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Living in the Shadow of the Intangible: the Nature of the Copy of a Copyrighted Work Part One

*Pascale Chapdelaine**

Copyright laws throughout the world are copyright holder centric and present a very fragmented source to comprehend the rights of users, and in particular of consumers owning copies of copyrighted works. Although in recent years, a growing number of commentators have worked towards defining the place of users in copyright law, little attention has been devoted to the nature and justifications of copy ownership of copyrighted works. This paper applies property and copyright theory to define and justify the existence of copy ownership of copyrighted works. It seeks to carve out in clearer terms the place of copy ownership legally and normatively, to offer a counterbalance to a predominant copyright holder centric approach to copyright law. Part One of this paper lays the theoretical framework of property and copyright theory. Part Two applies the theoretical framework to define the nature of the copy of a copyrighted works, as well as its justifications. It explores the ramifications of copyright acting as a property limitation rule to copy ownership, and how copy ownership can also act as a property-limitation rule of copyright.

À travers le monde, les lois sur le droit d'auteur sont centrées sur les détenteurs de ces droits et présentent donc une façon très fragmentée de concevoir les droits des utilisateurs et, plus particulièrement, des consommateurs qui possèdent des exemplaires d'œuvres protégées par le droit d'auteur. Récemment, un nombre grandissant de commentateurs cherchent à mieux définir le statut des utilisateurs relativement au droit d'auteur, mais peu se sont penchés sur la nature et les justifications de la propriété d'exemplaires d'œuvres protégées par le droit d'auteur. Dans cet article, l'auteure applique les théories de la propriété et du droit d'auteur pour définir et justifier le droit de propriété d'exemplaires d'œuvres protégées par le droit d'auteur. Elle cherche à mieux comprendre la propriété d'exemplaires d'œuvres protégées par le droit d'auteur, des points de vue juridique et normatif. Elle cherche aussi à présenter une approche différente de celle qui

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prévaut dans le domaine, qui demeure centrée sur les détenteurs du droit d'auteur. Dans la première partie de cet article, l'auteure étudie le cadre théorique du droit de la propriété et du droit d'auteur. Dans la deuxième partie, elle présente un cadre théorique pour définir et expliquer la nature de l'exemplaire d'une œuvre protégée par le droit d'auteur. Elle étudie les conséquences du droit d'auteur agissant comme une limite au droit de propriété d'un exemplaire d'une œuvre protégée et comment la propriété d'un exemplaire d'une œuvre protégée peut aussi constituer une limite au droit d'auteur.

1. PART I — INTRODUCTION

The nature of the ownership rights in the lawfully acquired copy of a copyrighted work is a remarkably undertheorized area of the law.¹ The few instances of this inquiry have traditionally led courts and commentators to resort primarily to the constitutive legislative acts of copyright.² The prevailing assumption is that the constitutive acts of the rights of the copyright holder dictate the scope of the rights in the copy of a copyrighted work to a large extent.³ The great lacuna of this approach is that copyright laws are generally structured around defining the exclusive rights and remedies of copyright holders, with isolated references to uses of copyrighted works that are stated not to infringe copyright, *i.e.* exceptions or limitations to copyright. As a result, the exact nature of the ownership rights in the copy of a copyrighted work has been left largely undefined, with some fragmented implications by default to which we are led, by what copyright exclusive rights do not already cover.⁴

The investigation into the nature and scope of copy ownership offers a counterbalance perspective to the traditionally copyright holder centric framework of copyright. Current fair dealing or fair use doctrines, and Canada's private copying regime, fill this role only partially for the consumer of copyrighted works. Copy

¹ One notable exception, from a U.S. perspective is J.P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 Wm. & Mary L. Rev. 1245, whereby the author looks more broadly at the concept of "possession" of digital copies, beyond the scenarios of lawfully purchased copies of copyrighted works. Copy ownership is also discussed in M. Seringhaus, "E-Book Transactions: Amazon "Kindles" The Copy Ownership Debate" (2009) 12 Yale J.L. & Tech. 147

² For instance, in Canada, the Canadian *Copyright Act*, R.S.C. 1985, c. C-42 (the "CCA").

³ Sale of Goods laws and in Québec the *Civil Code of Québec*, as well as consumer protection legislation would also apply to the terms of the sale, although the scope of application of these laws to certain transactions involving copyrighted works, such as computer software is unclear given the definition of "goods": B. Sookman, *Computer, Internet, and Electronic Commerce Law* (Toronto: Thomson Carswell, loose-leaf) at 2-76.18.

⁴ As Joseph Liu notes, regarding the unlimited ability to read the copy of a copyrighted work (in a U.S. context): "The legal "source" of this unlimited ability to read, to the extent there is one, can be found in the gaps in the *Copyright Act*. Section 106 of the Act, as several commentators have noted, does not include in the bundle of copyright rights the right to control the reading of a given copy.": *supra* note 1, at 1287.

ownership creates a distinct relationship between the owner of the copy and the copyright holder with its own particularities. Fair dealing or fair use doctrines are not by design, specifically concerned about this relationship, although they may be at time relevant to clarify the permitted scope of use of the lawfully acquired copy of a copyrighted work. For its part, private copying allows lawful copy owners to make a limited number of copies of musical recordings without the consent of copyright holders subject to several conditions.

Two recent judgments by the Supreme Court of Canada shed some light on the nature and scope of the ownership rights in the copy of a copyrighted work. In *Galerie d'art du Petit Champlain inc. c. Théberge*⁵ Binnie J. for the majority, drew the line between the rights of the owner in the physical copy of a copyrighted work and the rights of the copyright holder. Having decided that the transposition of lawfully purchased posters of artist Claude Théberge's paintings on a canvas was not a "reproduction" of the copyrighted work as per the exclusive rights conferred to Théberge under section 3 of the CCA, the court's majority further held that such transposition did not fall within the economic rights of the artist (while it may have fallen under his moral rights). Commenting on the proper balance that needs to be struck among the creator's rights and other public policy objectives, Binnie J. stated that this exercise "lies not only in recognizing the creator's rights but in giving due weight to their limited nature,"⁶ so that, "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it."⁷ In *CCH Canadian Ltd. v. Law Society of Upper Canada*⁸, having to interpret the scope of the fair dealing provisions in the CCA, the Supreme Court characterized the exceptions to copyright infringement as "users' rights" and not just mere loopholes in the CCA.⁹ This statement and the remarks in *Théberge* offer a new perspective on the place of users of copyrighted works in Canada. They shake the preconception of the CCA as being almost exclusively concerned with the exclusive rights of copyright holders.¹⁰

As promising as *Théberge* and *CCH* may be in ascertaining clearer and perhaps broader rights in and to the consumers' copy of a copyrighted work, there are obvious constraints to how far the judiciary can go in filling that gap, if courts are to rely predominantly on the framework set out by the CCA.¹¹ In that light, the

⁵ *Galerie d'art du Petit Champlain inc. c. Théberge*, [2002] 2 S.C.R. 336 (S.C.C.).

⁶ *Ibid.* at para. 31.

⁷ *Ibid.* at para. 32.

⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (S.C.C.).

⁹ *Ibid.* at para. 48.

