



Reconsidering Copyright's Constitutionality

Graham J. Reynolds

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Reconsidering Copyright's Constitutionality

Abstract

In 1996, in *Compagnie Générale des Établissements Michelin – Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [Michelin], Justice Teitelbaum of the Federal Court (Trial Division) held both that specific provisions of the Copyright Act did not infringe the right to freedom of expression as protected under the Canadian Charter of Rights and Freedoms and that, even if they did, these provisions could be justified under s 1 of the Charter. Since Michelin, these conclusions have been treated by Canadian courts as settled. The purpose of this paper is to challenge these conclusions by subjecting certain core provisions of the Copyright Act to Charter scrutiny. I will do so in reliance on one case study, namely copyright term extension. I will argue that the use of copyrighted works in the context of this case study constitutes protectable expression, and that core provisions of Canada's Copyright Act infringe the Charter right to freedom of expression in purpose and effect. As well, I will argue—drawing in particular from the SCC's decision in *Saskatchewan (Human Rights Commission) v Whatcott*—that these provisions might not be justified under s 1. Lastly, I will address the remedies that might be granted by a court should it conclude that provisions of the Copyright Act unjustifiably infringe s 2(b) of the Charter. Ultimately, I will demonstrate that there are serious questions to be answered with respect to whether provisions of Canada's Copyright Act unjustifiably infringe the Charter right to freedom of expression. It is time for Canadian courts to move past Michelin and to reconsider copyright's constitutionality.

Keywords

Copyright; Freedom of expression; Canada; Canada. Copyright Act; Canada. Canadian Charter of Rights and Freedoms

Reconsidering Copyright's Constitutionality

GRAHAM J. REYNOLDS*

In 1996, in *Compagnie Générale des Établissements Michelin – Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) [Michelin]*, Justice Teitelbaum of the Federal Court (Trial Division) held both that specific provisions of the *Copyright Act* did not infringe the right to freedom of expression as protected under the Canadian *Charter of Rights and Freedoms* and that, even if they did, these provisions could be justified under s 1 of the *Charter*. Since *Michelin*, these conclusions have been treated by Canadian courts as settled. The purpose of this paper is to challenge these conclusions by subjecting certain core provisions of the *Copyright Act* to *Charter* scrutiny. I will do so in reliance on one case study, namely copyright term extension. I will argue that the use of copyrighted works in the context of this case study constitutes protectable expression, and that core provisions of Canada's *Copyright Act* infringe the *Charter* right to freedom of expression in purpose and effect. As well, I will argue—drawing in particular from the SCC's decision in *Saskatchewan (Human Rights Commission) v Whatcott*—that these provisions might not be justified under s 1. Lastly, I will address the remedies that might be granted by a court should it conclude that provisions of the *Copyright Act* unjustifiably infringe s 2(b) of the *Charter*. Ultimately, I will demonstrate that there are serious questions to be answered with respect to whether provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. It is time for Canadian courts to move past *Michelin* and to reconsider copyright's constitutionality.

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En 1996, dans l'affaire *Compagnie Générale des Établissements Michelin c. Le Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada - (TCA-Canada) [Michelin]*, le juge Teitelbaum de la section de première instance de la Cour fédérale a statué que certaines dispositions de la *Loi sur le droit d'auteur* ne contreviennent pas au droit de liberté d'expression tel que le définit la *Charte canadienne des droits et libertés* et que, même si c'était le cas, ces dispositions pourraient être justifiées en vertu de l'article premier de la *Charte*. Depuis le jugement *Michelin*, les tribunaux canadiens considèrent résolues ces conclusions. Cet article a pour but de les remettre en question en soumettant certaines dispositions fondamentales de la *Loi sur le droit d'auteur* à un examen détaillé à la lumière de la *Charte*. Afin d'y parvenir, j'analyserai dans une étude de cas l'acception du terme « droit d'auteur ». Je prétends dans cette étude de cas que l'utilisation de matériel assujéti au droit d'auteur est protégée et que des dispositions fondamentales de la *Loi sur le droit d'auteur* contreviennent en intention et en fait au droit de liberté d'expression tel que le définit la *Charte*. Je prétends de plus, m'appuyant en particulier sur le jugement de la Cour suprême du Canada dans l'affaire *Saskatchewan (Human Rights Commission) c. Whatcott*, que de telles dispositions ne sont peut-être pas justifiées en vertu de l'article premier. J'aborderai enfin les recours que pourrait accorder un tribunal s'il venait à conclure que les dispositions de la *Loi sur le droit d'auteur* contreviennent à l'article 2b) de la *Charte*. Pour conclure, je démontrerai que de sérieuses questions se posent quant à savoir si des dispositions de la *Loi sur le droit d'auteur* contreviennent de manière injustifiée au droit de liberté d'expression tel que le définit la *Charte*. Il serait grand temps que les tribunaux canadiens se dégagent du jugement *Michelin* et remettent en question la constitutionnalité du droit d'auteur.

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DO PROVISIONS OF CANADA'S *Copyright Act*¹ unjustifiably infringe the right to freedom of expression as protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*?² This question, while it has not been explicitly addressed by the Supreme Court of Canada (SCC), has been addressed by a number of lower Canadian courts.³ In the leading Canadian case to have addressed the intersection of the *Charter* right to freedom of expression and copyright—*Michelin*⁴—Justice Teitelbaum, of the Federal Court (Trial Division), held that specific provisions of the *Copyright Act* did not infringe the *Charter*-protected right to freedom of expression and, even if they did, they would be justified through the application of a section 1 analysis. Since *Michelin*, these conclusions have been treated by Canadian courts as settled.⁵

In this article, I argue that these conclusions ought not to be treated by courts as settled and that based on current copyright and *Charter* jurisprudence, a Canadian court could determine that provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. In so doing, this article adds to the voices of those who have argued that Canadian courts should reconsider the relationship between copyright and the *Charter* right to freedom

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1. *Copyright Act* RSC 1985, c C-42.
 2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
 3. See, for instance, *Queen v James Lorimer & Co*, [1982] FCJ No 229 FCTD & *Queen v James Lorimer & Co*, [1984] 1 FC 1065, 777 CPR (2d) 262 [*James Lorimer*]; *Canadian Tire Corp v Retail Clerks Union, Local 1518*, 7 CPR (3d) 415, [1985] FCJ No 1005; *Rôtisseries St.-Hubert Ltée v Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.)*, [1987] RJQ 443, 17 CPR (3d) 461; *Compagnie Générale des Établissements Michelin – Michelin & Cie v CAW-Canada*, [1996] FCJ No 1685, [1997] 2 FC 306 [*Michelin*]; *Fraser Health Authority v Hospital Employees' Union*, 2003 BCSC 807, 226 DLR (4th) 563; *Corporation Sun Média c Syndicat canadien de la fonction publique*, 2007 QCCS 2943, DTE 2007T-630; *Canwest Mediaworks Publications Inc v Horizon Publications Ltd*, 2008 BCSC 1609, 173 ACWS (3d) 431 [*Canwest 2008*]; *Drolet v Stiftung Gralsbotschaft (FC)*, 2009 FC 17, [2010] 1 FCR 492 [*Drolet*].
 4. *Michelin*, *ibid.*
 5. See, for example, *Canwest 2008*, *supra* note 3; *Drolet*, *supra* note 3. This attitude towards the *Copyright Act* is the case despite the SCC's articulation of the purpose of copyright having evolved since *Michelin*. The evolution of the purpose of copyright in Canada is discussed in greater depth in section 2(d) of this article. For other works that address this topic, see, for instance, Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 UOLTJ 315. In a separate work, I argue that the approach adopted in *Michelin* to the intersection of the *Charter* right to freedom of expression and copyright relies on now-invalid approaches to both copyright and freedom of expression and, as a result, that this approach is itself invalid and must be reconsidered.

of expression, including David Fewer, Jane Bailey, Carys Craig, and Bitá Amani.⁶ I also build upon my previous work in this area.⁷

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6. David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55:2 U Toronto Fac L Rev 175; Jane Bailey, "Deflating the Michelin Man" in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005); Carys J Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" (2006) 56:1 Univ of Toronto LJ 75; Bitá Amani, "Copyright and Freedom of Expression: Fair Dealing Between Work and Play" in Rosemary J Coombe, Darren Wershler & Martin Zellinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2013).
 7. Graham Reynolds, "A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression" (2006) 5:3 CJLT 179; Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 Queen's LJ 455. For other works that address the intersection of freedom of expression and copyright in Canada, see Joe Conforti, "Copyright and Freedom of Expression: A Privilege for New[s] Reports" (1990) 5 IPJ 130; Ysolde Gendreau, "Canadian Copyright Law and its Charters" in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford: Oxford University Press, 2005) 245; Ysolde Gendreau, "Copyright and Freedom of Expression in Canada" in Paul Torremans (ed), *Copyright and Human Rights* (The Hague: Kluwer Law International, 2004) 21; Alex Colangelo and Alana Maurushat, "Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures" (2006) 51:1 McGill LJ 47; Sarah Sklar-Heyn, "Battling Clearance Culture Shock: Comparing US Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film" (2011) 20:1 Cardozo J Int'l and Comp L 233; Margaret Ann Wilkinson and Charles A. Painter, "Shifting the Balance of Copyright Control for Photographic Works in Canada" (1998-1999) 13 IPJ 353; Teresa Scassa, "Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn v Office and Professional Employees' International Union, Local 378*" (2002) 39:4 Alta L Rev 934; Ian Kerr, Alana Maurushat and Christian Tacit, "Technical Protection Measures: *Tilting at Copyright's Windmill*" (2002/2003) 34:1 Ottawa L Rev 6; Ian Kerr and Jane Bailey, "The Implications of Digital Rights Management for Privacy and Freedom of Expression" (2004) 2:2 J of Info, Comm & Ethics in Soc 87; Abraham Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16:1 Can JL & Juris 3; Myra J Tawfik, "International Copyright Law: W[h]ither User Rights?" in Michael Geist (ed), *In the Public Interest* (Toronto: Irwin Law, 2005) 66; Gregory R Hagen and Nyall Engfield, "Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test" (2006) 3:2 UOLTJ 477; EAC Mohammed, "Parody as Fair Dealing in Canada: A Guide for Lawyers and Judges" (2009) 4:7 JIPLP 468; Graham Reynolds, "A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada" (2009) 6:3 SCRIPTed 639; Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist (ed), *From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010) 395; Graham Reynolds, "All the Game's a Stage: Machinima and Copyright in Canada" (2010) 13:6 JWIP 729; Graham Reynolds, "Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in

The article proceeds as follows. In Part II, I rely upon a hypothetical case of copyright term extension to discuss the scope of the section 2(b) right to freedom of expression in the context of copyright.⁸ I argue that the SCC's freedom of expression jurisprudence suggests that the unauthorized act at the heart of the case considered in this article conveys or attempts to convey meaning and thus constitutes protectable expression under section 2(b); that this act should not be excluded from the scope of the *Charter* right to freedom of expression due to the method or location of expression; and that key provisions of the *Copyright Act*—namely the general infringement provision (section 27(1)), read in context with the provisions granting rights in works (sections 3 and 5), the primary remedy provisions (sections 34, 38.1 and 42), the provisions detailing defences and limitations to copyright infringement (sections 29-30.9), and the provision setting out the term of copyright in works (as amended) (section 6), limit or restrict freedom of expression in purpose and effect, thus infringing the *Charter* guarantee.⁹

In Part III, I draw upon SCC jurisprudence and related commentary to discuss how the section 1 analysis might be applied in the context of the hypothetical case considered in this article. I argue that this jurisprudence suggests

Canada" (2010) 33:2 Man LJ 241; Graham Reynolds, "The Impact of Canadian Copyright Laws on the Voices of Marginalised Groups: Towards a Right to Rewrite" (2010-2011) 48:1 Alta L Rev 35; Teresa Scassa, "Trademarks Worth a Thousand Words: Freedom of Expression and the Use of the Trademarks of Others" (2012) 53:4 Les Cahiers de droit 887; Katie Sykes, "Towards a Public Justification of Copyright" (2003) 61:1 UT Fac L Rev 1; Daniel Gervais, "Making Copyright Whole" (2008) 5:1 UOLTJ 1; David Vaver, "Intellectual Property: The State of the Art" (2000) 116:4 LQR 621; David Vaver, "Copyright Defences as User Rights" (2012-2013) 60:4 J Copyright Soc'y USA 661; Pascale Chapdelaine, "The Ambiguous Nature of Copyright Users' Rights" (2013) 26:1 IPJ 1 at 18; Sunny Handa, *Copyright Law in Canada* (Markham, Ont: Butterworths, 2002) at 95; David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 22; David Vaver, *Intellectual Property Law*, 2nd Ed (Toronto: Irwin Law, 2011) at 46-50. See also Graham Reynolds and others, *Canadian Intellectual Property Law* (Toronto: Emond Montgomery, 2013). One section of this casebook addresses the intersection of freedom of expression and copyright (see pp 173-77). See, as well, Rebecca Tushnet, "Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation" (2000) 42:1 BC L Rev 1 for a similar analysis in the US context.

8. Like its articulation of the purpose of copyright, the SCC's view of the correct scope of s 2(b) has also changed over time. For a work that describes, in detail, the evolution of the SCC's articulation of the scope of s 2(b), see Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall LJ 1.
9. *Copyright Act*, *supra* note 1. Bailey, as well, has argued that "[a] strong argument can be made that the [Copyright] Act's prohibition against expressing certain content constitutes a *prima facie* section 2(b) violation." See Bailey, *supra* note 6 at 144.

that the objective of the impugned provisions of the *Copyright Act* is pressing and substantial and that there is a rational connection between this objective and the impugned provisions. However, I argue further that the impugned provisions may be considered overbroad and as a result may fail the minimal impairment branch of the proportionality test. In addition, a court could find that the deleterious impact of the provisions may not be outweighed by their benefits. As a result, these provisions may not be justified under a section 1 analysis.

