Copyright and Freedom of Expression: A Rawlsian Charter Analysis

by

Thomas Lloyd McConnell

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Thomas Lloyd McConnell 2018
Copyright and Freedom of Expression: 
A Rawlsian Charter Analysis

Thomas Lloyd McConnell

Master of Laws

Faculty of Law
University of Toronto

2018

Abstract

This thesis considers the relationship between copyright and freedom of expression in the Canadian legal context. It is argued that the existing Copyright Act constitutes an unjustified limitation of the Charter right to freedom of expression. In addition to analyzing and applying the relevant case law, the thesis suggests an alternative conceptual framework for assessing Charter rights violations. The proposed framework is derived from John Rawls's political philosophy, and requires judges to reason as though behind a Rawlsian veil of ignorance. It is argued that the Copyright Act limits freedom of expression, since most copyright infringing acts are attempts to convey meaning. It is further argued that the limitation cannot be justified under section 1 of the Charter, as the Act would not be selected over the available alternatives while under the veil of ignorance.
Acknowledgements

I would like to thank my thesis supervisor, Abraham Drassinower, for his guidance and helpful suggestions. I would also like to thank Aharon Barak for his enlightening course on proportionality.
Table of Contents

Acknowledgements........................................................................................................................................... iii

Table of Contents.............................................................................................................................................. iv

CHAPTER I: COPYRIGHT AND FREEDOM OF EXPRESSION........................................................................... 1

Freedom of Expression................................................................................................................................. 1
The Copyright Act........................................................................................................................................... 2
Does Copyright Violate the Charter? .......................................................................................................... 4
A Rawlsian Approach to the Charter ........................................................................................................ 5
Copyright Limits Freedom of Expression ................................................................................................... 6
The Purpose of Copyright........................................................................................................................... 8
Rational Connection................................................................................................................................. 9
Minimal Impairment................................................................................................................................... 11
Proportionality............................................................................................................................................... 12
Wrongful Reproductions............................................................................................................................. 14
Encouraging Authorship............................................................................................................................ 15

CHAPTER II: COPYRIGHT LIMITS FREEDOM OF EXPRESSION................................................................. 17

The Irwin Toy Test ......................................................................................................................................... 17
Applying Irwin Toy......................................................................................................................................... 20
Michelin......................................................................................................................................................... 23
Private Property........................................................................................................................................... 24
The Painting Analogy............................................................................................................................... 27
The Form/Content Distinction.................................................................................................................... 30
CHAPTER III: THE PURPOSE OF COPYRIGHT

The Oakes Test

The Economic Purpose of Copyright

The U.S. Approach

Copyright as the Engine of Free Expression

The Right to Make Other People's Speeches

Built-In Protections

Conclusion

CHAPTER IV: RATIONAL CONNECTION

The Rational Connection Test

Protecting Authors

Balancing Dissemination and Reward

The Purpose of Copyright, Restated

Expressive Diversity and Robust Debate

Conclusion

CHAPTER V: MINIMAL IMPAIRMENT

The Minimal Impairment Subtest

Fair Dealing

Government Incentives
Conclusion………………………………………………………………………………………….. 136

CHAPTER VIII: ENCOURAGING AUTHORSHIP………………………………… 138

Should Copyright Be Replaced? ................................................................. 139

A Return to the Veil of Ignorance……………………………………………… 142
Chapter I: Copyright and Freedom of Expression

Copyright and freedom of expression intersect on a daily basis. Every time someone forwards an e-mail, uploads a song, or shares an internet meme, both legal regimes are potentially implicated. Documentarians, hip-hop artists, and screenwriters are routinely required to obtain permission from copyright owners before creating and distributing their works, and risk facing serious legal consequences if they fail to do so. The intersection between these two areas of law raises important questions about each regime’s respective scope and purpose. Are the two legal regimes in tension, or are they complementary? Do authors have a valid legal right to prevent others from reproducing their works, or does this right violate the freedom of expression of those who want to incorporate those works into their own expressive activities? These are the questions that are addressed by this paper.

Freedom of Expression

Freedom of expression has been described as “little less vital to man's mind and spirit than breathing is to his physical existence”. Even before the Canadian Charter of Rights and Freedoms was enacted, Canadian courts recognized that the freedom to express opinions and share ideas was so fundamentally important to the functioning of Canadian democracy that it forms an unwritten constitutional principle. With the enactment of the Charter in 1982, freedom of expression was explicitly guaranteed in section 2(b), subject only to such reasonable limits as

---

3 Switzman, supra note 1. See also Reference re Secession of Quebec, [1998] 2 SCR 217.
“can be demonstrably justified in a free and democratic society”.

The Supreme Court of Canada has recognized three core values as underlying the freedom of expression guarantee, namely, “individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy”.

Government legislation that limits the right to freedom of expression, without sufficient justification, is constitutionally invalid. Since the enactment of the Charter, a wide variety of laws, including laws affecting the languages used on public signs, the advertising activities of dentists, referendum campaign expenditures, and the willful spread of false news, have all been declared constitutionally void. Although the protection given to freedom of expression in Canada is by no means absolute, it is widely viewed as one of the most fundamental rights in Canadian society, and legislation that interferes with the right is usually given careful scrutiny to ensure that it is adequately justified.

The Copyright Act

Section 3(1) of the Copyright Act grants copyright owners the exclusive right to reproduce, publicly perform, and publish (if unpublished) protected works of authorship. Those who do so without the copyright owner’s permission risk both civil and criminal sanctions,

---

4 Charter, supra note 2, s. 1.
6 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 52(1).
12 RSC 1985, c 42 [Copyright Act].
including injunction, damages, accounting of profits, delivery up of offending materials, fines, and imprisonment.\(^{13}\) There are a number of exceptions to copyright infringement, including fair dealing for the purpose of research, private study, education, parody or satire, criticism or review, and news reporting.\(^{14}\) The fair dealing exceptions allow users to substantially reproduce a work of authorship, without permission, for one of the enumerated purposes, if done in a manner that the court considers “fair”.\(^{15}\) It is also well established that copyright does not protect ideas, but rather only the manner in which those ideas have been expressed by the author (the idea/expression dichotomy).\(^{16}\)

Since copyright infringement often occurs in the context of an expressive act, such as the public performance of a song or the dramatization of a novel, there would seem to be an obvious conflict between copyright and freedom of expression.\(^{17}\) The issue, however, has been given very little consideration by Canadian courts. There has only been one decision, at the trial level, that has given a detailed analysis of the relationship between copyright and freedom of expression, and the decision arguably has some serious analytical shortcomings.\(^{18}\) There is also relatively little commentary addressing the issue from a specifically Canadian legal perspective.\(^{19}\)

\(^{13}\) Ibid. ss. 34(1) and 42(2.1).
\(^{14}\) Ibid. ss. 29, 29.1 and 29.2.
\(^{18}\) See Bailey, J. “Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Copyright Reform Process”, In the Public Interest: The Future of Canadian Copyright Law, Michael Geist, ed.,
Does Copyright Violate the Charter?

In this paper, I argue that the broad economic copyright granted by section 3(1) of the Copyright Act constitutes an unjustified limitation of the Charter right to freedom of expression. My analysis generally follows the framework that is used by Canadian courts when considering Charter rights violations, asking first whether the Act does, in fact, limit freedom of expression, before moving on to a consideration of each stage of the proportionality analysis as set out in R. v. Oakes. Although the argument is generally focussed on the relevant case law, I also engage in a critical reassessment of the law at various points throughout the paper. The ultimate goal is to offer a compelling account of how the conflict between copyright and freedom of expression should be understood and resolved in the Canadian legal context, rather than to predict of how it would be resolved under existing black letter law. As such, various well established doctrines and conceptual frameworks are, after careful consideration, set aside so that the analysis can proceed using a reimagined approach to rights protection which, I argue, is better aligned with the text and underlying spirit of the Charter.

That said, my analysis is primarily focused on the Copyright Act as it currently exists. Although some consideration is given to possible amended versions of the Act, the primary aim of the paper is to argue that the Act in its current form is constitutionally unsound.


A Rawlsian Approach to the Charter

A major focus of the paper is to propose an alternative conception of how Charter rights, such as freedom of expression, should be protected. More specifically, I propose an approach to section 1 of the Charter that is derived from John Rawls's political philosophy, and which I argue provides a better explanation of how the Charter mediates between the collective interests embodied in a government action and the individual interests protected by a constitutional right, in comparison with the standard conceptual framework that is often employed by Canadian courts.

Under my proposed approach, a Charter limitation is justified under section 1 when those who are subjected to the limitation would have agreed to impose it on themselves under fair conditions. To model these conditions, I use Rawls's concept of the veil of ignorance, which is a mode of reasoning in which the decision maker (e.g. a judge) is forced to reason as though they are unaware of their ultimate place in society, and could be assigned to any position with equal probability. If, under these conditions, the Charter limitation would be chosen over the available alternatives, then the limitation is justified under section 1. If, on the other hand, an alternative that is less restrictive of the Charter right would be selected while under the veil of ignorance, then the limitation is not justified.

Under my proposed approach, the ultimate question of whether or not the limitation would be selected under the veil of ignorance is asked during the final proportionality subtest. As such, the final subtest becomes the heart of the section 1 analysis, with the preceding stages being primarily concerned with gathering relevant information for consideration in the final
stage. My proposed approach to proportionality is set out in detail in Chapter VI. A brief summary of the argument presented in each chapter is provided below.

**Copyright Limits Freedom of Expression**

Chapter II addresses the question of whether the *Copyright Act* limits the right to freedom of expression. The chapter begins by applying the test for assessing alleged violations of section 2(b), as set out by the Supreme Court of Canada in *Irwin Toy Ltd. v. Québec (Attorney General)*. Since most copyright infringing acts are attempts to convey meaning, under the *Irwin Toy* test they *prima facie* fall within the scope of s. 2(b) protection. Although the test allows expressive activities to be excluded from protection based on their physical form (e.g. violence), copyright infringing acts of expression typically use the same kinds of physical forms as non-infringing acts (such as performing a play or selling a book). As such, there would not seem to be a basis under the *Irwin Toy* test for excluding copyright infringement from the scope of protection.

The chapter then turns to a consideration of the *Michelin* case, in which the Federal Court came to the opposite conclusion about whether the *Act* limits freedom of expression. In that case, the Court held that “[t]he *Charter* does not confer the right to use private property--the plaintiff’s copyright--in the service of freedom of expression”. But is the mere fact that copyright could be described as “private property” a sufficient reason to exclude copyright infringement from *Charter* protection? It is argued in chapter II that the term “private property”

---

21 [1989] 1 SCR 927 [*Irwin Toy*].
22 Supra note 18.
23 Ibid. at para. 79.
is capable of encompassing rights that are clearly inconsistent with freedom of expression, such as the right to prevent others from criticizing an author’s ideas. As such, if the freedom of expression guarantee is to have any meaningful content, it must set some limit on the government’s ability to assign private property rights. The mere fact that copyright could be described as a form of “private property” therefore does not, in itself, justify excluding it from the scope of section 2(b).

The chapter then turns to a more general discussion of the role that excluding forms of expression from the scope of s. 2(b) has in the *Charter* analysis. The suggestion in the case law that excluded forms of expression are "extremely repugnant" to the values underlying the freedom of expression guarantee is carefully considered. It is ultimately argued that, even if a very strict ‘extreme repugnance’ standard is used to identify excluded forms, the only possible effect that this would have is to allow laws that are aimed at curtailing legitimate social evils, but do so in a way that cannot be justified under s. 1, to avoid invalidation. More specifically, since reasonable limitations on extremely repugnant forms of expression, such as violent expression, will be justifiable under section 1, the only real impact of being able to exclude extremely repugnant forms of expression from the scope of section 2(b) is to allow limitations that are unreasonable, such as the death penalty, to avoid *Charter* scrutiny. As this is clearly inconsistent with the *Charter’s* textual requirement that freedom of expression only be subject to limitations that are demonstrably justified in a free and democratic society\(^\text{24}\), it is argued that the *Irwin Toy* test should be revised to remove the possibility of excluding some forms of expression from the scope of protection. If copyright infringement cannot be excluded from s. 2(b) on the basis of its

\(^{24}\) *Charter, supra* note 2, s. 1.
form, it follows that the *Copyright Act* limits freedom of expression, and must therefore be justified under s. 1 to avoid invalidity.

**The Purpose of Copyright**

Chapter III addresses the first stage of the section 1 analysis, which asks whether the purpose of s. 3(1) of the *Act* is sufficiently important to warrant limiting a constitutional right. Although the *Act* could potentially be seen as serving a number of different purposes, the Canadian case law primarily characterizes s. 3(1) of the *Act* as having an economic purpose. In particular, granting authors the exclusive right to reproduce their works is seen as providing an economic incentive to create works in the first place (other potential purposes of the *Act* are considered in chapter VIII). In light of the low threshold of importance that is typically required at this stage, it is argued that the *Act*'s economic purpose would likely be considered sufficiently important.

However, the *Act*'s purpose of encouraging authorship raises the possibility that it could potentially be seen as *enhancing* freedom of expression, rather than limiting it, as is the case in the United States. The chapter then turns to a consideration of the U.S. approach to the relationship between copyright and freedom of expression, to see if a similar approach might be appropriate in the Canadian context. It is argued that the *Act* could not be seen as enhancing the right to freedom of expression under Canadian law, since freedom of expression is primarily understood as a negative right in Canada. Furthermore, even if freedom of expression could hypothetically be seen as imposing a positive obligation on the government to encourage expression, it would still be improper to treat the fulfillment of the right’s positive aspect as
automatically justifying an interference with its negative aspect. This is because doing so would effectively render government interferences with freedom of expression immune to section 1 scrutiny whenever they happened to promote some forms of expression at the expense of others. The Act’s purpose of encouraging authorship therefore does not undermine the conclusion from chapter II that the Act limits freedom of expression and must be justified under section 1.

Rational Connection

Chapter IV addresses the rational connection stage of the section 1 analysis. Various articulations of the Copyright Act’s purpose are considered, in order to assess how effective the Act is at achieving those purposes. With respect to the suggestion from the Michelin case that the purpose of copyright is to protect authors, it is argued that the interests of some authors are, in fact, harmed by copyright. In particular, copyright prevents the authors of many derivative works from being able to create and distribute their works without permission from the original copyright owner (which may be difficult or impossible to obtain). As such, if the government’s purpose is to protect the interests of all authors, the Act as it currently exists is irrational and counterproductive.

With respect to the Supreme Court’s more recent articulation of the Act’s purpose as “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”\(^25\), there is also a rational disconnect between the Act’s purpose and its actual effects. In particular, the structure of the Copyright Act, in which the incentive to create works of authorship is provided by restricting the

free dissemination of works, requires a trade-off between the dual goals of encouraging
authorship and disseminating works. As authorship could be encouraged without restricting the
dissemination of works, such as by giving authors salaries or prizes, the Act is irrational insofar
as it requires an unnecessary trade-off between its two goals.

The chapter then proposes a more nuanced articulation of the Act’s purpose, which is
intended to avoid some of the rational connection problems identified above. It is suggested that
the Act could be seen as encouraging the creation of non-infringing works of authorship (which
would include works that do not borrow expression from other authors, or which do so either
with permission, or while falling within one of the exceptions to infringement). The Act could
furthermore be seen as using a decentralized, market-based mechanism for encouraging
authorship in order to avoid the potential pitfalls of having the government select which authors
to reward.

However, even with this more nuanced articulation there are reasons to doubt the strength
of the rational connection between the Act and its purpose. Many works of authorship would
likely be created even without the incentive created by copyright. It is clearly irrational to limit
freedom of expression in order to encourage the creation of a work that would have been created
anyway. It nonetheless seems likely that at least some commercial works of authorship would not
be created without the prospect of copyright protection. As such, the Act is rationally connected
to its purpose, though there are reasons to question the strength of that connection.
Chapter V addresses the minimal impairment stage of the section 1 analysis. The chapter begins by proposing an alternative conception of minimal impairment, which is partly derived from Aharon Barak’s approach (which he refers to as the “necessity test”). In particular, it is argued that Charter limitations should only fail the minimal impairment stage when there is a less restrictive alternative that is as effective at achieving the government’s purpose, while also having identical effects. By narrowly focusing on whether the limitation is necessary to achieve the government’s ends, it is possible to avoid importing balancing considerations into the analysis (these are properly taken into account in the final proportionality stage). It is furthermore argued that the primary purpose of the minimal impairment stage is not to determine whether a Charter limitation is justified, but rather to identify and describe various less restrictive alternatives (including alternatives that do not meet Barak’s strict necessity requirements) for possible consideration during the final stage.

The chapter then turns to a consideration of several less restrictive alternatives, including the option of simply expanding the exceptions to copyright infringement. This would, however, come at the expense of undermining the Act’s purpose. Since the incentive to create works is provided by granting an exclusive right over their reproduction, reducing the scope of that right (by expanding the exceptions to infringement) would necessarily reduce the strength of the incentive.

---

The next alternative that is considered is the distribution of tax revenue to authors based on the popularity of their works, as estimated by tracking technology that records activities such as plays, downloads, and streams. Although this scheme would maintain the incentive to create works of authorship, it has a number of potential downsides. For example, the tracking technology would raise privacy concerns, would likely be expensive to design and operate, and could be susceptible to being gamed so as to artificially inflate the popularity of a work.

The final alternative that is considered involves giving individuals the option to opt-out of the copyright regime, if they agree to devote a set percentage of their income to supporting authors. The collected money is pooled together into a fund (the “public culture fund”), and each participant is given the power to direct an equal portion of the fund to the authors of their choice via their income tax return. This proposal is intended to overcome some of the shortcomings of the popularity tracking scheme, while maintaining the incentive to create works of authorship.

It is ultimately concluded that, under the conception of minimal impairment proposed in this chapter, the Copyright Act satisfies the minimal impairment requirements. This is because all of the considered alternatives would have various effects that differ from those of the existing Act, such as requiring additional taxes. The less restrictive alternatives that have been identified are nonetheless relevant for consideration in the final proportionality subtest.

**Proportionality**

Chapter VI addresses the final stage of the section 1 analysis, proportionality. The chapter begins by offering a critique of the balancing metaphor that is often used to conceptualize the
proportionality subtest. It is argued that describing the proportionality subtest as a balancing exercise does not explain how an adequately neutral perspective is achieved, and also fails to explain why considering different alternatives can have an effect on the outcome. An alternative conception of the test is then proposed, which is derived from John Rawls’s political philosophy. In particular, it is argued that the proportionality subtest could be seen as an exercise of selecting between different alternatives for pursuing the government’s objective, while behind a Rawlsian veil of ignorance. If a less restrictive alternative would be selected while under the veil of ignorance, then the Charter limitation fails the proportionality subtest. This conception of the proportionality subtest overcomes the limitations of the balancing metaphor, and thus provides a more transparent and effective mode of reasoning for mediating between the collective interests embodied in a government action, and the individual interests protected by a constitutional right.

Before directly applying the proportionality subtest to the Copyright Act, the chapter turns to a consideration of the Act’s effect on freedom of expression. It is argued that the effect is relatively severe, since the time and skill required to communicate the ideas that are contained in a work of authorship, without substantially reproducing the work itself, make it unfeasible to do in most situations. As such, although copyright technically allows for the free flow of ideas (since ideas are not protected by copyright), in effect it substantially interferes with this process. Furthermore, since copyright increases the costs associated with accessing works of authorship, its overall effect is to systematically exclude the least wealthy members of society from public discourse. This seriously undermines the core values underlying the freedom of expression guarantee, including democratic discourse, the search for truth, and the self-fulfillment interests of both speakers and listeners.
The chapter goes on to question the Act’s effectiveness at encouraging authorship. Although there is not enough empirical evidence to conclusively determine how copyright affects the quantity and quality of authorship, there are good reasons to be skeptical about its supposed benefits. An obvious disadvantage of copyright is that it prohibits many forms of socially beneficial derivative authorship. It is also premised on an unrealistic view of human behaviour, which assumes that people lack a sense of fairness. If, in fact, most people do have a sense of fairness, and want to compensate authors whose works are beneficial to them, then it is possible that authors would be adequately compensated even without copyright.

The chapter then turns to a direct application of the proportionality subtest to the Copyright Act. It is argued that, while under the veil of ignorance, the public culture fund would be selected over copyright. This is because the downside risks associated with copyright, including being prohibited from creating works of authorship (if you are a derivative author) or being systematically excluded from public discourse (if you are one of the least wealthy members of society), are much worse than the downside risks associated with the public culture fund. Since a less restrictive alternative would be selected while under the veil of ignorance, it follows that the existing Copyright Act is not proportional, and therefore cannot be justified under section 1.

Wrongful Reproductions

In chapter VII, the analysis turns to a consideration of the non-economic interests that are protected by the Copyright Act. The purpose of this chapter is to assess whether the Act’s effects on these other interests might give us a reason to reconsider the conclusion from chapter VI.
Although many of the non-economic interests that are protected by copyright are undoubtedly important, such as an author’s interest in not being assumed to be complicit in an unauthorized commercialization of her work, these interests can be adequately protected by much narrower legal regimes. For example, if the government is concerned that unauthorized reproductions of an author’s work might create a false impression about what the author has said or done, this could be addressed by simply requiring unauthorized reproductions to be clearly labelled as such, rather than prohibiting them altogether.

Other non-economic interests that are protected by copyright are simply not serious enough to justify the Act’s effects on freedom of expression. For example, although an author may feel offended by unauthorized reproductions of her work, this is generally not harmful enough to warrant their prohibition (in much the same way that being offended by criticism would not warrant its prohibition). The chapter ultimately concludes that none of the identified non-economic interests provide a compelling case for overturning the conclusion from chapter VII that the Act is unjustified.

**Encouraging Authorship**

The final chapter (chapter VIII) briefly addresses the much broader question of what the government should actually do, if anything, to encourage authorship (as opposed to the much narrower question of whether or not the existing Copyright Act violates the Charter). It is argued that there are several potential downsides to the public culture fund, including the possibility that it could produce inefficient outcomes by incorrectly assessing the social benefit of authorship. Furthermore, if the public culture fund were to be implemented today, this would prioritize
encouraging authorship over more urgent concerns, such as providing basic economic security to those who are currently living in poverty. As such, it is argued that it would be inappropriate for the government to devote significant resources to encouraging authorship until the more basic needs of the least wealthy members of society have been met.
Chapter II: Copyright Limits Freedom of Expression

In order to establish a Charter violation, it must first be shown that the government has limited a protected right. Then it must be shown that the limitation is not justified under s. 1. This chapter deals with the first requirement. More specifically, it addresses the question of whether the Copyright Act limits the right to freedom of expression.

The chapter begins by introducing the framework that is used by Canadian courts to assess whether freedom of expression is limited by a government action (the Irwin Toy test), and then applies this test to the Copyright Act. The view that copyright infringement is excluded from the scope of section 2(b) protection, as held in the Michelin case, is then carefully considered.