¹⁰ Abraham Drassinower refers to the balance of *Théberge*, *supra* note 5, as a reflection of the CCA standing as a juridical order which "underlines and therefore advances the internalization of limitations of authorial entitlement," as opposed to merely establishing the exclusive rights of the copyright holders: A. Drassinower, "Exceptions properly so-called" in Y. Gendreau & A. Drassinower, eds., *Langues et droit d'auteur/Language and Copyright* (Carswell: Bruylant, 2009) 205 at 209-210.

¹¹ As we have been frequently reminded by the Supreme Court: "In Canada, copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are

application of property law and theory to better understand the scope of consumers' ownership rights in the copy of a copyrighted work provides a much needed complementary legal and normative framework of analysis.

Every consumer commercial transaction of a copyrighted work traditionally involves two sets of rights where one tends to overshadow the other. When a consumer buys a book, a music CD or a film DVD, she is the rightful owner of this chattel. However, even the less informed consumer knows that this chattel is not like any other one. She knows or ought to know, that by buying a book, a CD or a DVD, she does not become the owner of the expressive work that it contains. The dichotomy between the chattel and the copyrighted work has been traditionally presented as the distinction between the "tangible" and the "intangible," the former being owned by the purchaser of the copy of the copyrighted work, and the latter being the bundle of intellectual property rights of the copyright holder in the work that is made available to the purchaser. This creates a context by which the physical medium that supports or embodies the copyrighted work tends to be trivialized as relatively insignificant in comparison to the work of art — the predominant object of the transaction — protected by intangible rights that are made available to the purchaser. The online distribution of copyrighted works reinforces that trend because the transfer of a physical component is less apparent, although it is no less present.¹²

The co-existence of these two sets of rights, *i.e.* copy ownership and the exclusive rights of the copyright holder in the copyrighted work, gives rise to conflicts in situations where the rights of the purchaser of the copy and the rights of the copyright holder potentially overlap, or their respective scope is unclear, as this was the case in *Théberge*.¹³ Copyright law addresses some of these conflicts specifically, through the exhaustion or the first sale doctrine — whereby the copyright holder cannot control the subsequent transfer of copies of a copyrighted work after the first sale of such copies has occurred¹⁴ — and through specific provisions of the

exhaustive": *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at 82, whereby the Court refers to previous judgments by the same court having made the same statement.

¹² By contrast, in a transaction that involves a music CD or film DVD the CD or DVD in which the digital copy is embedded is a physical medium that is normally sold. When the copy of a copyrighted work is transferred through the internet, although no such supporting physical medium is transferred, the digital copy is no less tangible (magnetic charges or pixels on the screen) and it is a distinct, fixed copy of the copyrighted work that is downloaded to an electronic device (*e.g.* a personal computer or a MP3 player).

¹³ *Supra* note 5.

¹⁴ Under U.S. copyright law, the doctrine goes back to a decision by the U.S. Supreme Court in 1908: *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086 (1908) at p. 350-51 [U.S.] and was later codified; 17 U.S.C. §109. 109(a), currently provides that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." See also *supra* note 1 at 1289-1290. There is no equivalent provision in the CCA, although there is some recognition that a similar principle applies in Canada: J.

CCA, such as the ones that allow reproductions of computer programs to the owner of the copies of the copyrighted work.¹⁵ However, the extent to which property law and theory's long established tradition can adequately mediate between the conflicting ownership rights of the copyright holder and of the consumer on the copyrighted work needs to be explored further. This is the main purpose of this paper.

Through online licensing of copyrighted works, the sale of the copy of the copyrighted work is increasingly being eliminated and replaced by a licence by the copyright holder to the copy of the copyrighted work (in addition to the commercial practice to licence the intellectual property rights).¹⁶ Merging the traditional sale and licence into a single licence is not alleviating the conflicts between the rights of the copyright holder and of the consumer to the copyrighted work. First, the validity of this permutation by copyright holders from a sale to a licence is still unclear.¹⁷ Second, consumers are confused more than they ever were before as to what they are actually contracting to.¹⁸ At the risk of oversimplifying, some of the confusion seems to be created by the weight that is given to the elimination of an exchange of a physical medium "hand to hand" between the copyright holder (or distributor) and the consumer.¹⁹ For the former, this is an opportunity to gain more control than ever before on the distribution of her copyrighted works. For the latter,

de Beer & R. Tomkowicz "Exhaustion of Intellectual Property Rights in Canada" (2009) 25 C.I.P.R. 3. In recent years, the applicability of the first sale doctrine is increasingly under attack, as more and more copyrighted works are being distributed through a licence to the copy of the copyrighted work as opposed to a sale of the supporting medium of the work. Courts have at times recognized the validity of such transactions. For instance, see the recent judgment by the U.S. Court of Appeals, Ninth Circuit, *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 2010 WL 3516435, 10 Cal. Dailt Op. Serv. 11,903 (9th Cir. 2010) [*Vernor v. Autodesk, Inc.*].

¹⁵ Section 30.6 of the CCA, *supra* note 2.

¹⁶ M. Seringhaus, *supra* note 1 at 156.

¹⁷ In *Vernor v. Autodesk, Inc.*, *supra* note 14, the U.S. Court of Appeals, Ninth Circuit, reviewed the U.S. case law dealing with the qualification of the transaction around the copy of a copyrighted work, *i.e.* a sale or a licence. In that case, the Court gave significant weight to the terms of the licence as set by the copyright holder to decide whether a sale or a licence to the copy of the copyrighted work took place. The Court held, at p. 8, that "a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions." For a review of cases on copy ownership or licencing in the U.S., see also M. Seringhaus, *supra* note 1 at 161.

¹⁸ For example, M. Seringhaus, *supra* note 1 at 160-161, analysed the terms and conditions of the Amazon "Kindles." He noted that the terms were very contradictory: on the one hand it referred to consumers buying copies of e-books; on the other, it stated that the content was not sold but that it was licensed, and that Amazon could alter the terms and conditions of access and could even terminate the licence at any time.

¹⁹ Even in some cases of "hand to hand" exchange of a physical medium such as a disk to a computer software, there has been a practice to licence, not sell the physical medium, particularly in the software industry. The licence practice has been recognized in some cases. In others, courts have characterized the transaction as one involving a sale. See *supra* note 17.

she is still being provided with the copy of a copyrighted work, and her belief is that she owns it.

Property law and theory provide the tools to a fundamental enquiry that is particularly relevant to the increasing online distribution of copyrighted works: what is the significance of owning the copy of a copyrighted work, both to the consumer, and within the context of copyright law? It can also help resolve the ongoing controversy involving copyright holders and consumers' rights in the copy of a copyrighted work. Answering these questions and alleviating the tension between copyright holders and consumers is more pressing than it ever was before. Applying Jim Harris' theory of *Property and Justice*,²⁰ this paper looks at the entitlements that are generally attributed to ownership, as well as to how property limitations are justified and how they operate. From this perspective, the ownership rights of the copyright holder act as a limitation on the ownership rights in the copy of a copyrighted work.²¹ What is abundantly less clear is the extent to which the consumer ownership rights in the copy of a copyrighted work should act as a limitation on the ownership rights of copyright holders. I apply these property law and theory principles to digital copies of copyrighted works (whether they are made accessible on a physical medium, *e.g.* a CD, DVD, or through online licencing). In doing so, I look predominantly at the property regimes created by copyright law on the one hand, and personal property law on the other, independently of any express contract terms of the copyright holder that may alter them.²² The consumer of this inquiry is the average consumer, one who is involved in the vast majority of mass commercial transactions of copyrighted works. She uses and interacts with copyrighted works not necessarily with the intent of creating other copyrighted works. She makes uses of works for her personal benefit alone but through this self-consumption, she also takes part in the creative process through "meaning-making processes."²³

In Part II, I review the property law and theory framework of analysis that is being applied to copy ownership of copyrighted works. In particular, I introduce the concept of property and ownership to copyright and the copy of copyrighted works, as well as various forms of limitations and their central role within property law in general and for the purposes of our discussion in particular. In Part III, I describe the controversy that subsists on the nature of copyright as a form of pro-

²⁰ J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996).

