other way to read a work

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91 See Copyright SubCommittee. Final Report. supra note 20, at 3-4 ("In formulating its recommendations, SubCommittee members agreed that a balance should be struck between the needs of creators and users.")

92 To read the submissions to the Copyright SubCommittee of some of these interests, one wonders how they have managed to eke out an existence this far into the Information Age. The Periodical Writers Association of Canada informed the SubCommittee that "Creators are losing income as a direct consequence of copyright theft, although the exact amount has yet to be estimated due to the number of undetected offenses. As the Information Highway grows, so will creators' losses." Periodical Writers' Association of Canada (PWAC), "Submission to Copyright SubCommittee" (28 February, 1995) at 1. It should be noted, however, that the infringing activities the PWAC complains of stem from unauthorized placement of protected works on the Information Highway, rather than from works legitimately placed online but accessed without authorization.

93 According to Industry Canada, communications and computer service-producing industries generated approximately $35 billion in revenues, provided 260 000 jobs, and contributed 4.3% to the gross domestic product of the nation in 1994; telecommunications carriers alone contributed $16 billion to the gross domestic product, or 3% of the total. The film, video and sound recording industries, along with the heritage industries and related enterprises, all combined, employ over 120 000 people, and together with the publishing industry generated $5 billion in 1992. Industry Canada, "The Information Economy in Canada Fact Sheets (Prepared for the G7 Ministerial Meeting of Information Society)" (February, 1995) at 1.
in an on-line environment than to browse it. Reading is undoubtedly a "good thing."
And if reading is good, then so is browsing. So the Copyright SubCommittee
recommends that reading a protected work on-line will render the reader liable for
infringement. In fact, all uses of protected works on-line will constitute infringing acts
unless one of three conditions is met: 1) the work is in the public domain; 2) less than a
substantial part of a work is accessed; or 3) the proprietor of the protected work has
waived his or her right to reproduce the work.

The copyright community feels that it must control all uses of a work. Here's the
rub: copyright law has never endowed proprietors with a right to control all uses of a
work when that work consisted of atoms, and it has particularly never regarded reading as
an infringement of copyright. Picking up a book in a bookstore and leafing through its
contents, or going through a library and perusing its holdings have always been attributes
of the free flow of information in the marketplace of ideas.94 Ideas and expression are
intimately linked; both Canada95 and the United States96 have entrenched the freedom of
expression in their Constitutions. Governments should tread with light steps in their
vicinity; however, both the White Paper and the Copyright SubCommittee, in granting to
proprietors "an exclusive right to read",97 trample the expressive rights of users of
copyrighted works in the rush to expand the rights of intellectual property proprietors.

A review of the claims made by both sides of the browsing debate indicates that
the two sides may have been talking past one another. On the one hand, those with
interests in the use of materials subject to Copyright want to ensure that activities that
they already enjoy with copyrighted atoms -- books -- are not rendered infringing

94 See Litman, "The Exclusive Right to Read" supra note 61; Samuelson, "Legally Speaking: The NII
95 The Charter of Rights and Freedoms, supra note 15 s. 2(b).
96 United States Constitution, Amend. I.
97 Litman, "The Exclusive Right to Read", supra note 61.
activities merely because they are now dealing with bits. On the other, copyright proprietors strenuously resist any notion of browsing as a right; in other words, copyright proprietors do not want a "user's browsing right" to enjoin them from restricting public access to their intellectual property (be it contractually, technologically, or by locking it up forever). A more sinister interpretation of the copyright industry's arguments may conclude that they amount to opportunistic rent-seeking: the SubCommittee presented an opportunity to reshuffle the copyright deck so as to stack the cards in the industry's favor. Given that these corporations and collective rights organizations are driven by motive of profit, and not by any compelling vision of the greater good of Canadian society, this is a difficult charge for the industry to refute.

As a final note, interpreting works stored in RAM as reproductions leads to inconsistent results for identical activities. Two individuals conducting identical searches of two files will attract differing liabilities depending on the size of the document they are searching. If the first document is small, so that its entirety is stored in the RAM of the user's computer, a violation of the proprietor's reproduction right has occurred. Conversely, if the second document is very large, such that only a portion of it -- an insubstantial portion -- is stored in RAM, no violation has occurred. But the activities of the users, are identical in both circumstances.

The most powerful argument against the RAM-copy is the charge that it violates the Act's policy of technological neutrality: that dealings with works embodied in atoms (books) that are not restricted under the Copyright Act will now come within the ambit of

98Copyright SubCommittee, Final Report, supra note 20, at 13; see Libraries and Community Information Branch, Archives of Ontario, "Comments on the Preliminary Report of Copyright and the Information Highway" (27 February, 1995) at 2 [hereinafter Archives of Ontario] ("If the public is permitted to browse published and unpublished print material, that right to access should be available for electronic material.")
99Copyright SubCommittee, Final Report, supra note 20, at 13.
the copyright owner when the work is embodied by bits. Particularly, reading a book, browsing the shelves of a library, skimming a newspaper, watching a film, and dancing to music have always been attributes of our liberties under a Parliamentary democracy, not benefits conferred on the public by the *Copyright Act*. The SubCommittee took odds with this library/bookstore/browsing analogy, asserting that there is a commercial transaction intervening between the browsing user and the proprietor in the context of the library or bookstore; in a digital environment, it is argued that browsing usurps the possibility of a commercial transaction, since the user extracts the service's benefit without compensating the proprietor. This reply makes two faulty assumptions: first, that it is impossible to conduct financial transactions and otherwise to contract on the Information Highway, and second, that since the Internet allows the end-user to circumvent market intermediaries and approach the service provider directly, that this destabilizes the market for the work to the point where its viability is impossible to maintain. The first point assumes that contract law cannot survive in digitally networked environments, which the passage of time has clearly shown to be unfounded.

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102See, e.g., the submissions of the Archives of Ontario, *supra* note 98, at 2. ("If the public is permitted to browse published and unpublished print material, that right to access should be available for electronic material. It should be technology-neutral and should be unaffected by the storage medium.")

103The industry, The White Paper, and the SubCommittee all take the view that the Act confers no rights on users, but rather confers on copyright owners the right to exclude. Leaving aside the issue of exceptions and fair dealing, this position simply misstates the nature of a statutory regime such as the *Copyright Act*. Before the *Copyright Act*, the rights of users in relation to intellectual works were limited by the common law (trespass and contract), the criminal law (sedition and blasphemy), and any statute law that may have related to specific works. After the enactment of copyright law, the rights of users remained the same, but now subject to rights granted proprietors by statute. The statutory rights of proprietors are exceptions to the public's right to deal with intellectual works as they would, and these exceptions are enumerated, limited in time, and limited in scope. They are a right to exclude, but only in relation to certain uses for certain times.

104Gail Dykstra, Member of the Information Highway Advisory Council's SubCommittee on Copyright, Memo on "browsing" (draft on file with author).

105The SubCommittee argued that:

   The analogy... is faulty; in a library, rarely would users read an entire work and then photocopy it. In a digital world, users can browse an entire work, an exercise which in fact constitutes a use of the work.

Copyright SubCommittee, "Measures in Support of Canadian Content and Culture", *supra* note 79, at 4.

106It should be pointed out that a third faulty assumption underlies the argument: that the *Copyright Act* bestows upon the author the right to control the use of the work. Of course, the Act does not.
The second point is even more specious, when one considers that the market intermediaries that the Information Highway threatens to bypass are publishers, sound recording distributors and other powerful members of the copyright industry.

Advocates of designating browsing as an infringing activity point to the special nature of information products. Often all of the value to a database or other digital service is constituted in the production of a single fact from that service, in which case all of the utility of that service is engaged by the browsing activities of a user. The simple answer to this concern is to regulate access to the service. The principles of contract operates equally well in Cyberspace. If the risk of informational free riders counsels against placing services in a networked environment with open access, do not place it there. Use a commercial network instead, where access is monitored and metered.

Content providers should treat their products no differently as bits than they do as atoms. Newspapers and movie tickets are sold, not given away; the Information Highway possesses the capacity to regulate access.

The SubCommittee has stated that their interpretation of the reproduction right would in practice have little effect on the public's use of intellectual works,107 and that the specter of copyright proprietors suing downstream users for merely accessing protected works is unlikely.108 The SubCommittee in making this claim unrealistically envisions that infringement actions will be limited to cases in which the copyright proprietor is seeking to protect his or her economic interest in an intellectual work, and prevent...

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107"The SubCommittee is of the view that the limitation to users' ability to access works is not, in the context of browsing, a major issue." Copyright SubCommittee, Final Report, supra note 20, at 13.
108The SubCommittee stated:

For those limited cases in which a work is placed on the Information Highway without authorization for browsing, the fair dealing defense may very well be available to the user. But the SubCommittee is not convinced that such rare instances warrants a change in the fair dealing provisions in the Act.

Ibid. at 14. Proprietorial interests making submissions to the Copyright SubCommittee were anxious to dispel the notion that this increase in the range of activities users would now be liable for would be accompanied by an increase in the volume of litigation pursued under the Act.
another from "pirating" or "free riding" on the time, effort and creativity of the author. 109

However, both in Canada and the United States, infringement actions have not

exclusively followed this pattern. Copyright has been raised to stifle critique, 110 to

control parody, 111 to prevent biographical work, 112 to undermine transformative works, 113
to withhold knowledge from the public, 114 and as a weapon in labour disputes. 115 All of

109 It is important to note that the author is seldom the holder of the copyright in a published work - it is

usually a precondition to publication that the author transfer all rights in the work to the publisher. In fact,

the Periodical Writers Association of Canada complained of this very feature of copyright law in their

submission to the Copyright SubCommittee. See PWAC, supra note 92, at 6-7.

110 Hubbard v. Vosper (1971), [1972] 2 W.L.R. 389 (C.A.) (Church of Scientology attempted to prevent a
dissentident Church member from using some of the unpublished writings of Scientology founder L. Ron
Hubbard in a critique of the cult); New Era Publications International, SpA v. Key-Porter Books Ltd.
(1987), 18 C.P.R. (3d) 433 (F.C.T.D.) (Scientology again attempts to suppress the public disclosure of
sensitive Church materials, launching actions in several different venues internationally); Walt Disney
Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (Disney
enjoins use of its characters in a counter-culture magazine that lampoons Disney's simplistic moral views).

Live parodies "I Love New York" with "I Love Sodom"); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)
(defendant parodies "When Sonny Gets Blue" with "When Sonny Sniffs Glue"); Campbell v. Acuff-Rose
Woman" a fair use).

restraining defendant from using an unpublished letter written by J. D. Salinger in a biography of the
reclusive writer).

113 Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (post-modern artist Sherrie Levine enjoined from
utilizing the protected works of others in appropriational artworks).

based on quotations from Scientology founder L. Ron Hubbard's unpublished writings); New Era
based on passages quoted from Hubbard's published and unpublished writings); New Era Publications
(2d Cir.), cert. denied 110 S. Ct. 1168 (1990) (action based on passages quoted from Hubbard's published
and unpublished writings): see also New Era Publications Int'l ApS v. Carol Publishing Group, 904 F.2d
152 (2d Cir.), cert. denied 111 S. Ct. 297 (1990) (action based on quotations from Hubbard's published
writings); Religious Technology v. Netcom On-line Communications Servs., 907 F. Supp. 1361 (N.D. Cal.
1995) (action based on the published but secret "higher stages" works of Scientology). See also Lion
Laboratories Ltd. v. Evans, [1985] Q.B. 526 (C.A.) (corporation manufacturing breathalyzers seeks to use
copyright to restrain publication of internal memo expressing concern over unreliability of products
currently in use by police in Britain).

115 Rotisseries St-Hubert Ltée v. Le Syndicat des Travailleurs (Euses) de la Rotisserie St-Hubert de
Drummondville (C.S.N.) (1986), 17 C.P.R. (3d) 461 (Que. Sup. Ct.) (use of logo of restaurant in picket
signs an infringement of the plaintiff's copyright in the logo); Canada Safeway Ltd. v. Manitoba Food
and Chemical Workers, Local 832 (1983), 73 C.P.R. (2d) 234 (Man. C. A) (use of logo of restaurant in
picket signs an infringement of the plaintiff's copyright in the logo); Cie Générale des Établissements
a form of expression, lay outside the scope of freedom of expression).
these uses of copyright materials orbit close to the core of values inherent to freedom of expression. Expanding the reproduction right to encompass not only unauthorized reproduction, but also unauthorized reading, provides copyright proprietors with a powerful new lever with which to control uses of copyright materials that the proprietor does not approve of. The only defence mechanisms that the public would have against this weapon would be a corresponding expansion of the fair dealing defence, and the intervention of the Charter in the infringement calculus.

Given these considerations, it may be wise to consider the constitutionality of the SubCommittee's proposals before they become the law in Canada. Fortunately, Canada has that opportunity. The IHAC Final Report concludes its discussion of browsing by recommending that "further study and consultation with stakeholders will likely be required before this complex issue can be fully resolved." There is time to formulate a response, and suggest alternatives.

3) Alternatives

Both the White Paper and the SubCommittee embraced the RAM-copy as the answer to the digital dilemma. The irony is that both reports identified the capacity of existing and future mechanisms to address the concerns of content providers with on-line access. Contract law and technological solutions, both conspicuously absent from discussion of the reproduction right, re-emerge later in both reports. Contract law reappears in the SubCommittee's deliberations in two convenient locations: first, the SubCommittee shrugs off concerns that its proposals will decrease the volume of intellectual works available over the Information Highway by asserting that proprietors can clear intellectual property rights "in advance. Second, the SubCommittee envisions

116As well as private and unauthorized publication, performance, and communication by telecommunication — recall, by latching on to the use of a computer (and hence of a RAM "reproduction") in these otherwise acceptably private dealings, the copyright proprietor can tackle private dealings that would otherwise fall on the non-infringing side of the Act's public/private distinction for these dealings.

117IHAC Final Report, supra note 58, at 120.

118Copyright SubCommittee, supra note 20, at 13.
a role for contract law in the activities of rights clearance centres and other forms of collective administration on the Information Highway.\footnote{The SubCommittee recommends "the creation of administrative systems to streamline the clearance of rights for use of works in a digital medium." Recommendation 6.12 a., IHAC Final Report, \textit{supra} note 58, at 119.}

Moreover, technological solutions may provide ideal solutions to what are, after all, technological problems. The nature of commercial markets is such that commercial services fulfill commercial needs. Copyright is no different. As John Perry Barlow notes, \"(s)olutions will emerge. Nature abhors a vacuum and so does commerce."\footnote{John Perry Barlow, \"The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong\" 2(3) Wired (March 1994) 84, online version at 15.} Where contractual law is unable to fill a void, technology can step in. The Copyright SubCommittee agreed, recommending the "development and standardization of user-acceptable ways to track use of protected works\"\footnote{Recommendation 6.11 a., IHAC Final Report, \textit{supra} note 58, at 118.} and the "development and use of 'identifiers' to be included in the distribution of protected works in a digital format to make it easier to trace copyright ownership and unauthorized use of protected materials."\footnote{Recommendation 6.11 b., IHAC Final Report, \textit{supra} note 20, at 119.} These recommendations accurately foresee the centrality of technological protections to what is, after all, a fundamentally technological medium. John Perry Barlow argues that "encryption will be the technical basis for most intellectual property protection."\footnote{Barlow, \textit{supra} note 121, at 20.} Other technological solutions include digital watermarking,\footnote{Digital watermarks "encode digitized information with attributes that cannot be disassociated from the file that contains that information. This field of technology has been termed "steganography" and been conceptually referred to as "digital fingerprinting" or "digital watermarking." (White Paper, \textit{supra} note 19, at 90.)} encryption,\footnote{Encryption techniques use 'keys' to control access to data that has been 'encrypted.' Encryption keys are actually strings of alphanumeric digits that are plugged into a mathematical algorithm and used to scramble data using that algorithm... The result is a new sequence of digital data that represents the "encrypted" work. Anyone with the key can decrypt the work by plugging it into a program that applies the mathematical algorithm in reverse to yield the original sequence of binary digits that comprise the file. (White Paper, \textit{supra} note 19, at 88) (footnotes omitted).} and digital signatures.\footnote{Barlow, \textit{supra} note 121, at 20.} The SubCommittee went so far as to recommend...
that "[t]ampering or by-passing, for the purposes of infringement of any kind of encryption or copyguards, should be made a criminal offense under the Copyright Act."\textsuperscript{127}

These arrangements are all preferable to the expansion of proprietorial rights under the Copyright Act. The Information Highway is a technological medium; it lends itself to technological solutions.

4) \textit{Going International}

The Americans have not been successful in implementing this Digital Agenda to date. The implementing legislation, H.R. 2441, 104th Cong., (1995) died in Committee, ambushed by sudden and vocal opposition from user's groups, telecommunications firms, internet service providers, and libraries, educational institutions, and other publicly-minded institutions who recognized the White Paper's proposals for what they are: a gift to the copyright industry. Undeterred, the Clinton administration attempted to repeat their success at the TRIPS Agreement negotiations in 1994 by enshrining the White Paper's key reforms in an international Treaty -- the Berne Convention, which governs international standards of copyright protection. Again, however, the Clinton administration was beaten back; as Pamela Samueelson noted,

\begin{quote}
the real news is what \textit{didn't} happen at the World Intellectual Property Organization (WIPO) gathering in Geneva, a diplomatic conference convened to hammer out a new copyright treaty for the digital age. The Clinton administration's agenda -- an agenda that Hollywood and other major copyright industries lobbied hard for -- was resoundingly defeated in an international forum.\textsuperscript{128}
\end{quote}

\textsuperscript{126}A digital signature is a unique sequence of digits that is computed based on (1) the work being protected, (2) the digital signature algorithm being used, and (3) the key used in digital signature generation. Generating a digital signature uses cryptographic techniques, but it is not encryption of the work; the work may remain unencrypted so it can be accessed and used without decryption." (The White Paper, \textit{supra} note 19, at 89) (footnotes omitted).

\textsuperscript{127}Recommendation 6.11 e., IHAC Final Report, \textit{supra} note 58, at 119. The SubCommittee may be going too far on this point: the SubCommittee does not give any consideration to infringing uses that are otherwise acceptable under the Copyright Act's fair dealing provisions. See \textit{Nintendo of America v. Camerica Corp. et al.} (1991), 34 C.R.R. (3d) 193. Assumably, the fair dealing defense will apply, even in the criminal context. See \textit{R. v. Laurier Office Mart Inc.} (1994), 58 C.R.R. (3d) 403 (Ont. Ct. Prov. Div.).

\textsuperscript{128}P. Samuelson, "Copyright Cartel: How a Grab for Copyright Powers was Foiled in Geneva -- Big Media Beaten Back" 5.03 Wired (February, 1997) (available at
The copyright Treaty as ultimately accepted by delegates to the diplomatic conference refused to require that the RAM-copy be defined as a reproduction for the purposes of domestic copyright law. Instead, the Treaty remained silent on the topic, leaving the matter for the consideration of each member state.129

Of course, the battle over the RAM-copy is far from over. The US is likely to look to its success at the World Trade Organization negotiations as a model for linking the expansion of intellectual property rights to other trade issues, and re-introduce the Digital Agenda in future regional and global trade pacts. However, the hope is that by the time that the US is prepared to do so, the international position -- including Canada's -- will have solidified around a position favoring liability free reading of digitized works. The public interest in access to information demands no less.

III Conclusion

Access to works protected by copyright is under pressure. Both the Standing Committee on Canadian Heritage and the Copyright Subcommittee embraced a vision of copyright law that was not grounded in the positive law of the Copyright Act, but in the rhetorical excesses of creators and corporate intermediaries. It was not simply the interest of the public in the use of copyright materials that these Committees failed to take into account; rather, they discounted principles of reasonable access and the public's interest in the free flow of knowledge and the dissemination of information, all tenets of freedom of expression, to the point where the some of their recommendations and legislative amendments are constitutionally suspect.130 These measures have (and in the case of the Subcommittee recommendations, may have) serious ramifications for the balance of

130The recommendation on the reproduction right, if enacted, would most likely come under a Charter challenge and, it is submitted, would not survive in the form envisioned by the Subcommittee.
payments in this country. Canada is already a net importer of intellectual property. Increasing the rights of copyright proprietors, and thus the flow of funds to their coffers, would only exacerbate this problem. It is easy to justify the American White Paper's partiality towards the software and entertainment industries in the United States on the basis of their contributions to the Democratic Party's war chest and to the American economy as a whole. It is more difficult to find such rationales in Canada.

The central argument of the Final Report, that accessing a substantial portion of a digital work amounts to a reproduction of that work in a computer's random access memory (RAM), amounts to a rewriting of the Copyright Act. This expansion of the reproduction right would also violate the Act's commitment to technological neutrality, since it would still not be a violation of the rights granted under the Copyright Act to merely read or listen to a protected work outside of a digital environment. This recommendation is all the more troubling given the capacity for contract law and technological innovation to solve the challenges of on-line security. Commercial pressures will compel the protection of intellectual property in digital networked environments; the efforts of the copyright SubCommittee to revision the law into a weapon of the copyright industry are unnecessary, and amount to a distasteful display of corporate rent-seeking. The public interest in the dissemination of knowledge and the advancement of learning, however, had no such champion before the SubCommittee. The conclusions of the final Report reflect this imbalance.

