

5-11-2020

## Assessing Canada's Copyright Law in the Digital Context: Digital Locks, Open Licenses, and the Limits of Legislative Change

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ASSESSING CANADA'S COPYRIGHT LAW IN THE DIGITAL CONTEXT:  
DIGITAL LOCKS, OPEN LICENCES,  
AND THE LIMITS OF LEGISLATIVE CHANGE

JUSTICE OGOROH

A DISSERTATION SUBMITTED TO  
THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW  
YORK UNIVERSITY  
TORONTO, ONTARIO

NOVEMBER 2019

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# Abstract

This dissertation examines Canada's copyright law reform in the information age. The overarching theme of my research underscores the importance of considering the purpose(s) of copyright law and the public interest while navigating the copyright law reform process. Additionally, I advocate that in regulating the influence of technology in the copyright system, the default approach should aim to objectively balance the interests of stakeholders to the extent possible. Ultimately, recognizing that stakeholders will continue to develop pragmatic responses to the changing landscape through private contracting and technological measures, I suggest that embracing regulatory pluralism is the most promising path towards achieving balanced copyright in the digital age. I develop these arguments over six chapters.

In chapter one, I trace the contours of the origin and rationale of copyright protection, which culminated in the enactment of the first copyright law – the Statute of Anne of 1710. I examine the divergent views of copyright scholars on the specific reasons for enacting the Statute of Anne. Furthermore, I consider the purpose of copyright law in the Canadian context, and how it has evolved over the years, especially with judicial interpretations by the Supreme Court of Canada.

In chapter two, I examine the advent and impact of digital technology on the traditional copyright system. The already tensed copyright industry now faces a paradigm shift created by digital technology, which disrupts the traditional copyright business model by facilitating copying and mass distribution, as well as presenting new and easier modes of creativity. The need to address the challenges that digital technology poses to the copyright system inevitably produces calls for copyright law reforms. The WIPO Internet Treaties, which sought to make member states reform their national copyright laws to address challenges presented by digital technology, are a perfect example.

My focus in chapter three captures Canada's intriguing copyright law reform process as prompted by the WIPO Internet Treaties. I examine the background and buildup to the WIPO Internet Treaties as well as Canada's attempts to implement the Treaties. My analysis in this chapter raises concerns about whether copyright law reform in the technology age can adequately cope with the complex dynamics of the current copyright system.

Next, I embark on a case study of what I label the "free culture" and the "content industry" stakeholders. First, in chapter four, I delve into a detailed examination of the free culture stakeholder group through the lens of the Creative Commons licensing movement. My analysis of the Creative Commons licensing scheme traces its origin, objectives, conceptual framework, licence categories and how they operate, and its ideological approach to copyright in the digital age. Chapter five follows with a critical examination of the content industry stakeholders using technological protection measures as a reference for analysis. I discuss the various forms of technological protection measures and how they operate. I also interrogate the underlying approach to copyright and arguments that support the use of technological protection measures and the push for their incorporation into copyright law in the digital technology landscape.

The case studies in chapters four and five provide the context for chapter six. In this concluding chapter, I engage with the arguments that each set of stakeholders advance to justify their respective approaches to copyright and their use of these private ordering devices. Furthermore, in chapter six, I recommend embracing a *regulatory pluralism*

approach to understanding copyright policy in the information age. The regulatory pluralism recommendation is premised on the idea that the copyright system should be receptive to new and multi-stakeholder regulatory and private ordering initiatives, since reliance on copyright law alone is increasingly insufficient to regulate the activities of creators, consumers and the content industry. In addition to the challenges of implementing the WIPO Internet Treaties, a brief examination of the current Copyright Act review process underscores that copyright law reform alone is inadequate to deal with the challenges of copyright in the information era. This is not to say that legislative reform has no role to play. As an illustrative example, I recommend some salient reforms that are intended to balance the interests of users and copyright owners in relation to the current digital locks' regime in Canada.

Ultimately, I explain the importance of regulatory pluralism in the copyright context based on three main points: the need to 1) deemphasize over-reliance on copyright law reform; 2) encourage stakeholder-led regulatory practices; and 3) embrace innovative information and communications technology as an instrument to advance the purposes of copyright while serving as a platform for stakeholders to pursue their interests.

## **DEDICATION**

To my wife, Alice, and to my kids – Justice, Seraph and Justin.

## **ACKNOWLEDGMENTS**

Supervisory Committee:

Professor Carys Craig, Osgoode Hall Law School, Supervisor

Professor David Vaver, Osgoode Hall Law School

Professor Chitu Okoli, Skema Business School

And to all who have supported me on this academic journey.

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## **Introduction**

This dissertation examines Canada's copyright law reform in the digital landscape. Specifically, I focus on Canada's copyright law reform journey towards the implementation of the World Intellectual Property Organization (WIPO) Internet Treaties (hereafter "WITs") adopted by WIPO member states in 1996. Canada's copyright law reform process, prompted by the implementation of the WIT, generated a lot of attention as well as intrigue. In a copyright system driven by digital technology and the internet, and with multiple and multi-faceted stakeholders, the copyright law reform process in Canada proved to be a lengthy and arduous task. The existence of different and conflicting conceptual approaches to copyright and its overarching purpose(s) exacerbated the challenges of reform. Consequently, in Canada's implementation of the WITs, my research examines whether due consideration was given to the purpose(s) of copyright law and the balance of stakeholders' interests, and whether digital technology was conceptualized as a threat or catalyst to the copyright system.

For the purpose of my research, I focus on two copyright stakeholder groups, which I identify as the "free culture" and the "content industry" communities. The conceptual frameworks that underlie my research are what I describe as the "instrumentalist" and "intrinsic" approaches to copyright. These conceptual approaches underscore the free culture and the content industry's competing perspectives on copyright law: while the free culture stakeholders' ideology aligns with the intrinsic approach, the instrumentalist approach resonates with the content industry stakeholders. I analyze this further using the Creative Commons Licensing (hereafter "CCL") and technological protection measures (hereafter "TPMs") as case studies for the free culture and content industry stakeholders respectively. Both CCL and TPMs provided copyright owners with new tools for managing their copyright works and determining how they

could be accessed by the public. While CCL relied on existing copyright doctrine, TPMs were protected by new legal rules, which were the subject of the most controversial provisions in the 1996 WITs.

Unsurprisingly, Canada's implementation of the TPM and anti-circumvention provisions was characterized by disagreements and controversies. Canada's implementation of the WITs led to the enactment of the *Copyright Modernization Act, 2012* (hereafter "CMA"). The CMA was enacted after three failed legislative attempts over a period of sixteen years since the adoption of the WITs in 1996. The delay in Canada's implementation of the WITs is attributable to the dynamics of the legislative process, stakeholders' interests and lobbying, and the task of achieving balance in the copyright system. In order to adequately unpack and examine the salient points that underpin this research, I discuss issues that help put my arguments in perspective. Assessing Canada's copyright law reform in the era of digitized technology necessitated the study of the origin and purpose(s) of copyright law and how digital technology and the internet created a paradigm shift in the copyright.

In chapter one, I therefore delve into the historical analysis of the origin, development and the rationale for the eventual enactment of the first copyright law – the Statute of Anne (1709). I discuss the interesting beginnings of copyright in seventeenth and eighteenth century Britain, including the relentless efforts of the Stationers' Company to maintain a monopoly over printing, the significance of the enactment of the Statute of Anne, and its subsequent judicial interpretations. I then briefly discuss the development and rationale for copyright law in Canada, showing how judicial interpretation plays a pivotal role in shaping the direction of copyright law in the modern age. I conclude that the challenges of copyright in the seventeenth and eighteenth century still exist today, albeit in different forms.

The impact of technology on the copyright system is a cardinal focus of my research, therefore chapter two explores the paradigm shift created by digital technology and the internet in the sphere of copyright. Digital technology and the internet made the digitization of content possible; furthermore, it made content creation and dissemination significantly easy and inexpensive. While the emergence of technology simplifies creativity and enables the ubiquity of creative content, it raises some serious concerns about unauthorized access to and use of copyright-protected content. Consequently, I discuss the concept of digital information and communications technologies (ICT) and, in particular, whether they should be conceptualized as a threat to the copyright system, or an opportunity to advance its objectives. I examine this issue through the lenses of the free culture and content industry stakeholders and their respective approaches (intrinsic and instrumental) to copyright.

Chapter three details Canada's journey towards the implementation of the WITs and considers how well the implementation mirrors the purposes of copyright law and the goals of balance amongst copyright stakeholders. I set the context for this analysis by examining the origins, debates, controversies surrounding the TPMs provisions and the role the United States played both during the development of the WITs and their eventual implementation in Canada.

Chapter four and five embody a comparative analysis of the free culture and the content industry stakeholders. I provide a detailed analysis and critique of both the free culture and the content industry stakeholders. On the one hand, in chapter four, I examine the free culture stakeholders using the CCL scheme, while on the other hand, chapter five is devoted to the study of the content industry with specific focus on TPMs.

Chapter six assesses the critique of both the free culture (using CCL) and the content industry (using TPMs) against the backdrop of the purposes of copyright law, balance in the

copyright system in the digital context and the public interest. I then set out the context for my recommendations to address copyright challenges identified in this dissertation. First, I reiterate the challenges discussed in the dissertation, namely: 1) that the monopoly and control practices of the defunct Stationers' Company still exists presently in the copyright system, 2) the difficulty of managing the impact of ICT on copyright and creativity, 3) the inadequacy of copyright law reform alone to deal with the dynamics of digital technology, and 4) the difficulty in reconciling the differences in copyright ideology between the free culture and the content industry stakeholders.

Secondly, I make some recommendations by proposing a regulatory pluralism approach to understanding copyright law reform. This means embracing multi-stakeholder initiatives and ground-up regulatory practices that represent a shift from the sole reliance on copyright law reform to regulate copyright activities and its stakeholders as technologies change. Fittingly, I draw on Canada's experience and the ongoing copyright law review process to show that law reform is time-consuming, complex, and susceptible to the influence of lobbyists, internal politics and international interests. Consequently, my regulatory pluralism approach hinges on 1) de-emphasizing the over-reliance on copyright law reform, 2) encouraging stakeholder-led regulatory practices, and 3) embracing ICT as a useful tool in the copyright system that fosters the realization of the purposes of copyright law and the attainment of balance among copyright stakeholders. This is not to say that legislative reform has no role to play in helping to maintain the copyright balance as technologies and practices evolve. By way of illustration, following the incorporation of TPMs and their legal protection into copyright law in Canada, I conclude by making a case for some amendments to Canada's copyright law that could potentially mitigate the harshness of the current TPM regime.



## 1. Theoretical Framework

I conducted this research using a combination of two theoretical perspectives: the *instrumental* and the *intrinsic* conceptualizations of copyright. I will explain these two theoretical approaches, why I chose them and their usefulness to my research project.

### 1.1 Instrumental Approach

The instrumental perspective advocates for a copyright system where creativity is based on the promise of rewards; copyright protection is construed as a means to an end, with the end largely being financial benefit. This approach is based on the instrumental value of copyright as a means to an end,<sup>1</sup> in the sense that the beneficial effects<sup>2</sup> of copyright are strongly believed to be a necessary ingredient to encourage creativity. The instrumentalist conception of copyright therefore rests on a system of incentives, which ensures continuous innovation and creation of cultural works. This concept of copyright is not new and even pre-dates the Statute of Anne. In their rhetoric and campaign for the renewal of their exclusive right during the literary property debates, the Stationers' Company used the instrumental approach to justify their cause. Gillian Davies observed:

Parliament was regularly petitioned, therefore for a new Licensing Act. The booksellers argued that failure to continue the exclusive rights of printing had resulted in disincentives to writers. Without some form of protection to encourage authors, the public interest would be harmed by the decreased flow of works.<sup>3</sup>

It is not unsurprising that the Stationers' Company favoured this approach to copyright because their interest in the book trade was primarily motivated by financial gain. The

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<sup>1</sup> Lee Edwards et al, "Discourse, justification and critique: towards a legitimate copyright regime?" (2015) 21 *International Journal of Cultural Policy* 60 at 61 citing Drahos P, *A philosophy of intellectual property* (Dartmouth: Dartmouth Publishing, 1996)

<sup>2</sup> *Ibid.*

<sup>3</sup> Gillian Davies, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2002) at 11; *See also* Lyman Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 142.

instrumental notion of copyright as a system of incentive is highly popular among the school of thought referred to as *maximalists*.<sup>4</sup> Adherents to this school often favour the proposition that providing economic incentives through a system of intellectual property (copyright in this case) is crucial to progress, and without them there would be a dearth of creativity.<sup>5</sup> They claim that any reduction in the level of protection would invariably lead to diminished creativity.<sup>6</sup> They therefore condemn free-riding as undermining necessary incentives to create.<sup>7</sup> A pertinent question that may be difficult for proponents of the incentive-based theory to answer is whether creativity would end if copyright law ceased to exist? Surely not, of course, and this proves that some creators are not motivated to create by financial rewards.

In my view, the instrumental approach to copyright has three cardinal points: 1) strict copyright protection 2) a system of incentives and 3) continuous creativity, which is claimed to be enhanced by rewards/incentives. It is understandable why many supporters of the instrumental concept of copyright call for stricter copyright protection – it grants exclusive but limited monopoly rights, which in turn create artificial scarcity. Access to these protected works can then be granted for a fee, which is the reward or benefit to the creator to spur further creativity. Dr. Samuel Johnson’s view supports the incentive-based system of copyright: “no man but a blockhead ever wrote except for money.”<sup>8</sup>

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<sup>4</sup> Deborah Halbert, *The State Of Copyright - The Complex Relationships Of Cultural Creation In A Globalized World*, (Abingdon, Routledge,2014) at 12. “By intellectual property maximalist I mean several things. Intellectual property maximalist do not believe that the current protective levels are sufficient, and thus advocate for longer terms, broader protection and enhanced punishment for violations.” For the purpose of my research, I will refrain from using the term “maximalist” except where I am directly quoting an author. The reason is that the so-called maximalists do not refer themselves as such but it is a term with which critics have labeled them. I prefer to use the term *content industry* instead.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Mark Lemley, “Property, Intellectual Property, and Free Riding” (2005) 83 Texas L.Rev. at 12 at online: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=982977](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=982977) > accessed September 14, 2019.

<sup>8</sup> Quoted by Davies, *The Public Interest*, supra note 3 at 15.

Proponents of the instrumentalist discourse of copyright adduce several reasons to justify their approach to copyright. Karla O'Regan states that the incentive principle is the basis for the instrumentalist justification of copyright.<sup>9</sup> Through this lens, the grant of protection encourages authors to create and disseminate their work; the absence of protection would therefore lead to less creativity and dissemination of works.<sup>10</sup> Furthermore, the instrumentalist perspective claims to serve the public interest because copyright aids the establishment of an efficient market that creates benefits for consumers and the national economy.<sup>11</sup> In a bid to defend their support for a copyright regime based on the incentive model, Lee Edwards et al report the submission of Warner Bros. as follows:

Intellectual property rights are the cornerstone to facilitating, creating, distributing, and monetizing creative works. If one thinks of the media and entertainment industries as built upon creativity, then the industry looks at protection and growth of creativity as resting upon intellectual property protection.<sup>12</sup>

The content industry stakeholders seek to legitimize their perspective on copyright on the ground that the creative works they produce give enjoyment and satisfaction to users, create employment, generate revenue through the export of creative works and contribute to national economy. The buy-in into the instrumentalist idea is widely embraced and popular among the content industry stakeholders and generally acclaimed to be a source of motivation for creative production. It forms the basis upon which most copyright legislation is drafted and rationalized. Davies notes that just reward for labour provides stimulus for creativity and both are inseparably

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<sup>9</sup> Kala O'Regan, "Downloading Personhood: A Hegelian Theory of Copyright Law" (2010) 7 C.J.L.T. 1 at 13 at online: <<https://ojs.library.dal.ca/CJLT/article/viewFile/5213/4709>> accessed March 8, 2017.

<sup>10</sup> Ibid.

<sup>11</sup> Edwards, *Discourse, Justification and Critique*, supra note 1 at 69.

<sup>12</sup> Ibid.

linked.<sup>13</sup> Though this claim could be contested, it is supported by the Statute of Anne (encouragement of learned men to compose and write useful books) and the United States Constitution (to promote the progress of science) both of which emphasize the importance of copyright protection as a stimulant for creativity.<sup>14</sup> It is believed that the public interest is advanced when creators are encouraged (through the anticipation of rewards) to create and disseminate their works, which in turn inspire further creativity.

As O'Regan explains,<sup>15</sup> the economic or market efficiency justification of the instrumentalist theory of copyright is largely attributed to Ronald Coase<sup>16</sup> who asserted that the creation and dissemination of property was attributable to the perceived efficiency of market transactions.<sup>17</sup> The import of this claim seeks to justify the fact that property rights are able to function as a form of incentive<sup>18</sup> to enhance an efficient copyright market.

Despite its prevalence in the mainstream of copyright discourse, the instrumentalist theory of copyright is criticized for its strong emphasis on financial incentive as the sole reason for creativity. On this score, Edward *et al* comment on the instrumentalist notion of copyright that “the copyright regime is represented as being essential in order to support and facilitate cultural production, indeed, creativity tends to be conflated with the copyright regime, such that the only incentive for creativity is financial.”<sup>19</sup> Similarly, Diane L. Zimmerman strongly challenges the incentive-based system of copyright as a precondition for creativity to occur.<sup>20</sup>

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<sup>13</sup> Davies, *The Public Interest*, supra note 3 at 15.

<sup>14</sup> Ibid.

<sup>15</sup> O'Regan, *Downloading Personhood*, supra note 9 at 13.

<sup>16</sup> Ronald Coase, “The Problem of Social Cost” (1960) 3 J.L. & Econ. 1.

<sup>17</sup> Timothy J. Brennan, “Copyright, Property, and the Right to Deny” (1993) 68 Chicago-Kent L. Rev. 675 at 691 cited in “O'Regan, *Downloading Personhood*, supra note 8 at 13”

<sup>18</sup> Ibid.

<sup>19</sup> Edward et al, *Discourse, Justification and Critique*, supra note 1 at 69

<sup>20</sup> Diane L. Zimmerman, “Copyright as Incentives: Did We Just Imagine That?” (2011) 12 Theoretical Inquiries in Law 28 at 31 at online: < <http://www7.tau.ac.il/ojs/index.php/til/article/view/766/724> > accessed March 9, 2017.

The contrary view (which I subsequently discuss) is that empirical studies<sup>21</sup> show that financial incentive is not the only—or even the primary—source of motivation for creativity,<sup>22</sup> such that the copyright system should not be built on the foundation of financial incentives.

Another reason the financial reward incentive rhetoric is suspect is that it arguably seems to benefit the content industry entities (corporation) more than the average artist or creator who can hardly make a living relying solely on the proceeds from her work. Zimmerman presents evidence of some empirical studies<sup>23</sup> conducted in Britain,<sup>24</sup> Canada<sup>25</sup> and United States<sup>26</sup> indicating that most individual authors and artists cannot earn a living by solely relying on the proceeds from their work. Admittedly, these concerns about the instrumentalist approach are

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<sup>21</sup> See generally Christopher Buccafusco, et al, “Experimental Tests of Intellectual Property Laws’ Creativity Threshold” (2014) 92 Tex. L. Rev. 1922 at online: < <http://texaslawreview.org/wp-content/uploads/2015/08/Buccafusco-92-7.pdf> > accessed August 28, 2019; Raymond Ku, et al, “Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty” (2009) 62 Vand. L. Rev. 1669 at online: < <https://pdfs.semanticscholar.org/5aff/aa8dc9f6dc1868b4328ba989ff8716230c15.pdf> > accessed August 28, 2019.

<sup>22</sup> Elizabeth Rosenblatt, “A Theory of IP’s Negative Space” (2011) 34 Col. L. J. of Law & The Arts 317 at 321-2, 330-1 at online: < <file:///Users/aliceogoroh/Downloads/SSRN-id1662661.pdf> > accessed August 28, 2019. In analyzing the concept of negative space (a term coined by Kal Raustiala and Christopher Sprigman define the term as encompassing any “substantial area of creativity” in which intellectual property laws do not penetrate or provide only very limited propertization. Put differently, the industries in IP’s negative space exist in a “low-IP equilibrium,” where intellectual property protection is absent, or largely so, but creation continues) Rosenblatt contends that the motivation for creativity is not limited to financial incentives alone.

<sup>23</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 38.

<sup>24</sup> PR Newswire, “New Research Still Confirms UK Writers Struggle to Survive” March 8, 2007, at online: < <http://www.prnewswire.co.uk/news-releases/new-research-confirms-uk-writers-still-struggle-to-survive-156139775.html> > accessed March 13, 2017. Authors’ Licensing and Collecting Society (ALCU) commissioned the Centre for Intellectual Property Policy and Management (CIPPM), Bournemouth University to conduct research into authors’ earnings in the UK compared with those of German authors. The results are based on a survey of 25,000 authors in the two countries. Key findings of the study shows that only the top 10% of authors in UK reap real rewards, a typical author earns 33% less than the national average wage, 60% of professional writers need another job to survive and only 20% of writers earn all their income from writing.

<sup>25</sup> Kelly Hill and Kathleen Capriotti, “A Statistical Profile of Artists in Canada Based on the 2006 Census” (2009) 7 Statistical Insights on the Arts 1 at 11 at online: < <http://www.hillstrategies.com/content/statistical-profile-artists-canada> > at 12 and 24. Accessed March 13, 2017. A typical visual artist earned about \$8,000 from his or her work in 2005. The findings of the research reveal that the average earnings of authors and writers stood at \$32,045 and those of visual artists was \$13,976. The researched also presented data on the earnings of self-employed and paid authors and visual artists – self-employed authors and writers earned \$10,125 and their counterpart in paid employment earned \$14,375. Self-employed visual artists earned \$11,035 and their counterparts in paid employment earned \$6,000.

<sup>26</sup> Paul William Kingston & Jonathan R. Cole, “Economic and Social Aspects of the Literary Situation” (1983) 47 Pub. Opinion Q. 361, 366 “cited in Zimmerman, *Copyright as Incentives*, supra note 20 at 38-9.” “A U.S. survey by Kingston and Cole, reported in 1983, concluded that “writing yields little economic return: the median writing-related income at the time was \$4,775 (which worked out to be a return of a little under \$5.00 an hour). The researchers in that study found that 70 percent of those surveyed either held full time jobs or spent several hours each week on outside work to make ends meet. The support of spouses, they noted, is often necessary to allow individuals to devote significant blocks of time to the practice of their craft.”

genuine but the advocates of the approach also have some positive claim to justify their viewpoint.

In applying the instrumentalist idea in my research, my intention is not to discredit the approach but to critique its pros and cons. Furthermore, it is pertinent to state here that there is a close connection between the instrumentalist perspective of copyright in the ICT age and the use of TPMs because they encourage authorized use, which may allow a fee to be charged to access content. TPMs are discussed in greater detail in chapter five.

## **1.2 Intrinsic Approach**

The second analytical framework upon which I carry out my research is the intrinsic approach. This approach postulates that the motivation to engage in creativity is chiefly motivated by factors other than or solely monetary rewards; it further posits that creative works in themselves are valuable and that since the creators in this category are not primarily concerned with economic rewards, they are motivated to create by intrinsic desires such as the love for creativity, contribution to the public interest, increase access to cultural content for free etc. Consequently, creators on this spectrum may be more inclined towards making their works available and accessible to users for free. It is pertinent to note that writers have varying interpretations of the intrinsic approach to copyright. I will state these interpretations and clarify the aspect I will use for my research. Edward *et al* note that this perspective is based on the fact that “copyright may be justified intrinsically as a natural right that cultural producers have, either because (following Locke) their cultural works are born from their labour or because (following a German idealist tradition) they express their personality (Kretschmer and Kawohl 2004).”<sup>27</sup> Firstly, Edward et al explain the intrinsic approach using the natural right theory as developed by

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<sup>27</sup> Edward et al, *Discourse, Justification and Critique*, supra note 1 at 61.

John Locke;<sup>28</sup> but this is not the perspective upon which I intend to situate my analysis of the intrinsic approach. The reason is that it has the semblance of the instrumentalist theory because it promotes exclusive ownership of property as a means to gain financial reward. The second perspective on the intrinsic approach as articulated by Edward *et al* is that creative works emanates from and expresses the personality of the creator.<sup>29</sup> This is the aspect I hope to develop using the intrinsic approach. I develop the view that cultural works are motivated fundamentally by an innate desire for creative expression and the value here is the manifestation of the expression (cultural works), and if this is the case, creativity then is not chiefly centered on financial incentives, which creates the possibility of making the work freely accessible for others to use without harming future creativity. O'Regan identifies the intrinsic value<sup>30</sup> approach to copyright as an expression of the person but develops her scholarship on the relationship between personhood and property ownership.<sup>31</sup> Again, I wish to clarify that this is not the approach I follow in developing the intrinsic approach to copyright.