²¹ This is further discussed in Part IV(c) of the second part of this paper: P. Chapdelaine, "Living in the Shadow of the Intangible: the Nature of the Copy of a Copyrighted Work — Part Two": (2011) 23 I.P.J.

²² This approach is generally compatible with transactions involving the sale of a music CD or a film DVD which generally contain little additional express contractual terms. In the case of online licencing, where there often exist extensive standard terms and conditions, questions arise on the extent to which contractual terms can alter the scope of existing property rights. This is beyond the scope of this paper which focuses on the nature and scope of the property framework that regulates copyright holders rights and consumers' copy ownership.

²³ Neva Elkin-Koren describes this type of consumer of copyrighted work as a "consumer-as-participant": N. Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Tech. L.J. 1119 at 1139.

perty and its relevance to a better understanding of the nature of the copy of a copyrighted work. Part IV, V and VI are presented in the second and last portion of this paper.

2. PART II—LAYING THE FRAMEWORK: PROPERTY, ITS JUSTIFICATIONS AND LIMITATIONS

(a) Property and Ownership

The essence of property is the twin manifestation of trespassory rules²⁴ and the existence of a heterogeneous ownership spectrum that spans from “mere property” to “full-blooded ownership.” These ownership interests all share in common (i) a juridical relation between a person and a resource (ii) privileges and powers that are open-ended, and (iii) which authorize self-seekingness to the owner.²⁵ Self-seekingness refers to this intimate relationship between the owner and the resource as to how she chooses to dispose of the resource, with *prima facie* no duty to account to anyone on the merit or rationality of that preference.²⁶ The self-seekingness trait on the ownership spectrum of property is an important differentiator to distinguish private property from public property.²⁷ While “full blooded ownership”²⁸ is the strongest illustration of all three characteristics, mere property for its part embraces “some open-ended set of use-privileges and some open-ended set of powers of control over uses made by others.”²⁹ For instance, full powers of transmission may not be present in the case of mere property, while it is *prima facie* the case of full-blooded ownership.³⁰ Hence, property is by no means a homogeneous concept.³¹ It has evolved since the beginning of time and will likely continue to do so, as an enduring institution to regulate human behaviour and aspirations.³² Ar-

²⁴ Which refers to all rules which, by reference to a resource, impose obligations (negative or positive) upon an open-ended range of persons, with the exception of some privileged individual, group, or agency (*i.e.* the owner(s)). They are open-ended, and give rise to various civil or criminal remedies such as damages, possessory recovery, injunction or restitution: *supra* note 20 at 25, 86.

²⁵ *Supra* note 20, at 5.

²⁶ *Ibid.* at 65.

²⁷ *Ibid.* at 108.

²⁸ *Ibid.* at 30, defines “Full-blooded ownership” as “the relationship between a person (or persons) and a thing such that he (or they) have *prima facie* unlimited privileges of use or abuse over the thing and *prima facie* unlimited powers of control and transmission, so far as such use or exercise of power does not infringe some property independent prohibition.” I refer to “property independent prohibitions” in Part II (b), below.

²⁹ *Supra* note 20 at 29.

³⁰ *Ibid.*

³¹ For a discussion on the heterogeneous nature of property, see J. Waldron, *The right to private property* (Clarendon Press: Oxford, 1988) at 26 [J. Waldron]; *ibid.* at 4; M.J. Mossman & W.F. Flanagan, *Property Law Cases and Commentary* 2d ed. (Toronto: Emond Montgomery Publications, 2004) at 2.

³² E.M. Penalver & S.K. Katyal, *Property Outlaws* (New Haven and London: Yale University Press, 2010) at 27 describe the centrality of property and ownership to human

guably, intellectual property is one relatively recent example of that evolution.³³ The variances on the ownership spectrum are theoretically open-ended and infinite.³⁴ Yet, the three traits mentioned above are distinctive enough to refer to property as one institution. From this perspective, the ubiquity and perennality of the property institution, as well as its heterogeneity and adaptability,³⁵ offer an anchor of analysis of choice that can help clarify the rights in the copy of a copyrighted work, including their distribution online, where no “hand to hand” exchange of a physical device takes place.

Two elements must be present for a property institution to be in place. First, there must be a scarcity. We often describe copyright laws as the creation by the state of an “artificial scarcity” to prohibit the unauthorized copying that could otherwise prevail with respect to a work of authorship.³⁶ Second, the owner must be distanced from it in that she can apply control over the resource, and similarly, that others can be accused of taking the resource.³⁷

Distilled to its bare essence and relevant to the present discussion, property is distinct from other legal institutions by the open-ended (*a priori* unlimited) nature of the privileges and powers over a resource, as well as by the opposability of these privileges and powers to all (*in rem*).³⁸ At the same time, the open-ended texture of property does not preclude the existence of various forms of limitations, which are an integral part of property and how it is regulated.³⁹

(b) Justifications of (Intellectual) Property

Given that the fate of the ownership rights in the copy of a copyrighted work has so far been largely determined by copyright laws, the justifications behind the ownership of that copy are necessarily interwoven with the justifications for the property regime of copyright. At this stage, it is opportune to invoke property justi-

society as follows: “Ownership of land and the structures attached to land provide the spaces and places in which we carry out our social existence and clarify the divisions of labor, responsibility, and authority necessary for the very conduct of human society. We form and communicate our identities as individuals or members of groups by wrapping ourselves in personal or cultural property. Like wise, our contemporary popular culture is embodied in expressions and innovations that are increasingly protected by intellectual ‘property.’ Accordingly, property rights and the social norms that accompany (and are often reinforced by) ownership play a vital role in ordering our interactions with other human beings.”

³³ *Ibid.*

³⁴ *Supra* note 20 at 275.

³⁵ *Ibid.* at 4.

³⁶ *Ibid.* at 342; M.A. Lemley, “Property, IP and Free Riding” (2005) *Tex. L. Rev.* 1031 at 1055 [M.A. Lemley].

³⁷ *Supra* note 20 at 332, where the author discusses how certain matter cannot be the object of trespassory powers because of their high level of abstractedness: joy, happiness, friendship, etc. . . .; on a similar idea, see also K. Gray, “Property in Thin Air” (1991) 50 *Cambridge L.J.* 252 at 269.

³⁸ Unlike a contract, that binds the contracting parties only.

³⁹ See discussion in this Part II (b), below.

fictions that are relevant to copy owners, with some reference to copyright holders. The effect of property justifications on the scope of ownership rights in the copy of a copyrighted work is more specifically discussed in Part IV of this paper.

