WHOSE BALANCE? DIVERGENT DIRECTIONS IN CANADIAN COPYRIGHT REFORM

by

Megan Elizabeth Appleton

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Abstract
Over the last decade, Supreme Court copyright jurisprudence has undergone dramatic changes, concurrent with governmental copyright reform initiatives. Both the Supreme Court and the government have used the popular but unhelpful language of “balance” to explain and justify their initiatives. Unfortunately, there is no consensus as to what constitutes an appropriate balance or how to facilitate this and the two initiatives have been moving in opposite directions. The changes in the Supreme Court have altered the purpose and application of copyright law in a way that favours user access to works. Conversely, had they passed, government amendments would have increased owner rights and incentives, moving in a protectionist direction and restricting access and use. This would have the potential to impede future innovation. This thesis suggests that balance is an inadequate metaphor, examines the differences between the Supreme Court and governmental conception of “balance” and proposes reasons for these differences.
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Whose “Balance?” Divergent Directions in Canadian Copyright Reform

Over the last decade, Supreme Court of Canada copyright jurisprudence has undergone a paradigm shift, taking copyright law in a new direction and arguably changing its very character. This drive for change has been mirrored by governmental initiatives to amend the Copyright Act. Unfortunately, the direction taken by the two bodies is diametrically opposed. The Supreme Court has re-envisioned copyright law in a way that limits the rights granted to owners and makes the rights of users crucial, favouring access to works. The Federal government in turn proposed two Bills that, had either passed, would have granted additional rights to owners, limited users’ existing rights, and favoured protection of works. The discrepancy between the two initiatives has been obscured by the fact that both the Supreme Court and the government use the language of “balance” to explain and justify their actions.

“Balance” is a frequently used guiding principle in Canadian copyright law. As a directive, however, balance is unhelpful as it provides no innate benchmark against which to measure and fails to define parties to the balance, how to divide interests, or ascribe value to interests, which may be assigned different weight. The correct balance will depend on one’s philosophical perspective, characterization of copyright’s purpose, and belief regarding how best to serve this purpose. As a result, there is no consensus on what constitutes balance and how best it can be achieved.

Traditionally, copyright law has been seen as a means to protect authors and other rights holders. Government publications today still set the “balance” as between the rights of owners and the needs of users. Conversely, recent Supreme Court decisions have

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1 R.S., 1985, c. C-42 [Copyright Act].
2 This wording was used in earlier governmental publications, such as The Information Highway Advisory Council, Final Report of the Information Highway Advisory Council, Part 3 (Ottawa: Minister of Supply and Services Canada, 1995) [Final Report], which stated that a “balance should be maintained between the rights of creators to benefit from the use of their works and the need of users to access and use those works.” This characterization of balance has been implied in more recent publications, such as Industry Canada, Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (Ottawa: Industry Canada 2002), which refers to the “legitimate interests” of owners, and needs of users.
situated the balance as between the rights of owners and the rights of users.\textsuperscript{3}

Acknowledging that users’ rights are fundamental to copyright law and that today’s users require access in order to become tomorrow’s creators has led to an entirely different version of appropriate balance.

Recent Supreme Court judgments have described copyright as a tool for balancing rights. In effect, copyright mediates a clash of rights in order to fulfill its purpose of promoting future innovation through the provision of incentives. After rearticulating the purpose of copyright law, the Supreme Court then applied their concept of balance and heightened awareness of user’s rights to two aspects of copyright law: the originality standard and fair dealing. Rather than endorsing either of the existing standards for originality, the Supreme Court set the test for copyright protection as requiring the application of “skill and judgment.” Fair dealing was re-construed as a user right that, along with other exceptions, requires broad interpretation to ensure the access required for future creativity. These changes raised the bar in terms of what types of works are protected, and broadened the scope of uses that may constitute non-infringing unauthorized copying. This has resulted in a shift in the copyright balance towards user access and use.

Concurrent with the shifts in Supreme Court jurisprudence, the current phase of Canadian governmental copyright reform has culminated in two attempts to amend the Copyright Act: Bill C-60\textsuperscript{4} in 2005 and Bill C-61\textsuperscript{5} in 2008. Though both of these Bills contained limited additional benefits for users, they also granted significant new rights to copyright holders, some of which restricted the potential benefits of the new user rights and had the ability to impede users’ existing rights. Most important in this regard is that both Bills would have implemented anti-circumvention protection for Technological Protection Measures (“TPM”).

\textsuperscript{3} CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] S.C.J. No. 12 [CCH] initially describes the balance as: “the proper balance between the rights of a copyright owner and users’ interests...” (ibid. ¶ 48) but then, proceeds to define user interests, such as copyright exceptions, as user rights. Both owners and users are seen to have rights under the Copyright Act (ibid. ¶ 13), rendering the balance between rights and interests a more evenly weighted tension between rights.

\textsuperscript{4} Bill C-60, An Act to Amend the Copyright Act, 1\textsuperscript{st} Sess., 38\textsuperscript{th} Parl., 2005 [Bill C-60].

\textsuperscript{5} Bill C-61, An Act to Amend the Copyright Act, 2\textsuperscript{nd} Sess., 39\textsuperscript{th} Parl., 2008 [Bill C-61].
This expansion of owners’ rights and threat to the rights of users would have the effect of reversing the Supreme Court trend towards access and taken copyright law towards increased protection. In addition, though increasing owners’ rights may provide increased incentives, which would arguably lead to increased production in the short term, this is likely to harm long term production by preventing the access necessary for the creative process.

When Bill C-60 was read in 2005, many scholars commented on the difference in philosophy between it and recent jurisprudence. This critique is even more applicable to Bill C-61 as the philosophy reflected by the Bill’s contents is more obviously different and the potential impact more negative. Bill C-61 contains more extensive new rights for owners than Bill C-60, including multiple anti-circumvention measures, none of which are tied to actual copyright infringement. These measures provide an additional layer of rights to owners in that they may protect against access and control uses not captured by the Copyright Act as it currently stands. By protecting TPM, Bill C-61 would have threatened both users’ copyright-related and non-copyright related rights and may have allowed owners to use copyright law for uses traditionally beyond the scope of copyright law.

This thesis will begin by exposing “balance” as a pervasive but unsatisfactory concept. After setting the stage with a brief discussion of the challenges facing copyright today, it will examine the Supreme Court’s use of the concept of balance in recent copyright jurisprudence. This will include the evolution of the purpose of copyright law, the originality test, and fair dealing in several watershed cases. The conclusion this thesis will reach is that the Supreme Court has adopted a utilitarian approach to copyright law and a version of balance that favours public benefit through user access.

As evidence of the thought processes and philosophy underlying the governmental initiatives, this thesis will discuss several public statements made by the Canadian government on the nature and purpose of copyright law and the need for copyright amendment. Then discuss the most recent phase of copyright reform will be discussed,
including Bills C-60 and C-61. The conclusion that will be reached is that the government has also adopted an instrumentalist approach, but one that reflects an increasingly protectionist stance. After comparing the two approaches this thesis will show that the direction being taken by the Supreme Court and the government, though both allegedly in the name of “balance,” are essentially oppositional.

Subject to Constitutional limitations, the Federal government is under no obligation to follow the lead of the Supreme Court and may amend the Copyright Act as it pleases. A divergence in direction may not be problematic from this perspective, but the differences should be recognized, along with the motive behind them. This thesis will suggest that the reason the Bills have taken the form they have is that, rather than ensuring that copyright law is able to fulfill its mandate over both the short and long term, the government has been motivated by a desire to ratify the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). Canada signed both WIPO treaties but has so far chosen not to ratify. As a result, there is no legal obligation for Canada to comply with the requirements of either one.

1. The Inadequacy of “Balance” as an Ideal

Balance is not a new concept in copyright law. According to David Vaver, balance has been used at least as far back as the 18th century as a goal or justification and it’s been common in Anglo-American theory to treat intellectual property as the product of competing values and interests ever since. This is illustrated by the 1785 case of Sayre v. Moore, wherein Lord Mansfield cautioned that:

“[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, […] may not be deprived of their just merits, and the rewards of their ingenuity

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8 David Vaver, Intellectual Property Law, (Concord: Irwin Law, 1997) at 10. Notably, the need for balance appears to reject the idea that copyright is a “natural right” and recognizes that these rights are limited by other competing interests: David Vaver, Copyright Law (Concord: Irwin Law, 2000) [Vaver, Copyright Law] at 12.
and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”

From this we can see that, more than two hundred years ago, courts were attempting to find a balance between author reward and the public interest. This tension remains alive today.

Though balance sounds like a positive goal, it is an unhelpful guiding principle. For a start, competing interests cannot be weighed in an ideological vacuum. The two most common ideological justifications for the existence of copyright law are the natural rights view that an author has the innate right to be rewarded for their production, and the utilitarian view that copyright law exists to provide incentives to create, in order to encourage cultural production. “Balance” is used by both sides of the copyright debate, but choice of ideology will alter one's vision of the appropriate balance. Though this is a gross oversimplification, natural law theories arguably allow authors to collect the largest return possible for dissemination of their works. Balance would check this only insofar as overcompensation would impede progress. Utilitarian theory arguably favours granting only as much protection as is necessary to encourage production and dissemination, allowing a greater focus on access in furtherance of the public welfare that copyright is meant to support. In truth, there is great variation within each viewpoint. For example, within the utilitarian camp there are varying opinions on how much protection is required to ensure adequate incentives and what incentives are required to encourage production.

The use of “balance” as a metaphor requires the definition of interests, the parties to the balance, and how to divide the interests between them. Unfortunately, it gives no hint as

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11 Carys Craig, Copyright Communication, and Culture: Re-Imagining the Copyright Model (S.J.D. Thesis University of Toronto, 2006) [Craig, Re-Imagining] at 193.
13 David Vaver notes that within a view of copyright as the product of competing interests and values, there are two poles, one pulling towards protectionism and one pulling towards broad rights of use: Vaver, Copyright Law, supra note 8 at 12-13.
to whose interests should be included, what intrinsic weight they should be assigned, and
how the division should look. The balance may arguably be between the interests of
creators and users, owners and non-owners, or between copyright-owners and the public
interest.

A division between creators and users is arbitrary and ignores the dialogic nature of
creativity.\textsuperscript{14} As Julie E. Cohen points out, “creative outputs do not spring full-blown
from the minds of their creators, but are arrived at through processes that are iterative,
experimental and hands-on.”\textsuperscript{15} As a result, creators are users first and creators second.\textsuperscript{16}
In the same way that all creators are users, all users are potential creators. This has
always been true, but it is increasingly obvious in the age of the internet, given blogs,\textsuperscript{17}
personal websites, and online fan fiction.\textsuperscript{18} The experimentation Cohen mentions
requires access to a rich public domain, as it’s the ability to use ideas that makes it
possible for today’s users to become tomorrow’s authors.\textsuperscript{19}

If all creators are users and all users may become creators, the balance must lay between
current creators and future creators. To suggest otherwise risks limiting future
innovation, but this balance renders any division of interests artificial, except with
reference to a point in time.\textsuperscript{20} Separating the interests of creators and the public is also
unhelpful, as it’s hard to define the “public interest.” There is no single definition, as

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\textsuperscript{14} For more on creation as a dialogue and a relational theory of copyright law, see Craig, \textit{Re-Imagining
supra} note 11.

\textsuperscript{15} Cohen, “Creativity,” \textit{supra} note 15 at 1182.

\textsuperscript{16} Laura J. Murray, “Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses” in Michael Geist,
ed., \textit{In the Public Interest: The Future of Canadian Copyright Law} (Toronto: Irwin Law, 2005) [Murray,
“Patterns”] at 24 and Cohen, “Creativity,” \textit{supra} note 15 at 1179. Cohen notes that copyright scholarship
rarely discusses the nature of creativity and policy is based on assumptions regarding this process.

\textsuperscript{17} See e.g. www.technorati.com, a site that tracks blogs and suggests that there were 133 million of them

\textsuperscript{18} For more on fan fiction and copyright, see Deborah Tussey, “From Fan Sites to Filesharing: Personal Use

\textsuperscript{19} See Drassinower, “Rights-Based”, \textit{supra} note 10 at 18. It could be argued that there would be no \textit{The Da
Vinci Code} (Dan Brown’s 2003 novel, of which 57 million copies are claimed to be in print in 44
languages: http://travel.latimes.com/articles/la-tr-louvre14may14) without early English-language novels
such as Thomas Mallory’s \textit{Le Morte d’Arthur}, which was published in 1485 and claimed to be the first
English-language novel. This kind of borrowing from past works is much more obvious in the context of
appropriation art, an art form that uses pre-existing works as source material to convey new messages.

\textsuperscript{20} An author who needs access to other works for future production may still want to avail of rewards now.
“intellectual property intersects with the public interest over a range of issues.”

Through incentivizing production, intellectual property law can serve the public interest but it can also result in a debilitating level of excessive protection. In either case, the balance, such as it is, remains essentially between creators and future creators.

The only interest that remains separate for any length of time is that of owners. The Copyright Act grants rights to authors, but these rights are mainly transferable. As a result, not all authors are owners and owners are not necessarily authors. Given that an owner’s interest is to maximize financial return on investments, the balance can be articulated as being between owners and non-owners. This is still not entirely satisfactory, however, as future production will provide future investment opportunities, which mightn’t exist in the face of decreased access. Increasing copyright protection will limit access and chill production, which would also harm owners’ future interests. This suggests that the balance metaphor is strongest when it is characterized as being between protection and access. This is how I will characterize the balance underlying Supreme Court jurisprudence for the remainder of this thesis.

A further limitation on balance as a metaphor is that is doesn’t assist in finding the “correct balance,” which allows anyone to use the same rhetoric to justify and support their position. To give a relevant example, the Government of Canada has been at pains to describe their copyright initiatives as balanced. Their Statement on Proposals for Copyright Reform asserts that “[o]ne of the public policy principles underlying the Copyright Act is the need to maintain an appropriate balance between the rights of

21 David Anthony Fewer, Defining the Public Interest in Canadian Intellectual Property Policy (LL.M Thesis, University of Toronto, 1997) at 6 [Fewer, Defining].

22 For a through discussion of this tension, see Fewer, Defining, ibid. An alternate argument is provided by R. Polk Wagner, who argues that information can never completely be fenced off or controlled. His theory of incomplete capture suggests that even copyright protected works lead to a net gain in the public domain, as they inspire further production. He classes information as type I, the protected information, type II, works that spring directly from the protected work, as in a photo of a ballet, and type III, which is only indirectly associated, such as books set in the American south inspired by Gone with the Wind. Type III information is seen as “stimulative” as even protected information may inspire non-infringing works. As a result, information control isn’t as great a risk as critics fear: R. Polk Wagner, “Information Wants to be Free: Intellectual Property and the Mythologies of Control” (2003) 103:4 Colum. L. Rev. 995.

copyright owners and the needs of intermediaries and users.”24 In announcing Bill C-60, the government argued that a balanced copyright framework would help to “foster innovation and learning.” This balance was seen to require "strengthen[ing] the hand of our creators and cultural industries against the unauthorized use of their works on the Internet.”25 A year before, law professor and activist Michael Geist had stated that a “balanced approach […] in line with Canadian values, would be to permit all uses unless specifically prohibited.”26 Despite the shared language, the approach, increased rights for owners vs. a focus on users’ rights, could hardly be less similar. One favours access and use and one clearly prefers protection.