Zimmerman's claim (supported with empirical evidence) challenges the instrumentalist notion of incentive as the basis for creativity and articulates intrinsic motivation as an alternative understanding of what prompts the desire to engage in creative expression.<sup>32</sup> Before explaining Zimmerman's position, it is apposite to clarify that she does not discredit the incentive approach to copyright, on the contrary, she acknowledges its importance;<sup>33</sup> what she questions is the

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<sup>28</sup> John Locke, *Two Treatise of Government* (England: Awnsham Churchill, 1689) at 116-18 at online: < <http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf> > Accessed August 28, 2019.

<sup>29</sup> *Supra* note 27.

<sup>30</sup> O'Regan, *Downloading Personhood*, *supra* note 9 at 17.

<sup>31</sup> *Ibid.* at 28-32.

<sup>32</sup> Zimmerman, *Copyright as Incentives*, *supra* note 20 at 34.

<sup>33</sup> *Ibid.* at 57. "Maybe, too, understanding the true incentives for creativity might counsel investigating better ways to meet the needs of authors for a reliable income- possibly including greater investment in grants and fellowships-and perhaps better protection of the right of attribution. Having said that, there are going to be works that are created largely, or perhaps only, to earn money from public distribution. As noted earlier, lots of Hollywood productions seem to fall into the category, as do some

dominant narrative that the overarching motivation for creativity in the copyright system should be financial incentives.<sup>34</sup> In addition to developing her narrative, which favours the approach to copyright from the intrinsic perspective, she challenges the seemingly established idea that the expectation of financial rewards fuels the desire for motivation. She further contends that the promise of monetary reward could in fact be counter-productive.

Zimmerman supports the intrinsic understanding of copyright in the sense that creativity finds motivation from non-monetary incentives, and notes that researchers in psychology and human behavioural economics cast considerable doubt on the power of external inducement generally to actually motivate people and shape their activity in a particular way.<sup>35</sup> On the contrary, these scholars posit that the expression of human creativity is *primarily* motivated by intrinsic rather than extrinsic factors.<sup>36</sup> She argues that studies suggest that the promise of monetary rewards could actually diminish rather than enhance the motivation to produce high-quality and new works.<sup>37</sup> Under the intrinsic approach, creativity is motivated by reasons other than the expectation of financial benefit: the creator may be incentivised by the fact that her work is useful and valuable to others and contributes to the pool of creative knowledge, for example.

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other kinds of works that the public may indeed want but which might never appear if their creation depended on intrinsic motivation alone.”

<sup>34</sup> Ibid. “But the idea that for copyright to be any kind of useful incentives, it must offer the prospect of a larger and larger pot of gold through more control spread out over longer and longer times seems simply disconnected from what is really going on in the creative sphere.”

<sup>35</sup> Ibid. at 43.

<sup>36</sup> F.M. Scherer, *The Innovation Lottery*, in *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* 3 Rochelle Dreyfuss, Diane L. Zimmerman & Harry First eds. (New York: Oxford University Press, 2001) at 19.

<sup>37</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 43. Zimmerman notes that although this growing body of literature is occasionally referenced in the scholarship on intellectual property (Roberta R. Kwall, “Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul” (2006) 81 *Notre Dame L.Rev.* 1945; Bradford S. Simon, “Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law, (2005) 20 *Berkeley Tech. L.J.* 1613; Wendy J. Gordon, “Render Copyright unto Caesar: On taking Incentives Seriously” (2004) 71 *U. Chi. L. Rev.* 75, 89), there has been little systematic attempt to review it or to ask what its insights might reveal about the validity of the practices and assumptions of intellectual property.



This benefit to the public gives the creator a sense of satisfaction and fulfillment that is sufficient reward.

Wikipedia could be cited as an example of creativity based on the intrinsic approach to copyright with authors devoting unpaid hours to produce works that are freely available to the public in the name of advancing knowledge.<sup>38</sup> Further insight on the intrinsic approach to creativity can be found in the scholarship of Abraham Maslow<sup>39</sup> who asserts that creativity is an aspect of self-actualization rather than a response elicited by motivations external to the individual (that is, extrinsic).<sup>40</sup> Maslow argues that people create art because they have a built-in desire both to express themselves and to communicate their thoughts, impressions and ideas to others.<sup>41</sup> Similarly, Everett Hagen speaks of creativity as motivated by an innate drive and that people are motivated to create by the pleasure they get from problem-solving skills and from an inner sense of duty to achieve.<sup>42</sup>

In his study of innovative behaviour, Mihaly Csikszentmihalyi remarks that:

Creative persons differ from one another in a variety of ways, but in one respect they are unanimous: They all love what they do. It is not the hope of achieving fame or make money that drives them; rather, it is the opportunity to do the work that they enjoy doing.<sup>43</sup>

In my view, Csikszentmihalyi's opinion above does not discount the need for copyright or the exploitation of creative works, but it supports the assertion that, on the spectrum of creators, there are those whose creativity is not fundamentally fueled by the desire to make

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<sup>38</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 37.

<sup>39</sup> Abraham H. Maslow, *Motivation and Personality* 2<sup>nd</sup> ed. (New York: Harper and Row, 1970) at 15-30. According to Zimmerman, Maslow claims that people are motivated first to satisfy their psychological and safety needs, then their needs for love, connectedness, and esteem, and finally by their need for self-actualization. "cited in Zimmerman, *Copyright as Incentives*, supra note 20 at 46."

<sup>40</sup> Ibid. at 142.

<sup>41</sup> Ibid. at 69-70.

<sup>42</sup> Everett E. Hagen, "On the Theory of Social Change: How economic Growth Begins" (Homewood, Dorsey Press:1962) at 93.

<sup>43</sup> Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Innovation*, (New York: Harper Perennial, 1996) at 37.

money from their works. The drive behind creativity under the intrinsic approach is attributable to a number of factors. Zimmerman notes that one of those factors is spiritual/religious stimulus and she cites in support the United Society of Believers in Christ's Second Appearing (also known as Shakers) community who were extremely innovative.<sup>44</sup> Students of the Shakers agree that the motivation for their innovation and creativity was marginally commercial and chiefly pragmatic and spiritual.<sup>45</sup> Their desire to innovate and create would not have waned if there was no prospect of finding a market for their creations.<sup>46</sup> Dismissing the possible contention that the Shakers are outliers on the motivational spectrum, Zimmerman cites Hagen to support her claim:

The doctrine that the specific religious dogma of the Protestant Dissenters is peculiarly associated with innovational activity is obsolete, but a number of scholars observing economic growth in various societies have noted that innovators in the early stages of growth seem to be characterized by a common ethic which is appropriately termed religious in nature, whatever their religious dogma. They feel a personal responsibility to transform the world that far transcends the profit motive.<sup>47</sup>

Besides motivation that emanates from religious commitment, the sphere of open source movement provides the context to learn more about what motivates software developers to dedicate unpaid hours to works that will eventually be made free to the public. Josh Lerner and Jean Tirole admitted that, "to an economist, the behaviour of individual programmers and commercial companies engaged in open source processes is startling."<sup>48</sup> Lerner and Tirole concluded that the participants in the open source movement were motivated by the expectation

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<sup>44</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 35. According to Zimmerman, "Shakers belonged to a dissenting branch of Quakersism, founded in the middle of the eighteenth century in Britain by Mother Ann Lee and brought to the United States by her just as the American Revolution was beginning. She settled in New York State, and her subsequent Shaker communities spread out from there through New England and south to Kentucky." (For a brief history of the community visit <https://en.wikipedia.org/wiki/Shakers> accessed March 21, 2017).

<sup>45</sup> Ibid.

<sup>46</sup> Ibid at 36.

<sup>47</sup> Hagen, *Theory of Social Change*, supra note 42 at 93.

<sup>48</sup> Josh Lerner & Jean Tirole, "Some Simple Economics of Open Source" (2002) 50 J. Indus. Econ 197 at 198.

of future extrinsic rewards<sup>49</sup> such as enhancement of their reputation, which could increase visibility for greater career opportunities or status in the programming community.<sup>50</sup> Nevertheless, other scholars think differently; for example, Eric von Hippel and Georg von Krogh found that learning and enjoyment and a sense of ownership and control over the work products were fundamental prerequisite of who would participate.<sup>51</sup> This suggests that the love and enjoyment of programming are arguably the impetus to be part of the open source programming community. In my opinion, Zimmerman's acknowledgment that some programmers may be motivated by extrinsic reward does not invalidate the intrinsic perspective but shows that its claim cannot be absolute. There are creators on the intrinsic spectrum that may have some tendency or need to expect extrinsic benefits besides enjoying the engagement in their creative work.

Another form of intrinsic motivation arises out of a sense of obligation to give back<sup>52</sup> to society in general or to immediate circle of friends or colleagues. This supports the notion that the intrinsic concept of copyright is aimed at achieving public good. Since the creations of cultural goods are motivated by non-extrinsic rewards, it should mean public access to these creative expressions would mostly be unrestricted.

The narrative on the intrinsic approach goes further to claim that potential harm may flow from tying creative and innovative activities too closely to the promise of monetary rewards.<sup>53</sup> This claim relies on the product of empirical psychological studies on what motivates

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<sup>49</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 43.

<sup>50</sup> Supra note 48 at 218.

<sup>51</sup> Eric von Hippel & Georg von Krogh, "Open Source Software and the Private "Private-Collective" Innovation Model" (2003) 14 *Org. Sci.* 209 at 211, 216.

<sup>52</sup> John Cahir, "The Information Commons" (2003) (unpublished) 32-33 at online: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=428584](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=428584) > accessed March 21, 2017

<sup>53</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 45.

people to engage in creative and innovative thinking.<sup>54</sup> This claim may be counterintuitive but empirical evidence abounds to support it; however, Zimmerman warns that this type of research is complex and researchers in this field do not always agree with one another on the interpretation of results.<sup>55</sup> The results from this type of research are debatable<sup>56</sup> and difficult to interpret;<sup>57</sup> nonetheless, they present sufficient grounds to be taken seriously,<sup>58</sup> especially by intellectual (copyright) property scholars.

By way of example, a series of experiments were conducted with residents in a rural town in India, and then with students at MIT and University of Chicago; the experiments tested their performance in various tasks involving memory, problem-solving and creativity.<sup>59</sup> The findings indicate that in situations involving cognitive rather than physical effort,<sup>60</sup> higher monetary incentives led to worse performance.<sup>61</sup> A possible explanation for the detrimental effect the promise of rewards has on creativity can be found in what is called the self-determination theory.<sup>62</sup> Zimmerman notes:

Building on the insights of Maslow and others, researchers such as Edward Deci, Richard Ryan and Teresa Amabile have conducted empirical studies and interviews that have demonstrated a link between enhanced creativity and such internal factors as whether the subjects thinks of herself as free to follow her curiosity and structure her own approach to the task she chooses to undertake. If extrinsic tangible rewards are offered as motivators in a way that is

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Zimmerman identifies scholarship contesting the findings that extrinsic rewards can be detrimental to creativity, see Judy Cameron & David W. Pierce, "Reinforcement, Reward and Intrinsic Motivation: A Meta-Analysis" (1994) 64 Rev. Edu. Res. 363 (reanalyzing past research and concluding that monetary rewards are only harmful when not tied to measures of performance); Robert Eisenberger & Judy Cameron, "Detrimental Effects of Reward: Reality or Myth" (1996) 51 Am. Psychologist 1153 (rejecting the findings of harmful effects of rewards on creativity).

<sup>57</sup> For a review of the studies and various interpretations, see Beth A. Hennessey, "Self-Determination Theory and the Social Psychology of Creativity" (2000) 11 Psychol. Inq. 293, cited in "Zimmerman *Copyright as Incentives*, supra note 20 at 49."

<sup>58</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 49.

<sup>59</sup> Dan Ariely et al, "Large Stakes and Big Mistakes" (2008) 76 Rev. Econ. Stud. 451 "cited in Zimmerman, *Copyright as Incentives*, supra note 20 at 50.

<sup>60</sup> Ibid. at 464.

<sup>61</sup> Ibid. at 467.

<sup>62</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 50.

perceived as controlling, the quality of the individual's performance of a specified task seems to be diminished.<sup>63</sup> Interestingly, the disincentive effect of extrinsic motivators is strongest where the task at issue requires imagination and innovative approaches to problem-solving.<sup>64</sup>

Furthermore, in a study on the effect of external motivators (cash payment<sup>65</sup> inclusive) on learning among students (elementary and college level), the students were presented with a set of materials and half of the subjects were informed they would be assessed and graded on what they learned. The researchers discovered that those who did not expect to be tested showed greater understanding of the material than those who learned to be tested<sup>66</sup> and they had longer memory retention of the material.<sup>67</sup> The conclusion here is that intrinsic motivation engenders better conceptual understanding, greater creativity and improved problem-solving, relative to external controls.<sup>68</sup> This study suggests that tying reward to creativity has the tendency to condition and control human motivation and impedes self-expression (self-determination), which is an integral part of creativity.

In another study that aims to understand the connection or disconnection between extrinsic motivators and creativity, Amabile and her fellow researchers asked practising artists to randomly submit commissioned and non-commissioned works.<sup>69</sup> A panel of experts who did not know which works were commissioned and non-commissioned were invited to evaluate the works; the experts judged the commissioned works as less creative than the non-commissioned

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<sup>63</sup> Edward Deci & Richard M. Ryan, *Intrinsic Motivation and Self-Determination in Human Behaviour*, (New York: Plenum Press, 1985) at 66, 149, 310, cited in "Zimmerman, *Copyright as Incentives*, supra note 20 at 50."

<sup>64</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 50.

<sup>65</sup> For further reading on using money as reward, see Deci & Ryan, *Intrinsic Motivation*, supra note 63 at 44-49.

<sup>66</sup> Edward L. Deci & Richard Flaste, *Why We Do What We Do: The Dynamics of Personal Autonomy* (New York: Putnam's Sons, 1995) at 47-8.

<sup>67</sup> *Ibid.* at 48.

<sup>68</sup> *Ibid.* 51.

<sup>69</sup> Teresa Amabile, *Creativity in Context: Update to the Social Psychology of Creativity* (Colorado: Westview Press, 1996) at 175.

ones.<sup>70</sup> Furthermore, it was also found that the creativity of the commissioned works corresponds with the independent reports of the artists that they felt constrained or controlled by some commissions.<sup>71</sup> Consequently, Amabile concludes that extrinsic motivators have negative effects because they seem to reduce the individual's artistic involvement in the work, which results in a less creative product.<sup>72</sup> Put differently, Deci and Ryan note that "rewards contingent on performance are a special and especially harmful distraction because the activity becomes a means to an end and rather than an end in itself."<sup>73</sup>

The position that financial rewards have harmful effect on creativity is worth pondering, especially in the light of empirical evidence; however, to assume this position for all artists may not be appropriate given the varying motivating factors for artistic creation. Some artists are deeply in love with creativity as an end in itself and care little as to whether or not it generates financial rewards. These artists or creators likely do not rely directly on sales of their work as a means of livelihood. For those artists who love creativity for what it is and hope to obtain a just financial reward to make a living, however, it is hard to determine which takes preference, the money or the love for the art? And if the money their works generate is unable to sustain a living, they resort to other means of livelihood, which may or may not support or permit their continued creative endeavours.<sup>74</sup> A third category of creators are those who are primarily motivated by extrinsic rewards and may care less about creativity; their continued creativity therefore depends on the expectation of extrinsic reward. Highlighting these categories of creators or authors serves to properly situate the argument that extrinsic rewards could potentially impede creativity.

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Deci & Ryan, *Intrinsic Motivation*, supra note 63 at 142.

<sup>74</sup> PR Newswire, *UK Writers Struggle to Survive*, supra note 24; Hill & Capriotti, *Profile of Artists in Canada*, supra note 25; Kingston & Cole, *Aspects of the Literary Situation*, supra note 26.

Commenting on Amabile's work, Zimmerman admits that it also demonstrates that the relationship between the quality of performance on creative tasks and external rewards is not unitary;<sup>75</sup> she further notes:

Differences in reaction may also be dependent on differences in talent. Her research has found that where individuals with relatively low innate talent were told their work product would be evaluated upon completion, their performance actually improved; by contrast, among those whose skills were judged to be high at the outset of the experiment, performance deteriorated.<sup>76</sup> Research also suggests that rewards per se do not have a negative impact on creativity. Thus, an unexpected bonus received at the completion of a task, although it will not incentivize performance, will not hurt either.<sup>77</sup> What seems to be problematic is a reward that is salient during the performance of the work.<sup>78</sup>

The narrative on the intrinsic understanding and approach to copyright presents a clear contrast with the instrumental approach; this could be one of the problems inherent in the intrinsic approach because less emphasis on financial rewards as a motivation for creativity may undermine the value of reward for creativity. Nevertheless, recognition of the intrinsic approach provides the analytical framework to develop my discussion on the free culture and creativity in the context of ICT using CCL as a case in point. The understanding of copyright through the lenses of the intrinsic standpoint aligns strongly with the free culture agenda. By way of contrast, I will evaluate the goals and interests of the content industry stakeholder community using the instrumental approach, which closely mirrors their viewpoint.

On the relationship between the instrumental and intrinsic theories of copyright, while there are marked differences between the two, as the analyses above have shown, I observe that

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<sup>75</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 53.

<sup>76</sup> Amabile, *Creativity in Context*, supra note 69 at 151.

<sup>77</sup> Edward L. Deci et al, "Extrinsic Rewards and Intrinsic Motivation in Education: Reconsidered Once Again" (2001) 71 Rev. Edu. Res. 1 at 7, 10.

<sup>78</sup> Zimmerman, *Copyright as Incentives*, supra note 20 at 53.

some areas of intersection abound. Both perspectives claim to favour the interest of the public; instrumentalist notion posits that an incentivized copyright system encourages creativity resulting in more creative work products for the public to consume. The instrumentalist narrative also justifies their position on the ground that commercial activities in the copyright industry boost economic growth and creates jobs. On the other hand, the intrinsic approach advocates the recognition of the noble ideals that motivates creativity and that creativity is further encouraged by making works freely accessible by the public. Another intersection is that both perspectives expect to receive reward albeit in different forms. The reward in the intrinsic motivation to creativity is the satisfaction derived by the creator from her work; but the reward sought in the instrumental view is primarily monetary rewards.

My research applies these two conceptual frameworks to copyright to examine the perspectives of stakeholders (the content industry and the free culture community) to see how their interests align or conflict in a copyright system increasingly shaped by rapid developments in ICT. I have attempted to show in my analysis above that neither approach to copyright is perfect, and neither can their applicability claim to be absolute. To avoid any objection that these conceptual frameworks are too generalizing, it is pertinent to acknowledge here that, in between these two ends of the spectrum for interpreting creativity and copyright, artists and creators exist who do not fully confirm to either approach. For example, according to Lerner and Tirole some developers in the open source software community engage in creative coding activities with the expectation of future extrinsic rewards.<sup>79</sup> Having said this, the focus of my research will chiefly consider the free culture and content industry community essentially as *ideal types* for analysis.

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<sup>79</sup> Zimmerman, *Copyright as Incentives*, supra note 48.



## CHAPTER ONE

### THE PURPOSE OF COPYRIGHT LAW

This chapter appraises the rationale for the existence of copyright law in Canada. I begin by discussing the origin and development of the Statute of Anne (the first copyright law) and the reason(s) for its enactment. I then proceed to examine the reasons for enacting copyright law in Canada. In my analysis of the purposes behind the Statute of Anne and those informing copyright law in Canada today, I examine the dialogic interaction between the parliament and the judiciary on the development of copyright law, and the role that this plays. The chapter seeks to identify and present the thematic and problematic issues surrounding the origin, evolution and perceived purpose(s) of copyright law generally, and with specific reference to Canada.

#### 1.0 Copyright Law: Origin and Development

The origins of modern copyright law are traceable to the Statute of Anne,<sup>1</sup> which is widely accepted as having laid the foundation of copyright law over three hundred years ago. It is incontrovertible—but worth emphasizing—that prior to the Statute of Anne, artistic works existed; the Statute of Anne introduced legal recognition of authors' rights to control the making of copies and the grant of limited monopoly to exploit these rights. Salathiel Masterson suggests that although literary property probably did not exist in the ancient times, there is evidence that in ancient centres of learning such as Greece, authors secured compensation for their works.<sup>2</sup> There was, however, no formal law that granted rights to authors to control their works.<sup>3</sup> Authors

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<sup>1</sup> *The Statute of Anne* 1710, 8 Anne, c.19.

<sup>2</sup> Salathiel Masterson, "Copyright: History and Development" (1940) 28 California L. Rev. 620 at 620, 621. Instances of compensation to orators were not infrequent and orators were not in the habit of writing for free. Protagoras was the first lecturer to assume the title of Sophist and was said to be the first to received pay for his lessons.

<sup>3</sup> *Ibid.* at 620.

visited Rome from all parts of the civilized world to make their literary fortunes.<sup>4</sup> Absent any positive law that recognized authors' rights in their works and the power to sanction copying, authors' complaints against plagiarisms were no more than moral suasion. Thus, Martial writes to one Fidentinus:

It is said, Fidentinus, that in reciting my verses you always speak of them as your own. If you are willing to credit them to me, I will send them to you gratis. If, however, you wish to have them called your verses, you had better buy them, when they will no longer belong to me.<sup>6</sup>

Additionally, several centuries later but still prior to the Statute of Anne, records show a French court granting an order in recognition of an author's right.<sup>7</sup> There is plenty of evidence to suggest that, even before the formal recognition of authors' rights by the first copyright law, authors were already benefiting from their intellectual works, and sometimes finding support from the state and third parties in their efforts to control the publication of copies. But even where authors could successfully command recognition of some rights or some kind of claim of ownership over the product of their intellect, there was a marked difference between this and copyright in its present form. The enactment of the Statute of Anne was the first law to award authors the exclusive right to copy. It was of course preceded by intriguing debates, which I now examine.

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<sup>4</sup> Ibid. at 622. For example, Plautus, whose comedies date between 202 and 184 B.C., is reported to have been able to set himself up as a miller from the rewards of his plays; Cicero made a business out of the sale of his books by having publishing arrangements on a royalty basis.

<sup>5</sup> Masterson, *Copyright History*, supra note 2 at 622.

<sup>6</sup> Marcus Valerius Martialis, *Epigrams* (c. 80-104 AD), Book I, Epigram 29 at online: < <https://en.wikiquote.org/wiki/Epigrams> > accessed June 3, 2019.

<sup>7</sup> Daniel J. Gervais, "A Canadian Copyright Narrative" (2009) 21 I.P.J. 269 at 279. Citing M. Rose (See M. Rose, *Authors and Owners* (Cambridge: Harvard University Press, 1993) 17-19), Gervais notes that the Statute (The Statute of Anne) was not the first right accorded to authors in Europe. The role of the author as a right-holder had emerged in France in the early days of the 16<sup>th</sup> century. A French court granted the equivalent of an injunction to prevent an almanac from being sold without the consent of its author.

## 1.1 Prior to the Statute of Anne

The build-up to the Statute of Anne played a significant role in shaping the statute and its subsequent interpretation. Indeed, the nature of the debate could bear some similarities to the dynamics of the present-day copyright law reform debates. Though digital technology creates a marked difference in the substance of today's debates, the clamour for more control over content by copyright owners and unfettered access to content by users remain largely the same. Tracing the contours of the pre-Statute of Anne period in the 16th century reveals a time riddled with schemes, lobbying and agitation for monopoly and control of the book trade; the Stationers' Company was at the center of the monopolistic scheme to dominate the book trade.

### 1.1.2 The Stationers' Company and the Publishing Monopoly

Before the Statute of Anne, book-publishing rights were regulated through printing patents<sup>9</sup> and the London publishers' guild (Stationers' Company), and these were identified as publishers' rather than authors' rights.<sup>10</sup> In England, in 1403, a guild of stationers was formed; by this time they did not have any control over printed books<sup>11</sup> in the sense that they did not possess exclusive right or monopoly to publication or to sanction any publisher who published outside their guild. The stationers can be regarded as the forefathers of modern publishers. They

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<sup>8</sup> Originally the term *stationery* referred to all products sold by a stationer, whose name indicated that his book shop was on a fixed spot, usually near a university, and permanent, while medieval trading was mainly carried on by itinerant peddlers (including chapmen, who sold books) and others (such as farmers and craftsmen) at markets and fairs, at online: < [https://en.wikipedia.org/wiki/Stationery#History\\_of\\_stationery](https://en.wikipedia.org/wiki/Stationery#History_of_stationery) > accessed June 3, 2019.