Property, and particularly private property, is a controversial institution. As Jim Harris explains, “a property institution at least confers some private domain over some scarce things, so that the separateness of persons is made evident in the face of collective decision-making. But that domain necessarily confers some power over others and hence is distributionally problematic.”⁴⁰ However, in the case of copyright, the controversy does not arise as a result of scarce resources. Many forms of copyrighted works can be reproduced infinitely without depriving the original copyright holder and subsequent users from its use. Rather, it is the non-rivalrous nature of copyright and the scope of the artificially created scarcity through copyright law that gives rise to ongoing deliberations and passionate debate. Still, distribution issues on the extent to which this species of private property should unfold remain.

The linkage of copyright to property, either in an attempt to define the nature of the right, or by reference to property theories to justify its existence, is also the subject of ongoing debate and controversy. It seems however that the debate is obscured by at least two misconceptions. First, the nature of the property institution is often confused with one of its potential justifications, *i.e.* the existence of a natural right over some resource. Second, there may be an erroneous perception that property is a narrow, fixed in time phenomenon,⁴¹ as opposed to a flexible and somewhat heteroclitic organizing idea, that can accommodate a wide array of interests, including the specificities and peculiarities of copyrighted works.⁴²

One corollary of the controversial nature of property is that there is no apparent single satisfactory unifying theory of its justification. Arriving at a cogent theory of (intellectual) property may in fact necessitate the co-existence of different underlying justifications.⁴³ This is attributable in part to the heterogeneous nature of property (including the distinct nature of the myriad of exclusive rights con-

⁴⁰ *Supra* note 20 at 165; For James Grunebaum, his theory of private property and the concept of autonomous ownership lead him to conclude that private ownership is not morally justified: J. O. Grunebaum, *Private Ownership* (London, New York: Routledge & Kegan Paul, 1987) at 169-170.

⁴¹ Perhaps strictly viewed as “full-blooded ownership.”

⁴² R. Epstein, “The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary” (2010) 62 *Stan. L. Rev.* 455, argues that the evolution of property, including through its fragmentation and recombination is in fact a demonstration of its robustness. The author also argues that intellectual property can also be treated as property.

⁴³ *Supra* note 1 at 1300 takes this position with respect to U.S. copyright law.

ferred by copyright),⁴⁴ to the different meanings around the right to property,⁴⁵ and to the complementary role that apparently conflicting theories can play in justifying the “phenomenon” of property.⁴⁶ In fact, courts, legislators and commentators are influenced by various theories to decide on the scope of property (including intellectual property) rights.⁴⁷ This is reflected in the justificatory theory of property developed by Jim Harris and applied in this paper. After an extensive review of natural property theories,⁴⁸ property and freedom⁴⁹ and the instrumental values of property,⁵⁰ Jim Harris concludes that there exists no natural right to full-blooded ownership⁵¹ and that “the surviving property-specific justice reasons include the

⁴⁴ For instance, there are likely to be distinct justifications to the exclusive right to authorize first publication, which has strong privacy and autonomy based moral justifications, from the exclusive right to authorize reproduction of a copyrighted work which under the predominant view, is justified for instrumental reasons of promoting the creation and dissemination of works. On the distinct justification for the right to authorize first publication, see S. Handa, *Copyright Law in Canada* (Markham, Ontario: Butterworth Canada, 2002) at 107 & fol.

⁴⁵ See J. Waldron, *supra* note 31 at p. 16, where the author describes four different conceptions of the right to private property as follows: immunities against expropriation; natural property rights; the eligibility to hold property; and, a general right to property.

⁴⁶ See the discussion in Part IV(b) in the second part of this paper, *supra* note 21.

⁴⁷ W. Fisher, “Theories of Intellectual Property” in S.R. Munzer, ed., *New Essays in the legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168 at 174.

⁴⁸ Namely as it is associated with labour (*i.e.* the concept of self-ownership, creation-without-wrong and labour-desert theories) and the assault analogy (*i.e.* first occupancy, personhood-constituting and privacy theories): see *supra* note 20 at 182–228.

⁴⁹ In particular, a review of Hegel’s conception of property freedoms, as well as criticism of property freedoms including the problem of fetishism, disparities in wealth and domination-potential: see *supra* note 20 at 230–277.

⁵⁰ *Ibid.* at 278–306.

⁵¹ *Ibid.* at 182–229, reviews various theories to justify a natural right to property to conclude that there is no natural right to full-blooded ownership: “. . . no relationship between an individual and a resource arises such that just treatment of the individual requires that a property institution both surround the resource with trespassory rules availing the individual and any one to whom he chooses to transfer the resource and also conferring on the individual unlimited use-privileges, control-powers, and powers of transmission over the resource.” (at p. 228) Harris refutes labour theories relying on self-ownership to justify a natural right in the fruits of their labor as an extension of individuals owning themselves (because self-ownership is a *non sequitur*, *i.e.* from the premise that no one can own an individual, it does not necessarily follow that the individual can own himself). Yet Harris, sees an important property specific justice reason in the fruits of one’s labour that provides the “shell of a natural right,” *i.e.* that the need for the reward to be ownership does not follow, rather, a person has a just claim for a portion of social wealth that is created by her work when her work is by convention valued by others and by convention, gives some entitlements to a reward. He also reviews the creation without wrong justification for a natural property right as being an important property justice reason but not the foundation of a natural right, because the creator cannot impose unilateral trespassory rights. Harris explores first occupancy the-

prima facie normative status of all ownership freedoms” and to a lesser extent, “privacy, convention-dependent conceptions of labour-desert, as well as “pragmatic recognition of the wealth-creating potential of incentives and markets.”⁵² The *prima facie* status of all ownership freedoms, the role of instrumentalist and labour-desert theories, and their impact on the scope of the ownership rights in the copy of a copyrighted work are explored further below.⁵³

(c) The Limitations to Property and Their Significance

One of the appeals of property rules to apprehend the nature of consumers’ ownership rights in the copy of a copyrighted work, lies in the nature and the operation of their limitations, perhaps even more so than with respect to other chattels that are not subjected to copyright.⁵⁴ While all ownership freedoms have *prima facie* normative value, none of them is immune from various forms of limitations.⁵⁵

Broadly speaking, there are four main categories of property limitations. The first one refers to “property-independent prohibitions.”⁵⁶ While they effectively limit the open-ended use privileges of an owned resource, that is so regardless of the status of ownership. They also vary in time and in space. Safety regulation could fall in that category, as well as criminal law prohibitions. For example, the fact that you own a music CD does not entitle you, or anyone having it in her possession, to force it down someone’s throat (besides the fact that it would be physically impossible to do so). Property-independent prohibitions signal that certain uses prohibited to all are not *prima facie* part of the rights of even full-blooded ownership.⁵⁷

The second category of limitation refers to “property-limitation rules,” *i.e.*

ories and personhood-constituting theories, derived from bodily integrity. In the latter case, only in exceptional specific cases could there be a natural right derived from the personhood constituting aspect of the resource, *i.e.* a natural non transferable limited right on specific resources having this character (*e.g.* never to be seen diaries, sacred mementos). Harris also recognizes the shell of a natural right that is based on privacy that is hostage “to the problematic balance between the requirement of a range of specially protected autonomous choice and necessary intervention by the community to prevent abuse.” (at p. 227).