Consequently, the parties whose interests are to be balanced and what version of balance is best is entirely a matter of opinion. Additionally, as “balance” is not a term used in the Copyright Act, it is impossible to determine what balance the drafters would have preferred, or even if balance is what they had in mind. In this light, it must be borne in mind that “balance” is only a metaphor27 and may not be able to support the weight it is being asked to bear.28 Recognizing this, Carys Craig asks the question: “Whose rights will prevail if the balance or the illusion thereof can no longer be maintained?”29 This

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26 Michael Geist, “Will Copyright Reform Chill Use of Web?” *The Toronto Star* (30 May 2004), online: <http://www.michaelgeist.ca/content/view/1740/159/>. Further, Geist stated that “Canada displayed foresight in the late 1990s in identifying the potential for the Internet and new digital technologies to benefit all Canadians. In order to fulfill that vision, we need to reconsider the Bulte committee's recent recommendation so that the balance that is so critical to creators, users, and the broader public interest is preserved.”

27 See Alan Story’s, “Burn Berne: Why the Leading International Copyright Convention Must be Repealed” (2003) 40 Hous. L. Rev. 763 at 785-93 for a discussion of balance as a metaphor.

28 Abraham Drassinower, “From Distribution to Dialogue: Remarks on the Concept of Balance” (Lecture, University of Toronto Copyright Symposium, January 30, 2009) [unpublished] [Drassinower, “Distribution”].

question cuts through the rhetoric and exposes the reality that sometimes rights are incompatible and incapable of balance.

Abraham Drassinower suggests that we think of copyright less as a balance between opposing interests and more as a dialogue between them.\textsuperscript{30} Instead of balance, which demands a separation of parties and interests that may actually overlap,\textsuperscript{31} the purpose of copyright law might better be described as the harmonization of interests\textsuperscript{32} to benefit society. This would require the provision of incentives large enough to encourage further production, but not so large as to restrict current users’ ability to access works.

2. Context: Technology, the Internet, and Digital Copyright
Before examining the shifts in Supreme Court jurisprudence and government copyright reform, it may be helpful to set the stage. Both of these initiatives have taken place in a time of rapid advancements in digital technology. Inevitably, legislation is unable to keep pace with technological advancement and it arguably shouldn’t have to if the existing law can be interpreted so as to apply. Technological advancements have been seen as a threat to copyright law in the past,\textsuperscript{33} but relatively recent innovations including the internet have caused what some see as the perfect storm.

The concern about copyright in the digital age is understandable, given how much has changed since the drafting of the first written copyright laws. At that time, the main concern was competition from competing firms and individuals weren’t a threat. Now, given advances in technologies such as data compression, the average person can make unlimited, near perfect copies at home, anonymously and at almost no cost to them. At the same time that this copying has become possible, the internet has provided a vehicle

\textsuperscript{30} Rather than conceiving of balance as the language of copyright, Drassinower suggests that copyright is spoken in a language of which balance is the grammar: Drassinower, “Distribution”, supra note 28.

\textsuperscript{31} Especially in the face of the opinion that the best characterization of the parties whose interests are in the balance is creators and future creators who require access.

\textsuperscript{32} This is the term used by the Federal Court of Appeal in \textit{CCH v. LSUC}, [2002] 4 F.C. 213 [\textit{CCH, FCA}].

\textsuperscript{33} The “Betamax” case will serve as an example: \textit{Sony Corp. of America v. Universal City Studios Inc.}, 464 U.S. 417 (1984).
for efficient, easy, and global distribution. Together these advances have allowed for “rapid and inexpensive dissemination of digital content.”

The internet has created a participatory culture by lowering real world access barriers and allowing individuals to become producers of information and knowledge. Consumers may be able to produce content, but they are also able to copy and distribute on a scale never before seen. This applies equally to copyright-protected materials and has led to widespread copyright infringement. At the same time, technological advancements have also made the enforcement of current copyright law much more difficult.

Partially in response to advances in technology, copyright owners have sought ways to protect their copyright and increase their control over digital products. These tools include the use of Technological Protection Measures (“TPM”) and Digital Rights Management (“DRM”) systems. When it became clear that these technologies could be

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36 See for example Urs Gasser & Silke Ernst, “From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age,” Berkman Centre for Internet and Society Research Publication No. 2006-05, June 2006 [Gasser & Ernst].


39 This may spring from a perception that copyright infringement is acceptable, but it has been suggested that the disaggregation of author and owner or co-opting of authorship by buyers of author’s rights, may have led to disillusionment and the loss of copyright’s “moral luster.” In this case, piracy looks less like theft and more like the actions of Robin Hood: Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’,” (1991) Duke L.J. 455 at 501 and Jane C. Ginsburg, “Authors and Users in Copyright” (1997) 45 J. Copyright Soc’y U.S.A.1 at 8.

40 Using the example of illegal downloading, challenges to the enforcement of Canadian copyright law include the national reach of copyright law v. the global reach of the internet, the relative anonymity available online, the refusal by Canadian courts and legislators to assign liability to ISPs, and the dispersed nature of P2P platforms. As a result, it has been argued that technology has shifted the balance or status quo to the detriment of copyright owners to the extent that reform is necessary to redress the imbalance. Though technology has made enforcement more difficult, it has not changed the balance with respect to rights. Additionally, there is no empirical evidence to back up the argument that infringement such as downloading has actually damaged the industry.
circumvented, owners lobbied for separate protection for these tools. The argument given for “upgrading” the law relating to digital goods is that, if copyright law fails to adapt to new technological realities, incentives to produce will be reduced, creators will stop creating and creative culture will decline. The problem is that the control provided by TPM and DRM can be used for purposes entirely unrelated to copyright infringement.

2.1 TPM and DRM

“‘The answer to the machine is in the machine.’” TPM and DRM are not the same thing, though the terms are often used as if they were. In the words of Ian R. Kerr:

“In its simplest form, a TPM is a technological method intended to promote the authorized use of digital works. This is accomplished by controlling access to such works or various uses of such works, including copying, distribution, performance, and display.”

Passwords and cryptography are two of the most basic examples of TPM.

There are two types of TPM: access control and use control measures though, in point of fact, restricting access is the first level of restricting use. Access controls prevent unauthorized access to the media and act as a safeguard or “virtual fence” to enclose and “lock up” digital content, regardless of whether or not it is subject to copyright

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41 These tools are computer code and therefore protected by copyright as works, but additional protection has been sought to prevent users from bypassing the controls.
42 This assumes that creators create only because of the existence of incentives. This may not be true of all production, but is likely true of works that require a large initial investment, such as movies.
47 This term has been used by authors such as Ejan MacKaay, Neil Netanel, Niva Elkin-Koren and Victor Bougamin.
protection. Use control measures can be used to prevent certain uses, even after the
media has been accessed.

TPMs can work alone or they may be components, along with legal mechanisms, of
DRM systems. DRM describes a set of technologies, or “dynamic rights management
systems,” that may or may not use TPMs. These systems combine computer code,
which identifies content, and licensing or contractual agreements in an attempt to control
use of a work. As a digital “self-help” mechanism, DRM allows a shift in the locus of
infringement prevention from public authorities to private entities. In this sense, DRM
allows for the “quasi-privatization” of copyright law enforcement.

Given the control that DRM can provide, it is not surprising that it has become common.
As is the case with TPMs, however, the challenge for owners using DRM is that anything
that can be engineered can be reverse-engineered. This has led to an escalating “arms
race” between programmers and hackers in which months or even years spent designing
encryption protocols can be undone in minutes by a good hacker. This goes some way
to explaining why the incorporation of anti-circumvention measures in the Copyright Act
would be in the interest of rights owners.

2.2 The World Intellectual Property Organization (WIPO) Treaties
In 1996, Canada signed the WIPO Copyright Treaty (“WPT”) and the WIPO
Performances and Phonograms Treaty (“WPPT”) but has since chosen not to ratify
either. Though both treaties have multiple articles, the most relevant for the purposes of
this thesis is Article 11 of the WCT, which reads:

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48 Ian R. Kerr, “If Left to Their Own Devices...How DRM and Anti-circumvention Laws Can Be Used to
Hack Privacy” in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law
49 Kerr, Maurushat & Tacit, supra note 46 at 13-20.
51 Kerr, Maurushat & Tacit, supra note 46 at 25; Kerr, “Devices”, supra note 48 at 172.
52 Kerr, “Devices”, supra note 48 at 171-175.
53 Andrew D. Murray, The Regulation of Cyberspace: Control in the Online Environment (New York:
Routledge-Cavendish, 2007) [Murray, “Regulation”] at 180. Though copyright law could be said to be
about private rights, enforcement has traditionally been public.
54 Murray, “Regulation”, ibid. at 192.
“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

As with most treaties, the WCT leaves the details up to individual countries and provides no definition for terms such as “adequate” or “effective” measures.  

As Canada has not ratified the treaties, there is no legal obligation for compliance. Since 1996, however, Canada has faced pressure internationally and domestically not only to ratify both treaties, but to implement them in a specific way. Pressure from the United States in particular has intensified in recent years. This is a political reality that must be faced by the Canadian government, but the Supreme Court of Canada is not required to consider factors outside the current law.

3. Copyright Evolution in Supreme Court Jurisprudence
Supreme Court copyright jurisprudence has evolved in several ways over the last decade, beginning with the re-articulation of the purpose of copyright law. This newly expressed purpose was then used to change the application of copyright law in two significant ways:

55 This wording seems to require protection only for TPMs that provide effective protection, suggesting that some type of threshold must be met. Ironically, this could be interpreted to mean that the only protected TPMs would be those that worked and therefore weren’t in need of protection. Additionally, as cryptologists believe that there’s no such thing as an “effective” TPM for preventing copying, providing protection only to “effective” TPMs would appear to grant no protection at all. As no TPM will be universally effective, perhaps a better definition of and effective TPM is one that makes the costs of avoidance greater than the cost of compliance. It should be noted, however, that “cost” depends on the individual and includes factors such as time, risk, and skill in “hacking.” Another definition is “economically effective,” or one that saved the owner more money than the initial outlay for its creation. Again, there are obvious difficulties with this approach, given the retroactive analysis: Kerr, Maurushat & Tacit, supra note 46 at 35.

56 This would require bringing our Copyright Act into compliance with WIPO requirements.


58 The U.S. ambassador to Canada has called Canadian copyright the weakest in the G7 and the USTR placed Canada on its Special 301 Watch list: Michael Geist, “How the U.S. got its Canadian copyright bill” The Toronto Star, (16 June 2008), online: The Toronto Star <http://www.thestar.com/sciencetech/article/443867>.
the originality test for protection and the interpretation of fair dealing. These changes led to a significant shift towards the accessibility of works.

3.1 Copyright Law’s “Purpose” and Theoretical Justification

In the United States, the Constitution gives Congress the authority to create laws:

“[t]o 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 [emphasis mine].”

In this way, copyright’s purpose was spelled out before the law was even drafted. In contrast, the purpose of copyright law is not laid out in Canada’s Constitution, or even in our Copyright Act. As a result, courts have been left to define their own versions of copyright’s purpose through the jurisprudence.

As with the appropriate balance, one’s conception of copyright’s purpose will depend on choice of theoretical justification. In Canada, the dominant theories have been the natural rights theory and the utilitarian justification. Natural rights justifications break down into two subsets; personality theory, which views authors’ rights as inherent in the writer’s person, and the “Lockean” theory that an author is entitled to rights in their work, having exerted labour in its creation. From a natural rights perspective, the law reflects authors’ innate rights and exists solely to protect them.

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59 The U.S. Const. art. I, § 8, cl. 8, online: <http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html>. Ironically, this bears some resemblance to the Statute of Anne purpose of ensuring a supply of good books.

60 The Constitution Act, 1867.

61 Not everyone believes that the possible existence of “natural rights” would favour protecting copyright. Consider the opinion of Benjamin Kaplan: “If man has any ‘natural’ rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and ‘progress,’ if it is not entirely an illusion, depends on generous indulgence of copying.” Benjamin Kaplan, An Unhurried View of Copyright (Columbia University Press; New York, 1967), quoted in Victoria Anne Kuek, Digital Authorship: Achieving Copyright’s Goals (LL.M Thesis, University of Toronto, 2006) at 2. Further, Carys Craig notes that if one conceives of creation as a dialogic process, then the romantic notion of authorship may obscure the connection between origination and imitation: Craig, Re-Imagining supra note 11 at 5.

62 Immanuel Kant, The Metaphysics of Morals (Mary Gregor trns.) (Cambridge: Cambridge University Press, 1991) at 106. Hegel also adhered to the personality theory. See e.g. G.W.F. Hegel, Philosophy of Right (1821).

63 This stems from the basic tenet of Lockean theory that “people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.” Peter Drahos, The Philosophy of Intellectual Property (Aldershot: Dartmouth Publishing Company Ltd., 1996) at 160-167, quoting
From a utilitarian or instrumentalist perspective, owners’ rights are not innate and arise only from the legislation. They exist to benefit the public interest by encouraging the production of intellectual works. The rationale is that works won’t be produced without incentive and exclusive rights artificially create scarcity, allowing authors the opportunity for financial exploitation. The existence of monetary incentives will arguably “persuade the author to create and publish original works that will enrich the public domain.”

John Stuart Mill argued that free thought, free expression, and a “market-place” of ideas were prerequisites for the attainment of beliefs, individual development, and the discovery of truth. As a result, restricting expression and impeding the free flow or use of ideas slows individual growth and the expansion of knowledge. Conversely, if, by protecting works and providing incentives, copyright encourages production and dissemination of works that wouldn’t have been disclosed, it can facilitate growth by enhancing the free flow of ideas. Hence, according to utilitarians, authors’ rights exist only to serve the public interest in a healthy marketplace of ideas.

If copyright is in fact a tool to maximize the dissemination and use of information, the societal benefits provided by the granting of incentives must justify the restrictions on individuals’ freedom. If copyright limits rather than facilitates opportunities for


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64 “[A]nd not in spite of it”: Craig, *Re-Imagining supra* note 11 at 5.
66 Jessica Litman, “The Public Domain,” (1990) 38 Emory L.J. 965 [Litman, “Public”], at 1013. Copyright is therefore somewhat of a bargain: the creator is granted rights in return for creating and releasing their works
68 Hettinger “Justifying”, *ibid.* at 36.
69 Hettinger posits that the goals of copyright are to maximize the dissemination and use of information: *ibid.* at 49. Carys Craig describes the purpose of copyright as “the encouragement of communication and exchange by putting in place incentives for creativity and the dissemination of intellectual works.” In essence it is a social policy tool: Craig, *Re-Imagining supra* note 11 at 92.
production, it oversteps its justification and should be modified. The challenge is that the ideal level of exclusivity for promoting production without excessively restricting freedom and compromising the public domain is far from clear.

As revealed by their Constitution, American copyright law is premised on the utilitarian theory, but this is not necessarily true in Canada where the purpose has often been seen as “dual.” Judgments prior to 2002 were inconsistent on this subject and often appear rooted in a natural rights stance. Copyright’s purpose under the first written English copyright statute, the Statute of Anne, could be said to have stemmed from an explicitly utilitarian perspective. This statute emphasized learning and the encouragement of production, in order to enable “a supply of good books” and other works through ensuring sufficient reward. Cases from that time period reflect the same instrumentalist position. For example, the 1769 case of Millar v. Taylor, as cited by Binnie J. at paragraph 30 of Théberge v. Galerie d’Art du Petit Champlain Inc., opined that: “[i]t is wise […] to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works.” This suggests that copyright was granted only to encourage production through incentives, rather than to protect a natural right. This has arguably been the dominant

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70 For example by restricting the public domain to such an extent that further creation is chilled. Craig, Re-Imagining ibid. at 5; with respect to copyright and freedom of expression, Craig suggests that “if copyright undermines the values inherent in free expression it therefore loses its coherence and legitimacy”: Craig, Re-Imagining ibid. at 10.
71 Bailey, “Deflating”, supra note 24 at 148. See also Paul Ganley, “The Internet, Creativity and Copyright Incentives” (2005) 10 Journal of Intellectual Property Rights 188. Certain types of cultural production will be disproportionately restricted by access restrictions such as DRM, including what might be termed “participatory culture.” Urs Gasser notes that participatory culture includes blogs, fan fiction, spoofs, sampling, mash-ups, cut-ups, machinime (using video games to create stories and short films – see for ex. www.redvsblue.com) and derivative works and notes that strict enforcement of copyright and DRM will have a chilling effect on these forms of creativity: Gasser & Ernst, supra note 36 at 11.
72 CCH, supra note 3 ¶ 10.
73 Statute of Anne, 8 Anne, c.19. April 1710, online: http://avalon.law.yale.edu/18th_century/anne_1710.asp.
74 [2000] S.C.J. No. 32 [Théberge]: This action involved a situation in which a gallery purchased products embodying an artist’s works and transferred the image to canvas using a technique that left the original embodiment blank. As a result, though the embodiment of the work has changed, the total number of works was the same. The majority of the Supreme Court of Canada (SCC) found that there had been no infringement as no new reproductions of the works were brought into existence, nor was there any production or reproduction in any material form. “What began as a poster, authorized by the respondent, remained a poster.”: Théberge ¶ 2.
75 (1769), 4 Burr. 2303, 98 E.R. 201, per Willes J., at p. 218.
For example, in the 1943 case of *Vigneux v. Canadian Performing Rights Society*, Duff C.J.C. quoted the 1894 case of *Hanfstaengl v. Empire Palace* with approval, stating that:

“The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.”