<sup>9</sup> Lyman Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 78-113.

<sup>10</sup> Oren Bracha, "The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The life of a Legal Transplant" (2010)25 *Berkeley T.L.J.* 1427 at 1432.

<sup>11</sup> Masterson, *Copyright History*, supra note 2 at 625; Gervais, *Copyright Narrative*, supra note 7 at 274.

organized themselves into a guild and formed the Stationers' Company,<sup>12</sup> one of the primary aims of which was to vest its members with the exclusive right to publish books; unsurprisingly, the enforcement of this exclusive right was questioned by non-members.<sup>13</sup> The Stationers' Company's move for exclusive book publishing right (to have monopoly over the publication of books), gained the support of Queen Mary when she granted a royal privilege in the form of a Charter in 1556.<sup>14</sup> Subsequently, the Star Chamber Decree of 1586 codified the licensing framework for the Stationers' Company.<sup>15</sup> The licensing scheme required that any book printed in England had to be submitted to the Stationers' Company for licensing and then recorded in the Company's register.<sup>16</sup>

Prior to the grant of the royal privilege, the level of influence wielded by the Stationers' Company was uncertain. However, given that the guild had existed for more than a century before the royal charter, they must have been sufficiently significant to merit the royal privilege.<sup>17</sup> According to Thomas Morris, who describes the rise and influence of the Stationers' Company prior to its enjoyment of the privileges of the royal charter, the role of tradesmen of the guild (parchminers, lymners, and scribes) became largely redundant due to printing

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<sup>12</sup> Gervais, *Copyright Narrative*, supra note 7 at 274; Tomás Gómez-Arostegui, "The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710" (2010) 25 Berkeley T.L.J 1247 at 1253. Gómez-Arostegui explains that the Company of Stationers was the guild governing printers, booksellers and others in the book trade. Thomas B. Morris offers further insight on how the different crafts' guild in the book trade amalgamated into the Stationers' Company stating that "Four different skilled craftsmen combined to produce each book- the parchminer supplied the parchment, the scrivener copied the text, the lymner illustrated the it, and the bookbinder tied the completed sheets together between cover...As early as 1357, these groups had their own crafts guild. Near the beginning of the fifteenth century, however, a decision was made to join together. A petition to this effect on July 12, 1403, was granted by the Mayor and Alderman of London, and the guild of the participants in the trade, later to become known as the Stationers' Company, was born" Thomas Morris, "The Origins of the Statute of Anne" (1962) 12 Copyright L. Symp. 222 at 231.

<sup>13</sup> Gervais, *Copyright Narrative*, supra note 7 at 274. The opposition by non-members of the Stationers' Company not surprising because it adversely affected their interest in the sense that they could no longer publish books at liberty and therefore, suffer not just relegation, but denial of their authorial right.

<sup>14</sup> Ibid.; Masterson, *Copyright History*, supra note 2 at 625; Peter Baldwin, *The Copyright Wars* (Princeton, NJ: Princeton UP, 2014) at 55 [Peter Baldwin, *Copyright Wars*].

<sup>15</sup> Bracha, *The Adventures of The Statute of Anne*, supra note 10 at 1433. See also Patterson, *Copyright*, supra note 9 at 115-19.

<sup>16</sup> Ibid. at 1433-4; Gómez-Arostegui, *First Copyright Suit*, supra note 12,

<sup>17</sup> Masterson, *Copyright History*, supra note 2 at 625.

technology; and the only important group that remained were the booksellers or stationers.<sup>18</sup> The booksellers and stationers (many of whom became printers), for mutual business interests, maintained close interactions in the book trade and presented a common front. Subsequently, the Stationers' Company assumed a specific and important role in the book trade.<sup>19</sup> The preclusion of authors from the benefits of the royal privilege, however, was detrimental to the interests of authors and did not encourage authorship. Authors who did not enjoy this privilege had to rely on the Stationers' Company to publish their works and this did not give them much bargaining power. Naturally, this created an unhealthy rivalry between publishers and authors.

The extent of the power granted to the Stationers' Company by the British Monarch suggests that the Monarch saw the Stationers' Company as a useful mechanism to protect political and religious interests. According to Masterson, the reason behind the grant of the royal charter was:

...to prevent the propagation of the Protestant Reformation. After reciting that certain heretical books "both in rhymes and tracks" were daily printed, containing "great and detestable heresies against the Catholic doctrine of the Holy Mother Church," it ordains that for the suppression of this evil ninety-seven named persons shall be incorporated as a society of the art of a stationer. No person is to practice the art of printing unless he be one of this society, and the master and warden are authorized to search for, seize and burn all prohibited books, and to imprison anyone that should exercise the art of printing contrary to their direction.<sup>20</sup>

The privilege granted to the Stationers' Company was a strategic move by the Crown to maintain control and silence publications perceived to be offensive and contrary to the interests of the state and the doctrines of the Catholic Church. The Crown found in the Stationers'

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<sup>18</sup> Morris, *Statute of Anne*, supra note 12 at 235.

<sup>19</sup> Ibid. at 234-235.

<sup>20</sup> Masterson, *Copyright History*, supra note 2 at 628; Gervais, *Copyright Narrative*, supra note 7 at 275. In the quote, Masterson also cites "Drone, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States (1879) 56."; Morris, *Statute of Anne*, supra note 12 at 239.

Company a willing ally or, at least, a useful institution, and bestowed immense powers upon it including quasi-judicial functions to command compliance and enforce sanctions. The 1556 Charter represents a contrivance mutually beneficial to the Crown and Stationers' Company in the sense that the former used it as a mechanism to censor the publication of offensive content against the monarchy and established religion, while the latter used it to gain the coveted control and monopoly in the book trade.<sup>21</sup> Morris describes the alliance between the Crown and the Stationers thus:

Eventually, and perhaps inevitably, the government looked to the Stationers' Guild for assistance. Here was an established organization which could ferret out the source of heretical (or papistical, as the case may be) works as the Bishop or Mayor of London never could. They were printers and booksellers, they knew the locations of the presses and printers, they had developed their own machinery for the control of the trade and their register was a ready-made instrument for recording officially what works were printed. If all printers were forced to join the company, and all books were recorded on its register, and subject to its control, a centralized agency for censorship in the city of London would be established. This would mean that the limited membership of the Stationers' Guild would enjoy a monopoly over all printed works, but the government would gladly exchange such monopoly for an effective system of accountability and control. The stationers, needless to say, were quite satisfied with the bargain, and so it was to be.<sup>22</sup>

Morris asserts that the alliance between the government, the established Church and stationer both set the framework for the development, and perhaps also impeded, the development of copyright law for 150 years.<sup>23</sup> It is important to note that any member of the Stationers' Company who first entered a book in the register received the perpetual exclusive right to print that book.<sup>24</sup> The Stationers' copyright was perpetual in the sense that there was no

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<sup>21</sup> Bracha, *The Adventures of the Statute of Anne*, supra note 10 at 1433; Gervais, *Canadian Copyright*, supra note 7 at 275.

<sup>22</sup> Morris, *Statute of Anne*, supra note 12 at 238-39.

<sup>23</sup> *Ibid.* at 240.

<sup>24</sup> Bracha, *The Adventures of the Statute of Anne*, supra note 10 at 1434.

provision for any work to ever fall into the public domain, as we understand the term today.<sup>25</sup> This arrangement, while it lasted, was supported by various instruments.<sup>26</sup> This period marked the beginning of the Stationers' Company's influence and control in book publication, and created the desire for continued monopoly and control of creative works.

### 1.1.3 The End of the Stationers' Company's Monopoly and the Quest for Revival

Prominent authors such as John Locke, John Milton and Daniel Defoe, at that time in England, began to criticize and oppose the Stationers' Company's exclusive rights to book publication and called for an end to the monopoly. Perhaps their opposition to the Stationer Company's monopoly rights influenced Parliament's ultimate withdrawal of its support and refusal to renew the royal privileges. The Stationers' privileges (the exclusive right to book publication) were renewable but allowed to lapse in 1679; they were revived by James II in 1685 for seven years but the British Parliament eventually declined to renew them once again in 1694.<sup>27</sup> This was a clear indication that Parliament began to withdraw its support for the

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<sup>25</sup> Gómez-Arostegui, *First Copyright Suit*, supra note 12 at 1255. In simple terms, works come under the public domain when their copyright term has expired or where the owner cannot be identified. It is a broad and complex area of intellectual property that has received scholarly analysis, see Pamela Samuelson, Mapping the Digital Public Domain: Threats and Opportunities (2003) 66 L. & Contemp. Probs. 147; Carys J. Craig, "The Canadian Public Domain: What, Where and to What End?" (2010) 7 Canadian J.L.T. 221 at 221.

<sup>26</sup> Ibid. "This form of copyright persisted under the auspices of various Star Chamber decrees from 1556 to 1641, parliamentary ordinances and statutes during the Civil War an Interregnum from 1643 to 1660, and then under the Printing Act of 1662 after the Restoration. The Printing Act lapsed between March 1678/9 and June 1685 and then expired on May 3, 1695. These lapses of protection (1679-1685 and 1695-1710) constituted statutory copyright interregnum—a time when copyright was not supported by statute..."

<sup>27</sup> Gervais, *Canadian Copyright*, supra note 7 at 275; Masterson, *Copyright History*, supra note 2 at 630; Morris, *Statute of Anne*, supra note 12 at 247-48. The refusal by Parliament to revive the Stationers' monopoly in 1694 was the final blow that led to the decline of the Stationers' Company; however, prior to this time, their fall came by installments. According to Morris, the Long Parliament on July 4, 1641, abolished the Star Chamber from which Decrees 1556, 1586, and 1637 were issued and the decrees fell with the Chamber and for the first time in eighty years, the Stationers' authority rested on nothing but the original charter of 1557. Though the Stationers later filled the void with an act of Parliament, the hiatus dealt a severe blow to the Stationers because in 1641, 240 titles were entered in the register but in 1642, only 76 were entered. Morris further reports that in 1649, an act was passed with reduced the powers of the Stationers by permitting two presses outside London to operate and all the limitations were removed from the number of master printers who could enter the trade. Again in 1653, another act was passed which reduced the Stationers' powers by making a Council of State, not the Stationers' Company, the final arbiter of exclusive rights to print literary works. The Stationers were relegated to the position of enforcement agency only.

monopoly enjoyed by the Stationers' Company. The Stationers' Company lobbied intensely for a new legislative scheme with the usual pattern of licensing privileges<sup>28</sup> for the preservation of the publishing monopoly it had enjoyed for over a century. The Stationers' Company made several abortive attempts<sup>29</sup> to renew the Licensing Act.<sup>30</sup> Over a period of fifteen years (1695 – 1710) the Stationers' Company attempted to reclaim its monopoly over the book trade through petitions to Parliament. Those of 1703, 1704, 1706 and 1707 failed. Their lobbying tactics even adopted a sentimental approach. Lord Camden subsequently described how “the Stationers came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought their wives and children to excite passion, and induce Parliament to grant them a statutory security”<sup>31</sup>

Unsurprisingly, as Oren Bracha recounts, the bills were opposed due to concerns over censorship, monopoly powers, and the interests of publishers to the detriment of authors, who arguably ought to be the legitimate beneficiaries.<sup>32</sup> This period also opened up an opportunity to advocate for authors who hitherto did not have rights in their works. As described by Gervais, during the time after the Charter had elapsed in England, John Milton and John Locke<sup>33</sup> advocated for an end (non-renewal of the Charter) to the licensing regime (royal privileges) which they considered prepublication censorship.<sup>34</sup> Similarly, Daniel Defoe argued that prepublication control was unnecessary and that “copy-right” should be granted to all authors.<sup>35</sup>

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<sup>28</sup> Bracha, *The Adventures of the Statute of Anne*, supra note 10 at 1435.

<sup>29</sup> Patterson, *Copyright*, supra note 9 at 138-41 on the attempts to renew the Licensing Act.

<sup>30</sup> *Licensing of The Press Act*, of 1662.

<sup>31</sup> Karl Fogel, “The Surprising History of Copyright and The Promise of a Post-Copyright World” at online: <<http://questioncopyright.org/promise>> at 4, accessed February 23, 2017.

<sup>32</sup> Bracha, *Adventures of The Statute of Anne*, supra note 10 at 1435.

<sup>33</sup> Gervais, *Canadian Copyright*, supra note 7 at 275. John Milton and John Locke were instrumental in the fight to end the licensing regime.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 280.



Furthermore, referring to a call for legislation to grant authors rights in their work, Ronan Deazley reports Defoe's proposition thus:

these things call for an Act of Parliament, and that so loud as I hope it will not be deny'd, that so Property of Copies may be secur'd to Laborious Students, to the Encouragement of Letters and all useful Studies.<sup>36</sup>

As we will see below, Defoe's proposition above captures the purpose of creating copyright law in much the same terms as it is articulated today. He canvasses for legislative protection for the rights of authors in their work as a means to achieve the encouragement of learning more broadly. Unlike the stationers and booksellers whose petition sought the preservation of their copies and trade, Defoe articulates a different justification for recognizing authors' rights.<sup>37</sup> As Ronan Deazley notes, Defoe's proposal articulates a connection between publishing rights and the benefit to society as a whole, which comes from the encouragement of learning and the provision of statutory protection for books as a way of achieving this.<sup>38</sup> Defoe's rhetoric, it has been argued, influenced the Stationers' change of strategy. As Mark Rose explains, "it was Defoe's agitation on behalf of authorial rights that provided the London stationers with a new strategy for pursuing their own interest."<sup>39</sup> Similarly, Gervais notes:

Focusing the attention on authors allowed booksellers to achieve their aims, while avoiding the problem of defending their unpopular trade. Authors did want rights they could enforce themselves, even though most of them were happy to work with publishers. There was, in other words, a timely convergence of interest. On the one hand, authors were basking in the sun of Enlightenment, stroked by the rays of individualism. On the other hand, the Stationers advocated in favour of a right for authors of which they would be assignees, through the then-prevailing patronage arrangement. They understood that they

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<sup>36</sup> Ronan Deazley, *The Statute of Anne, On the Origin of the Right to Copy*, (Oxford: Hart Publishing, 2004) at 32.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> M Rose, *Authors and Owners: The Invention of Copyright* (London, Harvard University Press, 1993) at 35. "Cited by Ronan Deazley, *The Right to Copy*, supra note 36.

need a justificatory theory other than greed or, indeed, their desire to survive to convince both Parliament and the public.<sup>40</sup>

Although Gervais claims that most authors were happy to work with publishers, it appeared they did not have much of a choice. For more than a century, the publishers exercised great authority and had established dominance and monopoly in the book trade and they knew that, even if authors were granted rights in the copies of their books, they would still require the services of the booksellers or publishers to whom they would have to assign their rights. This age-long monopoly could have caused a less cordial relationship between authors and publishers. It was for their own interest that the stationers decided to change strategy and, on the pretext of advocating authors' rights, fulfill this interest. This scheme was first manifested by the booksellers in a 1706 pamphlet titled "*Reasons humbly Offer'd for a Bill for the Encouragement of Learning, and the Improvement of Printing.*"<sup>41</sup>

Although the Stationers' Company wielded so much power, which arguably could have advanced their cause, it appears that lobbying on their own behalf became unpopular and faced much opposition. Defoe's eloquent articulations, for example, strongly supported authors' rights to copies of their own work in the face of the publishers' claims. Such authors (who were not within the publishing monopoly held by the Stationers' Company) could not freely publish their works without scrutiny. Consequently, the Stationers' Company's lobbying rhetoric and tactics took a different tone. According to Deazley, thirteen influential Booksellers and Publishers in London and its environs supported authors' interests when they petitioned the House of Commons seeking leave to present a bill:

[M]any learned Men have spent much Time, and been at great Charges in composing Books, and who used to dispose of their Copies

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<sup>40</sup> Gervais, *Canadian Copyright*, supra note 7 at 279.

<sup>41</sup> Ronan Deazley, *The Right to Copy*, supra note 36.

upon valuable Considerations, to be printed by the Purchasers...but of late Years such Properties have been much invaded by other Persons printing the same Books, either here in England, or beyond the Seas...to the great Discouragement of Persons from writing Matters, that might be of great Use to the Publick, and to the great Damage of the Proprietors; And praying, that Leave may be given to bring a Bill for the securing of Property in such Books, as have been, or shall be, purchased from or reserved to, the Authors thereof.<sup>42</sup>

The previous campaign strategy of the Stationers' Company had been to attract sympathy by bemoaning the plight of their precarious livelihood; but now they emphasized the authors' right and the public good.<sup>43</sup> As Simon Stern notes, in order to restore the status quo, the booksellers presented publicly persuasive justifications that involved claims about the authors' rights to speak to the public.<sup>44</sup> The account of authors<sup>45</sup> demonstrates how, in the fifteen-year quest for legislation for an exclusive right to print, booksellers moved from censorship-oriented justifications to arguments emphasizing authors' interests.<sup>46</sup>

Another possible explanation for the Stationers' inclusion of the authors' interest in their lobbying campaign is the relationship forged among prominent stakeholders. The success of the 1709 petition, according to the account given by Morris,<sup>47</sup> suggests that the Stationers' change of approach and the drafting and eventual passage of the bill that heralded the Statute of Anne may

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<sup>42</sup> Ibid. at 33. The signatories to this petition were as follows: Edward Brewster, Daniel Browne, Richard Chiswell, Robert Clavell, Freeman Collins, Timothy Goodwin, Charles Harper, Henry Mortlock, William Rogers, Samuel Roycroft, Jacob Tonson, Benjamin Tooke and John Walthoe.

<sup>43</sup> Ibid.; Bracha, *Adventures of the Statute of Anne*, supra note 10 at 1436.

<sup>44</sup> Simon Stern, "From Author's Right to Property Right" (2012) 62 *University of Toronto Law Journal* 29 at 42. In this article, Stern's approach to the history of copyright adopts what he calls author's dignitary right, including communicative rights (bearing on who controls the public presentation of text), and reputational rights (bearing on the text's appearance and its status as a reflection of the author).

<sup>45</sup> John Feather, "The Book Trade in Politics: The Making of The Copyright Act of 1710" 8 *Publishing History* 19; Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1992) 34-7. (Cited in Stern, *Author's Rights*, supra note 44).

<sup>46</sup> Stern, *Author's Right*, supra note 43.

<sup>47</sup> Morris, *Statute of Anne*, supra note 12 at 253. On the events of the 1709 petition and the passing of the Statute of Anne, Morris relies on the work of Ransom [Ransom, *The First Copyright Statute* 21 (1956)]. Morris admits that some of the account may involve speculations, but reasons abound for the justification of such speculation.

be attributable to the interlocking circle of relationships among Jacob Tonson,<sup>48</sup> Joseph Addison,<sup>49</sup> Richard Steele,<sup>50</sup> Dr. Jonathan Swift<sup>51</sup> and Edward Wotley.<sup>52</sup> Morris believes that the web of interaction involving Tonson (the bookseller), Swift, Addison and Steele (authors) and Wotley (a legislator) could not have been unconnected to the drafting of the original bill leading to the enactment of the Statute of Anne.<sup>53</sup> The involvement of prominent authors to align with booksellers could have been motivated by their concern that absent copyright, they would also suffer seriously from unauthorized reproduction.<sup>54</sup> On this point, John Feather argues that the Stationers' Company's support for authors and the public good was a façade, and that their real motive was to secure publishing rights for their own benefit.<sup>55</sup>

On December 12, 1709, the booksellers presented their petition after which permission was sought to present a draft bill for securing to them the property of books bought and obtained by them.<sup>56</sup> The House of Commons responded to the petition by granting leave to Wortley to present a bill; the initial version presented on January 11<sup>th</sup>, 1710, was titled "*A Bill for the Encouragement of Learning, and for Securing the Property of Copies of Books to the Rightful*

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<sup>48</sup> Ibid. at 253. Jacob Tonson was a powerful London bookseller in his time and had influential writers and parliamentarians as friends such as Joseph Addison, Richard Steele, Dr. Jonathan Swift and Edward Wotley.

<sup>49</sup> Ibid. Joseph Addison was a writer and member of Parliament; he also served as Tonson's literary agent before 1700. Together with Richard Steele, he published a popular periodical called *The Tatler*.

<sup>50</sup> Ibid. Richard Steele was Tonson's friend, it is speculated that their friendship intensified because Steele was in a love relationship with Elizabeth (Tonson's niece) who bore Steele a daughter.

<sup>51</sup> Ibid. Jonathan Swift was well acquainted with Tonson and in close relationship with Addison and Steele. He was a contributor to *The Tatler*.

<sup>52</sup> Ibid. According to Morris, Edward Wotley would appear one of the most over-looked figure in the development of the Statute of Anne. He was a member of Parliament and one of the three members of the Commons appointed to prepare the, and it was he who presented the draft to the House. Wotley met Addison in 1699 and they were close friends; it is speculated that it may have been through Addison that Wotley met Steele.

<sup>53</sup> Ibid. at 255-56. Morris further explains that it is usual for interested groups to prepare original drafts of bills presented to legislative bodies; he notes that Blagden [Cyprian Blagden, *The Stationers' Company: A History, 1403 – 1959* (Cambridge: Harvard University Press, 1960)] has documented throughout his study the crucial role the stationers traditionally played in all legislations concerning their interest. They undoubtedly participated in every bill since 1695. When the 1707 attempt failed, they launched another bill.

<sup>54</sup> Ibid. at 256. The terms "unauthorized reproduction", "unauthorized access", and "illegal filesharing" are generally more acceptable in scholarly discourse as appear to be less controversial compared to the term "piracy", which is controversial and one-sided. See generally Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: Chicago University Press, 2010)

<sup>55</sup> John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London: Mansell, 1994) at 56-7.

<sup>56</sup> Ibid.

*Owners thereof.*<sup>57</sup> Prior to this, as noted above, four petitions had already been rejected by Parliament, demonstrating its resistance to the booksellers' efforts to regain monopoly over the book trade. However, this time, the Stationers' support for authors' interests and perhaps leveraging relationships with influential booksellers, authors and legislators for lobbying purposes may have made the difference. The bill was passed but it did not go through unscathed. The title of the bill was revised and according to Morris, the revision was significant and indicative of Parliament's prejudice against booksellers; he notes that "Instead of 'securing,' the title now read 'vesting,' and instead of 'owners' it reads 'authors or purchasers.'" This change from securing to vesting is significant, of course, because it suggests that the Act is creating a new right rather than recognizing and giving additional protection to an existing one.<sup>58</sup> The bill presented did not contain any provision on limiting the term of copyright;<sup>59</sup> therefore, an additional and significant blow the British Parliament dealt to the Stationers' January 11, 1710 bill was the creation of a limited term and so the title read "*An Act for the Encouragement of Learning by Vesting the Copies of printed book in the Authors or Purchasers of such Copies, during the Times therein mentioned.*"<sup>60</sup> Eventually, then, the climax of the debate on the bill led to the enactment of the first copyright law by the British Parliament. The creation of a limited term in the Statute of Anne became the subject of continuing debate, however, and subsequent litigation.

## 1.2 The Statute of Anne

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<sup>57</sup> Stern, *Author's Right*, supra note 44 at 45 citing "UK, Journal of the House of Commons, vol.16 (12 December 1710) at 240; Morris, *Statute of Anne*, supra note 12 at 258.

<sup>58</sup> Morris, *Statute of Anne*, supra note 12 at 258.

<sup>59</sup> Wikipedia, "Statute of Anne" at online: < [https://en.wikipedia.org/wiki/Statute\\_of\\_Anne](https://en.wikipedia.org/wiki/Statute_of_Anne) > accessed June 10, 2019.

<sup>60</sup> Stern, *Author's Right*, supra note 44 at 46.

On April 5th, 1710, the Statute of Anne <sup>61</sup> came into force. As we have seen, it emerged from the attempts by the Stationers' Company to renew their exclusive privileges and contained provisions that heralded a turning point in the ownership of copyrights. The discussions that follow examine the innovations brought by the Statute of Anne and the purpose(s) for its enactment.