The Irwin Toy Test

The test used by Canadian courts to assess whether a government action impairs the Charter right to free expression was first articulated by the Supreme Court of Canada in Irwin Toy Ltd. v. Québec (Attorney General). The analysis proceeds in two stages. At the first stage, it is determined whether the government action restricts an activity falling within the scope of section 2(b) protection. According to the Court, any activity that “conveys or attempts to convey a meaning… has expressive content and prima facie falls within the scope of the

---

27 Michelin, supra note 18.
28 Irwin Toy, supra note 21. In Irwin Toy, the Court was asked to consider the constitutional validity of legislation that prohibited commercial advertising directed at children. Chief Justice Dickson, writing for the majority, confirmed that advertising is a protected form of expression. The legislation was nonetheless found to be justified under section 1, and so constitutionally valid.
29 Ibid. at para. 40.
As constitutional entrenchment is intended to protect everyone’s freedom to express themselves, even those whose messages are “unpopular, distasteful or contrary to the mainstream”, expressive activities cannot be excluded from section 2(b) merely on the basis of the meaning being conveyed.31

The Court characterizes expression as having both a “content” and a “form”.32 The meaning conveyed by an act of expression is its content, and the physical act through which that meaning is conveyed defines its form.33 Although expressive activities cannot be excluded from protection on the basis of their content, the Court suggests that some forms of expression are excluded.34 The Court specifically identifies violence as an excluded form, but does not provide any general criteria for determining what other forms of expression might be excluded.35

If it is determined that the restricted activity is not protected by section 2(b), either because it does not attempt to convey meaning or because it uses an excluded physical form, then the right to free expression is not offended by restricting that activity. The Charter challenge therefore fails, and the analysis ends. If the restricted activity does fall within the scope of section 2(b), then the analysis proceeds to the second stage.36

30 Ibid. at para. 41.
32 Irwin Toy, supra note 21 at para. 41.
33 Ibid. at paras. 41-42.
34 Ibid. at para. 42. The Court has subsequently characterized threats of violence as excluded from protection, thus potentially undermining the form/content distinction. See R. v. Khawaga, 2012 SCC 69 at para. 70. The form/content distinction is examined in more detail below beginning at page 25.
35 Irwin Toy, supra note 21 at para. 42.
36 Ibid. at para. 45.
At the second stage, it is determined whether the purpose of the government action is to restrict expressive activities, or if this is merely an unintended consequence of the action.\textsuperscript{37} It is important to note that the term “purpose” as used here does not refer to the ultimate end that is sought by the government action, but rather refers to whether the action specifically targets activity that is expressive. According to the Court, “if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee”.\textsuperscript{38} A rule against handing out pamphlets would therefore be characterized as purposefully interfering with expression, since it takes aim at conduct that is expressive. This is true even if the rule’s ultimate aim is to reduce litter.\textsuperscript{39}

If it is found that the government’s purpose is to restrict expression, then the action necessarily limits freedom of expression and, to be constitutionally valid, must be justified under section 1.\textsuperscript{40} If, on the other hand, interference with expressive activities is merely an unintended effect of the government action, then a limitation of the right will only be found if it can be shown that the restricted expression promotes at least one of the values underlying the freedom of expression guarantee.\textsuperscript{41}

\textsuperscript{37} Ibid. at para. 47.
\textsuperscript{38} Ibid. at para. 51.
\textsuperscript{39} Ibid. at para. 49.
\textsuperscript{40} Ibid. at para. 47.
\textsuperscript{41} Ibid. at paras. 52-53. The Court identified noise control as an example of a government action whose purpose is neutral to expression, but which incidentally affects some expressive activities (such as shouting).
Applying Irwin Toy

To apply the Irwin Toy test to the Copyright Act, we must first determine whether the activity that is prohibited by the Act, namely copyright infringement, is an attempt to convey meaning. Section 3(1) of the Act defines copyright as "...the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...". The subsection goes on to list in paragraphs (a) through (j) a number of specific rights that are protected, such as the sole right to convert a dramatic work into a novel or other non-dramatic work.\footnote{42} Section 27 of the Act provides that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do."

A work of authorship, such as a novel, a film, or a painting, undoubtedly has meaning. An activity that conveys or communicates a work from one person to another will therefore convey meaning, and thus \textit{prima facie} fall within the scope of section 2(b). As such, insofar as the Act prohibits activities that convey works from one person to another, it interferes with expression that is \textit{prima facie} protected by the Charter.

It is clear that many of the activities that are prohibited by the Copyright Act involve conveying or communicating a work of authorship from one person to another. For example, publicly performing a work\footnote{43}, publishing a work\footnote{44}, presenting a work\footnote{45}, communicating a work

\footnote{42} Copyright Act, \textit{supra} note 12, s. 3(1)(b). \footnote{43} \textit{Ibid.} s. 3(1). \footnote{44} \textit{Ibid.}. \footnote{45}
by telecommunication\textsuperscript{46}, renting out a work\textsuperscript{47}, and selling a tangible object embodying a work\textsuperscript{48} all necessarily involve conveying or communicating the work from one person to another. Reproducing a work\textsuperscript{49} is also often done as part of an act of communicating the work from one person to another. For example, when one person e-mails an electronic copy of a work to another person, this act of communication involves reproducing the work. Insofar as the copyright owner's exclusive right to reproduce the work prohibits this activity, it interferes with the conveyance of meaning. The same applies to physical copies of a work that are reproduced for sale or for public or private distribution, as well as electronic copies that are reproduced through peer-to-peer file sharing networks and the like.

There are, however, some forms of copyright infringement that arguably do not involve the conveyance of meaning. For example, if someone were to make an unauthorized copy of a work of authorship, without distributing the copy to anyone else, this could arguably violate the copyright owner's exclusive right to reproduce the work, without having conveyed any meaning.\textsuperscript{50} Although many reproductions of this kind are excluded from the scope of copyright protection, including those falling under the legislated exceptions for reproductions for private purposes\textsuperscript{51}, recordings for later listening or viewing\textsuperscript{52}, and the making of backup copies\textsuperscript{53}, there

\begin{footnotes}
\footnotesize
\item[46] Ibid. s. 3(1)(e).
\item[47] Ibid. s. 3(1)(f).
\item[48] Ibid. ss. 3(1)(h) and 3(1)(i).
\item[49] Ibid. ss. 3(1)(j).
\item[50] Ibid. s. 3(1).
\item[51] Though it may be possible to characterize this act of reproduction as conveying meaning, such as by being part of the original act of communication from the author to the copier, or even as an act of communication from the copier to herself at a later time, it is not necessary to resolve this issue for the purposes of this paper.
\item[52] Copyright Act, supra note 12, s. 29.22.
\item[53] Ibid. s. 29.23.
\end{footnotes}
are likely some situations in which reproducing a work of authorship for personal use would violate the *Act.*

It is nonetheless clear that the *Act* does prohibit activities that convey meaning, regardless of the fact that it may also prohibit some activities that do not convey meaning. As such, the *Act* interferes with activities that *prima facie* fall within the scope of section 2(b) protection under the *Irwin Toy* test. Of course, any aspects of the *Act* that relate only to non-expressive activities would not interfere with expression, and, insofar as they could be separated from those aspects of the *Act* that do interfere with expression, would not run afoul of section 2(b). The remainder of this paper will focus only on those forms of copyright infringement that convey meaning, and are thus *prima facie* protected by section 2(b).

Under the *Irwin Toy* test, expressive activities can be excluded from the scope of section 2(b) if they have an excluded form, such as violence. Copyright infringing acts do not, however, generally have an unusual physical form that might be used to exclude them from protection. Rather, infringing acts typically have the same kinds of physical forms that are used by original authors to communicate their non-infringing works, such as speaking, distributing material copies of a work, or transmitting electronic copies over the internet. The only way to distinguish between infringing and non-infringing communicative acts is by referring to the content or meaning of those acts. Therefore, there does not appear to be any basis under the *Irwin Toy* test for excluding copyright infringing expression from the scope of section 2(b).

---

54 For example, a reproduction that involves the circumvention of a technological protection measure would not fall within the exception for backup copies that is set out in section 29.24 of the *Act.*
55 This conclusion is reassessed below, beginning on page 30.
It is also clear that the *Copyright Act* specifically targets expressive activities. In particular, s. 3(1) of the *Act* prohibits activities that are unambiguously expressive, such as publishing and publicly performing a work of authorship. The *Act* would therefore be understood under the *Irwin Toy* test as purposefully restricting expression, even if this is not the ultimate aim of copyright.\(^{56}\)

It would therefore appear relatively straightforward to conclude that the *Copyright Act* limits the right to free expression and, to be constitutionally valid, must be justified under section 1.\(^{57}\) This, however, was not the conclusion that was reached in the leading Canadian case on the intersection between copyright and freedom of expression.\(^{58}\)

**Michelin**

The *Michelin* case concerned the unauthorized use of Michelin’s Tire Man logo on union organizing materials, including leaflets and posters that depicted the Tire Man with his foot raised threateningly over an unsuspecting worker.\(^{59}\) Michelin sued the union for both copyright and trademark infringement, and was successful in the copyright claim.\(^{60}\)

---

\(^{56}\) The purpose of the *Copyright Act* is considered in chapter III.

\(^{57}\) This conclusion is generally accepted in the literature. See, for example, Bailey, Craig, and Fewer, *supra* note 19. Gendreau, *supra* note 19, however, suggests that copyright and freedom of expression do not conflict. Gendreau’s arguments are addressed below beginning at page 51.

\(^{58}\) *Michelin*, *supra* note 18.


\(^{60}\) *Ibid.* at paras. 3, 114. The trademark claim was unsuccessful because the union’s use of the logo did not constitute use of the logo as a *trademark*. 
As a defence, the union argued that, insofar as the Copyright Act prohibited parodies, it unjustifiably limited their Charter right to freedom of expression. The union suggested “reading down” the wording of the Act so as to include parody as a fair dealing exception. The trial judge, Justice Teitelbaum, was not receptive to this argument. Reasoning that “[t]he Charter does not confer the right to use private property--the plaintiff’s copyright--in the service of freedom of expression”, he held that the Act did not impair the union’s constitutional rights. Although he accepted that the union’s leaflets and posters had expressive content, he concluded that copyright infringement was a prohibited form of expression (akin to violence), and was thus excluded from the scope of section 2(b). As the Act did not interfere with protected expression, there was no need for justification under section 1.

Private Property

Justice Teitelbaum’s conclusion that the Charter does not confer the right to use someone else’s private property has intuitive appeal. After all, most Canadians would not be pleased to hear that a vandal has a constitutional right to break into their homes and spray paint the walls.

---

61 Ibid. at para. 77.
62 Ibid. at para. 77. The Act has been subsequently amended, and section 29 now includes parody as a fair dealing exception.
63 Ibid. at para. 79.
64 Ibid. at paras. 85-87. There is some ambiguity about the precise ratio decidendi of the decision. At different places in his reasons, Justice Teitelbaum writes that “the use of private property is a prohibited form of expression” (para. 88); “a person using the private property of another like a copyright, must demonstrate that his or her use of the property is compatible with the function of the property before the Court can deem the use a protected form of expression under the Charter” (para. 105); and “[t]he threshold for prohibiting forms of expression is not so high that use of another’s private property is a permissible form of expression” (para. 106). It is not the aim of this paper to fully canvas all of the arguments set out in the Michelin decision. The suggestion that private property is excluded from Charter protection has been singled out because it offers an interesting way to think through the problem of whether copyright infringement should be protected by section 2(b). For a discussion of some of the other aspects of the Michelin decision, see Bailey and Craig, supra note 19.
65 Ibid. at para. 79. Justice Teitelbaum did nonetheless provide some comments on section 1 in obiter at paras. 109-111.
But does the term “private property” provide an acceptable standard for distinguishing between protected and excluded forms of expression? Justice Teitelbaum does not provide a definition of “private property” in his reasons. It is nonetheless clear that he considers the term to encompass real property and personal property, in addition to copyright.  

Real property, personal property, and copyright share a number of characteristics. They each entitle the holder of the right to exclude others from engaging in specific activities, and are generally enforceable against all others. In the case of real property and personal property, the owner of a physical object, such as a building or a computer, is entitled to exclude others from physically interacting with that object. In the case of copyright, the owner is entitled to exclude others from engaging in various activities in relation to a work of authorship.

Although the three kinds of rights are broadly similar, they differ significantly in the kinds of activities over which they grant exclusivity. Real property and personal property are defined in relation to specific tangible objects, and only restrict acts of physical interference with those objects. The scope of these property rights is therefore limited to activities that occur within a narrowly bounded geometric space. In contrast, copyright targets expressive activities based on the meaning that is conveyed thereby (i.e. based on whether or not the activities reproduce or communicate a protected work), regardless of where those activities occur.

In order for Justice Teitelbaum’s conception of “private property” to embrace all of these rights, it must be defined quite broadly. It might, for example, be defined as any privately held,

66 Ibid. at paras. 89-90.
67 Copyright Act, supra note 12, s. 3(1).
68 As noted above, copyright may also target some non-expressive activities, such as reproducing a work for private use in some circumstances.
state enforced right to exclude all others from engaging in certain activities. This is roughly the
definition proposed by Felix Cohen in his well-known "Dialogue on Private Property". At a
minimum, Justice Teitelbaum's definition must be broad enough to encompass privately held
rights to prohibit others from expressing particular meanings.

Given the apparent breadth that Justice Teitelbaum gives to the term “private property”,
excluding the entire category from the scope of section 2(b) is, despite intuitive appeal, quite
problematic. Imagine, for example, that the Copyright Act were amended to do away with the
idea/expression dichotomy and the fair dealing exceptions. Under the amended Act, authors
would acquire exclusive rights over the ideas expressed in their works, and anyone wishing to
convey those ideas (e.g. for the purpose of criticism) would need permission from the copyright
owner.

It is immediately apparent that this amended version of the Act would be directly at odds
with the core values underlying the freedom of expression guarantee. Authors would have the
power to censor virtually all discussion of the ideas presented in their works, thereby seriously
undermining the free and open debate that is necessary to advance the search for truth. When
this power of censorship is exercised over political ideas, the very foundation of our democratic
system of government collapses.

If the freedom of expression guarantee is to have any meaningful content, it must set
some limit on the government’s ability to assign private rights of censorship. The blanket

---

69 9 Rutgers Law Review 357 (1954) at 373.
70 The search for truth is discussed in Ford, supra note 7 at para. 56.
71 The importance of free and open debate in a democracy is discussed in Switzman, supra note 1 at page 306.
exclusion of “private property” from the scope of section 2(b) fails to recognize this limit, and thus provides an inadequate explanation for why copyright infringement should be excluded from protection.

Of course, as Justice Teitelbaum has not defined the term "private property" in his reasons, it is possible that he would not have considered this amended version of copyright to be "private property". It is nonetheless clear that it would be untenable to exclude all copyright-like rights from the scope of section 2(b). Furthermore, irrespective of Justice Teitelbaum's reasons for grouping real property, personal property, and copyright together as "private property", there are good reasons why these rights should be considered separately, as is discussed below.

**The Painting Analogy**

How should we think about the relationship between freedom of expression and private property rights? In answering this question, it may be useful to consider an analogy that Justice Teitelbaum draws between copyright infringement and vandalism.\(^\text{72}\) According to Teitelbaum J., a vandal could not “credibly allege that freedom of expression gives him or her the right to subvert the content or message of [a] painting by physically drawing a moustache on the painting”.\(^\text{73}\) He suggests that we should be similarly dismissive of a copyright infringer who asserts the right to produce an altered copy of the painting, even though “[o]ur instincts might not be so certain” in the infringement context.\(^\text{74}\)

---

\(^\text{72}\) *Michelin*, *supra* note 18 at para. 103.

\(^\text{73}\) *Ibid.* at para. 103.

\(^\text{74}\) *Ibid.* at para. 103.
Why is it that our instincts about excluding copyright infringement from *Charter* protection are not as certain as our instincts about excluding vandalism? Consider the different interests that are at stake in the vandalism scenario compared to the infringement scenario. When the vandal physically draws a moustache on the painting, the owner of the painting’s ability to exert exclusive control over a physical possession is implicated, as is the painter’s ability to express herself. More specifically, when the vandal draws on the painting without the owner's consent, the owner is denied the ability to exert exclusive control over the painting as a physical possession, at least during the time that the painting is being physically manipulated by the vandal. In other words, in order to give the vandal legal permission to commit vandalism, it would be necessary to limit everyone else's right to exert exclusive control over their physical possessions.

The painter's ability to express herself is implicated because her act of expression is embodied in the physical painting. In other words, the specific form in which the painting has been presented by the painter conveys the message or meaning that the painter seeks to express. When the painting is altered without the painter's consent, her act of expression is obstructed, since the painting no longer conveys the painter's intended message. Although it remains possible for the painter to try to express herself again through another painting, if the vandal is given legal permission to alter her paintings without consent, then her attempts to express herself will always be liable to being obstructed. As such, giving the vandal legal permission to commit vandalism would limit everyone else's ability to express themselves (at least insofar as their expression is conveyed through a physical medium that is capable of being vandalized).  

75 The point here is not that the government has a positive duty to support expression, such as by protecting personal property rights. Rather, the point of this section is to emphasize the different interests
In contrast, when the infringer produces an altered copy of the painting, neither of these interests are affected. The original painting is left untouched, and so the owner’s right to exclusive control over the painting, as a physical object, remains intact. The painter’s ability to express herself is also unaffected, as her act of expression, as embodied in the painting, is unchanged. There therefore appear to be compelling reasons for excluding vandalism from the scope of section 2(b), which are not present with respect to copyright infringement.

The infringer’s activity does, of course, affect other interests. The distribution of a mocking copy of the painting could reduce the desirability of the original, thereby lowering its resale value at the owner’s expense. The painter may suffer emotional distress at having her work used to express a message that she does not agree with. She may also feel that the infringer has appropriated the value of her time and effort without providing fair compensation.

It is nonetheless clear that the interests that are at stake in the protection of real property and personal property are very different from those that are at stake in the protection of copyright. The intuition that vandalism should be excluded from the scope of section 2(b) presumably reflects an instinctive judgement that the interests protected by real property and personal property so clearly outweigh the freedom of expression benefits of vandalism that no explicit justification is needed. As copyright does not protect the same interests as real property

---

76 I do not mean to suggest here that the meaning of the painting, as understood by the audience, is unchanged by the infringer’s activity. Rather, I am referring to the painter’s ability to present her thoughts and feelings to the audience through a physical action (without supposing that the painter can or should have any ability to dictate how the audience understands or reacts to her action). This ability is impaired by the act of vandalism, but not by the act of infringement. If, however, the altered copy is falsely presented as though it is the author’s own, unaltered expression, this would undermine the author’s ability to express herself, since she will have lost the ability to distinguish her own expression from the infringer’s expression. This is discussed in further detail in chapter VII.
and personal property, our intuitions about vandalism do not apply to copyright infringement. This is not to say that the interests that are protected by copyright are necessarily less important than those that are protected by personal property and real property, but merely that they are different. As such, it would be inappropriate to exclude copyright infringement from the scope of section 2(b) based on our intuitions about vandalism.

As we have seen, not all government regulations that take the form of private property rights can be excluded from the scope of section 2(b). It is also now clear that different kinds of private property protect different interests, and vary in the manner and magnitude of their effects on freedom of expression. As such, the mere fact that a government regulation can be labelled as “private property” is not particularly helpful for determining whether it can be justifiably excluded from Charter protection. If copyright infringement is indeed excluded from the scope of section 2(b), this must therefore be based on reasons that go beyond the mere fact that copyright can be described as a kind of private property.

**The Form/Content Distinction**

How, then, do we determine whether copyright infringement is a protected form of expression? As noted above, the Court in *Irwin Toy* did not provide any general criteria for assessing whether a given form of expression is protected. One way to address the problem is by focussing on the distinction between form and content. As previously noted, infringing and non-infringing acts of expression generally use the same physical forms. As the *Irwin Toy* test only allows expression to be excluded based on its form, there does not appear to be any basis for

---

77 The interests that are protected by copyright are considered in Chapter III.
78 *Irwin Toy*, *supra* note 21 at para. 42.
excluding copyright infringement from the scope of protection. If non-infringing expression is protected, as it clearly is, then infringing expression must be protected as well.

On closer examination, however, this line of argument appears to be flawed. It relies on the notion that excluded expression, such as violence, is distinguished from protected expression merely on the basis of its physical form, and not its meaning. This, it turns out, may not accurately reflect how the distinction is drawn.

Consider the example of a tattoo artist, who expresses himself by injecting a pattern of ink into the skin of a patron. This act certainly conveys meaning, and so *prima facie* falls within the scope of section 2(b) protection. So long as the person being tattooed is a willing participant, no one would characterize the act as an excluded act of violence. But what if the tattoo were forcibly applied to the skin of an unwilling participant? In this scenario, the act would undoubtedly be characterized as violence, and would be excluded from *Charter* protection. But in both cases, the physical form of the act appears to be the same. Both physically consist of one person injecting a pattern of ink into the skin of another person. What distinguishes them as violent or non-violent is the presence or absence of consent.

Is consent an attribute of the physical form of an act of expression, or of its meaning? Certainly there are physical manifestations of consent, such as the exchange of a verbal agreement. But consent seems to most essentially reside in a kind of shared understanding between the parties. This shared understanding is arguably more closely related to the meaning of an act than to its physical form. The act of applying a tattoo to someone else's skin would, for example, have a significantly different meaning depending on whether it was done with or
without consent, even if the tattoo itself (i.e. the pattern of ink) was the same. If done with consent, the meaning would primarily emanate from the pattern of ink itself, and its placement on the recipient's body. Without consent, the act would also send a strong message of intimidation, objectification, and disrespect.

The role of consent in distinguishing between violent and non-violent acts of expression suggests that it may not always be possible to rely on physical form alone to distinguish between protected and excluded expressive activities, despite what was said in Irwin Toy. This example furthermore shows that the presence or absence of consent is sufficient to differentiate between protected and excluded forms, regardless of whether consent is conceived of as an attribute of form, of meaning, or of both.

The absence of permission from the copyright owner to reproduce a work of authorship is, of course, one of the defining elements of copyright infringement.\(^79\) As such, consent plays much the same role in distinguishing infringing expression from non-infringing expression as it does in distinguishing violent expression from non-violent expression. The fact that infringing expression seems to have the same physical form as non-infringing expression therefore does not preclude removing copyright infringement from the scope of section 2(b).

**The Scope of Section 2(b)**

In order to determine whether copyright infringement is protected, we must therefore move past the form/content distinction, and directly consider the appropriate standard that should

---
\(^{79}\) *Copyright Act, supra* note 12, s. 27(1).
be used for excluding expressive activities from Charter protection. Although the Supreme Court has not provided a clear articulation of this standard, in R. v. Keegstra it was suggested that the “extreme repugnance of [violent forms of expression] to free expression values” might justify taking the “extraordinary step” of excluding them from the scope of section 2(b).⁸⁰ This suggests that copyright infringement should only be excluded from protection if it is “extremely repugnant” to the values underlying the freedom of expression guarantee.

There are, however, some conceptual difficulties in applying this “extreme repugnance” standard. For example, it is unclear who bears the burden of showing whether a given form of expression is sufficiently repugnant to warrant exclusion. Under the Irwin Toy test, it is the party asserting a violation of her right to free expression who must show that the restricted activity is protected.⁸¹ But if the burden falls on the right-asserting party, this seems to require a presumption that all forms of expression are “extremely repugnant” unless proven otherwise. This is clearly inconsistent with the suggestion in Keegstra that excluding a form of expression from constitutional protection is an “extraordinary step”.

In practice, the Court does not seem to require either party to satisfy a particular burden of proof. The exclusion of violence is treated as a matter of common sense, apparently springing from the Justices’ own intuitions about the proper scope of protection.⁸² Likewise, in the Michelin case, Justice Teitelbaum’s exclusion of private property seems to rely heavily on his own intuitions.⁸³

---

⁸⁰ Keegstra, supra note 31 at para. 37.
⁸¹ Irwin Toy, supra note 21 at para. 41.
⁸² Ibid. at para. 42. See also Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at para. 20.
⁸³ Michelin, supra note 18 at para. 103.
Of course, no one would argue that the right to free expression should prevent the government from being able to prohibit acts of violence. But by carving out an exception without clearly articulating the basis for that exception, the Court has left open the possibility that other forms of expression could be excluded without having to meet any particular standard of justification. Judges are therefore empowered to remove expressive activities from the scope of protection merely on the basis of intuition. As intuition may be coloured by unexamined biases and assumptions, this creates the risk that government interferences with free expression that cannot be demonstrably justified in a free and democratic society (the section 1 standard) could nonetheless be found constitutionally valid.

Freedom of expression has been described as “essential to the working of a parliamentary democracy”\(^{84}\) and “little less vital to man's mind and spirit than breathing is to his physical existence”.\(^{85}\) The fundamental importance of this freedom, together with its entrenchment in the constitution, strongly suggest that the burden should fall on the government to justify limitations thereof. If the government is unable to provide a satisfactory justification, the judicial presumption should favour protection of the right.

But if the burden of justification falls on the government, it is unclear what role the exclusion of “extremely repugnant” forms of expression has in the constitutional analysis. The phrase “extremely repugnant” suggests that the bar for excluding expressive activities from constitutional protection is very high. As such, whenever the government is able to show that an expressive activity is extremely repugnant, they will presumably also be able to show that limiting the activity is justified under section 1. And if government interferences with extremely

\(^{84}\) Switzman, supra note 1 at page 326.
\(^{85}\) Ibid. at page 306.
repugnant forms of expression were always justified, then the ability to exclude these forms from constitutional protection would be redundant.

But is it true that interferences with extremely repugnant forms of expression will always be justifiable under section 1? Consider a law that institutes the death penalty for politically motivated violence. This law would presumably be very difficult to justify under section 1, in light of the severe and irreversible nature of the punishment. But showing that violence is extremely repugnant to freedom of expression values, and thus excluded from constitutional protection, would be quite straightforward. It therefore seems that the law would not run afoul of section 2(b), despite the fact that it limits an expressive activity, and does so in a manner that may not be justifiable under section 1.