We can see that the interests of parties other than the authors were being considered and used to limit or “balance” those of authors, but the purpose of the *Copyright Act* was still exclusively to protect authors’ rights.

In 1990, the court once again reached back in time to borrow a statement of purpose for copyright law. In *Bishop v. Stevens*, the position of the Supreme Court of was taken directly from the 1934 case of *Performing Right Society, Ltd. V. Hamond’s Bradford Brewery Co.* and confirmed that the single object for which the *Copyright Act* was passed was “the benefit of authors of all kinds.” This focus on authors’ rights may stem from a natural rights stance based on an idealized image of romantic creators. Unfortunately, this single-minded focus on the author and the “romantic notion” of the author tends to lead to the vilification of users as potential infringers and infringers as thieves stealing from authors. In this regard, it should be noted that copyright

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76 (1774) 4 Burr 2408.
77 [1943] SCR 348.
78 [1894] 3 Ch. 109 at 128 (C.A.).
79 [1990] 2 S.C.R. 467 [*Bishop*].
80 [1934] 1 Ch. 121 at 127, cited in *Bishop, supra* note 79 at 478-9.
81 Strangely, this case is also used to support the proposition that Canadian copyright law is a creature of statute: *Bishop, ibid. at 477*, along with *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 [*Compo*] at 373.
82 According to David Vaver, “the mere mention of authors, writes or composers connotes certain things to use. We think of the stereotypical author in his garret, a tragic sort of person driven by his muse.” David Vaver, “Intellectual Property Today: Of Myths and Paradoxes” (1990) 69 Can. Bar. Rev. 98 [Vaver, “Paradoxes”] at 102.
originally protected the right of the publisher rather than the author\textsuperscript{84} and that copyright today is rarely owned by the first author.\textsuperscript{85}

### 3.2 The “New Purpose” of Copyright Law

In \textit{Théberge v. Galerie d’Art du Petit Champlain Inc.},\textsuperscript{86} the Supreme Court of Canada laid out the purpose of copyright law, stating at paragraph 30:

“The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”

Unlike in the United States where copyright law has the single goal of promoting innovation, \textit{Théberge} shows that in Canada the goals are two-fold; encouragement of production and author reward. Incentives benefit the public through a rich public domain, but so too does access to works and the purpose of copyright law is to mediate between the two goals. The balance between dual goals may not be new, but the articulation of the balance is. Not only does \textit{Théberge} define the parties whose interests are to be balanced as the creator and the public interest, but at paragraph 31, the Court discussed what this balance means and how it should be applied, stating that:

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

Finally, in paragraph 32, the negative consequences of excessive control are examined and the centrality of balancing to copyright is linked to the existence of exceptions:

\textsuperscript{84} Mark Rose, \textit{Authors and Owners: The Invention of Copyright} (London & Cambridge: Harvard University Press, 1993).

\textsuperscript{85} Vaver, “Paradoxes”, \textit{supra} note 82 at 104. Additionally, “authorship” doesn’t necessarily require creative spark and may not deserve the respect it compels. This is illustrated by the case of \textit{Walter v. Lane} [1900] AC 539 in which a journalist who transcribed speeches as they took place was found to own copyright, having given them fixation.

\textsuperscript{86} \textit{Théberge, supra} note 74: This action involved a situation in which a gallery purchased products embodying an artist’s works and transferred the image to canvas using a technique that left the original embodiment blank. As a result, though the embodiment of the work has changed, the total number of works was the same. The majority of the Supreme Court of Canada found that there had been no infringement as no new reproductions of the works were brought into existence, nor was there any production or reproduction in any material form. “What began as a poster, authorized by the respondent, remained a poster” (\textit{ibid.} ¶ 2).
“Excessive control by holders of copyrights and other forms of intellectual property may
unduly limit the ability of the public domain to incorporate and embellish creative
innovation in the long-term interests of society as a whole, or create practical obstacles to
proper utilization. This is reflected in the exceptions to copyright infringement enumerated
in ss. 29-32.2”

As a whole, this case notes the balancing role of copyright law and focuses on the
dangers inherent to granting excessive rights and the harm this may cause to the public
interest. This seems almost a reversal from the perspective shown in past cases such as
Bishop. Instead of being for the benefit of authors, copyright is seen to have two goals,
each of which limits the other and copyright law is seen as a tool for finding the middle
ground. In its discussion of the efficiency of the policy and the long term societal
interests, Théberge reflects a strongly utilitarian view.87

Years later, in the Euro-Excellence v. Kraft Canada Inc88 decision, Bastarache J.
discussed the Théberge decision and extracted three important concepts: balance, the
limited nature of creators’ rights, and the legitimate interests of the copyright holder. In
essence, Bastarache suggested that because copyright’s purpose is to balance interests,
authors’ rights are limited and must be understood in relation to the interests and rights of
other parties. As a result, only the interests that are consistent with the balance at the
heart of copyright were protected by the Copyright Act.89

In 2004, CCH Canadian Ltd. v. Law Society of Upper Canada90 validated the balancing
purpose of copyright law but described the parties whose interests were to be balanced
differently. At paragraph 23, the Court approved the Théberge approach, noting that:

87 It has been argued that the language used to explain the balance sought in Théberge introduces the public
interest, while maintaining a natural rights or property-based justification for copyright law. In particular,
Teresa Scassa suggests that “just reward” may prioritize the rights of authors over users: Teresa Scassa,
“Interests in the Balance” in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright
Law (Toronto: Irwin Law, 2005 at 45 [Scassa, “Interests”]. I disagree - the use of the term “just” is equally
likely to refer to an incentive that would be fair to both sides and not tend to overcompensate the owner at
the expense of the public.
89 Though Bastarache’s peers rejected this concept, his interpretation shows further movement away from
the traditional “author-oriented” approach seen in previous cases: Abraham. Drassinower, “The Art of
Selling Chocolate: Remarks on Copyright’s Domain.” (2007) 4 U. Ottawa Law & Tech. J. [Drassinower,
“Chocolate”] at 8, discussing Euro-Excellence.
90 CCH, supra note 3: The Great Library of the Law Society of Upper Canada provided a custom
photocopying service and self-service photocopiers for use by library patrons. The publishers of legal
reporters brought a copyright infringement action against the Law Society alleging that copyright was
infringed when the copies were made. The Law Society counterclaimed for a declaration that single copies
“in Théberge, supra, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”

CCH then took this a step further, stating that both owners and users have rights under the Copyright Act and stating that the case required the Court to interpret the scope of both. CCH later speaks of balancing owners’ rights and users’ interests, but, having declared that users have rights, the balance is transformed into one between the rights of owners and users’ rights. By balancing the rights of owners with the rights of users, CCH appears to conflate the interests of creators with those of owners and those of users with the public interest.

CCH’s characterization of the balance as a clash of rights leaves authors’ rights intact and pits them against the rights of users in order to satisfy copyright’s dual roles. Carys Craig has suggested that this version of balance can be contrasted with the American version, wherein authors’ rights are intended to benefit the public good. In this way, any balancing is within this context, setting protection against the public domain to find the best way to serve society at large. In Canada, both recent case law and government publications have confirmed that copyrights are granted by and arise only from the Copyright Act. This suggests that the Canadian approach to copyright is now a confirmedly instrumentalist one. If this is true, copy rights were put in place in order to serve a function, be that to reward authors or to provide incentives. If, as CCH suggests, the Copyright Act grants both owners’ and users’ rights and the purpose of copyright law is made by staff or patrons were not infringing when they are made for the purpose of research. The SCC decided that there was no primary or secondary infringement on the part of the Law Society as these copies are made for the purpose of research, hence fair dealing. Additionally, though decisions when accompanied by head notes, etc., as a compilation, are original works, the decisions alone are not original works in which the publishers could assert copyright. Additionally, providing a means by which patrons could infringe copyright did not constitute authorizing infringement.

91 CCH, ibid. ¶ 11.
92 CCH, ibid. ¶ 13.
93 Teresa Scassa refers to this as “interesting” but feels that the interests of users and those of the public don’t always coincide: Scassa, “Interests,” supra note 87 at 48. This may be true in the short term, but as incentives are meant to drive production, which in turn facilitates access and further production, I disagree.
95 Théberge, supra note 74 ¶ 5, CCH, supra note 3 ¶ 9, Compo, supra note 81 at 373, and Canada, Industry Canada, Supporting Culture (Ottawa: Industry Canada, 2002) [Canada, Supporting Culture] Backgrounder, which reads: “[Copyright] is a statutory right. In other words, no person is entitled to copyright protection other than under and in accordance with the Copyright Act.”
is to steer between them to preserve the public domain and access, this situates the
tension within the context of how best to serve the public benefit. In this case, though
Canadian copyright law has two goals, the purpose is now broadly the same as in the
United States.

Another recent case that approves the balancing purpose of copyright law is Society of
Composers, Authors and Music Publishers of Canada v. Canadian Association of
Internet Providers, wherein the Court cited the CCH statement that:

“[u]nder the Copyright Act, the rights of the copyright owner and the limitations
on those rights should be read together to give the ‘fair and balanced reading that
befits remedial legislation.’”

Additionally, at paragraph 115, the Court noted that they are interpreting the “Act in the
way that best promotes the public interest in the encouragement and dissemination of
works of the arts and intellect,” without depriving owners of their “legitimate
entitlement.”

Though the idea of balance in Théberge and CCH has been approved in the cases that
followed, there are many challenges that arise from the lack of clear instructions on how
to apply this purpose. Though Théberge focused on the limited nature of creators’ rights
and the dangers of overcompensation, hinting at the proper balance, there is no test or
advice on how to implement it. Theresa Scassa has concluded that, due to this absence,
the relevance of the compromises reflected in the legislation, the nature, and weight of
the interests to be balanced remain open for debate. This has led to “balance” being
applied somewhat differently in some post-CCH cases such as Robertson v. Thomson Corp.
Scassa has suggested that these issues would be best dealt with by clarification
or instructions in the Copyright Act, but this would require that any legislative
amendments incorporated the approach reflected in recent Supreme Court jurisprudence.
This has not been demonstrated by recent amendment attempts.

97 SOCAN, ibid. ¶ 88, quoting CCH, supra note 3, ¶ 48.
98 Again, this terminology may sound author-focused, but the entitlement stems from the statute.
3.3 The “Originality” Standard

After endorsing the balancing purpose of copyright law, the Court in CCH bore this purpose in mind while applying the Copyright Act to the facts of the case. In the process, the originality test for copyright protection and the treatment of fair dealing were reinterpreted in a way that accorded with the Court’s focus on user rights and the limited nature of owners’ rights.

In general, the Copyright Act creates and grants legally enforceable rights over intellectual expression. Authors or subsequent owners are granted the exclusive right to produce, reproduce, publish, or perform101 “original literary, dramatic, musical and artistic work[s].”102 The Copyright Act states that to do anything that is granted as a sole right to the copyright owner, without consent, is an infringement of copyright.103 The result is that copyright law restricts how works may be used, but there are tests that must be met in order for a work to be protected and exceptions that render unauthorized copying non-infringing.

The expressions of ideas are subject to copyright, but the ideas themselves are not.104 Likewise, concepts, principles, facts and knowledge are not subject to copyright either.105 “Originality” is required, as the Copyright Act grants rights only in “original” works, and works that don’t satisfy this requirement remain in the public domain, along with works whose copyright has expired.106 “Originality,” however, is not defined in the Act, but the standard has long been debated in the jurisprudence.

101 Copyright Act s.3(1).
102 Copyright Act s.5(1).
103 Copyright Act s.27(1).
106 The term granted by s.6 of the Copyright Act is the lifetime of the original author, plus 50 years.
As Jessica Litman has suggested, “originality is a legal fiction.” Works are influenced by previous works and the law recognizes this by not requiring that works be absolutely original. Imagination isn’t required either, as this would set the bar higher and require third party analysis prior to granting protection. The definition of “original” used limits the works subject to copyright and “delineates the scope of the protection they receive.” Thus, originality is not just a prerequisite, but could be said to be the defining characteristic of protected works. As a result, CCH’s choice of the appropriate test for originality is one of the most significant changes in recent copyright jurisprudence.

Prior to CCH, the two tests that had been applied were the industriousness or “sweat of the brow” test, and a requirement of “creativity.” As Abraham Drassinower wrote, the “doctrinal battle” between the two schools was symbolic of a deeper theoretical debate between the natural law and utilitarian justifications for copyright law. In one, fairness to the author as labourer is the overriding concern. In the other, the public interest in production and dissemination of works plays trump.

Over time, Canadian copyright jurisprudence has swung back and forth between the sweat of the brow and creativity standards. U & R Tax Services Ltd. V. H & R Block Canada Ltd., was decided in 1995 and found that: “industriousness (‘sweat of the brow’) was enough to give a work sufficient originality to make it copyrightable.” Conversely, Tele-Direct (Publications) Inc. v. American Business Inc. concluded the same year that the “skill, judgment or labour” test really required skill judgment and

107 Litman, “Public”, supra note 66 at 969.
108 Craig, Re-Imagining supra note 11 at 162.
110 Abraham Drassinower suggests that the originality test is the “core normative notion” that defines copyright’s domain and orient copyright’s balance: Drassinower, “Chocolate”, supra note 89 at 21.
112 Craig, “Evolution,” supra note 29 at 427.
labour.\textsuperscript{114} As a result, labour wasn’t enough and some level of creativity was required for originality.

Rather than endorsing either the industriousness or creativity test, \textit{CCH} concluded that the “correct position falls between these extremes.”\textsuperscript{115} The Court decided at paragraph 16 that, in order for a work to qualify as original, “it must be more than a mere copy of another work.” More was required than that the work originated from the author; though it needn’t be creative in the sense of being novel or unique. What is required to attract copyright protection “is an exercise of skill and judgment.”\textsuperscript{116} This was seen to fit with the balancing purpose of copyright law, as stated in \textit{Théberge}:

“When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation. […] [W]hen an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.”\textsuperscript{117}

The industrious standard was seen to shift the balance too far in favour of owners’ rights, constraining protection of the public interest,\textsuperscript{118} but creativity implied novelty or non-obviousness; concepts that were more appropriate to patent law. Requiring the exercise of skill and judgment for a finding of originality was seen to be a “workable yet fair standard that was consistent with the policy objectives of the \textit{Copyright Act}.”\textsuperscript{119}

The discussion in paragraph 23 of \textit{CCH}, noting that labour isn’t enough and the industriousness test leads to “overcompensation” suggests that copyright was never meant as a reward for mere labour. If copyright is not meant to reward labour, it must reward something else, which tends to further invalidate the Lockean justification for

\begin{footnotes}
\item[115] \textit{CCH}, supra note 3 ¶ 16.
\item[116] \textit{CCH}, ibid. ¶ 16.
\item[117] \textit{CCH}, ibid. ¶ 23.
\item[118] It is arguably true that granting copyright protection based merely on industriousness could benefit production, but it may be that the Court was attempting to encourage only certain forms of production. What is clear is that the Court was trying to encourage access, which directly opposes increased protection.
\item[119] \textit{CCH}, supra note 3 ¶ 24.
\end{footnotes}
copyright law.\textsuperscript{120} Prior to \textit{CCH}, originality determinations were mainly concerned with authors’ rights and how best to identify, envision, and protect them. The choice of “skill and judgment” and the comment on the test’s effect on balance shows the evolution of Supreme Court copyright jurisprudence towards a focus on access, the public interest and away from the past reality of copyright law as a tool to protect owners’ interests.