The Information Highway still promises to fundamentally reshape the way Canadian society does business, and still holds potential for revitalizing Canadian democracy by permitting unprecedented access to information and to the means of voicing one's thoughts. The SubCommittee's Final Report, however, privileges the first of these potentialities at the expense of the second. Before Parliament considers the feasibility of revising the Copyright Act to accommodate the digital age, it must find a
way to give voice to the public interest the SubCommittee and the Standing Committee on Canadian Heritage so resolutely ignored.
Chapter 5: Pharmaceutical Patents and Compulsory Licensing: Canada's Review of Bill C-91

I Introduction

This Chapter examines the public's interest in a specific area of patent law -- pharmaceutical innovations. This topic has been selected for scrutiny because its treatment at the hands of Canadian legislators and policy makers contrasts so sharply with the treatment accorded the subject matter of the previous Chapter, issues of access to copyright materials. The Canadian government has long appreciated that pharmaceutical patents touch upon a significant public interest that merits a powerful tailored remedy. In the past, Parliament has favoured the compulsory license. Access to copyright protected works, in contrast, has never been recognized by legislators as meriting so vigorous statutory manifestation. Historically, the public interest in pharmaceutical patents has been well represented by market forces, government agencies, and private institutions.

The public interest in access to works protected under the Copyright Act, in contrast, suffers from a relative dearth of market-oriented parties and government champions, and in fact usually enjoys the persuasive resources of only publicly-minded institutions such as libraries and educational institutions. Pharmaceutical patent law is therefore an ideal foil to copyright access for consideration of the public interests that Parliament finds pressing, and the role of interest groups in identifying and safeguarding that public interest through tailoring explicit remedies.

No area of intellectual property protection in Canada has been the subject of more controversy than pharmaceutical patents. Patents grant inventors limited monopolies in their inventions as "a reward, an inducement, to bring forth new knowledge," permitting inventors, or their assignees, to charge monopoly prices for use of the invention. Thus,

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patent law seeks to benefit society, in the long run, by trading off between incentives to create and restrictions on the dissemination of inventions.

Pharmaceutical patents, like other patents, permit their owners to sell their wares at monopoly prices. Pharmaceutical patents therefore increase the cost of health care. The problem with this is that consumers priced out of the market simply do not receive the medical care they require: monopoly pricing places medication out of the reach of those priced out of the market. In Canada, socialized health care helps ensure that this does not occur; provincial drug purchasing plans provide funds to ensure that citizens in need of patented medicines receive them. However, these plans have two undesirable effects. First, state financed drug purchasing plans remove a natural drag on the ability of pharmaceutical patentees to raise prices above marginal cost. Drug purchasing plans ensure that fewer consumers are priced out of the market, which, assuming that governments will tolerate higher drug prices than the least price-tolerant citizens, in turn permits drug prices to reach equilibrium at a higher point. Second, state funding of drug plans places the burden of meeting the monopoly pricing of pharmaceutical patentees on taxpayers. Therefore, although state sponsored drug plans ameliorate the deadlier effects of pharmaceutical patents, they exacerbate the social cost of those patents. These pressures have had their impact on Canadian health care: historically, Canada has had among the highest prices for pharmaceuticals in the world. Patent policy is essentially a form of industrial policy, it would therefore seem unobjectionable for the state to intervene in the patent regulatory regime to minimize this burden or place controls on drug pricing.

The debate over pharmaceutical patents has been framed in terms of competing interests of the public. This Thesis has identified three general values that comprise the

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2 Lexchin, *Pharmaceuticals, Patents and Politics: Canada and Bill C-22* (Ottawa: Canadian Centre for Policy Alternatives, 1992) at 2.

public interest in intellectual property: efficiency considerations, distributive concerns, and democratic values. While the last of these -- democratic values -- does not really enter into the debate over pharmaceutical patents, the others, efficiency and distributive considerations, clearly do. Patent laws exist to overcome the common pool problem known as the tragedy of the commons; they seek to allocate resources in inventive technologies by ensuring that inventors have the opportunity to commercially exploit their inventions. Pharmaceutical patents, on the other hand, tend to be essential goods (i.e., enjoying a relatively inelastic demand curve) whose market is supplied by public funds. In this context, the combination of pharmaceutical patents and publicly supported drug plans may create a market that is too lucrative. If so, the public's concern for the integrity of efficient markets for inventions may be in conflict with the public's interest in the allocative efficiency of the national economy. Further, the national interest affordable health care represents an area in which the public has expressed a fundamental interest in distributive values: every Canadian should have access to affordable health care. Expensive patented pharmaceuticals present a bar to the fulfillment of that national goal.

Since early in this century, the Canadian government has manipulated its patent laws to shape a regime of patent protection that facilitates national health care objectives while paying lip service to the objectives of Canada's patent laws. Specifically, Canada has made use of a compulsory licensing regime to encourage price competition in pharmaceuticals. Compulsory licensing was first implemented in 1923, when the Patent Act\(^4\) was amended to allow compulsory licenses to use a patented process to manufacture a drug in Canada.\(^5\) In 1969, the Liberal government expanded the compulsory license to include the importation of patented pharmaceuticals.\(^6\) As a result of these measures, a domestic pharmaceutical industry sprang up for the first time, although it specialized in

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\(^5\) *Eastman Report*, *supra* note 2 at 1.

\(^6\) Ibid.
the manufacture of generic drugs, rather than developing and patenting new pharmaceuticals; prior to 1969, the majority of pharmaceutical suppliers in Canada were powerful multinational firms from Europe and the United States. These policies also had a positive -- although not overwhelming -- effect on Canadian health care. A government Commission of Inquiry into the Pharmaceutical Industry (the Eastman Report) conservatively estimated that the compulsory licensing provisions of the *Patent Act* saved Canadians approximately $211 million in drug costs, with little impact on the profitability of the pharmaceutical industry. Another reviewer noted that by 1993, the multinational pharmaceutical companies had lost only 3.1 per cent of the Canadian market to the generic drug manufacturers.

In 1987, under intense pressure from the international pharmaceutical industry lobby, as well as from the United States, the Conservative government passed Bill C-22, which substantially amended the compulsory licensing regime that had been in place previously. Compulsory licenses could issue only after the pharmaceutical manufacturer had enjoyed a minimum of seven to ten years of the patent term. Bill C-22 also created the Patented Medicine Prices Review Board (PMPRB), a quasi-judicial administrative board assigned the task of monitoring and reporting on the introductory prices of new drugs, and also the rate of rise in drug prices. The Board was also authorized to penalize firms introducing drugs at "excessive" prices, or who raised drug prices at a rate exceeding that of the Consumer Price Index.

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7Ibid. at 54 (noting that only 20% of those employed in the Canadian pharmaceutical industry work for Canadian companies, and that only 16% of the value of factory shipments are accounted for by Canadian pharmaceutical companies); Lexchin, supra note 3 at 2.


9Eastman Report, supra note 2 at 315-6.

10Ibid. at 158 ("[Pharmaceutical] profitability did not fall after the 1969 amendments to the Patent Act.")

11Lexchin, supra note 3 at 3.
In 1993, the Liberal Party again altered Canada's pharmaceutical patent policy, this time in response to the North American Free Trade Agreement\(^\text{12}\) and the TRIPS Component of the Uruguay Round GATT Agreement\(^\text{13}\). Bill C-91 abolished the compulsory licensing regime of Bill C-22 entirely, ostensibly as a requirement of Canada's newly acquired trade obligations. However, the Liberals did keep in place the PMPRB, and introduced a number of provision to enhance competition in the market upon patent expiration. Bill C-91 also required that the sections of the Patent Act relating to pharmaceuticals were to be referred to a committee of either or both Houses by February 15, 1997. The federal Liberals have duly commissioned a hearing, but it would appear that the prospects of the Liberals re-introducing a compulsory licensing regime are dim. Both Health Minister David Dingwall and Industry Minister John Manley have asserted that Canada must respect international trade obligations before considering the re-introduction of compulsory licensing,\(^\text{14}\) and suggested that Canada is in fact barred by its international trade obligations under the WTO from implementing such a regime. Such a claim represents either a misreading of the TRIPS Agreement, or an attempt to sidestep political responsibility for Bill C-91's perceived harms, if any. While the merits of re-introducing compulsory licensing are debatable, the claim that it is now impossible to adopt a compulsory licensing scheme without violating our trade agreements is refutable.


\(^{13}\)Agreement on Trade-Related Aspects of Intellectual Property (being Annex IC to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakech, Morocco, on April 15, 1994, establishing the World Trade Organization) component to the GATT (General Agreement on Tariffs and Trade, 30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700) [hereinafter TRIPS Agreement].

This Chapter reviews Canadian pharmaceutical patent policy under Bill C-91 and examines the performance of the Industry under the rules it has laid down to determine whether Canada's best interests lie in re-introducing compulsory licensing or maintaining the current regime of relatively strong patent protection for pharmaceuticals. Part II reviews the theoretical justifications for patent law, and considers concerns over the interaction between health care and legal monopolies, and the utilization of compulsory licenses to overcome these concerns. Part III briefly recaps Canada's historical treatment of pharmaceutical patents up until the present. Part IV examines the contemporary Canadian pharmaceutical industry, and considers whether or not Bill C-91 has succeeded in its twin goals of keeping patent drug prices down while simultaneously encouraging pharmaceutical investment in Canada. Part V considers the Liberal government's claims that Canada is barred from re-introducing a compulsory licensing regime by its international trade obligations, before turning in Part VI to a consideration of the application of public choice theory to the Canadian pharmaceutical patent policy formation process. Part VII concludes that regardless of the availability of compulsory licensing, the current regime under Bill C-91 has been generally effective in meeting Canada's objectives for the Canadian pharmaceutical industry. While the Canadian government's pharmaceutical patent policy is ostensibly the correct one, the government should nonetheless be chastised for seeking to evade responsibility for those harms its chosen policy ultimately works.

II Economic Theory and Pharmaceutical Patents

A strong case can be forwarded that inventions should be respected as a property of their inventors based on notions of "natural right." The preamble to the French Patent Act of 1789 expressly adopts such a basis:

Every novel idea whose realization or development can become useful to society belongs primarily to [the person] who conceived, it would be a
violation of the rights of [humanity] in their very essence if an industrial invention were not regarded as the property of its creator.15

Neither Canada nor the United States has ever subscribed to a natural right justification for patent law. Rather, Canada has always protected inventions under patent law on theory of statutory utilitarianism. As Industry Canada has recently noted,

[Patent] protection enables inventors to benefit from their creations, providing an incentive to perform research and development and stimulating the advancement and diffusion of technology. Under Canada's Patent Act, the information in patent documents must be made public within a specific period of time. Thus, patents also promote the sharing of technical knowledge.16

Thus, while the goal of the Canadian patent system is to benefit creators of inventions, it does so for the ultimate benefit of Canadian citizens. This central purpose provides both a justification for, and a limitation on, the rights of inventors under the Patent Act.

A Unabashed Utilitarianism

Intellectual property statutes represent government interventions into the market justified by a failure of the market to adequately safeguard proprietarian rights in intangibles. This market failure stems from the "public good" aspect of intellectual property: second comers can reproduce the results of creative efforts more cheaply than creators can, since the second comers do not have to incorporate into their pricing the sunk costs involved in creation -- they can "free ride" on the investments of the original investor.17 The original creator, facing competition in the market priced at a much lower marginal cost than the creator can afford, will be unable to recover sunk costs. Faced with this competitive position, rational investors unable to recoup sunk costs by being first to the market or thorough other mechanisms imposing artificial exclusivity (such as

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16Industry Canada, Bill C-91 Review, supra note 14.
trade secret or contract law)\textsuperscript{18} will not enter the market in the first place. To the extent that intangibles represent a valued, welfare-enhancing component of the economy, society will be worse off in the absence of some intervention in the market to restore to creators some measure of exclusivity in their creations. Patent law seeks to do this for inventors by granting them a kind of property right in their inventions, in the form of a statutory monopoly.\textsuperscript{19}

Property rights in inventions allow creators to recoup sunk costs through exploitation of their inventions. In addition to a period of exclusivity --20 years from the date of filing for a patent -- patent laws permit inventors to exploit their monopoly, to the extent that the market permits, by raising price above marginal costs. The ability of patent holders to charge monopoly pricing is circumscribed to some extent by availability of substitute goods in the market and a corresponding ability of consumers to price-discriminate. However, where the patented article is unsubstitutable, and the item is a "necessary" good, as opposed to a luxury or trivial item, patentees have the ability to extract considerable sums from the patent. These "quasi-rents," by restricting output and raising price, effectively price some consumers out of the market, introducing a deadweight loss into the system. These welfare losses are sustained on the premise that without such investment, no investment will be directed towards inventive activities in the first place.

B The Problem of Monopoly Rents in Health Care

Pharmaceuticals provide a clear case for the need for state market intervention in the form of a grant of intellectual property rights. The cost of research and developing a new drug and bringing it through regulatory approval and ultimately to market is enormous, with the fruits of that investment encapsulated, as it were, in an easily

\textsuperscript{18}See S. Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harv. L. Rev. 281.

analyzed and imitated format. Patent rights in pharmaceutical products avoid the harmful effects of market debilitating free riding by granting a period of exclusivity as both an incentive for investment in research and investment and as a precaution against market failure in an industry intrinsic to the public interest in health care. However, the welfare losses associated with monopoly pricing are particularly disturbing in the context of health care. These welfare losses are exacerbated by peculiarities in the demand curve of medicinal products. First, since pharmaceutical patents represent the cutting edge of biotechnology, the generally face little competition in the market. Accordingly, consumers cannot fend off monopoly pricing by substituting away from the offending supplier. Moreover, patented pharmaceuticals tend to arise in areas of health care for which there is great demand. Therefore, pharmaceutical patents tend to introduce statutory monopolies into areas already characterized by relatively inelastic demand curves. Second, because of the importance of health care to consumers, fewer consumers get priced out of the market, producing particularly effective quasi-rents for pharmaceutical patentees. Further, the welfare losses associated with consumers priced out of the market are smaller, but more disturbing: those priced out of the market are priced out of proper health care. In a country without Canada's social safety net, these welfare losses can be deadly.\textsuperscript{20} In Canada, where we have socialized medical care, those costs are largely, although not completely, absorbed by provincial drug purchase plans. Since these plans minimize the volume of consumers priced out of the market, they exacerbate the problems presented by an already inelastic demand curve. These market characteristics profoundly enhance the value of pharmaceutical patents to their owners,

\textsuperscript{20}N. Chomsky has argued that "drug prices are way lower in India than in Pakistan next door because India happened to develop its own pharmaceutical industry. The American corporations don't like that. They want more children to die in India. It's not whether they care whether children dies. They want more profit, which means more children die in India. They want to make sure India doesn't produce drugs at less than the cost of American drugs.... So drug prices will shoot sky high in India and children will die but there will be more profits." N. Chomsky, Lecture at the University of Illinois at Chicago (17 October, 1994) (excerpt available at http://www.lumpen.com/magazine/bestof/chomsky.txt, 12 March, 1997).
who can now set prices at a higher equilibrium. Unfortunately, these benefits arise at the expense of markedly increased burden on taxpayers, who, after all, have to foot the bill for drug purchase plans. Moreover, if, as in Canada, the industry benefiting from patent protection is based out of the country, and invests its research and development funds outside of the country, then it is tempting to conclude that the "trade-off" between incentives to innovate and the public need for dissemination of and access to inventions has become one sided.²¹

C The Compulsory License

Compulsory licensing of pharmaceutical patent can potentially arrest excessive profit-taking by pharmaceutical patentees while still ensuring that innovation is rewarded, and so maintaining the integrity of the patent system. Under a compulsory licensing system, a potential licensee requests a government patent authority to compel the patent holder to extend a license to manufacture or import the patented article. The patent must be on fair and equitable terms, to ensure that the patent holder receives sufficient income to recoup costs sunk in research and development of the patented article. Compulsory licensing benefits consumers by introducing into the market a second source of supply of the patented article, thereby introducing price competition and effectively eradicating the patentee's quasi-rents. Compulsory licensing in this context is used to encourage competition, and should be distinguished from compulsory licensing to prevent abuse of patent rights, or anti-competitive exploitation of a patent.²²

Compulsory licensing is thus a mechanism by which the state can utilize market forces to address concerns over excessive profit-taking associated with monopoly pricing in markets supported by state-funded health care. It is not the only mechanism by which states can address the problems associated with pharmaceutical patents: direct taxation,

²¹ Eastman Report, supra note 2 at 333.
²² Patent Act, supra note 4, s. 65; see also Combines Investigation Act, R.S.C. 1985, c. C-34, s. 1 (renamed Competition Act by S.C. 1986, c. 26 s. 19).
price capping, and state funded research in pharmaceuticals all represent viable alternatives with varying degrees of intrusiveness and effectiveness. However, the simplicity of compulsory licensing, combined with its reliance on market functions both for lowering prices and in ensuring that innovators get a return on their investment (in the form of royalties), made compulsory licensing the preferred mechanism of the Canadian government for the better part of the twentieth century.

III The Canadian Approach to Pharmaceutical Patents

A Pre-1969

Canada adopted a compulsory licensing approach to pharmaceutical patents in its 1923 amendments to the Patent Act. Under these amendments, competitors could apply to the Commissioner of Patents for a compulsory license to make, use or sell a patented drug before the patent expired, provided that the active ingredients used in generic drugs were manufactured in Canada. The goal of these provisions was twofold: to introduce price competition into the Canadian pharmaceuticals market, and to establish a domestic pharmaceutical manufacturing industry. Unfortunately, the amendment was largely unsuccessful: between 1935 and 1970, only 11 licenses were granted on 53 applications. The 1923 amendments failed for two reasons: first, the Canadian patent authorities' management of license applications could be characterized as neither consistent nor efficient, a fact reflected in the high degree of abandoned and withdrawn license applications. Second, the small size of the Canadian market itself deterred

24 Liczin, supra note 3 at 1.
27 Gorecki, supra note 25 at 29.
domestic firm from setting up shop: simply, Canada was to small to nurture a domestic industry.\textsuperscript{28}

\textbf{B Post 1969}

In the 1960's, three government reports criticized the price of Canadian patented drugs as among the highest in the world.\textsuperscript{29} Despite vigorous opposition from the Pharmaceutical Manufacturer's Association of Canada (PMAC), the domestic industry organization for foreign multinational drug companies,\textsuperscript{30} the Liberal government under Pierre Trudeau responded by deleting the \textit{Patent Act}'s domestic manufacturing of active ingredients requirement, permitting competitors to import patented pharmaceuticals for the first time. Generic drug manufacturers received 142 licenses to manufacture 47 patented drugs in the first eight years under the new licensing provisions, generally at a royalty rate of 4\% of the sales of the generic product. \textsuperscript{31}

Under the compulsory licensing regime established by the 1969 amendments to the \textit{Patent Act}, a generic drug industry sprang up in Canada. By 1980, generics held 4.4 per cent of the market; by 1990, the generics' share had grown to 9.3 per cent, under a slightly modified, less favorable regime.\textsuperscript{32} Conversely, the multinational pharmaceutical industry also seemed to flourish under the compulsory licensing regime. Between 1972 and 1987, the average return on equity before taxes for the pharmaceutical industry as a whole, was between 21.4 per cent and 45.5 per cent, never ranking below 20th of 87

\textsuperscript{28}Lexchin, \textit{supra} note 3 at 1.


\textsuperscript{30}Lexchin notes that the PMAC campaign against the \textit{Patent Act} amendments cost between $200 000 and $250 000 (1969 Canadian dollars). \textit{Supra} note 3 at 2.

\textsuperscript{31}Industry Canada, \textit{Bill C-91 Review}, \textit{supra} note 14.

\textsuperscript{32}A. Rotstein, "Intellectual Property and the Canada-U.S. Free Trade Agreement: The Case of Pharmaceuticals" (1993) 8 I.P.J. 121 at 124.
manufacturing industries in Canada and ranking first in 1986 and 1987. The Eastman Report noted that profit levels in Canada were "generally higher than... in most other well-developed countries in the world," including France, Japan, Switzerland, the United Kingdom, and West Germany. The Eastman Commission noted that

In 1983, the prices of generic dmgs were 51 per cent of the prices of the drugs from patent-holding firms for substitutable brands. The consequence of compulsory licensing is that Canadian consumers and taxpayers paid $211 million less in 1983 than they would have done for the same drugs in its absence.

These observations prompted the Eastman Commission to recommend the retention of the compulsory licensing provisions of the Act, which they saw as "an effective component of an appropriate patent policy for the pharmaceutical industry."36

C Bill C-22 (1987)

Despite the favorable report of the Eastman Commission, the Mulroney Conservatives restructured the compulsory licensing regime governing pharmaceutical patents in 1987. Under heavy pressure from the United States, Mulroney passed the Patent Amendment Act, better known as Bill C-22, which curtailed the scope of the compulsory license provisions, and instituted a new mechanism for controlling excessive drug prices. Although the Conservatives insisted that the shift in Canadian patent policy was unrelated to the Free Trade Agreement under negotiation with the US, the link between the two would seem clear from the circumstances.

