Copyright Legislative Impunity? How Copyright Term Extensions Violate Freedom of Expression

by

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Abstract

With the global trend of harmonizing intellectual property rights, there is enormous pressure on Canada to adopt a maximalist approach to copyright protection. The purpose of this paper is to assess the constitutionality of the copyright extensions for sound recordings and performances found within the Economic Action Plan 2015 Act. Although Canadian courts have been reluctant in the past to consider the effects of copyright law on freedom of expression, the time is now ripe for the courts to assert their authority under the constitution. This paper demonstrates that copyright law is indeed in conflict with freedom of expression and that any time the legislature amends or imposes new burdens on expression, the government must justify those actions. In the case of the twenty-year term extension for sound recordings and performances, a constitutional analysis reveals that the law is disproportionate and cannot be saved under s.1 of the Charter.
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Introduction

In the wake of the Trans Pacific Partnership Agreement,\(^1\) the race towards maximizing copyright legislation and strengthening the rights of copyright-holders is accelerating.\(^2\) On the other hand, the Supreme Court of Canada\(^3\) has been increasingly emphasizing that copyright is about achieving a delicate balance between copyright holders on the one hand and users on the other. This balance is necessary as copyright creates incentives to encourage new works that contribute to society while freedom of expression, which has been interpreted as the right to disseminate and receive information\(^4\), is fundamental to a free and democratic country.

On June 23, 2015, the *Economic Action Plan 2015 Act, No 1*\(^5\) received royal assent and saw the federal government extend the term for copyright protection of sound recordings and performances from fifty years to seventy years. The amendments to the *Copyright Act*\(^6\) confirm the trend towards maximizing copyright holder protection. The purpose of this paper is to demonstrate that the term extension unduly restricts freedom of expression under *section 2(b)* of the *Canadian Charter of Rights and Freedoms*\(^7\). The SCC has given a very broad interpretation to *s.2(b)* to include all expression that conveys meaning so long as it is not expressed through violence. Expressing oneself, and receiving information through the use of sound recordings or performances to convey a meaning, is a protected form of expression and any limit of that expression must be justified under *s.1* of the *Charter* if the legislation is to withstand constitutional scrutiny.

\(^1\) Knowledge Ecology International leaked the latest IP chapter on August 5, 2015 online: http://keionline.org/tpp/11may2015-ip-text. Hereinafter as TPP

\(^2\) David Lametti, “Coming to Terms with Copyright”. Chapter 17 in Michael Geist., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 484

\(^3\) Hereinafter the SCC


\(^5\) *Economic Action Plan 2015 Act, No 1, RSC 2015, c36*

\(^6\) *Copyright Act RSC, 1985, c. C-42* as amended

\(^7\) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11. Hereinafter as the *Charter*
s.1 of the Charter tells us that the rights and freedoms guaranteed in the Charter are not absolute and may be limited by the government so long as the limits are “prescribed by law” and can be “demonstrably justified in a free and democratic society”. In R v Oakes\(^8\), the SCC set out a two-part test, the onus being on the government, to prove that the limit can be justified. If the government can establish that they have a “sufficiently important” objective to justify limiting a Charter right, they then must demonstrate that the limit is proportionate by satisfying three separate criteria.\(^9\)

In assessing the criteria, the SCC has made clear that the Copyright Act has multiple purposes and its aims are to balance the interests of copyright holders and users of copyrighted works. “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”.\(^10\)

The notion of balancing rights and interests of different groups in the Copyright Act will become relevant to the constitutional justification analysis performed in Part III of this paper.

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\(^8\) R v Oakes [1986] 1 S.C.R. 103

\(^9\) The proportionality test will be discussed in great detail in Parts III and IV of this paper. The three criteria are 1) the law must have a rational connection to the government’s objective, 2) the law must minimally impair the constitutional right no more than necessary to achieve the objective, and 3) the law must be proportionate in its effects.

\(^10\) Théberge v. Galerie d’Art du Petit Champlain inc. 2002 SCC 34, [2002] 2 S.C.R. 335 at para 32. Also see CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339 at para 23 “As mentioned, 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. 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… By way of contrast, when 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.”

Also see para 24 “Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The “sweat of the brow” approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner’s rights, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the Copyright Act.”
Part I of this paper describes the conflict between freedom of expression and copyright. It also looks at the history of Canadian case law and explains why Canadian courts have been reluctant to intervene in the conflict. In Part II we look at three US cases that deal with similar legislation to see what lessons can be taken and imported into the Canadian analysis. Part III is a detailed and descriptive review of how a Charter analysis is performed in Canada. Finally, Part IV is a Charter review of the provisions in the Economic Action Plan Act 2015 which extend copyright protection for sound recordings and performances. This paper concludes that these new provisions are not justifiable limits on free expression and are therefore unconstitutional.
Part I
The Clash Between Expression and Copyright

Freedom of expression is one of the cornerstones of every free democracy. It allows for political dissent, protection of human rights and freedoms, and has been said to be the core of “human individuality and dignity”.

The SCC has held the rationale for constitutional protection of freedom of expression under s.2(b) of the Charter is three-fold: it is essential to intelligent and democratic self-government, it provides for an open exchange of ideas that enhances the search for truth, and it is a condition in seeking individual self-fulfillment.

On the other hand, copyright law can be viewed as a specific limited monopoly granted over the access to and dissemination of expression. This monopoly directly conflicts with the notion of free expression. There are many reasons and theories to justify why copyright exists. We will briefly describe a simplistic view of two major competing theories and conclude that neither theory can sufficiently account for all of the provisions in the Copyright Act. However, neither theory can be dismissed as each plays a role in explaining the purposes and justifications for copyright. The different theories will become relevant in our constitutional analysis in Part IV where we consider the purposes of copyright legislation and the copyright term extension for sound recordings and performances.

The first theory, based on John Locke’s justification for property rights, is natural rights theory which holds that labour should be rewarded and therefore protected by the law. Under this theory, an individual has a natural right to reap the benefits of what they sow. The other major competing theory is the utilitarian theory which holds that copyright is a way to provide incentives for the purpose of encouraging the creation and growth of intellectual works. The exclusive right to exploit intellectual works benefits society as a whole because it further


The report goes on to say “This right is inter-linked and interdependent with the exercise of all human rights and is one of the essential foundations of a free and democratic society.”

\[ \text{12 Ford v Quebec (Attorney General), [1988] 2 S.C.R. 712 at 765. Also see Irwin Toy Ltd. v Quebec (Attorney General) [1989] 1 S.C.R. 927 at para 56 } \]
encourages the creation and dissemination of new works that enriches the public domain. David Fewer argued in 1997 that many intellectual property rights owners and legal practitioners would side with the natural rights theory whereas academics would assert that the dominant theory is a utilitarian one. No single theory can completely account for all the provisions of the Copyright Act, but both theories can be used to explain many parts of the act. For example, copyright terms can be explained by the utilitarian theory because limited times create incentives for owners to create new works. There is a diminishing utility to providing longer terms and the ultimate goal of new works is to benefit the public. Therefore, once a copyright term expires, it then belongs to the public domain. Natural rights theory does not sit well with the current conception of copyright terms. Under that theory, copyright should subsist for the life of the creator to reward them for their hard labour and to protect their natural right of owning their creations so long as they live. The current act however, provides for a term of life plus fifty years for some forms of copyright. Also, there are other provisions in the act where the creator is not automatically assumed to be the owner of a copyrighted work. However, the natural rights theories does a better job in explaining the moral rights provisions that are provided for in the Act whereas the utilitarian theory would struggle to find good justification for these rights.

Despite the important principals of free expression and the fundamental goals of a free and democratic society, there is growing pressure towards a maximalist approach to copyright protection. Canadian courts have been reluctant and have yet to exercise their authority

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13 David Fewer. “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada”. (55 University of Toronto Faculty of Law Review 175-240, 1997) at 191-192

14 Also see s.13(3) “Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.”

15 However, perhaps a more fitting justification for moral rights in the Canadian Copyright Act is that those rights appeared in Canada after it signed onto the Berne convention and not as a result of a moral rights justification.

16 The draft Intellectual Property Chapter of the TPP Agreement will require contracting parties to create minimum copyright terms of life plus seventy years. The current protection in Canada is life plus fifty years.

under the *Charter* to strike down copyright legislation which exclusively deals with the manipulation of expression.\(^{18}\) Indeed copyright legislation is a restriction on expression as it limits the way in which one can interact and express ideas by requiring individuals to obtain a license or acquire ownership of a work to be used for their own individual expression and restricts their ability to receive that information.

Copyright in Canada has been around long before the *Charter* came into force. It was only in 1986, in *Oakes*, that the SCC introduced the current s.1 justification test which permits the government to limit *Charter* rights. The relative newness of the *Charter* and its slow and progressing development could explain why freedom of expression and copyright have not been clashing before the courts.

In 1984, the Federal Court heard the case of *Canada v James Lorimer & Co.*\(^{19}\) where Lorimer was found guilty of infringing crown copyright. In his defence, Lorimer raised s.2(b) of the *Charter* arguing that copyright was an infringement on free expression. Although the court rejected the defence, they recognized the potential conflict between freedom of expression and copyright:

> If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them. So little of its own thought, belief, opinion and expression is contained in the respondent's infringing work that it is properly

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\(^{18}\) See David Fewer. “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada”. (55 University of Toronto Faculty of Law Review 175-240, 1997) where he explores reasons why the *Charter* and freedom of expression have yet to be fully explored by the courts.

\(^{19}\) *The Queen v James Lorimer and Co.* [1984] 1 FC 1065, 77 C.P.R (2d) 262
to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work.\textsuperscript{20}

This case highlights the possibility of freedom of expression being able to constrain copyright, however the court failed to set out the parameters of when that would be the case.