Part IV addresses remedies. In the event that the impugned provisions noted above are held to infringe the section 2(b) right to freedom of expression and are not saved by section 1, what might be the appropriate remedy? While a court could sever part of the offending provision (or provisions), my analysis of section 1 jurisprudence suggests that a court could find that the most appropriate remedy would be for the Court to declare the *Copyright Act*, in its entirety, to be of no force or effect (albeit with a temporary suspension of invalidity). Although appearing at first glance to be a radical outcome, such an action would be consistent with both past *Charter* jurisprudence and, more generally, with the division of authority between courts and Parliament.

My purpose in writing this article is to call into question the view that arguments challenging the constitutionality of provisions of the *Copyright Act* on *Charter* right to freedom of expression grounds are “bound to fail,” as one lower court stated.¹⁰ Rather, given that a Canadian court could determine that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression, it is important for Canadian courts to consider the question of copyright’s constitutionality rather than reject it out of hand. As Margaret Radin writes, “[i]t may be that the copyright law that we have can easily meet the freedom of expression test, but that does not mean that we should not apply the test to see whether the law meets it.”¹¹

10. *Canwest 2008*, *supra* note 3 at para 37.

11. Margaret Jane Radin, “The Rule of Law in the Information Age: Reconciling Private Rights and Public Values” (2009) 4 *JL Phil & Culture* 83 at 104. It should be noted that Radin is speaking in the context of US copyright law.

I. COPYRIGHT AND FREEDOM OF EXPRESSION (SECTION 2(B))

A. HYPOTHETICAL CASE: COPYRIGHT TERM EXTENSION

Justice L'Heureux-Dubé noted in *Dunmore*, that “*Charter* litigation decisions cannot be made in a factual vacuum.”¹² The question of copyright’s constitutionality must be addressed in the context of a specific factual matrix. The hypothetical case that I rely on for the purposes of this article is as follows: An action is brought against A for copyright infringement for making available works the copyright in which would have expired were it not for a legislative amendment to the *Copyright Act*, enacted after the works were created, that extended the term of copyright for both future and existing works. The case assumes that the act complained of prima facie infringes copyright and is not saved by any defence to copyright infringement. The defendant, A, argues that specific provisions of the *Copyright Act* (both the provision setting out the term of protection for copyrighted works as well as other core provisions) unjustifiably infringe the *Charter* right to freedom of expression.¹³

I have selected this hypothetical because a recent amendment to the *Copyright Act*,¹⁴ as well as possible future amendments to the *Copyright Act*,¹⁵ suggest that in the not too distant future, a case challenging the constitutionality of similar provisions of the *Copyright Act* could be brought. However, I do not mean to suggest that this is the only type of situation that might lead a court to determine

12. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para 126, [2001] 3 SCR 1016 [*Dunmore*].

13. As a preliminary issue, it should be noted that the SCC has held that statutory provisions are not presumed to be consistent with the *Charter*. As noted by Justice Beetz, who delivered the judgment of the Court, “the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.” See *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110 at 112, 38 DLR (4th) 321.

14. As part of a budget implementation act that received royal assent on June 23, 2015, the Government of Canada extended the term of copyright protection in published sound recordings (both existing and not-yet-created) from, broadly speaking, fifty years after publication to seventy years after publication. Both existing works and works not-yet-created receive the benefit of this extension. See *Copyright Act*, *supra* note 1 at ss 23(1)(b), 23(1.1).

15. On February 4, 2016, Canada signed the Trans-Pacific Partnership Agreement, one of the articles of which requires contracting parties to protect works, performances, and phonograms for the term of the natural life of the author plus 70 years after the author’s death. See Trans-Pacific Partnership (Final Draft), 4 February 2016, USTR 2010 00014 at art 18.63, online: <ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

that provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression, or that my conclusions are restricted to the specific case presented. Rather, I present this case as an illustrative example of some of the constitutional issues raised by Canadian copyright law.¹⁶

B. DO THE ACTIVITIES IN QUESTION HAVE EXPRESSIVE CONTENT?

As noted by Justice Cory in *Libman v Quebec (Attorney General)*, the SCC has interpreted the *Charter* right to freedom of expression broadly in order to “extend the guarantee under the Canadian *Charter* to as many expressive activities as possible.”¹⁷ According to Justice Cory, “any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of section 2(b) of the *Canadian Charter*,” aside from certain circumstances in which the method or location of an expression will result in the expression not being protected under the *Charter* right to freedom of expression (an issue that will be addressed in the next section).¹⁸

In making a copyrighted work available, is A conveying or attempting to convey meaning? One factor that must be addressed in considering this question is whether section 2(b), despite protecting an “infinite variety of forms of expression,” only protects expression made by the individual claiming the benefit

16. Furthermore, I have intentionally not included additional details in this case study, such as a specific work or individual, in order to avoid drawing attention away from the broader question of whether a Canadian court could determine that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. For works the focus of which is copyright term extension, see, for instance, Marci A Hamilton, “Copyright Duration Extension and the Dark Heart of Copyright” (1996) 14:3 *Cardozo Arts & Ent L J* 655; Arthur R Miller, “Copyright Term Extension: Boon for American Creators and the American Economy” (1998) 45:3 *J Copyright Soc’y USA* 319; Tyler T Ochoa, “Patent and Copyright Term Extension and the Constitution: A Historical Perspective” (2001) 49:1 *J Copyright Soc’y USA* 19; Dennis S Karjala, “Judicial Review of Copyright Term Extension Legislation” (2002) 36:1 *Loy LA L Rev* 199; Richard A Epstein, “The Dubious Constitutionality of the Copyright Term Extension Act” (2002) 36:1 *Loy LA L Rev* 123; Marvin Ammori, “The Uneasy Case for Copyright Extension” (2002) 16:1 *Harv J L & Tech* 287; Martin Kretschmer et al, “Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings” (2008) 30:9 *EIPR* 341.

17. *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at para 31, 151 DLR (4th) 385.

18. *Ibid.*

of the section 2(b) right.¹⁹ The question of whether a party can convey meaning, for section 2(b) purposes, using the copyright-protected expression of another was answered in the affirmative in *Michelin*. Justice Teitelbaum concluded that, despite the fact that “‘Bibendum’ [the “Michelin Man” character] is not the fruits of the defendants’ own labours,” the Canadian Auto-Workers Union (CAW) was conveying meaning, and thus engaging in expression, by using the modified Bibendum on its pamphlets and leaflets.²⁰ As he noted, “[a]t its minimum, the meaning in this instance is that Michelin workers should band together in the union before they are stomped into submission by the corporate powers symbolized by the ‘Bibendum.’”²¹ Carys Craig echoes Justice Teitelbaum’s conclusion that CAW’s use of Bibendum conveys meaning, writing that “the defendants’ depiction of Bibendum contributed something to the public understanding, generating new meaning by recontextualizing a powerful communicative symbol, expressing it anew and with a radically different message.”²²

Some might argue, however, that rather than conveying or attempting to convey meaning, all that A is doing in my hypothetical case is engaging in a purely physical act, unconnected to expression. Indeed, some courts have interpreted as purely physical acts that might otherwise be seen as expressive.²³ The result of this interpretation is that the act is not considered to be protectable expression under the *Charter* right to freedom of expression. One instance in which this classification occurred was in *R v Ludacka*,²⁴ a case heard by the Court of Appeal for Ontario (OCA). *Ludacka* dealt with the question of whether a series of explicit sex acts, performed on stage, constituted expression and, thus,

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19. *Weisfeld v Canada (CA)*, [1994] FCJ No 999 at para 29, 116 DLR (4th) 232. See also Craig, *supra* note 6 at 83-84. Here he argues that “[t]hat the expression originates with the speaker is simply not a requirement of an attempt to convey meaning before it can fall within the freedom-of-expression guarantee... If someone writes ‘War is Terrorism!’ on a placard and hands it to me, I would be expressing myself by waving that placard. The expression may not be *mine* in the copyright sense of having originated from me as an author, but by demonstrating my support of that message, I would undoubtedly be engaged in an act of self-expression.”
 20. *Michelin*, *supra* note 3 at 40. See also *Coles Book Stores Ltd v Ontario (Attorney General)* (1991), 6 OR (3d) 673 at para 80, 88 DLR (4th) 312.
 21. *Michelin*, *ibid* at 41.
 22. Craig, *supra* note 6 at 112.
 23. See, for instance, *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969, 58 DLR (4th) 577 [*Irwin Toy*]. Specifically, see where Chief Justice Dickson and Justices Lamer and Wilson write that “[i]t might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content.”
 24. (1996), 105 CCC (3d) 565, 28 OR (2d) 19 [*Ludacka*].

was prima facie protected by the *Charter*.²⁵ Justice Dubin held that the explicit sexual acts complained of were “purely physical activity which does not convey or attempt to convey meaning.”²⁶ Applying this decision in the context of A’s actions, it could be argued that the act of making available copyrighted works is a purely physical activity that does not convey or attempt to convey meaning.

The approach adopted in *Ludacka*, however, can be critiqued on several grounds. First, it is inconsistent with the expansive conception of section 2(b) repeatedly affirmed by Canadian courts. In *Ontario Adult Entertainment Bar Assn v Metropolitan Toronto (Municipality)*,²⁷ a case decided after *Ludacka*, the OCA held that explicit lap dancing is expression, as “courts have taken an expansive view in approaching the characterization of conduct as expression.” Further, “competing values and interests that arise when viewing certain impugned conduct” that might otherwise lead a court to determine that conduct does not constitute expression, are more properly assessed under a section 1 analysis.²⁸

Second, the decision in *Ludacka* can also be critiqued on the basis that it is inconsistent with prior SCC jurisprudence. In *Butler* (which was decided by the SCC four years before the OCA’s decision was handed down in *Ludacka*), Justice Sopinka stated that “I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression.”²⁹ Justice Sopinka distinguished “purely physical activity” (that is, physical activity that is not intended to convey a meaning, and does not convey a meaning) from the sale and rental of “‘hard core’ videotapes and magazines as well as sexual paraphernalia.”³⁰ He held that “while indeed ‘physical’”, the sale and rental of these items “conveys ideas, opinions, or feelings.”³¹ Despite involving an element of physicality—in that individuals must engage in some physical act or process in order to make a work available for others to access—*Butler* and *Ontario Adult Entertainment* suggest that the act of so doing is a physical act that conveys information, expression, ideas, and opinions, and thus should be seen as expressive.

25. *Ibid.*

26. *Ibid* at 572.

27. *Ontario Adult Entertainment Bar Assn v Metropolitan Toronto (Municipality)* (1995), 35 OR (3d) 161, 151 DLR (4th) 158 [*Ontario Adult Entertainment*].

28. *Ibid* at para 50.

29. *R v Butler*, [1992] 1 SCR 452 at 489, 89 DLR (4th) 449 [*Butler*]. As Justices Dickson, Lamer, Wilson held in *Irwin Toy*, even the act of parking a car can have expressive content. See *Irwin Toy*, *supra* note 23 at 969.

30. *Butler*, *ibid* at 461.

31. *Ibid* at para 487.

C. IS THE ACTIVITY EXCLUDED FROM THAT PROTECTION AS A RESULT OF EITHER THE LOCATION OR THE METHOD OF EXPRESSION

Notwithstanding the SCC's characterization of the *Charter* right to freedom of expression as a broad and expansive right, some acts that convey or attempt to convey meaning are excluded from the scope of protectable expression on the basis of either the method or the location of the expression. In their majority reasons in *Montréal (City)*,³² Chief Justice McLachlin and Justice Deschamps wrote that these exclusions should not be interpreted broadly. Instead, "expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee," namely self-fulfillment, democratic discourse, and truth-finding.³³

1. METHOD OF EXPRESSION

The sole method of expression to have been excluded from protection by the SCC under section 2(b), subsequent to *Irwin Toy*, is violent expression or expression that takes the form of violence. In *Montréal (City)*, Justices McLachlin and Deschamps noted that although it "may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator," violent expression is excluded from protection under section 2(b) on the basis that it "prevents dialogue rather than fostering it," "prevents the self-fulfillment of the victim rather than enhancing it," and "stands in the way of finding the truth rather than furthering it."³⁴

Some might describe the unauthorized use of copyrighted works as a violent act, as an act that harms the author of the work, or as an act that is equivalent to a violent act.³⁵ The scope of the violence exclusion from section 2(b), however, has been confined by Canadian courts to acts of violence committed by one individual against another, or to threats of violence.³⁶ While it is possible that in certain instances, individuals could engage in the unauthorized use of copyright-protected

32. *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141 [*Montréal*].

33. *Ibid* at para 72.

34. *Ibid*.

35. For instance, in an article published in the Guardian Newspaper, Alexis Petridis describes how the singer Madonna characterized the unauthorized leak of music from her album Rebel Heart as "a form of terrorism" and "artistic rape." See Alexis Petridis, "Madonna: I did not say, 'Hey, here's my music, and it's finished.' It was theft" *The Guardian* (December 21, 2014), online: <<http://www.theguardian.com/music/2014/dec/21/madonna-album-hack-living-state-terror>> .

36. See, for instance, *Irwin Toy*, *supra* note 23; *R v Geoghegan*, 2004 ABPC 127, [2004] AWLD 610.

expression in a manner that threatens violence against an individual (for instance combining clips of movies and sending them to an individual as part of a threat of violence against that individual or against a group with which the individual identifies), in most circumstances, excluding uses of copyrighted works from the protection of section 2(b) of the *Charter* on the basis that unauthorized use of copyrighted works harms the author of the work (or is equivalent to a violent act or a threat of violence) would be to adopt an interpretation of violence inconsistent with the way in which violence has been interpreted by Canadian courts in the context of this step of the section 2(b) analysis.