1) Compulsory Licensing

33Lexchin, supra note 3 at 3 (citing Statistics Canada, Corporation statistics — detailed income and retained earnings statistics for 182 industries (Ottawa: Statistics Canada, various years).
34Eastman Report, supra note 2 at 277.
35Ibid. at 32 and 58.
36Ibid. at xix.
37Canada had been on the US's "hit list" for intellectual property trade abuses for its pharmaceutical patent regime since the early eighties. See Rotstein, supra note 32 at 125; Lexchin, supra note 3 at 4.
39At one point, the US included Canadian capitulation over pharmaceuticals in a press release as one of the American triumphs of the negotiations. This line was removed after heated protests from Canadian politicians. See Lexchin, supra note 3 at 5.
Under Bill C-22, pharmaceutical patent owners received a prolonged period of exclusivity before the patent could be exposed to compulsory licensing. Patented drugs manufactured in Canada received a ten year period of exclusivity, while imported drugs received a seven year period of exclusivity. Significantly, Bill C-22 also permitted for the first time patent claims for products *per se*, rather than limiting pharmaceutical patent claims to process claims or claims to products made under a chemical process.

2) *The Pharmaceutical Pricing Review Board*

Partly to make up for the expected impact of the partial loss of compulsory licensing of patented pharmaceuticals, Bill C-22 created the Patented Medicine Prices Review Board (PMPRB), an independent, federal, quasi-judicial administrative tribunal. The primary tasks assigned the PMPRB included the regulation of patented pharmaceutical prices to ensure they were not excessive, and also monitoring and reporting on research and development investments by pharmaceutical corporations.40

3) *The Quid Pro Quo*

Not included in among the provisions of Bill C-22, but very much part of the equation, were commitments made by the multinational pharmaceutical corporations to increase their presence on Canadian soil. PMAC pledged to spend $1.4 billion on research and development in Canada, and place an emphasis on basic research. PMAC also pledged that by 1996, ten per cent of sales would be earmarked for research and development in Canada. PMAC also promised to significantly increase employment in Canadian pharmaceuticals, and to keep price rises in line with inflation.41

D NAFTA, TRIPS and Bill C-91

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41 Rotstein, *supra* note 32 at 128.
Bill C-22 signaled a retreat from Canada's reliance on compulsory licensing to introduce competitive pricing into the market for patented pharmaceuticals. However, pharmaceutical multinationals and the United States were still not satisfied with the Canadian position, and, buoyed by their success with linking trade and intellectual property protection, worked within the context of the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade and Tariffs (GATT) to amend further Canada's patent laws.42 Their success cannot be understated. Ultimately, the Canadian government was willing to sacrifice its pharmaceutical patents policies in exchange for US concessions on agriculture and textiles.43

The federal government passed Bill C-91,44 on February 4, 1993, well before the compulsory date for accession to either NAFTA or the TRIPS Agreement.45 Bill C-91 effectively gutted the patent policy Canada had relied upon for the previous seventy years, stripping the Patent Act of its compulsory pharmaceuticals licensing mechanisms entirely, but augmenting the responsibilities and powers of the PMPRB. In exchange, PMAC pledged to up its commitment to basic research and pharmaceuticals development in Canada, although once again these commitments were not incorporated into law.

1) Elimination of Compulsory Licensing

Industry Canada continues to insist that a "regime of compulsory licensing, similar to what existed prior to Bill C-91, would be contrary to Canada's international treaty obligations under the WTO and the NAFTA."46 Although the removal of compulsory licensing ostensibly grants the full term of patent protection to pharmaceuticals, the reality is that the time involved in developing a drug and receiving regulatory approval eats into the term of drug patents. PMAC claims that this process

42Ibid. at 130-131.
45Ibid. at 132.
46Industry Canada, Bill C-91 Review, supra note 14.
shortens its patents' lives by 10 to 12 years; not surprisingly, the lobbying organization of the generics, the Canadian Drug Manufacturers Association (CDMA), claims the figure is more accurately six to eight years.

To soften the blow of the loss of compulsory licensing, Bill C-91 also introduced two new exceptions to patent infringement enabling generic manufacturers to begin marketing competing products as soon as the relevant patents expire. These permit generic manufacturers to deal with a patented pharmaceutical to begin the process of seeking regulatory approval for it,47 and to manufacture and stockpile pharmaceuticals prior to patent expiry.48 Although designed to speed the entry of competition into the market, Bill C-91 generally requires the expiration all of patents associated with a pharmaceutical before the Ministry of Health will issue a Notice of Compliance (NOC) indicating regulatory approval.49 By "linking" approval of generic pharmaceuticals to the patent status of the brand-name equivalents, Bill C-91 sought to provide a check on generic practices abusive of competition in pharmaceuticals.50 However, by granting the brand-name manufacturer a right of final say of the list of patents associated with a drug, the NOC regulations grant the multinationals a potential mechanism for using the courts to tie up generic entry for up to two and a half years after patent expiry.51 The CDMA vigorously opposes these mechanisms, as do consumer interest groups and provincial

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47 Patent Act, supra note 8, s. 55.2(1).
48 Ibid., s. 55.2(2).
49 Ibid., s. 55.2(4). In practice, the Regulations under s. 55.2(4) are more complicated, and permit the release of a NOC 30 months after the initiation of court proceedings by the patented pharmaceutical manufacturer challenging the claims of the generic applicant. This has resulted bizarrely in the issuance of a NOC despite the lack of agreement over which patents a generic manufacturer is potentially dealing with, and despite the existence of a patent infringement action before a Canadian court on the same issue.
51 Industry Canada, Bill C-91 Review, supra note 14.
politicians, whose drug benefit plans are forced to bear the burden of what they claim amounts to extra-statutory patent protection.⁵²

2) The Pharmaceutical Pricing Review Board

Bill C-91 also revamped the role and powers of the Patented Medicine Prices Review Board. The PMPRB's two essential tasks continue to be monitoring the prices of patented pharmaceuticals and compiling research and development data; however, Bill C-91 greatly expanded the means available to the PMPRB to ensure industry compliance with its rulings. The PMPRB does not regulate manufacturers' prices drugs in the public domain, or those for which the patent is pending.⁵³

The PMPRB ensures compliance with its guidelines through a combination of voluntary compliance guidelines for pricing new and existing medicines, backed up by strong new enforcement mechanisms. The PMPRB guidelines keep the price of new patented pharmaceuticals in check by seeking to:

- limit prices for most new patented drugs to the range of prices for existing drugs used to treat the same disease;
- limit prices of breakthrough patented drugs to the median of the prices charged for the drug in the seven industrialized countries listed in the Patented Medicines Regulations (France, Germany, Italy, Sweden, Switzerland, UK, US);
- and limit price increases for patented medicines already on the market to the consumer price index (CPI).⁵⁴

The PMPRB's new enforcement mechanisms include price rollbacks, reimbursement of excess revenues, and fines up to twice the excess revenues.⁵⁵ The PMPRB estimates that

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⁵²Nova Scotia Minister of Health, Bernie Boudreau and Richard Mann, Minister of Economic Renewal Agency, in their brief to the Bill C-91 Review Committee, noted that:

The NOC Linkage Regulations have negatively affected the Canadian public, through higher drug costs, in part due to delays in dispute resolution. Currently there is no provision within the Regulations to allow for restitution to the public where disputed products are not issued an NOC but ultimately found not to have infringed upon any patents.

Canada NewsWire Ltd., "Canada's Generic Industry Responds to Bill C-91 Committee Report" (24 April, 1997) [hereinafter "Canada's Generic Industry Responds"].

⁵³Patented Medicine Prices Review Board (PMPRB), "Fact Sheet" (November 1996) (available at http://ppp.atreide.net/PMPRB/factsh-e.htm, 12 April, 1997).

⁵⁴Industry Canada, Bill C-91 Review, supra note 14.
manufacturers voluntarily adjusting pharmaceutical prices in compliance with Board
guidelines have saved consumers "almost $33 million in 1995, for total savings of more
than $100 million since 1990."56

3) PMAC Research & Development Commitments

As with Bill C-22, PMAC made a number of commitments to improve its
research & development and investment record in Canada. PMAC pledged between $200
and $400 million in additional R&D spending.57 As was the case with Bill C-22, these
commitments were not entrenched into law, although the PMPRB has been given charge
over monitoring PMAC's faithfulness in complying with these promises.

IV Bill C-91 Mandatory Review

The Regulatory review currently being carried out by Industry Canada is
statutorily mandated by s.14(1) of Bill C-91. Industry Canada has asserted that it is
reviewing Bill C-91 with the goals of Canadian pharmaceutical policies in mind. The
"key objectives" of this policy are:

- to support the development of the pharmaceutical industry in Canada;
- to ensure patented drugs are available at non-excessive prices; and
- to ensure conformity with Canada's international obligations.58

It should be noted that these objectives do not neatly coincide with those of the Patent
Act, which Industry Canada states

enables inventors to benefit from their creations, providing an incentive to
perform research and development and stimulating the advancement and
diffusion of technology.... [P]atents also promote the sharing of technical
knowledge.59

55PMPRB, "Fact Sheet," supra note 47.
56Ibid.
57Rotstein, supra note 32 at 132.
58Industry Canada, Bill C-91 Review, supra note 14.
Thus, Canada's pharmaceutical policy grafts onto its patent policy a concern for "fairness" in pricing, a measure that would seem incompatible with both its commitment to patents as an engine of industrial development and to international trading standards of intellectual property protection.

Nonetheless, Industry Canada would seem satisfied that these tensions have been resolved adequately under the Bill C-91 regime. In an interim report, the Standing Committee on Industry expressed a continuing concern with the cost of patented medicines in Canada and dissatisfaction with the "linkage" regulations governing generic Notice of Compliance approvals, but otherwise called for no significant alterations to Canada's treatment of drug patents. Moreover, Industry Canada has expressed approval of the multinationals' record in meeting its R&D and employment goals.

A Drug Prices

Industry Canada figures indicate that in 1994, Canadians spent $9.2 billion on drugs (averaging $314 per person), represents 12.7% of national health expenditures. Sales of patented pharmaceuticals accounted for 41% of all drug sales, or $2.4 billion, equivalent to 3.3% of national health expenditures. The CDMA warned in 1985 that the price of medicines would soar under the post Bill C-22 regime. However, a 1992 government study concluded that, contrary to CDMA's claims, the impact of the new regime on drug prices has been negligible: between 1987 and 1991, drug prices rose at the rate of inflation. A subsequent study by Green Shield Prepaid Services, Inc., criticized the government study's assessment techniques, and concluded that in fact the

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60 Standing Committee on Industry, "Report on Bill C-91" (23 April, 1997).
61 Industry Canada, Bill C-91 Review, supra note 14.
63 Department of Consumer and Corporate Affairs, "Trends in the Pharmaceutical Industry in Canada in the Post 1987 Environment" (Ottawa: Dept. of Consumer and Corporate Affairs, 1992) at 32-35.
cost of prescription drugs had risen over that period at a rate double that of inflation, and that rise was largely fueled by the cost of new patented pharmaceuticals.  

PMAC has argued that Canada has an excellent record on drug pricing under Bill C-91, pointing out that "Canadian drug price increases have averaged below the rate of inflation -- 1.6 per cent versus 3.1 per cent -- from 1988-94." Of the top 200 selling drugs in Canada in 1994, the prices for 86 per cent of them did not increase, 57 per cent were priced below the international medium, and averaged a price two thirds that paid in the US. Similarly, "[t]he prices of new breakthrough and substantial improvement drugs were, on average, 11 per cent lower than the median international price." These figures refer to all commercially marketed pharmaceuticals, rather than patented pharmaceuticals per se; however, Industry Canada figures would seem to bear these claims out, even for patented pharmaceuticals.

Prior to the formation of the PMPRB, the price of patented pharmaceuticals in Canada increased at a rate higher than that of inflation. Since then, the prices of patented pharmaceuticals have increased on average only 1.6% per year, well below the yearly average inflation rate of 3.1%. Industry Canada reports that in 1994, "prices of patented drugs actually fell by 0.42% and by another 1.75% in 1995."

The Canadian pharmaceutical industry's performance also compares favorably to foreign benchmarks. Between 1992 and 1994, "Canadian prices declined, on average, from about 3% above the median of foreign prices to just below the median of foreign prices." Canadian pharmaceuticals prices are lower than those of the US, Germany, and

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64 Green Shields Prepaid Services, Inc., *A Report on Drug Costs* (Willowdale, ON: Green Shield, April 1992) at 2-3.
68 Industry Canada, *Bill C-91 Review, supra* note 14, citing PMPRB data.
Switzerland.\textsuperscript{71} Canada compares particularly well with the US: since the introduction of
the PMPRB, US pharmaceutical prices have risen faster than Canadian prices. The
PMPRB has concluded that the Canada/US gap for patented drugs had widened to 47% by 1994.\textsuperscript{72}

These observations have led the Standing Committee reviewing Bill C-91 to
conclude that the system of price controls implemented by the PMPRB represent a
method of keeping pharmaceutical prices reasonable that is to be favored over the pre-Bill
C-22 compulsory licensing regime.

B PMAC Compliance with Research & Development Commitments

Medical research spending by the pharmaceutical industry has risen from $166
million in 1988 to $624 million in 1996.\textsuperscript{73} PMAC committed itself to increase R&D to a
figure 10 per cent of sales by 1996; that figure was surpassed in 1993, and had reached
12.5 per cent of sales by 1995.\textsuperscript{74} The CDMA has charged that the majority of these funds
have gone into clinical research and development, rather than basic research, an
allegation that is supported by the figures. While expenditures on basic R&D rose from
19% of total R&D expenditures in 1988 to 26.7% in 1990, at the same time the
comparable figure in the US is 47.5%.\textsuperscript{75} PMAC counters that "[b]asic research has
grown 340 per cent in only six years, from 30 million dollars in 1988 to 132.2 million in
1995,"\textsuperscript{76} and that it is irrational to deride funds earmarked for clinical research, since
those funds have contributed over $720 million to hospitals and universities across

\textsuperscript{71}PMPRB, "The Top 200 Selling Patented Drug Products in Canada" (Ottawa, 1994).
\textsuperscript{72}Industry Canada, Bill C-91 Review, supra note 14, citing PMPRB data.
\textsuperscript{73}PMAC, "PMAC Corrects Drug Patent Myths" (available at http://www.pmac-acim.org/, 17 March,
1997).
\textsuperscript{74}PMAC, "Canada's Pharmaceutical Research Policy: A Decade of Achievement," supra note 65.
\textsuperscript{75}Lexchin, supra note 3 at 10.
\textsuperscript{76}PMAC, "Pharmaceutical Patent Protection: Decision Time for Canada" (available at http://www.pmac-
acim.org/, 17 March, 1997).
Canada since 1988. However, benchmarking these funds against other nations places these boasts in perspective: in 1989, the Swedish industry spent 21.8 per cent of sales on R&D, the UK 20.9 per cent, West Germany 17.9 per cent, and the United States 14.2 per cent.

PMAC also claims to have fulfilled its promise to expand the size of the Canadian pharmaceutical workforce in creating over 3,000 jobs since 1987. PMAC attributes 28.5 per cent of its workforce to "high quality, scientific positions conducting research as a direct result" of PMAC R&D funding. Predictably, the CDMA downplays these positions as mostly directed towards clinical lab work, rather than in basic research. Nonetheless, the achievements of PMAC is impressive.

C Conclusions

Overall, the Standing Committee is correct in asserting that Bill C-91 has effectively implemented Industry Canada's objectives for the pharmaceutical industry. The PMPRB seems to have kept patented pharmaceutical prices in check, and research & development performance, while seemingly out of step with international benchmarks, is nonetheless vastly superior to the pre-1987 regime.

The contrast between Canada's comparatively mediocre performance before the implementation of Bill C-91, and its superior performance after, when benchmarked against other nations and inflation, lends substance to the claim that the PMPRB's price controls provide a better mechanism for implementing Canada's health standards than the prior system of compulsory licenses. While this result may seem counter-intuitive, it follows from the inelastic nature of the demand curve for patented pharmaceuticals. Demand for pharmaceuticals is relatively inelastic at the best of times; patented pharmaceuticals, representing the latest breakthroughs and advances in health care, enjoy

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77 Ibid.
78 Lexchin, supra note 3 at 9.
an exaggerated demand. This inelasticity is compounded by Canada's commitment to subsidized health care through drug benefit plans, which essentially provide consumers with augmented resources for pharmaceutical purchases. In a market featuring compulsory licensing, there may be competition, but both generics and patent holders are able to set prices relatively high by virtue of the artificially inelastic curve of pharmaceutical demand and the augmented resources of consumers with which to purchase pharmaceuticals. The PMPRB, in contrast, essentially comprises price cap regulation, constraining patent holders, and so also generics, from setting prices artificially high. While the level at which prices are initially set plays some role in determining the "fairness" of the pricing regime, benchmarking would seem to indicate that Canadian prices compare favorably to those of other industrialized countries.

Moreover, the performance of both the generic drug companies and the multinationals under the Bill C-91 regime leads one to conclude that if anything, Bill C-91 has been incredibly lucrative for the Canadian pharmaceutical industry, generally. Industry Canada estimates from 1991 to 1996, the generics averaged a yearly growth of 18.9 per cent, compared to 4.1 per cent for brand name companies.81 Between 1993 and 1996, annual sales growth of generics (26.4%) significantly outpaced growth of brand names (1.0%).82 Moreover, Industry Canada estimates an annual growth rate for generics over the next 10 years of 4.5 per cent, compared to 3.5 per cent for brand name pharmaceutical companies.83 Moreover, "in 1995, generic companies held 14.3% of the dollar value of the prescription market in Canada" -- higher than the generic share in the US (10%) and in Europe (on average 9%).84

The multinational drug companies, perhaps less surprisingly, have also done well under Bill C-91. The multinationals accounted for 84.5% ($5.3 billion) of the dollar

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81 Industry Canada, Bill C-91 Review, supra note 14.
82 Ibid.
83 Ibid.
84 Ibid.
value of the pharmaceuticals market; on average, patented drugs, their most lucrative products, account for 40–45% of all pharmaceutical sales.\textsuperscript{85}

The only loser under Bill C-91, it would then seem, are consumers -- or rather, their representatives, the provincial governments who operate the nation's drug benefit plans. A public opinion poll released in early April indicates that 55 per cent of Canadians believe Bill C-91 has resulted in higher drug prices and increased costs for the country's health care system.\textsuperscript{86} A study by the Queen's University Health Policy group, commissioned by the CDMA, argues that "Canadians would save between \$4.1 and \$9.4 billion over the next twenty years if pharmaceutical patent protection is reduced to periods comparable to those prior to the passage of federal patent legislation, Bill C-91."\textsuperscript{87} Saskatchewan Minister of Health, Eric Cline, testified before the Industry Canada Committee that "we can argue all day about the numbers but the bottom line would not change -- C-91 has resulted in increased drug costs and unless it is changed, will continue to increase costs to consumers and taxpayers."\textsuperscript{88}

These claims are difficult to square with the empirical evidence, which clearly show an improvement in pharmaceutical pricing since the abolition of compulsory licensing. While it cannot be doubted that compulsory licensing combined with the price cap regulation currently implemented by the PMPRB would produce significant savings for provincial drug plans, Canada has never administered this form of patent regulation. Moreover, such a form of regulation would clearly bring Canada into disrepute amongst its trading partners as, if not a violation of international trade law, then a disturbing disrespect for still-coalescing norms of intellectual property protection. Moreover, it is

\textsuperscript{85}Ibid.
\textsuperscript{86}"Canada's Generic Industry Responds", supra note 52.
\textsuperscript{87}Canada NewsWire, "Queen's Health Policy Study Shows Reducing Patent Protection Would Save Canada's Health Care System Billions of Dollars" (30 January, 1997).
\textsuperscript{88}Ibid.
far from clear that a return to a simple compulsory licensing regime, without price
capping, would be tolerated under the TRIPS Agreement of the WTO or NAFTA.

V Trade Dimensions

Industry Canada has asserted that a "regime of compulsory licensing, similar to
what existed prior to Bill C-91, would be contrary to Canada's international treaty
obligations under the WTO and the NAFTA." In contrast, the CDMA has submitted
legal opinions to Industry Canada arguing that Canada could legally return to a
compulsory licensing regime under both trade agreements. Industry Canada has argued
that Article 27 of the TRIPS Agreement prohibits Canada from discriminating between
different fields of technology, which may preclude Canada from applying its health
policies in a manner that would result in pharmaceutical patents being treated differently
from other technologies. However, Article 27 deals with patentable subject matter, not
treatment of already patented technology, and so is irrelevant to the debate over the
propriety of compulsory licenses of pharmaceuticals. Industry Canada has also indicated
that the National Treatment requirements of the TRIPS Agreement and NAFTA may
pose an impediment to a restoration of the compulsory licensing regime. This argument
is based on the predominance of foreign multinationals among proprietors of
pharmaceutical patents in Canada: any compulsory licensing provisions would be seen,
so this argument goes, as a differential treatment of industry participants surreptitiously
targeting firms based on country of origin in violation of Canada's trade obligations.
Industry Canada suggests that these arguments, combined NAFTA's and the TRIPS
Agreement's greatly restricted scope for the implementation of compulsory licensing

89 Industry Canada, Bill C-91 Review, supra note 14.
90 Ibid.
91 TRIPS Agreement, supra note 12, Article 3.
92 NAFTA, supra note 12, Article 1703.1.
93 Ibid., Article 1709.10.
94 TRIPS Agreement, supra note 12, Article 33.
regimes, would seem to close off any chance for re-implementation of compulsory licensing.