It seems, then, that the primary effect of excluding “extremely repugnant” forms of expression from the scope of section 2(b) is that it allows the government to avoid constitutional invalidation of laws that are aimed at curtailing legitimate social evils, but which do so in a manner that is so contrary to the fundamental values of Canadian society that they are not justifiable under section 1.

This is a highly problematic result, as the Charter clearly manifests the intention that freedom of expression only be subject to limitations that meet the section 1 standard. If the government is able to limit expressive activities in a manner that is not demonstrably justified in a free and democratic society, the very purpose of the Charter is undermined.\footnote{One response to this line of argument would be to point out that the proposed death penalty law directly engages the section 7 right to life. If the law is subject to full Charter scrutiny under section 7, there is presumably no need for an additional round of scrutiny under section 2(b). This may be true enough in the}
Conclusion

It follows from the preceding discussion that excluding forms of expression from the scope of section 2(b), even when done on the basis of a strict “extreme repugnance” standard, is inconsistent with the basic scheme of the Charter. As such, it would be improper to exclude copyright infringement from Charter protection without undertaking a full analysis under section 1. Furthermore, as we will see in the following chapters, copyright infringing expression can, and often does, promote the core values underlying the freedom of expression guarantee. As such, a blanket exclusion of all copyright infringing expression on the basis that it is “extremely repugnant” to these values is untenable.

As a final note regarding the scope of section 2(b), it is worth briefly considering the outcome of conflicts between copyright and freedom of expression. In the Michelin case, Justice Teitelbaum ordered the delivery up or destruction of the union’s leaflets and posters. In other cases the consequences could be even more severe, including imprisonment. The idea that the state could order the destruction of your work of authorship without having to demonstrably

context of a case where both sections 7 and 2(b) are pleaded, but is not acceptable as a standalone proposition about the scope of section 2(b). It does not, for example, provide any justification for failing to consider section 1 in the context of a case where section 7 has not been pleaded. Indeed, there may exist laws that limit an “extremely repugnant” form of expression in a manner that is both unjustifiable under section 1, and outside the scope of every other Charter right. Under these circumstances, full constitutional scrutiny would only be available via section 2(b). Aharon Barak takes a similar view about the proper scope that should be given to constitutional rights. See Barak, supra note 26 at pages 37 to 44. One consequence of this position is that forms of expression, such as violence, which are currently excluded from the scope of section 2(b), should be reconceived as protected forms of expression whose limitation is usually easily justifiable.

87 One consequence of this position is that forms of expression, such as violence, which are currently excluded from the scope of section 2(b), should be reconceived as protected forms of expression whose limitation is usually easily justifiable.


89 Michelin, supra note 18 at para. 117.

90 Copyright Act, supra note 12, s. 42(2.1).
justify their actions should give pause to anyone who values freedom of expression, regardless of their ultimate views about the proper scope of section 2(b).\textsuperscript{91}

\textsuperscript{91} Where the “state” is understood as including the judicial branch of government when enforcing a federal statute such as the Copyright Act.
Chapter III: The Purpose of Copyright

In chapter II, it was argued that the Copyright Act should properly be seen as limiting the right to free expression. In order to determine whether this limitation violates the Charter, we must now consider whether the Act’s interference with free expression is demonstrably justified under section 1.

This chapter introduces the overall framework that is used to assess whether a limitation of a Charter right is justified (the Oakes test). It then focuses specifically on the first part of the test, which asks whether the purpose of the Act is sufficiently important to justify the limitation. The Act’s speech enhancing purpose raises some additional questions about the relationship between copyright and freedom of expression, which are addressed with reference to the approach that is taken in the United States.

The Oakes Test

The test that is used by Canadian courts to determine whether a limitation of a Charter right is justified under section 1 was first set out in R. v. Oakes. The first step of the test is to determine whether the purpose of the limitation is “of sufficient importance to warrant overriding a constitutionally protected right or freedom”. If the limitation has a sufficiently important

---

92 Supra note 20.
93 Ibid. at para. 69.
purpose, then the analysis proceeds to a “proportionality test”, wherein it must be shown that “the means chosen [to achieve that purpose] are reasonable and demonstrably justified”.\footnote{Ibid. at para. 70. The three components of the proportionality test (rational connection, minimal impairment, and proportionality) are addressed in chapters IV, V, and VI, respectively.}

According to the Court in \textit{Oakes}, the government’s objective must “relate to concerns which are pressing and substantial in a free and democratic society” in order to warrant overriding a constitutionally protected right.\footnote{Ibid. at para. 69.} This language suggests a relatively strict standard, which might only permit section 1 justification in limited circumstances. Subsequent case law has shown, however, that in practice, most government objectives will be found to be sufficiently important.\footnote{See L. Trakman \textit{et al.}, “\textit{R v. Oakes} 1986-1997: Back to the Drawing Board” (1998) 36 Osgoode Hall Law Journal 83 at 95.}

In the few cases where the government’s purpose has been fatal to section 1 justification, the impugned laws were effectively a direct attack on the right itself. In other words, the government’s purpose was simply to deny or limit the right, rather than to pursue some broader objective.\footnote{See Sharpe and Roach, \textit{supra} note 11 at pages 69 to 72. Section 1 justification has also failed at the first stage of the \textit{Oakes} test in cases where the government did not articulate any purpose for the limitation. See, for example, \textit{Friend v. Alberta}, [1998] 1 SCR 493.}\footnote{[1985] 1 S.C.R. 295 [\textit{Big M}]. See also \textit{Quebec (A.G.) v. Quebec Association of Protestant School Boards}, [1984] 2 SCR 66 and \textit{Zylberberg v. Sudbury Board of Education (Director)} (1988), 52 DLR (4th) 577 (Ont. CA).} For example, in \textit{R. v. Big M Drug Mart Ltd.}, a Sunday closing law whose purpose was to mandate religious observance could not be justified under section 1.\footnote{\textit{Big M}, \textit{supra} note 98 at para. 140.} As the very purpose of the law was to interfere with freedom of religion, characterizing it as a reasonable limit under section 1 would have amounted to “[justifying] the law upon the very basis upon which it is attacked”.\footnote{99} Interestingly, in \textit{R. v. Edwards Books and Art Ltd.}, a law having much the same
effect, but enacted with the secular purpose of providing a uniform holiday, was found to be constitutionally sound.\textsuperscript{100}

This case law suggests that virtually any purpose that is not merely a direct attack on Charter rights and their underlying values will be found to be sufficiently important to warrant limiting a constitutional right.\textsuperscript{101} Even laws that appear to be fundamentally inconsistent with a protected right, such as Sunday closing laws, may nonetheless pass this stage of the Oakes test if they aim to achieve a purpose beyond merely denying the right.

Is this permissive attitude toward the government’s reasons for limiting a constitutional right appropriate? In answering this question, it is important to note that the severity of the limitation is not at issue at this stage of the analysis. Nor is the impairment of the right being weighed against the value of achieving the government’s purpose.\textsuperscript{102} It could very well be the case that the government action has a relatively unimportant purpose, but only impairs the right slightly. Under these circumstances, the benefit of achieving the government’s purpose could outweigh the cost to the right. It would therefore be premature to conclude that a limitation is not justified merely because the government’s purpose seems unimportant. As such, the low threshold that is used when assessing the government’s purpose at this stage of the Oakes test seems appropriate.\textsuperscript{103}

\begin{enumerate}
\itemsep0pt
\item[100] [1986] 2 SCR 713.
\item[101] See Sharp and Roach, supra note 11 at page 71.
\item[102] See Barak, supra note 26 at pages 246 to 249.
\item[103] I argue in chapter VI that the final “proportionality” stage of the Oakes test should be seen as the heart of the section 1 analysis. The preceding stages, including assessment of the government’s purpose, can therefore be seen as merely precursors to the final analysis, in which relevant information is identified and gathered. Under this view, it would generally be inappropriate to conclude that a limitation is unjustified before the final proportionality analysis is undertaken.
\end{enumerate}
The Economic Purpose of Copyright

Although the purpose of copyright is subject to debate, it is generally seen in North America as an economic right that is given to authors as an incentive to create works of authorship. The standard economic justification posits that, because the cost of reproducing works of authorship is generally low, consumers will be tempted to acquire unauthorized, low-cost copies of works instead of purchasing them directly from authors. This makes it difficult for authors to recoup the expenses incurred in the creation of their works. Authors will therefore lack an economic incentive to produce works of authorship, even in circumstances where doing so would be beneficial to overall social welfare. This dynamic results in a kind of collective action problem, wherein everyone would be better off if authors were fairly compensated, but no individual wants to contribute to that compensation. By prohibiting unauthorized copying, copyright restores the economic incentive and addresses the collective action problem.

This economic rationale for copyright is reflected in the case law. For example, in the Michelin case, the purpose of the Act is described as “protect[ing] authors and ensuring that they are recompensed for their creative energies and works” More recent case law expressly describes s. 3(1) of the Copyright Act as an “economic right”, and articulates the purpose of the Act as “a balance between promoting the public interest in the encouragement and

---

104 See Drassinower, Abraham, “A Note on Incentives, Rights, and the Public Domain in Copyright Law”, Notre Dame Law Review 86.5 (September 2011) 1869 at page 1869. It is beyond the scope of this paper to consider and evaluate all of the possible justifications for copyright. For an overview of some of the different theories that are used to justify intellectual property rights, see Fisher, William W., "Theories of Intellectual Property" in Stephen R. Munzer (ed.), New Essays in the Legal and Political Theory of Property (Cambridge University Press, 2001) 168 [Fisher].
106 Michelin, supra note 18 at para. 109.
107 Théberge, supra note 25 at para. 12.
dissemination of works of the arts and intellect and obtaining a just reward for the creator”.

The legislature also appears to have recognized that copyright has an economic purpose, describing the Act as “an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation” in the preamble to the most recent amendment.

It is, of course, possible that, in the context of a Charter challenge, the government could attempt to characterize the Copyright Act as having a non-economic purpose. There is a well-developed literature on the purpose of copyright, including many theories that see copyright as protecting non-economic interests. Indeed, even in the quotations reproduced above there are phrases, such as “just reward” and “fair rules”, that could be interpreted as suggesting a blended purpose that reflects both economic and non-economic concerns. It is beyond the scope of this paper to fully canvass all of the ways that the Act’s purpose could be conceived, or to predict how government lawyers would characterize the Act’s purpose in the context of a Charter challenge. Rather, my primary aim is to evaluate whether the predominant economic rationale for copyright is able to adequately justify the Act’s interference with freedom of expression. It will therefore be assumed for the time being that the Act has an economic purpose roughly along the lines suggested in the Canadian case law.

As we will see in chapter IV, the precise articulation of the government’s purpose can have a significant impact on the proportionality analysis. To avoid unduly restraining the

---

108 Ibid. at para. 30.
109 Copyright Modernization Act, S.C. 2012, c. 20, preamble.
111 Some of the non-economic interests that are protected by copyright will be considered in chapter VII.
analysis in the following chapters, we will therefore leave our articulation of the economic purpose of copyright intentionally vague for the time being. It is nonetheless clear that, however the economic purpose is articulated, it would likely satisfy the first stage of the *Oakes* test. In particular, the *Act* is intended to address economic concerns regarding the compensation and encouragement of artistic work, and is not merely aimed at denying the right to free expression. In view of the low threshold of importance that is imposed at this stage of the analysis, this economic purpose would almost certainly be considered sufficiently important to warrant limiting a constitutional right.

It seems, then, that the analysis under this stage of the *Oakes* test is quite straightforward, and that we can quickly move on to the proportionality analysis. There is, however, something unique about the purpose of copyright that warrants further consideration. In particular, though copyright limits freedom of expression (as was argued in chapter II), it also has the seemingly contradictory purpose of *encouraging* expressive activities. This raises some additional questions about the relationship between copyright and freedom of expression that should be addressed before moving on to the proportionality analysis.

**The U.S. Approach**

If copyright is intended to encourage expression, it could be argued that the *Act* should properly be seen as *enhancing* freedom of expression, rather than limiting it. This is how the relationship between copyright and freedom of expression is understood in the United States. The U.S. Supreme Court has described copyright as the “engine of free expression”, on the basis
that it “supplies the economic incentive to create and disseminate ideas”. The Court has also suggested that copyright does not conflict with freedom of speech because it has “built-in free speech safeguards”, such as fair use and the idea/expression dichotomy, and because freedom of speech does not generally include the “right to make other people’s speeches”.

United States law is, of course, quite different from Canadian law, and so the approach taken in the U.S. is of limited relevance to Canada. The U.S. Constitution, for example, does not include a limitations clause similar to section 1 of the Charter. Perhaps as a result of this difference, U.S. courts have taken a unique approach to free speech issues which involves applying different levels of scrutiny to different categories of speech, and excluding some categories of speech from protection altogether. The Charter, with its express limitations clause, has allowed Canadian courts to take a more generous approach to the scope of protection. As a result, the focus of most Canadian freedom of expression cases is on section 1 justification. Nonetheless, the arguments used in the U.S. do have some intuitive resonance, and similar views have been endorsed by Canadian commentators. As such, they warrant consideration before moving on with the section 1 analysis.

113 Fair use is the U.S. equivalent to fair dealing.
115 U.S. Const. amend. I.
116 See Barak, supra note 26 at pages 502 to 521.
117 See Roach, Kent and David Schneiderman, “Freedom of Expression in Canada” (2013) 61 S.C.L.R. (2d) 429 at 469. Another important difference is the Copyright Clause in the U.S. Constitution, and the fact that it was adopted close in time to the First Amendment. See Eldred, supra note 112 at 219.
118 See Craig, supra note 19, in which it is argued that the key to understanding the relationship between freedom of expression and copyright is to see them both in light of their mutual goal of maximizing
Copyright as the Engine of Free Expression

Freedom of expression is predominantly understood in Canada as a negative right. In other words, the government has a duty not to interfere with expression (without adequate justification), but generally does not have a positive obligation to support or encourage expression. Laws, such as the Copyright Act, which are intended to encourage expressive activities, cannot logically be seen as promoting or acting as the “engine” of this negative right (i.e. an engine of the government’s duty not to interfere with expression). As such, the idea that copyright could serve as the “engine of free expression”, and thus be seen as enhancing freedom of expression rather than limiting it, would appear to have no basis under existing Canadian law. This is not to suggest that s. 2(b) prohibits the government from encouraging expression. Rather, the point here is merely that encouraging expression would not be understood under existing Canadian law as somehow fulfilling the s. 2(b) right.

It is nonetheless possible that Canadian courts could one day interpret section 2(b) as imposing a general obligation on the government to encourage expressive activities. One could imagine this occurring, for example, in the context of a future Charter challenge to the Copyright Act, in which the courts might look to the U.S. for guidance on how to conceive of the relationship between copyright and freedom of expression. It is therefore worth considering whether the Act’s fulfillment of an as-of-yet unrecognized positive aspect of the freedom of expression guarantee might cause us to question our previous conclusion that the Act interferes cultural flows and channels of communication. See also Gendreau, supra note 19, in which it is suggested that the idea/expression dichotomy prevents copyright from conflicting with freedom of expression.

120 The Court has, however, “left open the possibility that, in exceptional cases, positive action by government may be called for”. Ibid. at para. 26.
with section 2(b). In other words, if copyright could be seen as fulfilling a positive aspect of the right to freedom of expression, as it is in the U.S., might it be reasonable to adopt an approach analogous to that taken in the U.S., and conclude that the Act enhances section 2(b) rather than limiting it, such that no section 1 justification is required?

It is important to recognize that the Copyright Act necessarily interferes with the negative aspect of the right to free expression, regardless of whether it is also seen as fulfilling a positive aspect of the right. In particular, the Act encourages some kinds of expression (copyright protected expression) by prohibiting other kinds of expression (copyright infringing expression). We would therefore have to view fulfillment of the positive aspect of the right as somehow negating or cancelling out interference with the negative aspect of the right in order to be able to conclude that the Act does not limit section 2(b), and therefore requires no section 1 justification.

But would this be an acceptable way to conceive of the freedom of expression guarantee? To answer this question, it may be helpful to reconsider the hypothetical example introduced in chapter II, in which the Copyright Act was amended to grant exclusive rights over the expression of ideas. If the Act were amended in this way, it would certainly continue to provide an incentive for the expression of highly original ideas. Indeed, it would arguably provide a more powerful incentive than the existing Act, since copyright owners would be given a wider grant of

---

121 This is not meant to suggest that section 2(b) does or should impose a general obligation to encourage expressive activities. Rather, it is only raised as a possibility in order to fully consider all of the implications of characterizing copyright as the “engine of free expression”.

122 There are, of course, other ways to encourage expression without simultaneously prohibiting expression. Some of these alternatives are discussed in chapter V.
exclusivity. As such, the amended Act would presumably fulfill the positive aspect of freedom of expression at least as effectively as the current Act.

As we saw in chapter II, granting exclusive rights over the expression of ideas is entirely inconsistent with the core values underlying the freedom of expression guarantee. If section 2(b) is to have any meaningful content, it must be capable of invalidating legislation of this kind. But if fulfilling the positive aspect of the freedom of expression guarantee renders a government action immune from invalidity for interfering with the negative aspect of the right, then section 2(b) could not invalidate the amended Act. It follows that this approach to reconciling the positive and negative aspects of the right to free expression is not acceptable.

At the same time, it is clear that the speech enhancing effects of a government action could, in some circumstances, justify interfering with freedom of expression. For example, the speech enhancing effects of a rule requiring participants in a town hall meeting to express themselves in an orderly fashion might justify interfering with their freedom to shout over one another. Courts must therefore be able to distinguish between instances in which the speech enhancing effects of a government action justify interfering with freedom of expression, and instances in which they do not. Under the Canadian constitutional structure, the appropriate place to draw this distinction is under section 1.

The reason for this is quite simple: when the government interferes with expression, it is interfering with a Charter protected right, and should be required to justify the interference under section 1. This is true regardless of whether the government’s purpose is to encourage expression, to protect another constitutional right, or to pursue some other objective. If the
government’s objective is to satisfy a constitutional requirement, such as our hypothetical positive duty to encourage expression, this would undoubtedly be of relevance to the section 1 analysis. And if there were no reasonable alternatives for fulfilling the government’s constitutional duty, the interference would almost certainly be justified. But the mere fact that the purpose is constitutional in nature should not absolve the government from having to justify the interference under section 1. As we have seen, doing so would permit highly problematic government actions, such as our amended Copyright Act, to avoid much needed constitutional scrutiny. Indeed, it would allow virtually any government restriction on freedom of expression to be rendered immune to constitutionally invalidity merely by tacking on a speech-enhancing component.

It follows, then, that even if the Copyright Act could be conceived of as the “engine of free expression”, it would still be necessary to demonstrate that the particular means that have been chosen to serve this function are adequately justified. In Canada, the proper place to consider this justification is under section 1.

**The Right to Make Other People’s Speeches**

The idea that freedom of expression does not protect the “right to make other people’s speeches” would also appear to have no sound basis under existing Canadian law. Originality is not a relevant consideration under the Irwin Toy test, and is generally not taken into account when courts are asked to determine whether an expressive activity is protected by the Charter. For example, when the Supreme Court was asked to determine whether secondary picketing is a protected form of expression, they did not inquire into the degree of originality of the...
picketing. Had they done so, they likely would have found that picketing is a very unoriginal form of expression. Indeed, part of what makes it effective as a means of communication is that it involves a large group of people delivering a unified message. When an individual protester participates in a chant that someone else has authored, she is quite literally delivering someone else’s speech. But no Canadian court would suggest that this lack of originality is a reason to exclude her expressive activities from Charter protection.

Even the Michelin decision recognized that an expressive activity need not be “original” in order to count as expression under section 2(b), and that “it is sufficient if there is an attempt to convey meaning”\textsuperscript{124}. The reason that copyright infringement was excluded from protection was because copyright is a kind of “private property”, and not because infringing expression is insufficiently original. The exclusionary rule in Michelin would not apply, for example, to the unauthorized distribution of a work whose term of copyright protection had expired (and so was no longer subject to a private property right). The English teacher who recites a Shakespearean sonnet in class is thus protected by section 2(b), even under the restrictive approach to freedom of expression used in Michelin.

Not only does the exclusion of unoriginal expression have no basis under existing Canadian law, it is also fundamentally inconsistent with the values underlying the freedom of expression guarantee. The degree of originality of an act of expression does not dictate its importance to the search for truth, democratic discourse, or self-fulfillment. Participating in an act of protest might have a significant impact on all three of these values, despite being highly

\textsuperscript{123} Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156.
\textsuperscript{124} Michelin, supra note 18 at para. 85.
unoriginal. And reciting a Shakespearean sonnet surely provides a more enriching educational experience than reading the average English teacher’s self-penned poetry. To exclude expressive activities from Charter protection merely because they are insufficiently original would be to abandon the very principles which animate freedom of expression law in Canada.

It is, of course, possible that limiting unoriginal expression might be justified in some circumstances. And although the degree of originality does not determine whether or not an act of expression promotes the values underlying the freedom of expression guarantee, it may be a relevant consideration when assessing whether a given limitation is justified. For example, a law which prohibited all expressions of original thought would likely be more burdensome on the right to free expression, and thus more difficult to justify, than a law which only prohibited expressive acts that were devoid of original thought. Under the Canadian constitutional structure, the appropriate place to consider whether a limitation is adequately justified is under section 1.

**Built-In Protections**

The last argument from the U.S. that we will consider here is the idea that copyright doctrines such as fair dealing and the idea/expression dichotomy are “built-in free speech protections” that prevent copyright from conflicting with freedom of expression. As with the previously considered arguments, this one also appears to be inconsistent with existing Canadian law.

---

125 Educational expression is, of course, relevant to both the search for truth and self-fulfillment. It would also be relevant to democratic discourse in at least some circumstances.

126 As Neil Netanel has pointed out, the idea that the First Amendment does not protect the “right to make other people’s speeches” is also inconsistent with U.S. jurisprudence outside the copyright context. See Copyright's Paradox, supra note 114 at pages 176 to 177.
Although the idea/expression dichotomy and the fair dealing exceptions certainly reduce the amount of expressive activity that is prohibited by copyright, they do not eliminate the conflict altogether. The Copyright Act still prohibits the unauthorized communication of works in circumstances that fall outside the ambit of the legislated and common law exceptions to infringement. Indeed, if these exceptions extended so widely as to permit the unauthorized communication of a work in all circumstances, copyright itself would effectively cease to exist.

The issue, then, is not whether copyright’s built-in limitations preclude a conflict with freedom of expression, but, rather, whether those limitations sufficiently restrain copyright’s interference with freedom of expression so as to permit constitutionally validity. Under Canadian law, the proper place to consider whether a limitation of a Charter right is sufficiently restrained is under the minimal impairment stage of the proportionality test.

It has nonetheless been suggested that, even in the Canadian context, the idea/expression dichotomy might prevent copyright from conflicting with freedom of expression. In particular, Ysolde Gendreau has argued that the Charter was probably designed to protect ideas rather than expression. And since copyright does not protect ideas, “it is likely that the spheres of protection do not really clash”.127

This characterization of freedom of expression does not, however, accurately reflect the law in Canada. The Supreme Court has clearly established that section 2(b) protects not only the freedom to convey abstract ideas, but also the freedom to choose the particular symbolic form in which those ideas are conveyed. For example, in Ford v. Quebec (Attorney General), the Court

---

127 Gendreau, supra note 19 at page 229.
held that section 2(b) protects the right to express yourself in the language of your choice.\textsuperscript{128} Legislation requiring exclusive use of the French language on public signage therefore interfered with the right to freedom of expression, even though it remained possible to convey the same abstract ideas in French that might have otherwise been written in English.\textsuperscript{129}

Furthermore, even if we were to conceptualize freedom of expression as only protecting ideas, the selection of particular symbolic forms (i.e. arrangements of words or other signifiers of meaning) for conveying those ideas would still need to be protected. This is because the words or symbols that are used to convey an idea are intimately connected to the idea itself. Making even a minor change to the wording will have an effect on the idea that is conveyed thereby. For example, if I were to describe this paragraph as being “important” to my overall argument, this would convey a slightly different idea than if I described it as “essential”. Even words that have identical definitions will differ in meaningful ways, such as their familiarity to the audience, their formality, and their connotations. It follows, then, that virtually every combination of words (or other symbols) will convey a different idea from every other combination, if only slightly. A restriction on the freedom to choose a particular combination of words or symbols is therefore necessarily a restriction on the freedom to express ideas.