In the heavily criticized\textsuperscript{21} Michelin case\textsuperscript{22}, CAW had used the image of Bibendum (Michelin Tire Man) in a number of posters and flyers in a campaign against the Michelin Tire Company. The company sued CAW for appropriating the Bibendum image and the defendant unsuccessfully argued parody as an exception to the Copyright Act.\textsuperscript{23} Another more relevant argument raised in the case was that the leaflets were a protected form of expression under s.2(b) of the Charter. In an unusual finding, the Federal Court gave a narrow account of s.2(b):

\begin{quote}
I hold that the defendants' right to freedom of expression was not restricted. The Charter does not confer the right to use private property--the plaintiff's copyright--in the service of freedom of expression. Since there has been no infringement of the defendants' freedom of expression, the plaintiff has no need to justify sections 3 and 27 of the Copyright Act under section 1 of the Charter.\textsuperscript{24}
\end{quote}

The narrow view of s.2(b) in this case is at odds with the rulings of the SCC in defining freedom of expression.\textsuperscript{25} In Part III of this paper, we will consider the highest court’s rulings on the

\textsuperscript{20} Idem.
\textsuperscript{23} Parody is now one of the listed exceptions of fair dealing under s.29 Copyright Act
\textsuperscript{24} Supra Note 22 at para 79
nature and scope of freedom of expression which will in fact reveal a very open and broad interpretation of expression that does include using the expression of others to convey meaning.

Jane Baily provides three different reasons to be suspect of the precedential value of the *Michelin* case. First, she correctly asserts that the legislative powers under *sections 91 and 92* of the *Constitution Act 1867* are subject to constitutional constraints including the constraints set out in the *Charter*. Since copyright law is a “creature of statute” created under the authority of s.91 of the *Constitution Act 1867*, it must conform to the *Charter*. Secondly, the idea that property rights can trump or take precedent over constitutional rights contradicts the concept of constitutional supremacy. The SCC has explicitly rejected the notion that property rights and corporate-commercial rights enjoy *Charter* protection. Finally, Bailey criticizes the federal court for failing to make a distinction between real property and copyright which is non-rivalrous. A final contention that can be added to Bailey’s list is that the court in *Michelin* incorrectly asserted that they can engage in balancing the rights and interests of copyright holders and users prior to determining whether s.2(b) had been infringed. As will be demonstrated in Part III of this paper, balancing should not come into play when determining whether a *Charter* right as been infringed, the test must be reserved for the proportionality assessment under s.1 of the *Charter*.

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28 *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, s91, reprinted in RSC 1985, Appendix II, No. 5. Hereinafter as *Constitution Act 1867*

29 See s.32 of the *Charter*

30 See s.52 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

31 J. Bailey, ‘Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Copyright Reform Process’ Chapter 5 in Michael Geist., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 142

The *Charter* has two provisions relating to rights outside of the *Charter* and what to do when those rights conflict with the *Charter*. s.25 deals with aboriginal rights and s.29 deals with denominational, separate or dissentient schools. The *Charter* provides that whenever there is a conflict between any of those rights and a *Charter* right, those rights will prevail. Had the *Charter* contemplated that property rights should trump *Charter* rights, it would have specified it.

32 Supra Note 26
Myra Tawfik and Ysolde Gendreau\textsuperscript{33} provide another reason for why courts have been reluctant to find that copyright clashes with freedom of expression. They both assert that the Copyright Act itself has “internalized” Charter values in order to remain consistent with the Charter.\textsuperscript{34} These internal safeguards (ie. fair dealing and idea/expression dichotomy\textsuperscript{35}) provide the illusion that users’ rights and copyright holder rights would always be in balance so long as the safeguards exists. Under this view, courts need not engage in constitutional scrutiny as the relationship between copyright and expression is already in balance. In Part IV, it will be demonstrated that although these factors are relevant to a constitutional analysis, they cannot and should not be the basis for dismissing judicial review on Charter grounds. The internal safeguards imbued in the Copyright Act must be reserved for the proportionality test after an infringement has been found.

In recent years, the SCC has become more active in asserting its role in ensuring rights in the Charter are upheld including overturning laws which had been operational for decades.\textsuperscript{36} The courts attitudes towards copyright law have also shifted significantly and following the case of \textit{CCH}\textsuperscript{37}, the SCC has taken a strong interest in copyright and has emphasized the importance of maintaining a balance between copyright holders’ and users’ interests. In 2012, an unprecedented five separate copyright decisions were released by the SCC on the same day. The court took the opportunity to reinforce users’ rights in copyright and went on to expand fair dealing. Their openness towards constitutional judicial review and new attitudes towards copyright\textsuperscript{38} suggest that the court is ready to tackle the clash between expression and copyright,


\textsuperscript{34} Supra Note 21 at 258

\textsuperscript{35} See Part II of this paper for a detailed explanation of the speech safeguards.

\textsuperscript{36} One such example is the recent decision of \textit{Carter v Canada}, [2015] 1 S.C.R. 331, where the court held that the laws in the Criminal Code which criminalized assisted suicide were unconstitutional in their current form.


\textsuperscript{38} See Abraham Drassinower “Taking User Rights Seriously”. Chapter 16 in Michael Geist., \textit{In the Public Interest: The Future of Canadian Copyright Law} (Toronto: Irwin Law, 2005) at 477
particularly in a time when the government has come under pressure to harmonize copyright laws through the TPP.
Part II
US Copyright Extensions

In this next section, this paper considers several US Supreme Court cases that deal with copyright extensions. The US cases are interesting and will be useful to our analysis because in recent years the SCC has adopted similar approaches to copyright exceptions and views on users’ rights and have diverged on those views with our colonial predecessor’s current positions on copyright exceptions. Another reason why we consider the US cases is because if the current TPP agreement is signed, it will require the Canadian government to pass similar legislation like the ones being considered in the cases below.

Although we will demonstrate in Part IV of this paper that Canadian constitutional review is fundamentally different from US constitutional scrutiny, nevertheless, important lessons can be learned from the US decisions. The analysis begins with *Eldred v Ashcroft*[^39], a case concerning the *Sonny Bono Copyright Term Extension Act 1998 (CTEA)*[^41].

### Eldred v Ashcroft

Among the various plaintiffs in this case were a non-profit organization that made copies of books available over the internet free of charge, a publisher that specialized in reprinting rare books that were in the public domain, a sheet music vendor and music director who purchased and sold music at low costs because the works were in the public domain, and finally a movie restoration company who restored old films or movies whose owners were difficult to locate. The plaintiffs brought suit over *CTEA* which extended copyright protection for a work from life plus fifty years after the death of the creator to life plus seventy years after death[^42]. This paper is


[^42]: These provisions are in the draft of the TPP, a trade agreement currently being negotiated by a number of different countries including Canada and the United States.
interested in two main arguments raised by the petitioners in the suit: the first is that the US Congress exceeded their constitutional powers under The Copyright and Patent Clause and secondly that CTEA violates the guarantees of free speech enshrined in the First Amendment.

In their first argument, petitioners claimed that Congress exceeded its powers because they violated the “limited times” restriction in Article 1 Section 8 of the US Constitution. The clause reads “The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. The petitioners argued that three previous acts which extended copyright protection in addition to the current CTEA was Congress’s way of circumventing the “limited times” restriction by perpetually extending copyright protection. In 1831, Congress extended copyright protection for the first time since the enactment of the Copyright Act for 14 additional years. In 1909, Congress used its powers again to extend copyright protection for an additional 14 years. Finally, the last copyright extension before CTEA took place in 1976 where copyright protection was expanded to life plus fifty years. The second major point raised by the petitioners is that the CTEA is a form of regulating speech which requires the court to apply a heightened form of judicial review, namely strict scrutiny under the First Amendment.

The majority, delivered by Justice Ginsburg, rejected both challenges against the CTEA. The court held that the 1998 CTEA did not offend the “limited times” provision just as it had not offended it in 1831, 1909 and again in 1976. Each time Congress decided to extend the term of copyright, it was within its power to do so as each extension was for a specific limited term. The CTEA extends copyright for a term of life plus seventy years, which is a “limited time” within the meaning of the constitution. As for the argument that Congress is circumventing the “limited time” provision by creating and joining together a number of “limited” extensions, the earlier decision by the court of appeal responded that “such legislative misbehaviour “clearly is not the situation before us”. This was later affirmed by the US Supreme Court in Golan v Holder.

43 Copyright Act 1831, 4 Stat. 436
44 Copyright Act 1909, Pub.L. 60-349, 35 Stat. 1075
45 Copyright Act 1976, Pub.L. 94-553, 90 Stat. 2541
46 Golan v Holder, 565 U.S.___(2012) Hereinafter as Golan v Holder
The majority of the Supreme Court in *Eldred* were quick to dismiss the second challenge raised under the First Amendment. It provided two main reasons for dismissing the claim. First, it asserted that copyright legislation had its own internal speech accommodations sufficient to adjourn a First Amendment claim. Those internal mechanisms are the idea/expression dichotomy and the fair use doctrine. The idea/expression dichotomy holds that only expressions are protected from copying, however ideas are in the public domain and can be used freely by any individual thereby lessening any effect on the First Amendment. The fair use doctrine provides for exceptions to copyright for uses that are considered to be fair. Secondly, the Supreme Court reasoned that since the clause granting power to Congress to enact laws for the promotion and progress of science were enacted in “close proximity” to the First Amendment, it stands to reason that the framers of the constitution had contemplated and approved that the promotion and progress of science was an appropriate and acceptable balance between free speech and copyright protection. Therefore, it is within congressional powers to legislate matters of copyright and there was no need for First Amendment scrutiny.

Constitutional challenges to the First Amendment normally attract either intermediate scrutiny or strict scrutiny, the highest form of judicial review. Nevertheless, the district court in this case denied the First Amendment claim. It relied on a D.C. Circuit decision stating that “there are no First Amendment rights to use the copyrighted works of others”. Later, the Circuit Court of Appeals for the District of Columbia affirmed the lower decision, quoting *United Video v FCC* “copyrights are categorically immune from challenges under the First Amendment”. Finally, the Supreme Court in *Eldred v Ashcroft* affirmed both lower court decisions stating that “Congress has not altered the traditional contours of copyright protection, further First Amendment Scrutiny is unnecessary.” The court rejected the claim that strict scrutiny was applicable to a copyright scheme which contains its own “speech protective purposes and safeguards”. The Supreme

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48 *Eldred v Reno*, 74 F. Supp. 2d at 3 (2001)
49 *United Video, Inc. v F.C.C.*, 890 F 2d 1173 (D.C. Cir. 2001)
50 Supra Note 40
Court did however state that the D.C. Circuit Court had misspoken when it claimed that copyright legislation is categorically immune from challenges under the First Amendment. Therefore, the court left open the possibility that copyright legislation may attract strict scrutiny when the “traditional contours” of copyright protection are altered.