Article 30 of the TRIPS Agreement provides that "Members may provide limited exceptions" to patent rights that "do not unreasonably conflict with a normal exploitation of a patent and do not unreasonably prejudice the legitimate interests" of the patent owner. The standard remedial action under TRIPS, as under Article 5A of the Paris Convention (the international Convention governing patent rights), is the compulsory license. Interestingly, the compulsory licensing provisions of the TRIPS Agreement contemplates the introduction of two new, publicly-minded grounds for carving out exceptions to intellectual property rights: the "public interest" provision under Article 8(1), and the "antitrust" provision under Article 8(2). Article 8(1) provides that:

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\text{Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.}\]

Article 8(2) provides:

\[
\text{Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.}\]

These provisions were included in the TRIPS Agreement largely at the insistence of developing countries, who regarded them as essential for relieving the strains that the TRIPS Agreement is likely to place on their economies. Although NAFTA does not contain an equivalent to the TRIPS Agreement's Articles 8(1) & (2), it similarly provide

\[95\]bid., Article 30.
\[96\]bid., Article 8(1).
\[97\]bid., Article 8(2).
\[98\]See A. Deardorff, "Should Patent Protection Be Extended to All Developing Countries?" 13 World Economy 497 (1990); Arvind Subramanian, "TRIPS and the Paradigm of the GATT: A Tropical, Temperate View" 13 World Economy 509 (1990).\]
for "limited exceptions to the rights conferred by a patents" via the invocation of compulsory licenses.\textsuperscript{99} Both the NAFTA and the TRIPS Agreement compel a prospective licensee to first seek a voluntarily license from the patentee under "reasonable commercial terms."

Given the role of health care in Canada's "socio-economic development," a plausible argument may be made that Canada could avail itself of this aspect of the TRIPS Agreement to implement a compulsory licensing regime. Similarly, Canada may be able to point to the supra-competitive profits of Canada's pharmaceutical industry as misuses of patents rights, and so re-institute compulsory licensing by that mechanism. However, the latter claim must be substantiated by identical conclusions from the domestic competition tribunal, and given that the growth of the brand name industry in Canada has been merely healthy, as opposed to unmerited, it is unlikely that this route holds much promise.\textsuperscript{100}

Nevertheless, these options indicate that the federal government's reluctance to re-institute a compulsory licensing system in Canada may have more to do with politics than trade law. A return to compulsory licensing would not be welcomed by the United States, Canada's major trading partner, who would likely retaliate to such a move by implementing countervailing duties on agriculture or timber, two areas of long-standing difference between Canada and the US. Given the success the PMPRB has had keeping pharmaceutical prices in check over the past decade, it would appear that the government's reluctance to abandon the Bill C-91 regime would be well founded.

VI Interest Groups and Pharmaceutical Patents

Even a cursory overview of this Chapter reveals that the activities of interest groups pervades Canadian pharmaceutical patent forums. The most active and powerful

\textsuperscript{99}NAFTA, \textit{supra} note 12, Article 1709.6.
\textsuperscript{100}\textit{Ibid.}, Article 1709.10(b); TRIPS Agreement, \textit{supra} note 12, Article 33.
interest group on the Canadian pharmaceutical patent policy scene is the Pharmaceutical Manufacturers Association of Canada (PMAC). PMAC is the domestic wing of a major international pharmaceutical manufacturer's lobby, highly organized and very well financed. The vast majority of pharmaceutical patents in Canada belong to members of this interest group. Correspondingly, they actively and vociferously advocate extending the scope of pharmaceutical patent protection. During the Bill C-91 Review process, PMAC's advocacy activities included lobbying both behind the scenes and before the Standing Committee on Industry, compiling extensive statistics on PMAC drug prices and promise performance (in relation to domestic research goals), and launching a national advertising campaign through television and newspapers ads seeking to win over the support of the Canadian public for strong patent protection for pharmaceutical patents.

The Canadian Drug Manufacturers Association (CDMA) is the domestic industry's counterpart to PMAC. CDMA members manufacture predominantly generic drugs. These two interest groups advocate positions that are usually diametrically opposed, and so serve to counter-balance one another in public pharmaceutical policy forums. Indeed, the presence of a vibrant generic drug manufacturing industry in Canada represents a market contribution to the realization of public interest goals in Canada's pharmaceutical patent policy. Generics, by definition, seek to compete for market share based on price. This competition provides a drag on drug prices and correspondingly welcome relief to consumers and drug plan providers.

A second counter-balance to the resources of the international drug manufacturers is the presence of public and private drug plans in the Canadian health policy mix. Most drug plans provide funding for only the least expensive of available brands of a given drug. Invariably, this means that most drug plans mandate generic over brand name
However, where generics are unavailable, as they are when a medicine is patented, drug plans are subject to the monopoly pricing practices of the patent owner. Drug plan administrators therefore comprise a natural adversary to PMAC in policy forums. In the Bill C-91 hearings, many of the Provinces sent delegates to press for tighter controls on drug pricing. For example, Darren Praznick, Minister of Health for the Government of Manitoba, reminded the Committee Members that "as we attempt to balance support for domestic industry and multinational research efforts, we must not lose sight of the fact that the primary concern should be the provision of quality, affordable health care for Canadians." Noting that between 1975 and 1994 "Canadian expenditures on drugs increased from... 8.7% to 12.7% of total health care expenditures," Mr. Praznick urged the Committee to maintain "strict price controls... to ensure Canada pays only the lowest price available" among comparable industrialized nations.

Similarly, Eric Cline, Minister of Health for the Government of Saskatchewan, reminded the Committee that its "interest as a committee, quite naturally, is in the health of the pharmaceutical industry. My interest as a minister of health is in the health of individuals and the effect this legislation has on overall population health." Mr. Cline noted that Bill C-91 had increased "drug costs for the public and for government-funded drug programs," and proved a challenge for governments attempting to "stabilize health care costs," and concluded that "fairness to the health of Canadians has been overlooked."  

103 Ibid. at 6.
105 Ibid. at 1-2.
106 Ibid. at 3.
Columbia, repeated this theme, arguing that Bill C-91's patent policies cost British Columbians about $40 million in excessive drug costs each year. That $40 million is about a year's worth of life-saving insulin for 20,000 diabetics. It would pay for 2,500 her operations in my province. It would be enough to provide 8,000 cancer patients with treatment for a year. The cost of Bill C-91 is very real, and it has put B.C.'s pharmacare program at risk.  

The importance of national distributive goals relating to health is sufficient to entice considerable private resources into the policy fray, as well. The Standing Committee on Industry heard submissions from a number of citizens groups. For example, James Rycroft, Coordinating Secretary of the Legion Seniors and Veterans Services Committees of the Royal Canadian Legion, representing "approximately 500,000 Canadians, many of whom are seniors and all of whom are concerned about drug prices," argued before the Committee that the Canadian government must "balance the interests of consumers and the various parties to the pharmaceutical industry."  

David Orchard, Chair of a non-partisan citizens organization called "Citizens Concerned About Free Trade" attacked the Liberal Party's record on free trade, arguing that "the Liberals... ratified NAFTA. [T]o stand and wring your hands and say you can't change this monopoly protection [and re-institute compulsory licensing] because of NAFTA is, I'm pointing out, sheer hypocrisy." Not all citizen submissions to the Standing Committee critiqued Bill C-91. Dr. Lorne Tyrrell of the Faculty of Medicine and Oral Health Sciences at the University of Alberta pointed out that since the passage of Bill C-22 and Bill C-91, Alberta has "seen a dramatic increase in the funding from industry to the university... -- an increase of more than 500%." Similarly, several parties commented

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107 Presentation of the Hon. J. MacPhail before the Standing Committee on Industry, supra note 104 at 16.  
109 Ibid. at 20.  
110 Presentation of D. Orchard before Standing Committee on Industry, ibid. at 23.  
111 Presentation of Dr. J. Tyrrell before Standing Committee on Industry, ibid. at 37.
on the value of multinational research and development investment to their home provinces.

A fifth interest clearly at work in Canadian pharmaceutical patent policy forums, although usually invisible, is the United States. The US possesses a large domestic pharmaceutical industry with substantial investments in drug research and development. This industry represents a substantial proportion of the global pharmaceutical industry. Accordingly, US trade policy has long pressed for heightened levels of international patent protection for pharmaceuticals. Indeed, one of the most contentious issues in the negotiation of the TRIPS component to the GATT was the drafting of the conditions necessary before a state might limit the private exploitation of a patent through compulsory licensing. In the past, Canada has ranked high on the United States' watch list of trade law violators, largely because of the implementation of compulsory licensing prior to 1987.

These five groups comprehensively represent those interests connected to pharmaceutical patents. Perhaps more important than this comprehensiveness is their relative balance: while powerful and wealthy commercial forces argue for greater protection of their intellectual property, those forces are balanced by equally well financed and organized forces that argue for greater competition in patented pharmaceuticals. These balancing forces include both market-oriented and public entities. Despite this relative balance, it would seem that the multinationals and their "invisible" but persuasive partner, the United States, carried the day: the Standing Committee on Industry recommended no fundamental changes to the way Canada treats pharmaceutical patents. That is not to say that the Committee did not recommend some needed reforms to the Bill C-91 framework; rather, it is to say that the Committee refused to recognize that a distributive value -- universally accessible (i.e. affordable) health care -- should gain ascendance over the efficiency concerns that the extension of patents to pharmaceuticals is designed to meet, nor over the national government's
fundamentally distributive concern with the jobs that biotechnology and pharmaceuticals firms create in Canada through research and development.

**VII Conclusion**

Canada is somewhat unique among developed countries in utilizing its patent laws to implement its health care policies. Historically, Canada had used a compulsory licensing scheme to ensure that innovative pharmaceutical corporations received a fair return on their investments while simultaneously using market forces to keep prices for patented pharmaceuticals low. This regime was substantially scaled back by Bill C-22, and eradicated entirely by Bill C-91. In its place, Canada now implements its pharmaceutical policy objectives through two mechanisms: first, sympathetic exemptions from patent infringement encourage early competition in pharmaceuticals whose patents have newly expired; second, administrative overview by the Patented Medicine Price Review Board (PMPRB) regulates the price of patented pharmaceuticals, ensuring that drug prices rise no faster than the rate of inflation, and that newly patented pharmaceutical products are introduced to the health care market at reasonable rates.

These measures can only be described as a success. The empirical evidence shows that the PMPRB has succeeded in keeping the price of pharmaceuticals in line with inflation, and at extracting significant commitments to expand the domestic research and development expenditures of the multinational pharmaceutical companies. Far from dooming Canada's generic drug industry, as the Canadian Drug Manufacturers warned, Bill C-91 has seen the industry thrive. Michael Rachlis, a doctor with the Medical Reform Group, challenged the Industry Canada Standing Committee to approach the revision of Bill C-91 from first principles:

I urge the members of the committee to first review their own values. Do you believe, like most Canadians, that health care should be prudently provided to people according to their health care needs? Or, do the members of the committee believe that Canada's health care system is
simply yet another commercial opportunity? You cannot accomplish your task of reviewing Bill C-91 until you have clarified your own values. What side are you on?\textsuperscript{112}

The government of Canada's pharmaceutical patent policy seeks to co-opt the commercial aspects of the provision of pharmaceuticals and combine them with public interest price cap regulation to achieve investment in innovation and respect for property on the one hand, and affordable health care. It may be too early to conclude that this policy has been successful; however, the early results are in, and they look good.

\textsuperscript{112}``Canada's Generic Industry Responds'', \textit{supra} note 52.
Chapter 6: A *Sui Generis* Right to Data? A Canadian Position

I  Introduction: The WIPO Treaty

A  International Developments

At the December, 1996, World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva, WIPO asked delegates to consider a Draft Treaty governing a *sui generis* regime of intellectual property rights for database proprietors.\(^1\) The Draft Treaty would compel participating governments to legislate a novel form of intellectual property rights expressly tailored for database proprietors. The Conference never raised the Draft Treaty itself for consideration, largely due to vocal opposition\(^2\) and international concerns that adoption at that point in time would be premature.\(^3\) Instead,

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2 "The third treaty involving the role of databases in the development of a global information infrastructure and introducing a *sui generis* system of protection of databases at the international level was deferred, due to the clamorous protests of many players in the database arena, including the American Association of Law Libraries." J. J. Marke, "Database Protection Acts and the 105th Congress" (18 March, 1997) New York Law Journal 5. See, e.g., Letter of the American Association for the Advancement of Science to Vice-President Albert Gore, Jr. (November 25, 1996) (available at http://www.public-domain.org/database/aaas.html, 23 March, 1997) ("Specifically, we are troubled that the international treaty does not include adequate provisions for fair use or other public-good exemptions crucial to scientific research and education."); Letter of National Writers Union to B. Lehman, Assistant Secretary of Commerce of Patents and Trademarks (22 November, 1996) (available at http://www.public-domain.org/database/nwu.html, 23 March, 1997) ("While legions of lawyers may relish the thought of constant litigation in order to establish interpretations, we would argue that the notion of a *sui generis* protection of databases benefits only a small segment of powerful publishers, that it will only reduce the amount of information available to the public and raise the costs of information for the sole purposes of increased profits to publishers—without any obvious benefit to society as a whole nor specifically to the individual creator."); Letter of Software Developers to C. G. Lowrey, Associate Commissioner for Governmental and International Affairs (21 November, 1996) (available at http://www.base.com/gordoni/thoughts/wipo-db.html, 17 March, 1997) ("The WIPO database treaty is based on an inadequate understanding of the scope of its effects. We find the treaty to be ill-considered and inappropriate.")

WIPO elected to raise the Treaty again at a subsequent Diplomatic Conference, after national representatives have had time to analyze the impact this new right might have on domestic markets and make submissions to a WIPO Committee of Experts.4

The Canadian government has expressed some surprise at the sudden introduction of the Draft Treaty into the international intellectual property agenda: it was not until September, 1996, only four months before the Conference, that the WIPO administration released the text of the Draft Treaty.5 However, the government should not have been so unprepared -- at a February, 1996 meeting of a WIPO Committee of Experts, the European Union had proposed that international law on database protection be harmonized.6 The United States made a similar proposal at a May, 1996 meeting of the WIPO Committee of Experts, which included the substantive provisions of a treaty.7

Moreover, both the European Community and the United States had recently concluded

believes, however, that neither the overall question of sui generis database protection nor the specific provisions of the proposal in the current WIPO draft has received sufficient review and analysis in the US to justify immediate adoption of the proposed database protection treaty.""); Letter of Bloomberg L.P. to C. G. Lowrey, Associate Commissioner for Governmental and International Affairs (22 November, 1996) (available at http://www.public-domain.org/database/bloom.html, 23 March, 1997) ("Bloomberg supports WIPO's effort to focus attention on the issue of database protection but does not favor the call for immediate [sic] adoption of the proposed database protection treaty."); Letter of B. Alberts, President, National Academy of Sciences, W. A. Wulf, President, National Academy of Engineering and K. I. Shine, President, Institute of Medicine, to M. Kantor, Secretary of Commerce (9 October, 1996) (available at http://www.fnc.gov/nas_letter.html, 23 March, 1997) ("What is especially disconcerting is that these radical legal changes have been proposed by the Department of Commerce for formal discussion and negotiation at the WIPO Diplomatic Conference this December, without any debate or analysis of the laws potentially harmful implications for our nations [sic] scientific and technological development.")


5Interview with B. Couchman, Industry Canada (14 April, 1997).


investigations into the feasibility of domestically legislated *sui generis* regimes for the protection of databases, resulting in the European Community's Directive on the Legal Protection of Databases\(^8\) and the introduction of similar legislation into Congress.\(^9\)

Although the American legislation was allowed to die in Committee, it undoubtedly will be re-introduced in the current session.\(^{10}\) Neither of these legislative initiatives can be described as sudden: the EC's database Directive has been in the works since at least the early 1990's with the formation of the EC Information Market Policy Action Program (IMPACT),\(^{11}\) and rumblings over database protection have been emanating from the US since 1991, when the US Supreme Court handed down its decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,\(^{12}\) denying copyright protection to unoriginal compilations of data. Despite these warnings, the Canadian government has not inquired into the feasibility or desirability of a *sui generis* legal regime for databases in Canada.

The WIPO Draft Treaty, the European Directive and the US bill are all premised on the need for government intervention to correct for the market's failure to adequately safeguard investment in database products and services. This premise is common to most forms of legal protection for intellectual property, which focus on the public good aspects of intangibles. Simply, intangible goods can be easily and cheaply appropriated by second comers offering competing informational services that do not incorporate data accumulation costs into their pricing structure. Without the legal or technical means to arrest such free-riding, unsanctioned appropriations of data threaten to undercut the

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\(^{10}\) Marke, *supra* note 2.


\(^{12}\) 11 S. Ct. 1282 (1991) [hereinafter *Feist*].
viable of data collection ventures by denying them the ability to compete with opportunistic second comers. Without the opportunity to recoup the costs of start-up, no business venture will undertake the costs of gathering data in the first place. Thus, intellectual property rights seek to eradicate market-destructive appropriations while simultaneously encouraging investment in the protected activity. Like other statutory intellectual property rights, all three sui generis database regimes embrace a property rights approach to legal protection. However, these proposals have been dogged by accusations that they are excessively concerned with the protection of investments in databases, and show limited concern for competitive markets in value-added information products and services, and less for norms of information sharing within science and research communities.13

It is within this framework that Canadian policy makers must contemplate the introduction of a sui generis regime of property rights for databases into Canadian law. Legislation implementing the WIPO Draft Treaty will have an impact upon suppliers of raw data, downstream value-adding data suppliers, consumers of data, and scientific research and development ventures in both the private and public sphere; as such, a sui generis regime of data protection may well influence Canadian industrial policy, educational policy, Canadian capital markets, and the national balance of payments. Indeed, commercial databases are essentially information brokers operating in the "new economy," and as such operate in close connection to such developments as the globalization of commercial environments and the emergence of digitally networked information infrastructures. The Canadian government has made a commitment to

13See, e.g., Letter of Sports Team Analysis and Tracking Systems, Inc. to C. G. Lowrey, Associate Commissioner for Governmental and International Affairs (22 November, 1996) (available http://www.public-domain.org/database/stats.html, 17 March, 1997) ("The Proposed Treaty presents a very serious threat to the news reporting and analytical activities of STATS and other publishers and media organizations."); Letter of Alberts, Wulf and Shine, supra note 3 (Moreover, the proposed changes are broadly antithetical to the principle of full and open exchange of scientific data espoused by the U.S. government and academic science communities, and promoted internationally.")
developing this emerging sector of the economy into one of international comparative advantage.14 Logically, Canada should then adopt laws which ultimately enhance the position of emerging information-based and technology-based Canadian businesses. It is far from apparent that the adoption of the proposed sui generis rights of the WIPO Draft Treaty on database protection is in Canada's best interests. This Chapter seeks to begin this analysis.

Part I of this Chapter examines the content of the sui generis law proposed by the WIPO Draft Treaty, and sketches the dimensions of the international database market. Part II reviews perceived shortcomings of the WIPO Draft Treaty. Part III outlines the economic and legal arguments that are forwarded as justifying the introduction of new rights for database proprietors. Part IV situates this analysis within the context of Canadian law and industrial policy and the international market for database products and services. Part V concludes that a new, strong form of property rights for database proprietors may not provide the ideal legal environment for Canada's information industry, and suggests that a modified property rights regime, an unfair competition or modified liability rules regime may represent a more equitable legal regime for database protection. Where the previous Chapter of this Thesis have observed the interplay of competing interest groups in policy formation arenas, this Chapter is premised on the opposite phenomenon -- the domination of a branch of intellectual property policy by a powerful, well-organized and well-financed interest group operating in international, trade-related policy forums unopposed by countervailing market or non-market actors.

B  The Sui Generis Right

Before considering the international economic implications of the provision of a new form of strong property rights for database proprietors, it is useful to examine the precise ambit of the sui generis rights. Firstly, these rights attach to "databases," defined as any "collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means." To qualify for protection, a database must represent "a substantial investment in the collection, assembly, verification, organization or presentation of the contents of the database." A "substantial investment" is defined as "any qualitatively or quantitatively significant investment of human, financial, technical or other resources in the collection, assembly, verification, organization or presentation of the contents of the database." Thus, the WIPO Draft Treaty is directed at protecting investment per se, a novel feature in international intellectual property instrument which we will return to shortly.