Violence aside, are there any other ways in which A's action could be considered to "undermine[] the values underlying s 2(b)" on the basis of the method of expression, and be excluded from the scope of protectable expression on this basis?³⁷ A's making available works that, but for a retroactively-applied legislative amendment to the *Copyright Act* extending the term of copyright, would be in the public domain could prevent dialogue. For instance, it could lead authors to choose not to write additional works out of concern that those works would be disseminated without their authorization. Furthermore, to the extent that the self-fulfilment (or "self-actualization"³⁸) of the original authors in my hypothetical case is linked to their ability to control or manage the dissemination of their copyrighted works, their self-fulfilment may be limited by the widespread dissemination of their copyrighted works by A. Finally, the unauthorized use of copyrighted works by A may "stand[] in the way of finding the truth" if it causes authors who might otherwise contribute to the truth-finding process not to write, or leads publishers who might disseminate works that would otherwise contribute to the truth-finding process not to publish.³⁹

Canadian courts have held, however, that in situations where the method of expression cannot be separated from its content, the expression is entitled to protection under section 2(b) regardless of whether that method might "undermine[] the values underlying s. 2(b)."⁴⁰ In my hypothetical case, the method through which the message is conveyed—when the content of the expression is stripped from the equation—does not conflict with the values underlying freedom of expression. Making copyrighted works available does not, in and of itself, undermine or conflict with those values. Rather, the argument that this method

37. *Montréal*, *supra* note 32 at para 72.

38. *R v Sharpe*, 2001 SCC 2 at para 76, [2001] 1 SCR 45 [*Sharpe*].

39. *Montréal*, *supra* note 32 at para 72.

40. *Ibid.* See, for instance, *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para. 3, 52-53, [2011] 1 SCR 19 [*CBC*].

of expression undermines the values that underpin freedom of expression “rests on its content”—namely the fact that the works made available are works that are copyrighted.⁴¹ As a result, this argument, as was held by Justices McLachlin and Deschamps in *Montréal (City)*, “cannot be considered in addressing the issue of whether the method . . . of the expression itself is inimical to s. 2(b).”⁴²

The argument that the method of expression in my hypothetical case cannot be separated from its content, and thus the expression should not be excluded from the scope of protectable expression, is supported by SCC jurisprudence relating to choice of language and artistic expression. Both of these types of expression have been said by the SCC to be instances in which the method or form of expression is inseparable from its content. In *Reference re: s. 193 and 195.1(1)(C) of the Criminal Code*, for instance, Justice Lamer wrote that:

In my view the choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth. Language is, shortly put, both content and form.⁴³

Art is another type of expression in which form and content are linked. Justice Lamer, in *Reference re: s. 193*, wrote that “just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression.”⁴⁴ He went on to state that:

Without settling the matter conclusively, I am of the view that at the very least a law that makes it an offence to convey a meaning or message, however distasteful or unpopular, through a traditional form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression, and must be justified, if possible, by s. 1 of the Charter.⁴⁵

Like language and art, the choice to express oneself using copyrighted content can be seen as “an expression of cultural identity, and in many cases is an expression of one's identity.”⁴⁶ For instance, using a copyrighted image on

41. *Montréal*, *supra* note 32 at para 68.

42. *Ibid* at para 68.

43. *Reference re ss 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1181, 56 CCC (3d) 65 [*Reference re: s. 193*]. See also *Ford v Quebec*, [1988] 2 SCR 712 at para. 40, 54 DLR (4th) 577. In the latter, the Court wrote that: “[l]anguage is so intimately related to the form and content of expression that there cannot be true freedom . . . of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.”

44. *Ibid*, *Reference re: 193* at 1182.

45. *Ibid* at 1184.

46. *Ibid* at 1182.

a personal web page, wearing a t-shirt with a logo of a product or company a person identifies with or supports, creating a mix tape or CD or playlist, combining two existing works into one new work, and sending a friend a link to a song are some of the myriad acts that can be seen as instances of individuals expressing their identity through the use of copyrighted works. In addition, again like language and art, the use of copyrighted content “colours the content and meaning of expression.”⁴⁷ A different message is conveyed by the use of Bibendum in the pamphlets prepared by the CAW than by a description of the business practices engaged in by Michelin that the CAW finds objectionable. The use of copyrighted content, therefore, is “both content and form.”⁴⁸ As Craig writes, “[t]he question of whether a work as a whole is subject to copyright and, if so, what elements of the work fall within the scope of the owner’s interest cannot be divorced from an inquiry into the nature and content of the expressive work.”⁴⁹ As was held in *CBC 2011*, the method of expression—namely the use of copyrighted content—“cannot be considered separately from the content and cannot serve as a basis for excluding the expressive activity from the protection of s. 2(b) of the Charter.”⁵⁰

Furthermore, although different from the laws at issue in *Reference re: s. 193*, in which the SCC considered the constitutionality of certain provisions relating to prostitution (including the section of the Criminal Code that prohibited communications in public for the purpose of prostitution), copyright can be conceptualized as “a law that makes it an offence to convey a meaning or message ... through a traditional form of expression like the written or spoken word or art.”⁵¹ Instead of prohibiting specific messages, or types of communications, the provisions of the *Copyright Act* prohibit the manner in which those messages are expressed (namely through the use of copyrighted content).

Reference re: s. 193 and *CBC 2011*, taken together, suggest that the act described in my hypothetical case should not be excluded from the scope of protectable expression on the basis of the method of expression, and that the provisions of the *Copyright Act* restraining this type of use should instead be seen as a restriction on freedom of expression that requires justification through a section 1 analysis.

2. LOCATION OF EXPRESSION

47. *Ford v Quebec (Attorney General)*, *supra* note 43 at 748.

48. *Reference re: 193*, *supra* note 43 at 1181.

49. Craig, *supra* note 6 at 99.

50. *CBC*, *supra* note 40 at para 53.

51. *Reference re: 193*, *supra* note 42 at 1184.

Justice Teitelbaum, in *Michelin*, took the view that expression that makes use of copyrighted works should be excluded from protection under section 2(b) on the basis that copyright-protected expression, a species of private property, could not be used in the service of freedom of expression.⁵² In reaching this conclusion, Justice Teitelbaum drew parallels between the use of copyright-protected expression (considered by the SCC to be property, as described below), and expressing oneself on private property.⁵³

In recent years, the SCC has clarified the test for excluding messages conveyed on either private or public property from the scope of protectable expression under section 2(b). As noted by Justice Deschamps in *CBC 2011*, “for ... the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding.”⁵⁴

In *Montréal (City)*, Justices McLachlin and Deschamps affirmed that expression taking place on private property is generally not protected by section 2(b). However, their judgment implies that the reason why expression taking place on private property falls outside the protected sphere of section 2(b) is not because property rights exist outside of the scope of the *Charter*. Rather, it is because of the way the *Charter* has been interpreted as applying to government action.⁵⁵ In instances in which private property rights do not involve state-imposed limits on expression, the *Charter* would not apply as “state action is necessary to implicate the *Canadian Charter*.”⁵⁶ However, in situations where private property is intertwined with state-imposed limits on expression, those limits may be challenged using the *Charter* right to freedom of expression.⁵⁷

52. *Michelin*, *supra* note 3 at 39-49.

53. Bailey, *supra* note 6 at 143; Craig, *supra* note 6 at 92.

54. *CBC*, *supra* note 40 at para 37.

55. See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

56. *Montréal*, *supra* note 32 at para 62.

57. See, for instance, *R v Layton*, [1986] OJ No 3069, 38 CCC (3d) 550. Jack Layton had been convicted under s 2(1)(b) of the *Trespass to Property Act*, RSO 1980, c 511 for refusing to leave the Eaton Centre (a shopping mall) after having been directed to leave by the persons in charge of that private property. Layton had been handing out leaflets relating to a unionization campaign. The Ontario Provincial Court found that Layton's s 2(b) rights had been unjustifiably infringed.

The SCC, on multiple occasions, has referred to copyright as a species of property.⁵⁸ If copyrights are to be considered property rights, however, they do not exist independently of the *Copyright Act*. Rather, they are rights created by the state through the passage of copyright legislation. As Justice Estey wrote in *Compo Co v Blue Crest Music Inc*:

copyright law ... 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.⁵⁹

Given both that copyright is a “creature of statute,” and that it limits the expression of some in order to advance the interests of others (*e.g.*, authors, publishers, and the public more generally), the property rights granted under the *Copyright Act* can be said to involve “state-imposed limits on expression.”⁶⁰ They are thus subject to the *Charter*, and a *Charter* analysis must be conducted in the same manner in the context of copyright as with other legislation. As Craig writes, “[b]ecause copyright is an interest conferred by government regulation, it follows that it can be subjected to *Charter* scrutiny and limited in the name of the rights enshrined in the *Charter*.”⁶¹ Contrary to the conclusion reached by Justice Teitelbaum in *Michelin*, the formal conception of copyright as a private property right should not result in the exclusion of expression that makes use of the copyrighted works of others from the scope of section 2(b) of the *Charter* on the basis of the location of expression.⁶²

58. In *Cinar Corporation v Robinson*, Chief Justice McLachlin, writing for the Court, characterized the infringement of copyright as “a breach of ... property rights.” She also stated that “[c]opyright infringement is a violation of s. 6 of the [Quebec] *Charter*, which provides that ‘[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.’” See *Cinar Corporation v Robinson*, 2013 SCC 73, at paras 102, 114, [2013] 3 SCR 1168 [*Cinar*]. As well, in *Canadian Artists’ Representation v National Gallery of Canada*, copyright is referred to, in a number of instances, as property. See *Canadian Artists’ Representation v National Gallery of Canada*, 2014 SCC 42 at paras 16 & 22, [2014] 2 SCR 197.

59. *Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357 at 373, 105 DLR (3d) 249.

60. *Montréal*, *supra* note 32 at para 62.

61. Craig, *supra* note 6 at 95.

62. Bailey, as well, writes that “foreclosing the protection of certain expression under section 2(b) on the basis that it conflicts with unentrenched property rights directly contradicts the concept of constitutional paramountcy – with the unenshrined property right seemingly taking precedence over the enshrined right to free expression.” See Bailey, *supra* note 6 at 142.

D. "IF THE ACTIVITY IS PROTECTED, DOES AN INFRINGEMENT OF THE PROTECTED RIGHT RESULT FROM EITHER THE PURPOSE OR THE EFFECT OF THE GOVERNMENT ACTION?"⁶³

Section 27(1) is the general infringement section under the *Copyright Act*. It 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."⁶⁴ The rights of copyright owners are set out in section 3 of the *Copyright Act*. These rights include the right to reproduce a work, to perform a work in public, and to communicate the work to the public by telecommunication, in whole or in substantial part.⁶⁵

Section 5 of the *Copyright Act* sets out the conditions for subsistence of copyright. Section 5(1) notes that provided certain citizenship/residence requirements are met, "copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work."⁶⁶ The term of copyright is addressed in sections 6-12 of the *Copyright Act*. The general term of copyright in Canada is the life of the author plus fifty years from the end of the calendar year in which the author dies.⁶⁷ The legislation outlined in my hypothetical case extends the term of copyright protection in both existing and future works.

Section 34(1) of the *Copyright Act* details the remedies that are available to copyright owners. It states that "[w]here copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right."⁶⁸ Statutory damages are provided for in section 38.1 of the *Copyright Act*, and criminal remedies are addressed in section 42.⁶⁹ Defences to copyright infringement in Canada, the most expansive of which is fair dealing, are set out in sections 29-30.9 of the *Copyright Act*.⁷⁰

Do the provisions of the *Copyright Act*, in purpose or effect, infringe section 2(b)? First, what is the purpose of the provisions in question? Justice Teitelbaum,

63. *CBC*, *supra* note 40 at para 38.

64. *Copyright Act*, *supra* note 1 at s 27(1).

65. *Ibid* at s 3.

66. *Ibid* at s 5.

67. *Ibid* at s 6.

68. *Ibid* at s 34(1).

69. *Ibid* at ss 38.1, 42.

70. *Ibid* at ss 29-29.2, 29.21-30.9, 38.1, and 42.

in *Michelin*, defined the objective of the *Copyright Act* as “[t]he protection of authors and ensuring that they are recompensed for their creative energies and works.”⁷¹ However, this view of the purpose of copyright—referred to by Justice Abella as “author-centric”—represents the “former framework” for copyright.⁷² In its place, the SCC—beginning with Justice Binnie’s majority decision in *Théberge*—has stated that there are two objectives to copyright, namely to ensure that copyright owners receive a just or fair reward, and to advance the public interest in the encouragement and dissemination of works of the arts and intellect.⁷³

What is the relationship between these two objectives? Addressing this question in detail is beyond the scope of this article. Given the importance to a *Charter* analysis of properly characterizing the objective of impugned provisions, however, a court faced with a challenge to copyright’s constitutionality will need to grapple with this question.⁷⁴ One way to frame this relationship would be to say that one of the two purposes articulated by Justice Binnie in *Théberge* acts in the service of the other. Under this view, the just rewards provided in the *Copyright Act* are the means through which the public interest in the encouragement and dissemination of works of the arts and intellect is advanced. Support for this articulation of copyright’s purpose can be found in *Cinar*, in which Chief Justice McLachlin wrote that copyright “seeks to ensure that an author will reap the benefits of his efforts, *in order to* incentivize the creation of new works.”⁷⁵

I adopt this conception of copyright—in which the purpose of copyright is to incentivize the creation of expression by granting copyright owners rights in works of expression as well as the ability, through the state, to enforce infringements of those rights—for the purposes of this article. Under a different

71. *Michelin*, *supra* note 3 at 53. Similarly, in *Canadian Private Copying Collective v Canadian Storage Media Alliance* Justice Noël, who delivered the reasons for judgment of the FCA, wrote that “[t]he essential element of the federal legislative competence over copyright ... involves the establishment of a legal framework allowing rightsholders to be rewarded for the reproduction of recorded music by third parties.” *Canadian Private Copying Collective v Canadian Storage Media Alliance*, 2004 FCA 424 at para 33, 246 DLR (4th) 193 [CPCC].

72. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 9, [2012] 2 SCR 326.