\subsection*{3.4 Fair Dealing}

“To say that every new work is in some sense based on the works that preceded it is such a truism that is has long been a cliché, invoked but not examined. [T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. […] This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.”\textsuperscript{121}

As previously discussed, creators are users first and creators second. As a result, access to a robust public domain is a necessary antecedent to creation and intellectual expression.\textsuperscript{122} To phrase this differently, in order to make new meaning, creators require access to their cultural heritage.\textsuperscript{123}

Fair dealing permits otherwise infringing use of copyright-protected works, as long as the purpose of the use is covered in the \textit{Copyright Act}.\textsuperscript{124} Thus, it is one of the devices that allow the space for creation’s dialogic exchange,\textsuperscript{125} ensuring that the copyright system

\textsuperscript{120} Carys Craig has argued that the movement in copyright’s doctrinal structure has been the result of: “some seismic shifting in the theoretical ground underlying copyright”: Craig, “Evolution,” \textit{supra} note 29 at 430.

\textsuperscript{121} Litman, “Public”, \textit{supra} note 66 at 966.

\textsuperscript{122} As David Vaver has said, “Keeping a broad public domain itself encourages experimentation, innovation, and competition”: Vaver, \textit{Copyright Law}, \textit{supra} note 8 at 13.

\textsuperscript{123} In the words of Wendy Gordon: “[j]ust as land is necessary for farmers to bring forth fruit (in Locke’s imagery), a common of previously-created intangibles is necessary for creators to bring forth new works of the imagination:” Wendy Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993) 102 Yale L.J. 1533 at 1556.

\textsuperscript{124} These include use for the purpose of research or private study (s.29 of the \textit{Copyright Act}), for the purpose of criticism or review (so long as sources are appropriately cited) (s.29.1), for the purposes of news reporting (this also requires proper attribution) (s. 29.2), and a variety of purposes on the part of educational institutions. The purpose must be one listed in the Act, the use must be fair, and it must comply with additional requirements where necessary. As a result, fair dealing is quite limited and can fail at any of the above levels.

\textsuperscript{125} It has been said that fair use, the American version of fair dealing, guarantees the necessary “breathing space within the confines of copyright […] to protect copyrighted materials and allow others to build on it at the same time, thus acknowledging the “collaborative and interactive nature of cultural creativity.”: \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569 [\textit{Acuff-Rose}]: Justice Souter at para 579: this is an
isn’t self-defeating. With respect to theoretical framework, were the justification for copyright law based purely on natural rights, the copyright system would merely ensure that the author reaps a reward. The inclusion of fair dealing suggests that copyright law was never intended solely as a tool for the protection of the creator.

Prior to CCH, fair dealing was viewed as a defense, interpreted narrowly and all but redundant. One example of the strict interpretation of fair dealing is the 1998 case of Hager v. ECW Press Ltd., which addressed fair dealing for private study and research. Here, a biography wasn’t found to qualify as fair dealing for research purposes, as the use “contemplated by private study and research is not one in which the copied work is communicated to the public.” Other examples of strict interpretation include B.W. International v. Thomson Canada, Ltd., wherein the court decided that the publication of a leaked work couldn’t be fair dealing and Boudreau v. Lin, in which the copying and sale of course materials by a University didn’t qualify for fair dealing as private study because the materials were distributed to all members of a class.

At the first CCH trial the defendant, the Law Society of Upper Canada, argued that the purpose of their photocopying service was research. CCH responded that, under the Copyright Act, the relevant purpose is the purpose for which the people making the American case and refers to Fair Use, which is the American version of fair dealing, but fair use and fair dealing play the same role in U.S. and Canadian copyright law respectively. Though it is less comprehensive, the same could be said of fair dealing. Craig, Re-Imagining supra note 11 at 242 and 256. 

The counterargument is that, from an economic perspective, fair dealing has nothing to do with ensuring creative space and merely reflects the high transaction costs associated with collecting royalties for uses the purpose of which we refer to as fair dealing. This suggests that, rather than having an important function within copyright law, fair dealing was merely a way to avoid incurring the costs involved. In turn this could be argued to have a utilitarian purpose in not compromising or limiting author’s promised incentives. For a thorough discussion of the economic effects of fair dealing, see Marcel Boyer, “The Economics of Copyright and Fair Dealing 2007s-32, Scientific Series 2007 Cirano, online: <http://ssrn.com/abstract=1133593>.


85 C.P.R. (3d) 289 [Hager].

Hager, ibid. ¶ 55. This seems to read the provision as “for private study or private research.”


Craig, “Changing”, supra note 128 at 444.

copies did so and the intentions of the recipients were irrelevant. The judge agreed and looked only to the purposes of the Law Society, which couldn’t be viewed as doing research.

The Federal Court of Appeal opted not to apply this narrow view. Fair dealing was not to be “strictly construed” as this would be “inconsistent with the mandate of copyright law to harmonize owners’ rights with legitimate public interests.”135 Linden J also suggested that users deserve a balanced reading, stating that, rather than providing a defense, an act: “falling within the fair dealing provisions is not an infringement of copyright.”136 This removed fair dealing uses from the owner’s exclusive domain, increasing user’s ability to deal with the work while limiting owner rights. Additionally, it foreshadowed the Supreme Court redefinition of fair dealing as a user right as opposed to merely a defense.137

The Supreme Court decision in CCH brought user rights to the forefront of copyright law, with the result that it’s perhaps the most important case in recent copyright history. Paragraph 48 states that:

“the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right.138 In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.

135 CCH, FCA, supra note 32 ¶ 126.
136 CCH, FCA, ibid. ¶ 126.
137 Craig, Re-Imagining supra note 11 at 253.
138 Redefining fair dealing and other exceptions as user rights raises philosophical questions about the nature of rights and what this characterization means in relation to parties’ obligations. Wesley Hohfeld conceived of fundamental legal concepts as pairs of “correlatives.” Each correlative concept is one end of the same relationship. The correlative of “right” is “duty,” meaning that a right can be defined as control over the actions and conduct of others. “Duty” is therefore the obligation to act accordingly. Right and duty are not opposites, however: the opposite of right is “no-right” (the absence of a right) and the opposite of duty is “privilege.” The correlative of privilege is no-right. When one lobbies for a right, they want to enforce a duty on others and control others’ actions. If a person lobbies for a “privilege,” they are asking for someone’s pre-existing right to be taken away through the negation of their duty. In essence, privilege (or lack of duty) is merely lack of compulsion, and is not in fact properly characterized as a right. If the Supreme Court has characterized fair dealing as a user right, we may then ask: what is the corresponding duty? The duty to provide access, or the duty not to bring action for this use? Access seems to be taking it too far. Without a corresponding duty, however, fair dealing may be more properly characterized, at least in Hohfeldian terms, as a privilege: Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, (Westport: Greenwood Press, 1978) (reprint of the 1964 printing of the ed. first published by Tale Univ. Press, New Haven, 1919).
Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation [emphasis mine].”139

The Court went beyond characterizing fair dealing as a right and required that “research” be given “a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”140 In accordance with the requirement for a liberal interpretation, the Supreme Court agreed with the Federal Court of Appeal decision that copying didn’t constitute research, “in and of [itself]” but was a part of the research process. In addition, the decision found that research isn’t limited to non-commercial or private contexts and “[l]awyers carrying on the business of law for profit are conducting research within the meaning of s.29 of the Copyright Act.”141

Noting that the Copyright Act doesn’t define “fair” for the purposes of fair dealing, nor does it give any guidance on how to apply the fair dealing provisions, the Supreme Court in CCH approved of the test set out by Lord Denning in Hubbard v. Vosper.142 It then applied the test that the Federal Court of Appeal had set out, which analyses a variety of factors: i) the purpose of the dealing; ii) the character of the dealing; iii) the amount of the dealing; iv) alternatives to the dealing; v) the nature of the work; and vi) the effect of the dealing on the work. After applying these tests to the copying in question, the Supreme Court found that the dealing had been fair.143

The idea that users’ rights are integral to copyright law isn’t entirely new,144 but judicial affirmation of the centrality of users’ rights and the rights of the public are rare. For the first time in Canadian copyright history, CCH recognized a user right to carry on exceptions and recognized that these exceptions must be interpreted broadly.145 The role CCH assigned to fair dealing has had a “clear transformative impact” on Canadian

139 CCH, supra note 3 ¶ 48.
140 CCH, ibid. ¶ 51.
141 CCH, ibid. ¶ 51.
142 [1972] 1 All E.R. 1023 (C.A.) at 1027.
143 CCH, supra note 3 ¶ 53-60.
copyright law and practice,\textsuperscript{146} reflecting a shift in beliefs about the nature of copyright and a transition from a focus on author’s rights towards a focus on users’ rights.\textsuperscript{147} In this sense, \textit{CCH} suggests that public benefit is the central concern of the copyright system.\textsuperscript{148}

The response to \textit{CCH}’s treatment of fair dealing has not been unanimously positive. If fair dealing is a right that renders copying non-infringing \textit{ab initio}, this means unauthorized copying is not intrinsically wrong. Carys Craig has pointed out that this conflicts with some copyright owners view of fair dealing as “fair stealing:” a more acceptable version of theft,\textsuperscript{149} but owners are not the only ones who are uncertain. Giuseppina D’Agostino describes the \textit{CCH} decision as “user-centric”\textsuperscript{150} and cautions that the: “skewed expression of balance and the objectives of copyright law” led to an “ill-conceived copyright policy […] matched by equally ill-conceived language.”\textsuperscript{151} Though the Court unquestionably paid more attention to users’ interests than in past cases, it didn’t lose sight of owners’ rights. The balance in \textit{CCH} was between the dual goals of protecting owner rights and user interests\textsuperscript{152} and considered the \textit{Copyright Act}’s function in ensuring a “just reward” for creators.\textsuperscript{153} As a result, \textit{CCH} can not accurately be described as “unbalanced” or anti-author, despite having shifted the balance towards access and use.

\textsuperscript{146} Drassinower, “Authorship” \textit{supra} note 144 at 201.
\textsuperscript{147} Craig, \textit{Re-Imagining} \textit{supra} note 11 at 255-6.
\textsuperscript{148} Théberge, \textit{supra} note 74 at ¶ 30-31 and \textit{CCH}, \textit{supra} note 3 ¶ 23.
\textsuperscript{149} Craig, “Changing”, \textit{supra} note 128 at 454, referring to Jeremy Phillips’ statement in his article “Fair Stealing and the Teddy Bear’s Picnic” (1999) 10 Ent. L. Rev. 57 at 57: “To copyright owners, the defence of fair dealing is a legitimation of that which is inherently wrong, a sort of ‘fair stealing.”
\textsuperscript{150} “[T]his can be seen in particular in the court’s language, liberal interpretation of fair dealing, its elevated status of the doctrine as compared to other copyright exceptions, and its underlying policy preoccupations.”: D’Agostino, “Healing” \textit{supra} note 145 at 11-12.
\textsuperscript{151} D’Agostino, Healing”, \textit{ibid.} at 15. Professor D’Agostino argues that the “unfortunate copyright parlance” in CCH wrongly conflates the interests of creators and owners, parties that she suggests do not always share interests. This is an interesting point: at paragraph 10, CCH approves the balance as stated in Théberge, between promoting the public interest v. just rewards for creators, and then proceeds to restate it in para. 48 as between the interests of owners and users. Whereas promoting the public interest may also protect users’ interests in access, production and dissemination, this is indeed not always true of creators and owners.
\textsuperscript{152} \textit{CCH}, \textit{supra} note 3 ¶ 48.
\textsuperscript{153} \textit{CCH}, \textit{ibid.} ¶ 10, referring to ¶ 30 of Théberge, \textit{supra} note 74.
Writing in 1994, lawyer and blogger Howard Knopf described the Canadian fair dealing defense as “statutorily restrictive and not easily capable of a remedial, flexible, or evolutionary interpretation.” This opinion was mirrored by the comments of Justice Linden in the Federal Court of Appeals decision in CCH, noting that “[i]f the purpose of the dealing is not one that is expressly mentioned in the Act, this Court is powerless to apply the fair dealing exemptions.” Despite the emphasis on an expansive interpretation in the Supreme Court decision in CCH, the same comments could be made today. The Copyright Act itself still reflects a narrow vision of fair dealing as a limited defense, rather than the user right it’s described as in CCH. This threatens the potential legacy of CCH, as narrow provisions lead to narrow interpretations, even in the face of a decision urging broad interpretation.

To avoid the possibility of future case law failing to live up to the CCH decision, Carys Craig has argued that the statutory fair dealing provisions should be changed to resemble the American fair use rules, including the open-ended formulation and test. She is not alone in this belief. In its current form, even if courts follow CCH’s guidance in construing fair dealing broadly, some uses are covered by American fair use, but not

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154 Mr. Knopf writes http://excesscopyright.blogspot.com, a blog that argues that although intellectual property law is good, “excess” intellectual property law is not.


156 CCH, FCA, supra note 32 ¶ 127.

157 “The fair dealing provisions: “[create] unnecessary rigidity by excluding uses which may be fair and desirable, but do not fall under any allowable purpose. Second, [they] encourage courts seeking to avoid this rigidity to stretch the meaning of the allowable purposes to cover dealings that may not necessarily be compatible with their ordinary meaning.” Ariel Katz, What Can Canada Learn from Israel about Copyright Reform? University of Toronto Law School Blog, December 8, 2007 [Katz, “Learn”].

158 Craig, “Changing”, supra note 128 at 455

159 Craig, “Changing”, ibid. at 439; Craig, Re-Imagining supra note 11 at 243.

160 For example, Ariel Katz wrote of the American version of fair use: “This approach for fair use has worked fine for the US for decades. Last year, the Gower Review recommended that the UK move in the same direction. Israel did so last month. Canada should do the same.” Israel shares a common copyright heritage with Canada and, until 2007, their Act was still principally based on the UK Copyright Act of 1911 (as was our first Copyright Act in 1921). Prior to the amendments of 2007, Israel had a “closed” fair dealing provision like Canada’s, but opted to adopt an American-style, open-ended version of Fair Use: Katz, “Learn”, supra note 157.
Canadian fair dealing. For example, one fair dealing purpose is criticism, but this hasn’t been extended to parody, which is viewed as a sub-set in the United States.161 Other examples include time-shifting and internet browsing.162 Craig argues that “balance” between authors’ rights and the public interest demands broad fair dealing provisions163 and that the language of users’ rights isn’t enough to guarantee users’ interests will be advanced. This will require substantive change. As a result, Craig contends that:

“the Canadian government should seize this opportunity for change. Taking its lead from the Supreme Court, it should acknowledge the centrality of fair dealing in Canadian copyright policy, and the need for a broad defence to ensure that users’ interests are not undermined. This should translate into a proposal for an open-ended fair dealing defence, amenable to principled and purposive interpretation, and flexible enough to withstand the test of time.”164

In common with Teresa Scassa’s suggestion that “balance” should be dealt with in the legislation, this would require that the government adopted the Supreme Court’s perspective on copyright law and amended the Copyright Act accordingly. To date this has not happened.