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15Article 2 (i). Although a full analysis of this aspect of the WIPO Draft Treaty is beyond the scope of this paper, it is worth noting that some critics have claimed that this definition is of overwhelming breadth, and replaces the obvious question of "what qualifies as a database?" with "what doesn't?" See, e.g., P. Samuelson, "Legally Speaking: Legal Protection for Database Contents" (Nov. 1996) 39 Comm. of the ACM at 4-5 (noting that a similar definition of "database" in the US legislation, H.R. 3531, is broad enough to encompass unpatented machines, software user interfaces, and standards); "Software Developers Comments on the WIPO Database Treaty" (21 November, 1996), available at http://www.base.com/gordon/thoughts/wipo-db.html (17 March, 1997) [hereinafter "Software Developers Comments"] (expressing concern that the WIPO Draft Treaty's definition of "database" is broad enough to encompass Internet routing infrastructure, the Internet domain name system, and Internet search services, introducing non-market derived revenue windfalls for some firms at the expense of an irrationally increased cost structure for the remainder of Internet service providers and users); P. Jaszi, "Some Public Interest Considerations Relating to H.R. 3531 Database Investment an Intellectual Property Antipiracy Act of 1996" (available at http://arl.cni.org/info/frn/copy/peter.html) [hereinafter "Some Public Interest Considerations"]; J. H. Reichman and P. Samuelson, "Intellectual Property Rights in Data?" (1997) 50 Vanderbilt L. Rev. 51 at 103.
16WIPO Draft Treaty, supra note 1, Article 1(1).
17Ibid., Article 2(iv).
Second, in addition to advocating the continued application of copyright law to databases, the WIPO Draft Treaty mandates the creation of two new rights: the extraction right and the utilization right. The WIPO Draft Treaty defines an "extraction" as "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form." Essentially, this right substitutes for copyright's reproduction right, but operates in a broader fashion, unhindered by copyright's requirement of "fixation." The Draft Treaty defines "utilization" as "the making available to the public of all or a substantial part of the contents of a database by any means," and specifies that this includes "inter alia by the distribution of copies." The Notes to Article 2 of the Draft Treaty indicate the breadth of this definition, stating that the concept of "utilization... covers all forms of making a database or its contents available to the public. It comprises both tangible and intangible dissemination and diffusion, including the distribution of physical copies and all forms of transmission by wire or wireless means." This right marks a substantial retreat from copyright law's limited notion of a derivative work, drawing within the reach of database proprietors all downstream uses of substantial portions of a database. Together, the extraction and utilization rights represent a powerful expansion of the "pay-per-use" model already employed by most on-line database proprietors, but one which would focus not on a contractual right of access, but rather on a property right to the data itself.

18Ibid., Article 1(4) ("The protection granted under this Treaty shall be provided irrespective of any protection provided for a database or its contents by copyright or by other rights granted by Contracting Parties in their national legislation.")
19Ibid., Article 3(1) ("The maker of a database eligible for protection under this Treaty shall have the right to authorize or prohibit the extraction or utilization of its contents.")
20Ibid., Article 2(ii).
21"[T]he term 'extraction' is a synonym for 'copying' or 'reproduction.'" Notes on Article 2, note 2.05.
22To qualify for protection under copyright law, a work must be "fixed" in a tangible medium. A copy must be similarly fixed to qualify as a reproduction, and hence an infringement. Canadian Admiral Corp. Ltd. v. Rediffusion Inc. [1954] Ex. C. R. 382 (Exch. Ct.).
23WIPO Draft Treaty, supra note 1, Article 2(vi).
24Ibid., Notes on Article 3, note 3.03.
25Ibid., Notes on Article 2, note 2.11.
For both the extraction and utilization rights, the key to their ambit lies in the breadth of the definition of "substantial part." The Draft Treaty specifies that "any portion of the database ...that is of qualitative or quantitative significance to the value of the database" qualifies as a "substantial part."26 An accumulation of small portions of a database may equal a "substantial part," since such systematic use may have the same effect as the extraction of a substantial part of a database.27 The substantiality of any portion is to be measured "against the value of the database," such value consisting of both the value of "direct investments made in the database" and "the market value or expected market value of the database."28 While obviously embracing commercial substitution, this analysis also accounts for the "diminution in market value that may result from the use of the portion."29 Thus, the WIPO Draft Treaty contemplates that very small portions may have commercial significance: if, for example, a researcher wishes to utilize the search results from a database in more than a single project, even if the results comprise a single fact, such use may qualify as a "utilization" under the Draft Treaty. As this reuse substitutes for a second commercial extraction, the funds that flow to the database proprietor are diminished, thereby diminishing the market value of the database. Therefore, even a single fact, when extracted and reused, touches upon the value of the database, and therefore qualifies as "substantial." In this manner, the rights accorded database proprietors may go far beyond those necessary to eradicate commercially destructive free-riding to embrace simple "use" by even non-commercial patrons.30

Third, the Draft Treaty alternately proposes either a fifteen or twenty-five year term for these rights,31 renewable upon "any substantial change to the database, evaluated

26 Ibid., Article 2(v).
27 Ibid., Notes on Article 2, note 2.10, and Article 2(v).
28 Ibid., Notes on Article 2, note 2.10.
29 Ibid.
30 See Jaszi, "Some Public Interest Considerations," supra note 15 at 4 (noting that "the breadth of these prohibitions creates real risks that they would be enforced not only between competitors in the database industries, but also against end-users....").
31 WIPO Draft Treaty, supra note 1, Article 8(1).
qualitatively or quantitatively... which constitute a new substantial investment."\textsuperscript{32} In this way, continuous changes to a database can result in a constantly re-initiated term of protection, resulting in an effectively unlimited term of protection.

C The Digital Agenda

The language of the WIPO Draft Treaty tracks a much more controversial reading of copyright law favored by the Clinton Administration which would, among other things, recharacterize all storage of information in a computer's RAM as a reproduction for the purposes of copyright law, regardless of the transitoriness of the copy.\textsuperscript{33} This re-interpretation of copyright law, undertaken ostensibly for the purposes of adapting the law to the technological changes of the digital age, would have the effect of substantially benefiting American commercial interests with substantial intellectual property holdings.\textsuperscript{34} Indeed, the proposals of the Draft Treaty on database protection should be

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\textsuperscript{32}ibid., Article 8(3).
\textsuperscript{34}See, e.g., P. Jaszi, "Goodbye to All That -- A Reluctant (and Perhaps Premature) Adieu to a constitutionally-Grounded Discourse of Public Interest in Copyright Law" (1996) 29 Vand. J. of Transnational L. 595 at 599 ("In this vision, the goal of copyright, so to speak, is to improve the competitive position of companies that have significant investments in inventories of copyrighted works.")
considered in the context of the Geneva Diplomatic Conference itself, which could be characterized as an attempt to enshrine the Clinton Administration's controversial objectives as a norm of international intellectual property protection. Domestic American interests harboring significant concerns with this agenda were quick to point this out. However, of more concern to most participants was the speed with which this strategy was implemented. The Americans submitted their proposals to the WIPO Committee of Experts before they had even introduced legislation before Congress, and well before any public scrutiny of the proposed law had occurred. Even parties who may ultimately benefit from the heightened level of protection afforded by a new database law opposed the WIPO Draft Treaty as circumventing the democratic process. Due largely to these protests, the Diplomatic Conference postponed consideration of the Draft Treaty until fuller international consideration could be given to the matter. With a

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35 See Reichman and Samuelson, supra note 15 at 109-113; Jaszi, "Some Public Interest Considerations," supra note 15 at 4. As the Draft Treaty on database protection was not raised for consideration at the Conference, the bulk of the attention of the delegates fell upon the Draft Treaty on Copyright, which sought to enshrine the expanded reproduction right as a minimum requirement of international intellectual property law: Article 7 of the proposed Copyright Treaty read "[t]he exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form." available at the US Patent and Trademark Office website, http://www.loc.gov/copyright/wipo4.html, March 15, 1997). This proposal was defeated at the Conference, and in its place delegates accepted a provision which left much more room for liberal interpretations of fair use and non-infringing reproduction in on-line environments. See WIPO Copyright Treaty (available at http://www.wipo.org/eng/diplconf/distrib/94dc.htm, 15 March, 1997).

36 See, e.g., Reichman and Samuelson, supra note 15 at 110.

37 Ibid. at 102 (describing this failure as an "embarrassing omission.")

38 See, for example, Dunn & Bradstreet, a leading firm in the field of business information, in its letter to the Patent and Trademark Office regarding the WIPO Draft Treaty, noted that although "a prominent member in the class of intended beneficiaries of the protections proposed to be adopted in the database protection treaty," Dunn & Bradstreet nonetheless urged that the United States oppose any effort to bring the treaty to a vote. "[N]either the overall question of sui generis database protection nor the specific provisions of the proposal in the current WIPO draft has received sufficient review and analysis in the US to justify immediate adoption of the proposed database protection treaty." Letter of Dunn & Bradstreet, supra note 3 at 1-2.
Committee of Experts scheduled to convene in Geneva for September 10-12 of this year, it would seem that, for Canada at least, such consideration is due.39

II The Short-Comings of this New IPR

The WIPO Draft Treaty, the EC Database Directive, and the American database Bill H.R. 3531 have all been soundly criticized as one-sided documents catering to influential commercial interests. These criticisms do carry some clout: the costs of legislating a sui generis property right for database proprietors are far-reaching, and the impact of the rights themselves seems likely to entrench current industry leaders. Disturbingly, the "losers" of the database debate -- hypothesizing that the WIPO Draft Treaty represents a representative outcome of the debate -- will include along with high-tech info-pirates value-adding entrepreneurs, academic and industrial researchers and those valuing freedom of expression.

A The Ethos of the Competitive Market

By gaining a property right in the utilization -- and re-utilization -- of information extracted from a database, database proprietors would gain through the WIPO database treaty a stranglehold on all forms of derivative uses of database contents. While this would have the disturbing effect of overlaying database access procedures with a "pay-per-use" property regime, it also would also supplant the market norm of free competition with the threat of market exclusion and dominance. The database industry is already characterized by a distinct absence of competition.40 A market of few participants and

39Indeed, according to a memorandum of WIPO's Director General, dated March 20-21, consideration is past due: proposals for the new Draft Treaty on database protection was due at the end of March, 1997. See WIPO Doc. AB/XXX/3, supra note 4. According to B. Couchman of Industry Canada, the Canadian government had yet to initiate its studies into the WIPO database proposals by April, 1997.
40For example, a 1993 OECD Report indicated that the science and technology field possesses only seven major international competitors, and that the industry expects to consolidate down to only 4-5 players within the near future. Organization for Economic Co-operation and Development, Economic and Trade Issues in the Computerized Database Market, Information Computer Communications Policy Paper #32 (1993) at 14 [hereinafter OECD Database Report]. See discussion of the global database market, infra notes 94 - 100 and accompanying text.
dominant niche players, protected by high start-up and maintenance costs and only limited economies of scale, the Draft Treaty would seem to compound the problems of the database industry rather than solve them.41

1) The Value-Added Market

The actual shape of the database industry is not apparent from the incentives model that is used to justify the introduction of a sui generis regime of property rights for databases. The WIPO Draft Treaty's articulation of the danger of market-destructive appropriations draws the picture of a database market characterized by workmanlike corporations investing time and money in gathering data. The reality is that the majority of players in the database market are hybrid entities, both accumulating data from a variety of sources (including other databases) and adding value to that data.42 The societal value from allowing value-added entrepreneurs to exploit market opportunities derives from the expanded range of products and services on the market, and the willingness of small or new commercial ventures to embrace riskier ventures, as well as from the obvious benefit of having more market players, and therefore a healthier competitive market in the provision of informational goods and services. Value-added uses of data include, among other things, indexing services, search engines, and add-on software products.43 Obviously, not all of these value-added uses of data are competitive uses: commercial ventures servicing markets unavailable to the data source, or able to operate profitably in market segments abandoned by the data source as unprofitable, plug

41 See discussion of the global database market, infra notes 94 - 100 and accompanying text.
42 This characteristic is expressly addressed by both Bloomberg L.P. and Dunn & Bradstreet in letters to the Patent and Trademark Office regarding the WIPO Draft Treaty. See Letter of Bloomberg L.P., supra note 3, and Letter of Dunn & Bradstreet, supra note 3. The OECD's 1993 report on the international database market noted that "gateways" services, which provide links from one service provider to another, showed a physical average growth of over 23% per annum between 1986 and 1990. The strategy of linking through "gateways" represents an attempt to marry complementary services and achieve economies of scope, thereby attracting a critical mass of users. OECD Database Report, supra note 40 at 12. With the boom in digital telecommunication infrastructure and the phenomenal expansion of the Internet in the '90's, this trend can only have accelerated.
a gap in the market and fulfill a capitalist truism. Those entities able to exploit their abilities -- and the opportunities of the market -- survive. Courts have been particularly reluctant to impose liability where commercial entities do not compete with the source of the information, or have invested substantial time and money in the venture themselves. Moreover, where the costs of copying data approximately equal the costs of gathering the data itself, a grant of property rights introduces inefficient market distortions and cannot be said to stimulate investment.

The emergence of digitally networked environments has generated a host of new value-added services and products, compounding the importance of this segment of the database market. Reichman and Samuelson have posited that digital technology will likely cause the market for value-added database products and services to outstrip the market for primary data in the near future, for two reasons. First, "digital technologies facilitate the disaggregation of value-added functions." Digitally networked environments allow new forms of data manipulation, aggregation and presentation that were unavailable to Guttenberg. Second, "digital technologies foster new functions, such as reformatting, filtering, and hot-linking, which have no counterparts in print media."

Advocates of intellectual property rights often downplay the proprietary nature of the rights themselves, arguing that the true implications of the enforcement of such rights is the imposition of a license. However, the reality is that the standard remedy for the invasion of a property right is an injunction, and intellectual property rights holders, preferring to maximize profits by maintaining its monopoly, have not hesitated to demand

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45See, e.g., Schroeder v. William Morrow & Co., 566 F.2d 3 (7th Cir. 1977), Feist, supra note 12.
47Reichman and Samuelson, supra note 15 at 125.
48Ibid. [footnotes omitted].
49See, e.g., N. Siebrasse, "A Property Rights Theory of Copyright Law" University of Toronto Faculty of Law, Law and Economics Workshop, (10 April, 1997) 9.
just that of courts asked to enforce these rights. Where a database market is relatively competitive, this should not raise competitive concerns. However, where demand for a database's services is inelastic, due to either inefficient price discrimination mechanisms negating the ability to substitute data suppliers, or the importance of the data to the consumer, enforcing a proprietary monopoly and its monopoly pricing introduces welfare losses that are difficult to justify in a market that putatively values the competitive provision of goods and services.

These circumstances would seem to call for the imposition of a compulsory license as a solution. The first two drafts of the EC Database Directive contained compulsory licensing provisions that would have compelled sole source and government-generated database proprietors to extend licenses on fair and non-discriminatory terms. Under pressure from the European database industry, that provision was withdrawn. The US legislation adopts a similar approach: compulsory licensing is not even an option. Not surprisingly, the WIPO Draft Treaty reflects this hostile stance, and makes no mention of compulsory licensing.

2) Windfalls

A second impact the WIPO Draft Treaty may have on the competitiveness of information industries flows from the scope of its definition of "database." A "database," recall, is defined in the Draft Treaty as "a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being accessed by electronic or other means." Virtually anything can qualify as "a collection of ..."

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50 In Feist itself, Rural refused Feist's request to license its telephone listings in an effort to protect its market for advertising revenue, causing the Supreme Court to characterize Rural's motivations as "an unlawful purpose 'to extend its monopoly in telephone service to a monopoly in yellow pages advertising." Supra note 12 at 343 (quoting trial judge).
51 See Reichman and Samuelson, supra note 15 at 86. Nonetheless, the Final Directive does compel the Commission to review the impact of these provisions and make recommendations on the necessity of reinstituting "non-voluntary licensing arrangements." See EC Database Directive, supra note 8, Art. 16(3).
52 See H.R. 3531, supra note 9.
53 WIPO Draft Treaty, supra note 1, Article 2(i).
materials arranged in a systematic way," resulting in the creation of powerful new property rights where none existed -- or were even imagined -- before. The WIPO Draft Treaty on database protection, if passed unaltered, will radically change the way we treat many everyday services, including sports statistics, weather forecasts, stock pricing, newspapers, telephone directories, train schedules, and health information. More troublingly, it is far from clear that a new form of property rights is even needed by some of the industries who will benefit from this treaty. The OECD's 1993 Database Report indicated that the global database industry grew between 1986 and 1990 at a rate of almost 25% per annum. Not only do these markets show no evidence of market failure, but their participants have given no indication of a need for the creation of rights beyond the commercial rights already inherent to the market.

Consider the Internet. The breadth of the definitions of a "database" has created a danger that new and powerful rights will be created where none were ever intended to exist, bequeathing some market participants with an unexpected, undeserved windfall. A brief to the US Patent and Trademark Office by a coalition of software developers warned that the broad definition of "database" will inevitably alter the economic reality of the Internet.54 For example, the routing infrastructure of the Internet comprises local computers, ignorant of the topography of the Internet, who communicate through a large series of intermediate systems containing Internet address data, or "routing tables." This architecture is largely compelled through requirements of networking efficiency: it is ridiculous to require every local computer on the Net to store a list of global Internet routing tables. Yet, since such a list is clearly an accessible "collection of ...materials arranged in a systematic way," the proprietors of systems fortunate enough to contain routing tables will then find themselves in a powerful position. Since these systems are generally owned by large network interconnectivity providers such as PSI, MCI, and

54"Software Developers Comments," supra note 15. Signatories to this document include Internet service providers, authors of popular books on the Internet, and software engineers and systems analysts.
Sprint, the Software Developers have expressed some fear that a new right in data could be used as a "price lever ...to force smaller providers out of the market." Similarly, the Comment expressed some concern with the rather sudden accumulation of market power held by Network Solutions, Inc., registrar of the Domain Name System, should the US embrace the WIPO Draft Treaty unaltered. Finally, the Comment pointed out that every Internet search engine, from Alta Vista to Yahoo!, constructs from every indexed URL a mini-index with which it conducts its search. Since "each web site on the Internet fully meets the definition of a database," each mini-index is an extraction. Again, if search engines are required to obtain a license from every indexed web site, search engines will cease to be, at least in the form we now know them.

Legislating windfalls and sheltering markets from the rigors of competition through sui generis property rights, especially in the absence of market failure or a pressing social need, cannot be easily squared with traditional notions of democratic governance and responsible policy-making. As the following comments show, these concerns are amplified when one of the primary consumers for the products and services of databases is the academic community, which can be characterized by limited (and shrinking) resources and relatively inelastic demand.

B Commodifying the Academy

Perhaps the most vocal opposition to the WIPO Draft Treaty has come from the academic research and development community, who see themselves targeted by database proprietors as a relatively vulnerable revenue source. Public researchers are among the heaviest users of databases. To some extent, the academic view has some

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55Ibid. at 2.
56Ibid.
57Ibid. at 3.
58In a recent informal survey on "Technology Scholarly Communication" conducted by the Association of Universities and Colleges of Canada, 53.2% of those responding by mail, and 84.9% of those responding via the Internet, indicated that they used databases on a regular basis (available at http://www.aucc.ca/english/university/carl-sum.htm, April 23, 1997).
force: the current model for research in our universities is based primarily on government funding and widespread sharing of data among interested parties. Technological growth is based more on cumulative innovation than revolutionary insight; the ethic of data sharing amongst researchers is at the core of that process. The WIPO Draft Treaty seeks, prima facie, to eradicate this norm, replacing with it a pay-per-use model. This is not necessarily a bad thing; should the current model of government funding remain intact, the academic research community could see funding for research actually increase after the proprietization of data. This could happen through either the use of data rights as a source of government revenues, entailing a welfare transfer from private industry to government coffers, or through the academic community embracing data protection as a means of extracting research funds from private enterprises. Of course, the effectiveness of both these strategies at enhancing, or at least averting a deterioration, of the global welfare of academic research depends on the resiliency of the data sharing norm within the academic community itself, and the ability of public institutions to erect "Chinese walls" between public and private research. However, these scenarios are unlikely, given the ever increasing degree of integration between public institutions and private enterprise, and the increasing reliance of Canada's universities on private funding as government financial support falls away. Much more likely is a scenario in which more and more of Canada's publicly funded databases have their administrative and servicing functions outsourced to private enterprises, and in which universities are divided between

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60Article 5(2) of the WIPO Draft Treaty specifies that "It shall be a matter for the national legislation of Contracting Parties to determine the protection that shall be granted to databases made by government entities or their agents or employees."

61See, e.g., "Nortel Gives $8 Million for Institute" Financial Post (21 February, 1997), describing partnering between Northern Telecom, Ltd. and the University of Toronto on a Graduate Programme in advanced telecommunications.
"have" and "have-not" researchers, corresponding with their access to capital and to
good quality research that private industry is willing to pay for.

Of course, it is possible that as public researchers adjust to the new regime of data
rights, the rigors of the market may produce efficiency gains among public institutions,
off-setting both adjustment costs and the loss of the synergies of the data sharing model.\textsuperscript{62} Moreover, the carrot of property rights in data, combined with the crunch in public
funding, may serve to generate unprecedented public production of quality data, and a
rationalization of investment in revenue maximizing streams of research. This possibility
in itself represents a new danger, as the pressure for revenues from data may direct public
expenditures towards applied research as opposed to primary research. Further, these
hypotheses fundamentally recharacterize what public research actually does: it is
emphatically not a business, and generally cannot recast itself as a business. If the bulk
of research carried on at universities were profitable in and of itself, private enterprise
would likely already be there.