### **1.2.1 Copyright Under the Statute of Anne**

The Statute of Anne brought what is perceived as a landmark change by granting authors a twenty-one year copyright term for any book or books already printed; and a fourteen-year renewable copyright term for any book or books already composed and not yet printed and published.<sup>62</sup> This provision brought a radical change by shifting the exclusive copyright ownership in books from the Stationers' Company members to authors.<sup>63</sup> Thus, the Stationers were stripped of their copyright ownership, exclusive publication rights and the power of censorship and enforcement<sup>64</sup> that existed under the royal charter. The Statute of Anne made provisions for sanctions<sup>65</sup> for the violation of authors' copyright. However, as mentioned above, with regards to the fourteen-year term of copyright for new books, authors could assign their copyright under the Statute;<sup>66</sup> this meant that an author was entitled to assign copyright in books to anyone.

Two other provisions of the Statute of Anne which sought to ensure access to knowledge were the publishers' duty to fix fair prices, and to provide 9 free copies of their best publications

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<sup>61</sup> Deazley, *The Right to Copy*, supra note 36 at 36-7.

<sup>62</sup> *Statute of Anne*, supra note 1, s.1.

<sup>63</sup> Patterson, *Copyright*, supra note 9 at 145.

<sup>64</sup> Masterson, *Copyright History*, supra note 17; Bracha, *Adventures of the Statute of Anne*, supra note 10 at 1437.

<sup>65</sup> *Statute of Anne*, supra note 1, s.1, anyone who prints or reprints books without the author's written consent shall forfeit such books to the author who shall damask and make waste paper of them.

<sup>66</sup> *Ibid.*

to various institutions.<sup>67</sup> The Statute provided that booksellers and printers should not sell books at a price adjudged to be high or unreasonable, and where this was found to be the case, the price was to be reduced.<sup>68</sup> The Statute also imposed a duty on publishers to deliver 9 free copies of their best book publications for the use of the royal library, libraries of the universities of Oxford and Cambridge, the libraries of four universities in Scotland, the library of Sion College in London, and the library belonging to the faculty of advocates in Edinburgh.<sup>69</sup> Failure to deliver the 9 free copies attracted a fine of £5 for every copy not delivered.<sup>70</sup> The duty to fix a fair price was intended to check the exploitation of the public by publishers and the duty to deliver 9 free copies was aimed at ensuring unrestricted access to the knowledge without prejudice to the copyright granted to authors. However, the need to physically travel to the library to access these books may have been a practical constraint depending on the distance of travel; additionally, another possible restriction may have been whether access to these libraries was open to the general public.

At face value, these historical changes introduced by the enactment of the Statute of Anne give the impression that the Statute was intended essentially for the benefit of authors and the public. However, there are divergent views on the subject; as Bracha notes, modern scholars disagree on the purposes and motivating forces behind the Statute of Anne.<sup>71</sup> The divergent views of scholars on the exact purpose(s) for enacting the Statute of Anne is not due to paucity of information on plausible purpose(s) but the indeterminacy arising from the existence of more than one purpose.

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<sup>67</sup> Ibid. at s.4 and 5.

<sup>68</sup> Ibid. at s.4.

<sup>69</sup> Ibid. at s.5

<sup>70</sup> Ibid.

<sup>71</sup> Bracha, *Adventures of The Statute of Anne*, supra note 10 at 1431

Before we get there, however, it is helpful to consider the effect of the statute on the Stationers' claim to copyright under the common law, and the litigation that ensued. This analysis reveals the dialogic relationship between the judiciary and the Parliament in respect of the Statute of Anne.

### **1.2.2 The Statute of Anne, Common Law Copyright and Early Copyright Cases**

The concept of English common law is multifaceted,<sup>72</sup> but a simple and brief explanation will suffice for the purpose of this research. English common law system draws its origin from judge-made laws, judicial precedents, customs and traditions. In his analysis of the meaning and understanding of English common law concept, Morris Cohen considered various definitions of common law, one of which explained common law as:

...the unwritten law, the law that receives its binding force from immemorial usage and universal reception, in distinction from the written or statute law. That body of rules, principles and customs which have been received from our ancestors, and by which courts have been governed in their judicial decisions. The evidence of this law is to be found in the reports of those decisions, and the records of the courts. Some of these rules may have originated in edicts or statutes which are now lost, or in the terms and conditions of particular grants or charters; but it is most probable that many of them originated in judicial decisions founded on natural justice and equity, or on local customs.<sup>73</sup>

This provides a succinct definition of the concept of English common law, which is predominantly unwritten but expressed in judicial decisions. For the purposes of the analysis to

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<sup>72</sup>Morris Cohen, "The Common Law in the American Legal System: The Challenge of Conceptual Research" (1989) 81 Law Lib. J. at 13. Cohon states that "since the concept of the common law is multifaceted, encompassing a variety of meanings, the literature that surrounds it reflects a wide range of approaches and themes. So diverse is this literature that one is often initially uncertain as to the thrust of a particular author's discussion of the common law. Research on a legal concept with such a long and diverse history similarly raises unique bibliographic problems.

<sup>73</sup> Ibid. at 15.



follow, it is worth noting in passing that Canada inherited the common law legal system from Britain (although the province of Quebec also inherited the French civil law system).

The enactment of the Statute of Anne was not a complete victory for the Stationers' Company, as we have seen. Although they secured copyright for books already published<sup>74</sup> and new books (through assignment by authors),<sup>75</sup> a limited term of twenty-one years (for books already published) and fourteen years (renewable) for new books, was attached to these rights. For about a century and half, the Stationers' Company had had exclusive perpetual copyright in book publication; subjecting their copyright to a limited term was alien to them. In fact, according to Stern, it was considered illegitimate,<sup>76</sup> perhaps because enjoying monopoly rights for over a century gave them a sense of entitlement. Unfortunately for the Stationers' Company, the era of monopoly rights in book publishing ended with the enactment of the Statute of Anne. However, what remained to be determined for the Stationers' Company was whether the Statute of Anne gave a specific limited term while the perpetual common law right continued to subsist, or whether it abolished common law perpetual copyright by *replacing* it with a limited statutory term.<sup>77</sup> Any adjudication on this question would be deemed not ripe for consideration until at least the expiration of the twenty-one year term in 1731 and possibly, a third party publication attempt of a work for which the term had expired. However, a failed petition was made to Parliament in 1734 by the London booksellers to extend their statutory term.<sup>78</sup>

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<sup>74</sup> *Statute of Anne*, supra note 1, s.1.

<sup>75</sup> *Ibid.* and s.11.

<sup>76</sup> Stern, *Author's Right*, supra note 44 at 39.

<sup>77</sup> Masterson, *Copyright History*, supra note 2 at 630.

<sup>78</sup> Morris, *Statute of Anne*, supra note 12 at 224. The petition to extend the statutory copyright term arose in 1734 out of a challenge to the London booksellers copyright (or expired copyright). Three years after the works of Shakespeare, Milton, Dryden and other works expired and free to print (except common law right remained the Statute of Anne notwithstanding). One Walker began printing cheap editions of the works of Shakespeare. The London booksellers' response was to seek extension of their limited statutory term. It is also important to note that Stern reports that "As De Grey LCJ noted in *Donaldson*, the London booksellers did not promote 'the Idea of a Common Law Right in Perpetuity,...till after their Failure in procuring a new Statute' for the extension of the copyright term in the 1730s. These failed attempts, De Grey explained, led the booksellers to reason that

Following the failed petition, the London publishers sought injunctive relief at Chancery albeit interlocutory (that is, not perpetual) orders. In June 1735, Sir Joseph Jekyll, M.R., granted Eyre (a bookseller) an injunction restraining the publication of an edition of *The Whole Duty of Man*.<sup>79</sup> Injunctive relief became a safe harbour for the booksellers and they used it to their advantage to secure several injunctions. In 1736, Jekyll again granted Walthoe an injunction against Walker for a book which enjoyed the Statute of Anne's protection till 1731.<sup>80</sup> Jacob Tonson was granted an interlocutory injunction by Lord Hardwicke against Walker for Milton's *Paradise Lost*.<sup>81</sup> It appeared Walker was on a publication spree undeterred by previous restraining orders.

The Chancery cases above suggest that the judges appeared implicitly to favour the concept of common law copyright even if its origin seemed controversial. According to De Grey,<sup>82</sup> the London booksellers articulated the notion of common law right or perpetual copyright after their attempt to extend their statutory copyright term proved abortive. They needed a justification for the continuous enjoyment of the exclusive right to publication even after the expiration of the limited term granted by the Statute of Anne. Since the Statute of Anne was silent on the common law right, it was necessary for the London booksellers to invoke the doctrine of common law right. Analyzing the concept of common law right, Morris notes that:

No common law court had ever affirmed this right, but the Star Chamber, by supporting the validity of the stationers' register and the decisions of the Stationers' Court, had given governmental sanction to its existence. In addition, strong legal arguments could

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'if...the Legislature will not do it for us, we will do it without their Assistance,' and only then did anyone 'begin to hear of this new Doctrine, the Common Law Right' Stern, *Author's Right*, supra note 44 at 39 (footnote 28).

<sup>79</sup> Ibid. at 225 cites *Eyre v. Walker*, 2 Bro. P.C. 138, 1 Eng. Rep. 842 (Ch. 1735).

<sup>80</sup> Ibid. cites *Walthoe v. Walker*, 3 Swans. 676, 36 Eng. Rep. 1019 (Ch. 1736); a similar case involving the same Walker for the same work but for a different edition was decided in a similar manner – *Tonson v. Walker*, 3 Swans. 672, 36 Eng. Rep. 1017 (Ch. 1752).

<sup>81</sup> Ibid. cites *Tonson v. Walker*, 4 Burr. 2325, 98 Eng. Rep. 213 (Ch. 1736).

<sup>82</sup> Stern, *Author's Right*, supra note 44 at 39 (footnote 28).

be made, based on traditional principles, for the existence of a common-law property right.<sup>83</sup>

In my view, the Stationers' Company did have exclusive publishing rights (without term limits) which rested on the various legal instruments<sup>84</sup> the last of which lapsed in 1695; however, the question of whether this right could survive after the expiration of the limited term granted by the Statute of Anne became a highly debated and litigated issue. The enactment of a term limit to copyright could suggest that the Stationers' Company's exclusive right was extinguished upon the cessation of the statutory twenty-one year statutory right in existing publications. Consequently, it could be argued that printed or published books prior to the Statute of Anne, which had enjoyed perpetual common law right, no longer did so when the Statute of Anne came into force and limited their perpetual right to twenty-one years.

The interlocutory injunction granted to the London booksellers even after their limited statutory term had elapsed<sup>85</sup> was at best, a temporary haven for the booksellers because a substantive suit would need to be heard on the merits on whether common law rights survived the Statute of Anne and possibly litigated all the way to the House of Lords. The booksellers were determined to tenaciously hold onto the lifeline of injunctive relief to the extent of staging a case, as was discovered in *Tonson v. Collins*.<sup>86</sup> Even though the decision was going to favour the plaintiff, the case was dismissed upon discovery that it was a collusion<sup>87</sup> because Tonson was paying the defendant's expenses.<sup>88</sup> Masterson asserts that as a result of the ill-fated *Tonson v. Collins*, scepticism arose in Chancery, which led to the undoing of the booksellers because in

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<sup>83</sup> Morris, *Statute of Anne*, supra note 12 at 251.

<sup>84</sup> Cp. Gómez-Arostegui, *First Copyright Suit*, supra note 12 at 1255.

<sup>85</sup> Morris, *Statute of Anne*, supra note 12 at 226; Masterson, *Copyright History*, supra note 2 at 630.

<sup>86</sup> *Tonson v. Collins*, 1 Black W. 301, 96 Eng. Rep. 169 (Ch. 1761) cited in Morris, *Statute of Anne*, supra note 12 at 225.

<sup>87</sup> Masterson, *Copyright History*, supra 2 at 631. Masterson notes that *Tonson v. Collins* was first brought before the King's bench and the defendant was to answer for infringing on the rights of Tonson on *The Spectator* which was not within the protection of the Statute of Anne as the term had expired. The case was later adjourned to the Exchequer and despite all the judges favoring Tonson, it was dismissed based on discovery that it was a collusion.

<sup>88</sup> Morris, *Statute of Anne*, supra note 12 at 225.

subsequent cases (*Millar v. Donaldson* and *Osborne v. Donaldson*), injunctions were refused without any opinions given.<sup>89</sup>

Finally, the opportunity came for a pronouncement on whether the common law right survived the Statute of Anne in the landmark case of *Millar v. Taylor*.<sup>90</sup> Millar instituted an action against Taylor for publishing the poem, *The Seasons*<sup>91</sup> without his consent notwithstanding that the statutory copyright term in the work had expired under the Statute of Anne.<sup>92</sup> Taylor contended that since the term had expired, the work was already in the public domain.<sup>93</sup> Sir Thomas Sewell, M.R., referred the matter to the King's Bench for determination.<sup>94</sup> Four judges sat on the case at the King's Bench including Lord Mansfield, and judgment was given for the plaintiff by a vote of three to one.<sup>95</sup> In his analysis of the judgment, Deazley notes:

Despite each of the four having communicated their thought on the matter to each other, having “talked the Matter over several times”, and having equally endeavoured to persuade one another”, Yates J. nevertheless felt compelled to dissent from the opinion of the other three judges. Unanimity of thought upon this issue was not to be achieved. Given the question was “so important to the Literary World” Yates J. expressed his regret that “there should be any Disagreement upon this Bench.”<sup>96</sup>

Deazley further remarks that Lord Mansfield was undisturbed by the dissent of Yates, J.; on the contrary, Lord Mansfield claims it strengthened the conviction of the majority decision when he said:

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<sup>89</sup> Masterson, *Copyright History*, supra note 2 at 631. In footnote 32, Masterson states that both cases were reported as one in (1765) 2 Ed., cited in *Millar v. Taylor* (1969) 4Burr. 2303 at 2327.

<sup>90</sup> *Millar v. Taylor* (1769) 4 Burr. 2303,98 Eng. Rep. 201.

<sup>91</sup> Masterson, *Copyright History*, supra note 85, Millar had purchased rights in *The Seasons* from the original author – James Thompson.

<sup>92</sup> Ibid.

<sup>93</sup> Stern, *Author's Right*, supra note 44 at 72.

<sup>94</sup> Ibid.

<sup>95</sup> Masterson, *Copyright History*, supra note 85.

<sup>96</sup> Ronan Deazley, “Commentary on *Millar v. Taylor* (1769)” (2008) in *Primary Sources on Copyright (1440 – 1900)*, eds L. Bentley & M. Krestschmer, at online:<

[http://www.copyrighthistory.org/cam/commentary/uk\\_1769/uk\\_1769\\_com\\_972007181852.html](http://www.copyrighthistory.org/cam/commentary/uk_1769/uk_1769_com_972007181852.html) >Accessed February 23, 2017, at 5.

I do not know whether it may not be very advantageous, that there has been a difference of opinion, for it has been the occasion of going into the whole of the question, and the whole of the arguments much more at large; and it is a general question that concerns a vast number of people, now and for the time to come, it concerns the whole kingdom: And therefore I think it is of publick advantage that we have different perceptions of this question, that has occasioned its being so minutely and so thoroughly gone into<sup>97</sup>

Lord Mansfield favoured common law copyright and Yates, J. inclined to the contrary, perhaps because they both had previously expressed this position. Yates, J., as a counsel in 1762, had represented a defendant where he argued at length against the existence of common law right.<sup>98</sup> On the other hand, Lord Mansfield (William Murray), appeared as counsel in *Millar v. Kincaid* (1749-1751) in favour of the London booksellers' interest and argued in support of perpetual copyright in *Tonson v. Walker* (1752).<sup>99</sup> It might be asked whether, in the interest of justice and fairness, both Lord Mansfield and Yates J. should have recused themselves from the case on the basis of their prior interest in the issues involved. However, the case did not reveal that either of them had personal interests in the case or were connected to any of the parties, as opposed to having merely framed arguments on behalf of their clients in their previous capacity as counsel. While their own views are evident in their decision, there is no reason to doubt their professional objectivity.

In support of their ruling in favour of perpetual right, the majority examined the wording of the 1710 Act and found nothing contrary to the author's right at common law.<sup>100</sup> To justify his ruling, Lord Mansfield explains:

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

what is agreeable to natural principles is common-law; what is repugnant to natural principles is contrary to common-law, it is agreeable to natural principles that an author should have a copy of his own works before publication...Why? ... Because it is *just* that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is *just*, that Another should not use his Name, without his consent. It is *fit*, that He should judge when to publish, or whether he will ever publish. It is *fit*, he should not only choose the Time, but the Manner of Publication; how Many; what Volume; what Print. It is *fit*, that he should choose to Whose care he will Trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide it, not to foist in Additions...I allow them sufficient to shew it is agreeable to the Principles of Right and Wrong, the Fitness of Things, Convenience, Policy, and therefore to the Common Law to protect before Publication...The 8<sup>th</sup> of Queen *Ann* is no Answer. We are considering the *Common* Law, upon Principles *before* and *independent* of that Act.<sup>101</sup>

The pivot for Lord Mansfield's reasoning is based on common law, with which he equates natural law principles. Since the Statute of Anne does not expressly negate the common law right, he argues that the Statute of Anne, therefore, has no answer to the question at hand, and that recourse must be had to common law itself. He also makes a commendable argument in support of an author's rights to earn rewards for his work as well as dignitary rights of the author.<sup>102</sup> Lord Mansfield's reasoning for authors' right would have been meritorious save for the fact that the plaintiff in the case was a London bookseller and not an author (and of course he had previously defended the interest of London booksellers).<sup>103</sup> Lord Mansfield's argument that the Statute of Anne did not expressly negate the common law right can be countered by the provision that creates term limits. The statute expressly stated that books already printed or published (which previously had no term limit) were subject to a term limit of twenty-one years.

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<sup>101</sup> *Ibid.* at 6.

<sup>102</sup> Stern, *Author's Right*, *supra* note 44.

<sup>103</sup> Deazley, *Commentary on Millar v. Taylor*, *supra* note 96 at 5.

This provision notwithstanding, Lord Mansfield endorses common law right and its attendant implication of rights in perpetuity.

It is the negative implications of a common law right for society that Yates J. develops in his compelling dissent. According to Deazley's analysis, Yates J. could not reconcile the implications of perpetuity which the majority judges omitted from their reasoning.<sup>104</sup> Yates J opined thus:

Shall an *Author's Claim* continue, *without Bounds of Limitation*; and *for ever restrain all the Rest* of Mankind from their natural right by an *endless Monopoly*? Yet *such* is the claim that is now made, a Claim to an *exclusive* Right of Publication, *for ever*: For, nothing less is demanded as a Reward and Fruit of the Author's Labour, than an absolute Perpetuity.<sup>105</sup>

As noted, Yates J. had previously argued against the existence of common law rights.<sup>106</sup> His strong dissent should not come as a surprise and considered on the merits, it is more of a public interest-oriented dissent. In my view, his dissent does not discount the value of authors' rights to earn a living from their work, but he is more concerned about a right *without bounds or limitation*, which creates an *endless monopoly*. My inference is that Yates J. perceived that granting endless monopoly would be equal to going to back to the days of the Stationers' Company's monopoly, which was what the statute sought to end. The implication of this according to Yates J, would be to forever *restrain the rest of mankind* from accessing creative content. This statement might seem hyperbolic, but it raises genuine concern about locking out the public from accessing works to encourage the propagation of learning.<sup>107</sup>

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<sup>104</sup> Ibid. at 6.

<sup>105</sup> *Millar v. Taylor*, supra note 90 at 232.

<sup>106</sup> Deazley, Commentary on *Millar v. Taylor*, supra note 96.

<sup>107</sup> Ibid. at 6.

Beyond the arguments and reasoning put forward by Lord Mansfield and Yates J, the main contention, in my view was the clash between English common law and the Statute of Anne. Common law tradition as I explained earlier, though largely unwritten is an age-long practice with a strong foundation. English judges take common law seriously and can be regarded as the primary custodians of English common law. Though common law is largely unwritten, this does not affect its consistency or make it unduly volatile. This explains why the majority favoured a common law approach in *Millar v. Taylor*. Copyright before the Statute of Anne, that is, under common law, was perpetual and the judges were convinced that that right should still subsist notwithstanding the enactment of the Statute of Anne and the limited term provision for books already printed or published. So, while the views and reasoning of Lord Mansfield seemed absolute, especially when it supported monopoly, it was born out of a common law perspective.

Furthermore, the case may not have arisen had the Statute of Anne contained provisions that expressly stated whether the common law copyright had ended or not. While I argue that this was stated in the term limit provision, it was not sufficiently explicit to convince the majority in *Millar v. Taylor*. Perhaps it was deliberate that the Statute of Anne was silent on the issue, that is, not expressly mentioning that the term limit provisions applied specifically to common law. I strongly believe that in the course of considering the bill that was passed into law (Statute of Anne), it would have been contemplated that express provisions could be made to end the Stationers' heretofore perpetual common law copyright; especially considering the fact that bill was an opportunity to rid the Stationers' Company of their monopoly rights. My speculation is that they feared the consequences of tampering with the age-long tradition of common law. So,



at best, a term limit was included in the Statute of Anne, leaving the question of its interpretation to the courts.

Notably, in their divergent views, both Lord Mansfield and Yates J tried to legitimize their opinion by referring to natural rights principles; Lord Mansfield notes that “what is agreeable to *natural principles* is common law”<sup>108</sup> Yates J remarks “restrain all the rest of mankind from their *natural rights*.”<sup>109</sup> The ruling in this case thus became a major victory for the London booksellers; but it did not last as long as they would have wished.

The next landmark case of *Donaldson v. Beckett*<sup>110</sup> can be regarded as a sequel to *Millar v. Taylor*. The subject matter was the same collection of poems, *The Seasons*. Millar passed on in 1768 and his rights in *The Seasons* were purchased from Millar’s estate by Beckett.<sup>111</sup> However, Donaldson was selling cheaper editions of the same work.<sup>112</sup> Beckett successfully obtained a restraining order in Chancery against Donaldson. Lord Chancellor Apsley followed the precedent of *Millar v. Taylor* and made the interlocutory injunction against Donaldson permanent.<sup>113</sup> Donaldson appealed and the matter was referred to the House of Lords.<sup>114</sup> Five questions were put before the judges whom the Lords summoned to give their opinion; the last two questions were essentially whether a common law right existed and, if so, whether the Statute of Anne removed this right.<sup>115</sup> Eleven of the twelve judges<sup>116</sup> had to give their opinion on

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> 4 Burr. 2408, 2 Bro. P.C 129, 98 Eng. Rep. 257 (H.L. 1775), cited in “Morris, *Statute of Anne*, supra note 12 at 227.”

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ronan Deazley, “Commentary on *Donaldson v. Becket* (1174)” (2008) in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, at online: < [http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary\\_uk\\_1774](http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1774) > Accessed February 23, 2017 at 2.

<sup>114</sup> Wikipedia, *Donaldson v. Becket*, at online: < [https://en.wikipedia.org/wiki/Donaldson\\_v\\_Beckett](https://en.wikipedia.org/wiki/Donaldson_v_Beckett) > Accessed February 23, 2017 at 2. Note that seven months previously, in the case of *Hinton v. Donaldson*, the Scots Court of Session, had ruled that copyright did not exist in the common law of Scotland and that Alexander Donaldson (the defendant) could lawfully publish Thomas Stackhouse’s *New History of the Holy Bible*.

<sup>115</sup> Supra note 113 at 3.

<sup>116</sup> Ibid., Lord Mansfield abstained having given his opinion on the matter in *Millar v. Taylor*.

the matter: on the first question the judges ruled (7 to 4) in the affirmative; and on whether this right was taken away by the Statute of Anne, the judges ruled (6 to 5) in the affirmative.<sup>117</sup> The House of Lords had the final say in the matter and of the five Lords, four (Lord Camden, Lord Chancellor Apsley, the Bishop of Carlisle, and the Earl of Effingham) spoke against the common law right and one (Lord Lyttleton) in favour; eventually, the perpetual injunction in favour of a common law right (*Millar v. Taylor*) was quashed.<sup>118</sup> As Deazley notes, Lord Camden's compelling rejection of the common law right dismisses the citations and precedents<sup>119</sup> that had been relied on to support it as a "heterogeneous heap of rubbish, which is only calculated to confound your lordships, and mislead the argument."<sup>120</sup> Lord Camden further noted:

The arguments attempted to be maintained on the side of the respondents, were founded on patents, privileges, Star Chamber decrees, and the bye-laws of the Stationers' Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom; and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from these premises in which it could not possibly have existence.<sup>121</sup>

The judiciary in its landmark decision in *Donaldson v. Beckett* filled a lacuna in the Statute of Anne by dismissing the Stationers' Company's claim to perpetual right. This shows the dialogic interaction between the legislature and judiciary in shaping copyright law from the very early periods as it still continues to do to this day. It is fitting, therefore, that the next discussion underscores the dialogue between the legislature and judiciary in the wake of judicial decisions after the enactment of the Statute of Anne.