_Golan v Gonzales_

Following _Eldred v Ashcroft_, a similar case was heard by the Tenth Circuit Court of Appeals in _Golan v Gonzales_. In that case, petitioners challenged both the _CTEA_ and _section 514_ of the _Uruguay Round Agreements Act (URAA)_. The argument made against the _CTEA_ was the same one raised in _Eldred v Ashcroft_, namely that the twenty-year copyright extension violated the “limited times” provision of the Copyright Clause. The court dismissed the claim against _CTEA_ as having been answered by the Supreme Court in _Eldred v Ashcroft_. However, the court did entertain the challenge to _Section 514_ of the _URAA_.

_Section 514_ of the _URAA_ was meant to implement Article 18 of the Berne Convention. Article 18 requires each member country to afford the same copyright protection to foreign actors as they would their own. The implementation of _Section 514_ would mean that certain works which were already in the public domain would now become copyrighted works. Here the court took the opportunity to define an aspect of what it means to “alter the traditional contours of copyright protection”, a definition that was left undefined by the Supreme Court in _Eldred v Ashcroft_. The court reiterated that copyright is not immune from challenges under the First Amendment and therefore can be used to limit Congress’s power under the Copyright Clause. The court held that an assessment of the traditional contours of copyright protection involves “both a functional and a historical component”. The functional component refers to a process or outline of a structure and the historical component relates to the historical practice regarding copyright and the public domain. Based on these two components the court assessed the processes of copyright and determined that perfecting a copyright involves a particular sequence: from creation, to copyright, and finally to the public domain. _Section 514_ of _URAA_ disrupts that sequence and rather than the sequence ending in the public domain, the court found that _Section 514_ of the _Act_

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51 _Golan v Gonzales_, 10th Cir. (2007)
52 _Idem._
begins the sequence after a work has made it into the public domain. Furthermore, the court
determined that historically there has been no tradition of a work attaining a copyright after it has
entered into the public domain. Therefore, the URAA was held to have “contravened a bedrock
principle of copyright law that works in the public domain remain in the public domain”.\footnote{Idem.} The
court explained that the sequence of copyright, in addition to the historical assessment of
copyright legislation, leads to the conclusion that the traditional contours of copyright have been
altered.

Next, the court addressed whether the infringement could be justified in light of the safeguards
available. They held that the idea/expression dichotomy is not a tool designed to determine
whether the use of Congress’s power over expressions in the public domain are contrary to the
First Amendment. They also held that the fair use doctrine did not sufficiently safeguard First
Amendment interests because the doctrine does not address works that have entered the public
domain. Therefore, the built in safeguards contained did not sufficiently protect First
Amendment interests and the court remanded the case back to the district court for First
Amendment Scrutiny.

\textit{Golan v Holder}

In \textit{Golan v Gonzales}, the Tenth Circuit Court attempted to fill in the gap left by the US Supreme
Court in \textit{Eldred} by setting out the definition of “traditional contours” of copyright. Following
that decision, another appeal of the decision made its way to the US Supreme Court in \textit{Golan v
Holder}. There, the court overturned the Tenth Circuit’s holding that section 514 of the URAA
had violated the “traditional contours” of copyright. The dispute in \textit{Golan} dealt with foreign
works that were in the public domain and had never been protected by US copyright. Petitioners
argued that the “limited times” period for those works had already expired. According to them,
the limited period of time was 0. Once that time expired and the works entered the public
domain Congress could not create a second period of “limited times”. The Supreme Court
rejected this reasoning and held that since these works were never protected in the first place,
Congress could indeed create a specific term of protection. The decision meant that foreign works which had previously been in the public domain for years, would no longer be available to the public. The court went on to evaluate the historical context and found that historical practices support their conclusion. Namely that works previously in the public domain have come under copyright protection, including works that were created prior to the Copyright Act of 1790. The court stated that “the first Congress did not view the public domain as inviolate”. Ultimately, the US Supreme Court rejected the Tenth Circuit ruling that copyright’s traditional contours had been altered. The court submitted that the traditional contours of copyright includes the free speech safeguards of fair use and the idea/expression dichotomy. So long as those safeguards are in place, there is no need for a heightened form of judicial review.

Lessons from Eldred and Golan
In the lower court decision of Eldred v Reno, the court held that there is no First Amendment Right to use copyrighted materials. Later, in the case of United Video, Inc., the court seems to affirm that decision by claiming that copyright is “categorically immune” from First Amendment scrutiny. The decisions of Eldred v Ashcroft and Golan both recognized a conflict between copyright and the First Amendment. At first glance, it may appear as though the US Supreme Court in Eldred v Ashcroft affirmed the previous decisions of Reno and United Video as it held that First Amendment scrutiny was not applicable in the case before them. However, the court in Eldred did state that the DC Circuit court in Eldred v Reno misspoke when it claimed that copyright is categorically immune from First Amendment scrutiny. This demonstrates the courts acceptance that copyright laws may be challenged by the First Amendment. In fact, in Golan v Holder, the US Supreme court recognized that copyright in general posed a limit to free speech: “Concerning the First Amendment, we recognized that some restriction on expression is the inherent and intended effect of every grant of copyright.”

Even though the US Supreme Court openly recognizes the conflict between free speech and copyright, the judges avoid First Amendment scrutiny by claiming that the “speech safeguards” imbedded in copyright and the fact that the Copyright Clause was drafted in close proximity in time to the First Amendment would mean that First Amendment scrutiny may be bypassed. The speech safeguards argument is the same argument Tawfik and Gendreau espoused when they
described the Canadian courts reluctance in addressing the conflict between copyright and free expression.

Although Canada also has similar safeguards such as fair dealing and the idea/expression dichotomy, Canadian constitutional review should not undergo the same analysis as in the US. For one, the Canadian courts would not invoke the same argument of proximity in time between the Copyright clause enacted under s.91 of the Constitutional Act 1867 and s.2(b), freedom of expression under the Charter. s.2(b) of the Charter only came into force in 1982 with the passing of the Constitution Act 1982, whereas the distribution of legislative powers were enacted in 1867. The framers of the 1867 Act did not yet envision a bill of rights protecting freedom of expression. Therefore, when the legislatures enacted the Constitution Act 1982, which includes the Charter, they intentionally made all laws that are not constitutional subordinate to freedom of expression and the other rights in the Charter.

Furthermore, s.52 of the Constitution Act 1982 declares that the constitution is the supreme law of Canada and any law that is inconsistent is of no force or effect. The Charter protects freedom of expression whereas copyright or property rights in general are not protected by the Charter. More importantly, Canadian constitutional review would take on an entirely different methodology from the US cases to analyzing the problem with conflicting Charter rights and legislation such as the Copyright Act.

The next part of this paper turns to constitutional judicial review of a Charter problem in general. Once a general overview of constitutional review is given, Part IV of this paper will specifically analyze the effect of a twenty-year extension on freedom of expression.
Part III
Canadian Constitutional Review and Freedom of Expression

Judicial Review of Constitutional Rights

Judicial review of constitutional challenges involve two basic steps: the first is a determination of the scope of the constitutional right and whether that right has been affected by a sub-constitutional law. If so, the second step is to determine whether the government can justify the limit on a constitutional right by a sub-constitutional law. This 2-stage analysis has become so internationally prevalent that Lorraine Weinrib coined the term “The Postwar Paradigm” to explain the phenomena.

Defining the scope of a constitutional right is crucial to understanding the outer limits of that right. Each and every time a sub-constitutional law affects a constitutional right, the government must justify the infringement. That justification is based on some form of a balancing test.

Figure 1

In Figure 1, the illustration depicts the scope of a constitutional right. The “R” in the center stands for “right”. There are three outer circles: yellow, green and red. Those outer circles are potential boundaries for the outer limits of the constitutional right. It is up to the courts, when

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54 I borrow the term sub-constitutional from Aharon Barak, former president of the Supreme Court of Israel. He describes sub-constitutional laws as any law or rule which does not have constitutional status, i.e. ordinary statutes and common law rules.


56 Lorraine Weinrib, The Postwar Paradigm and American Exceptionalism, The Migration of Constitutional Ideas 84, 93 (Sujit Choudry ed., 2006)

57 Supra Note 55 at 22
interpreting constitutional rights, to determine the scope of the right. If the courts provide a narrow interpretation we may find the boundary might be the yellow inner circle. Broader interpretations may look like the green middle circle or the red outer circle. The horizontal line in Figure 1 represents a sub-constitutional law (ie. Statutory law or common law rules). We see that the sub-constitutional law in the figure is touching or passing through the red and green circles. If the courts defined the outer limits of the constitutional right as being either the red or green circles, then the sub-constitutional law is infringing or abridging the constitutional right and the burden now shifts to the government to prove why that limit on the constitutional right may be justified. If, on the other hand, the court determines that the scope of the right is the yellow circle, then there is no need for the government to justify the sub-constitutional law, as it is not affecting the right.

There is an important and significant difference between internal limits of a right and external infringement of a right. Internal limits are not a form of infringement but rather are used to define the scope of the constitutional right. If the definition of the right contains certain internal limitations, then that would normally speak to the scope and boundary of the right. In contrast, an external limit is referring to a sub-constitutional law which would limit an individual from enjoying a constitutional right, as defined by its scope.

Looking at s.2(a) of the Charter as an example, the section reads “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion;”. The wording of the Charter is vague and we rely on the courts to interpret the scope of freedom of conscience and religion. In the case of R v Big M Drug Mart Ltd. it was held that “The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and disseminating.” The recent decision of Trinity Western University v The Law Society of Upper Canada emphasized the caveat created in R v Big M Mart Ltd.