A second line of argument minimizes the impact of data rights by noting that
many databases already charge for access and monitor use of data. The WIPO Draft
Treaty merely adds the more formidable enforcement mechanisms of property rights to
contractual and technological mechanisms already in place. The underlying premise of
this argument is that since public researchers already pay for data, the Draft Treaty
merely alters what researchers are paying for. While this may be true of some databases
relied upon by academics, such as legal databases and bibliographic databases, these data
sources are in the minority. As Samuelson and Reichman note, the truth is that "the
important databases on which basic science relies ...are usually cooperative in nature,

\textsuperscript{62}See, \textit{e.g.}, Robert P. Merges, "Property Rights Theory and the Commons: The Case of Scientific
government controlled, and geared to a relatively small and selected band of users who benefit from the principle of free and open access to data."\textsuperscript{63}

Perhaps more troubling is the failure of the WIPO Draft Treaty to compel Contracting Parties to legislate public good exceptions, such as the traditional "fair use" or "fair dealing" defence of copyright law.\textsuperscript{64} The US legislation contains absolutely no fair use measures. This means that any reuse of data derived from a database, even if by an unaware third party, would infringe the rights of the database's proprietor, even if the transaction costs involved in searching for the data's owner are prohibitively high. Ignorance, of course, is not a defence to invasion of property. Researchers need to reuse data in verifying the results of others research, communicating or debating with other researchers, and merely publishing the results of their own research. All of these activities are culpable acts under the WIPO Draft Treaty.

\textbf{C \quad Freedom of Expression}

While the Draft Treaty's effects on Canada's research and development community are troubling, the implications of the Treaty for constitutionally guaranteed rights of expression are even more disturbing. The Supreme Court has stated that freedom of expression fulfills three fundamental social and democratic roles: as a component of democratic self-government, as a pre-requisite to individual self-fulfillment, and as a condition precedent to the search for truth,\textsuperscript{65} and emphasized that its "vital importance... cannot be over-emphasized."\textsuperscript{66} Where the utilization of the proprietary data of others intersects with these values, a statutory grant of property rights

\textsuperscript{63}Supra note 15, citing Bits of Power, supra note 59 at chs. 2-4 and Executive Summary.

\textsuperscript{64}"Contracting Parties may, in their national legislation, provide exceptions to or limitations of the rights provided in this Treaty in certain special cases that do not conflict with the normal exploitation of the database and do not unreasonably prejudice the legitimate interests of the right holder." WIPO Draft Treaty, supra note 1, Article 5(1).


in data can be tolerated only if demonstrably justified as a reasonable limitation on freedom of expression under section one of the Charter of Rights and Freedoms.\textsuperscript{67}

The demand for a \textit{sui generis} right in data has been precipitated, to a large extent, by the perceived failure of copyright law to adequately safeguard the interests of database proprietors. The reason behind this perceived failure is copyright law's regulatory function, which seeks to balance the interests of copyright owners with those who use their expressive works. The US Constitution embraces a utilitarian justification for copyright, granting Congress authority to legislate to "promote the Progress of Science and useful Arts."\textsuperscript{68} While Canadian copyright law cannot be described as so unabashedly utilitarian, it also embraces a user access and dissemination as a primary function.\textsuperscript{69} In the vast majority of cases, there is no conflict between the goals of copyright law and those of freedom of expression. Indeed, as the US Supreme Court has noted, copyright functions as "an engine of free expression."\textsuperscript{70} The WIPO Draft Treaty, in contrast, was not drafted with the goals of the US Constitution, despite its lineage.\textsuperscript{71} Rather, the Draft Treaty was drafted with the express goal in mind of safeguarding investments.\textsuperscript{72} It should be emphasized here that the Draft Treaty is unconcerned with \textit{maximizing} investment; it is content with safeguarding investment. Not only are traditional goals of intellectual


\textsuperscript{68}US Constitution, Article 1, s. 8, cl. 8.

\textsuperscript{69}As Madame Justice B. McLachlin has noted,

\begin{quote}
We must stop thinking of intellectual property as an absolute and start thinking of it as a function—as a process, which, if it is to be successful, must meet diverse aims: the assurance of a fair reward to creators and inventors and the encouragement of research and creativity, on the one hand; and on the other hand, the widest possible dissemination of the ideas and products of which the world, and all the individuals in it, have such great need.
\end{quote}


\textsuperscript{71}See "US Proposal," supra note 7.

\textsuperscript{72}See WIPO Draft Treaty, supra note 1, Preamble.
property statutes and freedom of expression not referenced by the Draft Treaty -- they are irrelevant to the Draft Treaty.

It might be argued that this omission is of no consequence to merely a commercial statute: bankruptcy law is similarly unconcerned with the dissemination of knowledge, and yet the Bankruptcy Act functions under no cloud of unconstitutionality. This argument protests too much: it ignores the centrality of information to speech. Facts, *per se*, are elements of speech, *per se*. The unhindered availability of information is essential to all of the constitutional values at the core of freedom of expression in Canada. Moreover, it is this realization that lies at the core of copyright's constitutionality: the fact that property rights attach only to expression, leaving ideas -- and facts -- free to the public at large accommodates the demands of freedom of expression. Indeed, this reasoning lies at the core of the US Supreme Court's decision in *Feist*: that facts are unprotected and available to all is "the essence of copyright' and a constitutional requirement." While *Feist* is guilty of treating facts and data as identical to ideas -- they are not -- facts and ideas function inseparably for the purposes of freedom of expression. Jessica Litman has argued that "the most crucial cost of according quasi-copyright protection to facts is the loss of the symbolic force of the axiom that facts cannot be owned." Clearly, access to and use of facts revolve closely around the core of freedom of expression values. It may nonetheless be argued that rights in data may enhance freedom of expression by improving access to information: once property rights are in place, contractual and technological safeguards will be redundant and so dropped as unnecessary. Professor Litman has argued that "the only legitimate justification for

conferring statutory protection on facts is ensuring that public access to factual compilations is enhanced."77 However, it seems unlikely that these subsidiary impediments to access will fall by the wayside. They minimize transaction costs and aid in enforcement, and may ultimately be used to keep tabs on the use of extracted data itself. A much more likely scenario involves multiple layers of protection.

A final feature of the WIPO Draft Treaty that touches upon freedom of expression values involves the effectively perpetual term of protection and the absence of a novelty requirement in protected subject matter. Combined, these features effectively eradicate any notion of a public domain for facts. While the value of the public domain, as such, has not been the subject matter of judicial inquiry, recent scholarship suggests that its value is very much linked to the same constitutional values as the idea/expression dichotomy.78 Indeed, ideas are merely one component of many public domain concepts, including unprotected works, the merger doctrine, scenes a faire, stock characters and phrases, and up until now data and facts. These conventional view of the public domain is that these items are not protected by intellectual property law because they are not worth protecting, or are impractical to protect. A more robust view of the public domain regards the public domain as comprising the raw elements of expression; this view envisions the public domain not as the worthless expressive castaways of society, but as compelled into existence by the constitution. When one considers the breadth of the definition of "database," one cannot help but conclude that if adopted, the WIPO Draft Treaty unless radically amended in implementation is on a collision course with the Constitution.

The WIPO Draft Treaty is a deeply flawed document. It represents an extreme vision of a possible future intellectual property infrastructure, one in which commercial

77Litman, "After Feist," supra note 75 at 616.
incentives and values displace those of academic research and freedom of expression. Even as a document professedly concerned with commercial realities, it in fact represents a model in which the market dominance of current industry leaders will be insulated from the competitive pressures of value-added service providers. A statute truly concerned with the integrity of the competitive market in databases would focus its attention on maximizing investment in the industry; the WIPO Draft Treaty, in contrast, merely safeguards whatever investment the market may direct towards the production of databases. While the WIPO Draft Treaty may not represent the ideal model for protecting databases in Canada, it at least has served the valuable purpose of focusing international attention on both the costs and benefits of protecting data as such. The final two Parts of this Chapter will attempt to apply the lessons of the WIPO Draft Treaty to Canada, and consider the necessity of a sui generis right for databases in Canada, and if needed, what a Canadian database statute should look like.

III Justifying a Sui Generis Right in Data

A Market Failure: Protecting Investments

Part I of this Chapter introduced the philosophical underpinning of most intellectual property statutes: the recognition that without state intervention, market failure will induce a chronic under supply of intangible goods and services. The economic justification of intellectual property is straightforward: it is intellectual property's "public good" aspect that distinguishes it from other forms of property. Simply, the costs of creating an intellectual work exceed the costs of copying it; once copied, it is relatively easy to produce and disseminate more copies. However, competitors can take advantage of these features, reproducing and disseminating the intangible works of others at a cost superior to those borne by the original creator, since competitors, free-riding on the creative efforts of others, may set their price at the

79 See discussion of the global database market, infra notes 94 - 100 and accompanying text.
marginal cost of producing copies, and need not incorporate the sunk costs of creating the work in the first place. Unless being first to market provides financial benefits sufficient to recoup these sunk costs -- the exception, not the rule -- no actor will invest the funds necessary to produce the intellectual property in the first place. Intellectual property rights seek to remedy this chronic under supply by limiting access to a work, thereby providing the creator with sufficient lead time to recoup sunk costs and, preferably, return a profit. The "central problem" for most intellectual property regimes is "[s]triking the correct balance between access and incentives."\(^80\) The wonders of the digital age have intensified the public good challenges of intellectual property. Perfect reproduction and instantaneous dissemination potentially shortens any lead time that the original creator may enjoy, and bridges any potential gap in quality between the original and the copy.

The WIPO Draft Treaty embraces a selective portion of this logic. The Preamble states that the Treaty has been proposed out of a desire "to enhance and stimulate the production, distribution and international trade in databases,"\(^81\) and to do so by establishing "a new form of protection for databases by granting rights adequate to enable the makers of databases to recover the investment they have made in their databases."\(^82\)

Although the Preamble recognizes that "databases are a vital element in the development of a global information infrastructure and an essential tool for promoting economic, cultural and technological advancement," such promotion is not a textual priority of the Draft Treaty itself. The Notes on Article 1 recognize that the database industry, as a "content industry," have "both direct and indirect effects on the development of the information infrastructure at a national and international level," and as such "plays a significant role in fostering new industries and job growth;"\(^83\) however, again neither

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\(^81\) WIPO Draft Treaty, supra note 1, Preamble.
\(^82\) Ibid. at Notes on Article 1, note 1.02.
\(^83\) Ibid., Preamble.
technological innovation nor economic growth are matters for the Draft Treaty text. Rather, the focus of the Draft Treaty is on investment. Investment is the measure for both the scope of the rights and substantiality of changes that give rise to a new term of protection. The Draft Treaty is uninterested in maximizing investment in databases, and merely "recognizes" the broader societal and economic impact databases may have. This feature of the WIPO Draft Treaty has led some Americans to question the constitutionality of a Treaty-implementing intellectual property statute that does not serve the objectives of the Copyright and Patent Clause of the US Constitution. Backers of the Draft Treaty-- and of H.R. 3531 -- point to the Commerce Clause of the US Constitution as providing constitutional authority for a sui generis right in databases.

The grant of rights in the WIPO Draft Treaty go much farther than the limited objective of safeguarding investments would seem to require. First of all, term renewal is attached to the database at large, rather than the data per se. Therefore, by incremental additions that amount to a subsequent "substantial investment," one can obtain potentially perpetual protection for a single element of data. However, no rational business makes an investment that requires an indefinite, potentially infinite term of protection to recoup. For that matter, no rational business invests in the hope of recouping the investment in a generation's time -- the term of protection offered by the WIPO Draft Treaty is wildly out of such with the stated goals of the intellectual property right. Similarly, the extraction and utilization rights are activated by a second comer's dealing with a "substantial part" of the database. "Substantiality" is defined in terms of impact of use on value of the database, which is regarded broadly. This definition has the effect of catching even the activities of good faith customers. Again, if the Draft Treaty is truly preoccupied with the

84 Ibid. at Article 1(1) ("Contracting Parties shall protect any database that represents a substantial investment in the contents of the database.")
85 Ibid. at Article 8(3).
86 US Constitution, Article 1, s. 8, cl. 8. See Reichman and Samuelson, supra note 15 at 56; Jaszi, supra note 15 at 5.
"public good" aspects of intellectual property, then it the rights should activate according to the nature of the use, keying in on competitive uses rather than customers' uses.

Moreover, the Draft Treaty fails to consider the possibility that alternative modes of protection might adequately safeguard the integrity of the database market. Contract law, technological safeguards, unfair competition law an copyright law all protect databases to varying degrees. In fact, the ability of database proprietors to safeguard their interests would seem to be well documented by the reality of the marketplace. The international database industry is noted for few players possessing market dominance in niche markets: the 50 largest database hosts distribute 69% of the databases in the world.\textsuperscript{87} On-line databases routinely supplement copyright protections with on-line contractual obligations. Sole-source data providers have charged monopolistic prices for access to data, with unfortunate implications for vulnerable social institutions such as public educational institutions and libraries.\textsuperscript{88}

B Originality in Copyright Law

If the dire straits of the international database industry is not behind the introduction of the WIPO Draft Treaty, then we must look elsewhere to find a proper justification. An often cited culprit is copyright law's originality requirement. Copyright law, like patent, seeks to strike a balance between access to intellectual property and incentives to its creation. To that end, copyright protects original works fixed in a tangible medium. The question is as to the measure of "originality:" is mere workmanship (or investment) sufficient, or is some modicum of creativity required? If the former, then compilations of data, arranged in unimaginative fashion, qualify for copyright protection; if the latter, then something more is required of the arrangement.

\textsuperscript{87}OECD Database Report, \textit{supra} note 40 at 36.

\textsuperscript{88}American courts have criticized precisely this sort of behavior on the part of software firms: see, \textit{e.g.}, \textit{Sega Enterprises, Ltd. v. Accolade, Inc.}, 785 F. Supp. 1392 (N.D. Cal. 1992), aff'd in part, rev'd in part, 977 F.2d 1510 (9th cir.); \textit{Vault v. Quaid Software Ltd.}, 847 F.2d 255 (5th cir. 1988). See also M. Leaffer, "Engineering Competitive Policy and Copyright Misuse" (1994) 19 Dayton L. Rev 1087.
than mere "sweat of the brow." A copyright law which protects only works of "high authorship" would then orphan works lacking sufficient originality to the public domain, creating a "gap" in protection. Theoretically, a significant number of databases fall into this "gap."

The European Community has required of its member's copyright statutes a relatively high level of creative originality; not surprisingly, the EC Database Directive has often been justified as a necessary component of a currently incomplete EC intellectual property law framework. Similarly, since the US Supreme Court's decision if Feist, the US database industry has been calling for similar legislative action from the US government. These concerns are not without justification: Non-creatively arranged compilations of factual matter are potentially vulnerable to market-destructive free-riding. As one commentator has observed, "[u]nder the Supreme Court's analysis, a competitor would be infringing no copyright if it simply stole the data and left the base."

The problem with citing copyright law's incomplete protection as a justification for implementing a sui generis regime of rights for databases is that this argument slyly substitutes "no protection" for "incomplete protection." The truth is that a high originality requirement does not deny all copyright protection to databases -- only to those less creatively presented to the consumer. Moreover, even works of low authorship are not unprotected: Feist itself held that unfair competition law remained an adequate safeguard for uncreative compilations of facts and data. Moreover, the years since Feist have not seen the sky fall in on the US database industry. Even before Feist, some US

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89 Supra note 12.
91 Litman, "After Feist," supra note 75 at 609.
Circuit courts, notably the Second and Ninth, had accorded databases very thin copyright protection.93 Nonetheless, neither California nor New York can be said to suffer from a dearth of database services and products, both before and after Feist. Further, concerns over the inadequacy of copyright law again ignore the potential of database proprietors for self-help: contractual and technological safeguards, combined with a healthy helping of unfair competition law, seem more than adequate to ensure healthy investment in the database industry.

C The Realpolitik of International Trade in Intangibles

If neither market failure arguments nor those based on the inadequacy of copyright law provide a compelling reason for the urgency with which the WIPO Draft Treaty has been introduced, perhaps a more politically attentive explanation will suffice. As noted above, the international database market is characterized by an absence of competition and a corresponding tendency towards large dominant players in niche markets. It is also characterized by US dominance.

A 1993 OECD Report on "Economic and Trade Issues in the Computerized Database Market" provides one of the few comprehensive analyses of the contemporary international database market.94 This Report provides objective evidence of the US's comparative advantage in this area: in a global industry worth approximately US$10.9 billion in 1990, the US industry alone commanded a 49.2% market share.95 This comparative advantage seems to be greatest at the leading edge of database technology: the inclusion of CD-ROMS into the 1990 global database market would up the American industry's share of the global market to an astounding 58%.96 US dominance in the database industry is largely attributable to its lead time: the first database "host," Dialog,

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93See, e.g., Worth v. Selchow & Richter, Co., 827 F.2d 569 (9th Cir. 1987); Financial Info., Inc. v. Moody's Investor's Serv., 808 F.2d 204 (2d Cir. 1986), cert. den'd, 484 U.S. 820 (1986).
94OECD Database Report, supra note 40.
95Ibid. at 12. These figures exclude Central and Eastern European countries.
96Ibid.
was created in the 1960's and arose out of the need amongst scientists and researchers to share data on nuclear and energy and space research. Dialog is to this date the world's largest database host, distributing 13.6% of the databases available in the US. It was not until the seventies that the first European database proprietors appeared on the scene, well after the establishment of several large American databases. However, since then, the European and Japanese industries have been catching up. The projected growth rate for 1990-1995 of the European and Japanese database industries was projected at 13.4% and 15.7%, respectively, compared to 9.2% for North America.

This US dominance, more than any other factor, may be behind the European Community's Database Directive. In the early 1990's, the EC Information Policy Action Program (IMPACT) began formulating a strategy for European information technologies. Among their early conclusions was that European database producers had to overcome several comparative disadvantages in order to match American global dominance in the database industry. Picking up on the Nordic countries "catalogue rule" -- a copyright-like protection for compilations not protected by copyright -- the EC proposed a sui generis form of protection for databases. Reflecting the IMPACT Program's preoccupation with the comparative advantage of European database proprietors, the EC Database Directive bases its external applicability on national

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97 *ibid.* at 11.
98 *ibid.* at 36.
99 *ibid.* The British firm of Reuters, established in the late sixties, provides the only noteworthy exception to this pattern (*ibid.*), and is correspondingly Europe's largest database host, distributing 6.4% of the databases available in the EC (*ibid.* at 36-42).
100 *ibid.* at 12.
101 The OECD's 1993 Database Report indicates that in 1989, US ASCII databases accounted for 8.6% of databases distributed in Europe, while European penetration of the US market was limited to 6.2% of distributed ASCII databases (*ibid.* at 40). Note, however, that these figures do not account for market power, but only for absolute penetration.
reciprocity, rather than national treatment, the established norm for most forms of international intellectual property protection. The American legislation, H.R. 3531, may best be seen as a counter to the EC Database Directive's reciprocity provisions. Without complementary recognition of rights, American database proprietors may be shut out of the European market -- or at least placed at a comparative disadvantage relative to their European competitors.

However, the move to the international forum before a single nation has enacted sui generis database legislation can best be seen as an offshoot of the US success in the intellectual property component (TRIPS) of the negotiations in the Uruguay Round of negotiations over the GATT. The TRIPS Agreement came about after years of sustained pressure from American, European and Japanese manufacturing associations, and has been widely condemned as favoring the interests of the developed North at the expense of the developing countries of the South. The database industry repeats the pattern of comparative advantage: North American, European Community and Japanese

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104EC Directive on Databases, supra note 8 Article 11.
105See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Article 5(1). See also the Agreement on Trade-Related Aspects of Intellectual Property (being Annex IC to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakech, Morocco, on April 15, 1994, establishing the World Trade Organization) component to the GATT (General Agreement on Tariffs and Trade, 30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700), Article 3 (National Treatment). The EC Database Directive's reciprocity component is modeled on a similar demand made by the United States with regard to international semiconductor protection. See Reichman and Samuelson, supra note 15 at 96.
106EC Directive on Databases, supra note 8 Article 11.
database players accounted for 95% of the US$10.9 billion 1990 global market. Not surprisingly, it is the large international database proprietors that are pushing for this Treaty, notably the American industry and the British and Dutch database proprietors.

However, WIPO may not be the ideal forum for an international convention catering to the comparative trading advantages of the North. Much of the success of the TRIPS Agreement can be attributed to the "horse-trading" that occurs in negotiations under the GATT, now administered by the World Trade Organization (WTO). In other words, the accession of the South to an international intellectual property protocol that seems to work clearly against their interests, at least in the foreseeable future, only makes sense as a concession in exchange for greater access to Northern markets in areas in which the South enjoys a comparative advantage, namely, manufactures.

One problem with this approach before the WIPO is the weaker bargaining position of the North: without being able to link trade in databases to trade in goods, the US and the EC do not have anything substantial to offer the South in return for an extension of new intellectual property rights to database proprietors. This weakness has already surfaced in negotiations over the Copyright Treaty at the December, 1996 Diplomatic Conference in Geneva, where US attempts to implement the White Paper's

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109OECD Database Report, supra note 40 at 12.
digital framework globally met with stout resistance, forcing the withdrawal of a key Article regarding the interpretation of the reproduction right in digital environments.\textsuperscript{114} For that reason, if the North does not succeed at implementing a variation of the WIPO Draft Treaty that is to its liking at a future WIPO Diplomatic Conference, we can expect to see it raised before WTO reviews of the TRIPS Agreement in the near future.