To summarize, between Théberge and CCH, the purpose of Canadian copyright law was identified as maintaining a balance between owner and user rights. This purpose was then used to affirm users’ rights as an integral part of copyright law, fundamentally altering how copyright law is understood. These cases have taken an increasingly utilitarian perspective, recognizing that copyright law is not intended merely to protect owners, but to protect them only to the level required to provide incentives to stimulate production, promote access to works and the public benefit.165 Given the limited nature of owner rights, Théberge and CCH have confirmed that copyright law must assess what

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161 See Acuff-Rose, supra note 125. Writing in 1997, David A. Fewer noted that the only reported parody cases at that time “held so little faith in the ability of fair dealing to accommodate their expressive interests that they failed even to raise fair dealing as a defence.” It has been raised since that time in cases such as Cie Générale des Etablissement Michelin-Michelin & Cie. v. C.A.W ((1996), [1997] 2 F.C. 306 • (1996), 71 C.P.R. (3d) 348 • (1996), 124 F.T.R. 192 [Michelin], but the fair dealing provisions in the Act were strictly interpreted and claims of parody failed: Fewer, Defining, supra note 21.

162 Craig, “Changing”, supra note 128 at 457: Craig refers to Sunny Handa’s observation that the copying inherent to internet browsing mightn’t be saved by fair dealing, as casual browsing isn’t likely to qualify as use for the purposes of research, private study, criticism, review, or news reporting. For further discussion, see Sunny Handa, Copyright Law in Canada (Markham, ON: Butterworths, 2002) at 294.

163 Craig, Re-Imagining supra note 11 at 244.

164 Craig, “Changing”, supra note 128 at 461

level of protection will best advance its objectives without infringing unnecessarily on individual rights. In the words of Daniel J. Gervais, this requires that copyright is limited, shouldn’t “carelessly enter into the private sphere of individual users,” and that we must “judge the alignment of the Act’s interpretation with [copyright’s] purpose.”

If the law moves beyond this mandate, it is over-stepping its natural boundaries and should be curtailed.

4. Copyright Law and Legislative Reform

At the same time that the Théberge line of cases was being decided, the Canadian government was moving towards amending the Copyright Act. Given the lack of direction for copyright law in the Canadian Constitution, subject to some limitation, the government is free to amend the law, taking it in whatever direction suits their policy objectives. This includes the ability to add a statement of purpose to the Copyright Act that conflicts with the purpose articulated by recent Supreme Court jurisprudence. Though no amendments have yet been passed, it is clear that the initiatives are moving in different directions. In order to compare the governmental mind set and initiatives with the Supreme Court jurisprudence, I will look first at the language used in government publications and then proceed to examine the content and probable results of Bills C-60 and C-61.

One’s view of copyright’s function and choice of philosophical justification is determinative of how one believes the law should be structured and applied. The philosophy of the ministries most responsible for copyright reform can be guessed at

166 Gervais, “Purpose”, supra note 165 at 320.
167 Limitations imposed by the Canadian Charter of Rights and Freedoms, for example. Copyright law could not effectively limit the rights granted under the Charter, such as freedom of speech.
168 Scassa, “Interests,” supra note 87 at 45.
169 There are two government ministries that are responsible for copyright law in Canada. Industry Canada is responsible for the administration of the Copyright Act and Industry Canada and Canadian Heritage are jointly responsible for developing copyright policy and revisions to the Copyright Act.: Lesley E. Harris, Canadian Copyright Law, 3rd ed. (Whitby: McGraw-Hill Ryerson, 2001) at 15.
from the language they use, which should assist in predicting and explaining amendment initiatives.170

In 1985, the House of Commons Standing Committee on Communications and Culture’s Sub-Committee on the Revision of Copyright released *A Charter of Rights for Creators*. It is clear from the title that the focus was on owners’ rights, but the report confirms this, asserting that: “[o]wnership is ownership is ownership. The copyright owner owns the intellectual works in the same sense as the landowner owns land.”171 This belief reflects a strong focus on protecting the rights of owners, rather than facilitating or encouraging intellectual output.

In 1995, the Information Highway Advisory Council’s Copyright Sub-Committee released *Copyright and the Information Highway: Final Report of the Copyright Sub Committee*. The Committee declared the Canadian *Copyright Act* to be “based on […] the recognition of the property of authors in their creation and the recognition of works as an extension of [their] personality.”172 This explicitly applies a natural rights perspective, suggesting that the interests of users will be a secondary concern at best.

2001’s Industry Canada report, *A Framework for Copyright Reform*, is a stark contrast in that it adopts a utilitarian perspective. The report states that: “[t]he Government is committed to ensuring that copyright law promotes both the creation and the dissemination of works.” From a cultural policy perspective, the object of the *Copyright Act* was, in part, to “ensure appropriate access for all Canadians to works that enhance the cultural experience and enrich the Canadian social fabric.” Access was seen as: “an important public policy objective to consider when reviewing the copyright framework.”173 From the economic policy perspective, the *Framework* document saw

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170 Though it should be borne in mind that the Bills that eventually result from consultation processes do not necessarily live up to the promises made.
copyright protection as “a powerful lever to promote innovation” through “[rewarding] the creation and dissemination of knowledge and cultural content, and [facilitating] access.” Though the mention of innovation, access, and dissemination shows promise, the Framework document also referred to promises made in the January 2001 Speech from the Throne that the government would “provide better copyright protection.”

This apparent philosophical reversal and recognition of the need for access is reflected in 2001’s Canadian Heritage and Industry Canada, Consultation Paper on Digital Copyright Issues. This paper proclaimed that copyright “serves to recognize, promote and protect intellectual expression, as well as encourage and enable access to and dissemination of such expression.” As positive as this sounds, this paper also proposed amending the Copyright Act to add a "making available" right, and anti-circumvention protection for TPM and Rights Management Information (“RMI”). This suggests that protection was still considered the most important aspect of copyright’s role.

2002’s Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act also used instrumentalist language. The government’s aim was: “to maintain a modern copyright act that promotes the best interest of Canadians, while adhering to our international obligations.” The Executive Summary states that the objectives include both “legitimate interests of creators to be paid for use of their works and the needs of users to have access to those works,” thus implying a balance. The report discusses the operation of the Copyright Act, including whether or not the fair dealing provisions should be amended “to ensure [they do] not exclude activities that are socially beneficial and cause little prejudice to rights holders’ ability to exploit their

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174 This seems to parallel the instrumentalist philosophy that was seen in the Théberge decision the following year. Canada, Framework, supra note 173.
175 Canada, Framework, ibid. 173 at s.2: “Copyright: A Public Policy Framework.”
177 Canada, Supporting Culture, supra note 95 at 1 http://strategis.gc.ca/eic/site/crp-prda.nsf/eng/rp00863.html
178 Canada, Supporting Culture, ibid. at 12. This is undoubtedly a reference to the WIPO Treaties and Canada, in regard to which, Canada has no obligations, international or otherwise.
works.” Again this appears to be a positive step, but the fundamental public policy objectives of copyright were described as “remuneration and control for rights holders, and the dissemination and access to their works.” This articulation of copyright’s objective isn’t universally accepted, as it suggests more control than many believe the Copyright Act was intended to grant. The rights granted to owners are limited and allow control only in relation to those uses specifically listed in s.3(1). Most possible uses of the works are beyond the control of authors.

The misconception that copyright owners have, or at least ought to have, the right to authorize all uses of their works is shown in the 2001 Framework document, which suggests that:

“some uses of works are permitted without the rights holder’s consent or without the payment of royalties. These are called ‘exceptions.’ In other cases, authorization is not required but creators and other rights holders are entitled to remuneration.”

In point of fact, under the Copyright Act, exclusive rights are the exception rather than the rule and any use not listed as an exclusive right is beyond the reach of copyright law. Many uses do not require authorization or incur royalties, but control continues to be a popular theme. It is not one, however, that appears consistent with the need for access and suggests a continued focus on the interests of the owner, rather than the promotion of access or balance.

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179 Canada, Supporting Culture, ibid. s.B.2.8 at 36.
180 Canada, Supporting Culture, ibid. at 1.
181 Access is not subject to owner control at all once a work is published. Laura Murray gives the example of a user who owns a book and decides to tear the pages out for use as wallpaper. No matter how offended an author may be, they do not have the right to prevent it: Murray, “Patterns”, supra note 16 at 30. At page 34 of this article, Murray also quotes Lawrence Lessig as saying stating that just because control is possible, it doesn’t necessarily follow that it is justified. Also: “in a free society, the burden of justification should fall on him who would defend systems of control.”: Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (New York: Vintage Books, 2001) at 14.
182 Canada, Framework, supra note 173.
183 Bruce Stockfish, then Director General in the Department of Canadian Heritage, speaking at an appearance at the Canadian Heritage committee on June 11, 2002, opined that copyright is: “a matter of exclusive rights for creators of works. The nature of copyright is such that there is exclusivity; there is control over works. In order for users to have access to creators’ works, there needs to be clearance of those works”: Remarks by Bruce Stockfish, Standing Committee on Canadian Heritage, 37th Parliament, 1st Session, Evidence (11 June 2002), www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=6610#T0910, quoted in Murray, “Patterns”, supra note 16 at 32. If this were the case, a user would have to request permission prior to reading a book.
When the Standing Committee on Canadian Heritage released their *Interim Report* in 2004,\(^\text{184}\) the first recommendation was to ratify the WIPO Treaties,\(^\text{185}\) cautioning that “Canada must respect its obligations”\(^\text{186}\) and noting the provisions relating to exceptions and anti-circumvention measures. Canada’s obligations did not require greater restrictions on copyright then and still don’t today. The drive to ratify the treaties speaks more to the initiatives of the government than any need to comply with international commitments.\(^\text{187}\)

Other recommendations in the *Interim Report*, had they been implemented, may have restricted permitted uses in the digital environment to the point of nullification.\(^\text{188}\) Particularly concerning were recommendations that would have allowed extended licensing for internet materials used for educational purposes,\(^\text{189}\) rendered material on the internet freely usable for educational purposes only if the owner affixed notice of consent to use without prior consent or payment,\(^\text{190}\) and the recommendation that the government put in place an extended collective licensing scheme for educational institutions’ use of information and communications technologies.\(^\text{191}\) Myra Tawfik has suggested that this would have transformed the *Copyright Act* from one that can be used to mediate between competing and overlapping interests, to one strongly favouring the interests of the rights holder,\(^\text{192}\) ignoring the balance and access alluded to in past publications.

When Industry Canada announced Bill C-60, *An Act to Amend the Copyright Act*, the result of the consultation to that point, they were careful to present the Bill as balanced.

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\(^\text{185}\) Canada, *Interim Report*, ibid. - Recommendation 1 at 5. Recommendation 3 at page 11 included a “notice and takedown” provision and recommended that the Act be amended to confirm that ISPs can be liable for infringement, if they act as anything other than “true intermediaries.”


\(^\text{187}\) The position of Myra Tawfik was that the Standing Committee invoked international obligations as an excuse to advance their own desired ends, which were alleged to be ensuring the ratification of the WIPO treaties: Tawfik, “International”, *supra* note 57 at 72-78.

\(^\text{188}\) Tawfik, “International”, *ibid.* at 67.


\(^\text{192}\) Tawfik, “International”, *supra* note 57 at 67.
It was announced that: "A balanced copyright framework will help [...] foster innovation and learning"\(^{193}\) while asserting that “[w]e must strengthen the hand of our creators and cultural industries against the unauthorized use of their works on the Internet.”\(^{194}\) This strengthening of the rights of owners and industry appears to be the *balance* favoured by the Canadian government.

Recent Supreme Court jurisprudence has moved from a natural rights-based view to an explicitly utilitarian approach. At the same time, government publications have also shown a trend towards instrumentalist language. The government’s approach for facilitating societal benefits such as production and access, however, is very different from the Supreme Court’s. Though highlighting access and, more recently, balance, the government publications have taken an increasingly protectionist position. This shows either a disagreement as to how best to implement the bargain struck by copyright law, or that the government’s reason for amending the *Copyright Act* is to ratify the WIPO treaties, increasing owners’ rights such as TPM protection, regardless of the potential effect on the public domain and user rights.

### 4.1 The Current Round of Canadian Copyright Reform

Two reasons have been given for the current round of copyright reform. The first is the drive to ratify the WIPO Treaties and the second is a concern that the *Copyright Act* must be modernized as it is unable to keep pace with new technologies in its current form.\(^{195}\)

Given the focus on the WIPO treaties in government publications including the *Consultation Paper on Digital Copyright Issues*,\(^{196}\) *A Framework for Copyright Reform*,\(^{197}\) *Supporting Culture and Innovation*,\(^{198}\) and the *Interim Report on Copyright*

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194 Canada, “Announces”, *ibid*.
195 Tawfik, “International”, *supra* note 57 at 66.; “Today more than ever, copyright policy and law are being challenged by new and rapidly evolving technology.”: Canada, *Supporting Culture*, supra note 95 at 2.
196 Canada, “Consultation”, *supra* note 176.
Reform, this stage of copyright reform arguably began in 1996 with Canada’s signature. Ultimately, this is what provided the political “catalyst” for change. Though Canada signed the treaties, they haven’t been ratified and, absent ratification, Canada is therefore not bound by their requirements. Notwithstanding this, the WIPO obligation that member states must establish legislation prohibiting TPM circumvention has been front and centre in government amendment attempts.

Following the Interim Report in 2004, in 2005 the Liberal government under Paul Martin introduced Bill C-60. In late November, 2005, a non-confidence motion was passed, dissolving Parliament and effectively killing the Bill. In 2007, the Throne Speech again promised new legislation and in December 2007, Stephen Harper’s Conservative government gave notice for Bill C-61. This Bill had a first reading in 2008, but died on the order paper after Parliament was dissolved early and an election called.

4.2 Bill C-60
On June 20, 2005, Bill C-60, entitled An Act to amend the Copyright Act had its first reading. The “Summary” of this Bill states that the enactment would amend the Copyright Act to implement the provisions of the WIPO Treaties, clarify the issue of ISP liability, facilitate technology-enhanced learning and interlibrary loans, and generally update the Copyright Act.

199 “With it’s signature in 1997, Canada also signaled its commitment not to derogate from the principle embodied in the [WIPO Treaties]. Canada has yet to ratify these treaties as ratification will be possible only after amendments.” Canada, Supporting Culture, supra note 95 at 3.
199 Canada, Interim Report, supra note 184.
200 This would be the position of Laura J. Murray: Murray, “Patterns”, supra note 16 at 15.
201 Geist, “Anti-circumvention”, supra note 45 at 213.
202 Canada, “Consultation”, supra note 176 at 11.
203 Geist, “Anti-circumvention”, supra note 45 at 214.
204 “Our government will improve the protection of cultural and intellectual property rights in Canada, including copyright reform.” Full text available online: CTV.ca, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071016/thronespeech_SIDEBARS_071016/20071016/.
205 It was read by the Minister of Canadian Heritage, 1st Sess., 38th Parl.
Bill C-60 would have granted additional rights to copyright holders, including the new right of “making available,” and implemented a “notice and notice” system. It also contained increased exceptions for users, including limited exceptions for educational institutions and students, and confirmed that network service providers weren’t liable for infringement using their services or for caching and other “incidental” acts rendering telecommunications more efficient. The provision that got the most negative press, however, was section 27. This contained new rights for owners in the form of a prohibition on the unauthorized removal of electronic RMI and declared that it was infringement to circumvent, remove, or render ineffective a TPM in order to infringe the copyright. This section proposed a new Copyright Act s. 34.02(1) that would read as follows:

An owner of copyright in a work [is] entitled to all remedies […] infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer’s performance or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

Though the prohibition on anti-circumvention appears logically linked to infringement, it should be noted that, in addition to prohibiting circumvention for the purposes of infringing the rights of another party, it also prohibits circumvention for the purposes of

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206 Bill C-60, s.2: “a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication”; Additionally, ss.8(1), 9 and 15 would have granted additional performer’s rights in relation to their performances, ss.10-13 and 15 would have added additional rights for makers of sound recordings.