73. *Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34, [2002] 2 SCR 336 [*Théberge*].

74. Craig, for instance, argues that “the failure [by Canadian courts] to satisfactorily consider copyright in the light of freedom-of-expression values can be traced back to a broader failure to appreciate the nature and the purpose of copyright.” See Craig, *supra* note 6 at 81.

75. *Cinar*, *supra* note 58 at para 23 [emphasis added].

view of copyright's purpose(s), however, both the section 2(b) analysis and the section 1 analysis might proceed differently.⁷⁶

In seeking to determine whether core provisions of the *Copyright Act* infringe section 2(b) in purpose or effect, the example used in *Irwin Toy* of a rule against handing out pamphlets is informative. As noted by Chief Justice Dickson and Justices Lamer and Wilson (who co-wrote the majority reasons for judgment), this rule—despite “purport[ing] to control litter”—“is ‘tied to content.’”⁷⁷ That is to say, “[t]he rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning.”⁷⁸ Like the rule at issue in *Irwin Toy*, the provisions of the *Copyright Act* noted above are also “tied to content.”⁷⁹ They “control access by others to a meaning being conveyed,” namely the meaning of the copyrighted work, and any meanings that are added to that work by parties that re-work it; they also “control the ability of [the unauthorized user of copyrighted content] to convey a meaning.”⁸⁰ In so doing, the impugned provisions of the *Copyright Act* limit, deny, and abridge expression.

In addition to arguing that the purpose of the impugned provisions of the *Copyright Act* is to limit or abridge expression, it can also be argued that their effect is to deny or abridge freedom of expression. As noted by the majority in *Irwin Toy*, in order to demonstrate that the effect of government action is to deny or abridge freedom of expression, “a plaintiff must state her claim with reference to the principles and values underlying the freedom,” namely truth-seeking, participation in decision-making, and self-fulfillment and human flourishing.

In the context of my hypothetical case, the effect of the impugned provisions is to deny or abridge freedom of expression. The application of the *Copyright Act* restricts or limits A's ability to disseminate expression. It also restricts the ability of the public to receive expression from A. As a result, both A and the public are prevented from using this expression to the degree that they otherwise might, in the furtherance of truth-seeking, social and political decision-making, and self-fulfillment.

Thus far in this article, I have argued that A's making available of copyrighted works constitutes expression, that it should not be removed from the scope of

76. For instance, the section 2(b) and section 1 analyses might proceed differently if the purpose of copyright was to protect authors' dignity interests, to reward authors for their labour, or to maximize the creation of certain types of works.

77. *Irwin Toy*, *supra* note 23 at 974.

78. *Ibid.*

79. Bailey refers to Canada's copyright laws as “classic content-based restriction[s].” See Bailey, *supra* note 6 at 139.

80. *Irwin Toy*, *supra* note 23 at 974.

protectable expression due to the method or location of expression, and that certain core provisions of the *Copyright Act* infringe the section 2(b) guarantee of freedom of expression in both purpose and effect. Unless they can be justified under section 1 of the *Charter*, these provisions should be declared of no force or effect.

II. SECTION 1 OF THE CHARTER, APPLIED IN THE CONTEXT OF COPYRIGHT

A. ARE THE MEASURES PRESCRIBED BY LAW?

The first question to be addressed under a section 1 analysis is whether the impugned provisions are “limits prescribed by law” within the meaning of section 1.⁸¹ In *R v Therens*, Justice Le Dain (dissenting on other grounds) stated that “[t]he limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.”⁸² The impugned measures that are the focus of this article are expressly provided for in the *Copyright Act*. As a result, the provisions of the *Copyright Act* are limits prescribed by law for the purposes of the section 1 analysis.

B. PRESSING AND SUBSTANTIAL OBJECTIVE?

The next part of the section 1 analysis asks whether the objective of the impugned provisions is “sufficiently important to justify overriding a *Charter* freedom.”⁸³ The SCC has noted that properly characterizing the objective of the impugned provisions is of “great importance”⁸⁴ to the section 1 analysis. Justice Deschamps has written that “all steps of the Oakes test are premised on a proper identification of the objective of the impugned measure.”⁸⁵ Of particular concern is the need to ensure that the objective is not articulated in an overbroad manner. As stated by Chief Justice McLachlin in *RJR-MacDonald Inc v Canada (Attorney General)*, “[i]f the objective is stated too broadly, its importance may be exaggerated and

81. *Charter*, *supra* note 2 at s 1.

82. *R v Therens*, [1985] 1 SCR 613 at 645, 18 DLR (4th) 655.

83. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 112, 176 DLR (4th) 513.

84. *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 20, [2010] 1 SCR 721 [*Toronto Star*].

85. *Ibid* at para 20.

the analysis compromised.”⁸⁶ One possible negative consequence of overstating the legislative objective is that it may be difficult to establish that the provision (*i.e.*, the “means adopted to promote” the objective)⁸⁷ is minimally impairing.

What are the objectives of the impugned provisions of the *Copyright Act*? As noted above, for the purposes of this analysis, I adopt the view that the objective of the impugned provisions is to incentivize the creation of expression by granting copyright owners rights in works of expression, as well as the ability, through the state, to remedy infringements of those rights.

The objective of the impugned provisions of the *Copyright Act* is consistent with this objective. That is to say, in order to incentivize the creation and dissemination of works of the arts and intellect, the *Copyright Act* grants, to authors of works (section 5), a set of time-limited (sections 6-12) rights (section 3) with respect to these works; permits authors to assign those rights to others (section 13(4)); makes it an infringement of copyright to engage in any of the acts that the copyright owner has the exclusive right to do without the authorization of the copyright owner, provided no defences or limitations exist to render the act non-infringing (sections 27, and 29-30.9); and makes available to copyright owners a number of remedies in the event that their rights are infringed (sections 34, 38.1 and 42).⁸⁸

Is the objective of the impugned provisions of the *Copyright Act* pressing and substantial? In *JTI*, Chief Justice McLachlin (who delivered the judgment for the Court), citing Peter Hogg’s *Constitutional Law of Canada*, noted that “[a]n objective will be deemed proper if it is for the realization of collective goals of fundamental importance.”⁸⁹ A wide range of objectives has been considered by

86. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 144, 127 DLR (4th) 1 [*RJR-MacDonald*].

87. *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 38, [2007] 2 SCR 610 [*JTI*].

88. *Copyright Act*, *supra* note 1. Other parts or provisions of the *Copyright Act* may be held to have different objectives. For instance, Part VIII of the *Copyright Act* (ss 79-88), which legalises the private copying of recorded music in certain circumstances in exchange for the imposition of a levy on certain types of audio recording music, may be held to have a different objective than the provisions noted above. In *CPCC*, the objective of this part was said to be to ‘legalize[] private copying by a class of users while providing that rightsholders are compensated for the expropriation of their exclusive rights’. See *CPCC*, *supra* note 70 at para 32. Another part of the *Copyright Act* that might have a different objective than that of the provisions noted above is the part that provides legislative protection for technological protection mechanisms. See, for instance, *Copyright Act*, *supra* note 1 at s 41.

89. *JTI*, *supra* note 87 at para 37, citing to Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Carswell, 2007) at 132.

the SCC to be pressing and substantial.⁹⁰ Although the list of objectives held to be pressing and substantial is lengthy, however, not every objective suggested by the government has been found to be pressing and substantial.⁹¹

In *Michelin*, Justice Teitelbaum stated that he “would have had no difficulty in determining that the objective of the *Copyright Act*” was “pressing and substantial.”⁹² He also noted that “the pressing and substantial nature of the Copyright Act’s objective is buttressed by Canada’s international obligations in treaties like the Berne Convention of 1886 as revised in Berlin in 1908 and in Rome in 1928.”⁹³

As noted above, the objective of the impugned provisions of the *Copyright Act* is conceptualized differently today than it was in 1996. However, for several reasons, I suggest that a Canadian court would consider the objective of the impugned provisions of the *Copyright Act* to be pressing and substantial. First, as noted above, the SCC has considered a wide range of objectives to be pressing and substantial, demonstrating that the threshold for such a determination is not overly onerous for governments to meet. As the Constitutional Law Group notes, “[t]he courts seem prepared to regard almost any purpose ...

90. These objectives include “to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable,” to “reduc[e] the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity,” and providing “a safe, welcoming public transit system,” among many others. See, in order, *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 19, [2013] 3 SCR 733 [*Alberta IPC*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 71, [2013] 1 SCR 467 [*Whatcott*]; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 76, [2009] 2 SCR 295.

91. Three objectives rejected by the SCC on the basis that they are not pressing and substantial are budgetary considerations, “maintaining conventional standards of propriety, independently of any harm in society,” and “the promotion of marriage.” See, in order, *Schachter v Canada*, [1992] 2 SCR 679 at 709, 93 DLR (4th) 1 [*Schachter*]; *Butler*, *supra* note 30 at 498; *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 184, [2002] 4 SCR 325.

92. *Michelin*, *supra* note 3 at 53. It should be noted that he defines the objective of the *Copyright Act* as the protection of authors and ensuring that they are recompensed for their creative energies and works.

93. *Ibid.* Craig writes that “[h]aving identified the ultimate purpose of the *Copyright Act* as the protection of authors—and not, say, the public interest in encouraging creativity and the dissemination of intellectual works—the court could hardly avoid the conclusion that enforcing the author’s monopoly is a rational and efficient means by which to achieve that purpose.” See Craig, *supra* note 6 at 91.

as ‘pressing and substantial.’”⁹⁴ Second, the granting of a just reward in order to incentivize the creation and dissemination of expression is connected to “the realization of collective goals of fundamental importance.”⁹⁵ One such goal is the encouragement and dissemination of works of art and the intellect. A wide range of benefits flow to the public from the existence of such works, including benefits tied to truth-seeking, democratic discourse, and self-fulfillment. Third, this objective is neither “trivial” nor “discordant with the principles integral to a free and democratic society.”⁹⁶ Rather, the objective of the impugned provisions *advances* principles integral to a free and democratic society such as the freedom of expression of authors and the public. Fourth, as noted by Justice Teitelbaum, the pressing and substantial nature of the objective is supported by international treaties, ratified by Canada, that protect copyright.⁹⁷ Fifth, the pressing and substantial nature of the objective can also be seen to be supported by international human rights conventions ratified by Canada, including the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.⁹⁸ Vaver writes that “[w]hen the Supreme Court speaks of copyright law’s need to achieve a ‘proper balance between protection and access,’ the language echoes the customary international law of human rights treaties such as the Universal Declaration of Human Rights of 1948.”⁹⁹

The arguments outlined above strongly suggest that should this issue come before a Canadian court, the objective of the impugned provisions noted above would be seen as being of pressing and substantial importance “sufficient to justify some limitation on freedom of expression.”¹⁰⁰ A separate question to be addressed, however, is whether the specific limitations set out in the *Copyright Act* can be justified. This question can be answered through the application of the proportionality branch of the section 1 analysis.

94. Joel Baken et al, eds, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery Publications, 2010) at 777.

95. *JTI*, *supra* note 87 at para 37.

96. *R v Oakes*, [1986] 1 SCR 103 at 138-139, 26 DLR (4th) 200 [Oakes].

97. *Michelin*, *supra* note 3 at 50-51. See also *R v Lucas*, [1998] 1 SCR 439 at para 50, 157 DLR (4th) 423 [Lucas].

98. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976 accession by Canada 19 May 1979); *United Nations Declaration on the Rights of Indigenous Peoples*, GA res 61/295, UNGAOR, 61st sess, Supp no 49, UN Doc A/RES/61/295 (2007) 1.

99. David Vaver, “Copyright Defences as User Rights” (2013) 60:4 J Copyright Soc’y USA 661 at 671.

100. *Whatcott*, *supra* note 90 at para 23.

C. DO THE IMPUGNED MEASURES SATISFY THE PROPORTIONALITY BRANCH OF THE SECTION 1 ANALYSIS?

There are three parts to the proportionality branch of the section 1 analysis. First, it must be asked whether the limit is rationally connected to the objective; second, whether the limit minimally impairs the right in question; and third, whether the benefits outweigh the deleterious effects. In applying this test, it is important to recall the statement in *Whatcott* that “perfection is not required. Rather the legislature’s chosen approach must be accorded considerable deference. ... [w]e must ask whether Parliament has chosen one of several reasonable alternatives.”¹⁰¹

D. IS THE LIMIT RATIONALLY CONNECTED TO THE OBJECTIVE?

It is not necessary for the government to conclusively establish that there is a rational connection between the objective and the means used to promote the objective (*i.e.*, the limitation). Rather, as noted by Chief Justice McLachlin when writing for the majority of the SCC in *Alberta v Hutterian Brethren of Wilson Colony*, “[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.”¹⁰²

In *JTI*, Chief Justice McLachlin noted that although this step is not “unimportant,” “[f]ew cases have foundered on the requirement of rational connection.”¹⁰³ Some cases *have* foundered on the requirement of rational connection, however. For instance, in *RJR Macdonald*, Chief Justice McLachlin held that one provision of the *Tobacco Products Control Act* failed the rational connection test on the basis that “there is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason” between “the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products.”¹⁰⁴

How might the rational connection test be applied in the context of the impugned provisions of the *Copyright Act*? In *Michelin*, Justice Teitelbaum held

101. *Ibid* at para 78. Bailey relies on the SCC’s decision in *Dunmore* to argue that “courts should [not] defer to Parliament in analyzing the constitutionality of the Act.” See Bailey, *supra* note 6 at 151.

102. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, 310 DLR (4th) 193.

103. *JTI*, *supra* note 87 at para 40.