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59 R v Big M Drug Mart Ltd. [1985] 1 SCR 295
60 Trinity Western University v The Law Society of Upper Canada [2015] ONSC 4250
“… The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.”

Here, the court in *R v Big M Mart Ltd.* was emphasizing the scope or the outer limits of freedom of religion. The right to freedom of conscience and religion allows individuals to entertain the beliefs that a person chooses and to declare those beliefs openly and without fear through worship and practice or by teaching and disseminating. However, the right is limited to those manifestations that do not injure his or her neighbours or their parallel rights to hold and manifest beliefs of their own. This limit is an example of an internal limit on a constitutional right. An internal limit is imposed by the constitution itself and is not manifested through a sub-constitutional law or rule. Therefore, if the government created legislation that would impose restrictions on religious practices which caused injury to others, there would be no need for the government to justify such limits as the sub-constitutional law restricting religious practice which harms others is not protected by s.2(a) of the Charter.

What happens to the scope of a constitutional right, if a sub-constitutional law infringes that right, but is then held to be justified by the government in the second stage of the analysis? Does the justification change the scope of the constitutional right? Would the scope of the constitutional right look different after the justified infringement? For example, would the right now look like Figure 2 where a piece of the right has been carved out to make way for the justified infringement?

*Figure 2*
In figure 2, we can see that the line representing the sub-constitutional law is no longer infringing the scope of the right as the scope has now changed to make way for the justified sub-constitutional right. Under this interpretation, any sub-constitutional law that affects the right in the newly carved out area would no longer require government justification. This scenario would be analogous to the arguments made in *Eldred* and *Golan*. The claim in those cases is that because of the proximity of the enactment of the First Amendment with the Copyright Clause, the framers envisioned that the two rights are compatible and in balance because of the speech safeguards contained in the *Copyright Act*. So long as the “traditional contours” of copyright remain, First Amendment judicial scrutiny is not required because the *Copyright Act* has already been “justified” by the framers of the constitution and therefore they have carved an exception to the scope of the First Amendment right.

However, is this a correct assessment of what should happen to the scope of a constitutional right under a Canadian analysis? The answer is unequivocally no. The scope of a right granted to individuals under the *Charter* is a right granted by the constitution itself. A sub-constitutional law cannot be used to amend the scope of a constitutional right. The only way to amend a constitutional right is to make an amendment to the constitution itself and that may only be done through one of the amending procedures set out in *Part V* of the *Constitutional Act 1982*. Therefore, when a sub-constitutional law that infringes a right in the *Charter* is justified under s.1 of the *Charter*, the scope of the constitutional right remains exactly intact. Any future infringements on that right will have to be justified by the government each and every time they pass new legislation affecting the right.\(^{61}\) In fact, according to Aharon Barak, a law which has already passed constitutional scrutiny and satisfied the justification test can be challenged again several years later, particularly when it becomes clear that the law is not achieving the government’s intended purpose.\(^{62}\) Therefore, just because a law passed constitutional scrutiny once, does not mean that it would automatically pass the same scrutiny each time.

\(^{61}\) *Supra Note 55* at 22

\(^{62}\) Ibid. at 313
Defining the Scope of Section 2(b) “Freedom of Expression”

Freedom of Expression under s.2(b) of the Charter has been interpreted broadly by the SCC. In Irwin Toy Ltd. v Quebec (Attorney General) the court determined that only expression which conveys meaning falls within the ambit of s.2(b) of the Charter. In that case, the court discussed two internal limits on freedom of expression: expression that does not convey meaning, and expression that does convey meaning, but is violent in nature. The rationale for protecting expression was also elucidated in Irwin Toy:

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

As Hogg notes, the SCC’s acceptance of all three rationale make for a very broad definition of the right to free expression. In Figure 3, we will explore some of the case law which demonstrates how broad freedom of expression has been interpreted by the courts.

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63 Indeed, the Supreme Court of Canada has held in many cases that the rights in the Charter should be interpreted generously to accord an individual with the full benefit of the Charter. See Hunter v Southam Inc. [1984] 2 S.C.R. 145 at para 155-56. Also see R v Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at para 344. Also see United States of America v Cotroni [1989] 1 S.C.R. 1469.

64 Supra Note 25

65 Ibid. at para 53

66 Supra Note 58 at 43-9
Figure 3 illustrates several examples of expression. According to the rational of protecting expression set out in *Irwin Toy* political expression certainly falls within the scope of protected speech. Similarly, in the case of *Ford v Quebec*[^67], commercial signs were held to be a form of protected expression under s.2(b). How about expression that may lie on the fringes? Does hate speech fall within the ambit of s.2(b)? In *R v Keegstra*[^68], the SCC emphasized that freedom of expression is content neutral and protects all content that conveys meaning no matter how offensive the message may be. How about child pornography, one of the most repugnant forms of expression? Can this activity fall within the protection of s.2(b)? The SCC visited the question in *R v Sharpe*[^69] where it was held that indeed child pornography is a form of expression protected by s.2(b) of the Charter. The court held that “the right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us

[^67]: *Ford v Quebec* [1988] 2 S.C.R. 712
[^68]: *R v Keegstra* [1990] 3 S.C.R. 697
to understand the thought of others or consolidate our own thought.” From the line of cases, it is very clear that freedom of expression has been interpreted as broadly as possible and nearly all forms of expression are protected by the right. The red lines in Figure 3 show the internal limits of the right which are violent expression and expressions that do not convey meaning. Any government limit on these two forms of expression will require no justification on the government’s part as they do not fall within the ambit of s.2(b).

Difficulties with Michelin

In the Michelin case we saw the Federal Court attempt to amend the interpretation of the scope of s.2(b). The question before them was whether the leaflets and posters used to convey the union’s message was “expression” within the meaning of s.2(b). Noted in paragraph 85 of the judgement was that the leaflets were indeed expression and that they did contain meaning. The Federal Court attempted to distinguish between content and forms of expression, noting that all content is protected expression but not all forms of expression are (i.e. violent expression). The court concluded that the use of property is a form of expression and therefore can be excluded from the ambit of s.2(b). The difficulty with the analogy made by the court employing the case of Committee for the Commonwealth of Canada v Canada⁷⁰ is that the latter case involved the use of real public property and private property which is not the same as intellectual property that is non-rivalrous. The use of copyright material in a leaflet is about the content of the expression. The form of expression would be the words and drawing on the leaflet itself. Furthermore, Irwin Toy held:

If the government’s purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government’s purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical

consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.\textsuperscript{71}

Even if the use of intellectual property could be considered the “form” of expression, nevertheless, \textit{Irwin Toy} clearly stated that restricting forms of expression are also protected by \textit{s.2(b)}. More importantly, the court in \textit{Michelin} erred when it employed balancing as it was considering the scope of freedom of expression.

I disagree with the defendants' submission that the balancing of the parties' interests is only properly performed in the context of section 1 of the Charter. Although the defendants are correct in stating that the balancing of the parties' interests and rights most often occurs in the section 1 analysis, some balancing, particularly when it comes to the use of property, whether public or private, must take place even before the Court undertakes an inquiry under section 1 to determine if the form of expression is prohibited.\textsuperscript{72}

This statement cannot be further from the truth and emphasizes the grave error made by the court in \textit{Michelin}. The balancing of rights and interests is not to be employed in the first stage of the 2-stage judicial review analysis. The claim that property may not be used as expression implies that the sub-constitutional laws relating to property can redefine the scope of a constitutionally protected right. This cannot be correct because the scope of a constitutional right is defined by the constitution itself. Balancing must occur in the second stage of the 2-stage analysis because property rights themselves are rights of a sub-constitutional nature and therefore any limits those rights place on freedom of expression are external limits to that constitutional right. If any balancing of rights and interests are to be performed, they must be performed in the second stage of constitutional review.

\textsuperscript{71} \textit{Supra Note} 25 at para 49
\textsuperscript{72} \textit{Supra Note} 22 at para 100
Similarity with the First Amendment
In the United States Bill of Rights, the First Amendment reads “Congress shall make no law… abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the government for redress of grievances.” In contrast to the Canadian Charter’s freedom of expression provision, the First Amendment uses the term “freedom of speech” which Peter Hogg points out as being narrower\(^{73}\) than the term “expression”. Consequently, s.2(b) of the Charter is broader than the US First Amendment as it is not limited to expression through speech.\(^{74}\) Nevertheless, the US Supreme court in Eldred and in the Golan cases recognized that there is indeed an intersection between copyright law and free speech. In Canada, where s.2(b) is much broader than the First Amendment, surely copyright also conflicts with the notion of free expression.

Stage 1 – Canadian Constitutional Review
Once the scope of a constitutional right is defined, an analysis of the law being challenged can take place. This analysis consists of looking at the purpose and the effect of the challenged law to determine whether it abridges a Charter right.\(^{75}\) If either the purpose or the effect of the law abridges the right, then the right will be infringed and the government would have to then justify that infringement under s.1 of the Charter.

Stage 2 – Canadian Constitutional Review
When a Charter right has been infringed by a sub-constitutional law, the second stage of the analysis is to determine whether the government can justify the infringement under s.1 of the Charter. In this stage of the analysis the burden of proof shifts from the claimant, who must prove that their right has been infringed, to the government who must demonstrate that the limit

\(^{73}\) Free speech has also been interpreted more broadly by the US Supreme Court to include expression beyond speech. Nevertheless, the plain meaning of the US constitution is narrower than that of the Charter.

\(^{74}\) Supra Note 58 at 43-7

\(^{75}\) Ibid. at 36-23
is proportionate. The standard of proof under s.1 is the civil standard, by a preponderance of probability. s.1 reads “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Therefore, the rights and freedoms set out in the Charter are guaranteed, but may be subject to limits, so long as those limits are “prescribed by law” and can be “demonstrably justified in a free and democratic society”.