207 Bill C-60, s. 29: a “notice and notice” allowed an owner to send notice of a claimed infringement to a network provider or ISP, who would forward the notice to the alleged infringer.

208 Bill C-60, ss.18 and 20. The exceptions were limited as they themselves contained extensive exceptions. For example, under the proposed s.30.01(4)(b), in order to qualify for the exception, the educational institution must destroy any copies made for lessons within 30 days of the end of the course of which it forms a part.

209 The proposed Copyright Act s.31.1(2): A person referred to in subsection (1) who performs any other acts related to the telecommunication that render it more efficient, including the caching of a reproduction of the work or other subject-matter, does not, by virtue of those acts alone, infringe copyright…

210 The proposed Copyright Act s. 34.01(1): The owner of copyright in a work, […] is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form […] and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright.

211 This section would also cover offering or providing a service that circumvented TPMs for the purposes of infringing copyright.
making a private copy. Logical link or not, this section grants owners an additional right not currently included in the Copyright Act.

In addition to granting an additional right, the proposed s. 34.02(1) conflicts with s. 80(1) of the current Copyright Act, which grants users the right to make a copy for private use of any sound recording onto sound recording media. Section 27 of Bill C-60 would limit this pre-existing right to sound recordings that contain no TPMs. Given that all buyers of blank recording media are required to pay a levy and given that the levy was itself created for the purposes of “striking a balance between the rights of creators and those of users,”\(^\text{212}\) denying users this right would have negated the bargain struck with society.

Though Bill C-60 did offer limited user gains, it didn’t include changes to fair dealing as a user right or otherwise.\(^\text{213}\) As well as rules against circumvention, it also granted a significant new exclusive right – the right to make a work available to the public – which the Federal Court had decided in BMG Canada Inc. v. John Doe wasn’t a right under the Copyright Act.\(^\text{214}\) As a result, it’s clear that the amendments in Bill C-60 favoured the interests of owners over those of users.

4.3 Bill C-61
When Bill C-61 was introduced, the focus was again on balance. Addressing a press conference after the Bill’s first reading on June 12, 2008,\(^\text{215}\) Jim Prentice, the Minister of Industry, declared that "the purpose of the bill has been to expand the balance of


\(^\text{213}\) There is no obligation on the government to incorporate the Supreme Court’s approach, but, as previously noted, some academics had suggested that this should be the case.

\(^\text{214}\) BMG, supra note 100 at ¶ 28. Though granting additional rights is the prerogative of Parliament, this new right seems targeted at capturing uploading of files in peer-to-peer (P2P) file-sharing. This would have the effect of side-stepping an industry-unfavourable decision.

\(^\text{215}\) The Notice Paper for this Bill had been published in December of 2007, but there was a brief delay due to public response and concerns over the lack of public consultation. It was read in the 2nd Sess. of the 39th Parl. by the Minister for Industry.
protection between consumers and copyright holders.” Further, Prentice insisted that "[t]his bill reflects a win-win approach."  

Bill C-61’s Summary notes that it would amend the Copyright Act in order to “update the rights and protections of copyright owners to better address the Internet, in line with international standards,” clarify ISP liability, permit certain uses of digital technologies for educational and research purposes, permit certain uses of copyrighted material for private purposes and give photographers the same rights as other creators. Though this purports to provide increased benefits to users, benefits to owners were front and centre in the form of significant additional rights. In this regard, the Bill’s Preamble shows the government’s intention to strengthen and increase the protection granted to owners, regardless of the potential for restricting users’ existing rights.

In the Preamble the Copyright Act is referred to as “an important […] cultural policy instrument that […] supports creativity and innovation...” This embraces the utilitarian justification for copyright law and acknowledges copyright’s function as a social policy tool. The Preamble then clarifies the government’s intention to “[promote] culture and innovation” by “enhancing the protection of copyright works […] including through the recognition of technological measures”. The utilitarian purpose is clear, but the direction is very different from the Supreme Court’s move towards recognizing user rights. Additionally, the Preamble states that:

“the exclusive rights in the Copyright Act provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on these rights exist to further enhance users’ access to copyright works…[emphasis added]”;

Though this shows one version of balance, the phrasing suggests that owners still have rights and users still have only interests. This very different from the Supreme Court’s clash of rights. The government’s choice not to view users’ interests as integral rights, despite CCH, reflects a version of balance more in keeping with the last generation of Supreme Court jurisprudence.

216 Peter Nowak, “Copyright law could result in police state: critic” CBC News (12 June 12 2008) online: <http://www.cbc.ca/technology/story/2008/06/12/tech-copyright.html> [Nowak, “Copyright”].

217 The language of “rights holder” rather than authors in this context and the focus on economic rights and incentives may also suggest that the government has abandoned any vestiges of natural rights reasoning.
Additionally, the Preamble suggests that the WIPO treaties reflect global norms for copyright protection and the Canadian *Copyright Act* does not. Despite the fact that the WIPO treaties are not mentioned in the Summary, this comparison in the Preamble exposes the underlying intention of Bill C-61 to bring the *Copyright Act* into compliance with WIPO obligations. It should perhaps be borne in mind, however, that Bills do not always live up to their Preamble.

Like Bill C-60, if it had passed, Bill C-61 would have granted increased rights to performers in their performances,²¹⁸ sound recording makers in their sound recordings,²¹⁹ and would have implemented new “notice and notice” provisions.²²⁰ A “making available” right would have allowed performers and producers of sound recordings to determine if and how their works are shared online,²²¹ rendering the unauthorized uploading²²² of protected material illegal. Though this would have clarified the legality of file-sharing and music downloading in Canada, it would also have granted a significant right to owners that is not currently included in the *Copyright Act*.²²³

Users would have enjoyed more infringement exceptions, such as the ability to “device shift,”²²⁴ and “time shift,”²²⁵ but these exceptions were limited by anti-circumvention rules and themselves limit the private copying users are allowed under s.80(1) of the *Copyright Act*.²²⁶ In spite of the appearance of an increased ability to make non-

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²¹⁸ For example, Bill C-61, ss.7(1) and 8.
²¹⁹ For example, Bill C-61, ss.9 and 10.
²²⁰ Bill C-61 s. 31.
²²¹ Bill C-61 ss.7 and 9 respectively.
²²² To a personal website, Facebook or other social-networking site, Peer-to-peer network (P2P), etc.
²²³ Though the Canadian *Copyright Act* doesn't grant a "making available" right, it does grant authors the exclusive right to communicate a work to the public by telecommunication (*Copyright Act* s.3(1)(f)). As a result, some have argued that an explicit making available right is redundant.
²²⁴ Reproduce works onto another medium or devices: Bill C-61, s. 17.
²²⁵ Make a copy for later viewing: Bill C-61, s.17.
²²⁶ For the device shifting exception to apply, the copies may not be given away, must be for personal use, and only one copy may be made for each device that the copier owns. Additionally, no TPMs may be circumvented. The copy of the work being reproduced may not itself be an infringing copy and must be legally owned by the person making the copy. Given that Bill C-61, s. 17 applies to sound recordings, this appears to replace s.80(1) of the current *Copyright Act*. Under the current s.80(1), however, the work being copied needn’t be a legal copy or owned by the copier, hence the new version would be more restrictive. Given that the levy paid on blank recording media is meant to compensate owners for possible
infringing copies, both the device-shifting and time-shifting provisions contain a sort of “poison pill” as the exception doesn’t apply if a TPM was circumvented. The result is that rights holders would be able to avoid the effects of these and other sections by using even the simplest TPM. As a result, the ability of users to avail themselves of rights under the Copyright Act would be subject to owner control. Given that many digital products contain TPMs, these new rights could largely be rendered moot.

There were positive aspects to Bill C-61: new exceptions would have applied to educational institutions and distance-learning, libraries, archives and museums, and the Bill confirmed that Internet Service Providers aren’t liable for infringement that occurs using their services. In addition, the Bill would have capped statutory damages at $500.00 per infringing act for individuals who infringed for private purposes. Again, however, the damage cap only applies if no TPM was circumvented to obtain access.

The most negative amendment contained in Bill C-61 was the addition of a wide-range of anti-circumvention measures. Section 31 proposed a new Copyright Act s. 41, which states in part that:

41.1(1) No person shall:
(a) circumvent a technological measure within the meaning of paragraph (a) of the definition “technological measure” in section 41;
(b) offer services to the public or provide services [that have the purpose of circumventing a TPM]
(c) manufacture, import, provide — including by selling or renting — offer for sale or rental or distribute any technology, device or component [that has the primary purpose of circumventing a TPM].

infringement and has been envisioned as a bargain, limiting the rights without limiting the obligations shifts the copyright “balance.”

227 Bill C-61, s.18.
228 Bill C-61, s.20.
229 Bill C-61, s.21: as long as certain requirements are met.
230 Bill C-61, s.30.
231 According to the proposed Copyright Act s.38(1.4). If technological protection measures were circumvented in order to take the infringing action, instead of the $500.00 limited, the individual would face up to a maximum of $20,000 per infringement, and the individual may still be liable for other types of damages and/or remedies.
232 Bill C-61, s. 31. Rights Management Information would also be protected under the proposed Copyright Act s.41.21.
“Technological measure” is defined broadly to include any “effective technology, device or component” that controls access or use or a work. “Circumvention” includes descrambling or decryption or a work, or avoiding, bypassing, removing, deactivating or impairing a TPM, unless this is done with the consent of the owner. Though there are exceptions to the anti-circumvention provisions, these exceptions would not be available to most people. In addition, had Bill C-61 passed, if a person circumventing did so knowingly and for commercial purposes, this would have been an offence with penalties ranging from six months imprisonment and/or a fine of up to $25,000 to five years imprisonment and/or a fine of up to $1,000,000.

5. Divergent Directions?

Having discussed the philosophy revealed by government publications and the content of Bills C-60 and C-61, I will now examine how these reveal a divergence in the directions being taken by the government and the Supreme Court.

There are three ways that the approach taken by Bills C-60 and C-61 conflict with the approach taken by the Supreme Court in Théberge and CCH. Broadly, these include the expansion of owners’ rights, the limitation of users’ existing copyright-related and more general rights, and the extension of copyright law to a degree that would have allowed owners to use it for purposes unrelated to copyright. The sum effect of these changes, had they passed, would have been to increase the protection available to owners and decrease users’ ability to access and use protected works.

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233 Exceptions include circumvention for investigation by law enforcement, interoperability of computer programs, encryption research, or in the case of perceptual disabilities, or for strict privacy-maintenance purposes. With the possible exception of the privacy exception, which allows people to circumvent a TPM to detect or prevent third party communication and collection of personal information, but only in a situation where the work does not contain a notice that using it will enable this.

234 Depending if this was on summary conviction or on conviction on indictment: Bill C-61, s .32. There was an exception for those acting on behalf of a library, archive or museum or an educational institution.
5.1 Additional Rights for Owners

Recent Supreme Court decisions have taken pains not to extend the rights granted to copyright holders and have restricted the way that owners’ existing rights can be interpreted. The refusal to extend owners’ rights is epitomized by the comments in Théberge on the limited nature of owners’ rights and the dangers of overcompensation, and the interpretation of the Copyright Act so as not to “extend rights too far.”\(^{235}\) In this way, not only are owners’ rights limited, but the Supreme Court will only interpret them in a way that coincides with their version of the purpose of the law.\(^{236}\)

The Supreme Court in Théberge was clearly wary of allowing for the extension of owners’ rights, claiming that:

“[e]xcessive control by holders of copyrights […] may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”\(^{237}\)

CCH brought parity of esteem to the rights of users, redefined the balance in Théberge as being between owners’ and users’ rights, and applied the limitations of owners’ rights to the application of copyright law in such a way as to benefit society. In defining their approach, the Court discards another option, because it “shift[ed] the balance in copyright too far in favour of the owner’s rights” and “unnecessarily interfer[ed] with the proper use of copyrighted works for the good of society as a whole.”\(^{238}\)

Another example of Supreme Court hesitation to allow extension of owner’ right is the given by the comments of Bastarache J. in Euro-Excellence. After approving the CCH approach he states that:

“[I]n order to protect the essential balance which lies at the heart of copyright law, care must be taken to ensure that […] once copyright is granted in a given work, the protection that it provides must not be extended beyond its natural limits, and must take proper account of user rights such as the right to deal fairly with a copyrighted work.”\(^{239}\)

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235 Théberge, supra note 74 ¶ 45.
236 Remember the comment at paragraph 30 of Théberge that: “[t]he proper balance […] lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”
237 Théberge, ibid. ¶ 33.
238 CCH, supra note 3 ¶ 41.
239 Euro-Excellence, supra note 88 ¶ 80. The Court didn’t agree with his view on “legitimate interest” but the point regarding the expansion of rights is still valid.
We can see from the Théberge line of cases that the Supreme Court’s view is that owners’ rights are limited, but neither the rights of owners’ nor the rights of users’ play trump. These rights are meant to be balanced against each other in order to promote a rich cultural heritage.

This stands in stark contrast with the approach taken by Bills C-60 and C-61, both of which would have granted significant new rights in the form of the “making available” right and anti-circumvention measures. The additional rights granted to users’ were not equal to the rights granted to owners and were directly limited thereby. The new rights granted to owners also had the tendency to limit users’ existing rights, upsetting whatever balance had been deemed appropriate in the past. The TPM anti-circumvention measures in Bill C-61 are the clearest example of this and deserve detailed discussion.

It has been suggested that TPMs should not be allowed to “alter the balance” of copyright law that existed under default rules. This principle has been called “prescriptive parallelism” by Reichman, Dinwoodie, and Samuelson, and conveys the notion that the traditional copyright balance of rights and exceptions should be preserved in the digital world. Assuming that the status quo represents the most appropriate balance, for this principle to succeed, the rights and exceptions granted to owners and users must remain the same or be altered in direct proportion to each other. TPMs can control access to and use of works TPM protection enables owners to control and prevent user behaviours previously beyond the reach of the law. Anti-circumvention legislation conveys the message that the government finds this acceptable, despite the possible limitation of user rights. If Bill C-61 had passed, direct protection of TPM would have provided another layer of rights to owners without implementing a reciprocal right for users, tipping the

240 Jerome H. Reichman, Graeme Dinwoodie, Pamela Samuelson, “A Reverse Notice and Takedown Regime to Enable Fair Uses of Technically Protected Copyrighted Works” (2007) 22 Berkeley Tech. L.J. 981 [Reichman, Dinwoodie & Samuelson]. Balance may be ambiguous, but this clearly suggests that the same rights and exceptions should apply. The counter argument is that the current balance may not be the most appropriate and a better balance might include TPM protection.

241 In the words of Carys Craig: “not only is it okay to erect fences, but it’s now okay to electrify them.” “Digital Locks & the Fate of Fair Dealing: In Pursuit of “Prescriptive Parallelism”” (Lecture, University of Toronto Copyright Symposium, January 2009) [unpublished].
existing balance and restraining user access. In the long term, this shift towards protectionism has the potential to hamper innovation.