104. *RJR-MacDonald*, *supra* note 86 at para 159. See also *R v D B*, 2008 SCC 25 at para 3, [2008] 2 SCR 3; *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 54, [2007] 1 SCR 429; *M v H*, [1999] 2 SCR 3 at para 4, 171 DLR (4th) 577.

that “the objectives of the Copyright Act are rationally connected to an action for copyright infringement,” concluding that:

There is a definite and efficient link between the goal of protecting the interests of authors and copyright holders by granting them a monopoly on the right to use and reproduce their works and the ability to enforce those interests in an action for copyright infringement.¹⁰⁵

As noted above, as a result of the SCC’s re-articulation of the purpose of copyright—beginning in *Théberge* and refined through a series of cases including *Cinar*—the rational connection analysis must be framed differently. The question that should be asked, in determining whether this part of the proportionality analysis is met in the context of my hypothetical case, is whether there is a rational connection between the objective of granting a just reward to copyright owners (in order to incentivize the creation and distribution of expression) and the means of doing so, namely through the grant of limited, assignable, exclusive statutory rights (including the “ability to enforce those [rights] in an action for copyright infringement”).¹⁰⁶

Is there “conclusive evidence or empirical evidence of a rational connection” between this objective and the means chosen to achieve this objective?¹⁰⁷ A number of commentators have challenged the idea that copyright incentivizes the creation of expression.¹⁰⁸ Julie Cohen, for instance, writes that “the incentives-for-authors story is wrong as a descriptive matter.”¹⁰⁹ Kal Raustiala and Christopher Sprigman also question whether the incentives provided by copyright are necessary to incentivize creativity or innovation in all contexts.¹¹⁰

However, the question of how to incentivize the creation and dissemination of expression can be considered to be a “complex social problem[,]” which would mean—following *JTI*—that Parliament’s decision on how to address this problem “should be accorded considerable deference.”¹¹¹ Furthermore, it can be argued that through the application of “reason and logic,” a rational connection

105. *Michelin*, *supra* note 3 at 54.

106. *Ibid* at 54.

107. *Toronto Star*, *supra* note 84 at para 25.

108. See, for instance, Julie Cohen, “Copyright as Property in the Post-Industrial Economy” (2011) 2 *Wis L Rev* 141; Jessica Silbey, “Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators” (2011) 86:6 *Notre Dame L Rev* 2091.

109. Cohen, *ibid* at 143.

110. Kal Raustiala & Christopher Sprigman, *The Knockoff Economy* (Oxford: Oxford University Press, 2012).

111. *JTI*, *supra* note 87 at para 41.

between means and objective can be established.¹¹² Hence, it is not unreasonable to accept that the provision of financial incentives for the creation of works of expression may encourage at least certain individuals to create those works.

As well, the SCC has stated that “widespread international practice” can be cited as a “relevant indicator” of a rational connection.¹¹³ Granting limited rights to authors in order to incentivize the creation and dissemination of works of expression can be said to be a widespread international practice.¹¹⁴ Cohen writes that:

[t]he statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation. Court opinions and legislative histories are peppered with references to the incentives for authors rationale. Judges recite it as a matter of course when deciding cases, and legislators, lobbyists, and other interested parties invoke it in debates about proposed amendments to the copyright laws. Copyright scholars frame policy problems in terms of an “incentives-access” tradeoff, and that framing in turn affects our analysis of what judges and legislators do.¹¹⁵

Given the above discussion, I suggest that a Canadian court would find the impugned provisions of the *Copyright Act* are rationally connected to the objective.¹¹⁶

E. MINIMAL IMPAIRMENT

The second part of the proportionality test can be referred to as the minimal impairment inquiry. In *R v Oakes*, in order to satisfy this branch of the proportionality analysis, the SCC required courts to demonstrate that “the means ... should impair ‘as little as possible’ the right or freedom in question.”¹¹⁷ Jamie Cameron notes that “[n]ot surprisingly, a consensus ... emerged that *Oakes*

112. *Toronto Star*, *supra* note 84 at para 25.

113. *Lavoie v Canada*, 2002 SCC 23 at para 59, 210 DLR (4th) 193.

114. Many countries around the world have adopted copyright legislation similar in form to Canada’s legislation as a mechanism through which to encourage the creation and dissemination of works. See, for instance, *U.S. Copyright Act*, 17 USC § 101 (1976); *Copyright, Designs and Patents Act 1988* (UK), c 48.

115. Cohen, *supra* note 108 at 142.

116. Bailey expresses doubts that certain provisions of the *Copyright Act* would satisfy the rational connection requirement. See Bailey, *supra* note 6 at 147.

117. *Oakes*, *supra* note 94 at 139, citing to *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321.

propounded a strict standard of justification which the Court subsequently found impossible to implement.”¹¹⁸

In *R v St-Onge Lamoureux*, Justice Deschamps, writing for the majority, stated that:

In the minimal impairment inquiry, the court must not second-guess Parliament and try to identify the least intrusive solution. In *Downey*, this Court stated that “... the issue is ‘whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively’”.¹¹⁹

In *Whatcott*, the range of alternatives from which Parliament could safely choose is referred to as the “range of reasonably supportable alternatives.”¹²⁰

How, then, might the minimal impairment analysis be applied in the context of the impugned provisions of the *Copyright Act*?¹²¹ As described above, I argue that the objective of the *Copyright Act* is to provide a fair reward for creators and copyright owners in order to incentivize the creation of works of the arts and intellect.¹²² Parliament has chosen to pursue this objective through the means of limited exclusive rights granted initially to authors, which can be then transferred from authors to other parties.

This was not the only means through which Parliament could have provided a fair reward for creators and copyright owners in order to incentivize the creation of works. This objective could also have been met, for instance, through government grants, tax incentives, certificates, medals, or prizes.¹²³ But many

118. Jamie Cameron, “The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*” 35:1 McGill Law Journal 253 at 264. See also Sujit Choudhry, “So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian *Charter’s* Section 1” (2006) 34 Sup Ct L Rev 501 at 502.

119. *R v St-Onge Lamoureux*, 2012 SCC 57 at para 39, 351 DLR (4th) 381.

120. *Whatcott*, *supra* note 90 at para 101.

121. In *Michelin*, Justice Teitelbaum found the impugned provisions of the *Copyright Act* to be minimally impairing of the *Charter* right to freedom of expression on the basis that “The Copyright Act does not prohibit attacks on the authors of works or their ideas. Infringers are only liable for reproducing the work or a substantial part of the same. Copyright also minimally impairs the Defendants’ right of free expression by the very well-tailored structure of the *Copyright Act* with its list of exceptions in Sections 27(2) and (3).” See *Michelin*, *supra* note 3 at 54.

122. As described above, this view of the purpose of copyright is given support by Chief Justice McLachlin’s reasons for judgment in *Cinar*. See *Cinar*, *supra* note 58 at para 23.

123. Bruno S Frey and Susanne Neckermann, “Prizes and Awards” in Luigino Bruni and Stefano Zamagni (eds), *Handbook on the Economics of Reciprocity and Social Enterprise* (Northampton, Massachusetts: Edward Elgar, 2013). See also Lior Zemer, “Rethinking Copyright Alternatives” (2005) 14:1 Int’l J of L and Info Tech 137 at 138-40. See also Tushnet, *supra* note 6 at 27-30.

jurisdictions around the world have accepted that the creation of limited property rights in intangible expression through the vehicle of copyright legislation is an effective way to reward authors and incentivize the creation and distribution of works of the arts and intellect. Given this widespread view, the decision to enact a *Copyright Act*—through which exclusive time-limited rights are granted in expression, with access to specific remedies, and subject to certain defences—could be seen as falling squarely within the range of “reasonably supportable alternatives” from which Parliament could choose in order to fulfill its objective.¹²⁴

Despite being a reasonable alternative, however, the impugned provisions (or portions thereof) could nevertheless fail to be minimally impairing on the basis that they are overbroad.¹²⁵ In *Whatcott*, the SCC listed a number of criticisms relating to overbreadth.¹²⁶ Justice Rothstein, writing for the Court, noted that:

Criticisms relating to overbreadth are that the definition or a particular legislative provision

1. is overreaching and captures more expression than is intended or necessary;
2. has a chilling effect on public debate, religious expression and media coverage about moral conduct and social policy;
3. does not give legislative priority to freedom of expression;
4. restricts private communications;
5. should require intention;
6. should require proof of actual harm;
7. should provide for defences, such as a defence of truth.¹²⁷

In the context of the facts of *Whatcott*, it was held that the “key to minimizing both subjectivity and overbreadth” is “[l]inking the test for hate speech to the specific legislative objectives.”¹²⁸

Could the impugned provisions of the *Copyright Act* be held to fail the minimal impairment part of the proportionality test on the basis that they are

124. *Whatcott*, *supra* note 87 at para 101.

125. See, as well, Bailey, who argues that “there are sound conceptual reasons to question whether the Act actually overcompensates authors for their ‘energies’ and ‘works’ with unnecessarily broad rights of exclusion.” Bailey, *supra* note 6 at 145.

126. *Whatcott*, *supra* note 90 at para 28.

127. *Ibid* at para 28.

128. *Ibid* at para 47. For another work that discusses copyright laws in the context of hate speech and pornography, see Tushnet, *supra* note 6. Craig also suggests that “a comparison can be made between copyright law and other laws such as pornography and hate speech regulation that appear on their face to limit expression but ultimately function to enhance relations of communication.” See Craig, *supra* note 6 at 113, n 113.

overbroad? In applying the first criticism noted in *Whatcott* in the context of overbreadth, one must ask whether the impugned provisions are overbroad in that they “capture[] more expression than is intended or necessary.”¹²⁹ As noted in *Whatcott*, “[p]reventative measures should only prohibit the type of expression expected to cause the harm targeted.”¹³⁰

Since *Théberge*, Canadian courts have accepted that copyright in Canada is primarily an economic right.¹³¹ As articulated by Justice Binnie in *Théberge*, the rewards provided by copyright are economic rewards, and the type of harm targeted is economic harm.¹³² In light of the SCC’s judgment in *Cinar* and consistent with the view of the purpose of copyright adopted in this article, the economic harm targeted can be said to be the harm that flows from acts that undermine the economic incentive for individuals to create.

If the objective of copyright in Canada is to grant a fair reward to copyright owners in order to incentivize the creation of works, then—as per *Whatcott*—the only type of expression that should be prohibited is expression that affects this incentive function: that is, expression that denies copyright owners a just or fair economic reward and in so doing negatively impacts authors’ economic incentive to create works or, perhaps, distributors’ economic incentive to disseminate works.

Acts that deny a creator a just or fair economic reward might deter him or her from creating or disseminating works in the future if the promise or possibility of economic gain acts as an incentivizing factor for his or her creation or dissemination of works. *Cinar* provides an informative example. “Dreamer[s]” like Robinson might not invest “years meticulously crafting an imaginary universe for an educational children’s television show” if another party could simply produce (and re-produce) the show without having to compensate Robinson.¹³³ Similarly, intermediaries such as production companies and distributors such as publishing houses or movie studios might not invest in the production and dissemination of expression if another publishing house or movie studio could simply re-produce the same work (in a manner that substitutes for the original work) without suffering legal sanction or paying compensation.

It could be argued, however, that the impugned provisions of the *Copyright Act* “capture[] more expression than is . . . necessary” to prevent the harm targeted because they prohibit types of expression that do not deny copyright owners a just

129. *Whatcott*, *supra* note 90 at para 28.

130. *Ibid* at para 47.

131. *Théberge*, *supra* note 73 at para 12.

132. *Ibid* at para 12.

133. *Cinar*, *supra* note 58 at para 3.

or fair economic reward and thus negatively impact authors' economic incentive to create works or distributors' economic incentive to disseminate works.¹³⁴ This result is due, in large part, to the structure of the *Copyright Act*, through which the infringement provision (section 27) and the rights-granting provision (section 3 and section 5), taken together, make any taking of a substantial part of a copyrighted work a prima facie act of copyright infringement, whether or not it impacts upon the just or fair economic reward to which copyright owners are entitled under the *Copyright Act*.¹³⁵

The extension of the duration of copyright protection in my hypothetical case could also be overbroad. Increasing the term of copyright protection might incentivize the creation of certain works that would not have been created had the term of protection remained at its current length (*i.e.*, the life of the author plus fifty years). However, the retroactive aspect of this provision might fall afoul of the section 1 analysis. As written by Justice Stevens in his dissenting judgment in the US Supreme Court decision in *Eldred v Ashcroft*, “[n]either the purpose of encouraging new inventions nor the overriding interest in advancing progress by adding knowledge to the public domain is served by retroactively increasing the inventor’s compensation for a completed invention.”¹³⁶

This view was supported by an amicus curiae brief in support of Eldred’s position written by a number of prominent economists, including Kenneth J. Arrow, Ronald Coase, Linda Cohen, and Milton Friedman.¹³⁷ In addition to arguing that the present value of additional compensation to authors flowing from copyright term extension in new works is “small, very likely an improvement of less than 1% compared to the pre-CTEA term,” these economists argued that “[t]he term extension for *existing* works makes no significant contribution to an author’s incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made.”¹³⁸ The brief

134. *Whatcott*, *supra* note 88 at para 28 See also Bailey, who argues that “technological developments ... increasingly call into question to what degree (if any), exclusivity is actually necessary in order to incent creation.” See Bailey, *supra* note 6 at 147).

135. *Copyright Act*, *supra* note 1 at ss 3, 5, 27.

136. *Eldred v Ashcroft*, 537 US 186 at 226, 123 S Ct 769.

137. *Brief of George A Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v Ashcroft*, 537 U.S. 186 (2002) (No. 01-618).