⁵² *Ibid.* at 13.

⁵³ See the discussion in Part IV(b) of the second part of this paper, *supra* note 21.

⁵⁴ G.S. Alexander, “The Social-Obligation Norm in American Property Law” (2008-2009) 94 Cornell L. Rev. 745 at 811. The author develops a social obligation norm theory in U.S. property law, based on the need to promote “human flourishing,” under which a more nuanced view of the right to exclude is presented. He uses the example of the exclusive rights conferred by copyright as one instance where the interdependency between the copyright holder and the community to which copyrighted works are intended impose social obligations which in turn impact on the scope of her exclusive rights.

⁵⁵ *Supra* note 20 at 275: from Harris’ standpoint, there exists no natural right to “full-blooded ownership” that are not dependent of some social convention.

⁵⁶ *Ibid.* at 32-33.

⁵⁷ *Ibid.*

when the *prima facie* open-ended privileges and powers of ownership are overridden.⁵⁸ All property institutions are subject to various forms of property-limitation rules,⁵⁹ which are more present with respect to land than with respect to chattels.⁶⁰ Examples of property-limitation rules include the common law tort of nuisance and limitations on the freedom to transfer property, for instance through the application of anti-trust law, or the application of fair dealing or fair use to limit the exclusive rights of the copyright holder in a copyrighted work.⁶¹ As it is the case with property-independent prohibitions, they may vary in time and in place. Property-limitation rules differ from the latter in that what they prohibit relates to an alleged harmful exercise of otherwise *prima facie* open-ended ownership privileges or powers,⁶² or one that by its nature is specifically addressed to owners and which raises public policy or distribution issues. The normative exercise to assess their merit involves a balancing act between the values taken to be inherent in ownership, the freedom to act self-seekingly, in relation to that which is one's own, and other values, individual or social.⁶³ One property nuisance case by the High Court of Australia, *i.e. Victoria Park Racing & Recreation Grounds Co. v. Taylor*,⁶⁴ (*Victoria Park*) is a good illustration of how courts mediate between two competing ownership rights and how one acts or not as a limitation on the other and *vice versa*.⁶⁵

Whether we characterize a limitation (for example, a limitation to the usage privileges of the consumer in the copy of a copyrighted work that is imposed by copyright) as "property-independent" or a "property-limitation rule" is critical. In the latter case, there is a prohibition on one of her *prima facie* open-ended privileges and powers that are at the essence of her ownership rights. In the former case, the prohibition is unrelated to the exercise by the owner of her property freedoms. If one is to give any weight to ownership and to the normative force of ownership freedoms, as it pertains to the rights of the owner as opposed to a non-owner, one of the corollaries of this distinction is that the property-limitation rules need to meet a special level of justification, process and clarity that falls within the internal logic of the property institution and to its limitations.

The third form of limitation refers to the most extreme manifestation of property limitation, namely when property can be confiscated from the owner, *i.e.* through the application of "expropriation rules."⁶⁶

58 *Ibid.* at 34.

59 *Ibid.* at 33.

60 *Ibid.* at 90.

61 Environmental conservation would be another example as well as other statutory restrictions. See *ibid.* at 35.

62 *Ibid.*

63 *Ibid.* at 90.

64 *Victoria Park Racing & Recreation Grounds Co. v. Taylor* (1937), 58 C.L.R. 479 (Australia H.C.)

65 See the discussion on *Victoria Park* in Part IV(c) of the second part of this paper, *supra* note 21.

66 The confiscation of products of crime under criminal law, the powers of the trustee in bankruptcy in bankruptcy law, as well as division of patrimony under family law are

Last but not least, practical and conceptual considerations impose limits to the scope of rights that property entails. An interest that lacks a distance between the owner and the object of property is a conceptual limit to property.⁶⁷ Also, there are property externalities, which for practical reasons, cannot fall under the purview of property. For example, it would be impractical to ban people from watching the beautiful garden of a private property, or to prohibit them from taking a picture from a distance, unless they pay a fee to the property owner. Some exclusive rights of copyright holders fall in that category.⁶⁸ They are not far from the example of the photograph of the lawn. There are however limits to the practicality argument, especially if there are strong justice reasons for supporting a property interest.⁶⁹ And yet, the practicality argument may point to deeper considerations of important normative value, that can add support to the application of other property limitations, for instance, property-limitation rules.

Whether a property limitation is intended to benefit the public or a competing private interest is another important distinction in understanding how property limitations operate and how various competing interests are assessed against the other. While “property-independent prohibitions” tend to stem from public law and policy (for example criminal law, road safety law) property-limitation rules can either serve specific public domain interests (such as in the case of heritage conservation by-laws) private interests (such as the tort of nuisance between adjacent neighbours) or a hybrid of the two. Whether the private property rights created by copyright benefit private or public interests heavily taints the ongoing debate around the scope of copyright holders’ exclusive rights, including the impact that they have on the “public domain,” freedom of expression and other fundamental rights and values. The design of copyright as a whole may be said to serve both the immediate private interests of the copyright holder — predominantly so during the protection of the copyrighted work — while it is also concerned with broader public policy consideration. In contrast, the ownership rights in the copy of a copyrighted work may be said to primarily benefit the private interests of the consumer.⁷⁰

As one last general introductory comment on property limitations, there is a

various examples of expropriation rules. See J.W. Harris, *supra* note 20 at 37-38. “Appropriation rules” reflect the other side of the coin of expropriation and even beyond. For instance, in case where the owner cannot be located, which does not necessarily entail an instance of expropriation. *Ibid.* at 38-39

⁶⁷ *Supra* note 20 at 332-333.

⁶⁸ See discussion in Part III below on the nature of copyright and particularly on the overprotection of copyright. To illustrate that point, see ss. 29 to 32.5 of the *CCA*, *supra* note 2, which contain very detailed enumerations of what are not considered infringements of copyright. As one example: the fact that it is permitted to take a picture of an architectural building, which under copyright laws is protected as a work of authorship see s. 32.2(1) b of the *CCA*. The inference is that were they not listed, all those acts could be considered as part of the exclusive rights of the copyright holder.

⁶⁹ *Supra* note 20, at 334.

⁷⁰ See the discussion in Part IV(c) and Part V of the second part of this paper, *supra* note 21.

remarkable asymmetry between the breadth of the limitations imposed on the consumer's ownership rights in the copy of the copyrighted work on the one hand, and the limitations that are imposed by the same consumer ownership rights on the property rights of the copyright holders on the other.⁷¹

3. PART III — THE NATURE OF COPYRIGHT

The *CCA* defines copyright, in relation to a work,⁷² as the sole right to produce or reproduce a work, to perform it in public, to telecommunicate it to the public, and other non-exhaustive exclusive rights, including the sole right to authorize any such acts.⁷³ Copyright also includes specific exclusive rights with respect to a performer's performance, sound recordings and communication signals.⁷⁴ In the present case of study, we are concerned with the ownership rights of the consumer to the commercial copy of a copyrighted work. Thus, the relevant aspects of copyright are the exclusive rights of the copyright holder after the first publication of the copyrighted work has occurred. Hence, other components of copyright, such as the sole right to authorize first publication, raise distinct questions on the nature of copyright and its theoretical justification, that are beyond the scope of this paper.⁷⁵

Copyright has been described as a monopoly,⁷⁶ as a regulatory right,⁷⁷ as a government subsidy,⁷⁸ as a privilege,⁷⁹ a construction of statute⁸⁰ and as property.⁸¹ The persistence with which some commentators insist that it is not pro-

⁷¹ See discussion in Part IV(a) of the second part of this paper, *supra* note 21 on the various privileges that property in the copy of a copyrighted work confers as opposed to the limitations that the copyright holder's exclusive rights impose.