It is of course true that a law prohibiting the use of a particular combination of words will generally impair freedom of expression less severely than a law that also prohibits the use of every other combination of words that could be used to express a similar idea.\textsuperscript{130} This is essentially what distinguishes the existing \textit{Copyright Act} from the hypothetically amended

\textsuperscript{128} \textit{Ford, supra} note 7.

\textsuperscript{129} The term “abstract idea” is used here to refer to a family of ideas that have the same general meaning.

\textsuperscript{130} However, as we will see in chapter VI, laws which technically allow for the expression of similar ideas using different words can nonetheless place severe restrictions on freedom of expression.
version discussed above. But the difference is one of degree, not of kind. Both laws interfere with freedom of expression, and so must be adequately justified in order to be constitutionally valid. In Canada, the appropriate place to consider whether an interference with freedom of expression is justified is under section 1.

Conclusion

The Copyright Act is generally understood as having the economic purpose of incentivizing the creation and dissemination of works of authorship. In light of the low threshold of importance that is required by the Oakes test, this purpose would almost certainly be seen as sufficiently important to warrant interfering with the right to free expression.

And although the Act is intended to encourage expression, and thus could potentially be characterized as the “engine of free expression”, this does not nullify our conclusion from chapter II that the Act interferes with the freedom of expression guarantee. Rather, in the Canadian context, the expression enhancing purpose of the Act, and its other characteristics which arguably limit the severity of the interference, are properly taken into account in the proportionality analysis under section 1. It is the first stage of the proportionality analysis, rational connection, that we turn to next in chapter IV.
Chapter IV: Rational Connection

In chapter III, it was argued that the purpose of the Copyright Act is to encourage authorship, and that this purpose would likely be seen as sufficiently important to warrant limiting the right to free expression. We now turn to the second stage of the section 1 analysis, which asks whether “the means chosen [to achieve the government’s purpose] are reasonable and demonstrably justified” (the proportionality test). This chapter focuses specifically on the rational connection portion of the test.

After introducing the rational connection test, the chapter turns to an assessment of the purposes of the Copyright Act as articulated in the case law, and the degree to which the Act itself is rationally connected to achieving those purposes. Based on this assessment, a more nuanced articulation of the purpose of copyright is proposed, which is then subjected to additional scrutiny.

The Rational Connection Test

The proportionality stage of the Oakes test involves three subtests: rational connection, minimal impairment, and proportionality. The rational connection subtest is considered below, and the minimal impairment and proportionality subtests are addressed in chapters V and VI, respectively.

---

131 Oakes, supra note 20 at para. 70.
132 Ibid.
According to the Court in *Oakes*, in order to satisfy the rational connection subtest, “the measures adopted [by the government] must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.”¹³³

The *Oakes* decision itself turned on the rational connection stage of the proportionality analysis.¹³⁴ The case concerned a criminal law which required those found guilty of possessing an illegal narcotic to prove that they were not also engaged in trafficking.¹³⁵ If unable to do so, they would be presumed guilty of trafficking, and subject to much harsher penalties (up to and including life imprisonment).¹³⁶

The Court found that the law was “aimed at curbing drug trafficking by facilitating the conviction of drug traffickers”¹³⁷, and that this was a sufficiently important purpose to warrant limiting a constitutionally protected right.¹³⁸ However, with respect to the rational connection test, the Court stated that “it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics.”¹³⁹ The law could have given rise to “unjustified and erroneous convictions for drug trafficking of persons guilty only of possession”¹⁴⁰, and therefore failed the rational connection test.¹⁴¹

¹³⁷ *Ibid.* at para. 73.
The Court in *Oakes* required a relatively high degree of rational connection between the law and its purpose, and most subsequent case law has taken a less onerous approach.\(^{142}\) Arguably, the concerns raised by the Court in *Oakes* relate more directly to the minimal impairment and proportionality subtests than they do to rational connection.\(^{143}\) For example, the fact that the law applied to those in possession of a very small quantity of narcotics seems to relate more directly to the question of whether there was an alternative approach that impaired the right less severely, as opposed to the question of whether the law, as a whole, facilitated the conviction of drug traffickers. Insofar as traffickers will sometimes be in possession of narcotics, the law would seem to be rationally connected to facilitating their conviction. And this is true even if the law would also be expected to result in the conviction of many individuals who were not engaged in trafficking.\(^{144}\)

On the other hand, the fact that the law applied to individuals who were unlikely to be traffickers does speak to the rationality of the decision to apply the law to those individuals. And the fact that a law limits *Charter* rights in circumstances where doing so does not significantly advance the law’s purpose is certainly relevant to the overall question of whether the law is reasonable and demonstrably justified. Depending on how the different subtests of the proportionality test are conceived, these important considerations may not arise in either of the minimal impairment or proportionality stages.\(^{145}\) In order to ensure that all relevant

---

\(^{142}\) See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 228.

\(^{143}\) See Barak, *supra* note 26 at page 306.

\(^{144}\) *Ibid*.

\(^{145}\) For example, Aharon Barak suggests that the minimal impairment test asks whether there is an alternative that impairs the right less severely while also achieving the government’s purpose as effectively as the impugned law. *Ibid* at page 317. Under this conception, the law in *Oakes* would likely pass the minimal impairment stage, since there would undoubtedly be some traffickers who only possessed a small quantity of narcotics at the time of arrest. An alternative law which did not apply to the
considerations are taken into account, it is therefore appropriate to fully scrutinize every aspect of the relationship between a Charter limitation and its purpose under the rational connection stage.

I argue in chapter VI that the final proportionality subtest should be seen as the heart of the section 1 analysis. Under this conception, the purpose of the preceding stages is not to conclusively determine whether a Charter limitation is adequately justified, but rather is to identify relevant considerations for use in the final analysis. Fully scrutinizing the rational connection between the limitation and its purpose is useful because it can reveal instances in which the limitation appears to be arbitrary, overbroad, ineffective, or even contradictory to its underlying purpose. This information is relevant to the final proportionality analysis, and is also helpful for identifying alternatives for consideration under the minimal impairment stage.

Under my proposed approach to section 1, it would generally be inappropriate to conclude that a limitation is unjustified at the rational connection stage. But this does not mean that the analysis should proceed in a cursory manner, looking only to see whether the limitation furthers its purpose to some minimal extent. Rather, every aspect of the relationship between the limitation and its purpose should be carefully examined, to ensure that all relevant considerations are at hand for the final proportionality assessment.

possession of small quantities of narcotics would not be as effective as the law as enacted, and would therefore not need to be considered under the minimal impairment stage. Only limitations that could not conceivably further the government’s purpose in any way would fail at the rational connection stage. In this unusual circumstance, there would be nothing to balance against the Charter right during the final proportionality analysis, and so it would be logically impossible for the limitation to be justified.
With these comments in mind, we can now turn to a consideration of the rational connection between the Copyright Act and its purpose.

**Protecting Authors**

In the Michelin decision, the purpose of the Copyright Act was described as “protect[ing] authors and ensuring that they are recompensed for their creative energies and works”.\(^{147}\) Is the Copyright Act rationally connected to the goal of protecting authors?

Copyright certainly does protect the interests of some authors. An author whose work is protected by copyright will generally be able to prevent others from reproducing the work without permission. This gives the author leverage over those who want to produce or obtain a copy of the work, which can be used, for example, to extract payments.\(^{148}\) In the absence of copyright, those who wanted to produce or obtain a copy of the work would generally be free to do so without the author’s permission (provided they did not run afoul of some other legal regime, such as contract). Copyright therefore provides some authors with a useful tool for advancing their own self-interest vis-à-vis those who might otherwise produce or obtain unauthorized copies.

But the protection that copyright offers to these authors often comes at the expense of other authors. In particular, in many, if not most, circumstances, copyright is directly at odds


\(^{148}\) In some circumstances, the author’s interests will be best served by simply refusing to grant permission, and using an infringement action or the threat of an infringement action to restrain an unwanted reproduction. See, for example, Vancouver Aquarium Marine Science Centre v. Charbonneau, 2016 BCSC 625, in which a copyright claim was used to suppress the distribution of a video that was critical of the copyright owner.
with the interests of authors whose works substantially reproduce the works of others (i.e. the authors of derivative works). Examples of derivative works include hip-hop songs that sample musical elements from pre-existing recordings, films and plays that are adapted from pre-existing novels, and documentaries that incorporate pre-existing footage.  

Although some of these works will be permitted under the fair dealing exceptions, many of them will not. For example, an unauthorized film adaptation of a novel, which is not for the purpose of parody or satire, will infringe copyright in Canada. Furthermore, even if the adaptation is for the purpose of parody or satire, it will still constitute copyright infringement if a court decides that the filmmaker’s use of the novel was not “fair”. For those authors whose works infringe someone else’s copyright, the Act not only fails to protect their interests, but indeed is directly contrary to their interests.

It is, of course, true that some authors of derivative works will be able to secure permission from the copyright owner to create and distribute their works. There are, however, many obstacles that can prevent derivative authors from being able to obtain permission. For example, the derivative author may be unable to determine who owns the copyright in the original work. This can be a significant problem, as there is no requirement to register copyright ownership in Canada. And even if the owner can be identified, there is no guarantee that they will even respond to a license request, let alone grant permission for a fee that the derivative
author can afford. In some circumstances, the owner may be unwilling to grant permission at any price. This might occur, for example, if the owner of the copyright in the original work views the derivative work as offensive or otherwise aesthetically displeasing.

These obstacles will prevent many potential authors of derivative works from being able to produce and distribute their works. Indeed, if we assume that most potential authors of derivative works are low profile individuals of meagre means, who would be interested in adapting or borrowing from culturally mainstream works produced by large corporations, then it is likely that copyright prevents the production of most of the derivative works that would otherwise be produced. The large corporate owners of popular mainstream works have little incentive to entertain, let alone grant, requests from low profile derivative authors who are unable to pay significant licensing fees. In view of the unlielihood of obtaining permission, one would expect that most authors will rationally choose not to waste their time and effort developing artistic projects that adapt or re-imagine a pre-existing copyright protected work. Indeed, even authors who are backed by large corporations will be wary of taking on projects that require permission from a copyright owner. For example, the creators of the Disney film Moana specifically chose to base their film on public domain mythology instead of a copyright protected work, after their previous project was shelved because of problems securing rights.\footnote{Miller, Bruce. "Sioux City native Ron Clements preps new film for Disney studio" Sioux City Journal (August 22, 2013), online: Sioux City Journal <http://siouxcityjournal.com/entertainment/movies/sioux-city-native-ron-clements-preps-new-film-for-disney/article_90931eff-4f52-5bfe-8fed-20b21ac104b7.html>.}

One potential response to this line of argument would be to suggest that derivative authors are in some sense ‘lesser’ authors, or perhaps not really authors at all. If the creators of derivative works are not considered to be authors, then the negative effect that copyright has on
their interests would not contradict the claim that the purpose of copyright is to protect authors. This, however, is a very difficult argument to defend. As a matter of Canadian copyright law, it is clear that incorporating pre-existing expression does not prevent a work from being sufficiently original to be considered a work of authorship. According to the Supreme Court of Canada, an original work “must be the product of an author's exercise of skill and judgment”\(^{155}\), and need not be “novel or unique”.\(^{156}\) Under this standard, even highly derivative works such as summaries and compilations are considered to be works of authorship.\(^{157}\)

If we leave aside the legal definition of authorship and look to more common understandings, it is still clear that the creators of derivative works would be considered authors. Indeed, many of the most iconic and widely revered authors in history created works that were derivative in nature. For example, William Shakespeare, who is perhaps the most iconic author in the cultural imagination of our time, routinely borrowed heavily from pre-existing works.\(^{158}\) Many of his most widely known plays, such as *Romeo and Juliet*, would have violated modern copyright law.\(^{159}\) In the present day, popular artists such as Jeff Koons and Richard Prince are likewise known for repurposing the expression of others (and often running afoul of copyright law in the process).\(^{160}\)

Derivative works that are produced *with permission* from the original copyright owner are often among the most important works experienced and discussed in contemporary North

\(^{155}\) *CCH, supra* note 15 at para. 25.
\(^{156}\) *Ibid.* at para. 16.
\(^{157}\) *Ibid.* at para. 36.
American culture. For example, in 2016 more than half of the Academy Award nominees for best picture were adapted from an earlier work.\footnote{161} To suggest that these filmmakers are not real authors would clearly be an untenable claim, whether made from a legal or a conventional perspective (it is, after all, the filmmakers who are invited onstage to accept the awards). Under Canadian copyright law, these films could not have been made without permission from the original copyright owner.\footnote{162} And although these particular films did ultimately get made, there are undoubtedly many others that did not because of an inability to secure permission from a copyright owner.

Adapting, borrowing, and reinterpreting the expression of others is a well established mode of authorship. Indeed, the sheer number of historical and contemporary examples suggest that it is among the most common and important forms of authorship that human societies engage in.\footnote{163} To exclude the creators of derivative works from our conception of authorship would therefore be untenable.

It follows that there is a significant disconnect between the Copyright Act itself and the purpose of the Act as articulated in the Michelin case. If the government’s purpose is to protect all authors, the Copyright Act as it currently exists is an irrational way to do so, since it unambiguously hurts the interests of a significant proportion of authors. At best, the Act is rationally connected to the narrower purpose of protecting authors who do not create (and are not interested in creating) works that violate the copyrights of other authors. This includes authors

\footnote{161} The list of nominees can be found online at <http://www.oscars.org/oscars/ceremonies/2017>.
\footnote{162} Copyright Act, supra note 12, s. 3(1)(e).
\footnote{163} For additional examples, see “Chapter Two: From Mein Kampf to Google” in Copyright’s Paradox, supra note 114, and Landes and Posner, supra note 105 at pages 58 to 60. Presumably, the existence of copyright law makes this mode of authorship less prominent in contemporary society than it otherwise would be.
whose works do not substantially reproduce the works of others, as well as authors whose use of previous works is permitted under one of the exceptions to infringement. But the authors of derivative works that require permission from the original copyright owner, and who are unable to secure that permission, are excluded from protection. Indeed, the Copyright Act not only fails to protect the interests of these authors, but directly sacrifices their interests in favour of protecting the interests of other authors.

Balancing Dissemination and Reward

More recent case law characterizes the purpose of the Copyright Act as “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”. Authorship is encouraged and rewarded by granting authors exclusive rights over the reproduction of their works, and dissemination is promoted by limiting the scope of those exclusive rights (e.g. through the fair dealing exceptions, the idea/expression dichotomy, and the limited term of protection). But if the government wants to encourage both the creation and the dissemination of works of authorship, is the Copyright Act a rational way to pursue those goals?

Recall from chapter III that the mechanism which the Copyright Act uses to encourage authorship is by prohibiting unauthorized reproductions of copyright protected works. The aim is to prevent consumers from being able to produce and share low-cost copies of a work, so that they must instead purchase higher-cost copies from the author herself. This is intended to encourage the creation of works of authorship, but it also has important effects on their

---

164 Théberge, supra note 25 at para. 30.
165 Ibid. at paras. 31 and 32.
dissemination as well. In particular, by raising the cost of accessing works, copyright reduces the number of individuals who are willing and able to do so. In economic terms, this is simply the law of supply and demand: as the price of something goes up, demand goes down. Although the magnitude of this effect will vary depending on the circumstances, for most popular works of authorship, such as Hollywood films, one would expect there to be a relatively large group of individuals who would be interested in accessing the work at little or no cost (e.g. over a peer-to-peer network), but who would be unwilling or unable to buy a copy at the price demanded by the copyright owner. The mechanism which the *Copyright Act* uses to encourage the creation of works therefore comes at the expense of reducing their dissemination.

Although the structure of the *Copyright Act* requires the dual goals of encouraging authorship and promoting the dissemination of works to be traded-off against each other, there is no inherent need to do so. If the government wants to encourage authorship, this can be achieved without limiting the dissemination of works. For example, the government could offer authors rewards such as salaries, prizes, or tax incentives instead of giving them copyright protection. There are many different mechanisms that could be used to encourage authorship without limiting dissemination, some of which will be considered in chapter V. For present purposes, we need only notice that there is no inherent tension between the goals of encouraging authorship and promoting dissemination. It follows that, insofar as the *Copyright Act* requires an unnecessary trade-off between these goals, it is irrational as a means of pursuing them both.

The irrationality of using copyright to encourage both authorship and the dissemination of works can be illustrated by considering the fair dealing exception for the purpose of
education.\textsuperscript{166} This exception to copyright infringement permits the reproduction of copyright protected works, without permission from the copyright owner, if done 1) for the purpose of education, and 2) in a manner that is considered “fair”.\textsuperscript{167} The presence of this exception presumably reflects a belief that the wide dissemination of educational works, such as textbooks, is desirable and so should not be excessively restricted. However, by limiting the scope of copyright protection for educational works, the exception also reduces the incentive to create those works. This creates a highly irrational situation in which the strength of the incentive to create a work is inversely related to the value of its dissemination (lower value non-educational works are given more protection, and thus more encouragement, than higher value educational works).\textsuperscript{168} If the government’s aim is to encourage the creation of works of authorship, surely they would want to design the incentive mechanism to particularly encourage the creation of works whose wide dissemination is believed to be highly valuable. And if the government is equally concerned with promoting the dissemination of works, it would surely be irrational to use an incentive mechanism that functions by restricting their dissemination.

Insofar as the purpose of the Copyright Act is understood as promoting both the creation and the dissemination of works of authorship, there would therefore seem to be a significant disconnect between the Act itself and its intended purpose. Indeed, the Act is specifically designed to sacrifice the unimpeded dissemination of works in order to encourage authorship. Promoting the wide dissemination of works is therefore best understood as a countervailing

\textsuperscript{166} Copyright Act, supra note 12, s. 29.
\textsuperscript{167} See CCH, supra note 15 at para. 50. Although this case was decided before s. 29 was amended to include education as a fair dealing exception, the same two-part test is used for all of the listed purposes.
\textsuperscript{168} For a discussion of this issue, see Lunney, Glynn S. “Reexamining Copyright’s Incentives-Access Paradigm”, 49 Vanderbilt Law Review 483 at page 486.
interest which pushes back against the Act’s underlying rationality, rather than as a purpose for enacting the legislation in the first place.

**The Purpose of Copyright, Restated**

In chapter III, we left our articulation of the purpose of the Copyright Act intentionally vague, to avoid unnecessarily limiting the analysis at the rational connection stage. Now that we have identified some potential pitfalls of the articulations found in the case law, we can put forward a more nuanced articulation designed to avoid those pitfalls. As we have seen, the Copyright Act does not encourage all types of authorship, and indeed strongly discourages some types of derivative authorship. A rational articulation of the Act’s purpose would therefore specify that the Act is intended to encourage only some kinds of authorship (non-infringing authorship), while discouraging others (infringing authorship). We have also seen that the Copyright Act is not rationally connected to the goal of promoting the dissemination of works, as its basic structure involves limiting dissemination in order to encourage authorship. A rational articulation of the Act’s purpose would therefore specify that the Act is intended to encourage (some kinds of) authorship, and that this is achieved by prohibiting the unauthorized dissemination of works (in some circumstances).

But why does copyright take the form of a private property right? As mentioned above, authorship could be encouraged using any number of different incentives, of which granting exclusive rights over the reproduction of a work is but one example. Ideally, our articulation of the Act’s purpose will reflect the rationale behind choosing this specific form of incentive. The American legal scholar Neil Netanel argues that a private property right is used because it
empowers the public to choose which authors are supported, by facilitating decentralized, market-based decisions. In contrast, if the government were to subsidize authors directly, there is a risk that authors would need to curry the government’s favour in order to receive financial support. Copyright allows authors to be independent of the government (and other wealthy benefactors), and thus encourages expressive diversity and robust debate.

If we synthesize the foregoing into a statement of the Act’s purpose, it looks something like the following: to encourage the creation of non-infringing works of authorship through a decentralized, market-based mechanism, which allows the public (rather than the government) to choose which authors are financially supported. By articulating the Act’s purpose in this way, we can avoid some of the rational connection problems identified above. However, even with this more nuanced articulation, the strength of the rational connection between the Act and its purpose is questionable.

The historical record shows that a considerable volume of works were produced before copyright existed. This suggests that, even without copyright, many authors would continue to produce works of authorship. This expectation is further reinforced by the common perception of authors as being innately drawn to their vocation, rather than motivated by the prospect of financial reward. Indeed, the idea of the ‘starving artist’, who pursues her creative projects despite the ruinous financial consequences of doing so, is so common that it has become a cliché.

---

169 See “Chapter 5: Is Copyright ‘the Engine of Free Expression’?” in Copyright’s Paradox, supra note 114.
170 Landes and Posner, supra note 105 at page 22.
171 Jessica Silbey has found in her empirical research that the prospect of obtaining intellectual property rights rarely serves as an inducement for artists to engage in creative work. See The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property (Stanford, California: Stanford Law Books, 2015).
If the purpose of the *Copyright Act* is to encourage authorship, the *Act* is irrational insofar as it grants copyright protection over works that would have been created anyway. This is irrational in the same way that the reverse onus clause was seen as irrational in the *Oakes* decision. By limiting freedom of expression in circumstances where doing so does not further the government’s aim, the *Act* has an arbitrary or overbroad effect on the right.

Of course, it would likely be difficult (if not impossible) to conclusively determine whether a given work of authorship would have been created in the absence of copyright protection. And even if we accept that a large volume of works would still be created without copyright, it is likely that at least some commercially motivated works would not.\(^{172}\) It follows that the *Act* is rationally connected to the encouragement of at least that subset of works whose creation is dependent on the existence of copyright.

**Expressive Diversity and Robust Debate**

Neil Netanel’s idea that copyright supports expressive diversity and robust debate has not been expressly included in the above articulation of the *Act’s* purpose. It is nonetheless a laudable goal that could be seen as underlying the decision to use a marketable property right to encourage authorship. If the *Act* does, indeed, promote expressive diversity and robust debate, this would certainly be a relevant consideration in the proportionality analysis. There are, however, reasons to doubt the strength of the rational connection between the *Act* and the achievement of this goal.

\(^{172}\) The extent to which copyright actually encourages expression, and the kind of expression that it encourages, is discussed in further detail in chapter VI.
By making expressive works subject to a private property right, copyright has the effect of making access to works dependent on ability to pay. Indeed, preventing individuals from producing and exchanging copies of a work at little or no cost is precisely what copyright is intended to do. The result is that the poorest members of society are systematically excluded from public discourse, at least insofar as public discourse is conducted through channels of communication requiring payment to participate. Consider, for example, the Academy Award winning film *Moonlight*, which was released in 2016. In Toronto, the cost to see this film in theatre was $13.50, which is more than many of the poorest members of society would be able to afford. Copyright prohibits these individuals from accessing an unauthorized copy at lower cost (e.g. through a peer-to-peer network or a bootlegger), and thus prevents them from experiencing the film. As a result, many of the poorest members of society were unable to fully participate in the conversations that took place at work, at school, on social media, and in the newspapers following the film’s win at the Oscars.

If the poorest members of society are excluded from the channels of communication in which public discourse takes place, they will, of course, be unable to contribute to that discourse. Copyright thus has the effect of excluding the voices of the poorest members of society, and thereby reduces expressive diversity and robust debate. If one of the goals of copyright is to

---

173 The list of Oscar winners can be found online at <http://www.oscars.org/oscars/ceremonies/2017>.
174 The ticket price was found online at <https://www.cineplex.com>, accessed on March 23, 2017.
175 This is particularly troublesome considering that many of those excluded from the conversation belong to the marginalized groups who are depicted in the film, and who therefore may have had the most at stake in the film’s cultural interpretation, as well as the most insightful commentary.
176 The effect that copyright has on the least well off members of society is examined in more detail in chapter VI.
support expressive diversity and robust debate, subjecting public discourse to exclusionary property rights does not seem to be a particularly rational way to do so.\textsuperscript{177}

**Conclusion**

We have seen in this chapter that the *Copyright Act* is not rationally connected to protecting the interests of all authors, but rather, only those whose works do not infringe the copyrights of other authors. This excludes, and indeed prohibits, modes of authorship that have produced some of the most universally admired works of all time, such as Shakespeare's plays. We have also seen that the *Act* is not rationally connected to the goal of promoting the dissemination of works, but rather sacrifices the unimpeded dissemination of works in order to encourage authorship. This has the effect of systematically excluding the poorest members of society from public discourse, by making access to works of authorship dependent on ability to pay. When the purpose of the *Act* is articulated so as to take these effects into account (and thereby avoid a rational disconnect between the *Act*’s stated purpose and its actual effects), the result is not quite as laudable of a goal as might otherwise be suggested by the case law. And even with this more nuanced articulation, there are still reasons to doubt the strength of the rational connection between the *Act* and its purpose.