This Chapter has suggested that the WIPO Draft Agreement, ostensibly a measure to plug a "gap" in global protection afforded intellectual property for compilations of data of "low" authorship, is best seen as international maneuvering by the North, playing to its comparative advantage in information industries. While the immediate legislative activities of the United States and the European Community may simply be attempts to subsidize domestic industry and countervail offshore advantages, the WIPO Draft Treaty with its international scope has international implications that will affect the industrial policies all signatory nations. Canada's stand in these negotiations should thus be predicated on two distinct factors. First, the extent to which Canadian law evidences this "gap" in intellectual property protections, and so suffers from a market failure resulting in sub-optimal investment in the database industry. Second, from a strictly economic perspective, Canada's international position in the international market for database products and services should provide at least some guidance to a prudent policy in international database protection. Whether or not Canada possesses a comparative advantage in databases, logically, should dictate whether Canada should embrace a corresponding expansion of rights a trade priority.

IV Defining a Canadian Position

A Originality in Canadian Copyright Law

Historically, Canadian copyright law has adhered to the British conception of originality, which states that mere industriousness, or the "sweat of the brow," is

\textsuperscript{114}See WIPO Copyright Treaty, \textit{supra} note 1.
sufficient to attract copyright protection. Under this conception of originality, Canada extends copyright protection to even unimaginatively compiled data. In fact, this conception of originality grants copyright privileges not only to databases, but also to racing forms, accounting sheets, advertisements and other non-creative, pedestrian works. While Canadian copyright protection does not extend to the actual facts or data compiled, it does extend to any reproduction of those facts that bears substantial similarity to the source compilation. It should be emphasized that Canadian courts do not grant a statutory monopoly via copyright law, but rather an exclusive right to reproduce them; facts per se, remain free for public use, provided one is willing to expend the labour required to "discover" them again. While this may seem inefficient, it merely reflects copyright's fundamental tension between the need to provide incentives for the creation of expressive works and the need for public access to those works.

If copyright law affords protection to "original" compilations of data based on labour rather than on creativity, then it would seem self-evident that Canada does not suffer from the "gap" in protection that is purportedly behind the push for database

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115See Slumber-Magic Adjustable Bed Co. Ltd. v. Sleep-King Adjustable Bed Co. Ltd. et al. (1984), 3 C.P.R. (3d) 81 at 84 (B.C.S.C.) ("In the case of a compilation, the originality requisite to copyright is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation"). English cases extending copyright protection on the basis of industriousness include Sayre v. Moore (1785), 1 East 316 (H.L.) (extending copyright protection to maps), Matthewson v. Stockdale (1806), 33 E.R. 103 (H.L.) (extending copyright protection to a directory of persons), Kelly v. Morris (1866), L.R. 1 Eq. 697 (H.L.) (extending copyright protection to a post office directory), and Morris v. Ashbee (1868), L.R. 7 Eq. 34 (H.L.) (extending copyright protection to a directory). The leading modern English case on originality in the English law of copyright is Ladbroke (Football) Ltd v. William Hill (Football) Ltd., [1964] 1 All E.R. 465 (H.L.).


Specifically, since Canadian copyright law defines a substantially similar reproduction in both quantitative and qualitative terms, database industry fears of having data "easily stolen and marketed as competing products with little hope for legal address" would seem groundless. Therefore, the fundamental rhetorical devices used to push the database treaty would seem to be baseless in Canada.

However, it should be noted that two recent international developments may throw the status of Canada's copyright law's originality requirement into a state of flux. First, the UK has under the EC Directive committed itself to adopt a sui generis regime of protection for databases, rendering its low originality requirement redundant. Second, the US Supreme in Feist has explicitly rejected the UK standard of industriousness in favour the higher standard of a modicum of authorial creativity.

In addition to adherence to the Database Directive, the UK itself has come under pressure to conform its copyright laws to those of other member countries in the European Community. The UK is the only EC member country whose copyright laws accept the low level of originality implied by industriousness. Since rights in facts are now to be governed by the sui generis regime envisioned by the European Directive, it follows that copyright protection beyond that afforded compilations under the Directive may be pre-empted. If this development does in fact signal a retreat from the UK position that originality is satisfied by industriousness, then Canada would be the last common law holdout embracing this conception of originality. Even if the UK declines to abandon its historical conception of authorship, the jurisprudential value of UK copyright law's originality doctrine is not likely to increase in the future. Since works of low authorship are more likely to avail themselves of the more powerful database rights

121See Information Industry Association, "U.S. Industry Needs Legislation," supra note 90 at 1 ("[T]here is a growing wariness that the current level of legal protection may not permit the massive investments needed to develop, market and maintain innovation and informative databases.")

122Ibid.

123German copyright law, for example, requires a higher level of creative originality than that demanded of US author's in Feist.
compelled by the EC Database Directive than the weaker rights copyright law provides, it is unlikely that the UK will continue as a fount of persuasive case law on originality. If Canada remains the lone holdout of a conception of "low" authorship," it would place Canada in the unique position of ostensibly protecting the interests of database proprietors without being internationally recognized as doing so. Canada, as a signatory to the Berne Convention, is required by its national treatment obligations to respect foreign firms copyright in data within Canadian borders, with a corresponding exodus of royalties, without receiving corresponding benefits from sui generis data rights, which, under the EC Directive model, would be governed by reciprocity.124

It may be that Canada is already moving away from a "sweat-of-the-brow" treatment of originality in copyright. The powerful unanimous opinion of the US Supreme Court in Feist has made itself felt in Canadian jurisprudence, and has been explicitly relied on in some cases125 and implicitly relied on in others.126 Even before Feist, some Canadian courts had denied copyright protection to works deemed lacking "panache."127 And most recently, a Federal Court Trial Division Judge declined to recognize copyright in the compilation of information in the "Yellow Pages":

Tele-Direct arranged its information, the vast majority of which is not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment or labour in its overall arrangement which is insufficient to support a claim of originality in the compilation so as to warrant copyright protection.128

124EC Directive on Databases, supra note 8 Article 11.
125See, e.g., CRTC Decision 92-1; *Prism Hospital Software Inc. et al. v. Medical Records Institute et al.* (1994), 57 C.P.R.(3d) 129 (B.C.Sup.Ct.) [hereinafter *Prism*.]
Moreover, even the US, also a common law jurisdiction, until recently also boasted of a line of case law which advocated mere industriousness as sufficient to meet copyright's originality requirement. Of course, this line of case law was expressly rejected by the Supreme Court in *Feist*. The power of this decision rests not in its doctrinal reasoning, but rather in its invocation of the powerful public interest purposes that American copyright law is said to serve: namely, the "progress of science and art." While Canadian copyright law enjoys no such explicitly utilitarian rationale, the Canadian law of copyright has not proved immune to the power of *Feist*'s logic.

Regardless of the content of Canadian copyright law's originality requirement, the pressure to "sign on" to a global *sui generis* regime for databases may be too much for the Canadian government to resist, particularly if the US and Europe press for it inclusion under the TRIPS framework. Moreover, it is unlikely that foreign governments will grant Canadians much credit for their tough stance on copyright: to the extent that a copyright regime may map onto a *sui generis* right to data, Canadian firms may qualify for some limited flow of revenues through reciprocity arrangements. However, since the extraction and re-utilization rights go beyond those limited rights afforded by the Canadian *Copyright Act*, international regulatory environments for databases would likely be asymmetrical, favouring firms of foreign *sui generis* jurisdictions over Canadian firms in a purely copyright jurisdictions. Undoubtedly, Canadian database proprietors would lobby the Canadian government to adopt the *sui generis* right: the prospects of enhanced revenues derived from the WIPO Draft Treaties expansive new rights are too good to resist.

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129 Supra note 12.

130 Ibid. at 349.

B Market Failure

The discussion thus far has demonstrated that database proprietors in Canada currently suffer from no "gap" in intellectual property protection. Accordingly, the main legal arguments behind the push for *sui generis* rights in databases should not carry great weight with Canadian policy makers. Nonetheless, it may be argued that the actual rights granted by copyright law, even under a "low" originality requirement, provide inadequate incentives to invest in the Canadian database industry. If so, this argument should be borne out by an analysis of the state of the Canadian market for databases. Not surprisingly, the facts do not seem to bear assertion out.

On a comparative basis, Canada actually has a relatively high level of activity in the database industry. The 1993 OECD Report indicated that Canada had 44 database hosts or gateways in 1989, compared to 307 for the US and 232 for the EC, despite a Canadian population that is 10% of the US and only 5% of the European population.\(^\text{132}\) Similarly, Canada produced a total of 248 ASCII databases in 1989 (17.5% of the global total) compared to 2214 for the US (51%) and 1048 for the EC (24%). Moreover, the actual number of databases in Canada that are of Canadian origin is surprisingly high: in 1989, 87.9% of Canada's ASCII databases were national in origin; 3.1% were of European origin and 5.1% are American.\(^\text{133}\)

To a large extent, this national preponderance is illusory. One must keep in mind that these figures refer to total number of databases, and do not consider either database size or market power. For example, Canada held only 2.6% of the 1989 North American market for on-line services, or US$152.9 million of a US$5.8 billion market.\(^\text{134}\) American service providers, in contrast, commanded a 91% share of this market, representing revenues of over US$5.2 billion.\(^\text{135}\) While Canadian on-line service

\(^{133}\)Ibid. at 40.
\(^{134}\)Ibid. at 49.
\(^{135}\)Ibid.
providers grew almost twice as fast as their American counterparts in the intervening year, by 1990 Canadians still commanded only 2.9% (or US$188.6) of a US$6.5 billion industry.\textsuperscript{136} 

It must first be acknowledged that this data is incomplete and out of date. This attests to both the speed at which technology is evolving and the speed at which the legal environment is changing: Canadian statisticians simply have been unable to keep up. Second, the failure of Industry Canada to conduct any meaningful contemporary examination of the Canadian database industry speaks volumes about the state of preparation of the Canadian government for international negotiations on a \textit{sui generis} form of protection for databases. However, given that it is the best data that we have available, it may nonetheless be possible to venture some conclusions about the state of the Canadian database industry.

First of all, it would seem that Canada does not suffer from a market failure that is sapping the country of investment in database; in fact, investment in on-line database services between 1989 and 1990 was growing at a significantly faster rate in Canada than in the US. Second, it would seem that despite the relatively high number of databases in Canada, the actual size of those investments is being dwarfed by American activities in Canada. This should not come as any great surprise; after all, the US, the world leader in database investment, the home of the largest concentrations of investment in data in the world, is also Canada's biggest trading partner. Based on these observations, it would seem that Canada should move cautiously before embracing a \textit{sui generis} form of data rights. While Canada clearly enjoys a comparative advantage in databases vis-à-vis much of the rest of the world, it is far from clear that advantage embraces our significant trading partners. If Canada suffers from neither investment debilitating market failure, nor a "gap" in protections its intellectual property affords, then a \textit{sui generis} form of database

\textsuperscript{136}\textit{Ibid.} Canadian on-line service provider revenues increased at a rate of 23.3% between 1989 and 1990, while US revenues grew only 13.3% over the same time period.
rights can only be described as a public subsidy to an industry that does not need it, one which benefits foreign firms more than Canadian firms. Canadians have better things to do with their money than reward the rent-seeking activities of powerful industry groups.

This Chapter has been highly skeptical of the claims of the American and European database industries regarding the legal and economic necessity of legislating database protection. Simply, the numbers do not seem to bear the claims out. Nonetheless, it does not necessarily follow that the Canadian government should adopt a stance firmly opposed to American and European interests. The European Database Directive is an accomplished fact; the United States administration seems equally resolute in adopting a similar form of database protection. Both camps are jointly pushing for global acceptance of this novel intellectual property right, and it seems certain that database rights will enter the TRIPS framework at the World Trade Organization at the earliest opportunity. Given this background, it seems certain that some form of database rights lie in Canada's future. Further, should Canada not adopt a stronger form of intellectual property protection than that granted under Canadian copyright law, the effect on the Canadian database industry may be to disadvantage it vis-à-vis its American and European competitors. In other words, Canada may find itself compelled to offer this form of protection as a counter incentive, to safeguard what investment Canada does boast in its database industry.

If this is the future of intellectual property rights for databases, Canada may be better served by becoming heavily involved at the international stage, and help shape the

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form that this database right will look like. The proposal on the table -- the WIPO Draft Treaty -- represents a maximalist position that will not likely be accepted even by its sponsor nation, the United States, and absolutely should not be accepted by Canada. In the following Part, this Chapter will very briefly overview some possibilities for database protection that meet the objections to the WIPO Draft Treaty outlined above.

V Alternatives: Recognizing Market Failure

The strengths of the WIPO Draft Treaty include its recognition that databases are commercially important enterprises in national and global economies increasingly dependent on information industries, and that there is a public interest in the provision of high quality collections of data. To the extent that international markets are unable to protect themselves from destructive appropriations, the law should step in and provide some form of legislated protection. The question remains as to how governments can narrowly tailor a law to address the specific market failure complained of without unduly harming the public interest in both competitive markets in value-added information goods and services, and without bestowing upon database proprietors an undeserved and market distorting windfall. Critics of the WIPO Draft Treaty, the American legislative initiative and the EC Database Directive have proposed two alternative models: an unfair competition regime, and a modified liability rules regime.138 To that, this Chapter adds a third approach: accepting a modified version of the property rights model proposed by the Draft Treaty.

A Amending the Draft Treaty

The shortcomings of the WIPO Draft Treaty for the protection of databases occur at both the practical and conceptual level. At the practical level, the Draft Treaty fails to accommodate the interests of science and research. A simple means of addressing this failure would be to provide some content for a "fair use" or "fair dealing" exception to

138 See, e.g., Reichman and Samuelson, supra note 15 at 137-163.
liability for extraction and utilization. This exception would, of course, be narrowly tailored to the non-commercial interests of public research and science. Given the intrinsic role of research and development to economic development, this would seem to be an efficiency-enhancing move. Similarly, the Draft Treaty fails to address the danger to competitive markets posed by abusive dominance of sole-source providers. An obvious solution to this problem is the introduction of narrowly tailored compulsory licensing, administered by an industry collective, and supplemented by the explicit oversight of substantive competition laws. Further, the Draft Treaty's definition of "database" must be modified to at the very least exclude unintended collections and avoid bestowing market-skewing windfalls.

At the conceptual level, the execution of the Draft Treaty exceeds its stated goals. If the international database industry is truly at risk from extractions and re-utilizations that ultimately serve as the basis for competing services, then a database right should be narrowly tailored to address market destructive free-riding. This can be accomplished by simply re-defining "extraction" and "utilization" to exclude non-competing uses, or more broadly exclude non-commercial uses. Further, if protection is truly needed only to recoup investment, then clearly the potentially infinite term of protection afforded database proprietors under the Draft Treaty is excessive. An alternative proposal may impose a relatively short term to each addition to the database, and attach those rights to the data itself. This may at first sound excessively complex; however, given the technology available to most database proprietors, and the efforts already made to attach identifying information to database extractions, the process would appear to be well within the grasp of the majority of database proprietors. However, if the international database industry suffers not from customer abuse, but, as claimed, from competitive abuse, then a property right regime would seem unwarranted, as what is really complained of is unfair extractions. This would logically seem to call for an unfair competition regime.
B Unfair Competition Law

To a certain extent, the WIPO Draft Treaty and its accompanying US legislation, H.R. 3531, represent an explicit rejection of an unfair competition regime. The US Supreme court in *Feist* explicitly stated that unfair competition law continues to apply to appropriations of unoriginal compilations of data; however, the Court did not regard Feist's actions, which included substantial investment beyond mere appropriation and a request of Rural for a license, as "unfair." To this end, the claim that there is a "gap" in intellectual property protection is untrue: in the US at least, the legacy of *International News Services v. Associated Press* continues as a remedy to market destructive free-riding. Complaints over the post-*Feist* intellectual property world, therefore, are not truly complaints about an absence of protection, but rather about the form of protection.

Unfair competition laws have the advantage of being narrowly tailored to the competitive process. However, they have the disadvantage of being a poorly delineated scope of protection. "Fairness" is discernible only on a case by case basis, therefore parties may not have a clear idea in advance where the rights of one party end and those of the other begin. Moreover, any number of factors may enter the equation, and it is difficult to guess in advance which ones will prove decisive. Nonetheless, prior to the drafting of the WIPO Draft Treaty, unfair competition regimes, in a variety of modified forms, were the favored route of a number of US academics.

C Modified Liability Regime: Unfair Extractions

Midway between a modified property rights regime and an unfair competition regime lies the modified liability regime, which "would emulate the economic functions

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139 *Feist*, supra note 12 at 354.
140 248 U.S. 215 (1918).
of the liability principles that underlie classical trade secret law." This model has enjoyed something of a resurgence in recent years among academics concerned with conventional intellectual property law's inadequate coverage of high technology tools.

A modified liability regime would provide those who invest in industrial applications of advanced technical know-how with artificial lead-time to overcome market failures, with a menu of users' fees that sensibly allocates contributions to the costs of research and development among members of the relevant technical community, and with a common set of pro-competitive ground rules that also make it possible for the relevant technical communities to take collective action to enforce and adjust the liability framework eventually adopted.

Legislating a "blocking mechanism" to provide artificial lead-time to permit database proprietors to recoup investment expressly addresses the claims of the WIPO Draft Treaty that the industry suffers from destructive free-riding. Legislating a form of "automatic license" administered by a non-governmental industry collective, akin the US copyright law's compulsory license for the recording of musical works, would establish clear obligations on behalf of both parties to a licensing transaction, and would establish competitive ground rules set initially through industry negotiation.

While an involved discussion of how such a regime might work in practice is beyond the scope of this Chapter, it is mentioned here to show that the range of policy options open to legislators is far broader than the absolutes of "no protection" and "overprotection" the current debate would seem to be founded upon.

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145 Reichman and Samuelson, supra note 15 at 148 (observing that "innovators and borrowers within a given sector will bargain around liability rules, if the law itself clearly establishes a baseline obligation.") See also R. P. Merges, "Of Property Rules, Coase, and Intellectual Property" (1994) 94 Columbia L. Rev. 2655.
VI Conclusion

Formulating a Canadian position of the feasibility of a *sui generis* regime of intellectual property rights for data is not a simple task. Trading-off between the need to provide incentives for investment in databases and the need to assure access to data is a difficult task at best, and one that is complicated by the very poor proposal that is currently on the table: the WIPO Draft Treaty represents a maximalist position, with regard for neither the competitive ethos nor the needs of science and research. This task is complicated in Canada by the unique nature of Anglo-Canadian copyright law's originality requirement, which extends copyright protection to even uncreatively compiled data. Moreover, analysis of Canada's database industry would seem to contradict industry claims that the market for databases has failed. Simply, the central arguments behind the thrust for *sui generis* rights to data do not seem applicable to Canada. More troublingly, the evidence would seem to suggest that existing intellectual property regimes, combined with contractual and technological safeguards, provide ample protection for databases, even at the international level. This raises the distinct possibility that the entire Draft Treaty exercise is one of international rent-seeking, a possibility given further credence by the international politics of the European Union's Database Directive. If this is the case, Canada should approach the Draft Treaty, and its enthusiastic endorsement by the United States and Europe, with cautious skepticism.

The World Intellectual Property Organization will shortly be taking up the task of drafting a revised treaty to present to delegates at an upcoming Diplomatic Conference. Given Canada's commitment to developing information technology as a centre of comparative advantage, Canada should take an active role in modifying the Draft Treaty proposals to reflect a more refined appreciation for the database industry's need for financial health and competitiveness, and for the essential role played by databases in the advancement of science and technology. In assuming this role as advocate, Industry Canada must have an appreciation for the realities of Canada's database industry,
including its size, its degree of foreign penetration, and the extent to which Canada possesses some degree of comparative advantage. Do Canadian database proprietors function primarily as suppliers of data, or as value-added intermediaries? To what extent are these distinct industries centres for future growth in Canada, and to what extent should they be? Similarly, Industry Canada must evaluate the implications of assigning property rights to data for Canada's science and research community, both at present and in the future. Canada is respected internationally and possesses a comparative advantage in information technologies, if not necessarily over Europe and the US, then surely with respect to much of the rest of the world. Canadian attempts to broker a middle way between the law as it stands and the extreme vision of the WIPO Draft Treaty will likely command considerable respect among nations resisting the US approach but realistically sensing the inevitability of the imposition of some form of international regime governing databases. The Canadian government must take the task of formulating a Canadian position on a *sui generis* right to data seriously, because Canada may not get another chance.
Chapter 7 Remedial Options

A common theme running throughout this analysis of Canada's intellectual property policy formation process is the failure of the government to provide consistently for a positive mechanism for the articulation of public interest values in policy formation venues. The introduction to this Thesis identified three areas in which the public has an interest in intellectual property laws: in the efficient allocation of resources, in adherence to distributive values, and in the promotion of democratic values. Intellectual property laws have the capacity to touch on all of these values. Market participants can generally be relied upon to advocate conditions that will allow them to compete internationally. Accordingly, policy makers can count on industry to identify inefficient market conditions associated with debilitating free-riding by competitors -- the classic public goods problem. More difficult for policy makers to identify are those circumstances in which industry participants might successfully obtain rents in the form of property rights which amount to over--protection. Excessive protection of intellectual property introduces barriers to entry for market participants while simultaneously attracting disproportionate attention from investors to the detriment of other sectors of the economy. Future market competitors cannot protest before policy makers and legislators -- they do not yet exist. Similarly, distribution values by definition benefit diffuse parties who are unable to organize effectively and whose stake may be too small, individually, to motivate intervention before policy forums. Moreover, without an explicit government stake in ensuring the integrity of the distributive value in question, policy makers may not be presented with an authoritative voice advocating that they respect the distributive value in question. Finally, democratic values, particularly those relating to freedom of

146See Chapter 1, supra.
expression, present policy makers with a diffuse and abstract value that lacks organized and influential public champions.