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<sup>117</sup> Supra note 114.

<sup>118</sup> Deazley, *Commentary on Donaldson v. Becket*, supra note 113 at 3-4.

<sup>119</sup> *Ibid.* at 4.

<sup>120</sup> *Ibid.*

<sup>121</sup> Wikipedia, *Donaldson v. Beckett*, supra note 114 at 4.

The enactment of the Statute of Anne ushered in a new era, though not one without challenges, and this led to some ground-breaking judicial opinions. We will return to examine the significance of *Millar v Taylor* and *Donaldson v Beckett* specifically in respect of this dialogic interaction between courts and the legislature, but first, there are a number of earlier cases that deserve to be brought into the picture.

### 1.2.3 Copyright Cases: Dialogue between The Judiciary and Parliament

*Burnet v. Chetwood*<sup>122</sup> was the first case to be litigated after passing the Statute of Anne in 1710 involving the translation of work under its protection.<sup>123</sup> The main issue for contention was whether the Statute of Anne prohibited the translation of works. In 1692, Thomas Burnet published *Archaeologia Philosophica* in Latin to express his views on geological history.<sup>124</sup> After Burnet's death, William Chetwood and Richard Franklin sought to print an English translation of two works by Burnet, *Archaeologia Philosophica* and *De Statu Mortuorum et Resurgentium*.<sup>125</sup> Burnet's executor (his brother George) sought an injunction from Chancery on the basis that the book was written in Latin because it was only intended for the learned, and he also complained that the translation distorted the meaning of the book.<sup>126</sup> In response, the defendants (Chetwood and Franklin) contended that their work was not the same book as *Archaeologia Philosophica* but a translation of the book into English.<sup>127</sup> They further argued that the claimant based his claim on the Statute of Anne which does not prohibit translation of such books into another language and the printing and publishing of such translation; they also

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<sup>122</sup> *Burnet v. Chetwood* (1721) 2 Mer. 441.

<sup>123</sup> Ronan Deazley, "Commentary on *Burnet v. Chetwood* (1721)"(2008) in *Primary Sources on Copyright (1450-1900)*, eds L. Bentley & M. Kretschmer, at online: <

[http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary\\_uk\\_1721](http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1721) > Accessed February 23, 2017.

<sup>124</sup> Stern, *Author's Right*, supra note 44 at 54.

<sup>125</sup> Ronan Deazley, *Commentary on Burnet v. Chetwood*, supra note 123 at 2.

<sup>126</sup> Stern, *Author's Right*, supra note 44 at 55.

<sup>127</sup> Ronan Deazley, *Commentary on Burnet v. Chetwood*, supra note 123 at 2.

stressed the fact their translation work was not a mechanical art but some skill in language and equal to the encouragement of learning within the act.<sup>128</sup> The Statute of Anne clearly was silent on translation of works into another language and the printing and publication of such works.

Lord Chancellor Macclesfield agreed with the defendants that the translation of a work could be a different book because of the skill and care that was put into the new version of the work, and that such endeavours were not within the prohibition of the Act.<sup>129</sup> Although sympathetic to the defendants' arguments, the Lord Chancellor Macclesfield nonetheless awarded an injunction to prevent the translation and printing of both works and the forfeiture of all copies in defendants' possession.<sup>130</sup> Deazley explains the rationale for the Lord Chancellor's decision as follows:

...He continued, however, that this was a book that contained "strange notions" and as such should not be made available in the "vulgar" tongue (that is, in English). Rather, it should remain in Latin only, "in which language it could not do much hurt, the learned being better able to judge" the work... "[A]n injunction was granted," and this based upon the Lord Chancellor's opinion that the court has "a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality."<sup>131</sup>

It is apparent in this case that the 1710 Statute of Anne was silent on translation of works to another language and printing and publication of the same. However, the opinion of Lord Macclesfield manifests an engagement with the parliament to fill in the legislative gap in the Statute of Anne. Lord Macclesfield acknowledges that translation of a work to another language (which becomes a different work) was not within the prohibition of the Statute of Anne. The reason is that, if the law is silent on it, prohibition is unlikely to be enforced because it did not

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

constitute infringement.<sup>132</sup> The court further recognizes an even more compelling argument that translation requires the investment of care and skill in language which contributes to the encouragement of learning as envisaged by the act. Ironically, in my view, it was for this same reason of *encouragement of learning* that the court decided against the defendants; that is, to prevent the distortion of knowledge. The court notes that the book was published in Latin to preserve the knowledge it contained and be judged by the learned; an attempt to translate it into a vulgar tongue (English) would defeat the interest for which the book was originally intended by the author.<sup>133</sup> The court self-reports that its opinion to prohibit the translation of the work is based on its inherent authority of *superintendency over all books*. This could be interpreted to mean that the court has the responsibility to ensure that published books do not distort knowledge and spread error to the detriment of the public.

Despite the jurisprudence behind that decision in *Burnet v. Chetwood*, it can be argued that to prohibit the translation of a work into another language absent any express prohibition by the act itself is not to interpret but to make law. Additionally, the concept of a superintendency role of the courts over all books portrays the semblance of censorship as carried out by the Crown through the Stationers' Company;<sup>134</sup> however, at that time, English courts were wont to deny copyright enforcement where doing so, in their view, would prevent the circulation of obscenity that could potentially corrupt public morals.

The arguments against the *Burnet v. Chetwood* decision present a reasonable view of the case at that time. However, my focus is the consideration of the dialogue between the judiciary and legislature. In every case that comes before the court, the court not only performs its

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<sup>132</sup> Deazley, Commentary on *Burnet v. Chetwood*, supra note 123 at 3.

<sup>133</sup> Stern extensively discusses *Burnet v. Chetwood* from the perspective of dignitary rights of the author, see Stern, *Author's Right*, supra note 44 at 54-9.

<sup>134</sup> *Ibid.* at 57.

adjudicatory functions, but also can be regarded through a modern lens as having been in discursive communication with the parliament. In *Burnet v. Chetwood*, the court demonstrates this dialogic interaction to make pronouncement on areas where the law is silent. This sends a message to parliament on areas that need future legislative attention and improvement. Lord Macclesfield's determination that the translation of a work is not an infringement moots the fact that it could be included in the law. In modern copyright law,<sup>135</sup> translations are regarded as derivative works within the scope of the author's exclusive right.<sup>136</sup> Although the observation of Lord Macclesfield may not have directly resulted in the right to control derivative works, it does form part of the rich contribution of the judiciary to the development of copyright law based on the relatively bare bones of the first copyright statute. Lord Macclesfield also foreshadows the standard of measuring originality when he states that "*some skill in language is requisite and in the course of rewriting, the translator dresses [the original text] up and clothes the sense in his own style and expression.*"<sup>137</sup> Despite other interpretations that may be given to the *Burnet v. Chetwood* ruling, its examination reveals its contribution to the development of copyright law which was in its infancy at the time.

The next copyright case to be considered as an example of dialogue between the judiciary and parliament is *Pope v. Curll*<sup>138</sup> where the court had to consider whether unpublished letters fall within the protection of the Statute of Anne. In this case, Pope filed a complaint in Chancery under the Statute of Anne against Curll concerning the publication of a volume of

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<sup>135</sup> David Vaver, *Intellectual Property Law: Copyright, Patents and Trade-Marks* 2d ed. (Toronto: Irwin Law, 2011) at 55. See, e.g., Canada's *Copyright Act* of 1921, drafted to align with the UK Copyright Act of 1911 in compliance with Berne Convention of 1908.

<sup>136</sup> David Vaver, "Translation and Copyright: A Canadian Focus" (1994) 16 EIPR 159 at 160 at online: <[https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2249&context=scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2249&context=scholarly_works)> accessed June 6, 2019.

<sup>137</sup> Stern, *Author's Right*, supra note 44 at 56. In his analysis of the movement from author's right to property right, Stern discusses some of the early copyright cases including *Burnet v. Chetwood* inclusive.

<sup>138</sup> (1741) 2 Atk. 342.

correspondence written by him and received from others, including Jonathan Swift.<sup>139</sup> Pope obtained an injunction against Curll pending a response from Curll.<sup>140</sup> According to Pope, between 1714 and 1738 he wrote series of letters to Swift but did not dispose of the copyright in the letters and therefore possessed the sole right to publish and sell them.<sup>141</sup> During this same period, Pope stated that he received various letters from Swift and claimed that both the letter he wrote and those addressed to him by Swift should not be published without his consent.<sup>142</sup> Pope asked for disclosure of all agreements made concerning the book and an accounting of all profits and paid to him.<sup>143</sup> In response, Curll contended that the letters sent by Pope to Curll were considered as gifts to Curll and no longer Pope's property.<sup>144</sup> Pope argued that, while he was no longer the proprietor of the letters, he still remained their author and thus retained the ability to decide whether or not they should be published.<sup>145</sup>

In his opinion on whether the unpublished letters fell within the protection of the Statute of Anne, Lord Chancellor Hardwicke ruled in the affirmative noting that "it would be extremely mischievous, to make a distinction between a book of letters, which comes into the world either by the permission of the writer, or the receiver of them, and any other learned work."<sup>146</sup> He further stated:

It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this that makes them so valuable, for I must confess for my own part, that letters which are very elaborately written, and originally

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<sup>139</sup> Ronan Deazley, "Commentary on *Pope v. Curll* (1741)" in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, at online: < [http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary\\_uk\\_1741a](http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1741a) > Accessed February 2017 at 2.

<sup>140</sup> *Ibid.*

<sup>141</sup> Mark Rose, "The Author in Court: *Pope v. Curll* (1741)" (1992) 21 *Cultural Critique* 197 at 206.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Deazley, *Commentary on Pope v. Curll*, supra note 139.

<sup>145</sup> *Ibid.*

<sup>146</sup> Rose, *Author in Court*, supra note 141 at 207.

intended for the press, are generally the most insignificant, and very little worth any person's reading. (Atkyns, *Pope*)<sup>147</sup>

On the issue of ownership and right to publication of the letters written by Pope and those addressed to him, Lord Hardwicke ruled thus:

As to the first (letters written by Pope),<sup>148</sup>...I am of the opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property...As for the letters in the volume written to Mr. Pope, I think that *he* cannot be heard to complain. They may possibly be published with the authority of the writers of them, and from copies taken from before they were sent to him.<sup>149</sup>

Lord Hardwicke rejected Curll's argument as to the letters written by Pope and, for the letters addressed to Pope, he ruled that Pope did not have the right to complain about their publication.

*Pope v. Curll* demonstrates the dialogue on the Statute of Anne between the judiciary and the parliament. The issue before the court was whether unpublished works or manuscripts (in this case a collection of letters) came within the protection of the Statute of Anne which provided only for works upon publication. As Deazley rightly notes, "The issue was just one of a number of concepts that had been left unresolved by the Statute of Anne: who had the right to first publish any written manuscript? and, upon what foundation?"<sup>150</sup> It is with this difficult question, for which the Statute of Anne made no provision, that Lord Hardwicke engaged in *Pope v. Curll* for the development and improvement of the copyright jurisprudence. Similar to *Burnet v. Chetwood*, the court resolves the question not based upon the face of the 1710 Act but its normative foundation. Lord Hardwicke's decision was guided by the fact that the Statute of

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<sup>147</sup> Ibid. at 208.

<sup>148</sup> Text in bracket added by the author of this dissertation.

<sup>149</sup> Deazley, *Commentary on Pope v. Curll*, supra note 139 at 2-3.

<sup>150</sup> Ibid. at 2.



Anne was passed “for the encouragement of learning” and the continued “production of useful books.”<sup>151</sup> Deazley explains that it would have been problematic to deny Pope any form of redress because epistolary exchanges at the time served a valuable instructional and educational function; indeed letter-writing in the eighteenth century was a practice in which all in society engaged.<sup>152</sup> So while the Statute of Anne was silent as to unpublished letters, to deny the letter writer any protection might discourage writing.<sup>153</sup> In sum, it would be counter-productive to deny the author of unpublished correspondence any right because such practice promotes the encouragement of learning in accordance with the Statute of Anne. A strict interpretation and enforcement of the Statute of Anne would have resulted in non-recognition of authorship and ownership of the letters written by Pope because they were not published by him and the Statute of Anne only protected published works, but this would have resulted in a misconception and conflicted with the prevalent notion of the instructional value of letter writing at that time. Instead, in the exercise of its adjudicatory function, the court effectively engaged in dialogue with parliament on the shortcomings of the Statute of Anne. The judgment could be criticized as the court overstepping its bounds and encroaching into the powers of parliament; but the court could equally be criticized for failing to uphold one of the stated objectives of enacting the Statute of Anne, which sought to encourage learning whether from letters or books.

In his opinion, which granted authorship of the letters to Pope, Lord Hardwicke’s reasoning distinguished between physical possession of the letters and the creative expression of author. He notes that the receiver of the physical object embodying the work has at best, a

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<sup>151</sup> Ibid. at 3.

<sup>152</sup> Ibid.

<sup>153</sup> Deazley, *Commentary on Pope v. Curl*, supra note 143 at 3.

qualified interest.<sup>154</sup> Deazley asserts that this reasoning “provided one of the earliest elaborations articulation on the problematic nature of copyright, and the relationship between the author, the reader, the book and the text.”<sup>155</sup> Commenting on Hardwicke’s decision, Mark Rose describes the decision as “a transitional moment in the conception of authorship and a pivotal moment in the production of the concept of intellectual property”<sup>156</sup> The illumination provided by Lord Hardwicke on this concept of copyright (authorship and the physical embodiment of the work and the user) can be regarded as one of the benefits of the courts engaging in a conversation with the parliament on shortcomings of the statutory provisions.

The next two cardinal cases that shaped the early jurisprudence of copyright in the mid-eighteenth century are *Millar v. Taylor* and *Donaldson v. Beckett*, discussed above. It is worth returning to examine these cases from the perspective of how the court dialogues with itself by re-evaluating previous decisions. Using *Millar v. Taylor* and *Donaldson v. Beckett*, I show that not only is there dialogic communication between or among arms of government, there is also the possibility of a dialogue within a single arm of government. These two cases exemplify this scenario; the court not only dialogues with the parliament, but also dialogues within itself through consenting and dissenting opinions of the judges.

Recall that, in *Millar v. Taylor*, the issue for determination was whether perpetual common right existed in copyrighted works notwithstanding the limited term provision in the Statute of Anne. Here again, the Statute of Anne was silent on this, which is not surprising considering how parliament resisted the booksellers bid to revive their monopoly rights. The court had to engage with the parliament and fill in the lacuna. A second level of dialogue ensues

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<sup>154</sup> Ibid. at 4.

<sup>155</sup> Ibid.

<sup>156</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (London: Harvard University Press, 1993) at 60, cited in “Ronan Deazley, *Commentary on Pope v. Curll*, supra note 139 at 4.”

in the court when there is no unanimity in the opinions of all the judges. Even the court confirms this internal dialogue when it notes that despite “having talked the matter over, several times and having all equally endeavoured to persuade one another.”<sup>157</sup> Arguably, the inability to achieve a unanimous decision was further heightened by the fact that Lord Mansfield and Yates J both had pre-conceived opinion already on the subject<sup>158</sup> from their days as practicing counsel and this may have in no small way influenced their viewpoints on the issues. In a decision which favoured the existence of common law right, despite the copyright term limit provisions of the Statute of Anne, Lord Mansfield supports his opinion by explaining that the answer to the question before the court does not lie in the Statute of Anne but what is agreeable to natural principles which he believes is common law.<sup>159</sup> On the contrary, Yates J cites public interest as the reason for his dissent asserting that an author’s right without limits would adversely affect the interest of the rest of mankind (public interest).<sup>160</sup>

The majority decision in favour of common law right was a major victory for the booksellers and in effect weakened the public domain established by the Statute of Anne through the introduction of limited term. The booksellers got from the judiciary what they could not obtain from parliament. To the booksellers, it was a welcome decision, but to authors and possibly the reading public, it meant the revival of the 16<sup>th</sup> and 17<sup>th</sup> century monopoly.

*Millar v. Taylor* demonstrates the uncertainty of judicial decisions and that the outcome may not always follow popular or expected views or, indeed, the assumed intentions of the legislature. The decision in *Millar v. Taylor* could be argued as right or wrong depending on whose interest is prioritized. My concern is the influence it had (though short-lived) in the

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<sup>157</sup> Deazley, *Commentary on Millar v. Taylor*, supra note 96 at 5.

<sup>158</sup> Ibid. Mansfield favoured common law right while Yates J was against it; also see my thought on this on pg. 20.

<sup>159</sup> Ibid. at 6.

<sup>160</sup> Ibid.

developmental phase of copyright law and its purposes. With *Donaldson v. Beckett*, the opportunity presented itself for the House of Lords to remedy, presumably, the wrong done in *Millar v. Taylor*. The earlier endorsement of perpetual copyright at common law was rejected on the ground that it could not be supported and that even if it existed, it was displaced by the Statute of Anne. The decision reveals that the dynamics in the conversation among the arms of government is an evolving and ongoing communication process. I mentioned earlier that the judiciary (and indeed any arm of government) can also look inward to interact and communicate with itself. This internal communication process can be in the form of a re-evaluation of an earlier adopted viewpoint and can effect a change where it is deemed necessary (subject to the court hierarchy system). This was exemplified by the *Donaldson v. Beckett* case; although the re-evaluation of the matter was triggered by litigants, the court could have simply endorsed the earlier decision of the lower court on the matter and more so because the facts and subject matter were exactly the same. The House of Lords chose instead to dialogue with not just the parliament, but with the lower court and revisit an earlier decision. The outcome of the dialogue culminates in overruling the earlier decision and changing the course of copyright history. The 1774 decision in *Donaldson v. Beckett* markedly shaped the future of copyright law and serves as a historical reference; but how much of this historical knowledge impacts the present-day copyright jurisprudence and policy formulation is another question.

Reviewing the early copyright cases show the enormous contribution of the judiciary in moulding copyright law from the beginning. This role is still crucial today even as the copyright system has experienced immense transformation over the past three centuries and the legislative text has grown in depth and detail. The notion of dialogue helps to refine and improve knowledge and understanding on a particular subject. As the process is ongoing, it creates the

opportunity for continuous evaluation of previous positions for iterative improvement. In a subject like copyright, where numerous interests are involved and the context is always changing, the value of dialogue helps the arms of government to engage with the issues and to assist one another in cautiously addressing them.

Having given a succinct account of the origin and development of copyright and the intrigues and interests involved, the question to which we now return is one that has been debated extensively by copyright scholars and other stakeholders: for what purpose or for whose interest was the Statute of Anne enacted?

### **1.3 The Purpose of the Statute of Anne: To What End and for Whose Interest?**

For a fair analysis of the purposes of enacting the Statute of Anne, it is pertinent to flashback to the royal privileges granted to the Stationers' Company and the debates that followed after it lapsed. My earlier discussion on the debates after the royal privileges ended and prior to the Statute of Anne reveals a period fraught with the intractable challenges of competing interests between authors and publishers and the public—not dissimilar to what exists today.

In tracing the historical account of how the royal privileges started, the views of scholars on the purpose of granting the members of the Stationers' Company monopoly rights in book publication seem to be fairly congruent. Bracha asserts that “the stationer’s copyright was rooted in an overlap between the guild’s commercial interests and the government’s political ones, the basic deal involved a facilitation of censorship in return for tight control of the trade and broad enforcement powers.”<sup>161</sup> Similarly, Gervais states that the royal charter favoured both the

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<sup>161</sup> Bracha, *Adventures of The Statute of Anne*, supra note 10 at 1433; Patterson, *Copyright*, supra note 9 at 28-30.

interests of the publishers and the Crown in maintaining control over new publications.<sup>162</sup>

Masterson explicitly states that:

It is not to be thought, however, that the sole, or even the chief, purpose of these privileges was to protect and encourage the printer or the author. The real reason behind the grants was to obtain for the Church and State an effective control and supervision over the press. Before a privilege could be obtained the work had to be submitted to censors and a favourable report secured...the first protection given to literary productions in what may be termed the growth of the present-day legal systems was not in recognition of a private right of an individual, but was rather a concession to achieve a more effective administrative control of a trade, the dangers of which were early seen by the political and ecclesiastical authorities.<sup>163</sup>

It is apparent that the royal charter was devised primarily to serve the interest of the Crown and ecclesiastical authorities,<sup>164</sup> and not for the interest of authors or for any individual. The benefit to the stationers followed as consequence of their role as a conduit to achieve political and religious objectives. In other words, if the Crown had other more convenient means of achieving its censorship objective, it may have dispensed with the stationers. However, the government's choice in using the Stationers' Company to do what I call *its dirty job* (pre-publication censorship, which was criticized by both Locke and Milton)<sup>165</sup> was very strategic because, prior to the grant of the royal charter, the Stationers' Company had recognized the enviable benefits of exclusive rights in book publication and began scheming for it amidst questions from non-guild members.<sup>166</sup> At this time, the members of the Stationers' Company did not have any copyright or legal backing for the exclusive publication right they arrogated to themselves. However, their cause must have gathered momentum because, as Masterson argues,

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<sup>162</sup> Gervais, *Canadian Copyright*, supra note 7 at 275.

<sup>163</sup> Masterson, *Copyright History*, supra note 2 at 626.

<sup>164</sup> Ibid. at 628.

<sup>165</sup> Gervais, *Canadian Copyright*, supra note 7 at 275. According to Gervais, John Locke and John Milton were instrumental in the fight against the licensing regime and prepublication censorship and spoke against such acts.

<sup>166</sup> Ibid. at 274.

though the influence exerted by the Stationers' Company before the grant of the royal charter was uncertain, they must have been a body of some importance.<sup>167</sup> Realizing that the ambition of the Stationers' Company could work in its favour, the State was motivated to legitimize their exclusivity claim through the royal privileges that they enjoyed for more than a century.

The Stationers' Company members were relentless in extending the privileges after their Charter ended, as we have seen. Consequently, it is important to ask how much of the royal privileges were transplanted into the Statute of Anne, and whether the Stationers' Company got what they wanted. Analyzing the purposes for enacting the Statute of Anne generates different views depending on who is doing the analysis and the interests they represent or favour. Copyright scholars and academics may think differently from publishers and may approach the issues differently from publishers. An objective review of a mix of views will hopefully shed some light on the issue.

Bracha asserts that the new strategy<sup>168</sup> adopted by the stationers eventually led to the enactment of the Statute of Anne, but that this did not imply they got everything they wanted.<sup>169</sup> Rather the Statute of Anne was a compromise:

The Statute was a compromise that contained various elements reflecting the interests and concerns behind it: the interests of stationers in securing their economic rights, fears of the Company's monopoly and of the power of its prominent members including by smaller booksellers, attempts to secure the public interests referred to as "the encouragement of learning," and an emerging concern for authors. The basic features of the Statute reflected this amalgam of competing forces.<sup>170</sup>

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<sup>167</sup> Masterson, *Copyright History*, supra note 2 at 625.

<sup>168</sup> Ronan Deazley, *The Right to Copy*, supra note 36.

<sup>169</sup> Bracha, *Adventures of The Statute of Anne*, supra 10 at 1436.

<sup>170</sup> Ibid.

Bracha implies that everybody at least benefited to some extent from the statute; authors got copyright in their books,<sup>171</sup> encouragement of learning secured the public interest,<sup>172</sup> and the stationers had the opportunity to be assigned copyright by authors.<sup>173</sup> Author Victor Bonham-Carter associates the purpose of the Statute of Anne with recognizing the author's position in copyright protection as well as giving them legal rights and the ability to bargain for better terms.<sup>174</sup> Agreeably, for the first time, the statute vested copyright in the author; but the exercise of that right as Bonham-Carter notes, to negotiate better terms is questionable as the authors still had to rely on the structure of the theoretically defunct but practically active book trade business built by the stationers.

Patterson thinks differently from Bonham-Carter and argues that the statute was primarily aimed at breaking the monopoly power of the Stationers' Company and that the figure of the author was merely used as a pretext to achieve that purpose and regulate the book trade.<sup>175</sup> Patterson states that the Statute of Anne was more of a trade-regulation statute and that earlier English copyright laws were censorship laws<sup>176</sup> and, as they functioned in censorship, so the Statute of Anne was meant to function in regulating the book trade.<sup>177</sup> Expounding his argument further, Patterson argues that:

Earlier English copyright acts, the Star Chamber Decrees of 1586 and 1637, the Ordinances of 1643 and 1647, and Licensing Act of 1662, were fundamentally censorship laws which may explain why

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<sup>171</sup> *Statute of Anne*, supra note 1, s.1.