Nonetheless, the *Copyright Act* almost certainly acts as an incentive for the creation of at least some works of authorship, and is thus rationally connected to achieving that goal. The weaknesses in the connection between the *Act* and its purpose are nonetheless relevant to the

\textsuperscript{177} Neil Netanel likewise recognizes that copyright impacts the mix of speakers and speech, including the balance between wealthy and poor speakers. In his view, U.S. copyright law should be amended to better promote diverse speech, for example by changing its scope, duration, and exceptions. See *Copyright's Paradox*, supra note 114 at page 120.
proportionality analysis, and will be taken into consideration in the final proportionality subtest in chapter VI. But first we must consider the minimal impairment stage of the section 1 analysis, which is what we turn to next in chapter V.
Chapter V: Minimal Impairment

In chapter IV it was argued that the Copyright Act is rationally connected to the goal of incentivizing the creation of at least some works of authorship, although there are reasons to doubt the strength of that connection. In this chapter we turn to the next stage of the proportionality test, minimal impairment. After introducing the minimal impairment subtest, the chapter turns to a consideration of various less restrictive alternatives that could be used in place of the existing Copyright Act. An assessment is then made as to whether the Act is minimally impairing of the right to freedom of expression, in view of the available alternatives.

The Minimal Impairment Subtest

The minimal impairment subtest requires that the impugned government action “impair the right of free expression as little as reasonably possible in order to achieve the legislative objective”.178 This is generally seen as the most important subtest, and is often the focus of Charter litigation.179 The subtest asks whether there are any alternative measures that could be used to achieve the government’s objective while impairing the Charter right less severely. If a less restrictive alternative is available, the limitation risks being found unjustified under section 1. For example, in Ford v. Quebec (Attorney General), the Supreme Court held that a law requiring the exclusive use of French on public signage failed the minimal impairment test, since the government’s purpose of promoting and protecting the French language could have been

179 Sharpe and Roach, supra note 11 at pages 76 and 81.
achieved through less restrictive measures, such as by requiring French to be prominently displayed in addition to any other languages.\textsuperscript{180}

Although the phrase “minimal impairment” suggests that the least restrictive alternative must always be chosen, Canadian courts often give a generous degree of deference to the choice of the legislature. The Supreme Court has held that, if a law “falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.”\textsuperscript{181} The existence of a less restrictive alternative is therefore not always determinative, and cases are instead often decided based on whether the limitation seems reasonable given the circumstances.\textsuperscript{182}

Although the minimal impairment subtest is often decisive in \textit{Charter} litigation, there are some commentators who believe that it should have a less prominent role in the analysis. For example, Aharon Barak argues that minimal impairment should only be used to invalidate a law in very specific circumstances, namely, when there is a less restrictive alternative that achieves the government’s purpose \textit{as effectively} as the impugned law, and which is otherwise \textit{identical in its effects}.\textsuperscript{183} According to this view, the minimal impairment subtest should be narrowly focused on the \textit{necessity} of restricting a constitutional right. If there is an alternative that is just as effective at achieving the government’s purpose, but is less restrictive of the right, then it follows that the restriction is not \textit{necessary}. If, on the other hand, the less restrictive alternative is not as

\begin{footnotes}
\item[180] \textit{Ford, supra} note 7 at para. 73.
\item[181] \textit{Libman, supra} note 178 at page 605.
\item[182] See Sharpe and Roach, \textit{supra} note 11 at pages 81 to 83.
\item[183] Barak, \textit{supra} note 26 at pages 321 to 324. Barak refers to this stage of the proportionality analysis as the “necessity test”.
\end{footnotes}
effective as the impugned law, then the restriction is necessary, and the law should satisfy the minimal impairment subtest.

To illustrate how Barak’s conception of minimal impairment would work in practice, it may be helpful to reconsider the reverse onus that was at issue in *Oakes.* In the *Oakes* decision, the reverse onus was found to be irrational insofar as it presumed that those in possession of very small quantities of narcotics were engaged in trafficking. Although the Court did not specifically consider minimal impairment, the same reasoning would seem to apply to that subtest as well. In particular, the Court’s reasoning implicitly suggests a less restrictive alternative, in which the reverse onus only applies to those in possession of a large quantity of narcotics. In view of this alternative, it is likely that the impugned law would have failed the minimal impairment subtest, if the Court had applied that subtest using the standard Canadian approach. In particular, given the Court’s view that the reverse onus was irrational when applied to those in possession of small quantities of narcotics, it is highly unlikely that they would have characterized the law as falling “within a range of reasonable alternatives”.

Under Barak’s conception of minimal impairment, the analysis would proceed very differently. In his view, minimal impairment is not concerned with the reasonableness of a law given the available alternatives. Rather, the only relevant consideration is whether the impairment of the right is necessary to achieve the law’s purpose. Insofar as the impairment furthers the law’s purpose beyond that which would be achieved by the available alternatives, the impairment is necessary, and therefore satisfies the minimal impairment subtest. In the context of

---

184 *Oakes*, *supra* note 20 at para. 1. Although *Oakes* itself was not decided under the minimal impairment subtest, the facts are well suited to illustrating Barak’s conception of minimal impairment.
186 *Libman*, *supra* note 178 at page 605.
the *Oakes* case, the relevant question is whether the reverse onus helps to combat drug trafficking when applied to those in possession of small quantities of narcotics. As it is undoubtedly true that drug traffickers will sometimes possess only small quantities of narcotics, it seems likely that the law would, in fact, convict more drug traffickers than the less restrictive alternative. As such, the law would likely satisfy the minimal impairment subtest under Barak’s conception. This is true regardless of the fact that the law would also likely result in the conviction of many individuals who were not engaged in trafficking.

Barak further reduces the scope of the minimal impairment inquiry by requiring the less restrictive alternative to have identical effects to those of the impugned law.\(^{187}\) For example, if the less restrictive alternative is more expensive to implement than the impugned law, the minimal impairment subtest does not require the government to adopt that alternative. This is true even if the alternative is as effective at achieving the government’s purpose.

Barak limits the scope of the minimal impairment subtest in order to exclude “balancing considerations”, which in his view are properly left for the final proportionality subtest.\(^{188}\) When deciding between a right limiting law and a less restrictive, but not quite as effective, alternative, the court must necessarily weigh the costs and benefits of the law against those of the alternative. For example, in the context of the *Oakes* decision, the law’s cost of convicting innocent individuals, and the law’s benefit of easily convicting traffickers, must be weighed against the alternative’s cost of making it more difficult to convict some traffickers, and the alternative’s benefit of avoiding false convictions. Likewise, when a less restrictive alternative is more

---

\(^{187}\) Barak, *supra* note 26 at page 326.  
\(^{188}\) Ibid.
expensive than a right limiting law, the law’s cost to the right and its financial benefit must be weighed against the alternative’s benefit to the right and its financial cost.

By only considering less restrictive alternatives that are as effective as the impugned law, and which have no other differences, this balancing exercise can be avoided. Since the only difference between the alternative and the law is their relative burden on the right, there is nothing to balance against (and potentially justify) the law’s heightened burden. Under these circumstances, the court can therefore conclude that the law is unjustified without having to engage in any balancing.189

Although Barak’s conception of the minimal impairment subtest provides a clear account of its requirements, and of how it is delineated from the other subtests, it also significantly reduces the scope of the inquiry. It is relatively uncommon for a right limiting law to have a less restrictive alternative that is just as effective at achieving the law’s purpose, and is otherwise identical in its effects. As such, under Barak’s conception of proportionality, most of the work will end up being done under the final proportionality subtest.190

As noted in chapter IV, in my view the main purpose of the first three stages of the section 1 analysis is to gather relevant information for use in the final proportionality subtest.191

Although I agree with the narrow threshold test that Barak proposes for assessing invalidity, in

189 Barak suggests that the tendency to resolve proportionality issues under the minimal impairment subtest may reflect judicial discomfort with explicitly engaging in balancing. Ibid. at page 338.
190 According to Barak, the minimal impairment subtest is “important”, but is not the “heart” of the proportionality analysis. Ibid. at page 339. As noted in chapter IV, I share Barak’s view that the proportionality subtest is the most important part of the proportionality analysis. My view of how the proportionality subtest should be conceived is presented in chapter VI.
191 This, of course, is not the view taken under existing Canadian law.
my view the primary purpose of the minimal impairment stage is to identify less restrictive alternatives, including alternatives that do not meet Barak’s strict criteria. These alternatives can then be compared with the government’s chosen approach in the final proportionality stage. My suggested approach to the proportionality analysis, and the arguments in support thereof, are set out more fully in Chapter VI.

With these preliminary comments in mind, we can now turn to a consideration of the alternative approaches that the government could use to encourage authorship, and an assessment of whether the Copyright Act is minimally impairing of the right to freedom of expression in view of these alternatives.

**Fair Dealing**

In the *Michelin* decision, Justice Teitelbaum suggested that, even if the Copyright Act did limit freedom of expression, the Act was nonetheless minimally impairing because the scope of copyright protection is limited by the fair dealing exceptions.\(^\text{192}\) It is, of course, true that the Act limits freedom of expression to a lesser extent than it otherwise would if there were no exceptions to infringement. But the question asked by the minimal impairment test is *not* whether the law could be more restrictive than it already is (e.g. by removing the fair dealing exceptions). Rather, the test asks whether the government’s purpose could be achieved in a less restrictive manner. As such, the fact that the Act is less restrictive than it otherwise could be is irrelevant to the minimal impairment assessment.

\(^{192}\) *Michelin, supra* note 18 at para. 111.
As noted in chapter III, even with the fair dealing and other exceptions to copyright infringement, the Act necessarily restricts at least some expressive activities that involve the reproduction of an existing work of authorship. For example, paragraph 3(1)(c) of the Act gives a copyright owner the sole right to convert a novel into a dramatic work "by way of performance in public or otherwise". An unauthorized stage adaptation will therefore be prohibited in many, if not most, circumstances. Although some adaptations will fall within one of the exceptions (such as fair dealing for the purpose of parody or satire), many will not. Indeed, if paragraph 3(1)(c) is to have any effect, including specifically the reference to "performance in public", it must prohibit this kind of expression in at least some circumstances. If, for example, the fair dealing exceptions were hypothetically construed so broadly as to permit all unauthorized public performances of a novel, then the reference to "performance in public" in paragraph 3(1)(c) would be rendered meaningless. This would obviously be an unreasonable interpretation of the Act. As such, even though there may be some ambiguity about the scope of the exceptions to infringement, they could not reasonably be understood as permitting all expressive activities that reproduce an existing work.

As discussed in the previous two chapters, the purpose of the Copyright Act is to encourage the creation and publication of (some kinds of) works of authorship. This is achieved by giving authors exclusive rights over the reproduction, presentation, and communication of their works. These exclusive rights, though limited in nature, necessarily restrict the expressive freedom of those who want to incorporate copyright protected works into their own expression.\textsuperscript{193} The question to be considered at the minimal impairment stage, then, is whether

\textsuperscript{193} It is, of course, theoretically possible for the Copyright Act to be amended so only non-expressive reproductions of a work are prohibited. The point here is that the existing Act necessarily restricts expression, even with the various existing exceptions such as fair dealing. Furthermore, if amended in
the encouragement of authorship can be achieved in a manner that is less restrictive of freedom of expression than the current Act.

Some commentators who have written about the tension between copyright and freedom of expression suggest that the conflict can be addressed by expanding the exceptions to copyright infringement. For example, David Fewer has suggested that the listed fair dealing exceptions should be treated as exemplary rather than exhaustive, in order to better accommodate Charter considerations.\textsuperscript{194} However, as discussed in chapter IV, the structure of the Copyright Act is such that the exceptions to infringement necessarily undermine the Act’s purpose. In particular, the exceptions reduce the scope of the exclusive rights that are granted to authors, and thus diminish their incentive to create works. As such, expanding the fair dealing exceptions would reduce the Act’s burden on freedom of expression only at the expense of undermining the Act’s purpose.

One might respond by arguing that the existing scope of copyright is unnecessary to provide the required incentive, with the result that reducing the scope would not undermine the Act’s purpose. Indeed, as argued in Chapter IV, the rational connection between the Act and its purpose appears to be tenuous at best. Nonetheless, at least for that subset of works that would not have been created in the absence of copyright protection, the exclusive rights granted by the Act do serve as an incentive. As such, reducing the scope of the exclusive rights would presumably reduce the incentive, thus failing to achieve the Act's purpose as effectively as the existing Act (even if this effect may be marginal).

\begin{flushleft}
\textsuperscript{194} Fewer, supra note 19 at pages 233 to 234.
\end{flushleft}
A less restrictive alternative which merely expands the exceptions to copyright infringement would therefore not meet the requirements of Barak’s minimal impairment test, since it would likely not be as effective as the existing Act at encouraging authorship. In order to be as effective as the existing Act, the exclusive right to reproduce a work would need to be replaced by some other incentive.

**Government Incentives**

How else might the government go about providing an incentive to create works of authorship? Perhaps the most obvious way is to simply pay authors to create works. This is how the government encourages activities such as public education and healthcare. By using tax money to pay the salaries of educators and healthcare workers, the government is able to increase the amount of these activities well beyond that which would occur in the absence of government intervention.

Although we are accustomed to education and healthcare being incentivized in this way, it is important to notice that there is no inherent need to do so. Rather, it is perfectly possible for the government to instead give educators and healthcare workers exclusive rights over the products of their labour, in much the same way that authors are given exclusive rights over theirs. For example, teachers could be given the right to decide how their students’ educations are put to use. A former student might, for example, be required to negotiate a licensing agreement with their math teacher before taking an accounting job, or with their French teacher before taking a trip to France. Similarly, doctors could be given the right to control how the
improved health of their patients is utilized. The recipient of a knee replacement might, for example, be required to obtain permission from their surgeon before going out dancing.

These kinds of exclusive rights would allow educators and healthcare workers to capture more of the benefit of their labour, through licensing fees and the like, and would thus provide an added incentive to engage in that labour. Of course, they would also come with severe costs to individual liberty. If defined broadly, they would give educators and healthcare workers so much control over the lives of their patrons as to amount to a kind of slavery. If defined narrowly, their effects on individual liberty might be similar to those of copyright.

There are, in fact, many similarities between copyright and the hypothetical rights described above. In each case, the right is granted in relation to something that would not have existed but for the right-holder’s labour. For example, my ability to read would not exist without the labour of those who taught me, just as a work of authorship would not exist without the author’s creative efforts. As such, in each case the liberty that is sacrificed relates only to activities that, without the right generating labour, would not have been possible anyway. As such, one might be tempted to characterize the restrictions as being relatively insignificant, or, if not insignificant, then at least justified by their relationship to the right holder’s labour.

On the other hand, activities such as education, medical care, and authorship can have transformative effects on those who experience them. An educator who teaches a child how to read fundamentally alters that child’s experience of the world. Her life is similarly transformed when a doctor diagnoses and treats her diabetes. Although perhaps not as obvious, the same kind of transformation can occur from experiencing a work of authorship, such as a children’s story.
The story becomes part of the child’s consciousness, and affects the way that she understands and reacts to the world around her.

These activities therefore do not merely create opportunities that were otherwise unavailable, but rather transform the very identities of those who experience them. As such, when the government prohibits a filmmaker from producing a film adaptation of his favorite novel, for example, this is experienced as a limitation of self rather than merely the withholding of a benefit conferred by someone else’s labour.

Indeed, in many ways the entirety of one’s self is dependent on the labour of others. Most obviously, our very existence is dependent on our parents’ efforts to deliver and nurture us through childhood. But we are just as dependent on the contributions of many other individuals as well. Without the medical advances achieved through the efforts of countless individuals over the last 200 years, many of us would not have survived to adulthood. The places we were born, the languages we speak, and the activities that occupy our time are entirely dependent on the deeds (and misdeeds) of those who came before us. As such, if we are to have any independent will, we must be able to accept at least some of the benefits of the labour of others without becoming subject to their legal control.

Of course, rights to exclude can be limited in scope, thereby allowing some of the benefit of an activity to be taken without permission. In the copyright context, the scope of the right is limited by the idea/expression dichotomy, the fair dealing exceptions, and the term of protection, among others. But limiting the scope of the right in this way necessarily comes at the cost of reducing the incentive. As such, when the government uses a property right to encourage an
activity, they must always balance the strength of the incentive against the right’s cost to freedom. By paying educators and healthcare workers a salary instead of granting them property rights over the products of their labour, the government is able to avoid having to make this tradeoff. Of course, there are other tradeoffs that must be made when the government collects taxes and uses them to pay the salaries of educators, healthcare workers and the like. But the fact remains that the government has the choice to encourage authorship by simply paying authors, and thereby avoid the freedom of expression costs associated with copyright.

So why does the government not simply give authors a salary? As was suggested in chapter IV, one possibility is that it is preferable for authors to be independent of government. Copyright allows decisions about author compensation to be made by the market instead of the government, and thus permits authors to express critical viewpoints without risking their livelihoods. It also ensures that the incentive to create works is more closely aligned with the preferences of the public, rather than those of the government.\(^{195}\)

**Popularity Tracking**

Might there be a way to obtain the benefits of market-based decision making while avoiding the costs to freedom of expression associated with copyright? One way to do this is by compensating authors based on the popularity of their works. For example, Neil Netanel and William Fisher have proposed schemes in which tracking technology is used to estimate the

\(^{195}\) Similar arguments could, of course, be used in the education and healthcare contexts as well.
popularity of works based on indicators such as the number of plays, downloads, or streams.\textsuperscript{196} Tax revenue is then distributed to authors in proportion to the estimated popularity of their works. These schemes are market-like in that decisions about author compensation are made by individuals rather than government. In particular, individual decisions about whether to spend time experiencing a work are what determines the level of compensation. These schemes are intended to coincide with a scaling back of copyright protections, such as by removing the prohibition against unauthorized non-commercial reproductions over the internet.\textsuperscript{197} As such, they aim to maintain the incentive to create works of authorship, while at the same time reducing the freedom of expression burden.\textsuperscript{198}

Although these schemes could therefore be as effective as the existing Act, there are a number of potential downsides that may make us wary of implementing them in practice. For example, Netanel’s scheme would be funded by charging a levy on products and services whose value is enhanced by peer-to-peer file sharing, such as internet access, computer hardware, and file sharing websites.\textsuperscript{199} Unfortunately, this would likely have a disproportionate impact on the poorest members of society, who have less disposable income to spend on things like internet access. As such, the scheme could have the regressive effect of making it more difficult for the poorest members of society to access the internet.


\textsuperscript{197} Copyright’s Paradox, supra note 114 at page 208. Fisher’s scheme would be funded by either an income tax or a similar levy on goods and services used to gain access to music and film. See Promises to Keep, supra note 196 at pages 16-17.

\textsuperscript{198} The authors do not necessarily conceive of the matter in these terms. Neil Netanel, for example, does not view file sharing as a form of speech protected by the First Amendment. See Copyright’s Paradox, supra note 114 at page 46.

\textsuperscript{199} Ibid. at page 208.
The tracking technologies required to implement these compensation schemes also pose a number of serious problems. For one thing, in order to accurately sample the popularity of every work that is circulating over the internet, the technology itself would presumably need to be very complex. As such, a significant government expense would likely be required to produce and operate the system. The schemes also raise obvious privacy concerns, as they involve government monitoring of activities that take place on private computers. Depending on how the technology functions, it could also slow down or otherwise impede the operation of monitored computers and computer networks. The tracking system would also be liable to being gamed, so as to artificially increase the popularity of a work. For example, a computer virus could be used to inflate the compensation that is paid to an author by causing infected computers to repeatedly download or play the author’s work. This could lead to an arms race in which the government is forced to constantly monitor and update the tracking software in order to fend off increasingly sophisticated attempts to game the system.

Another consequence of these schemes is that the total amount of money that is devoted to compensating authors becomes disconnected from consumer choice. Whereas under a copyright model everyone decides for themselves how much money to spend on works of authorship, under a taxation model this decision is made by the government. As such, the amount of money that gets spent on compensating authors might end up being set at an economically inefficient level that is much higher than what individuals would choose for themselves. For this reason, the schemes could be characterized as being less market-like than copyright. Of course, copyright also takes something from individuals without their consent, namely their freedom of expression, and may likewise do so at an economically inefficient level.
A final criticism of these schemes is that, because they compensate authors based on popularity, they may end up incentivizing the wrong kinds of works. This is because the popularity of a work does not necessarily reflect the public’s true assessment of its merit. For example, a film with a few famous actors and a good advertising strategy may become quite popular, in the sense that it is downloaded and viewed by many people, even if most of those people are ultimately disappointed. If the filmmakers are compensated based on popularity alone, this will encourage them to make a similar film in the future (even if most of the audience would prefer if they did not).

Public Culture Fund

Many of the shortcomings of the popularity tracking schemes described above could be avoided by instead using a taxpayer directed public culture fund to encourage and reward authorship. The scheme would work something like the following. Individuals would be given the option to opt-out of the copyright system if they agree to devote a set percentage of their income to supporting authors. The system would be progressively funded, with high income earners paying more than low income earners. To avoid undue hardship, very low income earners would be automatically exempt from copyright, without having to pay anything into the

---

200 Word of mouth endorsements and published reviews will, of course, affect how popular a work becomes. As such, the popularity of a work is not entirely independent of the public’s evaluation of its merit, though the relationship between the two is likely complex.

201 This is similar to how copyright functions today. In particular, because copyright owners can legally prevent people from obtaining unauthorized copies, the decision to pay for a work is usually made before the work has been experienced. Author compensation therefore does not necessarily reflect the audience’s evaluation of the work’s merit.


203 I am not proposing any particular percentage in this paper. It could, for example, be set based on the amount of money the average person spends on artistic works under the current regime.
fund. The collected money would then be divided into equal portions, which each participating taxpayer would direct to the author or authors of their choice through their tax return.\textsuperscript{204,205}

This system would not require tracking technology, and would thus avoid many of the problems associated therewith. It would also reduce administrative costs by relying on the existing income tax system, and would avoid the regressive effects of imposing a levy on internet access. The risk that the fund might grow to an economically inefficient size is mitigated to some extent by the ability to opt-out, as people will simply make do with traditional copyright rules if the tax rate is set at an unreasonable level.\textsuperscript{206} Allowing people to opt-out of the scheme is also fairer to those who choose not to consume unauthorized reproductions.

Fraud may also be less of a concern compared to the popularity tracking schemes discussed above. As the fund would be collected and distributed entirely through the income tax system, fraudulent activities would leave a paper trail that would allow perpetrators to be identified with relative ease. In contrast, computer activities such as downloading and streaming may be much more difficult to connect to a particular person. Furthermore, the incentive to

\textsuperscript{204} Giving everyone control over an equal portion of the fund (rather than their individual contributions) ensures that there is an incentive to create works that are valued by low income individuals. It also helps to mitigate the risk of fraud, discussed below.

\textsuperscript{205} There would also need to be rules for corporations and other legal entities. For example, corporations could be required to pay a set percentage of their profits in order to be exempt from copyright. For entities that make little or no profit, there could be a requirement that a certain percentage of the individuals who make up the entity (e.g. employees, shareholders, etc.) are themselves copyright exempt, in order to prevent people from creating corporations with the sole purpose of avoiding copyright.

\textsuperscript{206} Maintaining a reasonable fund size could also be achieved by giving participating taxpayers a degree of democratic control over the scheme. For example, participants could vote each year on whether the size of the fund should increase or decrease. The government could also provide statistics showing how the money is being distributed, so that participants are able to make an informed assessment of whether the fund is operating fairly. Another interesting possibility would be to let participants choose their own level of contribution from a set of options, and to make this information public. This would create social pressure to contribute a fair amount, and might help to ensure that the total amount of money devoted to the fund does not exceed what the public perceives as fair.
commit fraud would be significantly lower, since each participant would only be able to control (and thus potentially misappropriate) a small portion of the fund. In contrast, popularity tracking could potentially lead to much larger payouts, since the entire compensation structure would be susceptible to fraudulent manipulation. For example, a well executed computer virus could make a work seem much more popular than it actually is, thus garnering a payout that far exceeds the average person’s contribution to the levy. There would, of course, need to be some safeguards in place, such as a prohibition against directing funds back to yourself, but the risks of large-scale, undetectable fraud are likely relatively low.

The incentive to produce works would also be more closely aligned with the public’s actual preferences, since compensation would be based on each individual’s considered judgement of a work’s merit. Popularity, though certainly important, would not be sufficient to garner a large payout for works that fail to live up to their hype. As such, over time the fund would be expected to produce more works that people actually value, and fewer works that are merely designed to become popular.