Public choice theory suggests that legislatures operate much as a market does, and present well-organized and well-financed interest groups with ample opportunities to extract rents in return for political and financial support. On a less cynical level, public choice theory argues that such interest groups are at the very least well-placed to persuade policy makers of the prudence of favorable legislation. This Thesis has argued that this model applies well to intellectual property laws. Where the public interest is represented by market participants, or governments have a fiscal interest in some distributive value, the public interest will be well represented in intellectual property legislation. Where these conditions are not met, intellectual property legislation tends to favor market-oriented interest groups.

Public choice theory also suggests a number of methods by which public interest values might nonetheless be vindicated despite the hostility of well-organized and well-financed interest groups. This Chapter examines two broad categories of such approaches. The first section examines the capacity of the courts to address public interest concerns through judicial review of legislation marked by the touch of interest group activism. Courts might do this by narrowly construing such legislation, or by subjecting such legislation to constitutional scrutiny. The second section of this Chapter considers the options of legislators to address inequalities of bargaining power at policy forums that disadvantage the public interest. These options include improving the funding of public interest organizations, assigning existing government institutions the responsibility to track intellectual property policy with an eye to articulating public concerns, or creating a new government body to perform a similar task.

147See Chapter 3, supra.
I Judicial Review

A Statutory Interpretation

Public choice theorists concerned with the influence of interest groups on the legislative process have suggested judicial review as a mechanism for softening the effects of legislative capture. Simply, judges should keep the problem of interest group transfers in mind when engaging in statutory interpretation.148 Where a statute bears the hallmarks of an interest group bargain -- concentrated benefits and broadly distributed costs -- judges should construe those statutory provisions narrowly.149 Moreover, judges may in fact be better placed than political actors to ensure that laws promote the public good as opposed to reflecting the will of powerful interest groups, since judges are much less vulnerable to the influence of lobby groups and industrial organizations.150

This Thesis has argued that most of Canada's intellectual property laws bear the hallmarks of interest group bargaining. Recall Chapter 4's discussion of Canada's Copyright Act151 and its treatment of public institutions. Canada's 1988152 and 1997153 revisions can both be considered the products of interest group bargaining, but with a peculiar twist: public education and library institutions acceded to the 1988 revisions instituting collectives in return for the promise of legislating clear exceptions to the burdens these collectives would otherwise impose. The 1997 revisions to the Act, as initially drafted, sought to fulfill that promise by carving out clear exceptions to liability for certain patron uses and specific library services.154 These exceptions were ultimately

151 R.S.C. 1985, c. C-42 [hereinafter Copyright Act].
152 An Act to amend the Copyright Act and other Acts in consequence thereof, S.C. 1988, c. 15.
153 Bill C-32, An Act to amend the Copyright Act, 2nd Sess., 35th Parl., Canada, 1996.
154 See Chapter 4, supra.
dropped in favor of narrower defences ironically operative only where collectives do not administer reprographic rights. This about-face can be attributed to intense lobbying on behalf of the copyright industry, and political expediency. Similarly, the current move to create a *sui generis* property right in data was born and directed by industry participants eager to secure a permanent position in an emerging market. Intellectual property laws represent public interventions into what are essentially commercial activities; that industry participants should try and shape those interventions, and to turn public activity to private gain, should not be surprising. These are, after all, profit-oriented entities. It would be against their interests, against their very reason for being, to sit idly on the sidelines while political forces shape their destinies. It is only natural that commercial interests would want their voices heard in intellectual property policy formation, and if possible to beneficially influence that process.

The challenge for judges sitting on intellectual property matters is to identify those statutory provisions which might properly be construed as the products of successful rent-seeking strategies. Similarly, judges should identify those provisions designed to protect the public interest. The questions a judge should ask of each are similar: what purposes do defences fulfill? How far should statutory benefits and rights extend into private uses of intangible goods?

Consider how such an inquiry might play out in relation to a statute granting *sui generis* rights to database owners as contemplated by the WIPO Draft Treaty. For example, should private re-use of data extracted from a commercial database infringe the rights of a database owner? Considered cumulatively, the public's re-use of data is

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155 See Chapter 6, *supra*.

immense; should each such use of data be taxed, the financial benefit to database proprietors would be immense. Under the WIPO Draft Treaty proposals, the immensity of this potential financial gain argues for the inclusion of such re-uses among the proprietary rights of database owners. However, should a judge asked to interpret legislation modeled on the WIPO Draft Treaty include private re-use as a "use" for the purposes of the statute? Given the influential role the database industry has played in the creation of the sui generis database right, public choice theorist would argue that a judge should hesitate before accepting the expansiveness of these "use" rights. The social costs of the capture of private use of data within the ambit of database rights would be enormous. Given these factors, courts may well wish to construe the scope of such rights strictly to encompass only the explicit rationale offered for the Draft Treaty: to eliminate market debilitating appropriations of data which actually deprive the database owner of a market.

B Constitutional Guarantees

On a fundamental level, judges are directly responsible for safeguarding the public good against the excesses of democratic institutions in the judicial role as guardians of constitutional rights and freedoms. Intellectual property statutes are acts of Parliament, and so subject to constitutional scrutiny. The Charter of Rights and Freedoms enshrines these rights as the supreme law of the land; statutory law inconsistent with these rights is of no force and effect unless demonstrably justifiable as a reasonable limit on those rights. Freedom of expression, protected under s. 2(b) of the

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157Ibid., Notes on Article 2, note 2.10 (noting that the extraction and utilization rights granted under Article 3 might be undermined through this practice, resulting in a "diminution in market value that may result from the use of the portion.").
158Ibid., Article 3.
159Ibid. at Preamble, Notes on Article 1, note 1.02.
160Canadian Charter of Rights and Freedoms, s. 2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 32(1) [hereinafter Charter of Rights and Freedoms or Charter].
161Ibid.
162Ibid., s. 1.
Charter, would seem to be that right most closely associated with intellectual property, especially with copyright law and database laws. Public choice theory posits that courts in their function as guardians of Charter rights function as a baseline against which interest group rents must falter.

Arguably, Canadian laws already function under this model. In the fifteen years since the adoption of the Charter, Canadian courts have struck down a number of statutes closely associated with interest group activities. For example, in Irwin Toy,\textsuperscript{163} the Supreme Court upheld statutory limitations on advertising directed at children despite the protests of industry. Arguably, these statutory provisions represented the implementation of social values favoring fair advertising practices over market abuses. In contrast, in RJR-MacDonald,\textsuperscript{164} the Supreme Court rejected statutory limitations on cigarette company advertisements. Essentially, the Court found some of these measures to unjustifiable transfer rights from cigarette companies to anti-tobacco interest groups.

The Charter has been raised in a number of intellectual property cases with only limited success.\textsuperscript{165} Simply, courts have not proved willing to regard the intellectual property rights of others as touching upon constitutional concerns. More troublingly,

courts have often been among the most notorious abusers of property rhetoric in intellectual property contexts. Consider the recent Federal Court Trial Division case of *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada*. In *Michelin*, the Canadian Auto Workers Union employed a parodical drawing of the plaintiff's fictional character, "Bibendum" -- a puffy cartoon character composed of white tires better known to most as the "Michelin Man" -- in a pamphlet urging Michelin's Canadian employees to unionize. The drawing depicted Bibendum raising his foot over the heads of two unsuspecting employees, as if to stomp on them, and urged Michelin employees to unionize. The judge rejected the C.A.W. defences of fair dealing and freedom expression. Parody, although a critical use of copyright works, was to be nonetheless broader than the fair dealing privilege of criticism. Controversial though that holding might be, the court's ruling on the Charter issue was even more troubling. Holding that "the Defendants are not permitted to appropriate the Plaintiff's private property... as a vehicle for conveying their... message," the court went on to hold that "use of [the Plaintiff's private property, the "Bibendum" copyright, was hardly consistent with all of the purposes informing free expression," and so beyond the scope of expression protected under freedom of expression. This decision is remarkable in its characterization of expression protected by copyright law as an absolute form of property; indeed, the court explicitly rejected the Defendant's characterization of the bundle of rights granted by the Copyright Act as "quasi-public property." Remarkably, the court actually dove into the principles underlying freedom of expression to assert that parody "actually subvert[s] the... value of promoting the diversity of ideas." "If copyright is not respected and protected," the court argued, "the creative energies of authors and

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166 *Michelin*, ibid.
167 *Copyright Act*, supra note 6, s. 29.
168 *Michelin*, supra note 20 at 391.
169 Ibid. at 395.
170 Ibid.
171 Ibid. at 396.
artists in furthering the diversity of ideas will not be adequately compensated or recognized.  Remarkably, the court argued that "[t]he Defendants cannot logically assert a right to use the Plaintiff's private property within the scope of their freedom of expression, because then the Plaintiff would have a reciprocal duty to give the Defendants access to this property." [Emphasis in original]. One can only hope that the court, in articulating this understanding of rights, privileges and duties, was sacrificing logical precision for rhetorical effect.

Although it is beyond the scope of this Thesis to critique the court's reasoning here, it should be clear that in including parody with violence as the only two forms of expression beyond the scope of s. 2(b) of the Charter, the court expressed a very clear hostility to the deployment of appropriational tactics of critique, and to distribution values in relation to intellectual property generally. Although the decision in Michelin has been appealed, and is likely to be modified to some extent, the pattern of judicial treatment of intellectual property in the past is clear: relying on judicial intervention to uphold expressive rights in the context of intellectual property is a high risk venture.  

II Creating a Public Voice

The involvement of the judiciary in the intellectual property policy process is at best a reactive measure. Courts can address the short-comings of the legislative process only at the risk of challenging the product of a democratic institution. Legislatures legislate, after all, and intellectual property laws would seem to be unexceptional as far as legislation goes. Statutes like the Copyright Act and the proposed new database right fall within the core of competencies

172 ibid.  
173 ibid.  
174 For one article holding out hope for just such an approach in the context of copyright, see D. Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 U. Toronto Fac. L. Rev. ---.
democratic legislatures are designed to enact. Public choice theory posits that legislators are influenced by those groups well organized and well financed enough to articulate their perspectives in national policy forums; the failure of publicly minded organizations and institutions to have their interests accommodated may be a result of a kind of "inequality of bargaining power" at the national level. This inequality may simply be a form of market failure: publicly minded institutions simply do not have the resources to form an effective national lobby to counter the influence of corporate interest groups intent on expanding the scope of intellectual property with regard only for their private interest. If the federal government is serious about legislating in the wider public interest, then it should take measures to ensure that the public interest has a voice at national policy forums. One such measure may be to fund public interest groups to permit a coherent, organized lobby at the national level to counter powerful corporate lobbies. Second, the government may turn to federal organizations already in place, explicitly vesting in them the mandate to articulate public interest values in national policy forums. Third, the government may wish to be more proactive, and create an institution with the explicit mandate to watch over the public interest in intellectual property.

A Government Funding

The juxtaposition of the Standing Committee on Canadian Heritage hearings on Bill C-32, *An Act to Amend the Copyright Act* with those of the Standing Committee on Industry reviewing treatment of pharmaceutical patents demonstrates the effectiveness of viable, competitive markets to generate spokes groups for disparate market interests, and the danger of effective rent-seeking behavior where market inequalities predominate. Copyright industries face no natural theoretical antagonist; the long life of copyrights -- the life of the author plus seventy years, in most cases -- does not typically generate a group of
competitive publishers anxious to flood the market with inexpensive "generic" reproductions of formerly protected literary works. Pharmaceutical companies, in contrast, face competition from the first day the patent expires. Further, pharmaceutical patents touch upon values that Canadian governments have clearly recognized as distributive -- the public interest in universally accessible health care. Copyright law, in contrast, has not been widely regarded as touching upon distributive values at all. In contrast, copyright protection, which is restricted to the tangible expression of ideas, has not been associated with constitutional guarantees of expression, which presumably safeguard what is an essentially distributive value: freedom of expression.

The case of pharmaceutical patents dictates a number of possible courses of action for government policy makers intent on addressing this market failure. First, the government could strengthen the bargaining position of what market players that represent public concerns with intellectual property. The government has in the past already embraced this approach to copyright policy: in 1988, the government legislated the creation of collectives for the administration of copyright. Today, collectives such as SOCAN and Cancopy administer rights for authors and publishers and provide a well organized and well financed voice for author's rights at policy forums. Distributive values present in copyright law, in contrast, tend to be forwarded by much more modest entities: educational institutions, archives, museums and libraries all represent paradigms of access to information. However, these institutions do not voluntarily organize nationally into lobbying groups, nor should they be -- their mandate as public institutions is not to lobby the government for favorable treatment. However, if, for example, the Association of Universities and Colleges of Canada do not argue for educational exemptions from liability at policy forums, no one else will. These institutions are under financial pressures unlike those faced in private markets.
For this reason, the government should ensure that national organizations representing the public interest in intellectual property are suitably financed to carry out this function. This means not simply having the funds to organize and lobby, but also having the means of undertaking research into the effects of broadened intellectual property rights on access to information and the availability of education. The government relies on market players to articulate their interests to policy makers; it should at least ensure that all participants -- especially non-market institutions and public organizations -- have the means of making their contributions meaningful.

**B Existing Government Institutions**

Closely related to the adequate funding of public institutions is the utilization of government parties in intellectual property forums. Again, the Canadian approach to pharmaceutical patents provides a prime example of the intervention of government into a contested market for valid public interest purposes. The Patented Medicines Prices Review Board tracks prices on patented medicines and caps profits on those medicines; it also keeps track of pricing trends in the pharmaceutical industry in general. The PMPRB acts as a sort of industry watch-dog. The British Columbia pharmacare reference drug program, which identifies the least expensive of equivalent drugs on the market for utilization under the BC drug plan, provides another example of public institutions monitoring private markets in the interest of the public.\(^{175}\) Copyright markets enjoy no equivalent organization.

That is not to say that no such organization could exist; the Copyright Board and the Canadian Intellectual Property Office are two organizations closely

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\(^{175}\)See, e.g., Presentation of the Hon. J. MacPhail before the Standing Committee on Industry (17 April, 1997) at 19 (outlining the B.C. pharmacare reference drug program, which has saved the B.C. government over $74 million in drug expenditures since 1995) (available at http://www.parl.gc.ca/committees352/indu/evidence/65_97-04-17/indu65_blk101.html).
associated with Canadian intellectual property policy that could embrace this function. The Copyright Board, as overseer of agreements between users and collectives, is arguably in an ideal position to do just that. In the United States, the Library of Congress has historically played a similar role in servicing American intellectual property policy makers; arguably, the Library of Canada could take on the task of monitoring the copyright industry. The Competition Bureau is another federal organization that has been active before other federal organizations, including the Canadian Radio-Telephone and Telecommunications Committee; the Bureau should theoretically already be involved in intellectual property forums, at least to the degree that intellectual property issues touch upon competition law concerns. While none of these suggestions represents an ideal solution to the problem of ensuring a strong and independent voice for the public interest at intellectual property policy forums, each at least presents a possibility for addressing these concerns.

C The Independent Government Agency

A final proactive measure the government might employ in developing intellectual property policy is to ensure that a strong voice representing the public interest is present before all intellectual property law reform commission and legislative committees by creating a body charged with the duty of articulating public interest concerns with intellectual property. This body could be temporary - - called upon only as Commissions are created or as Parliamentary Committees sit -- or permanent, with a long-term mandate to investigate and articulate the public's concerns with intellectual property.

The Privacy Commission provides a prime example of what such an organization might look like. The office of the Commissioner was created out of a recognition that the public interest in rights of privacy could not be adequately safeguarded by market actors and private organizations. Moreover, since the
government itself was the party offending the public interest, presuming that the
government already took acceptable measures to safeguard private information, it
could play only a limited role in augmenting privacy safeguards. The public
interest needed an independent monitor. As a result, the Privacy Commission was
born. The Commission has the power to investigate complaints and to initiate
investigations on his or her own accord, to compel witnesses, and to review
governmental compliance with the Act. The Commissioner is a frequent
witness before other government tribunals and Commissions.

An alternative approach adopted this Spring by the Standing Committee on Industry in their review of Bill C-91's framework governing pharmaceutical patents was to employ Professor David Vaver, a professor of intellectual property law at Osgoode Hall Law School, York University, to act as a mediator in a special debate between legal experts of Pharmaceuticals Manufacturing Association of Canada (representing international brand name drug manufacturers) and the Canadian Drug Manufacturers Association (representing domestic generic drug manufacturers) before the Committee. The Bill C-91 hearings were complex and busy and the issues were subject to much rhetoric. Professor Vaver's role as mediator in the special debate was to define the issues and provide a neutral third party to control the flow of the debate. The end result was an even, productive debate which did much to educate the Committee members.

176Privacy Act, R.S.C. 1985, c. P-21, ss. 29-36, 53.
177Ibid. s. 29(3).
178Ibid. s. 34.
179Ibid. s. 37.
III Conclusion

The public interest in intellectual property is a nebulous concept. On the one hand, it includes primarily economic concerns with the efficient allocation of resources within information industries and across the economy generally. This includes concerns that valuable intangible goods and services are protected from the destructiveness commercial appropriations, but also with the need for value-added downstream deployments of those intangibles. Further, concerns for global economic efficiency dictate that creators not be over-compensated for their production, for this would lead to market-distorting re-allocations of resources attracted to the supra-competitive rents. On the other, the public interest includes values which must be described as distributive: ensuring universal access to health care; ensuring that all authors have access to the fundamental components of expression itself. Finally, the public interest includes values that can only be described as democratic in nature -- that is, justified as necessary for democratic self-government. Thus, intellectual property should never be used to silence critics of the government, or of private corporations.

How do intellectual property policy-makers give effect to all of these competing interests? The answer to that question is not simple. What is clear is that policy-makers must reject as fundamentally unhelpful rhetorical arguments based on the absoluteness of private property. In intellectual property forums, it is that very entitlement itself that is up for grabs, the very scope of the property right itself that is being defined. It is circular to argue that property rights must be augmented because they are property rights. Moreover, it does not detract from the respect owed creators to note that property rights contain within themselves inherent limits. If Canada's intellectual property laws are to
serve Canada's interests, they must be crafted from legislative processes that consider all relevant interests.

Never has the need to articulate clear limitations on the scope of intellectual property been more pressing. Internationally, the United States has been actively pressing for expanded protection of intellectual property. For the United States, this makes sound economic sense; The US is a net exporter of intangible goods and services. For Canada, the situation is more ambiguous. Industry Canada figures for 1994 indicate that in most areas of the economy which could be labeled "information industries," Canada was a net importer. Technologically, as globally networked digital environments become more efficient and secure, intellectual property commerce will likely move on-line. This is a welcome development; however, Canada should ensure that the law does not create inequalities of access or new grounds for liability which will serve to stifle speech or silence critics.

Canada should strive to be a voice of moderation at international venues considering the scope of intellectual property laws. However, Canada cannot perform this function without a balanced understanding of its domestic intellectual property laws. This balance is lacking in Canada's current policy formation mechanisms. This Thesis has therefore suggested that if Canada is to continue to embrace a property-rights approach to intellectual property law, policy makers must familiarize themselves with the grounds by which property claims are inherently limited. The public's claim to access to copyright works, for example, should be understood not as a "subsidy" to readers, but as a public right which operates in the economic interests of the nation and in the best interests of the public. Similarly, educational institutions and other publicly-minded institutions should be seen as fulfilling essential public needs, and not simply as another

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"special interest" group. Ottawa has to date treated these groups as simply another pressure group seeking special status. Nor has Ottawa considered the relation between intellectual property and constitutional guarantees. Historically, intellectual property and freedom of expression have occupied separate spheres. As property claims in intangible goods and services creep closer and closer to encompassing use \textit{per se}, Charter claims will undoubtedly make their appearance in intellectual property litigation. Parliament should therefore keep the values enshrined in freedom of expression in mind in reforming intellectual property laws.

The public interest in intellectual property has not fared well before recent law reform Commissions and Parliamentary Committees. The causes of this treatment are complex, but not insurmountable. The judiciary is well-placed to check the abuses of the legislation that results from successful rent-seeking activities of powerful interest groups; similarly, Parliament has several options at its disposal for addressing the failure of public interest values to make themselves felt at intellectual property law reform venues. Finally, publicly-minded citizens groups and public organizations and institutions can -- and must -- continue to play the political game, lobbying for improved legislation and seeking to counter the excesses of commercial interest groups. However, the involvement of private groups and citizens in intellectual property debates cannot absolve the responsibility of Parliament to safeguard the public interest. The public interest is a nebulous and contradictory concept; the ultimate responsibility of balancing these conflicting values that comprise the public interest lies with Parliament. Parliament cannot fulfill this task without articulating itself a reasoned and thorough understanding of how the public interest intersects with intellectual property laws. Until Parliament undertakes to give voice to public concerns with intellectual property, the public interest will continue suffer from disparagement and misrepresentation. Canadians deserve more from their intellectual property laws.