<sup>172</sup> Ibid. s.4 and 5, the duty to fix fair price and the duty to provide 9 free copies arguable was meant to safeguard the public from being exploited through exorbitant prices and create access to knowledge and learning respectively.

<sup>173</sup> Ibid. s.1; the fourteen-year copyright term granted to authors also provided that they could assign this right; in my view no better assignee than book publishers (stationers).

<sup>174</sup> Victor Bonham-Carter, 1 *Authors by Profession* 16 (1978) "cited in Bracha, *Adventures of The Statute of Anne*, supra note 169." (arguing that the Statute of Anne "established the author's right to his own property, and thereby gave him the power to bargain for better terms"). Victor Bonham-Carter (now deceased) was an author amongst other things and so his sentiments for authors are understandable.

<sup>175</sup> Patterson, *Copyright*, supra note 9 at 143; Bracha, *The Adventure of the Statute of Anne*, supra note 10 at 1431.

<sup>176</sup> The Star Chamber Decrees of 1586 and 1637, the Ordinances of 1643 and 1647, and the Licensing Act of 1662.

<sup>177</sup> Patterson, *Copyright*, supra note 9 at 143.



their relevance to the so-called first copyright act was ignored. Even so, the Statute of Anne descends directly from this earlier legislation, and just as these earlier laws functioned essentially in censorship, so the Statute of Anne was intended to function principally in regulating.<sup>178</sup>

Mark Rose agrees with Patterson, noting that the Statute of Anne was not quite the landmark recognition of authors' right as it has often been interpreted to be but favoured booksellers through the legislative continuation of the old trade regulation practices of the Stationers' Company.<sup>179</sup>

The historical account and the views of scholars examined above reveals factual details of the monopoly granted by the Crown to the Stationers' Company; the reasonable conclusion to draw is that the grant of exclusive right to book publishing prior to the Statute of Anne arguably benefitted, firstly, the State (by controlling publication that sought to challenge its authority), and then secondly, the Stationers' Company. This fact is crucial in trying to ascertain the motive or purpose behind the enactment of the Statute of Anne. There is a nexus between the monopoly regime and the new statutory copyright regime: the latter grew out of the demise of the former following the unflinching lobbying of the booksellers to revive their exclusivity. After the final lapse of the Stationers' Company's monopoly privileges in 1695,<sup>180</sup> the lobbying and several bills<sup>181</sup> sponsored by the booksellers did not have authors' interests or public interests in mind and were met with resistance.<sup>182</sup> Realizing that they needed an appealing justification more than censorship and exclusive publication, the interest of the author was projected and used as a

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<sup>178</sup> Ibid.

<sup>179</sup> Rose, *Author in Court*, supra note 141 at 199.

<sup>180</sup> Gervais, *Canadian Copyright*, supra note 7 at 275; Masterson, *Copyright History*, supra note 2 at 630; Morris, *Statute of Anne*, supra note 12 at 247-48.

<sup>181</sup> Bracha, *The Adventures of the Statute of Anne*, supra note 10 at 1435; Patterson, *Copyright*, supra note 9 at 138-41 on the attempts to renew the Licensing Act.

<sup>182</sup> Patterson, *Copyright*, supra note 9 at 138-41 on the attempts to renew the Licensing Act.

pretext to get the bill through parliament.<sup>183</sup> Arguably, had any of these bills been successful, there may not have been any need or momentum to provide for the interest of author in the law—and certainly not from the perspective of the booksellers. The resistance from parliament and the bid to dismantle the monopoly power of the cartel in the book publishing trade created the need to include authors’ interests in the bill. If, absent the strong lobbying by the booksellers, it is unlikely that parliament would have enacted a law primarily to provide for the interests of authors, then, from these historical facts, it can be argued that the protection of authors’ interests in the Statute of Anne was not the original or motivating intention. Patterson is right to conclude that the Statute of Anne was not intended primarily for the benefit of authors.<sup>184</sup> The proposed bill required substantial review by parliament in 1709 in order to reshape it to serve the public interest—and so the Statute of Anne was born. The stationers had lobbied to regain their exclusive monopoly, but the legislative result was both more and less than they had anticipated.

In my view, while the intention behind the lobbying efforts was primarily to favour the stationers and to push through a bill drafted under the influence of prominent publishers, authors and legislators,<sup>185</sup> parliament did significantly thwart the intention of the stationers by revising the bill to include public interest provisions and vest copyright in authors. It would therefore be misguided to simply conclude that the making of the Statute of Anne did not consider the interests of authors or the public. Indeed, Deazley’s argument, at least, is that the Statute of Anne was fundamentally about the public interest. The idea that the statute was enacted solely for authors is also a misconception and Patterson cautions against this; while Patterson

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<sup>183</sup> Deazley, *The Right to Copy*, supra note 36 at 33; Bracha, *Adventures of the Statute of Anne*, supra note 10 at 1436.

<sup>184</sup> Patterson, *Copyright*, supra note 9 at 143.

<sup>185</sup> Morris, *Statute of Anne*, supra note 7 at 255-56.

acknowledges that the statute did give authors copyright, his ultimate argument points to the public interest benefit created by the statute:

[T]he Statute of Anne is usually thought of as having vested the copyright of works in their authors; and superficially, the language of the statute conveys the idea that the act was especially intended to benefit authors. It did enable authors for the first time to acquire the copyright of their works, and to this extent, it was a benefit to them. The radical change in the statute, however, was not that it gave authors the right to acquire a copyright – a prerogative until then limited to members of the Stationers’ Company – but that it gave the right to all persons.<sup>186</sup>

If the statute did not wholly favour authors, this implies that the stationers would have been best positioned to gain from it. Patterson doubts the practical efficacy of vesting copyright in the author and suggests that parliament was more concerned about breaking the stationers’ monopoly than the interest of the author:

Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author’s right was more a matter of form than substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the change was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsman of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against the monopoly.<sup>187</sup>

Patterson seems to suggest that the author was caught in the crossfire between the stationers and Parliament. According to Patterson, parliament used the authors as an excuse to attack and dismantle the stationers’ monopoly. The setback experienced by the authors is that

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<sup>186</sup> Patterson, *Copyright*, supra note 9 at 145.

<sup>187</sup> *Ibid.* at 147.

despite their ownership of copyright, it did not place them in equal bargaining powers with the publishers. This is attributable to the longstanding and established monopoly held by the stationers; they owned the book trade market structure and distribution network, to which authors did not otherwise have access.

My view is that, though, in theory, the monopoly in the book trade was dismantled, in practice, the publishers were still very much relevant due to their well-entrenched book printing and distribution network, giving them an advantage over authors. Even though Bonham-Carter argues that the Statute of Anne gave authors copyright in their works and impliedly, power to negotiate a better deal with publishers,<sup>188</sup> it is doubtful if this was effective. With more than a century-long domination of the book publishing market, the stationers had become almost indispensable even after being stripped of their royal privilege of exclusive right to book publication. Their expectation was that the authors, though vested with copyright in their works, would need publishers and this gave the stationers power over authors and relevance in the scheme of things. The stationers' position was further strengthened by the fact that they could still acquire and own copyright through assignment by authors<sup>189</sup> including the renewal terms of such copyright.

My position here is that, based on the previous examination of the schemes and economic interests of the Stationers' Company and their tactical manoeuvre to include authors' interest as a means to an end, their intention to continue to maintain economic power and to control book publishing, albeit through subtle means, was hardly diminished. It appeared the motive of the publishers to remain relevant was by design; other interests and purposes (vesting authors with copyright in their works and public interest of encouragement of learning), are equally important

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<sup>188</sup> Bonham-Carter, *Authors by Profession*, supra note 174.

<sup>189</sup> *The Statute of Anne*, supra note 1, s.1; supra note 173.

reasons for the enactment of the statute and represent the effort by parliament to provide balance within and through the legislation.

Rose<sup>190</sup> and Patterson's<sup>191</sup> argument that the Statute of Anne was not primarily enacted to benefit authors is, I think, somewhat mischaracterized by Dennis Khong, who thinks that Patterson construes the Statute of Anne as a perpetuation of statutory form of publishers' interest.<sup>192</sup> Writing from a law and economics perspective on the Statute of Anne, Khong argues that, through anti-monopoly provisions, the statute sought to tackle monopoly in book publication.<sup>193</sup> For example he cites section one which vests upon authors and their assigns the sole right of publication<sup>194</sup> and by this, the exclusive monopoly of the publishers was weakened. The grant of copyright to authors by the act did not mean that the members of the Stationers' Company could no longer publish, but that every other person or publisher could now publish, although of course only now with the consent of authors. This right had previously been exclusive to members of the Stationers' Company and non-members were excluded from exercising this right. In effect, and from an economic perspective, the Statute of Anne functioned as a liberalization of the book trade, creating more competition. Khong also emphasizes that the introduction of a limited term was a departure from the stationers' ancient practice of perpetual right.<sup>195</sup> In fact, Khong notes that Wortley's bill did not have term limits because the stationers' were keen on maintaining their perpetual rights but the House of Commons introduced term limits.<sup>196</sup> Another anti-monopoly provision of the Statute of Anne was section four, which

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<sup>190</sup> Rose, *Author in Court*, supra note 141 at 199.

<sup>191</sup> Patterson, *Copyright*, supra note 9 at 143.

<sup>192</sup> Dennis Khong, "The Historical Law and Economics of the First Copyright Act" (2006) 2 *Erasmus Law and Economics Review* 35 at 36.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.* at 43; *The Statute of Anne*, supra note 1, s.1.

<sup>195</sup> Khong, *Law and Economics of Copyright*, supra note 55.

<sup>196</sup> *Ibid.*

functioned, Khong notes, as price control;<sup>197</sup> the section imposed a duty on publishers not to sell books at an unreasonable price as well as empowering any person to bring a complaint before specified authorities if they considered the price of a book to be unreasonable. Upon examination of the complaint, the adjudicator could review and set a new price, and failure of compliance by the printer or publisher would attract strict penalties.<sup>198</sup> Although a laudable provision to check monopoly pricing, Khong notes that there is no historical evidence to show how effective this provision actually was in checking monopoly pricing, and speculates it may not have yielded much success.<sup>199</sup> The arguments raised by Khong are genuine and should be taken into consideration as we evaluate parliament's effort to balance the competing interest at play at the time. But Khong did not address the fact that the established position of the stationers as controllers of the distribution network and longstanding connections in the book trade meant they could still control a large share of the market. This is perhaps the point Patterson was addressing in his opinion: ultimately, the Statute of Anne benefitted the publishers more.

The purpose of the Statute of Anne did not begin and end with the parliamentary enactment of the Act but was further refined by the judiciary through the early cases that tested the Act. It is fitting therefore to consider the purpose of the first copyright law from the perspective of judicial interpretation, which gave the judiciary opportunity to share its reflective and interpretative opinions on the subject. The discussion below draws one final time from the key cases already discussed, to which we now return with the aim of identifying the perceived purposes of copyright informing these important judicial decisions.

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<sup>197</sup> Ibid; *The Statute of Anne*, supra note 1, s.4.

<sup>198</sup> *The Statute of Anne*, supra note 1, s.4.

<sup>199</sup> Khong, *Law and Economics of Copyright*, supra note 192 at 58.

At first, the judiciary was a haven for publishers when the courts favoured them with pre-trial injunctions after the term in their published works ran out under the Statute of Anne. The court's endorsement (the grant of interlocutory injunctions and the decision in *Millar v. Taylor*) of the subsistence of common law rights implied that it was unaffected by the limited term in the Statute of Anne. The courts granted inter-locutory injunctions to prohibit the republication of works whose term under the Statute of Anne had lapsed. This sent a message to the stationers' that what they could not achieve through the parliament was coming through the courts. Furthermore, in the exercise of its interpretative role, the court gave an opinion (possibly influenced more by religion and morality than creativity, given the topics of the book) when it prohibited the translation of a work into another language despite admitting that there was no infringement of the original work. This once again emphasizes the impact of judicial interpretation in shaping the purpose of the Statute of Anne. The court envisions that the Statute of Anne was meant to encourage and promote new ideas and knowledge for the public interest. The court encouraged the productive consumption of existing works from which inspiration is derived and which, through the investment of care and skill leads, to the generation of a new work for more readers. While it could appear that the court went beyond its role, it does represent the court's dialogic communication with the parliament to expound the meaning and purpose of the Statute of Anne, contributing to the development of a copyright system that was, at that time, still in its developmental stages).

It is noteworthy that the interpretative role of the judiciary in shaping the purpose of the Statute of Anne did not follow a linear course, the courts having initially granted injunctions against republication of works whose term had expired under the Statute of Anne. As this demonstrates, dialogue within the judiciary on copyright issues does not always produce a

consensus opinion or a consistent position over time. However, the court was able to detect foul play in the concocted case of *Tonson v. Collins*<sup>200</sup> when the court realized the publishers were pulling the wool over its eyes because the plaintiff was paying for defendant's expenses (suggesting, in other words, that the case was fabricated).

Giving further clarity to the meaning and purpose of the first copyright statute, the court in *Pope v. Curl* expanded and interpreted the purpose of the Statute of Anne beyond what it expressly states to include what is implicit in the Act. The court explained that published letters (though not mentioned in the statute) have as much protection as do other published works and that to distinguish between the two would create hardship and impede the dissemination of knowledge. The Statute of Anne is hailed as a law that promotes authorship and learning; and these can manifest in different forms beyond the prescription of the statute. Consequently, for the purpose of the statute to be understood and achieved, the court reasoned that unnecessary restrictions or distinctions between different kinds of writings should be avoided. Additionally, the court's opinion is lauded by Deazley<sup>201</sup> and Rose<sup>202</sup> as an important explication of a fundamental area of copyright.

Finally, of course, both *Millar v. Taylor*<sup>203</sup> and *Donaldson v. Beckett*,<sup>204</sup> considered whether the Statute of Anne ended common law right. Amongst the purposes for enacting the Statute of Anne, the majority opinion in *Millar* found nothing that contradicted perpetual common law right. Yates J., meanwhile, rejected it as being detrimental to the *rest of mankind*, insisting on the limited term created by statute for the advancement of public interest and

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<sup>200</sup> Supra note 81; Morris, *Statute of Anne*, supra note 12 at 225. As previously mentioned, it was discovered that plaintiff was paying for defendant's expenses; Masterson, *Copyright History*, supra 2 at 631. The case was dismissed even if the outcome seemed like it was going to favour the plaintiff.

<sup>201</sup> Deazley, Commentary on *Pope v. Curl*, supra note 139 at 4.

<sup>202</sup> Rose, *Authors and Owners*, supra note 141 at 4.

<sup>203</sup> (1769) 4 Burr. 2303, 98 Eng. Rep. 201.

<sup>204</sup> 4 Burr. 2408, 2 Bro. P.C 129, 98 Eng. Rep. 257 (H.L. 1775).



authorship. In this case, although there was no consensus on the purpose of enacting the Statute of Anne emerged, the majority's commitment to natural and perpetual rights prevailed. When *Donaldson v. Beckett* overruled *Millar v. Taylor*; Lord Camden expressed his disapproval for the endorsement of perpetual common law right. Deazley notes that Lord Camden expounded on two pertinent themes:

The first turned on the sovereignty of Parliament, and the relationship between the legislature, the common law and the judiciary. He reminded the judiciary that their business is to tell the suitor how the law stands, and not how it ought to be; otherwise...each judge would have a distinct tribunal in his own breast and caprice, self-interest, and vanity would by turns hold the scale of justice while the law of property would be indeed most vague and arbitrary. His second concern was that of the bookseller...He reminded the peers that the common law right now claimed at your bar is the right of a private man to print his works for ever, independent of...all mankind. Should the Lords vote in favour of the perpetual right, he warned, all our learning will be locked up in the hands of the Tonsons and the Lintots of the age. Moreover, these booksellers, these engrossers, would then set upon books whatever price their avarice chuses to demand, till the public became as much as their slaves as their own hackney compilers are. Knowledge and science, he declared are not things to be bound in such cobweb chains.<sup>205</sup>

Lord Camden admonished that the judiciary has the responsibility to objectively interpret the enacted law to serve the interest of justice. Similar to the view expressed by Yates J in *Millar v. Taylor*, Lord Camden decried the notion of perpetual copyright and its negative impact on access to and dissemination of knowledge. The majority ruled against perpetual common law right and upheld the limited term in the Statute of Anne. The opinion in *Donaldson v. Beckett* not only overruled *Millar v. Taylor*, it set a historical definition of the purpose of copyright law which is to encourage authorship and ensure that knowledge is disseminated for the benefit of the public. In the exercise of its adjudicatory duties, the court in *Donaldson v. Beckett* dialogues

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<sup>205</sup> Deazley, *Commentary on Donaldson v. Beckett*, supra note 113 at 4.

within itself to review a previous ruling which it found to be inappropriate and reversed the decision. The court also dialogues with the Parliament by giving meaning to the Statute of Anne and defining its purpose.

The role of the judiciary in defining the purpose of the Statute of Anne—and therefore providing the justificatory framework for the development of modern copyright law—should be acknowledged. My interpretation of the judiciary’s contribution to the definition of the purpose of the Statute of Anne is that (according to the decision in *Donaldson v. Beckett*), it favours the encouragement of learning and the dissemination of works for societal benefit (public interest). Although some courts did favour publishers, on closer examination, it was discovered that the publishers were exploitative; and as Lord Camden stated above, the booksellers have the tendency to set high prices for books because they are primarily concerned with commercial success and control of the market. The opinion of the judiciary in defining the purpose of the Statute of Anne, especially in *Donaldson v. Beckett* served as a check on the publishers who were already in a *perpetual right business as usual* mindset.

From the foregoing analysis, it is apparent that several divergent interests or purposes influenced the enactment and subsequent interpretation of the Statute of Anne. Determining the core principle underlying the Act is therefore problematic and inevitably subject to debate. There were numerous interests involved in the making of the first copyright system, including those of parliament, publishers, authors and the public. On the purpose of enacting the Statute of Anne, Myra Tawfik seems to suggest that publishers’ interests prevailed:

Although its very title sets out the underlying purpose, tracing its contours has posed somewhat of a challenge to scholars. The traditional view of the law is that it was designed primarily with

publishers in mind - in other words, that it sought, first and foremost, to meet the needs of the book trade.<sup>206</sup>

It can be inferred of Tawfik's view above, and in particular her usage of the language "first and foremost," that even if the statute was designed to favour the book trade, there may have been other purposes at play.<sup>207</sup>

While I favour the opinion of Bracha above, that the Statute of Anne ultimately benefitted authors, the public interest (which by implication includes "users") and the stationers, I am also of the opinion that among the competing purposes or forces, one set of interests would trump all other purposes or at least dominate the scene: that of the Stationers' Company's. Other purposes identified include advancing the public good through encouragement of learning, the encouragement of authorship by vesting copyright in authors, and the regulation of the book trade through the cessation of the Stationers' Company's monopoly. However, based on the Stationers' Company's domination of the book publishing market and distribution network and connections, it would appear that, although the Statute of Anne did not give them all they desired, what they got was sufficient to still place them at an advantage against others in the book publishing industry. Their expectation was that the authors, though vested with copyright in their works, would need publishers (and so transfer their rights to publishers), and this gave the Stationers' Company power and continuing relevance in the scheme of things.

The above narrative and discourse on the intriguing origin, development and purpose of the first copyright law lays the foundation for the copyright law model adopted by other countries such as the United States, which enacted copyright laws in the 18<sup>th</sup> century after the Statute of Anne. As this research is focused on examining copyright in the context of digital era

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<sup>206</sup> Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, From "*Radical Extremism*" to "*Balanced Copyright*": *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 70.

<sup>207</sup> Bracha, *Adventures of the Statute of Anne*, supra note 10 at 1436.

technology in Canada, the analysis on the development of the first copyright law is helpful in discussing the origins and underlying purposes of copyright law in Canada.

#### **1.4 The Purpose(s) of Enacting Copyright Law – The Canadian Perspective**

Before examining the purpose(s) of copyright law in Canada, it is important to succinctly explain the history of copyright law in Canada. While Canada was under British colonial rule, its copyright law was subject to the imperial copyright system;<sup>208</sup> the first copyright law<sup>209</sup> in Canada was enacted in 1832 and was subject to British imperial copyright law. The local copyright laws (Canadian legislation) co-existed with British imperial copyright law, the former protected works in Canada while the latter protected works throughout the British Empire.<sup>210</sup> This obviously limited Canada's copyright legislation in ways typical of a colony under imperial rule. In 1842, the British passed the imperial *Copyright Act*, which made Britain the sole legal supplier of British books, pamphlets, sheet music, maps, charts, and plans to British colonies by prohibiting the import of these into British dominions by anyone other than the copyright owners.<sup>211</sup>

Canada made several unsuccessful attempts (1889, 1890, 1891 and 1895) to enact its own copyright law but these attempts were denied passage into law by the British.<sup>212</sup> However, in 1911, the British enacted a new Copyright Act, which gave Canada the authority to enact its own

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<sup>208</sup> Mario Bouchard, "The 2017 Parliamentary Review of Copyright Law: What Could Have Been on the Agenda But Will Not" (2017) 30 I.P.J at 3.

<sup>209</sup> *An Act for the Protection of Copyrights*, S.L.C., 1832, c.53.

<sup>210</sup> Sara Bannerman, *The Struggle for Canadian copyright: imperialism to internationalism: 1842-1971*(Vancouver: UBC Press, 2013) at 25.

<sup>211</sup> *Ibid.* at 28.

<sup>212</sup> Jay Makarenko, , "Copyright Law in Canada: An Introduction to the Canadian Copyright Act" Maple Leaf Web (2009) at online: <<https://www.mapleleafweb.com/features/copyright-law-canada-introduction-canadian-copyright-act.html#history>> accessed June 17, 2019.

copyright law.<sup>213</sup> The first domestic *Copyright Act* in Canada (which was not subject to British imperial copyright law) was passed by Parliament in 1921 but did not come into force until 1924.<sup>214</sup> By this time, although Canada was no longer a colony under the British rule, the 1921 Copyright Act was closely based on the British *Copyright Act* of 1911 to align with the provisions of Berne Convention for the Protection of Literary and Artistic Works.<sup>215</sup>

Since its enactment in 1921, the *Copyright Act*, has been amended several times to regulate performing rights societies and to establish the Copyright Appeal Board.<sup>216</sup> Around the early 1950s, influenced largely by the advent of technology such as computers, photocopiers, and recording devices, Canada carried out numerous studies on the need to update its copyright law.<sup>217</sup> These studies culminated in two major copyright revision processes implemented in two phases: phase I in 1988<sup>218</sup> and phase II in 1997.<sup>219</sup> In 2002, Industry Canada (now Innovation, Science, and Economic Development (ISED)) issued a report that identified 40 issues that

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<sup>213</sup> Ibid.

<sup>214</sup> Wikipedia, Copyright Act of Canada, at online: < [https://en.wikipedia.org/wiki/Copyright\\_Act\\_of\\_Canada](https://en.wikipedia.org/wiki/Copyright_Act_of_Canada) > accessed September 3, 2019.

<sup>215</sup> David Vaver, *Intellectual Property Law*, supra note 135 at 55.

<sup>216</sup> Mario Bouchard, *Parliamentary Review of Copyright Law*, supra note 208, The Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8; An Act to amend The Copyright Amendment Act, 1931, 1935, 25-26 Geo. V, c. 18; An Act to amend The Copyright Amendment Act, 1931, 1936, I Edw. VIII, c. 28; An Act to amend The Copyright Amendment Act, 1931, and The Copyright Act, 1938, 2 Geo. VI, c. 27.

<sup>217</sup> Jay Makarenko, *Copyright Law in Canada*, supra note 212, Key government studies that explored copyright during this period included the 1954-1960 Royal Commission on Patents, Copyright, and Industrial Design (the “Ilsley Commission”); a 1977 working paper by the Canadian Department of Consumer and Corporate Affairs, entitled *Copyright in Canada: Proposals for Revision of the Law* (the “Keyes-Brunet Report”); a 1984 federal government white paper on copyright, entitled *From Gutenberg to Telidon: A White Paper on Copyright*; and a report from the 1985 House of Commons’ Standing Committee on Communications and Culture, entitled *A Charter of Rights for Creators — Report of the Subcommittee on the Revision of Copyright*.

<sup>218</sup> Ibid. Phase I was undertaken in 1988, and involved several significant modifications to the original Act, including: statutory protection for computer programs, clarification and extension of moral rights, elimination of the compulsory licence for the reproduction of musical works and the substitution of a right of negotiation, the introduction of a new procedure to licence works where the owner could not be located, new rights for visual artists to exhibit their works in public, increased criminal sanctions, and the enactment of rules under which collective organizations could form and operate under the supervision of a revamped Copyright Board.