138. *Ibid* at 2.

concludes that “[t]aken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs.”¹³⁹

Applying the second criticism noted in *Whatcott* in the context of overbreadth, might the impugned provisions of the *Copyright Act* be seen as having a “chilling effect” on debate or expression?¹⁴⁰ This question—in the context of certain provisions of the *Criminal Code* relating to terrorism—was addressed in the 2012 SCC decision of *R v Khawaja*. Chief Justice McLachlin, who wrote the reasons for judgment for the Court, discussed the “evidentiary basis . . . required to establish that legislation has a chilling effect on the exercise of s. 2 freedoms.”¹⁴¹ While “[i]n some situations, a chilling effect can be inferred from known facts and experience,” she noted that in other instances it is necessary “to call evidence of a chilling effect.”¹⁴² Chief Justice McLachlin held that in the case of *Khawaja*, “it is impossible to infer, without evidence, that the motive clause will have a chilling effect on the exercise of s. 2 freedoms by people holding religious or ideological views similar to those held by some terrorists.”¹⁴³

It can be argued that the broad prohibition on the use of copyrighted material set out in the *Copyright Act* creates a chilling effect on the unauthorized use of copyrighted works, or on the circulation of ideas more generally.¹⁴⁴ Some individuals may choose not to express themselves using copyrighted works rather than risk a copyright infringement lawsuit. However, although there is a substantial body of literature in the context of copyright that addresses the issue of chilling effects, the majority of this research has been done in the context of

139. *Ibid* at 3. For other studies that engage with the question of the evidence for and against copyright term extension, see Centre for Intellectual Property and Information Law, “Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings” (Cambridge: University of Cambridge, 2006); Institute for Information Law, *The Recasting of Copyright and Related Rights for the Knowledge Economy* (Amsterdam: University of Amsterdam, 2006); PricewaterhouseCoopers, *The Impact of Copyright Extension for Sound Recordings in the UK* (London: PricewaterhouseCoopers, 2006).

140. *Whatcott*, *supra* note 90 at para 28.

141. *R v Khawaja*, 2012 SCC 69 at para 78, [2012] 3 SCR 555.

142. *Ibid* at para 79.

143. *Ibid* at para 80.

144. See *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*, [2005] ZACC 7 at para 104, 2006 (1) SA 144 [CCSA]. Justice Sachs discussed “the chilling effects that overzealously applied trademark law could have on the free circulation of ideas.” *Ibid* at para 104.

the United States.¹⁴⁵ The lack of definitive evidence that the impugned provisions of Canada's *Copyright Act* have had a chilling effect could lead courts to decline to find the impugned provisions invalid on the basis of overbreadth.¹⁴⁶

Applying the third criticism noted in *Whatcott* in the context of overbreadth, do the impugned provisions of the *Copyright Act* "give legislative priority to freedom of expression?"¹⁴⁷ In some ways, they can be seen to do so. For instance, the *Copyright Act* protects neither information nor ideas.¹⁴⁸ Furthermore, the rights of copyright owners with respect to works are limited both in scope and in duration.¹⁴⁹ Additionally, the *Copyright Act*—by providing mechanisms through which copyright owners can enjoin the unauthorized use of works in which they own copyright—can be seen as giving legislative priority to the freedom of expression interests of authors who continue to own copyright in works that they create.

In other ways, however, the impugned provisions of the *Copyright Act* do not give legislative priority to freedom of expression—specifically, the freedom of expression of non-copyright owning parties. For instance, the *Copyright Act* gives legislative priority to the property rights of copyright owners rather than to the freedom of expression of non-copyright owning parties. Under the impugned provisions of the *Copyright Act*, all unauthorized use by non-copyright owning parties of a substantial part of copyrighted works is, at first instance, prohibited. The non-copyright owning party—should they wish to have their use deemed non-infringing—must establish a defence to copyright infringement. Given the

145. See, for instance, Lumen <<https://www.lumendatabase.org>>; Wendy Seltzer, "Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment" (2010) 24:1 Harv J L & Tech 171; Jennifer M Urban & Laura Quilter, "Efficient Process or Chilling Effects—Takedown Notices Under Section 512 of the Digital Millennium Copyright Act" (2006) 22:4 Santa Clara Computer and High Technology Journal 621; Derek J Schaffner, "The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation" (2004) 14:1 Cornell J of Law and Pub Pol'y 145.

146. A full examination of this issue is beyond the scope of this article.

147. *Whatcott*, *supra* note 90 at para 28.

148. The question of what constitutes an idea, and what constitutes expression, may be one that is difficult to determine. See *Nichols v Universal Pictures Corp*, 45 F 2d 119 at 121, 7 USPQ 84 [1931]. Judge Learned Hand wrote:

Upon any work ... a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. ... [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. (*Ibid*).

149. *Copyright Act*, *supra* note 1 at ss 3, 5, 6-12, 29-30.9.

cost of defending a lawsuit in court,¹⁵⁰ one might wonder whether individuals who might be able to benefit from the defences set out in the *Copyright Act* will be in a position to exercise this right.

Furthermore, there is no mention of freedom of expression in the *Copyright Act*. The absence of a provision confirming the importance of freedom of expression can be contrasted with, among other examples, the hate speech provisions of Saskatchewan's *Human Rights Code*.¹⁵¹ Section 14(2) of the *Human Rights Code* provides that "[n]othing in subsection (1) restricts the right of freedom of expression under the law upon any subject."¹⁵² The SCC, in *Whatcott*, cited this provision as an indication that "[t]he Saskatchewan legislature recognized the importance of freedom of expression," and noted that "[t]he legislative objective of the entire provision is to address harm from hate speech *while limiting freedom of expression as little as possible*."¹⁵³ The absence of an equivalent provision in the context of the *Copyright Act* could be interpreted as an indication that Parliament has not recognized the importance of freedom of expression in the context of copyright.

Applying the fourth criticism noted in *Whatcott* in the context of overbreadth, the impugned provisions of the *Copyright Act* restrict private communications. For instance, if Party A sends an email to Party B that contains a copyrighted attachment, and Party B opens and downloads this attachment, this could constitute copyright infringement under the *Copyright Act*, in that Party B could be found to have infringed copyright by reproducing the work. In order for Party B's act to be found not to be infringing, Party B must establish that the act was covered by a defence to copyright infringement, such as fair dealing.

Applying the fifth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require intention for copyright infringement to be made out. The infringing party must merely commit a prima facie infringement for which no defence applies. As noted by Justice Teitelbaum in *Michelin*, "the intention of the infringer, whether or not in commercial competition with the copyright holder, is irrelevant to the question of infringement."¹⁵⁴

Applying the sixth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require proof of actual harm for a finding of copyright

150. See, for instance, Michael McKiernan, "The Going Rate" (2014) 39:6 Canadian Lawyer Magazine 33.

151. SS 1979, c S-24.1, s 14.

152. *Ibid.*

153. *Whatcott*, *supra* note 90 at para 110 [emphasis added].

154. *Michelin*, *supra* note 3 at 23. See also *James Lorimer*, *supra* note 3 at 1073.

infringement. Proof that a party has done something that the copyright owner has the right to do is sufficient, in the absence of a defence, to ground a successful action for copyright infringement. Though the party whose copyright has been infringed is entitled to an accounting of profits, they can alternatively elect to recover an award of statutory damages without demonstrating actual harm.¹⁵⁵

The creation of a statutory regime that imposes liability without harm is not unique to copyright. Such an approach also exists in the context of hate speech. Justice Rothstein wrote in *Whatcott* that “the imposition of preventive measures that do not require proof of actual harm” can be justified in part by “the difficulty of establishing a causal link between an expressive statement and the resulting hatred.”¹⁵⁶ A similar justification has been used to justify the imposition of statutory damages regimes in the context of copyright.¹⁵⁷

As noted in *Whatcott*, in some situations in which it is difficult to establish a causal link between the act and the harm flowing from the act, courts have accepted that a “reasonable apprehension of harm” approach should be applied. Under this approach, “a precise causal link for certain societal harms [is] not ... required. A court is entitled to use common sense and experience in recognizing that certain activities ... inflict societal harms.”¹⁵⁸ Justice Rothstein continues:

In *Thomson Newspapers Co.*, this Court recognized that a reasonable apprehension of harm test should be applied in cases where “it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society” (para. 115). Such an approach is warranted “when it is difficult or impossible to establish scientifically the type of harm in question” (para. 115).¹⁵⁹

Should a “reasonable apprehension of societal harm” test be applied in the context of the unauthorized use of copyrighted works or should “a precise causal link” be required?¹⁶⁰ It could be argued that certain types or instances of unauthorized uses of copyrighted works undermine the position of authors as equal participants in society. One example where this might be the case is where someone creates a work that is then acquired and published, without authorization and without compensation, by a different individual (a *Cinar*-type situation). The act of publication of this work conveys meaning and thus prima facie constitutes

155. *Copyright Act*, supra note 1 at s 38.1.

156. *Whatcott*, supra note 90 at para 129.

157. Pamela Samuelson and Tara Wheatland, “Statutory Damages in Copyright Law: A Remedy in Need of Reform” (2009) 51:2 Wm & Mary L Rev 439 at 446.

158. *Whatcott*, supra note 90 at para 132.

159. *Ibid* at para 133.

160. *Ibid* at paras 132-33.

expression under section 2(b). However, it also impacts the ability of the author to act as an equal participant by denying them all financial benefits from the commercialization of their creation. In this situation, a Court might not “demand a scientific demonstration or the submission of definitive social science evidence to establish that the line drawn by Parliament was perfectly drawn.”¹⁶¹

However, not all instances or types of copyright infringement can be seen as undermining the position of an author as an equal participant in society. For instance, in what ways are authors impacted by the unauthorized, non-commercial use of their works by individuals for their own creative endeavours? Even if the author has lost a potential licensing fee, can this be said to undermine the position of an author as an equal participant in society? In this type of situation, it could be argued that a reasonable apprehension of harm test should not be applied, and the plaintiff should be required to demonstrate proof of economic harm.

The seventh criticism noted in *Whatcott* is that legislation, in order not to be found to be overbroad, “should provide for defences, such as a defence of truth.”¹⁶² Numerous defences are set out in the *Copyright Act*, and their number and scope were expanded as part of the 2012 amendment process. These defences can be seen as providing space within which non-copyright owners can express themselves using copyrighted works.¹⁶³ Questions can be raised, however, as to whether these defences are sufficiently broad and whether they are too vaguely worded to be useful to defendants.¹⁶⁴

To summarize, although the impugned provisions fall squarely within the range of reasonably supportable alternatives that could have been selected by Parliament to address the objective of providing an incentive for the creation and dissemination of expression, it is possible—based on the SCC’s decisions in *Whatcott* and *Khawaja*—that the impugned provisions of the *Copyright Act* could

161. *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 116, 159 DLR (4th) 385.

162. *Whatcott*, *supra* note 90 at para 28.

163. Fewer, for instance, refers to defences to copyright infringement as “legal mechanisms [that] embrac[e] [expressive] values.” See Fewer, *supra* note 6 at 202.

164. Fewer critiques the way in which fair dealing was applied by a number of Canadian courts in the late 1990s, arguing that “interpretational deficienc[ies] abuse[] freedom of expression in Canada.” As well, in the US context, Rebecca Tushnet argues that fair use “is too vague to provide enough guidance,” stating that “[b]ecause the outcome of any particular case is uncertain, a potential infringer/fair user has to be willing to bear the substantial costs of litigation for a chance to escape liability. This seems quite likely to prompt self-censorship.” See Fewer, *supra* note 6 at 205-209; Tushnet, *supra* note 6 at 24. See also Timothy A O Endicott and Michael J Spence, “Vagueness in the Scope of Copyright” (2005) 121:4 Law Q Rev 657.

be held to fail to meet the minimal impairment requirement on the basis that they are overbroad. In light of this possibility, it is useful to apply the third and final step of the proportionality analysis.

F. DO THE BENEFITS OUTWEIGH THE DELETERIOUS EFFECTS

The last part of the section 1 analysis “requires an assessment of whether the importance of the legislative objective of [the impugned provision] ... outweighs the deleterious effects of the provision.”¹⁶⁵ In engaging in this balancing exercise, the value of the expression must be considered. In their dissenting judgment in *R v Sharpe*, Justices L’Heureux-Dubé, Gonthier, and Bastarache wrote that:

The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an attenuated level of constitutional protection These forms of expression receive an attenuated level of constitutional protection not because a lower standard of justification is applied to the government, but because the low value of the expression is more easily outweighed by the objective of the infringing legislation.¹⁶⁶

What is the importance of the impugned provisions of the *Copyright Act*? In the context of my hypothetical case, one can question what benefits flow from granting additional protection to works already created.¹⁶⁷ On the other hand, the deleterious effects of these provisions may include restrictions on the work’s circulation, which could impact upon the ability of individuals to access the expression and which in turn might impact individuals’ ability to use this expression in the service of self-fulfillment, truth-finding, or democratic discourse. These negative effects might be particularly severe in the context of works that are not widely available.

Do the deleterious effects of these provisions outweigh their beneficial impacts? In considering this question, courts must balance a number of factors, including whether the expression in question is “low value” expression. Is A’s use of copyrighted expression “low value” expression similar to defamatory libel,¹⁶⁸

165. *Whatcott*, *supra* note 90 at para 147.

166. *Sharpe*, *supra* note 38 at para 181.

167. See *Brief of George A. Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft*, *supra* note 135; “Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings” *supra* note 139; *The Impact of Copyright Extension for Sound Recordings in the UK*, *supra* note 139.

168. *Lucas*, *supra* note 97.

hate speech,¹⁶⁹ information about tobacco products and product brands,¹⁷⁰ and pornography.¹⁷¹ If it can be characterized as such, then it is possible that the benefits outlined above—however marginal they might be—might be found to outweigh the detrimental effects.

Expression that has been characterized by the SCC as “low value” does not advance, to any great degree, the core values of freedom of expression (namely the search for truth, self-fulfillment, and political participation). For instance, Justice Sopinka wrote in *Butler* that:

the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing . . . lies far from the core of the guarantee of freedom of expression in that it appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.¹⁷²

However, the expressive act in my hypothetical case advances the core values of freedom of expression. Specifically, A's making available works the copyright in which would have expired were it not for a legislative amendment extending the term of copyright advances the search for truth by making these works accessible to a broader range of individuals, enhances the self-fulfillment of all who read the works who would otherwise not have done so by giving them the opportunity to engage with its content, and—depending on the nature of the works and the actions taken by individuals after engaging with them—may enhance participation in social and political decision making.