⁷² *I.e.* an original work that falls under one or more of four categories: literary, dramatic, musical or artistic work: s. 2 of the *CCA*, *supra* note 2.

⁷³ Section 3 of the *CCA*, *ibid.*

⁷⁴ Section 2 of the *CCA*, *ibid.*

⁷⁵ See *supra* note 44 at 125-126 where the author suggests approaching copyright in two phases to apply coherent theoretical justifications. The first right to publish would be justified on the basis of privacy, while the exploitation right after publication has occurred would be justified by a social utility model.

⁷⁶ R.J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 *C.P.R.* (2d) at 33 [R.J. Roberts]; and P.E. Moyses, "La nature du droit d'auteur: droit de propriété ou monopole?" (1998) 43 *McGill L.J.* 507.

⁷⁷ R. Patterson, "Free Speech, Copyright and Fair Use" (1987) 40 *Vand. L. Rev.* 1 at 8.

⁷⁸ M. A. Lemley, *supra* note 36 at 1069. The author, after making an analogy to real property, tort, government subsidy and government regulation, concludes that no analogy is fully adequate but the closest one is probably a government subsidy as it underlies the trade-off at play better than talking about it as a real property right.

⁷⁹ M. Xifaras, *La Propriété Etude de philosophie du droit* (Paris: Presses Universitaires de France, 2004) at 411, 425.

⁸⁰ *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 *S.C.R.* 357, ¶23 (S.C.C.).

⁸¹ For a historical perspective on the debate around the nature of copyright, *i.e.* either as a monopoly, property or creation of statute, see H.G. Fox, *Canadian law of Copyright* (Toronto: University of Toronto Press, 1944) at 7-11, whereby after reviewing the three characterizations of copyright, the author concludes that copyright is incorporeal

erty, serves at times the overt purpose of distancing copyright from a natural right or common law property.⁸² The underlying purpose of distancing the nature of copyright from property, is allegedly to avoid the perceived absolutism and expansionist effects associated with the open-ended privileges and powers of property.⁸³ This motive, it seems, confuses the nature of the right, for instance property, with its justification, *i.e.* a natural right, which is not a *sine qua non* condition for the existence of property.⁸⁴ It seems to confront a specific rhetoric around property, the one that opposes it to any form of regulation or interference, as a powerful right that precedes the state, rather than property itself.⁸⁵ Although the open-ended texture of property may in theory lead to expansionism, the declared self-standing statutory nature of copyright⁸⁶ has not stopped it from expanding, independently of assimilating copy right to property.⁸⁷

property: *ibid.* at 10-11; *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201 (Eng. K.B.) at 218 [E.R.] *per* Willes J. [*Millar v. Taylor*]; *Kraft Canada Inc. c. Euro Excellence Inc.*, 2007 SCC 37 (S.C.C.) paras. 27–39 [*Kraft Canada Inc. c. Euro Excellence Inc.*]; *supra* note 20 at 42–47; D. Vaver, “Canada’s Intellectual Property Framework: A Comparative Overview” (2004) 17 I.P.J. 125 at 135; P.S. Menell, “The Property Rights Movement’s Embrace Of Intellectual Property: True Love Or Doomed Relationship?” (2007) 34 Ecology L. Q. 713 at 721; R. Epstein, “Liberty versus Property? Cracks in the Foundations of Copyright Law” (2005) 42 San Diego Law Review, 1; A. Mossoff, “Is copyright property?” (2005) 42 San Diego Law Review, 29; [P.S. Menell]; *supra* note 42.

⁸² R.J. Roberts, *supra* note 76 at 34; *supra* note 77 at 8. At other times, commentators have raised the reticence of qualifying copyright as property for political reasons. In particular, fearing the feudalist implications that this may have: see *supra* note 79 at 414. The more recent debate on the nature of copyright as property or not in the context of digital works is summarized by A. Mossoff, “Is copyright property?” (2005) 42 San Diego Law Review, 29, at 29 and fol.

⁸³ For example see N. Netanel, *Copyright’s Paradox* (New York: Oxford University Press, 2008) at 6-7.

⁸⁴ Even though the existence of a natural right to property has been the object of an ongoing controversy (see the discussion in Part IV(b) of the second part of this paper, *supra* note 21.) in an Anglo-American context, instrumentalism, and in particular utilitarianism, is often viewed as the most influential justification for the existence of private property, including intellectual property: J. Waldron, *supra* note 31 at 3: whereby the author develops his thesis of a rights-based theory of private property in contrast with dominant utilitarian justifications of private property.

⁸⁵ W. Patry, *Moral Panic and the Copyright Wars* (New York: Oxford University Press, 2009) at 97-132.

⁸⁶ *Compo Co. v. Blue Crest Music Inc.* *supra* note 80, at paragraph 23.

⁸⁷ In Canada, since the creation of copyright by statute, the exclusive rights conferred by copyright have expanded in scope, duration, as well as the subject matter of copyright (for example, the addition of communication signals and computer programs). From a U.S. perspective, J. Litman, “Lawful Personal Use” (2007) 85 Tex. L. Rev. 1871 at 1872, cites various recent legislative changes that have lead to progressively expanding copyright holders exclusive rights and restraining lawful personal uses of copyrighted material. See also the discussion of copyright expansionism in this section further below.

Another reason for the reticence to qualify copyright as property is related to how one defines property. A narrow view of property, *i.e.* as traditional tangible property, (such as land) with its demarcation or “fencing off” attributes, and its established set of rules and remedies, leads understandably to scepticism about any attempt to assimilate copyright to this specific entity. However, this narrow view of property is not reflective of the heterogeneity and adaptability of the property institution to regulate a multitude of heteroclitic relationships and resources, both tangible and intangible.⁸⁸ It cannot support an argument to exclude copyright from the property institution.⁸⁹

In Canada, copyright is probably more properly described as a distinct species of private property created by statute, although the Supreme Court has on numerous occasions distanced copyright law from property law, referring to *Compo Co. v. Blue Crest Music Inc.*: “copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.”⁹⁰ However, the same court and lower courts also often refer to copyright as a property right.⁹¹ Copyright confers a broad list of exclusive rights with correlative trespassory powers which are opposable to all (*i.e. in rem*).⁹² It can be assigned, in whole or in part,⁹³ it can be the object of contract⁹⁴ and it can be bequeathed. It is an object of commoditization.⁹⁵ Thus, in spite of its complex uniqueness,⁹⁶ one would be hard-pressed to deny copyright any

⁸⁸ *Supra* note 20 at 4, 348 where the author notes: “It is a mistake to assume that either we must align property in information with property in other resources or else we must exclude information from the property agenda. Property-institutional design may be and should be much more flexible than these alternatives allow.”