The test for justifying a limit of a Charter right was first set out by Dickson C.J. in R v Oakes where the court prescribed four separate criteria that must be satisfied to justify infringement. The first criteria requires the government to have a sufficiently important objective “to warrant overriding a constitutionally protected right.”

Once it has been demonstrated that the government’s objective is sufficiently important, the next step is to determine if the infringement is proportionate. This proportionality test was first adopted by German constitutional law after the World War II. Since then, it has spread throughout Europe and was eventually adopted by the European Court of Human Rights. Today, many non-European courts have incorporated the approach including Canada, Australia, Brazil, India, Israel, New Zealand, South Africa, and South Korea. Interestingly, the United States Supreme Court has never embraced the concept of proportionality. This is another reason why Canadian courts should be skeptical of adopting the US decisions in Eldred and in Golan.

The test of proportionality requires courts “to balance the interests of society with those of individuals and groups”. Oakes set out three important criteria for the proportionality test. The

76 Supra Note 8 at para 66
77 Ibid. at para 67
78 Ibid.
79 Ibid. at para 69
80 Moshe Cohen-Eliya and Iddo Porat “Proportionality and the Culture of Justification” (2010) American Journal of Comparative Law
81 Idem.
first criterion is that the law being challenged must be rationally connected to the sufficiently important objective (rational connection test). Secondly, the law must impair the right no more than is necessary to achieve the important objective (necessity test). Finally, there must be “proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified of ‘sufficient importance’” (balancing test). With respect to the final balancing test, Oakes held that the more severe the deleterious effects are on the individuals or groups affected by the law, the more important the government objective must be in order for them to justify the measure in a free and democratic society. The first two criteria of the proportionality test, rational connection and necessity, are tests of optimality which ensure that the government action which imposes limits on constitutional rights are operating efficiently. The two criteria are measured against the proper objective and the need to achieve that objective, whereas the balancing test is a broader assessment which sets out to determine whether the benefits of the law outweigh the costs to the individuals or groups affected by it.

Having briefly defined the 2-stage analysis, we will now revisit the US copyright extension decisions to further grasp the differences between US constitutional review and the Canadian 2-stage analysis.

The US Copyright Cases and the 2-Stage Analysis
Gardbaum argues that in the United States, courts tend to regard all limits (both internal and external) as being part of the scope of a constitutional right. The blurring of internal and external limits has significant consequences as was demonstrated in the cases of Eldred v Ashcroft and Golan v Gonzales. The US courts resorted to the rational basis analysis, the lowest threshold of scrutiny, by insisting that since the Copyright Clause had been an enacted around

83 Supra Note 8 at para 70
84 Ibid. at para 71
85 Supra Note 80
the same time as the First Amendment, any law which did not change the “traditional contours” could evade constitutional First Amendment scrutiny.

Rather than dealing directly with the scope of the First Amendment and deciding whether CTEA affects First Amendment rights, the Supreme Court in Eldred v Ashcroft ruled that a strict scrutiny analysis was unnecessary because the copyright regime contains speech safeguards. Even though the court in Eldred clearly stated that “some restriction on expression is the inherent and intended effect of every grant of copyright”, the court evaded strict scrutiny by claiming that the copyright regime was proportionate without ever having to perform a proportionality test.

Although the majority held that CTEA was proportionate, in reality, proportionality involves three separate criteria and what the US Supreme Court did was import a balancing test into the first stage of the analysis, a stage which in Canada, is meant to simply determine whether the right had been affected. The balancing test performed in that first stage does not take into consideration all of the factors that a proportionality test would if it were performed separately.\(^{88}\)

Aside from evading First Amendment scrutiny, there are other difficulties with attempting to import lessons from the cases of Eldred and Golan into the Canadian context. For one, Canada uses the 2-stage analysis, which unlike the United States, incorporates a 3-step proportionality test. Secondly, the scope of constitutional rights is often blurred in the United States and therefore, a law such as CTEA would not escape constitutional scrutiny in Canada. Also, the United States uses a tiered approach\(^{89}\) to constitutional review whereas in Canada, the justification test under s.1 of the Charter is the only test used, regardless of which right has been infringed. Therefore, even if constitutional review were performed in any of the above cases, it would be difficult to translate that analysis directly into the Canadian context which only has one level of review. Finally, a very important and notable difference between Canadian and US

\(^{88}\) The exact same reasoning here applies to the Canadian Federal Court decision in Michelin.

constitutional review is that the US does not use proportionality in the strict sense\textsuperscript{90, 91} as the court does not weigh the salutary effects of a sub-constitutional law against the harmful effects of that law.

In the next section of this paper, we will analyze the copyright provisions of the \textit{Economic Action Plan 2015 Act} using the 2-stage constitutional analysis described above.

\begin{footnotesize}
\textsuperscript{90} \textit{Supra Note} 87 at 851

\textsuperscript{91} Aharon Barak, \textit{Proportionality: Constitutional Rights and their Limitations} (New York: Cambridge University Press, 2012) at 206 – Barak notes that although there has not been a single instance where the concept of proportionality (all four steps) has been adopted by a US court. However, in a number of dissenting opinions handed down by Justice Breyer, it was ruled that in certain circumstances the courts have adopted balancing competing interests to determine if a law is proportionate. See \textit{Turner Broadcasting System Inc. v FCC}, 520 US 180 (1997); \textit{United States v Playboy Entertainment Group}, 529 US 803 (2000); \textit{Bartnicki v Vopper}, 532 US 514 (2001); \textit{United States v United Foods}, 533 US 405 (2001); \textit{Ysura v Pocatello Education}, 555 US (2009).
\end{footnotesize}
Part IV
Canadian Constitutional Review of Bill C-59 (Economic Action Plan Act 2015)

Part 3, division 5 of the Economic Action Plan Act 2015 amended the copyright term for sound recordings and performances from fifty years after fixation to seventy years. Fixation may occur any time after the recording but not before the expiry of fifty years for a total potential term of protection of one hundred years. After the amendment’s passing, the term of protection increased to seventy years after fixation, but the total potential term of one hundred years for sound recordings remains the same. The previous maximum term of protection for performances was ninety-nine years in the Act, the new amendment extends the maximum term of protection for performances by an additional year for a maximum term of one hundred years, harmonizing it with the same term of protection for sound recordings.

Before judicial review can be performed on Charter grounds, several conditions must be met under s.32 of the Charter. s.32 sets out that the Charter applies to the Parliament and the provincial legislatures in respect to all matters within the authority of Parliament or the provincial legislatures. Peter Hogg notes that in order for a law to undergo Charter review, it must first conform to the rules of federalism.92 Sections 91 and 92 of the Constitutional Act 1867 provide for a division of powers between the federal and provincial governments. Those powers are mutually exclusive. Since s.32 of the Charter notes that the Charter only applies to matters within the authority of the respective legislatures, laws which our outside of their authority (or ultra vires) would not be able to undergo Charter scrutiny. Those laws would simply be invalid on the grounds that they violate the rules of federalism.

Legislative bills enjoy a presumption of constitutionality with respect to their compliance with the rules of federalism. Hogg explains that there are three consequences of the presumption. First, the courts should avoid striking down laws unless they clearly offend federalism. Secondly, where validity depends on the determination of facts, the courts should uphold a law

92 Supra Note 58
where there is a rational basis for the finding. Finally, where a law is ambiguous and open to more than one interpretation, courts should read down a law to include only the interpretation which provides for a constitutional reading of the law. Only the third legal consequence of reading down is applicable to the presumption of constitutionality on Charter grounds. There are no constitutional presumptions with respect to laws that clearly offend the Charter and laws where constitutional validity are dependent on facts.

In order to determine whether s32 applies, we should first confirm that the Federal Economic Action Plan 2015 Act with respect to the Copyright Act provisions fall within federal jurisdiction. Section 91(23) of the Constitutional Act 1867 grants the federal government the power to create laws in relation to matters of “Copyrights”. Therefore, Part 3, Division 5 of the Economic Action Plan 2015 Act does not contradict the rules of federalism and is subject to the Charter. The next step is to determine whether there has been any government action which would make the Charter applicable. Generally speaking, copyright is a matter between private parties and the Charter only applies in the instance of government action. However, the Copyright Act itself and the amendments to the Act through the Economic Action Plan 2015 Act are legislative actions taken by government and therefore the Act itself is subject to the Charter.

93 Idem.
94 Idem.
95 Copyright in sound recordings and performances are known as “neighbouring rights”. These rights did not exists in 1867 and only appeared recently in Canada. An argument can be made that these rights are not “copyright” within the meaning of s.91(23). For the purpose of this paper, we will assume that these neighbouring rights are indeed within the legislatures authority under s.91(23). For more info on the history of neighbouring rights see Rasmus Fleischer. “Protecting the musicians and/or the record industry? On the history of ‘neighbouring rights’ and the role of Fascist Italy” (2015) Queen Mary Journal of Intellectual Property. Vol. 5, No 3, 327
96 Supra Note 13 at 215
Constitutional Review

1.1 Stage 1 – Does the Law Abridge Freedom of Expression? – Purpose and Effect of the Law

Since it has been determined that the Copyright Act and the amendments to that act through the Economic Action Plan 2015 Act are subject to Charter review, the first stage of the 2-Stage analysis involves determining the scope of the abridged right and determining whether the impugned law infringes on that right. In Part III we discussed how freedom of expression has been interpreted broadly by the SCC to include all forms of expression that convey meaning, so long as they are not in the form of violent expression. The liberal interpretation from Irwin Toy is consistent with the notion that expression includes the ability to use the expression of another in order to convey meaning.97 The SCC has not only interpreted expression as the right to impart information on others, but also to receive it.98

We now move to the discussion on whether the impugned law infringes the right of freedom of expression. This involves determining whether either the purpose or effects of the copyright extension of sound recordings abridges a Charter right.99 If either are found to infringe a Charter right, then the burden shifts from the claimant to the government to demonstrate that the limits can be justified in a free and democratic society.100

Irwin Toy cautioned courts from drifting to extremes when evaluating the purpose test to freedom of expression.