The question of whether the expression is of low value is not the only question to be considered in this aspect of the section 1 analysis, however. As noted in *Whatcott*, the freedom of expression values furthered by the expression in question must also be balanced “with competing *Charter* rights and other values essential to a free and democratic society.”¹⁷³ Competing *Charter* rights that must be balanced in the section 1 analysis in the context of my hypothetical case are the freedom of expression of the public and of authors, whether or not they continue to own copyright in the works that they create.¹⁷⁴

169. *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1.

170. *JTI-Macdonald*, *supra* note 87.

171. *Sharpe*, *supra* note 38.

172. *Butler*, *supra* 30 at para 120. See also *Sharpe*, *ibid* at para 24; *Lucas*, *supra* note 97 at para 73; *JTI*, *supra* note 87 at paras 68, 94, & 115.

173. *Whatcott*, *supra* note 88 at para 66.

174. See, for instance, Paul Torremans, “Is Copyright a Human Right?” [2007] *Mich St L Rev* 271 at 290.

Furthermore, as a result of *Cinar*, copyright owners' property rights and authors' rights to inviolability and dignity might also need to be balanced.¹⁷⁵ It is unclear, however, whether infringements of the authors' rights to inviolability and to dignity could be held to have occurred in all instances of copyright infringement or only in situations analogous to *Cinar* where the author remains the copyright owner.

Canadian courts have also held that balancing, in the context of the section 1 analysis, should "take into account Canada's international obligations with respect to international law treaty commitments."¹⁷⁶ As stated in *Whatcott*, "[t]hose commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values."¹⁷⁷ In the context of copyright law, international obligations that should be considered include international copyright and intellectual property treaties that Canada has signed and are in force—namely the *Berne Convention for the Protection of Literary and Artistic Works*, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, the *WIPO Convention*, the *WIPO Copyright Treaty*, the *WIPO Performance and Phonograms Treaty*, and *TRIPS*.¹⁷⁸

Canada's international commitments, however, are not limited to copyright or intellectual property more broadly. Other types of treaties and international commitments that should be considered in the balancing process include human rights treaties such as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *UN Declaration of Human Rights*, the *UN Declaration on the Rights of Indigenous*

175. *Cinar*, *supra* note 58 at paras 113-117. Fewer, as well, notes that courts considering claims for copyright infringement have, on occasion, "privilege[d] the privacy rights of individuals over the public interest in the dissemination of knowledge." Privacy is thus another right that might need to be balanced at this stage of the s 1 analysis. See Fewer, *supra* note 6 at 198.

176. *Whatcott*, *supra* note 90 at para 67, citing to *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 916.

177. *Whatcott*, *ibid* at para 67.

178. *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as revised at Paris on July 24 1971 and amended in 1979, S Treaty Doc No 99-27 (1986); *1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 UNTS 43; *Convention Establishing the World Intellectual Property Organization*, 14 July 1967, 828 UNTS 3; *WIPO Copyright Treaty*, 20 December 1996, 2186 UNTS 121; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 2186 UNTS 2013; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299 [TRIPS].

Peoples, and the *UN Convention on the Rights of Persons with Disabilities*.¹⁷⁹ Ultimately, a Canadian court could determine that the benefits of the impugned provisions—in the context of my hypothetical case or in other contexts as discussed in the conclusion—might not outweigh their detrimental effects.

III. REMEDIES FOR BREACH

In the previous section, I argued that in the context of my hypothetical case (as well as in several other contexts), the impugned provisions of the *Copyright Act* might not be justified under section 1 because they are overbroad or their deleterious effects outweigh their beneficial effects. This section will examine the options available to a court should it determine that the impugned provisions of the *Copyright Act* unjustifiably infringe the section 2(b) right to freedom of expression.

Section 52(1) of the *Constitution Act, 1982* states that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”¹⁸⁰ Multiple remedies, including striking down, severing, and reading in, are available to a court under section 52(1).¹⁸¹

Canadian courts are limited in their ability to read in or sever elements of statutory provisions. In *Schachter*, the Court noted that severance and reading in are appropriate remedies only where the inconsistency or the extension “can be defined with some precision on the basis of the requirements of the Constitution.”¹⁸² As Justice Lamer noted in his majority reasons in *Schachter*, in situations in which “the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis ... it is the legislature’s role to fill in the gaps, not the court’s.”¹⁸³ This principle applies directly in

179. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights*, GTA Res 217A(III), UNGAOR, 3rd sess, Supp No 13, UN Doc A/810 (1948) 71; *Convention on the Rights of Persons with Disabilities*, GTA Res 106, UNGAOR, 61st sess, Supp No 49, UN Doc A/61/106 (1948) 2. Bailey has written in detail on the ways in which the SCC’s interpretation of the s 2(b) right to freedom of expression is consistent with its international human rights obligations. See Bailey, *supra* note 6 at 134.

180. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1).

181. *Schachter*, *supra* note 91 at 705.

182. *Ibid* at 705.

183. *Ibid*.

the context of copyright. In the previous section, I argued that a court could conclude that the impugned provisions of the *Copyright Act* are overbroad. That is to say, as described in *JTI* and *Whatcott* and applied in the context of copyright, a court could determine that the impugned provisions either “on [their] face catch[] more expression than necessary to meet the legislator’s objective,”¹⁸⁴ or are overbroad due to vagueness.

Depending on how the offending provisions are drafted, severing might be the most appropriate remedy. This would only be the case, however, if the offending portion could be severed without the court being required to “fill in ... details”¹⁸⁵ or to “make ad hoc choices.”¹⁸⁶ If it is held that there are a number of ways through which the impugned provisions could be modified to address concerns relating to overbreadth (for instance by expanding defences to copyright infringement or by adopting new interpretive principles), then severance and reading in would be inappropriate.

In *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, Justice Gonthier noted that multiple approaches could be taken to remedy the *Charter* breach in question.¹⁸⁷ He stated further that “it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government’s task to determine which approach it prefers.”¹⁸⁸ Attempts by courts to re-craft the impugned provisions of the *Copyright Act* could be criticized on the basis that they “amount to making ad hoc choices from a variety of options” and pay insufficient respect to the role of the legislature.¹⁸⁹

This argument—that it would be inappropriate for a Canadian court to craft legislative amendments to remedy copyright’s constitutional issues in contexts where there is more than one way in which these amendments could be framed—is given support by the SCC’s decision in *Rocket v Royal College of Dental Surgeons of Ontario*.¹⁹⁰ In *Rocket*, the SCC found that the impugned regulation violated section 2(b) of the *Charter* and could not be justified under section 1 on the

184. *JTI*, *supra* note 87 at para 78.

185. *Schachter*, *supra* note 91 at para 52.

186. *Ibid* at para 56.

187. *Mackin v New Brunswick (Minister of Finance)*, 187 NBR (2d) 224, 69 ACWS (3d) 846 (NBCA); *Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405.

188. *Rice v New Brunswick*, *ibid* at para 77.

189. *Schachter*, *supra* note 91 at 707. See also *M v H*, *supra* note 104 at para 139.

190. *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 71 DLR (4th) 68 [*Rocket*]. See also *Hunter v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 64, cited in *Schachter*, *ibid* at 169.

basis of overbreadth. Rather than reading in additional exceptions, the SCC struck down the regulation. It did so due in large part to the structure of the regulation itself, which “starts with an absolute prohibition on all advertising, [and goes]... on to set out exceptions.”¹⁹¹ Chief Justice McLachlin referred to this method of legislative drafting as “almost certain to raise the spectre of *Charter* infringement.”¹⁹² Further, “[b]ecause the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.”¹⁹³ In a similar manner, it could be argued that the prohibition against the use of copyright-protected expression “would be justifiable if additional exceptions were added.”¹⁹⁴ For instance, the incorporation of additional categories into the fair dealing defence, or the creation of additional defences, could address concerns of overbreadth both in the context of my hypothetical case or more broadly. However, following *Rocket*, the creation of additional exceptions would be a matter for the legislators, not the courts.

Given the limitations of reading in and severance as possible remedies, a court could find that the most appropriate remedy would be a declaration of invalidity. To what should this declaration of apply? As described earlier in this article, the impugned provisions—those that I have argued restrict the section 2(b) right to freedom of expression—are section 27(1) of the *Copyright Act* (the general infringement provision), when read in context with the provisions granting rights in works (sections 3 and 5), the primary remedy provisions (sections 34, 38.1 and 42), and the provisions setting out defences (sections 29-30.9) and other limitations to copyright—for instance term limits, as amended (sections 6-12).¹⁹⁵ There is considerable overlap between a number of these provisions. The general infringement provision (section 27(1)), for instance, can only be understood in light of the provision articulating the rights granted to copyright owners (section 3), the provision setting out the conditions of subsistence of copyright (section 5), and the provision setting out the term of copyright (sections 6-12). It would thus be difficult for a court to remedy any constitutional violation involving these provisions by invalidating a single provision. A similar fact situation is found in *R v Guignard*, in which Justice Lebel, writing for the SCC, held that “[b]ecause of the considerable overlap between the definitions and the provision imposing

191. *Rocket*, *ibid* at 250.

192. *Ibid* at para 253.

193. *Ibid* at para 252.

194. *Schachter*, *supra* note 91 at 706, discussing *Rocket*.

195. *Copyright Act*, *supra* note 1.

the ban, the declaration of nullity must apply to both the definition and the ban itself.¹⁹⁶ This passage suggests that should one or more impugned provisions be found to be inconsistent with the *Charter*, all overlapping provisions could (and perhaps should) be struck down. Drawing from *Bedford*, Parliament would then be able to “devise a new approach, reflecting different elements of the existing regime.”¹⁹⁷

Should this declaration extend beyond specific provisions to the legislation as a whole? This question has been addressed by the SCC in several decisions, including *M v H* and *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*.¹⁹⁸ One question to be asked in considering this issue is whether Parliament would have enacted the legislation without the impugned provisions. If it cannot be assumed that it would have done so, then this is an indication that the statute should be struck down in its entirety.

In *M v H*, the SCC determined that the legislature would have enacted the legislation without the constitutionally impermissible provisions.¹⁹⁹ In the context of my hypothetical case, it might be assumed that Parliament would have enacted the copyright term extension without making it retroactive. However, in other contexts in which the constitutionality of copyright is challenged, this assumption might not be valid. For example, one decision in which the SCC determined that it could not conclude that the legislature would have enacted the legislation without the impugned provisions was *Alberta (IPC)*.²⁰⁰ This decision dealt with the constitutionality of specific provisions of Alberta’s *Personal Information Protection Act (PIPA)*.²⁰¹ Justices Abella and Cromwell, writing for the Court, stated that “[g]iven the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant.”²⁰² As a result, the SCC struck down *PIPA* in its entirety.

Similar to *PIPA*, the *Copyright Act* possesses an integrated structure. The primary infringement provision (section 27), for instance, must be read together with the rights-granting provision (section 3 for works), which itself must be read alongside the provision detailing the conditions for subsistence of copyright

196. *R v Guignard*, 2002 SCC 14 at para 32, [2002] 1 SCR 472 [*Guignard*].

197. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 165, [2013] 3 SCR 1101 [*Bedford*].

198. *Alberta (IPC)*, *supra* note 90.

199. *M v H*, *supra* note 104 at para 144.

200. *Supra* note 90.

201. SA 2003, c P-6.5 [*PIPA*].

202. *Alberta (IPC)*, *supra* note 90 at para 40.

(section 5) and the provisions setting out the term of copyright in works (sections 6-12). Given the integrated structure of the *Copyright Act*, and following *Alberta (Information and Privacy Commissioner)*, it can be argued that should it be found that one or more provisions of the *Copyright Act* unjustifiably infringe the *Charter*-protected right to freedom of expression, that it may be more appropriate to strike down the *Copyright Act* in its entirety than to invalidate a specific provision or a number of provisions.

In suggesting that a declaration of invalidity might be the most appropriate remedy in certain contexts, the next question that must be asked is whether the declaration of invalidity should apply immediately, or whether it would be appropriate for the Court to grant a temporary suspension of this declaration. Canadian courts have indicated their discomfort in granting a suspended declaration of invalidity. In *Canada (Attorney General) v Hislop*, for instance, Justices LeBel and Rothstein, writing for the majority, stated that the effect of granting a suspended declaration of invalidity is to “extend[s] the life of a unconstitutional law.”²⁰³ As noted by Justice Deschamps in her dissenting reasons in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, “[g]enerally, the Court should be wary of allowing or appearing to condone a continued state of affairs that violates *Charter* rights.”²⁰⁴

The SCC gave guidance in *Schachter* as to the types of situations in which temporary suspensions of invalidity could be issued. Chief Justice Lamer wrote that a suspension of invalidity is “clearly appropriate where the striking down of a provision poses a potential danger to the public ... or otherwise threatens the rule of law.”²⁰⁵ He also suggested that suspensions of invalidity “may also be appropriate in cases of underinclusiveness as opposed to overbreadth.”²⁰⁶ In these types of cases, were an underinclusive law to be struck down, deserving persons might be deprived of benefits “without providing them to the applicant.”²⁰⁷ Since *Schachter*, other justifications for granting a temporary suspension of invalidity have been articulated by the SCC in cases including *Bedford* and *Kingstreet Investments Ltd v New Brunswick (Finance)*.²⁰⁸

203. *Canada (Attorney General) v Hislop*, *supra* note 104 at para 92.

204. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 244, [2004] 1 SCR 76.

205. *Schachter*, *supra* note 91 at 715.

206. *Ibid* at 715.

207. *Ibid* at 715-716.

208. *Bedford*, *supra* note 198 at para 167; *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 at para 25, [2007] 1 SCR 3 [*Kingstreet Investments*].