This scheme would significantly reduce the freedom of expression burden of copyright. For low income individuals, the freedom of expression restrictions are avoided altogether, since they are automatically exempt from copyright.\textsuperscript{207} For those with a higher income who opt-in to the public culture fund, the restrictions are also avoided. For those who remain within the

\textsuperscript{207}Although the freedom of expression burden of copyright would be avoided, it is likely that other minor restrictions on expression would be necessary for the system to operate effectively. For example, those who distribute unauthorized copies would be required to identify them as such in at least some circumstances, in order to avoid undercutting the market for those who remain within the copyright regime. The \textit{Act} would also need to be amended to make those who knowingly take possession of an unauthorized reproduction, and who are not exempt from copyright, liable for infringement.
copyright regime, though the restrictions on freedom of expression remain, their severity is lessened by the fact that they have been taken on voluntarily.\textsuperscript{208}

The public culture fund could furthermore be implemented in a way that maintains the same level of incentive as is provided by the current copyright regime. In particular, the percentage of income that is collected for the fund could be adjusted so as to ensure that authors receive the same total amount of money as they do currently. And since decisions about which authors to compensate are left to individual choice, authors would enjoy a similar degree of independence from government as they do now. As such, the scheme would be \textit{as effective} as the \textit{Copyright Act} at achieving the \textit{Act}’s purpose, and would therefore satisfy the first part of Barak’s minimal impairment test.

Of course, the public culture fund would \textit{not} satisfy the second part of Barak’s test, as it would have various effects that differ from those of the \textit{Act}. Most obviously, the fund would require an additional income tax, and would therefore alter the finances of both individuals and government. The popularity tracking schemes that were discussed previously would likewise fail the second part of Barak’s test for similar reasons.

**Conclusion**

We have seen in this chapter that there are several different ways that the government could reduce the \textit{Copyright Act}’s burden on freedom of expression, including alternatives that would be just as effective at achieving the \textit{Act}’s purpose. However, none of these alternatives

\textsuperscript{208} This is, of course, only true if the payment required to opt-out of the copyright regime is set at a reasonable amount, and only applies to those who can afford it.
would be able to fully achieve the Act’s purpose without having some other effect, such as requiring higher income taxes. Although we have not canvassed all of the possible alternatives, it seems unlikely that there are any that would meet Barak’s strict requirements. In particular, as it is the restriction on freedom of expression itself which provides the incentive to create works of authorship, any reduction in the scope of the restriction will presumably decrease the incentive (though the magnitude of the effect will be difficult, if not impossible, to determine). Replacing this lost incentive will require some other mechanism, such as cash transfers to authors, which will necessarily have various other effects.

As such, although there are certainly less restrictive alternatives available, we can nonetheless conclude that the Copyright Act satisfies the requirements of the minimal impairment stage. The question of whether the Act’s freedom of expression burden can be justified in light of these available alternatives will be addressed in the final proportionality stage, which is the subject of the following chapter.

209 Arguably, an amendment to the Act which retroactively extended the term of copyright protection would not satisfy the minimal impairment test, since it is impossible to incentivize the creation of an already existing work. Interestingly, the U.S. Supreme Court accepted the constitutional validity of such an amendment in the U.S. context. See Eldred, supra note 112.
Chapter VI: Proportionality

In chapter V it was argued that the Copyright Act satisfies the requirements of the minimal impairment subtest, though several alternative approaches to encouraging authorship were also identified. In this chapter we turn to the final stage of the section 1 analysis, the proportionality subtest. The chapter begins by introducing the subtest as it is applied by Canadian courts, and then turns to a consideration of the balancing metaphor that is often used to conceptualize the test. An alternative conception of the test, which is derived from John Rawls’s political philosophy, is then proposed. The chapter then returns its focus to the Copyright Act, and considers both the severity of the Act’s effects on freedom of expression and its effectiveness at encouraging authorship. These considerations are then brought to bear on a final assessment of the Act’s proportionality. It is ultimately concluded that the Copyright Act as it currently exists fails the proportionality subtest, and therefore cannot be justified under section 1.

The Proportionality Subtest

The proportionality subtest requires “proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’”. The test is typically conceived of as a balancing exercise, in which the benefit of the state action in achieving its purpose is weighed against its

\[210\] Oakes, supra note 20 at para. 70.
cost in limiting the constitutional right.\textsuperscript{211} If the cost exceeds the benefit, then the limitation fails the proportionality subtest and cannot be justified under section 1.

When applying the proportionality subtest, the courts have recognized that it is not merely the abstract importance of the limited right and the government objective that must be considered. Rather, what matters is the law’s actual effects on the right and the objective.\textsuperscript{212} For example, if the law has an important purpose, but is not very effective at achieving that purpose, then the benefit side of the balance will be relatively light. Likewise, the cost side of the balance will weigh less heavily if the right, though important, is only limited to a minor extent.

Although the proportionality subtest is not often the focus of Charter litigation\textsuperscript{213}, the courts have affirmed its importance to the overall analysis.\textsuperscript{214} In particular, the Supreme Court of Canada has noted that this is the only subtest which “takes full account of the ‘severity of the deleterious effects of a measure on individuals or groups’”.\textsuperscript{215} In doing so, the Court has affirmed that a Charter limitation that has an important purpose, is rationally connected to achieving that purpose, and uses the least restrictive means for doing so, may nonetheless be unjustified if its benefits do not exceed its costs to the right.

\textsuperscript{211} Ibid. at para. 71. See also Roach and Sharpe, \textit{supra} note 11 at p. 76; and Barak, \textit{supra} note 26 at page 343.

\textsuperscript{212} \textit{Dagenais v. Canadian Broadcasting Corp.}, [1994] 3 SCR 835 at 887.

\textsuperscript{213} Roach and Sharpe, \textit{supra} note 11 at p. 78. Charter limiting laws do occasionally fail the proportionality subtest, though this often occurs after having already failed one of the preceding stages. See, for example, \textit{Thomson Newspapers Co. v. Canada (Attorney General)}, [1998] 1 SCR 877 at para 129; and \textit{Chaoulli v. Quebec (Attorney General)}, 2005 SCC 35 at para 157.


The Balancing Metaphor

Does the standard balancing metaphor, in which the costs and benefits of a Charter limitation are weighed against each other, provide an adequate account of the kind of analysis that is required by the proportionality subtest? There are at least two important ways in which the metaphor seems to be lacking in this regard. The first is that the metaphor does not seem to be capable of explaining how an adequately neutral perspective from which to weigh the costs and benefits of a Charter limitation can be achieved.

The balancing metaphor refers to the physical act of weighing objects, which is an inherently objective exercise. If object A weighs more than object B, this remains true regardless of who is doing the weighing. In contrast, determining whether a Charter limitation is justified is an inherently subjective exercise. Different people will often come to different conclusions based on their own subjective views of the matter, even when presented with identical evidence. Someone who bears the brunt of a Charter limitation’s costs while enjoying few of its benefits is, for example, unlikely to come to the same conclusion about proportionality as someone who receives all of the benefits and none of the costs. We nonetheless expect judges to take a neutral perspective that does not favour one subjective point of view over another.

The balancing metaphor is attractive because it suggests an objective weighing of costs and benefits, and thus appears to be neutral. However, as the weighing of objects does not involve transforming a subjective exercise into an objective one (since it is inherently objective to begin with), the metaphor does not actually explain how such a transformation is achieved. Describing the proportionality subtest as a balancing exercise is therefore more akin to an
assertion of neutrality than a demonstration of it. The metaphor does not explain how (or whether) a neutral perspective was achieved, and can encourage decision making that leaves little substantive reasoning available for critical analysis. The judge merely places the costs and benefits on each side of the metaphorical scale, and then, as if through the workings of some unseen gravity-like force, the scale tips one way or the other.

Identifying this gravity-like force is one way that the balancing metaphor could be improved, at least in terms of transparency. Aharon Barak has suggested that “social importance” should be used for this purpose.\(^{216}\) According to Barak, the social importance of a right limitation is determined by “society’s fundamental perceptions”, which are “shaped by the culture, history, and character of each society”.\(^{217}\) Under this conception of the proportionality subtest, a limitation that has a higher social importance will be given greater weight than a limitation having a lower social importance.

Balancing on the basis of social importance would certainly improve the transparency of a decision, by making more of the reasoning available for critical evaluation. Arguably, it would also improve neutrality, since the perspective taken is that of society as a whole, rather than a single individual. But is this perspective neutral enough to give adequate protection to constitutional rights?

Consider, for example, a society that widely disregards the interests of a particular class of individuals, such as the homeless. In this society, limitations that primarily affect homeless people would presumably have a lower social importance than similar limitations affecting other

\(^{216}\) Barak, supra note 26 at page 349.

\(^{217}\) Ibid.
groups. Using social importance to give each side of the scale its relative weight would therefore make it easier to limit the rights of homeless people, in comparison with more socially privileged groups.

This would clearly be inconsistent with the text of the *Chartier*, which guarantees rights such as freedom of expression to “everyone”218, and gives “every individual... the right to the equal protection and equal benefit of the law” 219. It would also fail to achieve the ultimate goal of the proportionality subtest, which is to “balance the interests of society with those of individuals and groups” 220. As social importance is, by definition, determined by the collective views of a society, it necessarily privileges the interests of the collective over those of the individual. As such, it fails to provide an adequately neutral perspective for mediating between the two. 221

**The Role of Alternatives**

The balancing metaphor also fails to explain why considering different alternatives can significantly affect the outcome of the proportionality analysis. Imagine, for example, a law that prohibits murder, and provides the death penalty as the only available punishment. Under the balancing approach to proportionality, the law’s cost to the right to life would need to be weighed against its benefits, such as reduced violence. A judge applying this methodology might reason as follows. Without the law, violent individuals would be free commit murder without

---

218 *Chartier*, supra note 2, s. 2.
219 *Ibid*. s. 15.
220 *Oakes*, supra note 20 at para. 70.
221 Balancing from the perspective of a single individual would, of course, also fail to provide a sufficiently neutral perspective. Another possibility which might seem promising would be to use the principle of utility maximization to give each side of the scale its relative weight. This would, however, similarly privilege the collective over the individual, by requiring individuals to sacrifice their rights whenever it was in the collective’s best interests to do so.
being punished by the state. As many people would be unable to adequately defend themselves without state intervention, the rate of violence would likely increase significantly. On the other hand, with the law in place, many of the most violent individuals would be tracked down and killed by the state, and thus prevented from committing further violent acts. As such, the rate of violent crime would be likely to significantly decrease. With these considerations in mind, the judge would likely conclude that the law was proportional, since the benefits of drastically reducing violent crime would likely outweigh the costs of taking the right to life away from convicted murderers.

Now imagine what would happen if the judge were to also consider an alternative law in which murder was punished with life imprisonment. This alternative would achieve most of the benefits of the law, since it would similarly allow the state to remove violent individuals from the general population. At the same time, it would completely avoid the law’s costs to the right to life, since no one would be put to death by the state. A judge who considered this alternative would therefore be much less likely to conclude that the law was proportional, since its marginal costs to the right to life greatly exceed its marginal benefits over the available alternative.

If the proportionality subtest is simply a balancing exercise that compares the costs and benefits of a law, then it would not be possible for the consideration of an alternative to affect the result in this way. If the law’s benefits exceed its costs, this must remain true regardless of whether other alternatives have been considered, in the same way that the relative weights of two

---

Note, however, that this alternative would not meet the requirements of the minimal impairment test. Life imprisonment does not guarantee that a murderer will not reoffend in the same way as the death penalty, since prisoners may still be able to commit violent acts against guards and other inmates. It also has various other effects, such as increased costs for running prisons, which do not satisfy the second part of Barak’s test.
objects cannot be affected by weighing a third. It is nonetheless clear that the proportionality analysis is highly dependant on the alternatives that are considered. The balancing metaphor does not explain this aspect of proportionality, and thus provides an inadequate characterization of the kind of reasoning that is required.\textsuperscript{223}

**A Rawlsian Approach to Proportionality**

Might there be an alternative way to conceive of the proportionality subtest, which avoids these shortcomings? In my view, a better approach can be derived from John Rawls’s political philosophy.\textsuperscript{224} Rawls’s work is concerned with identifying the principles of justice that are appropriate for determining the basic structure of a liberal democracy. Although this project is certainly broader than the task of deciding whether a Charter limitation is proportional, there is considerable conceptual overlap between the two. In particular, both are concerned with mediating between the collective interests embodied in a state and the individual interests of those living within that state.

Following the social contract tradition, Rawls argues that the most suitable principles of justice for a liberal democracy are those that individuals would select for themselves, if negotiated under fair conditions. More specifically, Rawls argues that the principles of justice

\textsuperscript{223} Under Barak’s conception of the proportionality subtest, considering alternatives is useful because it reduces the scope of the analysis. See Barak, *supra* note 26 at p. 355. Instead of having to balance all of the costs and benefits of a law, you only have to consider the marginal costs and benefits over the alternative (whose proportionality is already established). This is akin to comparing the weights of objects A and C, and then using your existing knowledge about the relative weights of objects B and C to determine whether A is heavier than B. Although this explanation suggests that considering alternatives may be useful in some circumstances, it does not explain how this can change the outcome of the proportionality test.

should be selected while under a “veil of ignorance”, which is a hypothetical condition in which
the parties are unaware of their own individual characteristics, such as their sex, ethnicity, social
position, and conception of the good.\textsuperscript{225} This forces the parties to deliberate as though they could
be assigned to any position within the resulting society with equal probability, and thus prevents
them from unfairly favouring their own interests over everyone else's.

Although the veil of ignorance is intended for selecting principles of justice, it also serves
as a useful model of the kind of reasoning that is required when assessing the proportionality of a
\textit{Charter} limitation. In particular, the proportionality subtest could be seen as requiring the judge
to consider the perspective of every individual who is affected by the limitation, and to deliberate
as though she could be randomly assigned to any one of those perspectives. The analysis would
take the form of selecting from a list of alternatives (as it does in Rawls’s theory), with the
\textit{Charter} limiting law being compared with various less restrictive alternatives for pursuing the
government’s objective. If the judge concludes that, while under the veil of ignorance, she would
clearly choose an alternative that impairs the right less severely than the enacted law, then the
law fails the proportionality subtest.

To illustrate how this conception of the proportionality subtest would work in practice,
we can reconsider the death penalty law that was described in the previous section. Unlike the
balancing approach, under the veil of ignorance the first step of the analysis is to identify a set of
less restrictive alternatives. Other methods of punishing murder, such as life imprisonment,
would therefore be given explicit consideration. The judge would then consider how various
groups are affected by each of these alternatives. Some of the relevant perspectives would

\textsuperscript{225} Ibid. at pages 14 to 18.
include innocent members of the public, convicted murderers, family members of victims and perpetrators, and people who are wrongfully convicted. The kind and severity of each alternative’s effects would be catalogued, relying on the presented evidence to supplement the judge’s own sense of empathy. With this background in place, the judge would then select one of the alternatives, deliberating as though she would be randomly assigned to one of the considered perspectives once her decision was made.

If deciding between the law as enacted, the pre-enactment condition (i.e. no prohibition against murder), and the life imprisonment alternative, it is likely that the judge would choose life imprisonment, in view of the severe downside risks associated with the other two options. The risk of being killed by the state would make the death penalty option very unappealing, as would the risk of unfettered violence associated with having no prohibition against murder. Although life imprisonment would not be the preferred option from every perspective, when deciding from under the veil of ignorance it is clearly preferable to the other two. Since life imprisonment is less restrictive of the right to life than the death penalty, selecting this option would mean that the law as enacted is not proportional, and therefore constitutionally invalid.

This way of conceiving the proportionality subtest has a number of advantages over the standard balancing metaphor. It explains why considering different alternatives can affect the outcome of the analysis, and thus offers a better account of what judges are actually doing when assessing proportionality. It also provides a mechanism for giving weight to the costs and benefits of a Charter limitation (each affected individual weighs the costs and benefits from their own perspective), while also providing an appropriately neutral perspective from which to render a decision.
The Proportionality Subtest is the Heart of Section 1

According to section 1, *Charter* rights can only be limited when “demonstrably justified in a free and democratic society”. Under what conditions can we say that this standard of justification has been met? The proportionality subtest as described above suggests the following answer: a *Charter* limitation is adequately justified when those who are subject to the limitation would agree to impose it on themselves, under fair conditions (i.e. under the veil of ignorance).

When the standard of justification is understood in this way, it becomes clear that each of the earlier stages of the analysis are mere precursors to the final proportionality subtest. In the first stage, the purpose of the limitation is determined (the pressing and substantial purpose test), since this information is required in order to assess whether the limitation would be agreed to. Next, the effectiveness of the limitation at achieving its purpose (the rational connection test) and the necessity of the limitation in view of the available alternatives (the minimal impairment test) are considered, since this information is likewise needed for the final analysis. The final stage (the proportionality test) is the heart of the analysis, since this is where the ultimate question of whether the limitation would be agreed to is asked.

When section 1 is conceived in this way, each of the preliminary stages of the analysis become primarily concerned with collecting relevant information, rather than conclusively determining whether the limitation is justified. Since none of the earlier stages directly address the ultimate question of whether or not the limitation would be agreed to under the veil of ignorance, it would generally be inappropriate to conclude that a limitation is unjustified before applying the final subtest. The only exception to this is when the information collected at an

---

226 *Charter*, supra note 2, s. 1.
earlier stage reveals that it would be impossible for the limitation to survive the final subtest. For example, if the limitation has no purpose, or does not actually further its purpose, then we can conclusively say that the limitation cannot be justified, since there would be no reason to agree to it under the veil of ignorance. Similarly, if there is a less restrictive alternative that is identical to the limitation in every other way, then we know for certain that the alternative will always be selected over the limitation.

With these preliminary comments in mind, we can now return to our consideration of the Copyright Act, and the question of whether the Act’s effects on freedom of expression are proportional in light of the available alternatives.

The Severity of the Restriction

How severe is copyright’s effect on freedom of expression? In the Michelin case, Justice Teitelbaum suggested that the effect was minimal. Noting that the union could express its anti-Michelin message without using the tire-man artwork, he concluded that copyright did not “create undue hardship for the defendants”. Many other commentators and courts share a similar view of copyright’s effect on freedom of expression. Ysolde Gendreau, for example, has argued that copyright is unlikely to impair freedom of expression, since copyright only protects the form in which an idea is expressed, and not the underlying idea. In her view, copyright therefore does not interfere with the free flow of ideas, which is the primary concern of freedom of expression.

---

227 Michelin, supra note 18 at para. 111.
228 Gendreau, supra note 19 at p. 229. See also Ashdown v. Telegraph Group Ltd., [2001] EWCA Civ 1142, [2001] 4 All ER 666 at para. 31; and Eldred, supra note 112 at page 221.
The problem with this argument is that it fails to recognize that restrictions which appear to relate merely to the form of expression can, in effect, have a significant impact on the content (i.e. the ideas) that can be expressed. The language restriction at issue in Ford v. Quebec is a case in point. In that case, the Court held that “[l]anguage is not merely a means or medium of expression; it colours the content and meaning of expression”. In other words, the fact that a message has been conveyed in a particular language affects and, indeed, becomes a part of the message. As such, even if you are fluent in French, it would be impossible for you to convey precisely the same meaning in French as you could in your preferred language.

Of course, this is a relatively minor restriction on freedom of expression, as it remains possible to express roughly similar meanings in French as you could in any other language. But what about someone who is not fluent in French? For this person, a broadly applied language restriction would drastically reduce her ability to communicate. For example, if there was a law that required all public communication to be conducted in French, she would need to devote a significant amount of time and effort to learning French in order to effectively express herself in public. For many, this would represent a major hardship, and some would likely never manage to become completely fluent. For these individuals, what looks like a relatively minor restriction on the form of expression will, in effect, severely impair the ideas that can be expressed.

A similar pattern occurs in the context of copyright. As with a language restriction, on its face, copyright merely restricts the form in which an idea can be expressed. Although infringing forms of expression are prohibited, you remain free to communicate roughly similar ideas

229 Ford, supra note 7.
230 Ibid. at para. 40.
231 In the Ford case itself, the language restriction only applied to public signage.
through non-infringing forms. However, what seems to be merely a form restriction can, and often does, have the effect of severely limiting the meanings that can be expressed as well. If the message that you want to convey substantially incorporates someone else’s work of authorship, and does not fall within one of the exceptions to infringement, then copyright will prevent you from conveying precisely that meaning. Furthermore, if you do not have the time or artistic talent to produce a similar, non-infringing work, then copyright will prevent you from conveying even a roughly similar meaning.

Imagine, for example, that you see a very moving film, and feel compelled to share the experience with others. The most obvious way to do so would be to simply distribute copies of the film. Copyright, however, generally prohibits you from doing so.232 As such, in order to convey a roughly similar meaning, you would need to produce your own, non-infringing film. Obviously, this would be impossible for almost everyone to do, in view of the vast financial resources that would be required.233 Furthermore, the artistic talent that would be needed to capture the experience of the original, without infringing the original’s copyright, is much greater than most people would be able to manage, even with unlimited financial resources. As such, copyright effectively prevents most people from conveying the meaning embodied in the film, unless they have the permission of the copyright owner.

---

232 It is, of course, possible to do so with the copyright owner’s permission. For example, assuming authorized copies of the film are available for sale, someone with sufficient financial resources could buy copies and distribute them as gifts. The role of wealth in determining who is able to access and share copyright protected works is addressed in more detail below.

233 One could, of course, attempt to recreate the experience of watching the film through a less expensive medium, such as a short story. However, the artistic talent that would be required to do so in an effective way is well beyond the abilities of most people. A mere summary of the film’s plot, for example, is unlikely to have the same emotional resonance as the film itself.
It might be argued that the real impediment to expression here is a lack of talent and/or financial resources, rather than copyright. Similarly, it could be argued that poor language skills are to blame for being unable to communicate effectively under the hypothetical language restriction described above. These arguments are, however, unpersuasive. In the copyright context, our film enthusiast already has everything that he needs to convey his message, namely access to the film and a means of making copies thereof (e.g. a computer). The only impediment to his expression is the prohibition against making and distributing copies.

This might be contrasted with a scenario in which there was no copyright, but the technology required to produce copies of a film simply did not exist. Under these conditions, the film enthusiast would need artistic, financial, and/or technological assistance in order to convey his message. As such, his inability to express himself would properly be attributed to factors other than government interference.234

Nor would there seem to be any reason to suppose that section 2(b) only, or even preferentially, protects the freedom of expression of those with artistic talent and/or financial resources (or, in the context of our hypothetical language restriction, those who can easily learn new languages). Rather, the Charter quite clearly states that freedom of expression is guaranteed to "everyone".235 Furthermore, the values underlying the freedom of expression guarantee,

---

234 As discussed in chapter III, section 2(b) is generally understood in Canada as a negative right, which does not impose positive obligations on the government to support or encourage expression. If section 2(b) were understood as imposing a positive obligation, then the film enthusiast might have a section 2(b) claim even under the scenario where the impediment to expression is a lack of technological know-how. The film enthusiast could argue, for example, that the government was obligated to provide him with technological assistance.

235 Charter, supra note 2, s. 2.
namely self-fulfillment, the search for truth, and democratic discourse, can certainly be advanced through expression by those who lack artistic talent, financial resources, and/or multilingualism.

The foregoing discussion illustrates that, although copyright technically allows for the free exchange of ideas, in effect it hampers this by limiting access to the words of the most eloquent, convincing, and thoughtful speakers. Effectively communicating the essence of a copyright protected work, without infringing the copyright, will often be extremely difficult, if not impossible, for most people to do (in much the same way that communicating in a required language is difficult or impossible for someone who is not fluent in that language). And even if one person is able to produce a reasonable approximation of the ideas embodied in a copyright protected work, and is thus able to convey those ideas without permission, the next person who wants to do the same will need to create his own approximation. Effectively, every act of transmission would require a new translation of the ideas, with unavoidable changes in meaning.236

Because of the problems inherent in reformulating an idea with each transmission of that idea, the only practical way to move complex or nuanced ideas through society under copyright constraints is by purchasing copies of the work from the copyright owner. This may work reasonably well for wealthy members of society, who can afford to pay for access to all of the works that they are interested in. But, as discussed in Chapter IV, copyright has the effect of

---

236 In some circumstances, the whole purpose of an act of expression is to share the specific words that were used by someone else. A particularly compelling example of this is provided in Copyright’s Paradox, supra note 114, in which the distribution of an unauthorized translation of Mein Kampf, intended to reveal Hitler’s extreme views to the American public, was prohibited as a copyright violation. The freedom to copy ideas obviously cannot replace this kind of expression.
excluding the least wealthy members of society, since they often cannot afford to pay for access to works.