...the greatest part of human activity has an expressive element and so one might find, on an objective test that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost always

97 Ibid. at 220
99 Supra Note 59
100 Supra Note 8
claim that its subjective purpose was to address some real or purported social need, not to restrict expression.\textsuperscript{101}

In order to avoid falling into one of the two extremes the court held that the purpose should be assessed in light of the guarantee in question.

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.\textsuperscript{102}

A court’s determination of the Act’s purposes will largely depend on which competing theory of copyright (natural rights vs. utilitarian) the judges may subscribe to. If judges prefer the natural rights theory, the reasons for copyright exists to protect the works of creators and to grant them exclusivity over those works in order to exploit them. Under this theory, the purpose of the Act is clearly and purposefully to limit the access and use of expression of others.\textsuperscript{103} Since the law extends copyright protection for an additional twenty years, the Act offends freedom of expression because it seeks to restrict others from accessing or conveying the meaning of copyrighted expression. Because the purpose of the legislation offends the \textit{Charter} it is unnecessary to consider the impact or effects of the legislation on expression.\textsuperscript{104} Therefore, under the natural rights theory, each time an amendment which effects expression is made to the \textit{Copyright Act}, a new challenge may be brought before a court and the government would have to demonstrate that the limit is demonstrably justified in a free and democratic society.

\textsuperscript{101} Supra Note 25 at para 48
\textsuperscript{102} Ibid. at para 49
\textsuperscript{103} Supra Note 13 at 220
\textsuperscript{104} Supra Note 59 at para 85
On the other hand, the utilitarian justification for copyright may be viewed as an engine for free expression. The ultimate goal of copyright under this justification is to benefit society as a whole, and therefore, incentives are created to promote the creation of new works and ideas. An argument can be made that the purpose of the Act is not to limit access or expression, but rather to foster greater expression by creating limited copyright terms in which the works would eventually end up in the public domain for everyone’s use. Therefore, the purpose of the Act under this approach may not directly offend freedom of expression. In such a case, a review of the effects of the law would reveal an infringement of freedom of expression as the engine of free speech is fueled by creating incentives by temporarily depriving others of access to information and to expressing that information. Therefore, under both the utilitarian approach and natural rights approach to copyright, the Acts and its amendments do infringe freedom of expression and the government must now carry the burden of demonstrating the law can be justified under s.1 of the Charter.

As a matter of comprehensiveness and before we consider the criteria set out in the Oakes test we must first address s.1 of the Charter which provides that “reasonable limits” can be placed on the rights in the Charter so long as they are “prescribed by law” and are demonstrably justified in a free and democratic society. Are the amendments to the Copyright Act found in the Economic Action Plan 2015 Act “prescribed by law”? There is no question that the Act was passed by the appropriate channels and went through the necessary requirements before becoming law.

1.2 Stage 2 – Is the Law Proportionate in its Effects?
Now that it has been established that the twenty year copyright extension infringes on freedom of expression and that the limit is “prescribed by law”, it is now up to the government to justify that infringement using the four criteria set out in the Oakes test.

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105 Also see Eldred v Ashcroft “some restriction on expression is the inherent and intended effect of every grant of copyright”
1.3 Proportionality – Proper Purpose

The question of whether the purpose of a law is proper to justify limiting a right is dependent on the values of a constitutional democracy. The analysis undertaken under this section is not concerned with the scope of the limitation on the constitutional right nor any consequences it may have on that right, but rather is solely concerned with law’s purpose. Therefore, according to Barak, the determination of a proper purpose should not involve any weighing of harm caused to the right nor should it involve any consideration of “internal speech protections” as was discussed in *Eldred*. That part should be reserved for the final step of the proportionality assessment.

In contrast, Peter Hogg argues that a law in which its effects are too severe on a constitutional right cannot be sufficiently important to justify infringement. Consequently, Hogg concludes that the fourth step of the *Oakes* analysis (the balancing test) is redundant because if a law is sufficiently important to override a right in the *Charter*, then it will always be proportionate.

Hogg acknowledges that he is alone in this view:

“Obviously Dickson C.J. who proposed the fourth step, did not regard it as redundant. Nor does Aharon Barak, former President of the Supreme Court of Israel, who is perhaps the foremost scholar of proportionality. Nor does the Supreme Court of Canada. McLachlin C.J. writing for the majority of the Supreme Court (and the minority did not disagree) in *Alberta v Hutterian Brethren of Wilson Colony (2009)*, explicitly considered my argument and rejected it”.

The difficulty with Hogg’s approach to the first criteria in *Oakes* is that he imports a balancing test into the equation of determining whether a law’s purpose is proper. This is similar to the error made by the Federal Court in *Michelin*. The correct way of assessing the purpose is to

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106 Supra Note 55 at 246

107 Ibid. at 246 - 247

108 Supra Note 86 at para 75

109 Supra Note 58 at 38-44 – 38-44.1
simply evaluate it independently without having regard to its effects on the constitutional right.110

In *Oakes*, Dickson C.J. stated that:

...the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’… The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.111

Following this statement, a proper objective must meet the standard implied in the words “free and democratic society”, must be pressing and substantial and finally must be directed at “the realization of collective goals of fundamental importance”112.

The purpose of this paper is not to challenge the entire *Copyright Act*, but rather to assess the constitutionality of the term extension for sound recordings and performances, therefore the focus is on the purpose of Part 3 Division 5 of the *Economic Action Plan 2015 Act*. When we look to determine the purpose, we need to ask why is a copyright extension provision for sound recordings and performances being buried inside a bill pertaining to the federal budget. Does this mean that the purpose of the bill has something to do with federal budgeting or finances? In the overview of the Act, the government discusses that the *Copyright Act* gives producers and artists the right to control their recordings for a specific limited term. The new Act amends the fifty-year term to seventy years “giving producers and performers an additional twenty years

110 See Dieter Grimm. “Proportionality in Canadian and German Constitutional Jurisprudence”. (2007) 57 University of Toronto Law Journal. Grimm concludes that the order of assessing the Oakes criteria is significant because “a confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable”.

111 *Supra* Note 8 at para 70

112 *Supra* Note 58 at 38-22 – 28-23
during which they have the right to be paid for the use of their recordings”. 113 These words imply that the purpose of the legislation, at least in part, is about providing artists the means of earning more money by granting them an additional twenty years of protection. Further supporting documentation of this purpose was obtained by Professor Michael Geist in a letter from Prime Minister Stephen Harper to the President of Music Canada, Graham Henderson. 114 In the letter dated April 21, 2015 115, the Prime Minister states that he shares the views of Mr. Henderson that “copyright protection for sound recordings falls short of what is required to protect artists and ensure they are fairly compensated for their work”. The Prime Minister goes on to announce that in the 2015 Budget, the government will extend copyright for sound recordings from fifty to seventy years. Based on this letter, it is clear that the goal of the government is to ensure that artists are being compensated “fairly” and that the current term of fifty years does not provide them with that compensation. It follows that the government believes that in order to ensure that artists are compensated fairly, the copyright term for sound recordings needs to be extended to seventy years. The overview also discusses that another purpose of the legislation is to ensure that Canada is in compliance with the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaties 116. Are these two purposes sufficiently important to justify an infringement?

Utilizing the rigorous standard in Oakes, it would be difficult to make a finding that copyright extension for sound recordings and performances for the purpose of providing artists more compensation would be “proper” to justify limiting a right in the Charter. Do the values underlying a “free and democratic society” support the idea that freedom of expression of the many should be curtailed for individuals to simply receive more compensation? The argument is not about whether artists should or should not be able to receive compensation for their work. They already do receive compensation for their work and are each granted with a minimum of

113 Supra Note 5, Part 3 – Division 5 - Overview
115 See Appendix A for a reproduction of the letter
fifty years copyright protection from the time of fixation for their sound recordings or performances. The argument is about whether sufficient compensation should be a value that can be held to be sufficiently important to justify limiting a Charter right. I would have to find that it is not a proper purpose. A proper purpose requires the legislatures to act with urgency. The government had already made a commitment in the 2012 to review copyright legislation in 2017\textsuperscript{117} and it also rejected proposals to extend the terms in all previous rounds of copyright reform. What was so pressing and substantial that the government felt necessary to extend copyright at this point in time and in a federal budget act that has nothing to do with copyright? Was the need so great that the government could not wait an additional two years to pass the legislation when an overview of copyright law is scheduled to take place? Is it because certain famous artists’ works are about to become part of the public domain? Is that a sufficiently pressing reason to warrant a Charter infringement? Again, I would find it difficult to come to the conclusion that such an objective is sufficiently important. Finally, does a twenty-year extension realize a fundamentally important collective goal of society? Again, the government’s objective is not that artists should be compensated, but rather they should receive more compensation at the expense of others. This in itself is not a sufficiently important societal goal requiring the government to suppress a Charter right. However, it is important to note that in practice, the SCC has been highly differential to the legislatures on determining whether a purpose is proper and it is very likely the SCC would give the legislatures deference in this matter and would find that the purpose is valid.

With regard to the second purpose about ensuring Canada meets its obligations under the WIPO Performances and Phonograms Treaties. This may be a sufficiently important objective, particularly if not conforming to the treaty would mean Canada is in violation of international law. However, a closer look reveals that Canada is already in compliance with the WIPO treaty with respect to its copyright terms. Article 17(1) and (2) provide that protection shall be provided to performers and producers of phonograms for at least fifty years after fixation of the works. Therefore, the claim that Canada is making amendments to the Copyright Act in order to comply with WIPO is not in respect with the copyright term extension of seventy years, but

\textsuperscript{117} Michael Geist, Letter to the Standing Committee on Finance. (June 3, 2015) online: \url{http://cdn.michaelgeist.ca/wp-content/uploads/2015/06/Geistc59submission.pdf}
rather to correct the one-year discrepancy noted earlier with respect to the maximum possible term provided between performances and sound recordings so that their terms are the same as one another (100 years). Therefore, the purpose of ensuring “Canada continues to meet its international obligations” under WIPO does not apply with respect to the additional twenty-year term extension.