<sup>219</sup> Ibid. Phase II was implemented in 1997, and included: new remuneration rights to producers and performers of sound recordings when their sound recordings are broadcast or publicly performed by radio stations and in public places like bars and restaurants, compensation system for private copying, in the form of a levy on blank audio recording media, benefitting eligible composers, lyricists, performers, and producers of sound recordings for the making of recordings, provisions granting exclusive book distributors legal protection in the Canadian market, new exceptions to non-profit educational institutions, libraries, archives, museums, broadcasters, and persons with perceptual disabilities allowing them to reproduce or use copyright material in specific circumstances without paying royalties or obtaining authorization from rights holders, statutory damages and wide injunctions to enhance the enforcement of copyright.

required legislative action in the short, medium and long term.<sup>220</sup> After the report was examined and deliberated upon,<sup>221</sup> it culminated in tabling Bill C-60 before Parliament in June 2005,<sup>222</sup> which was never passed into law. The focus of this project is on Canada's copyright law reform commencing from Bill C-60, and so this is the point to which we shall return in Chapter Three.

For now, my aim is to explore the purpose of copyright law from Canada's perspective. Until recently, the attempt to define the intention behind the existence of copyright law in Canada proved difficult. In 2005, Teresa Scassa expressed the view that, not only were the policy considerations underlying Canadian copyright law unclear, but they were made murkier with competing and often contradictory accounts from policy makers and courts.<sup>223</sup> Similarly, Daniel Gervais states that an attempt to identify the purpose of copyright law in Canada from government documents would provide no clear guidance.<sup>224</sup> This lack of clarity or explicit purpose of Canadian copyright is surprising, especially considering the fact that the first Canadian colonial copyright law - *An Act for the protection of Copy Rights*<sup>225</sup> was passed by the Parliament of the Province of Lower Canada in 1832. By this time, the US constitution had already been written and ratified, expressly providing for the purpose of copyright law: to promote the Progress of Science and useful Arts.<sup>226</sup> Unfortunately, this did not inspire a similarly clear provision on the purpose of Canadian copyright law, no doubt due at least in part to the fact that the Act was under British imperial copyright law.

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<sup>220</sup> Industry Canada, Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act (Copyright Act — Section 92 Report), October 2002. [2002 s. 92 Report]. "Cited in Mario Bouchard, *Parliamentary Review of Copyright Law*, supra note 215 at 5.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Teresa Scassa, "Interest in the Balance" in Michael Geist, ed, *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 41.

<sup>224</sup> Gervais, *Canadian Copyright*, supra note 7 at 285.

<sup>225</sup> *Copyright Act*, supra note 209.

<sup>226</sup> *United States Constitution*, Art. 1, §8, cl.8, 1789 provides for the purpose of copyright thus: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" This provision in the US constitution provides both for copyright in literary and artistic works and patents for inventions.

Thus, the lack of clearly articulated policy objectives created a gap in the Canadian copyright law. In fact, Gervais noted that in 1956 it was stated that to engage in the discourse on the purpose of copyright was unnecessary and unproductive.<sup>227</sup> In my view, the main challenge is that, in the absence of a statement similar to that found in the U.S. Constitution, policy considerations with regards to the purpose of passing copyright legislation in Canada were premised on the wrong idea. The Information Highway Advisory Council in a report on Copyright and the Information Highway noted:

It must here be recalled that the U.S. law is founded on the principle that copyright is a tool ‘to promote the progress of science and useful arts.’ According to that principle, the goal of the copyright in the U.S. is to be an incentive for the disclosure and publication of works. The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors.<sup>228</sup>

The statement above suggests that the perception, policy objective and purpose of passing copyright law in Canada tend towards individual property ownership, and this reflects the character of copyright reforms in Canada as putting the interest of individual authors and creators first as against the public interest.<sup>229</sup> Additionally, the above quote embraces the moral right aspect of Canadian copyright law (due to its French and British colonial roots, Canada

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<sup>227</sup> Copyright is in effect a right to prevent the appropriation of the expressed results of the labours of an author by other persons. That an author should have this right, at least for a limited period, is generally- on the ground of justice, expediency, or both. The right is regarded by some as a “natural right” on the ground that nothing is more certainly a man’s property than the fruit of his brain. It is regarded by others as not a natural right but a right which the state should confer in order to promote and encourage the labours of authors... We find it unnecessary to go on record with a conclusion of faith in either doctrine to the exclusion of the other. Canada, Royal Commission on Patents, Copyrights, Trade Marks and Industrial Designs, Report on Copyright, (Ottawa: Ilsley Commission, 1957) at 9 “Cited in Gervais, supra note 44 at 285.”

<sup>228</sup>Information Highway Advisory Council, *Copyright and the Information Highway: Final Report of the Copyright Sub Committee* (Ottawa: Information Highway Advisory Council, 1995) at 30; Gervais, *Canadian Copyright*, supra note 7 at 286.

<sup>229</sup> Laura J Murray, “Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses” in Michael Geist ed., *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 25. Helen Chalifour Scherrer, the Heritage Minister as at 2004 said: “We are going to make sure that downloading stays illegal. We will make it a priority, so it is done as quickly as possible ...she assured them that now I really know what the music industry is all about...I am going back to Ottawa with the will to do something.” This comment is suggestive of a one-sided approach to copyright and is detrimental to public interest and the purpose of copyright law.

recognizes both moral and economic rights),<sup>230</sup> which is again a matter of the individual entitlement of authors. In my opinion, this focus represents an incomplete picture of copyright policy in Canada. However, this narrow conceptualization of the purpose of copyright in Canada remained the status quo until early in the twenty-first century, when a revolutionary shift in thinking was initiated.

As Tawfik<sup>231</sup> notes, copyright in the new millennium began to focus on the public's interest in access to knowledge, likely given the growing influence of digital technology, which made accessing content considerably easier as a practical matter. This reorientation of the rationale for copyright protection had an enormous influence in the Canadian copyright system. The purpose of having copyright law in Canada received the attention of the judiciary, producing unprecedented pronouncements by the Supreme Court of Canada that have laid the foundation for the development of a clear articulation of the purpose for enacting copyright law in Canada. As Gervais has explained, and as we shall see in more detail below, the Supreme Court of Canada, through its opinions in three copyright cases, has finally articulated the rationale for enacting copyright law in Canada which had previously been lacking.<sup>232</sup>

Additionally, some effort was made in the enactment of the *Copyright Modernization Act*<sup>233</sup>(CMA) of 2012 to fill the gap (that is, the absence of a clear definition of the purpose of copyright law in Canada), capturing much of the essence of the Supreme Courts' earlier pronouncements. Part of the preamble to the Act provides:

Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors

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<sup>230</sup> Blayne Haggart, *Copyright: the global politics of digital copyright reform*, (Toronto: University of Toronto Press, 2014)15. [Haggart, *Copyright*]

<sup>231</sup> Tawfik, *History in the Balance*, supra note 206 at 71.

<sup>232</sup> Daniel J. Gervais, "The Purpose of Copyright Law in Canada" (2005)2 *University of Ottawa L.T.J.* 315 at 317.

<sup>233</sup> *Copyright Modernization Act*, S.C. 2012, c. 20, preamble.



of the knowledge economy...Whereas the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter<sup>234</sup>

The text quoted above suggests that the CMA was enacted to promote creativity, innovation and the development of a knowledge-based economy. Additionally, the CMA also provides for other purposes such as responding to the challenges and opportunities of digital technology, copyright protection based on international norms, to implement WIT including recognition of TPMs, foster competition, investment and promote research and education through technology.<sup>235</sup>

While the articulation of these purposes in the CMA is a welcome development, it creates a problem of identifying the core purpose as numerous purposes were identified in the preamble to the CMA. This is indicative of the current dynamics of contemporary copyright in the digital age where the enactment of copyright law cannot be narrowed to a single purpose due to competing interests. In order determine the purpose of copyright law, or at least to untangle and reconcile the various purposes stated in the CMA, recourse must be had to relevant judicial opinions on the subject. The following analysis will focus on cases on appeal to the Supreme Court of Canada whose pronouncement on the purpose of copyright law is considered enlightening. As we have seen, the cases that followed the enactment of the Statute of Anne demonstrated the crucial role of the judiciary in contributing to the discourse and definition of the purpose of copyright law. The discussion below will consider how the judiciary, in its dialogic interaction with other arms of government in Canada, has contributed to enriching the

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

discourse on the purpose of modern day copyright law in Canada, which had hitherto lacked a definitive explanation.

## 1.5 The Supreme Court of Canada and the Purpose(s) of Copyright Law

The case of *Théberge v. Galerie d'art du Petit Champlain*<sup>236</sup> is a landmark opinion in which the Supreme Court of Canada articulated the purposes of copyright law. In *Théberge*, a renowned artist, Claude Théberge, assigned the right to reproduce some of his works to a publisher.<sup>237</sup> An art gallery purchased art works (cards, photolithographs and posters) of Claude Théberge and then transferred the image onto a canvas through the process of lifting the ink that was used in printing a paper poster.<sup>238</sup> This left the poster paper blank. The issue for determination was whether this process of transferring the image onto the canvass constituted reproduction under section 3 of the Act.<sup>239</sup> Thus, the challenge for the Supreme Court was to determine the extent to which an artist, utilizing the statutory rights and remedies provided by the Copyright Act R.S.C. 1985, c. C-42, can control the eventual use or display of an authorized reproduction of his or her work in the hands of a third-party purchaser.<sup>240</sup> Bennie J delivered the majority opinion which in summary declared:

...the appellants did not thereby “copy” the respondent’s artistic works. They purchased lawfully reproduced posters of his paintings and used a chemical process that allowed them to lift the ink layer from the paper (leaving it blank) and to display it on canvass. They were within their rights to do so as owners of the physical posters (which lawfully incorporated the copyrighted expression). At the end of the day, no new reproductions of the respondent’s works were

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<sup>236</sup> *Théberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34 at paras. 30-31, [2002] 2 S.C.R. 336 [*Théberge*] at online: <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>> Accessed February 9, 2017.

<sup>237</sup> *Ibid.* at 336-7.

<sup>238</sup> *Ibid.* at 337.

<sup>239</sup> *Copyright Act* R.S.C. 1985, c. C-42.

<sup>240</sup> *Théberge*, supra note 236 at 344.

brought into existence. Nor, in my view, was there production (or reproduction) or a new artistic work “in any material form within the meaning of s.3(1) of the *Copyright Act*. What began as a poster, authorized by the respondent, remained a poster.<sup>241</sup>

The court therefore allowed the appeal in favour of the appellant.<sup>242</sup> In arriving at this decision, the *Théberge* court made a compelling explication on the purpose of copyright law in Canada. This articulation was responding to one of the sub-issues the court had to determine which hinged on reconciling the equipoise of economic interest of the author and the interest of the public. The court couched the issue as follows: if the plaintiff were to succeed, “the present balance between the economic interest of the copyright holder and the proprietary interest of the purchasing public would be significantly altered to the public’s detriment”.<sup>243</sup> Explaining further, Binnie J elucidates on the purpose of copyright law in Canada as follows:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated) [...]The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to over-compensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them...Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyright and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interest of society as a whole...<sup>244</sup>

The quote above has become famous in Canadian copyright jurisprudence, specifically, with reference to establishing the purpose of copyright law. The Supreme Court of Canada

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<sup>241</sup> Ibid. at 344-5.

<sup>242</sup> Ibid. at 345.

<sup>243</sup> Ibid. at 355.

<sup>244</sup> Ibid. at 355-6.

refines the meaning and significance of the concept of balance within the copyright system, which is now understood to mean balancing, on the one hand, the public interest (which lies in the encouragement and dissemination of works of art and intellect), and on the other hand, obtaining a just reward for the author.<sup>245</sup> With this, the Supreme Court of Canada brought a new perspective to the conception of balance and the policy objectives that underlie copyright law. A proper approach to balance, according to the Court, should not start and end only with the recognizing the creator's right, but it should also encompass the limited nature of the creator's right and the significance this has. In other words, the Supreme Court of Canada explains that the creator's rights are not absolute and that the creator and the entire copyright system are under obligation to acknowledge the limited nature of the creator's rights. It is the limited nature of the creator's rights that enable the encouragement of learning and dissemination of works for the benefit of the public interest through the copyright system.

The explication of balance by the court should not be interpreted to mean it favours the public interest over creators; on the contrary, the court impliedly means that both the public and the creator have legitimate claims to their interest in the copyright system. However, these competing stakeholder rights must be, as much as possible, fairly balanced, if copyright is to advance its purposes. The court agrees that creators are entitled to exploit their works for rewards, as a matter of justice or fairness, with its use of the term "*just reward*." Based on the court's reasoning, the meaning of just reward can be understood from two perspectives. First, just reward could mean either reward in monetary value or some other benefits. Secondly, the Supreme Court points out an implicit meaning of just reward, which means the right of the

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<sup>245</sup> The Supreme Court recognizes that an author deserves to be rewarded for his creations and cites *Millar v. Taylor* (1769), Burr. 2303, 98 E.R. 201, per Willes J., at p.218. "It is wise in any state, to encourage letters, and the painful researches of men. The easiest and most equal way of doing it, is, by securing to them the property of their own works...He who engages in a laborious work, (such for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for family."

creator to prevent anyone else other than himself from appropriating any benefits from his work. The obvious reason for vesting the creator with the right to prevent misappropriation of his work is to prevent any act that may be prejudicial to exclusive enjoyment of his just reward.

The Supreme Court of Canada had thereby given an enlightening analysis on the concept of just reward, which is conceptually helpful but leaves some substantial gray areas. For one thing, the court does not explain what really constitutes just reward.<sup>246</sup> The Court's silence on defining the meaning of just reward is understandable, not least because it would be unable to assume a more specific prescriptive position that would account for the diverse interests of stakeholders in different situations; rather, my inference is that the Court has given a direction by which stakeholders should be guided on the purpose of copyright law and how it shapes their rights and obligations, which is not simply subject to the claims of authors. Also, the directive rather than prescriptive approach of the court can be deduced when it articulates that misappropriation is tantamount to impeding a creator's just reward. What is "just" is a matter of context, and each case would have to be treated on its merits.

In my view, Canada's top court at least made it clear that the purpose of copyright law does not hinge exclusively on propertization of copyright or exploitation of rights for economic rewards, but that the public interest, creative innovation and society's interests as a whole should be the principles upon which the purpose of copyright is built. The exclusive rights granted to authors and creators is not only an end in itself but a means to an end;<sup>247</sup> equally important as an

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<sup>246</sup> Perhaps the Supreme Court omitted to delve into this because, at least when it comes to the valuation of certain rewards, this is within the purview of Copyright Board of Canada. See Copyright Board of Canada, "Raison d'être: Who We Are and What We Do", "The Copyright Board of Canada (the "Board") is an economic regulatory body empowered to establish, either mandatorily, or at the request of an interested party, the royalties to be paid for the use of a copyrighted work, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to supervise agreement between users and licensing bodies and issues licenses when the copyright owner cannot be located." At online: <<https://cb-cda.gc.ca/about-apropos/role-role/raisons-etre-e.html>> accessed June 19, 2019.

<sup>247</sup> Gervais, *Purpose of Copyright Law*, supra note 232 at 324.

ultimate objective of copyright is to benefit the interest of the public and society as a whole by encouraging production and dissemination of creative works to further inspire innovation and build a community of knowledge. The Supreme Court decries excessive control of creative works by copyright holders and that it limits enrichment of the public domain and creative innovation. Note that the Supreme Court does not disregard the exploitation of copyright for monetary gain as an aspect of copyright's purpose; instead, it advocates for a balanced system where authors and creators are entitled to a just reward. It is fitting to emphasize here that such reward is limited by external considerations including the broader public interest.

Despite some of the concerns I raised about the difficulty in applying the principles laid down, *Théberge* has contributed immensely to enriching copyright law in Canada by shedding light on its purpose. In the exercise of its adjudicatory functions, both in the majority and minority opinion (the latter also adding to the richness of the judicial elucidation), the Supreme Court communicates with other arms of government by defining the purpose of copyright law in Canada.

Since *Théberge* in 2002, the Supreme Court of Canada has had the opportunity to consider other cases wherein it made pronouncements approving *Théberge* and expanding on its meaning. In 2004, *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>248</sup> endorsed the explanation given by *Théberge* on the purpose of copyright law in Canada. At issue in that case was The Great Library at Osgoode Hall in Toronto operated by the Law Society of Upper Canada.<sup>249</sup> The Great Library provides “a request-based” and “self-service” photocopying service for its members, the judiciary and other authorized researchers for the reproduction of

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<sup>248</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 [*CCH*] at online: < <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html> > Accessed February 24, 2017.

<sup>249</sup> *Ibid.* at 2.

legal materials.<sup>250</sup> Publisher CCH Canada Ltd. brought an infringement action against the Law Society of Upper Canada seeking a permanent injunction prohibiting it from reproducing any of its published materials in the library. The Supreme Court held that the Law Society does not violate copyright when a copy of a reported case, case summary, statute, regulation or limited selection of text from a treatise is made by the library in line with its access policy.<sup>251</sup> Additionally, the court held that the library is not liable for copyright infringement by maintaining a copier for reproducing materials especially having placed a caveat that it would not be responsible for copies made in infringement of copyright.<sup>252</sup> In this case, the Supreme Court discussed the “purpose of the Copyright Act” and cited *Théberge*, which informed the Supreme Court’s ruling on every relevant issue.<sup>253</sup> The Supreme Court in *CCH* notes that:

Binnie J. recently in explained in *Théberge*...that the *Copyright Act* has dual objectives: The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of arts and intellect and obtaining a just reward for the creator...The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In interpreting the *Copyright Act*, the courts should strive to maintain an appropriate balance between these two goals.<sup>254</sup>

I wish to emphasize two crucial points with regard to the *CCH* case. First, it adopts the guidance of the *Théberge* Court on the purpose of copyright law in Canada and secondly, it depicts an example of intra-dialogue where the judiciary not only dialogues with other arms of government, but also with itself. This is because the fact that McLachlin J delivered this

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid. at 3. The concept of access is discussed in detail in chapter four. In summary, it is the opportunity copyright users have to use and interact with content. Access could be authorized or unauthorized. See chapter four (explained under the heading “Critique of TPMs and their Legal Protection”).

<sup>252</sup> Ibid.

<sup>253</sup> Ibid. at 2, 8-9.

<sup>254</sup> Ibid. at 8-9.

judgment is significant given her more author-centred view previously expressed in the Supreme Court case of *Bishop v Stevens*.<sup>255</sup>

In *Bishop v Stevens*, Bishop, a musician, composed a song and had a copy sent to a Performing Rights Society (PRS – an association that protects and enforces the copyright of its members) in Britain, and this association is also affiliated with Composers, Authors, and Publishers Association of Canada (CAPAC).<sup>256</sup> Without Bishop’s consent or authorization, Stevens, a singer, recorded the song and arranged with Télé-Métropole (a television broadcasting organization) to broadcast the recording.<sup>257</sup> The song was broadcast twice by Télé-Métropole using a pre-recorded tape in each case.<sup>258</sup> Bishop instituted an action against Télé-Métropole claiming copyright infringement not for performance, which he had been paid for, but for making ephemeral copies.<sup>259</sup> The trial court found that Télé-Métropole infringed on Bishop’s copyright by pre-recording the song.<sup>260</sup> Télé-Métropole’s appeal to the Federal Court of Appeal and Supreme was dismissed. At the Supreme Court, and according to McLachlin J (who delivered the judgment in this case), the opening paragraph in s.3(1) and the provisions of s.3(1)(d) of the *Copyright Act*,<sup>261</sup> clearly distinguish between the right to “record” (which in this case is to make ephemeral recordings before broadcast) and the right to “perform” a work,<sup>262</sup> and the right to perform does not include the right to record ephemeral copies for the purpose of

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<sup>255</sup> *Bishop v. Stevens* [1990] 2 S.C.R. 2 467 at online: < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/640/1/document.do>> accessed June 21, 2019.

<sup>256</sup> *Ibid.* at 470.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.* at 470-1, “The appellant, though unaware that the song was written by the respondent and not by Stevens, gave due notification and paid the appropriate fees to CAPAC, and the payments for the broadcast performances were eventually forwarded through PRS to the respondent. No specific arrangements, however, were made regarding the pre-recordings used in the broadcast.”

<sup>259</sup> *Ibid.* at 471.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Copyright Act*, 1985, supra note 239.

<sup>262</sup> *Bishop v. Stevens*, supra note 255 at 484.



facilitating a broadcast.<sup>263</sup> The ruling of the Supreme Court in the case favoured the author (Bishop); McLachlin J, in support of the author further endorsed an opinion stating that the singular purpose of copyright law is to benefit authors:

This distinction between the right to perform and the right to record a work is unsurprising in light of the object and purpose of the Act. As noted by Maugham J., in *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121, at p. 127, "the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical". See also Article 1 of the Revised Berne Convention, cited above. A performance is by its very nature fleeting, transient, impermanent. When it is over, only the memory remains. A composer who authorizes performance of his work for a period of time has not irrevocably given up control over how the work is presented to the public. He may choose at a future time to withdraw his authorization, and be the sole interpreter of his own work, or he may place conditions on his authorization.

The notion of judicial dialogue captures the idea that the law is not static but develops through a continuous conversation. The intra-dialogue of the Supreme Court is an opportunity to engage and re-evaluate its previous viewpoints and either confirm or contradict them. In this case, in a unanimous opinion penned by McLachlin C.J., the Supreme Court endorsed its previous explanation of the rationale for the enactment of copyright law in Canada as enunciated in the *Théberge* case, and applied it in a new context. This further strengthens and deepens the discourse on the purpose of copyright law in Canada.

A decade after the *Théberge* case, the Supreme Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*<sup>264</sup> still validates the purpose of copyright law explanation in *Théberge*. The Entertainment Software Association (ESA) represents video game publishers and distributors who enable customers to download

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<sup>263</sup> Ibid.

<sup>264</sup> [2012] 2 S.C.R 231.

video games from the internet: these copies are identical to those purchased in stores or shipped to customers by mail.<sup>265</sup> The video games contain copyrighted musical works and the royalties for the musical works are negotiated before the games are sold to the public.<sup>266</sup> SOCAN, which administers the rights to “communicate” to the public by telecommunication musical works on behalf of copyright owners, applied to the Copyright Board for a tariff covering downloads of musical works over the internet.<sup>267</sup> The Copyright Board concluded that the download of a file containing musical works is a communication to the public under s.3(1)(f) of the Copyright Act, entitling SOCAN’s members to compensation in accordance with an approved tariff.<sup>268</sup> The matter proceeded on judicial review to the Federal Court of Appeal where the decision of the Copyright Board<sup>269</sup> was endorsed. The ESA appealed the matter to the Supreme Court, and the apex court reiterated that negotiations concerning rights in musical works incorporated in the video games are negotiated prior to sale of the video games.<sup>270</sup> Upon conclusion of the negotiation of rights in the musical works, when the video games are sold, the owner of the copyright in the musical works has no further rights in respect of the sale.<sup>271</sup> The issue for determination by the Supreme Court on this appeal was “whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store,” which of course requires the work to be transmitted to the purchaser by telecommunication.<sup>272</sup> In its response, the Supreme Court asserts that it makes little sense to distinguish between the two methods of selling the same work,<sup>273</sup> contrary to the Copyright Board’s determination that sale of the video games

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<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid. at 232.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid. at 238.

<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

over the internet triggers a new fee.<sup>274</sup> The case implicates the important question of technology neutrality, with the court having to decide whether delivery of the same work over the *internet* should attract separate negotiations and an additional tariff. In arriving at its decision that no additional new tariff was triggered, the court took cognizance of the purpose of copyright law as discussed by Binnie J. in *Théberge*. The Supreme Court held that:

The principle of technology neutrality is reflected in s. 3(1) of the *Act*, which describes right to produce or reproduce a work “in any material form whatsoever”. In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.<sup>275</sup>

Specifically, and to emphasize how the SOCAN case contributes to the enrichment of a clear and articulate understanding of the purpose of copyright law in Canada, an affirmative reference was made to *Théberge*, with the Court noting: “ESA’s argument is also consistent with the Court’s caution in *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 366, that the balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator requires recognizing the “limited nature” of creators’ rights.”<sup>276</sup> Absent a clear explanation by Parliament or the Executive, the guidance given in *Théberge* on defining the purpose of copyright law in Canada is now seen as a helpful reference point for the court in deciding copyright cases.