5.2 Anti-circumvention and the Limitation of Users’ Rights

Writing in 2001, Selena Kim suggested that “the future of copyright holds narrower exceptions for users”242 and she may well have been right. In addition to TPMs' ability to promote digital lockup and the possibility that this will lead to a “pay-per-use” society,243 TPM protection may inhibit fair dealing244 and other copyright privileges,245 inhibit free speech, limit access to public domain works, tether works to devices, prevent legitimate research activities, and restrict competition.246

Though Bill C-60 contained TPM protection, Bill C-61’s anti-circumvention measures were quite a bit more extensive. For a start, the additional user exceptions247 in Bill C-60 contained no limitations pertaining to TPM circumvention and the TPM anti-circumvention clause, s.27, tied protection mainly to copyright infringement.248 Bill C-61, did limit additional user exceptions, denying their application if circumvention had

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243 Richard C. Owens, “Rehabilitating the Image of TPMs” (Lecture, University of Toronto Copyright Symposium, January 2009) [unpublished] [Owens “Rehabilitating”]. In regard to this idea of a “pay-per-use” system, Dan Burk and Julie Cohen note that, using TPM, the owner of copyright in an electronic book could control not only whether or not the purchaser can make copies, but how many times the purchaser reads: Dan Burk & Julie Cohen, “Fair Use Infrastructure for Rights Management Systems (2001) 15 Harv. J.L. & Tech. 41 at 48. Though true, there are possible benefits to this “fared use” in that digital content could become more accessible online. A reduction in user costs, such as traveling to a library, may be seen by some to balance a loss of free access.
245 For example, under the DMCA, a statute with similar wording to Bill C-61 in regard to anti-circumvention, there is case law stating that software making it possible to create a backup copy of a legally owed DVD violated the Act. In Macrovision Corp. v. 321 Studios, 2004 U.S. Dist. LEXIS 8345, 321 Studios was sued by Macrovision and MGM for making software that allowed users to make backup copies DVDs. 321 argued that the program merely enabled buyers to exercise their rights in works they had already bought. The software was found to violate the DMCA provisions, notwithstanding the potential lawful uses: discussed in Geist, “Anti-circumvention”, supra note 45 at 231.
246 Owens “Rehabilitating”, supra note 243.
247 Or “user rights” if we apply the reasoning from CCH.
248 As well as moral rights infringement and private copying.
taken place, whether or not this circumvention facilitated infringement. Additionally, the wording of Bill C-61 would make it illegal to circumvent a TPM, even where the underlying work is not subject to copyright protection. As a result, the promising ideas and reforms contained in Bill C-61 were negated by their own limitations and operability challenges.

Fair dealing would likely have been a victim of anti-circumvention provisions under either Bill. Though Bill C-60 banned circumvention for the purposes of infringement, there was no explicit exception for fair dealing, despite the fact that CCH deems this non-infringing use. Though fair dealing renders unauthorized copying non-infringing, users cannot be expected to possess the legal sophistication necessary to feel confident applying the doctrine and this would have had a predicable chilling effect on fair dealing, which CCH defined as a user right. The anti-circumvention measures contained in Bill C-60 had the potential to interfere not only with fair dealing and copyrights, but fundamental rights such as freedom of expression and privacy. Hence, we can see that the drafters of Bill C-60 chose not to apply the philosophical considerations in the Théberge line of cases to their treatment of TPM.

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249 DeBeer admitted that: “there are some interesting and promising principles buried in the bill. The idea of lower damages for non-commercial infringements compared to commercial piracy is a good one. Likewise, attempting to add provisions that legalize the everyday activities of ordinary Canadians is the right way to go”: Jeremy deBeer, “Canada's new copyright bill: More spin than 'win-win'” National Post (16 June 2008), online: National Post <http://www.nationalpost.com/todays-paper/story.html?id=590280> [deBeer, “Spin”].

250 “They've got a few headline-grabbing reforms but the reality is those are also undermined by this anti-circumvention legislation. They've essentially provided digital rights to the U.S. and entertainment lobby and a few analog rights to Canadians. […] The truth of the matter is the reforms are laden with all sorts of limitations and in some cases rendered inoperable.” Nowak, “Copyright”, supra note 215 quoting Michael Geist; Also: “[S]adly, the potential promise of these ideas is entirely negated […] as the bill] makes its own balancing provisions irrelevant.” deBeer, “Spin”, supra note 249.


252 As was suggested would be appropriate in Kerr, Maurushat & Tacit, supra note 46.
The anti-circumvention measures in Bill C-61 strayed even further from this philosophy, arguably eliminating the promised consumer gains\(^{253}\) and effectively sanctioning owners’ ability to determine consumer use. It should be emphasized that there are no exceptions in Bill C-61’s anti-circumvention clauses for fair dealing uses, private copying, or other users’ rights.\(^{254}\) Thus, even where the Copyright Act now explicitly allows unauthorized copying, TPM protection would prevent users from availing of these rights, as they require access to the work.\(^{255}\) In the words of Ian Kerr:

> “Since the combination of TPMs and contract can already be used to prevent access to works that even exceptions to copyright permit, such as fair dealing, a legal prohibition on the circumvention of TPMs that control access to public works, depending on how it is drafted, could further prevent the public from exercising existing rights.”\(^{256}\)

Aside from fair dealing, critics of anti-circumvention argue that TPM protection risks harm to the public domain, as works could be permanently fenced off behind legally enforceable digital barriers,\(^{257}\) granting a new exclusive right to access.\(^{258}\) Samuelson and Lessig have referred to this as the “second enclosure movement” due to the potential

\(^{253}\) For example, if Bill C-61 had passed, fair dealing may not have allowed the conversion of a protected CD into MP3 format, despite the device-shifting section that was touted as an additional user right: Kim, "Reinforcement", supra note 241 at 115-6. This has been the case in American, post-DMCA, jurisprudence, including UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 2000 Copr L. Dec. P 28 071, 54 U.S.P.Q. 2d 1668 (U.S. S.D.N.Y., 2000), May 4, 2000, and A&M Records Inc. v. Napster, Inc., 2000 U.S. Dist. Lexis 6243).

\(^{254}\) Various countermeasures have been suggested to prevent the harm that might result from anti-circumvention. Terry Cohen has noted that exceptions in anti-circumvention provisions “[w]ould not only allow the use of certain materials for worthwhile causes but also would provide a means for rightful users of the material to access it – even if the copyright owner has digitally protected the work.”: Terry Cohen, “Anti-Circumvention: Has Technology’s child Turned Against Its Mother?.” (2003) 26 Vand. J. Transnat’l L. 961. Perhaps this is optimistic and “could” may be a more realistic word than “would.” Reichman, Dinwoodie and Samuelson have suggested that there should be a system by which a party could notify the owner of the rights in a work that they wish to use the work in a way consistent with the public interest, which would oblige the owner to provide access: Reichman, Dinwoodie & Samuelson, supra note 239.

\(^{255}\) Kerr, “Devices”, supra note 48 at 188. For more on this, see Kerr, Maurushat & Tacit, supra note 46.

\(^{256}\) Kerr, Maurushat & Tacit, ibid. at 48.


\(^{258}\) Robert J. Tomkowicz & Elizabeth F. Judge, “The Right of Exclusive Access: Misusing Copyright to Expand the Patent Monopoly” (2006) 19 Intellectual Property Journal 351. Owens also suggests that access control TPM are acceptable as access is never guaranteed to a user. In support of this assertion, he notes that, once a work is produced, there is no obligation on the author to release it publicly. Though this is true, it doesn’t support his position, as the Copyright Act is neutral on the subject of access. There is currently no guarantee of access, but implementing protection for TPM/DRM would add a government-sanctioned right of access to the rights already enjoyed by owners. As a result, it is to be feared.
for private interests to virtually fence off the “cyber-commons.”  This in turn has the potential to “drastically disturb copyright’s delicate balance between private rights and the public interest.”  Copyright law gives owners rights in the works, not the physical embodiment of those works, and the Copyright Act doesn’t grant “control” of works. Users are able to do what they like, so long as their actions remain outside the exclusive rights granted to owners. This would be reversed in the face of TPM protection, as DRM licenses set conditions and boundaries around user freedoms. In the words of Jeremy deBeer, Bill C-61 would have allowed technology to: “[trump] whatever rights consumers or competitors might have otherwise had,” rending the law irrelevant and leaving people with “whatever rights content owners choose for them.”

As a result, the additional layer of legal protection is clearly inconsistent with the Supreme Court’s ruling that owners’ rights are limited and users’ rights must not be constrained. If the Supreme Court initiative is to be followed, use should not be added to the list of owners’ exclusive rights, which is a distinct risk if TPMs become protected.

5.3 Anti-circumvention and Privacy

Though the balance discussed in the preceding sections refers largely to copyright-related rights, fundamental rights may also be affected by TPM protection. These include privacy and freedom of expression. There are also concerns regarding anti-circumvention misuse.

259 Kerr, Maurushat & Tacit, supra note 46 at 48.
260 A good example of this is the difference between the private copying regime under the current Act and that proposed by Bills C-60 and C-61.
261 For example, they may reread a book or listen multiple times to a CD they already own.
263 deBeer, “Spin”, supra note 249.
264 This negative view of anti-circumvention is not universal. Richard C. Owens, for one, points to the fact that TPMs, as separate and distinct works, are already granted copyright protection. As reverse-engineering and hacking typically require copying at least portions of the code, then irrespective of dedicated rules, circumvention would already be prohibited under the Copyright Act. As a result, Owens argued that we should not fear direct TPM protection. The other side of this argument is that, if TPM and DRM are already protected under the Act as works, it is unclear why they should also be protected using anti-circumvention measures: Owens “Rehabilitating”, supra note 243.
Though TPM can provide protection against copyright infringement, DRM software also has the ability to undermine information-related freedoms, including the invasion of privacy. The privacy implications of the power of DRM systems to reach into private homes goes largely unexamined, which may result from the misconception expressed in *BGM Canada Inc. v. John Doe* that, though privacy concerns must be considered: “they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.”

Not only does this statement ignore public policy concerns, it was made in response to the large scale illegal downloading of protected music, not in the context of legitimate users who mightn’t know of the risks to their privacy. To allow intellectual property interests to win out over legitimate privacy rights in this context is nonsensical.

DRM has the ability to watch and track private activities and report back to owners regarding user activity, the contents of hard drives, and otherwise collect personally identifiable information. If personal information is collected, it may be locked up in TPM or DRM databases so that users can’t determine what information has been amassed without hacking the technology, which would be prohibited, but for limited exceptions. Any automatic collection and reporting of personal identification without

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267 *BMG*, supra note 100 ¶ 41, quoted in Kerr, “Devices”, *supra* note 48 at 179. Kerr finds this perspective problematic and agrees with Julie Cohen’s comment in Cohen, “Overcoming”, *supra* note 262 at 102 that the presumption that property must trump privacy, or even that it generally trumps, is ‘far too narrow, and ignores a number of important public policy considerations.’ Kerr, “Devices”, *supra* note 48 at 180.
268 DRM is predicated on the informed consent model, but not only is this based rather tenuously on the ability of consumers to be informed in time to waive their rights, but it also ignores the property rights that users have in the physical embodiment of protected works, and the medium used to access them. Julie Cohen notes the double standard that ones reasonable expectation of privacy diminishes in scope and force as invading them becomes easier, yet no one has suggested that ones reasonable expectation of property entitlements should decline in the same circumstances. In fact the opposite is true, as is shown by the movement towards TPM protection. Cohen, “Overcoming”, *supra* note 262 at 107-108.
269 For more on this subject, see Julie E. Cohen, “A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace” (1996) 28 Conn. L.Rev 981 [Cohen, “Anonymously”].
270 Where DRM software uses an Internet connection to report back to the rights owners, not only are there privacy implications, but there are concerns regarding the security of our computers: Cohen, “DRM”, *supra* note 265
271 Kerr, “Devices”, *supra* note 48 at 189. In fact, Bill C-61 did include an exception for privacy purposes. The proposed *Copyright Act* s. 41.14(1) would give a user the right of circumvention if the work had no label warning that a work will permit collection of personal information by a third party as long as the only
true informed consent may be contrary to Canada’s Personal Information Protection and Electronic Documents Act (PIPEDA).  

Amending the Copyright Act to include anti-circumvention measures with no conditions or provisos delivers the message that the government finds these practices acceptable and is willing to grant them the force of law. Ian Kerr has suggested that privacy rights should have a place in the “appropriate balance” and, as TPM and DRM have “extraordinary surveillance capabilities,” to allow TPM and DRM to circumvent privacy rights without countermeasures would upset the balance that the Government is allegedly undertaking to achieve through copyright reform. PIPEDA may well counter these threats, but Kerr has suggested that if anti-circumvention laws are put in place, then the law should also prohibit DRM from circumventing privacy rights and that DRM licenses should be voidable if they violate privacy law.

5.4 Anti-circumvention and Freedom of Expression

In Canada, freedom of expression is protected by section 2(b) of the Charter of Rights and Freedoms, which states that everyone has “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” When Parliament exercises its authority to legislate, its exercise of power may not derogate from Charter-protected rights, such as the right to freedom of expression. Ergo, the

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272 PIPEDA requires compliance with ten basic privacy principles: accountability, identifying purposes (the purposes of collection should be made clear at or before the time of collection), consent, limiting collection (to that which is necessary for specified purposes), limiting use, disclosure, and retention, accuracy, safeguards, openness, individual access, and challenging compliance. Andrew Frackman, Claudia Ray, Rebecca C. Martin, Internet and online privacy: a legal and business guide (New York City: ALM Publishing, 2002) at 176. Kerr, “Devices”, supra note 48 at 193-4.


275 Ian Kerr, “To Observe and Protect? How Digital Rights Management Systems Threaten Privacy and What Policy Makers Should do About It” in Peter Yu, ed., Intellectual Property and Information Wealth: Copyright and Related Rights, Vol. 1 (Santa Barbara: Praeger Publishers, 2007); Kerr, “Devices”, supra note 48 at 207. Arguably, DRM licenses would already be voidable if they are contrary to PIPEDA, but sadly this is an under-enforced statute, lacking in substantive remedies. Additionally, the individual DRM licenses would have to be challenged and it is unclear who would bring these actions.


277 In the case of copyright, this authority is granted by the Constitution Act, 1867, section 91(23).
Copyright Act may not undercut Canadians’ freedom of expression beyond a level that is deemed justifiable in a free and democratic society.²⁷⁸

In the past, Supreme Court jurisprudence has recognized that, in order to make fundamental freedoms such as the freedom of expression meaningful, restraint is not enough and there may be a positive obligation on the government to create an environment in which the freedom can flourish. According to Haig v. Canada (Chief Electoral Officer), this may require legislative intervention to prevent conditions which “muzzle expression.”²⁷⁹ A statute whose purpose or effect is to limit free speech prima facie violates the Charter and must therefore be of concern. It is clear that copyright law, as a general rule, restricts freedom of expression,²⁸⁰ but at the current level, copyright’s limitations have been found to be justified in a free and democratic society.²⁸¹ TPM protection would further expand the restrictions on freedom of expression and could be seen to negate the existing “constitutional balance,”²⁸² damaging freedom of expression by more than an acceptable amount.²⁸³

Jane Bailey believes that anti-circumvention measures could have a profound impact on freedom of speech and she is not alone.²⁸⁴ If we accept a concept of freedom of expression encompassing the right to seek, receive, and impart information and ideas, there are multiple ways that anti-circumvention could harm this ideal. Bailey lists four:

²⁷⁸ I.e. one that satisfies the “Oakes test” under s.1 of the Charter: Charter, supra note 276, s. 1.
²⁸¹ The Court in Michelin decided that the Charter doesn’t grant the right to use someone else’s copyrighted expression in the service of freedom of expression and, alternatively, if it did, this incursion was justified in a free and democratic society.
²⁸² Bailey notes that the parts of the Oakes test relating to rational connection (i.e. whether or not the measure is rationally connected to the goal) and whether or not the provision represents minimum impairment may not be satisfied in the case of TPM protection: Bailey, “Deflating”, supra note 24 at 147.
²⁸³ s.1 of the Charter is the section that confirms that the rights under the Charter are guaranteed, but it is also the section that allows for the reasonable limitation of those rights (see for example R. v. Keegstra, [1990] 3 S.C.R. 697).
first, individuals would be exposed to civil liability for accessing information through circumvention, restricting access and the right to receive information and granting rights-holders a government-endorsed digital lock up. Second, owner control over access to and use of digital content may create a pay-per-use system that would bar uses we take for granted, such as rereading a page. Third, TPM/DRM technology doesn’t respect existing users’ rights such as fair dealing and, hence, doesn’t favour the balance laid out in current statutory and common law. Fourth, as liability would arise, even in the absence of infringing use, TPM and DRM may chill the dissemination of scientific investigation and related endeavours. Each of the above examples threatens access and use of information in favour of protection. As a result, Bailey cautions that any statutory anti-circumvention measures should be shaped to limit restrictions on access to and use of information, which form an integral part of freedom of expression, not to mention Canada’s international human rights obligations.