It should also be noted that Parliament’s power to legislate in order to conform to international treaties is not an unlimited and unfettered discretion. Since the passing of the Constitution Act 1982, section 52 has changed the dynamics our constitution plays within our democracy. The constitution of Canada is now the supreme law of the land and any government action, including legislative, must conform to our constitution including the Charter. “In light of the globalization of the so-called ‘cultural industries’, it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions.”

Therefore, any legislation which is intended to harmonize Canadian law with WIPO Performances and Phonograms Treaties is subject to the limitations of our constitution including our Charter.

The Oakes test has received criticism for being overly strict; the case had set the standard for meeting the threshold of a proper purpose so high that the SCC had to back track and has now adopted a more flexible and contextual framework for analyzing rights. In Edmonton Journal

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118 Supra Note 27 at para 6

119 Canada is a dualist state which means that international treaties do not become binding in Canadian domestic law until Parliament ratifies those treaties. This creates a very interesting problem when the executive branch of the government binds Canada to an international treaty and then, for whatever reasons, Parliament decides not to ratify those treaties. In our particular scenario, it may be that Parliament finds the treaties to be in violation of the Charter. In a case where Parliament refuses to ratify a treaty, the treaty will have no effect on domestic law, however, Canada would still be bound under international law to comply with the treaty.


121 See United States of America v Cotroni [1989] 1 S.C.R. 1469 where La Forest, for the majority, wrote “In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights
Justice Wilson noted “One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context.” It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it.”

Since Irwin Toy, the SCC has adopted a less stringent approach to the first Oakes criteria. Instead of the demanding “pressing and substantial” standard, the court has taken a more deferential approach and has been satisfied with purposes which command a “valid” or “sufficiently important” objective.

Indeed Peter Hogg notes that the Oakes test seems to set a very high standard for the proper purpose, but in reality, the government has been able to demonstrate a proper purpose in each and every Charter challenge save for one or two cases that have reached the SCC.

With respect to the Copyright Act in general and to the amendments extending the term of protection for sound recordings and performances, how do we contextualize the value of the expression? It would appear that the expression should receive the broadest interpretation to include all possible types of recordings and performances, especially those which have political meaning and purposes. Since it is possible that this expression can be political in nature, it

guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

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122 *Edmonton Journal v Alberta* [1989] 2 SCR 1326

123 See *United States of America v Cotroni* [1989] 1 S.C.R. 1469 where the SCC was considering the constitutionality of extradition laws. There the court said “The Oakes test should not be applied in an overly rigid and mechanistic fashion: the language of the Charter invites a measure of flexibility. While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society to be achieved by the legislature”.

124 Sujit Choudhry “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 S.C.L.R (2d) at 509

125 *R v Keegstra* is an example where the SCC has found the government’s objective fails the proper purpose test.

126 Supra Note 58 at 38-23
would follow that under the contextual approach we would place great value on the expression and therefore a more strict approach to the Oakes test should apply. Under the strict test, the purpose should fail the Oakes analysis as was demonstrated earlier. However, based on past experience, the courts would likely grant a high degree of deference here and would find that the purpose is valid.

In the interest of providing a full and comprehensive analysis, and since the Supreme Court itself has only in a rare case struck down legislation for not having a proper purpose, it would be prudent to proceed on the assumption that the two purposes noted have met the “proper purpose” standard. We now proceed to the three requirements which make up the proportionality test. In order to give a proper analysis of the three proportionality criteria this paper will defend the two purposes as though they are indeed valid.

1.4 Proportionality – Rational Connection
The purpose of the rational connection test is to determine whether the means selected may somehow achieve the government’s stated objectives. There is no need for the means to completely achieve the object, even a partial realization would suffice. Barak criticizes Justice Dickson in Oakes when he stated that the means of achieving the government’s purpose has to be “carefully designed to achieve the objective in question”. In order to satisfy the rational connection test, the means used does not need to necessarily be carefully designed or even efficient to satisfy the rational connection requirement. The word ‘designed’ may suggest a requirement of efficiency which is incorrect. Dickson went on to emphasize that “the measures adopted… must not be arbitrary, unfair, or based on irrational connections”. According to Barak, this statement captures the essence of the rational connection test if it relates to the requirement “that the means adopted would be rational”, but again, the notion of “fairness” is not

127 Supra Note 55 at 305
128 Supra Note 8 at para 70
129 Ibid. at para 70
related to the rational connection test and would only be considered in the last two stages of proportionality.\textsuperscript{130}

We will examine the rational connection of each of the purposes identified in the previous section independently. We begin with the objective of “protecting artists and ensuring they are fairly compensated for their work”. Can an additional twenty years of copyright protection fulfill this objective, if not fully, even in part? The answer would have to be yes. If artists have an additional twenty years of copyright from the time of fixation, they can potentially earn more money. I use the word “potentially” because it cannot be said with 100% certainty that the measure will guarantee “fair compensation”. Other factors, including artists’ bargaining powers and the contracts of diminishing returns with record labels can highly influence whether this measure would provide “fair compensation”. Does the rational connection test require factual certainty? Barak explains that “there is no need to prove, with complete certainty, that the purpose of the law will actually be realized. All that is required is that the probability of realizing that purpose is not trivial, or theoretical.”\textsuperscript{131} In our current assessment of “fair compensation”, there is a possibility that artists would receive more compensation over a longer period of time to satisfy the government’s objective of fair compensation.

With the secondary objective mentioned in the \textit{Economic Action Plan 2015 Act}, the government stressed that the purpose of the changes are also to ensure that Canada continues to meet its obligations under WIPO’s Performances and Phonograms Treaty. Does a twenty-year term extension to performances and sound recordings have a rational connection to this objective if Canada is already complying with the WIPO treaty? The answer can only be in the negative. There is no relation between the twenty-year extension and continuing to conform to the treaty as Canada is already in compliance. The only rational connection between complying with WIPO and the new legislation is in relation to adjusting the maximum term of protection from ninety-nine years to one hundred years. Since this portion of the amendment is not being challenged, the objective need not be considered any further. Assuming the twenty-year extension could still

\textsuperscript{130} \textit{Supra Note 55} at 307

\textsuperscript{131} \textit{Ibid.} at 312
potentially fulfill the government’s objective of providing artists with fair compensation, we now move to the next Oakes criteria.

1.5 Proportionality – Necessity

The necessity tests looks at the means chosen by the government to achieve their objective and examines whether there are any less harmful means which could achieve the exact same ends. If there is even a hypothetical alternative which would be less harmful to the constitutional right, the courts must find that the law which infringes the right is unnecessary as it is not the least onerous on the constitutional right. The courts should proceed by considering the least harmful way of advancing the law’s purpose, if the means does not achieve the purpose, then an alternative which is more harmful can be considered. Under the necessity test a law can be very harsh and still pass the test, so long as it is the least harmful way to achieve the law’s proper purpose. The severity or harshness of the law is not relevant at this stage in the analysis and is a consideration for the final balancing criteria in Oakes.

When assessing alternative schemes, courts should only consider those that achieve the government’s purpose. An alternative which does not achieve the law’s purpose or would only partially achieve the purpose is not an alternative that can be weighed in this part of the test. This was demonstrated in the case of United States of America v Cotroni where the court was reviewing the constitutionality of extradition laws. Petitioners argued that the extradition laws, which sought to have them extradited to the United States for conspiring to sell narcotics into the US, violated their right to remain in Canada under s.6 of the Charter. The court rejected the argument that a Canadian indictment was a valid alternative means for consideration since the purposes of extradition were to fight the war on illegal drugs and international cooperation. Since a Canadian indictment would not achieve the objective of international cooperation, it could not be considered as a valid alternative, even though its means were indeed less harmful.

132 Ibid. at 321
Earlier, we identified that there were two purposes of the term extension. The first was to ensure Canada was continuing to meet its obligations under the WIPO Performances and Phonograms treaty and secondly was to ensure artists are fairly compensation. With respect to the first objective, does an alternative exist that would still achieve the government’s objective of complying with the WIPO treaty and less harmful to expression. The answer is yes, no copyright extension was necessary for Canada to enact because it was already in compliance with the treaty. The only amendment that was relevant dealt with extending the maximum term of copyright protection from ninety-nine years to one hundred years. That portion of the legislation is not under constitutional challenge. Therefore, the twenty-year extension was an unnecessary measure and unnecessarily harmed freedom of expression.

The second measure identified was ensuring that artists are fairly compensated. This objective is difficult to understand on its own without having to expound on the meaning of “fair compensation”. It would be helpful to know what the harm is that the government is trying to correct with the enactment of this law. Is it purely about artists receiving inadequate compensation or is there something else that can be inferred? The term fair, may also indicate that the compensation arrangement between artists and producers is what is currently causing their compensation to be unfair. We will consider both interpretations.

Assuming that the purposes are both about remedying inadequate compensation and unfair arrangements, are there other alternative means which are less harmful to freedom of expression? Could the government achieve the same objectives for artists without having to harm the public and restrict access to information for an additional twenty years? One alternative to consider would be regulating contractual arrangements between artists and producers. This could be done by setting a cap on fees charged by producers, allowing artists to benefit greater from their work. This alternative would satisfy both interpretations of “fair” compensation as it would grant artists more money and would remedy any unfair contractual arrangements in the industry.

Another alternative to “fair compensation” could be implemented through the public lending right (PLR) scheme which is a government program intended to compensate authors and artists for any potential losses resulting from having their works being made available through public institutions such as libraries. Canada first began paying authors and artists under the scheme in
1987. Since then the total annual payment has increased to over $9.9 million in 2012.\textsuperscript{134} However, according to a report prepared by the Public Lending Right Commission, the program is underfunded. Although the payments have remained steady over the past decade, the constant dollar value of those payments have declined.\textsuperscript{135} Between 1986 and 2001, payments to artists increased through the program by 251%. Then from 2001 until 2012 payments have only increased by 2.8%.\textsuperscript{136} It would have been very appropriate for the government to use the Economic Action Plan 2015 Act, a federal budget plan, to increase government funding under the scheme. One criticism of this proposed alternative would be that it only addresses the interpretation relating to adequate compensation, but it may not necessarily address the government objective of remedying any unfairness in their compensation, in particular between artists and producers.