This systematic exclusion of the least wealthy members of society from the channels of discussion through which public discourse takes place produces a fundamental distortion of both democracy and the search for truth, and thus undermines the core values underlying the freedom of expression guarantee. Imagine, for example, that an influential article about the opioid crisis was published in the Toronto Star, and access to the article was restricted to paying subscribers. This would exclude many of the least well off members of society from accessing the article, and would thus prevent them from participating in the surrounding public debate. Someone who is unable to read the article will not, for example, be able to write a letter to the editor providing a different perspective on the issue. And as many of those who are most affected by the opioid crisis belong to marginalized groups, systematically excluding those groups from the surrounding public debate will profoundly distort the public’s understanding of the issue. To the extent that the democratic process uses these distorted perceptions to guide government policy, democracy itself may fail to give proper consideration to the perspectives of those who are most affected by the government’s response.

Of course, the debate surrounding most important issues will flow through multiple channels of discussion, many of which remain open to the least wealthy members of society.

\[237\] In practice, the least wealthy members of society would likely have some access to the article. For example, if the article was published in a printed newspaper, it might be possible to access a copy at a public library. But most people do not have the time to go to the library every day and wait for a copy of the paper to become available. And even this may be impossible if, for example, the article is only published online, behind a paywall.
Unrecorded personal conversations are excluded from copyright’s reach, as are many forms of news reporting and private research. There are also public libraries through which works can be accessed, as well as works that are distributed for free over the internet, on television, and on the radio. Nonetheless, there are many kinds of works which usually require payment in order to be accessed, including books, films, subscription television, magazines, newspapers, and academic journals. These are some of the most important channels through which public culture flows, and from which being excluded represents a major impediment to fully participating in that culture. Often, public discussion and debate will focus on a relatively small selection of culturally important works, such as a popular television program, a hit movie, or an influential article or book. Insofar as these culturally important works are often made inaccessible by copyright, the ability of the least wealthy members of society to meaningfully participate in public culture is substantially undermined.

In addition to democratic discourse and the search for truth, copyright also interferes with the self-fulfillment interests of both speakers and listeners. Consider, for example, the perspective of someone who is very interested in public policy, but is not a very strong writer. This person might derive a great deal of self-fulfillment from fostering public education and debate through a blog devoted to sharing articles, books, documentary films, and the like that relate to important policy matters. Insofar as copyright would prevent her from sharing these

---

239 Copyright Act, supra note 12, ss. 29 and 29.2.
240 Of course, having no copyright protection would not ensure that all works of authorship were easily accessible to everyone. In order for the least wealthy members of society to access a work for free, someone who already has access to the work must make a copy widely available, such as through a file sharing service. Nonetheless, the wide prevalence of unauthorized file sharing under the existing copyright regime suggests that most culturally important works of authorship would be widely available in the absence of copyright protection.
241 Often, a culturally important work will be made more widely available within a few years of its release. For example, a hit movie may become available for free at a public library after it is released on DVD. Of course, by this time the focus of public discussion will have moved on to something else.
works without permission, her self-fulfillment may be greatly curtailed. And because she is not a
very talented writer, she may be unable to derive nearly as much self-fulfillment from authoring
and sharing her own, non-infringing works.

At the same time, the self-fulfillment interests of those who would otherwise access the
works shared through her blog are also seriously undermined. For example, someone who shares
the blogger’s interests, but does not have the financial resources to obtain authorized copies of
the shared works, may be substantially prevented from pursuing those interests if the blog, and
other potential sources of unauthorized copies, are prohibited by copyright law.

Copyright therefore can, and often does, interfere with the core values underlying the
freedom of expression guarantee. As such, the severity of copyright’s cost to freedom of
expression is greater than is often suggested in the case law and commentary.\(^242\) In order to
justify this cost, copyright must have an important purpose, be effective at achieving that
purpose, and have significant advantages over the available alternatives.

The Effectiveness of Copyright

How effective is copyright at achieving its purpose? According to some of the leading
experts on the economic justification for copyright, the benefits of copyright in terms of
encouraging valuable authorship are speculative.\(^243\) There simply is not enough empirical

\(^{242}\) Some of the commentary does recognize that copyright's effects on freedom of expression can be quite severe. See, for example, Bailey and Fewer *supra* note 19.

\(^{243}\) See Landes and Posner, *supra* note 105 at pages 9 to 10; and Merges, *supra* note 110 at page 3. The speculative nature of the economic justification for copyright is also discussed in Shiffrin, S.V. “The
evidence to conclusively say whether copyright encourages more socially valuable authorship than would occur in the absence of copyright protection. In the absence of this evidence, we can at best make educated guesses about copyright’s likely effects on the quantity and quality of authorship.

There are, however, good reasons to be skeptical about copyright’s effectiveness. Perhaps the most compelling reason is copyright’s effect on derivative authors, which was discussed in Chapter IV. We do not need empirical evidence to know that copyright prohibits many forms of derivative authorship, and the historical importance of this form of authorship is beyond question. As such, it seems fair to presume that at least this form of socially valuable authorship is likely to be discouraged by copyright protection, rather than encouraged.

A further reason to be doubtful about copyright’s effectiveness at encouraging authorship is that it is premised on a simplistic and unrealistic view of human behaviour. According to the standard public goods justification for copyright, when the cost of creating a work of authorship is high, and the cost of reproducing the work is low, people will simply copy the work without providing compensation. As a result, authors will be unable to recoup their costs, and will therefore refrain from creating capital intensive works of authorship, even when doing so would be beneficial for society. The problem with this story is that it presumes that humans lack a sense of fairness, and will not pay for something unless the government forces them to. This is a highly inaccurate view of human behaviour. Numerous studies have demonstrated that most people have a strong sense of fairness, and are highly motivated to act fairly, to be perceived as acting fairly.

Incentives Argument for Intellectual Property Protection”, 4 J.L. Phil. & Culture 49 (2009); and Fisher, supra note 104.
244 Ibid.
245 See Landes and Posner, supra note 105 at page 58.
fairly, and to punish the unfair behaviour of others.\textsuperscript{246} As such, one would expect that many people, and perhaps most people, would voluntarily compensate authors whose works were beneficial to them. This prediction is supported by a 2000 study of Napster users, which found that they were \textit{more} likely to increase their spending on music compared to non-users, despite the fact that they were able to obtain the music for free through the file-sharing software.\textsuperscript{247,248}

If we assume that people have a sense of fairness, and want to fairly compensate authors who create valuable works, then copyright may actually \textit{discourage} people from spending money on works of authorship. Imagine, for example, that it is important to you to compensate your favorite authors, and that you are able to budget $40 a month for this purpose. Without copyright, you would likely be able to access as many works of authorship as you like for free, and you could apportion your $40 a month to the authors whose works were most valuable to you. In contrast, under a copyright regime you would generally only be able to access works by purchasing a copy from the copyright owner, before having a chance to assess the work’s value to you. Under these conditions, a significant portion of your $40 is likely to end up going towards the purchase of works that were ultimately disappointing. As this money is effectively being wasted (since it is not serving its purpose of compensating your favorite authors), it would be rational for you to \textit{decrease} your budget for works of authorship, and to instead spend that money on something whose value is more assured.

\begin{footnotesize}
\textsuperscript{248} The popularity of crowdfunding services such as Kickstarter and Patreon is further evidence of the widespread willingness to support artists voluntarily.
\end{footnotesize}
It may very well be the case that, in the context of socially valuable, capital intensive works of authorship, society’s collective sense of fairness (in concert with various other norms of behaviour) would result in adequate compensation for authors, without the need for copyright or some other government intervention. Indeed, the level of compensation that authors would receive without copyright protection could be more economically efficient than occurs with copyright protection, in view of copyright’s various distortionary and counterproductive effects.

Of course, the precise nature of copyright’s effects on the quantity and quality of works of authorship is unknown, and is likely unknowable. Nonetheless, there are good reasons to be skeptical of copyright’s overall effectiveness at encouraging desirable forms of authorship. This uncertainty must be weighed against copyright’s much more certain costs to freedom of expression, which arise as a logical necessity and therefore need no empirical verification (there is no ambiguity about the fact that the Copyright Act prohibits infringing forms of expression).

One could nonetheless argue that the true freedom of expression costs of copyright are unknown, since it is impossible to predict how often prohibited forms of expression would occur in the absence of copyright. If very few people would have used the prohibited forms anyway, then the actual freedom of expression costs of copyright are arguably not as high as they otherwise might be. In my view, banning core expressive activities of even unidentifiable people (i.e. people who would engage in the banned expression, but whose presence cannot be empirically verified) constitutes a serious limitation of freedom of expression. We nonetheless do

---

249 As noted in Chapter IV, many authors have an innate drive to create works of authorship, and may therefore not even require a fair reward, let alone monopoly profits, to encourage them to create works.
know that many people would engage in the banned expression, since many already do, despite the prohibition.  

Copyright Behind the Veil of Ignorance

We can now turn to the ultimate question of whether the Copyright Act’s limitation of freedom of expression is proportional. Under the conception of proportionality set out above, the question to be asked is whether the Act would be chosen over the available less restrictive alternatives under a Rawlsian veil of ignorance. If the Act would be chosen over the available alternatives, then the limitation is justified and the Act is constitutionally valid. If, on the other hand, one of the less restrictive alternatives would be selected over the Act, then the limitation is not justified, and the Act is constitutionally invalid.

To simplify the analysis, for the purposes of this paper we will focus on selecting between the Act as it currently exists, and the public culture fund proposal set out in Chapter V. This avoids the unnecessary complication of determining whether the public culture fund would be selected over other possible alternatives, such as popularity tracking. These considerations are not necessary for answering the narrow question of whether or not the Act is proportional. Of course, if it is determined that the Act would be chosen over the public culture fund, then it would be necessary to continue the analysis by comparing the Act with other available

250 See, for example, “Online piracy of entertainment content keeps soaring” Los Angeles Times (September 17, 2013), online: <http://articles.latimes.com/2013/sep/17/business/la-fi-ct-piracy-bandwith-20130917>, reporting that copyright infringement accounted for 24% of total internet bandwidth in 2012.  
251 The broader question of what the government should actually do about encouraging authorship, if anything at all, is briefly considered in chapter VIII.
alternatives, until either a preferable alternative is identified, or there are no more feasible alternatives available for consideration.

Recall that under the veil of ignorance, you must deliberate without knowledge of your own place within society, and as though you could be randomly assigned to any position with equal probability. To proceed with the analysis we must therefore identify the different perspectives which would be affected by copyright and the public culture fund, as well as their likely effects on each of these perspectives.

The first obvious perspective to consider is that of authors. There are, of course, many different perspectives which fall within this broad category, and which would be affected differently by the two options. For the authors of popular works, the preference for copyright versus the public culture fund would likely depend on the specific context. If the public culture fund were designed in such a way that the author would expect to earn more money than through the copyright system, then the author is likely to prefer the public culture fund over copyright. If, on the other hand, they could expect to make more money through copyright, then they are likely to have the opposite preference. In either case, the strength of the preference is likely to be relatively weak, since the public culture fund would be designed to provide approximately the same level of incentive as copyright, and so would likely pay out a similar level of funding.

---

252 In this chapter, as in the previous chapters, I have focussed on the economic effects of copyright. The choice between copyright and the public culture fund has therefore been cast as being primarily about their economic effects. Of course, authors have other interests beyond economic interests which would affect their preferences. For example, some authors may feel deeply offended by having their work used in certain ways without permission. The question as to whether these other considerations may cause us to reconsider our conclusions about the Act’s constitutional validity are addressed in chapter VII.
The authors of unpopular works are unlikely to receive much funding from either scheme. As such, they would likewise be expected to be relatively indifferent as between the two options.\textsuperscript{253}

Authors of derivative works are likely to have a strong preference for the public culture fund, since copyright often prevents these authors from creating and distributing their works without the permission of the original copyright owner. As discussed in chapter IV, this permission may be difficult or impossible to obtain in many, if not most, circumstances. Since those who create and share works of authorship often view this activity as a core aspect of their personality, being prevented from doing so represents a significant impairment of their personal freedom and capacity for self-fulfillment. In addition to giving derivative authors the freedom to express themselves through their works of authorship, the public culture fund would also allow them to make a living from doing so, since the fund could be distributed to both derivative and non-derivative authors.\textsuperscript{254}

Non-derivative authors have a significant economic advantage under the copyright regime, since they do not need to compete with derivative authors who are unable to obtain the necessary permissions that are required by copyright. As such, they would likely prefer copyright over the public culture fund, at least from an economic perspective. However, the strength of this preference is likely to be relatively weak compared to that of derivative authors, since the

\textsuperscript{253} Of course, they may have a preference for one over the other as consumers of works. The perspective of consumers is considered separately below.

\textsuperscript{254} Derivative authors could also make a living by selling copies of their work, which would be prohibited under copyright if done without permission. The moral implications of profiting from derivative works without permission from the original author are discussed in chapter VII.
downside of facing increased competition is significantly less severe than the downside of being prohibited from expressing yourself through your works.

What about people whose primary relationship with commercial works of expression is as a consumer, rather than an author? Again, there are likely to be a variety of different perspectives within this broad category. For low-income individuals who are interested in experiencing many works of authorship, there is likely to be a very strong preference for the public culture fund over copyright. Under the public culture fund, these individuals would have relatively unfettered access to public culture and information, and would be free to educate themselves about a variety of topics, to access works of entertainment, and to participate in public conversations and debate in relation thereto. And since the public culture fund would maintain the incentive to create works of authorship, there would be no serious concern that the quantity and quality of works would substantially decrease, such that the least well off members of society would be made worse off by the change. If anything, the freedom to create derivative works would likely result in a greater variety of works being made available for public consumption. In contrast, under the copyright model these individuals would be broadly excluded from accessing many of the works that they are interested in, since they would be unable to afford to pay for that access.

Many wealthy individuals who consume a large quantity of commercial works of expression would likely prefer copyright over the public culture fund, since the fund would be designed to be progressively funded, with a greater proportion of the cost of rewarding authorship being borne by the wealthiest members of society. High-income earners who participated in the fund would face a higher tax rate, and so would have less material wealth than
under the copyright model. Of course, as noted in chapter V, the fund could be designed so that individuals were free to remain within the copyright regime, and thus avoid having to pay into the fund. This could significantly reduce the burden on wealthy individuals who do not want to devote a sizable portion of their income to encouraging authorship. However, it is likely that the mere existence of the fund would alter the incentives of authors with respect to the pricing of their works. For example, authors could start increasing the sale price of their works, in the hopes of forcing wealthy people out of the copyright regime and into the public culture fund. If this were to occur, wealthy individuals would be forced to either reduce the number of works that they consume, or devote more of their income to encouraging authorship than they would have under the pure copyright model.

Of course, since the tax used to fund the public culture fund would be set at a reasonable amount that everyone could afford, the burden faced by the wealthy under the public culture fund would be significantly less severe than the burden faced by the least wealthy under the copyright model. The wealthy would not be excluded from public culture, or from educating themselves about different topics, or indeed from accessing any of the works that they are interested in accessing. Nor would they face any more serious harms such as an inability to afford food, housing, or medical treatment.

It should furthermore be noted that many wealthy individuals would likely prefer the public culture fund over copyright, despite the increased costs associated therewith. For example, wealthy individuals who enjoy derivative works of authorship may prefer to reward authorship in a way that allows more of these works to be created. Individuals who value social justice, and
who wish to see the least wealthy members of society being treated more fairly, may also prefer the public culture fund over the copyright model, even if it requires having to pay more in taxes.

What about people who consume very few works of authorship? Because of the ability to opt out of the public culture fund, these individuals should have no strong preference for either option. Someone who manages to consume no commercial works of authorship would not need to pay any of their income towards encouraging authorship in either case. For those who consume very few commercial works, it is possible that the price of those works could be higher under the public culture scheme (if pricing behaviour were to change as suggested above). But because of the small volume of works being consumed, the overall effect on these individuals would be relatively small. Of course, if the public culture fund were to be implemented without the ability to opt out, these individuals would have a strong preference for copyright, since under the public culture fund they could end up paying a significant sum of money for something that they do not want.

Based on the perspectives considered above, it seems likely that the option that would be selected under the veil of ignorance is the public culture fund. Though this is not the preferred option from every perspective, its downside risks (being slightly less wealthy) are not nearly as severe as those of the copyright model (being excluded from public culture; being prevented from creating and distributing your works of authorship). Since the deliberations under the veil of ignorance occur without knowledge of your ultimate place in society, the public culture fund would be selected in order to avoid the possibility of facing the more severe costs associated with copyright. If this conclusion is correct, it follows that the Copyright Act is not proportional, and therefore lacks section 1 justification.
Counterarguments

Has the proportionality analysis presented above given sufficient weight to the potential downsides of using a public culture fund to encourage authorship? In their book *The Economic Structure of Intellectual Property Law*, Landes and Posner argue that the use of government rewards to encourage authorship would be politicized, as it would involve a government determination of the value of particular types of intellectual property, rather than a market value. They also note that employing a tax to fund such a scheme would inevitably create distortions in other parts of the market, such as the labour market.

The authors’ first point is likely directed at schemes in which a government body is tasked with deciding which works of authorship are deserving of compensation, and thus does not really apply to the public culture fund as described herein (which is designed to allow individuals to make this decision for themselves). Of course, the fund would involve the broad government decision to reward authorship rather than some other worthwhile endeavor, such as raising children or donating blood. But copyright also involves the government making the decision to reward authorship, and so this argument does not give us a reason to favour one over the other. If anything, the public culture fund would be *less* politicized than copyright, since it would not involve the government deciding that infringing works of authorship are less valuable than non-infringing ones.

The authors’ second point is more directly applicable to the public culture fund, since it would be funded by taxes and would therefore affect the incentives to generate material wealth.

---

through labour and investment. But copyright can also be seen as a “tax”, in the sense that it involves the government taking away a freedom in order to pursue its own ends. Whereas the public culture fund takes away the freedom to choose how much income to devote to encouraging authorship (at least for those who participate in the fund), copyright takes away the freedom to express certain messages. In either case there is a risk that having the government decide how these freedoms are exercised could lead to a less economically efficient outcome than if individuals were free to choose for themselves. The choice is therefore not between government intervention and no government intervention, but rather between two different forms of government intervention, each having its own costs and benefits. The problem posed by the proportionality analysis, as I have characterized it, is to determine which form of intervention, given their expected costs and benefits, would be selected while under the veil of ignorance.257

In my view, people would not choose to sacrifice their freedom of expression interests in exchange for an economic copyright while under the veil of ignorance, particularly in light of the available alternatives, such as the public culture fund, for addressing any “public goods” problem that may exist in relation to authorship. This is especially clear in light of the fundamental importance of the freedom of expression interest, the fact that copyright often affects the core values underlying that freedom, and the disproportionate effect that copyright has on the least wealthy members of society. Indeed, an economic copyright would seem to violate each of the principles of justice that Rawls argues would be selected under the veil of ignorance, as it sacrifices the core of a basic liberty in exchange for (speculative) increases in the size of the

257 The fact that both options come with downsides will, of course, affect the ultimate decision about what the government should do, if anything, to encourage authorship. This is a much broader issue than the narrower question being considered here, namely whether the Copyright Act as it currently exists is proportional. The broader issue of what the government should do about encouraging authorship is briefly discussed in chapter VIII.
welfare pie (violates the priority of the basic liberties); produces significant inequalities in the availability of works of authorship that are instrumental for developing the skills to succeed (violates equality of opportunity); and systematically excludes the least wealthy members of society from the benefits of encouraging authorship through government intervention, while disproportionately imposing its costs on them as well (violates the difference principle).  

Although the public culture fund would undoubtedly come with costs and uncertainties, if designed intelligently it is unlikely to have any worse effects than making the wealthiest members of society slightly less wealthy. From under the veil of ignorance, this seems like a relatively small price to pay to avoid copyright’s effects on the core values underlying the freedom of expression guarantee, on derivative authors, and on the least well off members of society.

**Other Versions of the Act**

The analysis presented above has focused on the Copyright Act as it currently exists. It is possible, however, that an amended version of the Act would be selected over the public culture fund while under the veil of ignorance, and thus be justified under section 1.

For example, the Act could be amended to permit most, or even all, forms of derivative authorship. The Act's effects on derivative authors have been the focus of much the preceding

---

258 See *Justice as Fairness*, supra note 224 at page 42. The difference principle requires social and economic inequalities to be to the benefit of the least well-off members of society.

259 For a contrasting view of how Rawls’s principles of justice might apply to copyright, see Merges, *supra* note 110 at pages 104 to 136. For a discussion of how Rawls’s ideas about public justification might apply to copyright, see Sykes, Katie “Towards a Public Justification of Copyright”, 61 U. Toronto Fac. L. Rev. 1 2003.
discussion, and removing the prohibition against unauthorized derivative works would significantly reduce the Act's freedom of expression costs. However, in my view, the public culture fund would still be selected while under the veil of ignorance, even if the Act were amended to allow all forms of derivative authorship. This is because the prohibition against literal copying would still have the effect of substantially excluding the least well off members of society from public discourse. This, on its own, is worse than the downside risks associated with the public culture fund.

Another possibility would be to drastically reduce the duration of copyright protection, such as to the original 14 year duration provided in the Statute of Anne. Again, this would certainly reduce the freedom of expression costs associated with copyright. Nonetheless, in my view the public culture fund would still be chosen under the veil of ignorance. Public discourse typically moves at a rapid pace, with prominent topics of conversation often changing on a day-to-day basis. Having unfettered access to a culturally important work 14 years after the fact does little to assist the least wealthy members off society in being able to meaningfully participate in public discourse and debate. As such, the freedom of expression costs of the Act would still be quite severe.

There are many other possible amendments to the Act, some of which might render it constitutionally sound. It is, however, not possible to consider all of the possibilities here. The arguments presented in this paper are intended to show that the Act as it currently exists is constitutionally invalid, and that the Act's conflict with freedom of expression stems from the basic structure of copyright itself. No suggestion is being made that the Act is incapable of being amended so as to pass constitutional scrutiny.
Conclusion

In this chapter, I have argued that the proportionality subtest can be seen as requiring a selection between the Charter limitation and the available less restrictive alternatives while under a Rawlsian veil of ignorance. This approach provides a more transparent and effective mode of reasoning for mediating between the collective interests embodied in a government action and the individual interests protected by a constitutional right. It was furthermore argued that, while under the veil of ignorance, the public culture fund would be selected over copyright. As such, the Copyright Act’s limitation of freedom of expression fails the proportionality subtest, and cannot be justified under section 1.
Chapter VII: Wrongful Reproductions

In chapter VI it was argued that the Copyright Act fails the proportionality subtest, and is therefore unjustified under section 1. This conclusion was premised on the commonly held view that the Act is primarily intended to serve the economic purpose of encouraging authorship. It is, however, possible to view the Act as serving a number of non-economic purposes as well. In this chapter, we will consider some of the non-economic interests that are protected by copyright, in order to decide whether they might give us a reason to reconsider our previous conclusion about the Act’s proportionality.

Non-Economic Interests

Authors undoubtedly have interests in relation to their works that go beyond purely economic concerns. A good case in point is Théberge v. Galerie d'Art du Petit Champlain Inc.260 In that case, the painter Claude Théberge sought to use copyright to prevent an art gallery from selling unauthorized canvas reproductions of his works, which had been created by physically transferring the works from authorized copies.261 In testimony, Mr. Théberge offered a vivid account of the reasons for his displeasure with the gallery’s actions:

“I would never want a penny for those works. Do you know why?... Because, first and foremost, it is once again a dilution of my work; it is an abusive commercialization of my work, without authorization; it is a manipulation of the work because, in many cases, my signature does not appear on the reproduction; it

260 Théberge, supra note 25.
261 Ibid. at para. 2.
is an anonymization, if I can use that word without being scholarly. There is no Théberge on my work, it is not signed. Turn it around and there is nothing on the back. Where does it come from, who sells it? Not a word. These things are all over the place. And, furthermore, the final argument, Mr. Charia, is that clients and friends of mine call me, they won't accept it anymore and they are asking me whether I am a party to the distribution of these things... Being a party to the distribution of these things means that they assume that I hatched a plot in which I am a participant. I'm getting money, royalties or ... that I make money off of it ...