⁸⁹ *Supra* note 32 at 39, 42, describe intellectual property (which includes copyright) as distinct from and far more complex than tangible property, while at the same time, it shares important similarities with tangible property.

⁹⁰ *Supra* note 80 at para. 23 (subsequently applied in numerous Supreme Court judgments: see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, *supra* note 11 at para. 82).

⁹¹ *Millar v. Taylor* *supra* note 81; *Kraft Canada Inc. c. Euro Excellence Inc.*, *supra* note 81, at paras. 27–39; *BMG Canada Inc. v. John Doe*, 2005 FCA 193, [2005] F.C.J. No. 858, ¶41 (F.C.A.); *Richie v. Sawmill Creek Golf & Country Club Ltd.* (2004), 35 C.P.R. (4th) 163, ¶20 (Ont. Div. Ct.).

⁹² The CCA, *supra* note 2 at ss. 3, 15, 18, 21 and 26 sets the exclusive rights of copyright holders that are opposable to all, including a copyright user who has no contractual relationship with the copyright holder. It also lists the remedies attached to these exclusionary rights in Part IV of the CCA.

⁹³ Section 13(4) of the CCA, *supra* note 2.

⁹⁴ The most frequent form being licence agreements.

⁹⁵ On the commoditization of copyright, see F. MacMillan, “The Cruel C: Copyright and Film” (2002) 24 Eur. I.P. Rev. 483, in particular, at 484.

⁹⁶ These are characteristics that the property institution, by its heterogeneity, can very well accommodate: see *supra* note 20 at 3–6.

commonality with property,⁹⁷ other than for ideological reasons.

The non-rivalrous nature of copyright strikes as the most obvious incompatibility with the property institution.⁹⁸ A prevailing utilitarian view to justify the existence of private property institutions is the need to allocate privileges and powers over scarce resources, to avoid the “tragedy of the commons.”⁹⁹ Unlike most resources subject to property, the use of one copy of the work does not take away the use and enjoyment by others,¹⁰⁰ including the copyright holder.¹⁰¹ Thus, copyright law creates an “artificial scarcity.”¹⁰² From that perspective, the statutory nature of copyright is not in contradiction with the property institution *per se*. Au contraire, it is the constitutive instrument that cures the non-rivalrous “flaw” of copyright to make it property.¹⁰³

Another peculiarity is the duration of copyright, which, unlike other property interests, is limited to the life of the author plus 50 years.¹⁰⁴ Aside from the fact that relatively speaking, this may very well be eternity,¹⁰⁵ the limited duration of a

⁹⁷ From a U.S. perspective, see *supra* note 42, who argues that intellectual property, including copyright, is property.

⁹⁸ As J. Waldron, *supra* note 31 at 31 notes: “Scarcity, as philosopher from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property.”

⁹⁹ Under a utilitarian argument for private property, as opposed to a common property situation, Harold Demsetz gives the example of the hunters, whereby in the latter case, it will soon lead to a depletion of game for all and the generations to come, on the basis that people are greedy and will try to get as much as possible for themselves, unless they have a strong incentive not to, *i.e.* the case where private property is in place, whereby private owners: “will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners created incentives to utilize resources more efficiently”: H. Demsetz, “Toward a theory of Property Rights” (1967) 57 *American Economic Review* 347 at 356.

¹⁰⁰ In fact, there is no “tragedy of the commons” in the case of copyright: *supra* note 32 at 44.

¹⁰¹ Except in some cases, with respect to the economic rights of the copyright holder regarding the sale of the copies of her copyrighted work.

¹⁰² *Supra* note 20 at 42–44, 342; M. A. Lemley, *supra* note 36 at 1055 notes that the purpose of the artificially created scarcity is “a conscious decision to create scarcity in a type of good in which it is ordinarily absent in order to artificially boost the economic returns to innovation.”

¹⁰³ P.S. Menell describes the role of intellectual property law as a means to resolve the non-excludable nature of intangible goods as public goods: P.S. Menell, *supra* note 81 at 726.

¹⁰⁴ Section 6 of the *CCA*, *supra* note 2. For some commentators, this is incompatible with the concept of property. See for example: *supra* note 79 at 411.

¹⁰⁵ In a day and age of instantaneous dissemination of unprecedented amounts of information, works are quickly relegated to the ranks of “dépassé.” Also, the quick pace at which technology is updated, for example, in the area of computer programs (protected by copyright as literary works) make this term likely much longer than its actual “utility life” can sustain.

right is no stranger to the property institution.¹⁰⁶

Of the three ownership interests that are common to all property institutions,¹⁰⁷ namely (i) a juridical relation between a person and a resource (ii) privileges and powers that are open-ended, and (iii) which authorize self-seekingness on the owner, copyright meets the first one,¹⁰⁸ and the second and third ones to a large extent. If not unlimited, there is an open-ended texture to copyright, in that the list of exclusive powers it confers is not exhaustive,¹⁰⁹ and gives rise to legal interpretation and uncertainty.¹¹⁰ More importantly, and just as for other forms of private tangible property, the manner of use, sharing and disposal of the exclusive rights conferred to copyright holders is open-ended.¹¹¹ As to the self-seekingness nature of copyright, it is a central feature to the operation of copyright, that the copyright holder may decide how and when she wants to dispose of copyright,¹¹² with no duty to account to any one on the merit or rationality of that choice.¹¹³ As the Supreme Court noted in *Robertson*, on the issue of whether freelance authors had impliedly or not licensed the right to the *Globe and Mail* newspaper to republish their articles in electronic databases: “parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*.”¹¹⁴ Thus, in spite of the seemingly limitative enumerated list of exclusive rights conferred to

¹⁰⁶ For example, in civil law, emphyteusis and usufruct are real rights (*i.e.* a dismemberment of the right of ownership) that have a limited duration of up to 100 years: arts. 1119, 1123 and 1197 of the *Québec Civil Code*.

¹⁰⁷ That is, from mere property interest to full-blooded ownership, see Part II (a) above.

¹⁰⁸ *I.e.* rights on the artificially scarce intangible resource that can be distanced from the copyright owner, that confer trespassory powers.

¹⁰⁹ Section 3 of the *CCA*, *supra* note 2, states: “‘copyright’, in relation to a work, means the sole right to produce or reproduce the work . . . and *includes* the sole right. . . .” [emphasis added].

¹¹⁰ P.S. Menell, *supra* note 81 at 744-745.

¹¹¹ *Supra* note 20 at 42-46.

¹¹² Section 13(4) of the *CCA*, *supra* note 2, provides: “The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other right by licence, . . .”

¹¹³ The *CCA*, *supra* note 2, also supports the self-seekingness aspect of copyright through moral rights, *i.e.* the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors (*i.e.* physical persons): see s. 14.1(1) of the *CCA*, *ibid*. However, moral rights *per se* are inalienable (but they can be waived): s. 14.1(2) of the *CCA*, *ibid*. They are unlikely property.