However, the first alternative is one that would adequately achieve the dual interpretation of adequate and fair compensation. Therefore, there would be no need for a twenty-year copyright term extension as it unnecessarily restricts freedom of expression and therefore fails the s.1 Charter justification test.

We have already established that a strict approach to \textit{Oakes} should be used in this case as the legislation could also affect political speech. However, even under the relaxed version of \textit{Oakes}, this stage of the analysis would not be satisfied. In \textit{RJR-MacDonald}\textsuperscript{137} the court held that “the government must show that the measure at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective”. This version of the necessity test has more flexibility than the one laid out in \textit{Oakes} as it contemplates a range of means that would minimally impair the constitutional right. Even under this scheme, it would be hard to justify a twenty-year extension as it cannot be viewed as a reasonable minimal limit when the

\begin{footnotesize}

\textsuperscript{135} Ibid. at 17

\textsuperscript{136} Ibid. at 18

\textsuperscript{137} RJR-MacDonald [1995] 3 SCR 199 at para 160
\end{footnotesize}
government could easily come up with an alternative which need not restrict expression at all and yet still achieve their entire objective. Twenty years of harm to the public domain could hardly be called “reasonable” when it is compared to legislation that would increase and fairly compensate artists without the need not extend the copyright term at all.

1.6 Proportionality – Balancing

Although the term extension has already failed the necessity test, we will continue with an analysis of the fourth Oakes criteria. The reason for the analysis is to demonstrate the considerations that must be analyzed in this step rather than in the first step of Oakes, proper purpose, as suggested by Peter Hogg.

In this step of the analysis, courts are to determine whether the overall effects of the law are disproportionate. This is done by measuring the salutary effects of the law and weighing them against the deleterious effects of the law. In *Alberta v Hutterian Brethren of Wilson Colony*, the SCC discusses how Peter Hogg believes this stage of the analysis is redundant. In explaining why Peter Hogg is incorrect in his assertion, the court quotes Barak to explain why the fourth step is indeed necessary.

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (stricto sensu) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right... It requires placing colliding values and interests side by side and balancing them according to their weight.

The court then goes on to explain how Barak’s explanations is the proper one even though the SCC has not always adhered to it. Let us consider how, according to Barak’s view, this stage of the analysis is intended to work. The courts must place the benefits of the proper purpose on one

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138 Supra Note 86
139 Ibid. at para 76, quoting Aharon Barak
side of the scale and the deleterious effects of that law on the other side. In the case before us, we determined that the objective was to provide fair compensation to artists. However, this is not the appropriate factor to be placed on the side of the salutary effects of the scale. Instead, the courts should weigh the marginal benefits of the law against the marginal deleterious effects of the law.\footnote{Adalah Legal Centre for Arab Minority Rights in Israel and others v Minister of Interior, [2006] HCJ 7052/03 at para 112} \footnote{Supra Note 55 at 350} 140 141 In other words, on one side of the scale we must place the benefits that a twenty-year term extension would have on fair compensation rather than simply placing the need for copyright legislation in general on one end of the scale or rather than placing a seventy-year copyright term on one side of the scale. The measure enacted by Parliament is a twenty-year extension and only the salutary effects of those additional twenty-years need be assessed against the harm that the additional twenty years will have on the public.

Included in the balancing analysis should be an assessment of the speech safeguards which are present in the Copyright Act itself, namely the fair dealing provisions and the idea/expression dichotomy. The idea/expression dichotomy limits copyright protection to expressions. Ideas may be copied and further developed by others to advance society. The fair dealing provisions also help balance users’ interests by allowing certain exceptions to copyright use. When an individual uses copyright work pursuant to the fair dealing provisions, they do not in fact infringe copyright. Fair dealing of works is outside of the sphere of copyright protection. Therefore, the speech safeguards are intended to balance users’ interests of encouraging the dissemination of works with those of the copyright holders.\footnote{Supra Note 27 at para 30} 142 Indeed, it may very well be that the Copyright Act was proportionate prior to the twenty-year term extension because of the fair dealing provisions and the idea/expression dichotomy. However, our assessment is not of the Copyright Act in general, but simply about the twenty-year term extension. Barak notes “… we are comparing the marginal social importance of the benefit gained by the limiting law and the marginal social importance of preventing the harm to the constitutional right caused by the limiting law.”\footnote{Supra Note 55 at 351} 143 The assessment is designed to look at the state of affairs in relation to the law’s
purpose before and after the enactment and to compare that to the constitutional right’s state of affairs before and after the enactment. As such, our focus is on the marginal effects on the law’s objectives and the marginal effects on the constitutional right. Barak also explains that any hypothetical alternatives that were rejected in the necessity test can also factor into the balancing equation. The marginal benefits of the rejected alternatives would be weighed against the marginal harm from rejecting those alternatives.

In 2005, a study by economist Abraham Hollander, commissioned by Industry Canada, found:

“Adding 20 years of protection would contribute 2.3% to the present value of royalties under a 7% discount rate, assuming that the flow of royalties remains unchanged during the whole period. Under identical assumptions, extending the protection period to 100 years would contribute a mere 3.0% to the present value. This, however, is true only if the royalty flow remains constant over time. When the annual royalties decline rapidly over time, as is typical, the increase in present value would be considerably smaller”.

Therefore, the salutary marginal effects to artists would be 2.3% to the present value of their royalties while having little if any effect on the number of works created in Canada. This increase in value is not very significant. The alternatives proposed in the necessity test were either to provide funding to a program such as PLR or to cap fees charged by producers. Those alternatives would reduce the marginal benefit to lower than 2.3% if the benefit received from the program or fee cap is greater than 0 but less than a 2.3% benefit. The marginal benefit would actually become a negative value if the alternatives would produce more than a 2.3% gain for artists.

144 Idem.
145 Ibid. at 353
147 Ibid. at 1
On the other hand, the deleterious effects of the law are severe because they will deprive the public of works for an additional twenty years. Twenty years is sufficient time to have a significant impact on arts and culture and on the public as a whole.  

Finally, we also need to factor the probability of the government achieving its purpose and measure that against the probability of achieving the harm. The main purpose found was to ensure artists are being fairly compensated. The Hollander report assessed the possibility of a twenty-year extension and found that the contribution to artists’ compensation would be very insignificant. Therefore, it is unlikely that the marginal benefit produced by the twenty-year extension would achieve the government’s objective. On the other hand, the probability of harming the public through an additional twenty years of depriving the use of works is 100% because limiting access is precisely what the copyright extension accomplishes.

Under this assessment, the law must fail the balancing test as the harm to the public significantly outweighs the marginal benefit to artists and is highly unlikely to achieve the government’s stated objectives.

148 Many case studies support the contention that creativity and innovation stem from past works. See Robert Weisberg, “The Study of Creativity: From Genius to Cognitive Science”. (2010) International Journal of Cultural Policity. Vol 16, No 3 at 241. As these works are restricted from access, we deprive other artists of building on those works and producing their own new works.

Also see Robert W. Weisberg. “Creativity and Knowledge: A Challenge to Theories” in Robert J. Steinberg, eds, Handbook of Creativity. (New York: Cambridge University Press, 1999) 226, where a case study is made of classical, jazz and contemporary music. The creative process of Mozart, Charlie Parker and the Beatles involved immersion in the works of others. For the first 6 years of the Beatles recording careers over 90% of their songs were “cover” versions of songs written and recorded by others.

149 Supra Note 55 at 363
Conclusion

With the global trend of harmonizing intellectual property rights, there is enormous pressure on Canada to adopt a maximalist approach to copyright protection. Whatever treaties the government decides to enter into, they must be cautious and mindful of the constitutional constraints that limit the legislature’s ability to pass laws contrary to the Charter.

The purpose of this paper was to assess the constitutionality of the copyright extensions for sound recordings and performances found within the Economic Action Plan 2015 Act. Although Canadian courts have been reluctant in the past to consider the effects of copyright law on freedom of expression, the time is now ripe for the courts to assert their authority under the constitution. This paper did not set out to challenge the Copyright Act in its entirety, but rather to assess whether the copyright term extensions could pass constitutional scrutiny.

This paper demonstrated that copyright law is indeed in conflict with freedom of expression and that any time the legislature amends or imposes new burdens on expression, the government must justify those actions. In the case of the twenty-year term extension for sound recordings and performances, a constitutional analysis reveals that the law is disproportionate and cannot be saved under s.1 of the Charter.

This paper comes at a time when the current government is in the midst of negotiating the Trans Pacific Partnership Agreement. The latest version of the intellectual property chapter clearly demonstrates that the treaty will have a drastic impact to the current state of copyright law in Canada. The contracting parties to the agreement are obligated to amend their domestic copyright laws and offer copyright protection for life plus seventy years for most copyright. The current term in Canada is life plus fifty years. Other provisions which raise constitutional concerns are the obligations on contracting parties to impose criminal sanctions and terms for imprisonment for individuals who tamper with digital rights management software. Each of the changes to copyright should be made with consultations and studies. Most importantly, the government must make sure that the amendments operate within the confines of our rights and freedoms guaranteed by our constitution.
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Appendix A – Letter from PM to Graham Henderson

April 21, 2015

Graham Henderson  
President  
Music Canada  
85 Mowat Avenue  
Toronto, ON M6K 3E3  

Dear Mr. Henderson:

Thank you for your recent letter regarding the copyright term for sound recordings. I have reviewed this material carefully, and share your view that the current term of copyright protection for sound recordings falls short of what is required to protect artists and ensure they are fairly compensated for their work.

Please know that, as announced today in Budget 2015, our Government will extend copyright protection for sound recordings from 50 to 70 years. The extension will be incorporated into the Budget Implementation Act, and will be in effect immediately upon passage of the legislation.

The Government is committed to recognizing the valuable contribution that artists make to the cultural fabric of Canada. I believe this measure is important in fully acknowledging and protecting that contribution.

Once again, thank you for taking the time to share your views on this matter.

Sincerely,

Prime Minister of Canada