Me, Claude Théberge, the artist, I have nothing whatsoever to do with it, and want to put a stop to it. It's just unreal. And especially, if I accepted money for that manoeuvre, I wouldn't dare look myself in the mirror, Sir. Q. So, this morning, it is your testimony, Mr. Théberge, that it is not a question of money ... . A.

Absolutely not.”

The Court ultimately found that s. 3(1) of the Copyright Act is an economic right that does not independently protect an author’s interest in being attributed for his work, nor his interest in not being presumed to be complicit in an unauthorized commercialization of his work. Although Mr. Théberge could have asserted his right to be attributed under the applicable moral rights provision of the Act, he could not rely on his moral indignation as a basis for establishing a violation of his economic rights under s. 3(1).

---

262 Ibid. at para. 20.
263 Ibid. at paras. 2, 11, 12, 21 and 22.
264 Ibid. at para. 19. Under the current Act, the moral right to be identified as the author of a work is protected by s. 14.1(1).
265 Ibid. at para. 74.
The facts in the Théberge case are somewhat unusual, in that the acts which violated the author’s sense of propriety happened to not technically coincide with a reproduction of the work (at least in the opinion of the Court). More often, improper attributions and misleading associations will occur in the context of an unauthorized reproduction. Copyright violations which engage these non-economic interests could therefore be used to support the argument that copyright is justified under section 1, despite the existence of alternatives for addressing the Act’s economic purpose. For example, in the context of a Charter challenge to the Act, one could imagine examples of plagiarism, unauthorized commercializations, and other misleading attributions and associations being used to demonstrate the need for copyright.

Most people would likely agree that creating a false or misleading impression about an author’s relationship to his work is morally wrong in at least some circumstances. For example, deliberately taking someone else’s work of expression and passing it off as your own is quite rightly viewed as a serious affront to the author’s dignity. Selling copies of his work in a manner that gives the false impression that he authorized the sales, or is being compensated for them, is also palpably wrong, since it undermines the author’s ability to control his own identity as an author.²⁶⁶ Distributing copies that have been altered without the author’s permission, such as MP3s with reduced sound quality, and which give the false impression that they represent the author’s original work, is likewise understandably viewed as wrongful in at least some circumstances.

However, although these wrongs sometimes overlap with copyright infringement, they are not coextensive with the broad economic copyright granted by s. 3(1). S. 3(1) is not limited

²⁶⁶ It also breaks down the economic relationship between the author and his audience, since it gives those who buy unauthorized copies the false impression that they have materially supported the author.
to unauthorized reproductions with misattributed authorship, or which otherwise create a false or misleading impression about the author’s actions. Nor is s. 3(1) even adequate at protecting these personality and reputational interests, as is evidenced by the Théberge case. If the government wants to protect these interests, they could do so using narrower prohibitions directed at the specific wrongs being targeted. The right to be attributed, for example, is already protected by s. 14.1(1) of the Act. Other rights, such as a requirement that unauthorized reproductions be clearly labeled as such, could also be added. 267

Of course, these rights would themselves limit freedom of expression, and would therefore need to be justified under section 1. It is beyond the scope of this paper to undertake such an analysis. 269 The relevant point here is that government concern about protecting the personality and reputational interests of authors does not support the broad economic copyright granted by s. 3(1).

Unpublished Works

Another form of copyright infringement that many would likely view as wrongful is the unauthorized publication of an unpublished work. When an act of expression that was intended for a private audience is published without the author’s permission, this is quite rightly viewed as

---

267 Other possible rights could include a requirement to notify consumers when an author is not being compensated for the use of her work, or a requirement to clearly indicate when changes have been made to a work without the author’s permission.

268 Requiring a notification when a reproduction is unauthorized could, incidentally, help to overcome a “public goods” market failure in relation to works of authorship. In particular, such a notice would likely engage with the audience’s sense of fairness, encouraging them to fairly compensate the original author by, for example, purchasing an authorized copy of the work (if they could afford to do so).

269 It is nonetheless clear that they would usually be much less onerous than the broad economic copyright granted by s. 3(1). Being required to identify the original author, or indicate when a reproduction is unauthorized, is certainly much less restrictive of freedom of expression than a blanket prohibition on unauthorized reproductions.
an invasion of privacy. The broad economic copyright granted by s. 3(1), however, is not limited to unpublished works. Nor is the economic conception of copyright applied by Canadian courts even particularly effective at protecting unpublished works. This is evidenced by the CCH case, in which the Supreme Court held that an unauthorized reproduction is *more likely* to be considered fair dealing if the work is unpublished, since the public interest is advanced by having a wider dissemination of the work.²⁷⁰

Even without copyright, there is already a significant degree of legal protection against the unauthorized publication of unpublished works. For example, an author’s private property rights allow her to physically exclude others from taking possession of the object or objects in which her unpublished work is embodied, such as a computer or canvas. Without physical access to the work, it is impossible for someone else to publish it without the author’s consent. Of course, the author may wish to distribute copies of the work to a private audience, such as an editor or a first reader, without forgoing her ability to control publication of the work. But again, the existing legal protection for contractual agreements would give her the ability to protect herself from an unwanted disclosure of the work from these individuals.

Despite these existing legal protections, there may be circumstances in which there is inadequate protection against an unwanted publication (such as when there has been a breach of confidentiality, and third parties, who are not bound by contract, begin distributing the work). But if the government views the existing legal protections as inadequate, they should design a legal regime that is narrowly focussed on the particular harm that they wish to curtail. For example, they could implement a copyright-like regime that applied only to unpublished

²⁷⁰ CCH, *supra* note 15 at para. 58.
Concerns about the unauthorized publication of unpublished works do not, however, support the broad economic copyright granted by s. 3(1).

An Author’s Sense of Ownership

Many authors likely feel a strong sense of ownership over their works, and may feel entitled to control how the works are used by others (even when the uses do not create false or misleading impressions, and raise no privacy concerns). For example, an author may feel that she has a moral right to exclude others from reproducing her work without permission, independent of any economic concerns. Of course, she may also feel that she has a moral right to exclude others from criticizing her work, or from using the ideas embodied therein. In each case, the author’s interest in enforcing her sense of ownership needs to be balanced against the interests of everyone else, including their freedom of expression interests.

As discussed in chapter VI, the freedom of expression costs of a broad right to exclude others from reproducing published works of authorship can be quite severe. When a work of authorship is experienced, it becomes part of the audience's consciousness, and affects the way they think about and understand the world. In order to express these thoughts effectively, it may be necessary to substantially reproduce the work. Furthermore, copyright’s effect of systematically excluding the least wealthy members of society from public culture undermines the core values underlying the freedom of expression guarantee, including democratic discourse, the search for truth, and the self fulfillment interests of both speakers and listeners.

271 Subject, of course, to constitutional scrutiny for compliance with the Charter.
In my view, an author’s sense of ownership is unlikely to be so deeply felt as to justify the freedom of expression costs of copyright, when assessed from behind the veil of ignorance. Furthermore, for those authors who do feel strongly about maintaining strict control over their works, it remains possible to do so through contractual agreements. For example, an author who does not want her works to be reproduced without permission could require her audience to enter a valid contractual agreement to that effect, prior to making the work available to them. If the audience is willing to freely forgo their freedom of expression interests in relation to the work, then the unfairness of prioritizing the author’s sense of ownership over the audience’s freedom of expression is significantly reduced.

Of course, in order to maintain legal control over the work, the contractual agreement would typically need to be quite onerous. For example, in order to prevent a book from being copied by third parties, the contract would need to require the purchaser to refrain from lending the book out, or from otherwise allowing anyone else to gain access to it. Alternatively, instead of distributing copies of the work, the author could display the work in a privately owned location, and require visitors to sign a non-disclosure agreement before entering the premises.

The onerous nature of these restrictions would make them relatively unattractive from an economic perspective. As such, many authors would likely forgo such restrictions in favour of a more open model of distribution, thereby creating a vibrant public culture from which no one is excluded. For works that remain carefully guarded against unwanted reproduction, the works arguably would not constitute “public” culture at all, and may be more akin to a private conversation than a public address. Of course, there may exist circumstances in which
contractual and private property rights would need to be limited in favour of freedom of expression, but a discussion of this topic is beyond the scope of this paper.

The presence of a public culture which exists beyond private contractual and property constraints would be further encouraged by having an alternative means of rewarding authorship, such as the public culture fund described in chapter V. Since author compensation would be highly dependent on the number of people who access each author’s work, it would generally be in their economic best interest to make works as widely available as possible. This effect would be further enhanced by making it a requirement of the public culture fund that works be released publicly, without restraints on unauthorized reproduction, in order to receive compensation from the fund. For example, authors could be required to upload a DRM-free digital copy of their work to a publicly available database in order to be eligible for compensation. Of course, for authors whose sense of ownership is more important than profiting from their works, it would remain possible to refrain from making their works publicly available (thus forgoing participation in the fund).

Policing Uncomfortable Expression

It is relatively easy to imagine unauthorized uses of someone else’s work that would widely be viewed as improper, impolite, or offensive. For example, consider a scenario in which a song is used, without permission, in an advertisement for a consumer product. The musician is likely to be quite offended by this unauthorized commercial use, as would many observers. How should the government address cases such as these?
Leaving aside the issue of profiting from someone else’s work, which will be addressed separately below, in my view much of the unfairness of this example resides in the misleading impression that the author has approved the use or endorses the advertised product. This can be addressed by requiring unauthorized uses to be clearly identified, as discussed above. Those who make an unauthorized commercial use of someone else’s work could furthermore be required to notify them of the use, and provide a clear indication if the author disapproves of the use. Requirements such as these would prevent an unauthorized reproduction from creating false impressions about what the author has said and done, and thus largely address the most disconcerting aspects thereof. They would also make the practice of using someone else’s work without authorization, in a purely commercial setting, quite unattractive, in light of the public backlash that would likely ensue thereafter.

Nonetheless, there is likely to be instances in which authors and members of the public are offended by unauthorized reproductions, even with strict labelling requirements in place. An author may, for example, feel that the reproduction of her work within an unauthorized derivative work debases the original, even without being misleading. Of course, she may also feel that the work is debased from being negatively reviewed or otherwise portrayed in an unflattering light, even when the work has not been reproduced without permission. In general, the idea of freedom of expression is that the government should not rush to censor expression merely on the basis that it is considered offensive by some. Rather, freedom of expression recognizes that there is a value to both speakers and listeners in allowing people to push the boundaries of propriety. What is considered offensive speech by some may be quite valuable to others, and over time the presence of this speech may change social perceptions in important ways. For example, there was a time when speech in support of gay rights or women’s rights
would have been widely considered offensive in Canada. Views gradually changed over time, in no small part because of the ability of social activists to express their opinions.

Examples such as these illustrate that allowing the offense of some individuals to dictate what kinds of expression can be permitted does not advance the cause of truth and fairness. Rather, it is generally believed that the democratic process, the search for truth, and the self-fulfillment of speakers and listeners are advanced by responding to offensive speech with more speech, rather than censorship. As such, if an author is offended by a particular unauthorized use of her work, she should respond by expressing her viewpoint and allowing people to decide for themselves whether or not to support that use.

Of course, there may be instances in which a particular speech act is so offensive that government intervention is warranted. For example, an unauthorized reproduction of a work could be used as part of a deliberate campaign to enact psychological harm on the author. But such instances are likely to fall within the ambit of some other legal regime, such as criminal harassment or hate speech, without requiring copyright-like protection.

In view of the significant harm that can result from government censorship, the state should generally refrain from policing speech on the basis of bruised egos and offended sensibilities. As such, the fact that authors may be offended by some unauthorized reproductions of their works is not sufficient justification for the broad copyright granted by s. 3(1).

---

273 The harm caused by a speech act should be at least as severe as the harm caused by censorship in order for it to constitute a reasonable response thereto.
Profiting From Someone Else’s Work

How should the government respond to those who make a profit from the unauthorized reproduction of someone else’s work? In my view, so long as the audience is properly informed of relevant information, such as the fact that the use is commercial and unauthorized, the public should be free to decide for themselves whether or not to financially reward that use. For example, the audience for a particular derivative work may feel that the original author contributed relatively little of value to the work, and so choose to compensate the derivative author only. Alternatively, the audience for a car commercial that makes unauthorized use of a popular song may choose to boycott the brand. Giving people the freedom to choose for themselves is the best way to ensure that the works (both derivative and otherwise) that people actually value will be rewarded, while also minimizing the extent of government coercion.

Freedom of expression, however, does not require that those who reproduce works of authorship without authorization be able to profit from their activity. As discussed in chapter III, freedom of expression is generally understood in Canada as a negative right. As such, the government is under no positive obligation to encourage or support expression. A legal regime which permitted expression in the form of unauthorized reproductions, but required some or all of the resulting profit to go to the original author, would therefore not run afoul of the freedom of expression guarantee.

If the government wanted to ensure that original authors are compensated for unauthorized reproductions of their works, one option would be to distribute the resulting profits according to the contribution of each author. For example, a government tribunal could be tasked
with assessing the relative value of the original author’s contribution and the derivative author’s contribution, and order the profit to be distributed accordingly. Although this would be administratively burdensome, and would likely produce relatively arbitrary awards, it would ensure that derivative authors are compensated for their work, and thus encourage this kind of activity when profitable. Alternatively, the government could simply require all profits to be returned to the original author. While this would be less administratively complex, it could also result in a socially inefficient level of derivative authorship.

**Free Riders**

A free rider is someone who enjoys a social benefit, but does not contribute to providing that benefit. Although the term is often used in relation to economics, it also has a moral dimension. Most people are morally offended by free riders, and will go out of their way to punish them (sometimes even at significant expense to themselves). Would a lack of copyright allow free riders to escape punishment in a way that is morally problematic?

Under the public culture fund scheme described in chapter V, the wealthiest members of society would generally be required to compensate authors, and thus could not behave as free riders (without breaking the law). Those with the lowest incomes, however, are not required to pay into the fund, and thus could potentially be characterized as free riders. But would this be appropriate? Works of authorship are, in economic terms, non-rivalrous. This means that the

---

274 The public goods justification for copyright essentially describes a free rider problem. Since free riders are able to enjoy works of authorship without compensating authors, authors have no incentive to create works in the first place. This problem and the potential solutions thereto, such as the public culture fund, are discussed extensively in the previous chapters and need not be addressed further here.

275 See *A Cooperative Species, supra* note 246 at page 24.
enjoyment of the resource by one person does not diminish its potential to be enjoyed by someone else. In theory, every person on earth could enjoy a work of authorship without the resource becoming depleted (in contrast with, for example, a barrel of oil). In this context, is it appropriate to characterize someone who benefits from a work of authorship, but who cannot afford to contribute to its production, as a free rider? In my view, no. If, following Rawls, society is conceived of as a fair system of cooperation\(^2\), then it would seem patently unfair to exclude people from the benefits of a non-rivalrous resource simply because they cannot afford to contribute to its production. As the resource cannot be depleted, excluding those who cannot afford to contribute would serve no purpose other than exacerbating inequality. Perhaps if other resources were distributed more fairly, it would be reasonable to expect everyone to contribute to the encouragement of authorship. But in a country such as Canada that allows people to live in poverty, it would be unreasonable to have this expectation.

What if the Copyright Act were declared unconstitutional, and no replacement such as the public culture fund was put in its place? Under these circumstances, it would be possible for people who can afford to encourage authorship to nonetheless enjoy the benefits of authorship without contributing to its production, thus acting as free riders. But it is important to note that many of those who, at first, appear to be behaving as free riders, may not truly be deserving of our moral scorn. For example, is someone who experiences a work and finds it to be a waste of time truly behaving as a free rider when he refrains from compensating the author? What about someone who spends as much money on rewarding authorship as he can afford, but then continues to access additional works? In my view, activities such as these are not morally blameworthy. In the first example the person who experiences the work is not receiving a benefit

\(^2\) Justice as Fairness, supra note 224 at page 5.
(and is thus not a free rider), and in the second there does not seem to be any moral justification for excluding someone from a non-rivalrous resource if they have already contributed as much as they can afford.

Insofar as the Copyright Act is intended to punish free riders, it is overbroad in that it also punishes many individuals who are not morally blameworthy. If the government wants to discourage free riders, they should use a scheme which does not punish people simply because they are unable to pay more than their fair share of the cost of encouraging authorship, such as the public culture fund described in chapter V.

**Conclusion**

We have seen in this chapter that there are numerous non-economic harms that the Copyright Act could be seen as addressing. The Act, however, is not well suited to addressing these harms. In some cases, such as protecting an author’s privacy with respect to her unpublished works, the Act is too broad, prohibiting a variety of activities that do not fall within the ambit of the wrong. In other cases, such as protecting an author’s sense of ownership over her work, the harm is simply not severe enough to warrant the Act’s effects on freedom of expression. As such, the non-economic harms identified in this chapter do not seem to provide any compelling reasons to overturn our previous conclusion that the Act is not justified under section 1.
In the final chapter, we move past the question of whether the *Copyright Act* violates the *Charter*, and briefly consider the much broader question of what the government should actually do, if anything, to encourage authorship.
Chapter VIII: Encouraging Authorship

The preceding chapters have addressed the question of whether s. 3(1) of the Copyright Act constitutes an unjustified limitation of freedom of expression. In answering this question, we have considered some of the alternative approaches to encouraging authorship that could be used in place of copyright. It was ultimately found in chapter VI that s. 3(1) of the Act cannot be justified under section 1 of the Charter, since a less restrictive alternative (the public culture fund) would be chosen instead of copyright while under a Rawlsian veil of ignorance.

In this chapter, we briefly consider the much broader question of what, if anything, the government should actually do about encouraging authorship. Even if the public culture fund would be selected over copyright under the veil of ignorance, this does not necessarily mean that it would be reasonable or fair to impose such a scheme on Canadian society. Both options could be unfair or unreasonable, with copyright simply being the worst of the two options.

The question of what the government should do about encouraging authorship is extremely complex, and warrants much more analysis than is provided here. Rather than offering a comprehensive examination of the issue, the following discussion is merely intended to clarify where the preceding chapters leave us with respect to this important, overarching question, as well as to provide some brief comments on how I believe the issue should be addressed.
Should Copyright Be Replaced?

If s. 3(1) of the Copyright Act were to be declared unconstitutional, would it be appropriate to replace it with something else? In my view, some of the non-economic harms identified in chapter VII, which are incidentally protected by s. 3(1), do warrant legal protection. For example, it seems reasonable to require unauthorized reproductions to be clearly labelled as such, in at least some circumstances. The psychological harm of having someone else’s expression falsely attributed to you, including expression whose message and aesthetic qualities differ substantially from your own, may be significant. At the same time, the freedom of expression cost of requiring unauthorized reproductions to be labelled would, in most cases, be relatively insignificant.

But what about replacing the core purpose of s. 3(1), encouraging authorship? In my view, the government should generally refrain from limiting individual freedom in the absence of a compelling reason for doing so. As discussed below, there are a number of reasons to be skeptical of the need for government intervention in the market for works of authorship.

The standard economic justification for copyright posits that, without intervention, free riders will undermine the market for authorship, resulting in fewer works of authorship than would be socially desirable. But even if we assume this story is true (and there are good reasons to be skeptical), it still may not be wise for the government to intervene.

When an author writes a book, the wellbeing of those who read the book is affected. But this also occurs with virtually every other action that the author performs. Whether she is
mowing her lawn, talking to her neighbour, or teaching her son to be polite, her actions will affect the wellbeing of others, most of whom will not compensate her for her efforts. Clearly it is impossible for the government to measure all of these effects, and to require the beneficiaries thereof to provide adequate compensation. As such, the government must decide under what specific circumstances to step in and demand compensation. As doing so will involve incurring administrative costs, the government should only step in when the expected gains of intervening exceed the costs.

The cost of implementing a scheme for compensating authors, such as the public culture fund described in chapter V, is likely to be quite substantial.\(^{277}\) Even though the public culture fund is intended to reduce administrative costs by piggybacking on the existing income tax system, it would undoubtedly cost many millions of dollars to implement. Furthermore, in order to have its intended effect, the scheme would have to require at least some individuals to spend more of their income encouraging authorship than they otherwise would. This is money that could have been spent on other things, which potentially would have been more socially beneficial.

Furthermore, there does not seem to be any good reason to suppose that the government would be able to accurately assess the value of encouraging authorship, so as to optimally design the fund.\(^{278}\) If the value assessment is off, then the fund could end up doing more harm than good, even leaving aside its administrative costs. For example, if the value of encouraging

\(^{277}\) The cost of compensating authors through a broad economic copyright would, of course, be even more substantial, as argued in the previous seven chapters.

\(^{278}\) The fact that experts studying copyright are unable to determine even its most basic effects, such as whether or not it is effective at encouraging authorship, suggests just how difficult this task would be. See Landes and Posner, supra note 105 at pages 9 to 20.
authorship is assessed too high, then the scheme could end up siphoning money away from other activities that are more socially valuable. The fund could even potentially result in too little money being spent on authorship, if the value assessment is too low. Since the size of the fund would likely affect people’s perceptions of the fair amount to spend on works of authorship, some people could end up spending less than they otherwise would have in the absence of government intervention.

The issue is further complicated by the fact that the government only intervenes with respect to some kinds of beneficial activities, such as authorship, and not others. As such, even if the government were able to accurately assess the value of encouraging authorship, intervening would still lead to distorted incentives in other parts of the economy.²⁷⁹ If authors receive a fair reward for their work, but child care workers do not, then people will have an incentive to become authors instead of child care workers, even if the opposite result is more socially beneficial.

These potential costs of intervening in the market for works of authorship must furthermore be weighed against its highly uncertain benefits. As discussed in chapter VI, the public goods justification for copyright relies on an unrealistic model of human behaviour. It may very well be the case that people’s sense of fairness, or even their self interested desire to encourage more of the works that they love, could lead to an economically efficient level of compensation for authors. This effect would be further enhanced by requiring unauthorized reproductions to be labelled, as suggested above, since this would engage people’s sense of

²⁷⁹ See Fisher, supra note 104 at pages 18 to 19.
fairness and allow them to distinguish between uses that compensate authors and those that do not.

Furthermore, even if authorship was rewarded at an economically inefficient level in the absence of government intervention, it is highly unlikely that it would cease altogether. Many authors, and perhaps the great majority of authors, are intrinsically drawn to authorship, and would continue to create works even without the prospect of significant financial reward. Nor is it at all likely that voluntary compensation of authors would cease. As such, the downside risk of not intervening in the market for authorship is unlikely to be catastrophic. On the other hand, if the government does intervene, the resources required to do so will certainly not be available for other important purposes, such as providing economic security for the least wealthy members of society.

A Return to the Veil of Ignorance

Although Rawls’s veil of ignorance was used in chapter VI as a model for the proportionality analysis, it is also generally useful for thinking through the fairness of different institutional arrangements. As such, one way to decide whether the government should intervene in the market for works of authorship is to ask whether those under the veil of ignorance would choose to compensate authors through a scheme such as the public culture fund, or to refrain from doing so and instead simply transfer the money that would have been spent on the scheme to the least wealthy members of society. In other words, are the least wealthy members of society

---

280 This is discussed in more detail in chapter IV.
281 There is no obvious reason to expect those who currently compensate authors voluntarily, such as through crowdfunding services, would cease to do so simply because copyright protection ended.
actually made worse off by requiring the wealth that is redistributed by the public culture fund to be devoted to encouraging authorship, instead of being used for something else that is more desperately needed, such as food, shelter, or medical care?

Unfortunately, we live in a society in which the least well off face very serious challenges. Approximately 16 percent of Ontario adults between the ages of 18 and 64 live in poverty.282 These individuals can generally expect to face food insecurity, poor education outcomes, and early sickness and death.283 In view of these unsettling facts, it would simply be unfair to the least well off members of society to spend significant public resources on encouraging authorship instead of dealing with the much more pressing need for basic income security. Even if, in an ideal world, it might be preferable for the government to ensure that authorship is adequately compensated, in the real world the government has a limited budget and must prioritize the most pressing concerns. If, under the veil of ignorance, there is a risk that you could end up living in poverty, it would simply be irrational to choose to spend public resources on encouraging authorship instead of using those resources to help alleviate poverty. As such, until we live in a society where the least well off are sufficiently well off that encouraging authorship could plausibly be selected over a simple income transfer (while under the veil of ignorance) we should refrain from devoting significant public resources to doing so.284

---

283 Ibid.
284 Why does this statement not undermine the conclusion that the existing Copyright Act fails the proportionality subtest? This is because the existing Act does not alleviate poverty either. As such, the fact that the least wealthy members of society would prefer for the government to prioritize the alleviation of poverty over encouraging authorship does not affect the choice between copyright and the public culture fund.