¹¹⁴ *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, ¶58 (S.C.C.). Other cases illustrate the broad freedom that is being granted to copyright holders on the terms under which they make their copyrighted works commercially available, beyond the terms of their constitutive legislative act. For example, cases where courts uphold the characterization made by copyright holders of the transaction on the copy of a copyrighted work as a licence, rather than as a sale, by predominantly relying on how the copyright holder describes the transaction *per se*, rather than by looking at its effects as a whole, as well as to the nature of the exclusive rights of the copyright holder

copyright holders by the *CCA*, copyright sits closer to the broadest form of ownership on the ownership spectrum, *i.e.* “full-blooded ownership” than it might appear at first sight.¹¹⁵

More than this, in respect of the trespassory powers and economic benefits that are presumed to be within the domain of the copyright holder, copyright has been described as conferring inflated ownership rights to the copyright holder. Applying economic theory, Marc A. Lemley rightly observes that copyright law allows the copyright holder to benefit from positive externalities of her ownership right to a degree that is not observed for other types of tangible property:¹¹⁶ “. . . society in general doesn’t prohibit free riding. Internalization of positive externalities is not necessary at all unless efficient use of the property requires a significant investment that cannot be recouped another way. And even then, economic theory properly requires not the complete internalization of positive externalities but only the capture of returns sufficient to recoup the investment. Only where there is a tragedy of the commons do we insist on complete or relatively complete internalization of externalities.”¹¹⁷ This is the result, according to Lemley, of a focus by the courts on the benefit of those externalities, *i.e.* “free riding,” and on the assumption that such benefits are necessarily unjust.¹¹⁸ One can think of many examples in the *CCA* that illustrate Lemley’s argument. First, the cornerstone of copyright law, *i.e.* the exclusive right to make copies of copyrighted works, is increasingly under attack with the advent of new technologies. The main criticism is that certain copies are not likely to threaten the creator-incentive primary justification of copyright, for instance, when a consumer makes copies for pure convenience purposes. A more controversial example is when the copy owner makes a copy for a family member or a close friend. It is not always clear that the copy is necessarily taking anything away from the copyright holder. In other words, had she not been provided with the copy, the close friend or the family member may not have purchased the copy of the copyrighted work at all. Also, making a copy for a close friend or family member can be seen as a reasonable freedom of the ownership rights in the copy of the copyrighted work that also promotes the dissemination of copyrighted works, and that can even benefit the copyright holder in other ways (for example,

and their underlying limitations, dictated by the overall objectives of copyright. As one recent example, see *Vernor v. Autodesk, Inc.*, *supra* note 14.

¹¹⁵ By contrast, a quasi-ownership interest, for example the one of a public corporation, would confer definite privileges and powers set out by statute as well as a duty to account for such actions. In other words, in such cases, there is no self-seekingness present: *supra* note 20 at 106 and following.

¹¹⁶ M.A. Lemley, *supra* note 36 at 1033: “Courts and commentators adopt — explicitly or implicitly — the economic logic of real property in the context of intellectual property cases. They then make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right.”

¹¹⁷ *Ibid.* at 1050. See also P.S. Menell, *supra* note 81 at 744-745, where the author notes that one of the important differences between intellectual property and tangible property is precisely that there is no tragedy of the commons and hence no need that every component of the artificially created resource should necessarily be owned.

¹¹⁸ M.A. Lemley, *supra* note 36 at 1044.

by encouraging the beneficiary of the burned copy to go to a concert or to buy the complete CD). However, the rights and remedies that generally support the exclusive right to reproduce, lead to infer that something is being taken away from the copyright holder because someone made additional copies of the work without compensation. There are several other illustrations of copyright holders' ability to capture the positive externalities of their ownership rights above and beyond what tangible property would normally allow.¹¹⁹ One example is the "incidental inclusion provision" in the CCA. It provides a limited exception to the inclusion of a work (for example a musical recording) into another work (for example, a film documentary) but only if the use of the first work is incidental and not deliberate.¹²⁰ Thus, other than for these very limited exceptions, any other positive externalities of a copyrighted work, even if quite minimal, falls within the exclusive domain of the copyright holder. By contrast, the use of a vase or a desk lamp not subjected to copyright (or to any other intellectual property right) is not subjected to any form of restriction from the maker of the vase or desk lamp and can be used freely in the film documentary as a positive benefit of owning that vase or desk lamp.

Consequently, if copyright holders benefit from even more externalities than other forms of tangible private property, the reason for such expansionist tendencies must be sought elsewhere than because copyright is assimilated to property by lawmakers, the judiciary and commentators. Thus, it is not so much the "properization" of copyright that can lead to expansionism, but rather a misinformed application of the concept of property to copyright: one that overlooks the existence and operation of property's intrinsic limitations.¹²¹ The proper application of the property framework to copyright may in fact lead to more constraining effects on the scope of copyright than the reverse.¹²² Also, invoking the *sui generis* nature of copyright to distance it from other forms of property does not shield copyright from expansionism. It gives more flexibility to policy and lawmakers to create and increase exclusionary rules and powers outside the established pre-existing parameters of property¹²³.

Given the close proximity of copyright to full-blooded ownership, as it has

¹¹⁹ Sections 29 to 32.2 of the CCA contain numerous exceptions to the exclusive rights of copyright holder which are perhaps even more revealing of the extensive scope of copyright holders exclusive rights than the sections of the CCA dealing with the exclusive rights of copyright holders *per se*. To name a few, educational institutions' specifically enumerated and carved-out exceptions, and the computer program limited copying exceptions for compatibility and back-up purposes.

¹²⁰ Section 30.7 of the CCA, *supra* note 2.

¹²¹ C.M. Newman, "Transformation in Property and Copyright" (2010) George Mason University Law and economics paper series, Research Paper No. 10-51, online http://ssrn.com/abstract_id=1688585, at 10.

¹²² *Ibid.*, where the author reflects on the *in rem* nature of property and on how it commands standardized and predictable rules that are not subject to the personal preferences of others. The author demonstrates how the application of a rigorous and consequentialist *in rem* approach to copyright would constrain rather than expand the current scope of copyright exclusive rights.

¹²³ *Ibid.*

been demonstrated in this section, the debate about whether copyright is property or not is as in fructuous as it is misguided. The distinct nature of copyright should not exclude *a priori* the application of or analogies to traditional tangible property law and theory. The qualification by the Supreme Court in *Compo Crest* (as cited above) of copyright law as distinct from property law, points to the specificity of copyright. However, it cannot be interpreted so as to deny that copyright also shares the characteristics of property and ownership of other resources, and that important insights ensue from this recognition. Acknowledging the property nature of copyright is particularly important to our present discussion, given the absence of an articulation in the *CCA* or elsewhere of the ownership rights in the copy of a copyrighted work. Viewed from the perspective of two competing ownership rights in the same resource, and how one right operates as a limitation on the other and *vice versa*, property theory provides a strong normative framework both for the consumer and the copyright holder's dual rights in the same copyrighted work. Calling copyright "property" is not going to completely resolve its contours either.¹²⁴ The proper question is: given the constitutive nature and justifications of copyright as a private property right, what limitations are justified and how can property law and theory inform us about their nature and operation?

¹²⁴ P.S. Menell, *supra* note 81 at 721. For Menell: "The critical question is not whether the rubric "property" applies to intellectual property but whether the traditional rights associated with real and other tangible forms of property apply to intellectual property." Peter Menell's answer to that question is no, while Richard Epstein would answer yes: see *supra* note 42.