5.5 Anti-circumvention Misuse – Contract, Competition, and Patent Law Effects

Anti-circumvention legislation, though characterized as copyright protection, doesn’t address infringement but instead protects the TPM itself. Given that TPM and DRM may prevent access or use, in the absence of a link between TPM protection and infringement, anti-circumvention will grant owners rights well beyond those traditionally associated with copyright law and allow copyright law to reach further than intended. This would have been the result, had Bill C-61 passed and could have given owners the ability to use copyright to enforce private contracts, extend the limited monopoly granted by patent law, and even block competition,

DRM contains licensing or contractual arrangements, may or may not contain TPM, and can limit the user in ways copyright law currently can’t. Contract law has enforcement

285 See also Kerr & Bailey, “Implications”, supra note 251.
287 Bailey, “Deflating”, ibid. at 133.
288 Geist, “Anti-circumvention”, supra note 45 at 222.
mechanisms that apply in the case of a breach of a DRM agreement. In the face of anti-
circumvention legislation, however, if a DRM containing TPM is breeched, then
copyright law will also be applicable, even absent infringement. In this way, copyright
law could be used to enforce private contracts between owner and user, providing
multiple advantages over contract law for owners. Anti-circumvention clauses require
only that circumvention took place. Contracts require offer, acceptance, and a meeting
of the minds to be enforceable, but in many DRM contracts, the user has no opportunity
to make an informed decision. Contract law also requires that the plaintiff prove their
damages. Copyright law, however, allows plaintiffs to elect statutory damages, which is
simpler and likely to be more profitable in the case of non-commercial infringing.
Expanding copyright in a way that makes accessing information accessible flies in the
face of recent Supreme Court jurisprudence. Owners have alternate and dedicated means
of enforcing agreements and we should be wary of making it more difficult for the public
to access and use information products. Additionally, the statutory damages available
under the Copyright Act are out of proportion with the effects of non-commercial TPM
circumvention.

Anti-circumvention may also effectively extend the monopoly granted by patent law.
Patent law grants exclusive rights for a period of 20 years and Canadian copyright law
grants protection for the life of the original author, plus 50 years. If passed, anti-
circumvention measures like those in Bill C-61 would protect TPMs for an unlimited

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290 This would be quite easy in many cases, as DRM has the ability to “call home” and report on the
behaviour of the user.

291 Users do not all take the time to read “clickwrap” contracts and, in the case of software and video
games, in many cases, the first hint that there is DRM arises when the user attempts to install the program,
which can itself constitute acceptance. In this case, the work is likely no longer returnable, as the
packaging has been removed, leaving the user with no means of refusing the contract. Even in cases where
the work is returnable prior to clicking “I agree” or for a certain time after installation, it is still the case
that not all consumers read and understand the volumes of “legalize” contained in many software End User
License Agreements.


293 Copyright Act R.S., 1985, c. C-42, s. 6.
TPM can also effectively tie products together, creating artificial reliance on branded products, even in the face of competition. Code may be used to restrict purchasers from using accessories or replacements such as toner cartridges from a rival company. If circumvention of the TPM is illegal, this means that the force of the law may be used to prevent users from dealing with an owner’s competitor. This may sound far-fetched, but in the United States there are incidences of the Digital Millennium Copyright Act being used to prevent the sale of a replacement garage door opener, microchips that would allow the use of third party ink cartridges, and more.

The reality of new technology is that enforcing digital copyright is very difficult. If we begin from the assumption that rights holders should be compensated for the copying of their works, the truth is that TPM and DRM are currently the most effective means of ensuring this. Regardless, we must question the appropriateness of directly protecting TPM through copyright law. As mentioned, TPM are already protected as works and through contract and no more is required. Additionally, anti-circumvention legislation would expand the potential for owner control, which could have a negative impact on future innovation, the very thing copyright law is meant to stimulate. Additionally, it’s been suggested that, rather than having any rational connection to copyright law, DRM are a tool to facilitate business models and, as Lionel Sobel has pointed out: “better business models are the Holy Grail of the digital age.” In reality, business models have nothing to do with the subject matter of the Copyright Act and we should be hesitant to accept the argument that further protection of TPM is necessary. Particularly as this

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294 In Bill C-60, the prohibition against circumvention was logically linked to whether or not the use to which the work was put was itself infringing. As a result, the anti-circumvention provisions would cease to prevent circumvention as soon as the term of copyright in the work expired.

295 Though digital technology moves so fast that this is unlikely to be a major concern.


297 In Lexmark v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004), the claim was that the chip copied the Toner Loading Program and circumvented two TPMs in contravention of the DMCA.

has the potential to impede use, access, and future production through working against a broad public domain.

In summary, Bill s C-60 and C-61 would have granted extensive additional rights to owners without reciprocal rights for users, undercut users’ copy rights, and potentially harmed fundamental freedoms. The TPM protection contained in both Bills would have allowed copyright law to transcend its current boundaries, though the risk of damage was much clearer in the case of Bill C-61. Despite the fact that Bill C-61 was introduced four years after CCH found that users’ rights are integral to copyright law,\textsuperscript{299} it seems that the government of Canada has failed to recognize them,\textsuperscript{300} placing the parties on unequal footing.\textsuperscript{301} In proposing these Bills, it is clear that the government has chosen to move in an entirely different direction.

6. Conclusion

We have seen that, from a shared history of interpreting copyright law as a tool to benefit authors, the Supreme Court of Canada and the Canadian government have taken different paths. Though it appears that both have accepted a utilitarian justification for copyright law, their chosen method of facilitating the bargain seems startlingly different. As we have seen, the Supreme Court has highlighted balance as the proper approach and has used this concept to redefine the requirements for protection and to reinterpret users’ rights as equal in importance to those of owners. This has had the predictable effect of limiting owners’ rights. The effect of the changes has been a shift towards favouring

\textsuperscript{299} CCH, supra note 3 ¶ 12.
\textsuperscript{300} This is further demonstrated by a Letter to the Editor written by Jim Prentice, Re: How the U.S. got its Canadian copyright bill, published in The Toronto Star, on June 17, 2008: “Our approach promotes the protection of creators’ rights, and access by students and researchers. It means consumers can enjoy everyday uses of copyright material. And it provides fairness and clarity for industries in the digital environment.” Online: <http://www.thestar.com/comment/article/444332>.
\textsuperscript{301} Considering the normative function of discourse, this is quite important. Terminology such as \textit{rights} and \textit{property} has greater strength and persuasive force than \textit{interests} or \textit{benefit}. In his article, “Taking the Protection-Access Tradeoff Seriously,” Harvey Perleman has suggested that protection of property rights has an advantage as a goal given that the “incentives created by property rights are clear and the rhetoric is powerful.” Access rights on the other hand are more ephemeral and theoretical and their lobby could be said to be less powerful: Harvey S. Perleman, “Taking the Protection-Access Tradeoff Seriously” (2000) 53 Vand. L. Rev. 1831 at 1834.
access to and use of works and away from protectionism, and what the Supreme Court described as overcompensation.

The government, though describing copyright in instrumentalist terms and allegedly proposing reforms to facilitate balance and encourage production, has chosen a much different path. This thesis has shown that, though government amendments would ensure owner incentives remained intact, they would also grant additional exclusive rights to owners, increasing the potential for compensation. This direction conflicts with the focus on the limited nature of owners’ rights and the counterproductive nature of overcompensation in Théberge and extends owners’ right in precisely the way that Bastarache J. warned against in Euro-Excellence. It also restricts the very rights deemed so important in CCH.

The government has repeatedly used the language of balance to describe their initiatives, but this “balance” is very different than that put forward by the Supreme Court. To put it succinctly, whereas the Supreme Court is using “balance” to move towards access, the government is using the same language to camouflage a move towards protectionism. Having recognized the differences obscured by the similar language, we must consider whether or not this conflict is a problem. The government has every right to change the Copyright Act in a manner inconsistent with the direction of the Supreme Court, but is this likely to benefit Canadians? This thesis has shown that the suggested amendments have the potential to restrict the current copyrights of users, as well as more fundamental rights, but what of the long term effects on cultural production? It has been said that copyright’s expansion is “inimical to copyright’s core goals and economic rationale.”

Unrestrained expansion of owners’ rights could challenge the maintenance of a healthy public domain, which would limit the scope of future creation. If the government stance is that copyright works even in part to encourage production, then this expansion of rights will obstruct their goals in the long term and should at least raise questions as to the appropriateness of the amendments.

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There are two possible explanations for this divergence. Either the government has a very different concept of how best to encourage production and anticipates that the first step is to ensure the content industries are well-compensated, or the amendments are rooted solely in the drive to ratify the WIPO Treaties. Given the negative effects of protecting TPM and the absence of a legal obligation to comply with the WIPO Treaties, it is hard to understand why the government keeps proposing anti-circumvention legislation. It has been noted that Canada has long been under pressure to ratify the WIPO Treaties and this has become more pronounced in recent years. Shortly after American President Barack Obama’s inauguration, Canada was placed for the first time on America’s copyright priority watch list, a list of countries “where Internet piracy flourishes.”303 This was intended to reflect a tougher stance against the Canadian government’s failure to deliver on his promise of a new copyright law. The U.S. Trade Representative supported this move, stating that: “This administration will protect American innovations and creativity by negotiating and enforcing strong and effective intellectual property protections.”304 This pressure is matched within Canada by the content industry to increase protection in the manner reflected by the WIPO treaties. We can therefore see that the pressure to amend our Copyright Act in order to ratify the WIPO treaties is strong and is almost certainly the true reason behind amendment attempts.

If the push to amend the WIPO treaties is truly the motivating factor, this doesn’t explain the extent of the proposed amendments. Bill C-61 in particular goes well beyond the WIPO requirements. For example, WIPO doesn’t require provisions against trafficking, or that all TPMs be protected against circumvention, regardless of rights in the underlying work. That Bill C-61 goes well beyond what’s necessary for ratification suggests that the Canadian government is bowing to pressure to implement the WIPO treaties in a specific, industry-friendly, way. The question remains whether or not any proposed amendments will benefit Canadians.

304 Koring, “Blacklist”, ibid.
The difficulties inherent to new technology have led reform advocates to suggest that Canada needs new rules to ensure copyright protection and clarity\textsuperscript{305} and there may indeed be a disconnect between copyright law and social norms.\textsuperscript{306} Clarity may be beneficial, but it isn’t clear that the current Copyright Act is insufficient. Scholars, such as Laura Murray suggest that preexisting laws did provide a framework for the development of new technology, stating that: “laws written before the new technologies appeared are best understood not as inadequate to the new situation but as constitutive of it.” As a result, Murray advises that history suggests that: “if we take a cautious approach to legal reform, we are more likely to craft laws that will match the needs of new markets, new generations, and still newer technologies.”\textsuperscript{307}

Ideally, our Copyright Act should represent the best way to facilitate its purpose of encouraging cultural production and protecting TPM bestows rights outside the current regime that are unrelated to copyright. This addition is an example of what has been referred to as “tipping the balance”\textsuperscript{308} or a deviation from the balance proposed by the Supreme Court, which is likely to sacrifice the production of works in favour of short-term gains for the content industry. Instead of encouraging the dissemination of works, anti-circumvention would likely: “concentrate control over dissemination in the hands of relatively few distributors,”\textsuperscript{309} harming the cultural production copyright is meant to

\textsuperscript{305} For example, Giuseppina D’Agostino has stated that: “[t]echnology has outpaced the law [leading to] ambiguity and frustration for all. Copyright reform has become necessary on complex issues: the need to curb infringement and protect investment; the need to breathe space into copyright law to allow educators and other users to teach, learn and enjoy without fear; the need to allow parody; the need to ensure that creators are rewarded and protected in the digital marketplace; and the need to strike a balance for all parties in the public interest.”\textsuperscript{305} Giuseppina D’Agostino, “Not all sides are represented in debate on copyright bill” The Toronto Star (19 June 2008) online: <http://www.thestar.com/comment/article/445688>.

\textsuperscript{306} John Tehranian provides several examples, including the fact that most email would infringe copyright by reproducing the sender’s email in the recipient’s reply: John Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap (2007) Utah L. Rev. 537 at 543-6.

\textsuperscript{307} Murray, “Patterns”, supra note 16 at 26.

\textsuperscript{308} Samuelson & Davis, supra note 34 at 16-17. Jane Ginsburg suggests that “the scope of copyright protection may [already be] more generous than is needed to spur initial creativity”: Jane C. Ginsburg, “The Exclusive Right to their Writings”: Copyright and Control in the Digital Age (2002) 54 Me. L. Rev. 195 at 198.

\textsuperscript{309} Jeremy F. deBeer, “Constitutional Jurisdiction Over Paracopyright Laws” in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005) at 97. It should be noted that he said this in regard to Bill C-60, which had much less restrictive TPM protection that was at least logically linked to infringement.
As a result, leaving the *Copyright Act* as is would be a better approach. As Myra Tawfik has suggested that:

> “if Canadian policy-makers further restrict users right beyond the limitations already imposed under the CR Act, this is much less about Canada’s international obligations than it is about placating special interests.”

If amendment is deemed necessary, the Canadian government should draft these amendments in such a way as to benefit all Canadians, not merely the rights holders. This requires a move towards access in order to facilitate a rich public domain.

It is very likely that we will see another amendment attempt before long. In fact, the Conservative Party’s official reelection platform promised to reintroduce copyright legislation:

> “that strikes the appropriate balance among the rights of [creators] and brings Canada’s intellectual property protection in line with that of other industrialized countries, but also protects consumers who want to access copyright works for their personal use […] We will also introduce tougher laws on counterfeiting and piracy and give our customs and law enforcement services the resources to enforce them.”

Not only are further reform attempts inevitable, but we can anticipate that they will contain TPM protection and other means of bolstering owners’ rights at the risk of harming users’ rights and the public domain, all under the veil of “balance.” Considering how this language can obscure the differences between versions of progress, we must either ignore it completely, or consider “whose balance” is being put forward.

Regardless of the language used, in any further amendment attempts we must remain alert to the actual implications of the changes and not rely on empty promises. Currently, the Government of Canada is holding a nationwide consultation on copyright reform and is inviting the response of all Canadians, both copyright holders and consumers. It is to be hoped that, through written submissions, online discussion, or attendance at town meetings.

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311 Tawfik, “International”, *supra* note 57 at 85.
313 The questions being asked are: How do Canada’s copyright laws affect you? How should existing laws be modernized? Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time? What sorts of copyright changes do you believe would best foster innovation and creativity in Canada? What sorts of copyright changes do you believe would best foster competition and investment in Canada? What kinds of changes would best position Canada as a leader in the global, digital economy?” Canada, *How to Submit*, online: <http://copyright.econsultation.ca/topics-sujets/show-montrer/18>.
hall meetings, Canadians will make their needs and perspectives known. As the beneficiaries of this social policy tool, we all have an important stake and stand to gain or lose both individually and as a society.
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