The possibility that a court might grant a declaration of invalidity should the *Copyright Act* be found to be invalid in whole or part is supported by the reasoning from the three cases noted above (*Schachter*, *Bedford*, and *Kingstreet*). First, although striking down the *Copyright Act* would pose no risk to public safety, it would deprive deserving people of benefits. Among those who would be deprived of benefits should the *Copyright Act* be struck down are authors who are copyright owners whose works could be used by anyone in any context (including a commercially competitive context) without the possibility of recourse. Second, drawing from *Bedford*, it can be suggested that given the increasing prominence of copyright in Canadian public discourse, “moving abruptly from a situation where [intangible expression] is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.”²⁰⁹ Third, given economic data on the importance of copyright to Canada’s economy, it is likely that—as was the case in *Kingstreet*—evidence would be led “establishing a real concern about fiscal chaos” should the *Copyright Act* be struck down.²¹⁰

If a temporary suspension is granted, for how long might it be granted? The SCC has suspended declarations of invalidity under the *Charter* in twenty-one decisions.²¹¹ In all but one case, the SCC granted suspensions of either six, twelve, or eighteen months.²¹² In total, in two out of twenty-one cases (10%) in which suspensions of invalidity were granted, the SCC suspended the declaration for a period of eighteen months;²¹³ in eleven out of twenty-one cases (52%), the

209. *Bedford*, *ibid* at para 167. In 2009, Canada’s federal government launched a public consultation on copyright in conjunction with the introduction of Bill C-61. Michael Geist writes that “[t]here were ultimately more than 8,300 submissions—more than any government consultation in recent memory.” See Michael Geist, “The Final Copyright Consultation Numbers: No Repeat of Bill C-61” (April 9, 2010) *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2010/04/copycon-final-numbers/>>.

210. *Kingstreet Investments*, *supra* note 209 at para 25. See, for instance, CONNECTUS Consulting Inc, *The Economic Impact of Canadian Copyright Industries—Sectoral Analysis* (2006); Conference Board of Canada, *Valuing Culture: Measuring and Understanding Canada’s Creative Economy* (2008).

211. This article is current as of 12 March 2016.

212. The one exception is *re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1. Here, the SCC “declare[d] all the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect.” In this case, the SCC held that a special hearing should be set to determine the period of temporary validity. *Ibid*, at 754, 769.

213. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1; *Dunmore*, *supra* note 11.

SCC suspended the declaration for a period of twelve months;²¹⁴ and in seven out of twenty-one cases (33%), the SCC suspended the declaration for a period of six months.²¹⁵

However, the last case in which the SCC suspended a declaration of invalidity for a period other than twelve months was the 2003 decision of *Nova Scotia (Worker's Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*.²¹⁶ Since this date, the SCC has granted suspended declarations of invalidity in nine cases, all for a period of twelve months.²¹⁷ It appears most likely that if a court decides to suspend a declaration of invalidity, it would do so for a period of twelve months.

This analysis is supported by remarks made by the SCC as to the appropriate length of time for which to suspend the effect of a declaration of invalidity. In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, the effect of the declaration of invalidity was suspended for eighteen months.²¹⁸ Justice L'Heureux-Dubé referred to the length of this suspension, in her dissenting reasons, as “longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and

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214. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 2 SCR 443, 150 DLR (4th) 577; *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 SCR 835; *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511; *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 SCR 208; *R v Tse*, 2012 SCC 16, [2012] 1 SCR 531; *Alberta (IPC)*, *supra* note 85; *Bedford*, *supra* note 196; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245; *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*]. In *Carter*, the SCC, in January 2016, granted a four-month extension of the suspension of the declaration of invalidity. See *Carter v Canada* (15 January 2016), Ottawa, SCC 35591 (Order Motion).
215. *R v Bain*, [1992] 1 SCR 91, 87 DLR (4th) 449; *Eurig Estate (Re)*, [1998] 2 SCR 565, 165 DLR (4th) 1; *M v H*, *supra* note 101; *United Food and Commercial Workers, Local 1518 (UFCW) v Kmart Canada Ltd*, [1999] 2 SCR 1083, 176 DLR (4th) 607; *Mackin v New Brunswick (Minister of Finance)*, *supra* note 185; *Rice v New Brunswick*, *supra* note 185; *Guignard*, *supra* note 197; *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504.
216. *Nova Scotia (Workers' Compensation Board) v Martin*, *ibid.*
217. *R v Demers*, *supra* note 215; *Charkaoui v Canada (Citizenship and Immigration)*, *supra* note 215; *Confédération des syndicats nationaux v Canada (Attorney General)*, *supra* note 215; *Nguyen v Quebec (Education, Recreation and Sports)*, *supra* note 215; *R v Tse*, *supra* note 215; *Alberta (IPC)*, *supra* note 90; *Bedford*, *supra* note 198; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245; *Carter*, *supra* note 215.
218. *Corbiere*, *supra* note 215.

respond to the needs of the different groups affected.”²¹⁹ A suspension of twelve months, on the other hand, was referred to by Chief Justice Lamer in his dissenting reasons in *Rodriguez v British Columbia (Attorney General)* as “giv[ing] Parliament adequate time to decide what, if any, legislation should replace [the impugned provision].”²²⁰

IV. CONCLUSION

In this article I have explored, in the context of a hypothetical case relating to copyright term extension, whether specific provisions of Canada’s *Copyright Act* infringe the *Charter* right to freedom of expression, and, if so, whether they can be justified through the application of a section 1 analysis. These questions were considered by Justice Teitelbaum in *Michelin*. As noted above, he held that specific provisions of the *Copyright Act* did not infringe the *Charter*-protected right to freedom of expression and, even if they did, they would be saved by a section 1 analysis. Since *Michelin*, these conclusions have been treated by Canadian courts as settled.

A number of commentators, however—including Fewer, Bailey, Craig, and Amani—have argued that these conclusions ought not to be seen as settled, and that elements of Canada’s *Copyright Act*, as written or as applied, are inconsistent with the section 2(b) right to freedom of expression.²²¹ This article, in which I resituate the analysis of copyright’s constitutionality in light of recent SCC jurisprudence in the areas of both copyright and freedom of expression, adds to and builds on these works.

Specifically, I have argued that A’s making available of copyrighted works constitutes protectable expression and that core provisions of Canada’s *Copyright Act* infringe the *Charter* right to freedom of expression in purpose and effect. As well, I have argued that these provisions might not be justified through the application of a section 1 analysis. Drawing in particular from the SCC’s decision in *Whatcott*, I have argued that although the impugned provisions should be seen as rationally connected to this objective, they may be found to be overbroad

219. *Ibid* at para 118.

220. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 570, 107 DLR (4th) 342.

221. Fewer, *supra* note 6; Bailey, *supra* note 6; Craig, *supra* note 6; Amani, *supra* note 6. Bailey, for instance, suggests that the “[*Copyright Act*] as currently structured cannot be assumed to be consistent with freedom of expression, and that the justifiability of the violation is by no means a foregone conclusion—particularly in the digital networked context.” See Bailey, *ibid* at 156.

and thus not minimally impairing. In addition, their detrimental effects may be found to be disproportionate to their benefits.

If a court determines that the impugned provisions of the *Copyright Act* infringe section 2(b) and that this infringement cannot be justified under section 1, the question turns to remedies. In the context of my hypothetical case, I suggested that the constitutionality of the impugned provision could be addressed by severing part of the provision. Depending on how the provision is drafted, however, my analysis of relevant SCC case law suggests that—perhaps surprisingly—in order to avoid usurping the role of Parliament, a court considering the constitutionality of specific provisions of Canada's *Copyright Act* should strike down either part of the *Copyright Act* or the *Copyright Act* in its entirety rather than trying to re-shape it (for instance through the addition of exceptions or defences to copyright infringement). I have argued that if a court strikes down the legislation in whole or part, it is likely that any declaration of invalidity would be suspended for a period of twelve months. Such a remedy would give Parliament the opportunity to remake Canada's *Copyright Act* in ways that are consistent with what the *Charter* requires.

The purpose of this article has been to demonstrate that the *Copyright Act* is not immune from freedom of expression scrutiny; that certain provisions of the *Copyright Act*, depending on the context in which they are engaged, may unjustifiably infringe the *Charter* right to freedom of expression; and that, as a result, Canadian courts should reconsider the relationship between the *Charter* right to freedom of expression and copyright. A number of possible consequences could flow from a reconsideration of this intersection. First, such reconsideration would provide Canadian courts with opportunities for further engagement with a number of legal issues that merit attention, including the purpose or objective of copyright. As described above, the purpose of copyright is an integral aspect of both the section 2(b) and section 1 analyses under the *Charter*. In *Cinar*, Chief Justice McLachlin wrote that copyright “seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works.”²²² Yet she also demonstrated an openness to considering additional justifications of copyright through her characterization of the acts of copyright infringement in *Cinar* as having violated Robinson's “personal rights to inviolability and to dignity.”²²³ Reconsidering the intersection between copyright and the *Charter* right to freedom of expression would provide Canadian courts with additional opportunities to consider the extent to which values such as dignity and

222. *Cinar*, *supra* note 59 at para 23.

223. *Ibid* at para 114.

autonomy—among others—either are or should be embedded within Canadian copyright law. Judicial reconsideration of this intersection could also result in further modifications to the section 2(b) and section 1 analyses themselves. What is more, it could create additional opportunities for courts and commentators to engage in further consideration of either the intersection of copyright and other *Charter*-protected rights or the intersection of intellectual property rights other than copyright and the *Charter*.

Second, Canadian courts' reconsideration of the intersection of copyright and the *Charter* right to freedom of expression could lead more individuals to engage—in different ways, and from different perspectives—with this intersection. For instance, consideration by the SCC of the intersection of copyright and the *Charter* right to freedom of expression might lead to a spike in empirical research on copyright law topics. As noted above, evidence plays an important role in the section 1 analysis. It can be used both by government to “justify the law’s impact in terms of society as a whole,” or by other parties (including interveners) to argue that the law is neither rationally connected to the objective nor minimally impairing.²²⁴ Choudhry writes that “the central debate in many section 1 cases is the quality of the evidentiary record.”²²⁵ Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts could also lead Canadian constitutional and freedom of expression scholars to engage with the intersection of copyright and the *Charter* right to freedom of expression to a greater degree than has previously been the case. Three of the most prominent constitutional law casebooks and textbooks used in Canadian law schools make no reference to copyright in the context of freedom of expression.²²⁶ Engagement with this intersection by constitutional scholars would bring a perspective that is thus far lacking in Canadian commentary in this area.

Third, Canadian courts' reconsideration of the intersection of copyright and the *Charter* right to freedom of expression could lead courts in other jurisdictions to reconsider the way in which they approach this intersection. Anne-Marie Slaughter has described the SCC as “highly influential, apparently more so than the US Supreme Court and other older and more established constitutional

224. *Bedford*, *supra* note 198 at para 126.

225. Choudhry, *supra* note 118 at 504.

226. See Hogg, Group, Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 1st edn (Toronto: Lexis Nexis, 2013). The absence of discussion of copyright in the context of these works can be contrasted with Eric Barendt's textbook *Freedom of Speech*, which contains an entire chapter on “Copyright and Other Property Rights.” See Eric Barendt, *Freedom of Speech*, 2nd edn (London: Oxford University Press, 2007) at 247-67.

courts.”²²⁷ The way in which the SCC articulates the relationship between freedom of expression and copyright may thus influence the articulation of this relationship in other jurisdictions.

Fourth, as argued above, Canadian courts’ reconsideration of the intersection of copyright and the *Charter* right to freedom of expression could result in certain provisions of the *Copyright Act* being declared of no force or effect, which would necessitate its reform. My hypothetical case focused on copyright term extension. However, as noted above, I am not suggesting that my conclusions are restricted to this specific case. Other scenarios that could have been considered include those in which fair dealing’s limits are challenged (for instance if an individual creates a “transformative work” that, although fair, falls outside of the fair dealing categories²²⁸); those in which an individual is sued for copyright infringement for making an unauthorized, personal copy of a work; those that challenge Canada’s moral rights regime (for instance due to the absence of free-standing defences to moral rights infringement); or those that challenge the provisions in Canada’s *Copyright Act* that make it an offence, in certain circumstances, to circumvent technological protection measures.

In any of these situations, a declaration that all or part of the *Copyright Act* is of no force or effect would create an opportunity for governments, non-governmental organisations, corporations, artists, scholars and others to suggest ways to re-make copyright in forms consistent with the *Charter*. It would, as Eric Barendt argues, give “[c]ourts, and writers on freedom of speech as well as on copyright” the chance to “confront th[e] clash of speech and property rights openly, and develop principles under which an appropriate accommodation of the two rights can be reached in concrete cases.”²²⁹ This could also result in opportunities for a broader reconsideration of the aims of copyright and the way in which copyright achieves these aims—not simply the way in which copyright impacts upon expression.

These are only a few of the consequences that could flow from Canadian courts choosing to reconsider their approaches to the intersection of copyright and the *Charter* right to freedom of expression. It is unclear, however, whether

227. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2005) at 74.

228. See, for instance, Graham Reynolds, “Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression” in Michael Geist (ed), *From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010). See also Fewer, *supra* note 6 at 199.

229. Eric Barendt, “Copyright and Free Speech Theory” in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (London: Oxford University Press, 2005) at 12.

such reconsideration will take place. Lower courts have shown no sign that they wish to revisit the issue. Similarly, the SCC has not signalled an interest in explicitly engaging with this intersection.²³⁰

What is clear, however, is that the view that arguments challenging the constitutionality of provisions of the *Copyright Act* on *Charter* right to freedom of expression grounds are “bound to fail” is not correct;²³¹ rather, a Canadian court could determine that core provisions of Canada’s *Copyright Act* unjustifiably infringe section 2(b) of the *Charter*. It is time for Canadian courts to reinvigorate their consideration of this issue and explicitly reconsider the constitutionality of copyright.

230. For a work that discusses the SCC’s approach to the intersection of the *Charter* right to freedom of expression and copyright, see Graham Reynolds, “The Limits of Statutory Interpretation,” *supra* note 7.

231. *Canwest 2008*, *supra* note 3 at para 37.