Similarly, in the 2015 case of *Canadian Broadcasting Corporation v. SODRAC 2003 Inc. and Society of Reproduction Rights of Authors, Composers and Publishers in Canada*,<sup>277</sup> the Supreme Court further gave its stamp of endorsement to the elucidation of the purpose of

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<sup>274</sup> Ibid. at 12-13.

<sup>275</sup> Ibid. at 14-15.

<sup>276</sup> SOCAN, supra note 264 at 15.

<sup>277</sup> 2015 SCC 57 at online: < <https://www.canlii.org/en/ca/scc/doc/2015/2015scc57/2015scc57.pdf> > Accessed February 24, 2017 [SODRAC].

copyright law in *Théberge*. The Canadian Broadcasting Corporation (CBC) has its original programs and licensed programs from third parties and broadcasts these programs on television and the internet.<sup>278</sup> The CBC is required to obtain licences in order to broadcast programs that contain copyright-protected musical works and SODRAC is the collective society that negotiates these rights with CBC on behalf of its members.<sup>279</sup> In the production of a program, the CBC needs to make several kinds of copies: “synchronization copies” incorporate musical works into an audiovisual program;<sup>280</sup> when the synchronization process is complete, the resultant final copy is called a “master copy;”<sup>281</sup> CBC then loads the master copy into its digital content management and several copies (including the music) of the completed program are made for internal use.<sup>282</sup> The collective society (SODRAC) began to distinguish between synchronization copies, and in 2006 SODRAC began asking CBC to pay for synchronization licences.<sup>283</sup> This resulted in an impasse such that the CBC existing licence could not be renewed, and the collective society (SODRAC) asked the Copyright Board to set the terms of the licence.<sup>284</sup> CBC contended that broadcast-incidental copies do not engage the reproduction rights, or, in the alternative, the synchronization licences impliedly covered the broadcast incidental copies if it was necessary.<sup>285</sup> In 2012 the Copyright Board concluded that the CBC broadcast-incidental copies did engage reproduction rights and that a licence for such copies cannot be subsumed under the synchronization licences, therefore CBC required a separate licence to cover its broadcast-incidental copies, and the Copyright Board issued an interim licence.<sup>286</sup> The Federal

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<sup>278</sup> *Ibid.* at 616.

<sup>279</sup> *Ibid.* at 630.

<sup>280</sup> *Ibid.* at 616.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.* 617.

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

Appeal Court upheld the decision of the Copyright Board; but on appeal, the Supreme Court of Canada set aside the decision of the Copyright Board and remitted the matter back to the Copyright Board for reconsideration.<sup>287</sup>

In its analysis of the issues involved in *SODRAC*, the apex court expressly stated how the understanding of the purpose of copyright has evolved under its auspices through earlier decisions. The Supreme Court notes that:

Though this Court's subsequent decisions in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC34, [2012] 2 S.C.R. 231 (ESA), have refined our understanding of the purposes of copyright law [...] To be sure, *Théberge* demonstrates how our understanding of the purpose of the Copyright Act has evolved since the pronouncement in *Bishop*<sup>288</sup> that the "single object" of the Act was to benefit authors: *Bishop*, at pp. 478-79[...] *Théberge* observed that, when weighing competing policy interests under copyright, "[t]he proper balance[...] lies not only in recognizing the creator's rights but in giving due weight to their limited nature."<sup>289</sup>

Dialogue between arms of government is clearly discernable in *SODRAC* as the Supreme Court, in the exercise of its adjudicatory functions, communicates with the parliament through its interpretation of the copyright law. This communication with Parliament necessitates an internal communication within itself, specifically through the review of its earlier decisions. Determining the purpose of copyright law is enriched in the process. In *SODRAC*, the Supreme Court, just like in *CCH*<sup>290</sup> and *SOCAN*,<sup>291</sup> affirmatively cites *Théberge* as laying down the fundamental principles to consider in determining the purposes of copyright law in Canada. Importantly, the *SODRAC* Court acknowledges that its understanding of the purposes of copyright law has

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<sup>287</sup> Ibid.

<sup>288</sup> See footnotes 255 for the facts of *Bishop v Stevens*.

<sup>289</sup> *SODRAC*, supra note 277 at 629, 643.

<sup>290</sup> *CCH*, supra note 248.

<sup>291</sup> *SOCAN*, supra note 264.

evolved and experienced refinement through cases it had considered. This therefore means that the purpose(s) of copyright law as understood by the courts has changed and could continue to develop over time. This is not unusual: as Roscoe Pound states, “the law must be stable, but it must not remain static.”<sup>292</sup> The realization of the Supreme Court of Canada of how its knowledge and understanding of the purpose of copyright law has evolved stems from the dialogue with itself and the parliament.

The above cases and other similar ones considered by the Supreme Court of Canada have provided robust guidance on the determining the purposes of having copyright law in Canada thereby attempting to fill in for the omission of parliament. These cases not only attempt to articulate the purpose of copyright law in Canada but show how and why it is important to know for what purpose copyright law exists. In the cases analyzed above, though the determination of the purpose of the dispute was not to primarily ascertain the purpose of copyright law in Canada, yet, the Supreme Court deemed it appropriate and necessary to identify the purpose of copyright law. In my view, the identification of the purpose of copyright law is pivotal to adjudication on copyright cases. This was confirmed most recently, in the Crown copyright case of *Keatley Surveying Ltd. v. Teranet Inc.*, when Abella J. wrote for the majority: “This Court’s post-*Théberge* jurisprudence has sought to calibrate the appropriate balance between creators’ rights and users’ rights. All provisions of the Copyright Act...must be interpreted with this balance in mind so that the Copyright Act continues to further the public interest.”<sup>293</sup>

A clear and well-defined purpose of copyright law is helpful in deciding between two competing copyright claims or interests among copyright stakeholders. While this may not be as

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<sup>292</sup> The Free Dictionary, Legal Dictionary, “Roscoe Pound” at online: < <http://legal-dictionary.thefreedictionary.com/Roscoe+Pound> > Accessed February 24, 2017.

<sup>293</sup> 2019 SCC 43, at paras. 44-46.

easy as it sounds, it does provide a foundation to build on. An examination of the purpose of copyright law in Canada shows (just like in the Statute of Anne) that not very much was said by Parliament about the purposes of enacting copyright law. However, examining relevant copyright opinions of the Supreme Court have enriched the dialogue through robust explanation on the purposes of copyright law in Canada. Additionally, and perhaps due to the influence of the pronouncements of the Supreme Court of Canada, Parliament is beginning to articulate the balance of rights between exclusive rights protected by copyright law and users' rights to access and use these works under exceptions. The text in the preamble to the CMA stated earlier is instructive here.<sup>294</sup> Incorporating such language in copyright legislation helps clarify its purpose and the rights and obligations of stakeholders.

The clarity given by the Supreme Court of Canada on the purpose of copyright law and other copyright issues has contributed immensely to the ongoing copyright discourse in Canada and has received the attention of copyright scholars<sup>295</sup> in Canada. Furthermore, the Supreme Court is in communication with other arms of government who are also entitled to respond; the Supreme Court may not always have the final say because parliament has been known to subsequently enact new laws which had previously being declared invalid by the Supreme Court.<sup>296</sup> In other words, as a fundamental feature of parliamentary supremacy, the Canadian Parliament can of course elect to enact or reform copyright laws in line with the decisions of the Supreme Canada or follow a different reasoning. In the dialogue among or between the arms of government on a particular issue(s), the possibility of conflict and disagreement is to be expected. The response of the executive or legislative arm of government could conflict with the

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<sup>294</sup> *Copyright Modernization Act*, supra note 233.

<sup>295</sup> Gervais, *Purpose of Copyright*, supra note 232; Michael Geist ed, *The Copyright Pentalogy, How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: Ottawa University Press, 2013).

<sup>296</sup> Peter Hogg, "Canadian Constitutional Law: Presentation to the Annual Conference of International Association of Law Libraries" (2013) 41.1 I.J. of Legal Information presentation 58 at 62-3.

direction of the Supreme Court on copyright issues in Canada—but it is unlikely to do so lightly or with disregard for the pronouncements of Canada’s top Court. For this chapter, it suffices to examine those judicial pronouncements on the purpose of copyright law in Canada, as we will return to discuss the responses of other arms of government Chapter Three, where I consider the activities of the executive and legislature on copyright law reform.

The articulation of the purposes of copyright law in *Théberge* is not akin to a statutory provision. In fact, it was noted in *SODRAC* that “the principles at work in *Théberge* ... can inform the interpretation and application of the terms of the Act but cannot supplant them.”<sup>297</sup> The Supreme Court issues a note of caution to itself, which can be inferred to mean that its role is not to usurp the primary law-making duty of the legislative arm of government.

## 1.6 Conclusion

This chapter lays the foundation for understanding the *purpose of copyright law in Canada* – a theme that will recur throughout this dissertation because of its vital connection with other core aspects of my research. To properly understand the analysis of the purpose of enacting copyright law in Canada, I set the foundation by discussing the origin and purpose of the first copyright law. I offered historical account of the development of copyright law through the activities of the Stationers’ Company before the enactment of the Statute of Anne. This discussion underscored the controversial foundations on which copyright was built, which are arguably reflected in the dynamics of the contemporary and complex copyright system.

Members of the Stationers’ Company who were empowered by the British Monarch through legal instruments that granted the Stationers’ Company exclusive and perpetual rights in

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<sup>297</sup> *SODRAC*, supra note 277 at 643.



book publication first enjoyed the concept of exclusive rights in book publication. The State entrusted extensive powers to the members of the Stationers' Company to superintend book publication and this privilege developed into a monopoly in the book trade. In return, and for the benefit of the British Monarch, members of the Stationers' Guild provided a censorship mechanism against the publication of seditious materials against the State. This collaboration meant that individual authors who were not members of the Stationers' Company could not publish books even if they intended to; this monopoly impacted negatively on authorship and continued for more than a century until a new political climate in Britain ended the monopoly. Though the monopoly ended, the members of the Stationers' Company were unflinching in their efforts to regain their control and monopoly over book publication—a quest that ultimately culminated in the enactment of the Statute of Anne – the first copyright law.

My investigation of origin and purposes for enacting the first copyright law indicates that, even after more than three centuries, it is still a debatable issue on which reasonable people may disagree—and they continue to do so to this day. My attempt to determine the purpose the Statute of Anne did not lead to a straightforward answer. The reason is that (as the historical analysis shows) the interplay of forces behind the statute could point in various directions. Historical facts and the views of copyright scholars indicate that protecting authors was not the primary motivating factor for the enactment of the Statute of Anne and that the publishers (stationers) benefitted more from the arrangement. Others argue that the Statute of Anne was a compromise to satisfy various interests or to advance the public interest more generally.

I further explored the post-Statute of Anne era through judicial interpretation of the Statute of Anne. I examined how the judiciary interpreted the purposes of the Statute among competing stakeholders in early landmark cases. This investigation shows the effort of publishers

to exploit the judiciary and revive their otherwise defunct exclusive and perpetual right to book publication. In summary, the judiciary attempted to fill the gap left by the parliament as to the purpose of the statute and, therefore, the scope of the rights that it afforded.

In summary, this chapter uncovers the uneasy history of copyright law, and its uncertain purpose, as well as the complex interests and tensions that inevitably underlie its enactment. In my view and from my research findings, while it may be difficult to identify a specific purpose underlying the Statute of Anne, the long title (*An Act for the Encouragement of Learning by Vesting the Copies of printed book in the Authors or Purchasers of such Copies, during the Times therein mentioned*) of the statute does provide a useful hint about the prevailing justificatory discourse. These words in the title (*for the encouragement of learning*) suggests that the core purpose intended by the statute—at least as presented to Parliament and the public—was to promote and encourage the creation and dissemination of knowledge; in other words, to serve the interest of the public. In order to achieve the encouragement of learning, the statute vests copyright in book to authors or purchasers for a limited time (*by Vesting the Copies of printed book in the Authors or Purchasers of such Copies, during the Times therein mentioned*). Therefore, this implies that encouragement of learning was the main purpose of the statute. Furthermore, the grant of copyright to authors was intended to incentivise them to create knowledge and encourage learning, by enabling them to enjoy the just reward for their creativity. Perhaps the intellectual property language in the United States constitution (*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*) was modeled to some degree after the long title of the Statute of Anne because of the evident similarities. Besides this core purpose of the Statute of Anne, other purposes included the abolition of the Stationers' Company's

monopoly rights to book publication, and regulation of the trade. It may seem that these other purposes were subordinate to the main purpose, but as I have argued, in practice the Stationer's Company had an advantage that allowed them to remain at the top of the copyright food chain, so to speak, even if the core purpose of the statute was to benefit public interest.

The review of the controversial origin and purposes for enacting the Statute of Anne provides the background against which to discuss the purpose of copyright law in Canada. Until the enactment of the CMA in 2012, which contains language on the purpose(s) of copyright law, Canadian legislation offered little help in articulating the purpose(s) of enacting copyright law. I examined relevant Supreme Court cases in Canada and the Court's guidance on understanding the purposes of copyright law in Canada. My research shows the consistency of the Supreme Court on its position on the purposes of copyright law in Canada since 2002. Therefore, the purpose of copyright law in Canada is to promote the public interest in the encouragement of learning and dissemination of works of art and intellect, and to balance this public interest with the creator's interest in obtaining a just reward. However, what this means in any particular case remains a matter of interpretation. Also, the Supreme Court may not always get the final word as the responses (legislation and policy formulation) from other arms of government may alter its pronouncements.

With this chapter having provided the foundations for understanding copyright's purpose, Chapter Two proceeds to discuss copyright in the context of digital technology, specifically, and the evolving views of the today's active stakeholder groups on the impact of technology on the copyright system and its objectives.

**CHAPTER TWO**  
**INFORMATION AND COMMUNICATIONS TECHNOLOGY**  
**AND THE COPYRIGHT SYSTEM**

This chapter shows how Information Communications Technology (ICT)<sup>1</sup> gradually developed over the centuries and shaped the understanding and approach to copyright. It also discusses the key copyright stakeholders on which my research is focused and how they appear to conceptualize copyright in the context of ICT. In Part One of this chapter, I examine the copyright system in the context of ICT. I begin by tracing the evolution of technology and its impact on copyright. As a build-up to the present and sophisticated state of ICT, I discuss the evolution of early technologies and their impact on the copyright system. Such technologies include the printing press, reprography, sound and video recording. I proceed to review the contemporary copyright landscape in the era of digital technology and how this phenomenon accounts for a re-imagining of the copyright system and frequent calls for copyright law reform. In Part Two of the chapter, I offer a broad overview of copyright stakeholders, but proceed to focus specifically on the stakeholders that are cardinal to my research; I explore their perspectives on the intersection of copyright and ICT, and, in particular, on the opportunities and challenges presented by ICT.

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<sup>1</sup> The term Information and Communications Technology is an extended term for information technology (IT) which stresses the role of unified communications (Murray James) and the integration of telecommunications (telephone lines and wireless signals), computers as well as necessary enterprise software, middleware, storage, and audio-visual systems, which enable users to access, store, transmit, and manipulate information. Wikipedia, Information and Communications Technology at online: < [https://en.wikipedia.org/wiki/Information\\_and\\_communications\\_technology](https://en.wikipedia.org/wiki/Information_and_communications_technology)> Accessed October 19, 2016. My use of ICT in this dissertation proposal is to broadly cover the forms of ICT that impact the copyright industry. Though ICT is an internationally recognized term, the usage of “IT” is popular in Canada, even when referring to telecommunications.

**PART I**  
**COPYRIGHT AND ICT**

**2.0 Overview of Copyright in the ICT Landscape**

The debates on copyright law reform in the era of technology have tremendously heightened due to a paradigm shift in the entire copyright system created by fast-paced ICT advancement. The emergence and proliferation of ICT since the late 20<sup>th</sup> century have spawned controversial and challenging copyright issues. The manifestation of creative works has significantly metamorphosed from hard copies to soft or digital copies. Additionally, the means of creation, replication, and distribution of creative works are now technology-driven such that they can now be done easier and faster. The dissemination of creative works to thousands of recipients can be achieved with just a click of the button. Is this technology-aided phenomenon an opportunity to be nurtured or a threat to copyright that should be curtailed? The answer to this question has generated polarized views for decades now. To the advocates of free culture, the benefits of ICT are typically lauded as an opportunity because it makes content available and easily accessible, while to the content industry stakeholders, ICT is perhaps more commonly viewed as a challenge to the traditional copyright business model. That is, it aids unauthorized access to copyrighted materials, which they typically claim leads to loss of revenue. On a more beneficial note, ICT is perceived as an opportunity to achieve cost effective production and distribution of content, being a more efficient means of revenue generation through the digitization of content, as well as a means to restrict access to content through TPMs. For now, it suffices to say that TPM is a technological method aimed at encouraging authorized use of

digital content (or, at least, restricting its unauthorized use).<sup>2</sup> They shall be examined in great detail in chapter five.

The challenges that ICT poses to the copyright system did not occur overnight; it took centuries of technological evolution to achieve its present state and, of course, the evolution continues. To properly situate the present challenges, it is apposite to trace the development of specific technologies that have impacted on copyright over the centuries.

## 2.1 Pre-ICT Era and Copyright

Prior to the development of ICT to its current state, copyright faced challenges with the evolution of the printing press (which eventually triggered the literary property debates examined in Chapter 1), and later, of course, with the emergence of reprographic and sound recording technologies. On the printing press, Edward Samuel explains:

...The movable type printing press was developed by Johann Gutenberg in Germany around 1440 and introduced to England by William Caxton in the last quarter of the fifteenth century. Prior to that time, it wasn't all that important to think about the rights of authors in books because it was so expensive and time-consuming to produce books that few were in fact duplicated. With the printing press, however, it became possible to reproduce books in multiple copies, by the hundreds or even the thousands.<sup>3</sup>

Before the computer age, the printing press technology was remarkably revolutionary because of its ability to produce numerous copies of books, which hitherto was laborious and cumbersome. It is regarded as the first copying technology.<sup>4</sup> Prior to the printing press technology, the concept or appreciation of “authorship” was not well developed because it was

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<sup>2</sup> Blayne Haggart, *Copyright: the global politics of digital copyright reform*, (Toronto: University of Toronto Press, 2014) at 30.

<sup>3</sup> Edward Samuel, *The Illustrated Story of Copyright*, at online:< <http://www.edwardsamuels.com/illustratedstory/isc1.htm> > Accessed March 21, 2016.

<sup>4</sup> *Ibid.* I replaced “copyright” with “copying” because copying is more appropriate and captures the concept of reproduction.

expensive and time-consuming to produce books.<sup>5</sup> This is in sharp contrast to what it is today because authors now leverage the power of digital technology to create and disseminate content across the world with minimal cost. The printing technology ignited and fueled authorship in the sense that its ability to easily produce copies of books incentivized authorship with the hope of earning some rewards as well as wide dissemination of their books. Besides encouraging authorship, the printing technology was essential to the flourishing of the book publishing business.

Although the printing press technology was remarkable, its process was laborious in the sense that the printing process involved manual activity until relatively recent times; the development of reprographic technology proved to be far more efficient with the advent of the photocopying machine, invented by Chester F. Carlson in 1938.<sup>6</sup> The photocopying machine enabled cheap and efficient reproduction of copies (including text and images) without the laborious printing press processes; however, by virtue of its copying efficiency it did pose a threat to the enforcement of copyright, which was, by then, well established.<sup>7</sup>

In the music industry, the development of sound recording technologies was similarly revolutionary and equally disruptive. The phonograph was invented by Edison in 1877;<sup>8</sup> the phonograph technology was crude and sound recording was completely mechanical because it did not use electricity.<sup>9</sup> However, the capacity to record and replay musical performances raised

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<sup>5</sup> Ibid.

<sup>6</sup> Samuel, *Story of Copyright*, supra note 3; It is important to note that centuries prior to the invention of the photocopying machine, several processes for making copies existed such as Ammonia and Blue Print, Pellet, Diazo, Paperographic, Edison Stencils processes etc, N.R. Jayaraman, “Reprographic process – Origin and development” (April, 2015), at online: < <http://santhiprinting.blogspot.ca/2015/04/reprographic-processes-origin-and.html> > Accessed October 24, 2016.

<sup>7</sup> Ibid.

<sup>8</sup> Daniel Von Recjlinghausen, “Electronic Home Music Reproduction Equipment” (1977) 25 at 759 at online: < [http://www.aes.org/aeshc/docs/vonreck\\_electronic-home-music.pdf](http://www.aes.org/aeshc/docs/vonreck_electronic-home-music.pdf) > accessed June 28, 2019.

<sup>9</sup> Supra note 3 at online: < <http://www.edwardsamuels.com/illustratedstory/isc2.htm> > Accessed February 12, 2018.

new but fundamental problems for copyright law, challenging traditional assumptions about the control over copies of musical works and their distribution.

Although copyright infringement predates copyright in the ICT age, there are marked differences between infringement in the pre-ICT age and copying in the ICT era. Despite the ingenuity of the printing press, reprographic and sound recording technologies, and the copyright infringement concerns they presented, the nature of these challenges were not as sophisticated as they are today in the era of digital technology. Prior to digital technology, copyright owners chiefly controlled the production and distribution of copies of works of authorship, and copies were obtained through purchase or borrowing from a library or a friend.<sup>10</sup> The effect of limited access to physical copies of creative works was that it created a physical scarcity to make sure losses through unauthorized access were minimized. This system favoured copyright owners more than users or consumers in the sense that copyright owners significantly controlled users' access to content by controlling the making and dissemination of (physical) copies.

Furthermore, technological advancement was less worrisome for content industries compared to the era of digitized content for a number of reasons. The previous copying technologies did not pose a significant threat to the content industry's scarcity-based business model<sup>11</sup> because, as noted by Ginsburg,<sup>12</sup> copyright owners substantially controlled the production and distribution of creative works; through this business model, they retained the power to create scarcity and increase the demand for cultural goods and guaranteed commercial gain. Maintaining the status quo of their existing business model ensured market structure stability for the content industry.

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<sup>10</sup> Jane C. Ginsburg, "Copyright and the Control over New Technologies of Dissemination" (2001) 101 *Columbia L.Rev.* 1613 at 1614.

<sup>11</sup> Haggart, *Copyright*, supra note 2 at 60.

<sup>12</sup> Ginsburg, *Control over New Technologies*, supra note 10.



Another reason the previous copying technologies could not so fundamentally alter the market place or threaten the business model of the content industries was that copies made in the non-ICT period were not exact replicas of the originals and were almost always poor quality replicas. Although photocopy generally means reproducing the exact copy, the quality of that copy is rarely equivalent to the original. Nor was photocopied or dubbed audiotape was exactly the same as the original work due to technological limitations.<sup>13</sup>

As Gillian Davies observes, it is “digital technology [that] has transformed the marketplace for copyright-protected works. It has opened up new ways of doing business...”<sup>14</sup> The previous technologies did not digitize content and so reproduction of copies at a commercial scale remained expensive,<sup>15</sup> which rendered relatively insignificant any possible threat to copyright owners. Illegal reproduction did take place, and did influence copyright policy and practice; but it did not take place at a scale significant enough to threaten the content industry at an existential level. In other words, as Blayne Haggart states:

Technological change has always influenced copyright law, but digital technology differs from previous technological advances in that it alters the very nature of the marketplace. Previous technological advances such as the invention of the record music and television were advances in degree, not in kind, over existing technologies.<sup>16</sup>

In summary, the advances in technology and its impact on copying and copyright were, while influential in the development of copyright law, not significant enough to generate the controversial discourse on copyright reform on the scale and to the extent that we witness today.

Let us turn then to examine copyright in the ICT age and its impact on the copyright system.

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<sup>13</sup> Ginsburg, *Control over New Technologies*, supra note 10.

<sup>14</sup> Gillian Davies, *Copyright and the Public Interest*, (London: Sweet & Maxwell, 2002) 305. [Davies, *Public Interest*].

<sup>15</sup> Supra note 10.

<sup>16</sup> Supra note 11.

## **2.2 ICT Era and Copyright**

Advancement in copying technology took on a different dimension as technological evolution gradually transitioned to the age of ICT where many manual tasks were gradually (and in some cases rapidly) replaced with technology-driven automation, especially through the use of computer systems. With specific reference to the copyright industry, the ICT age introduced the ability to dematerialize creative content from its corporeal form to digitized form. The digitization of creative works (text, audio and video) made it possible to create perfect copies of the original. This altered the market structure in the copyright landscape and posed unending challenges for copyright enforcement. Before examining the impact of ICT on the copyright industry, it is pertinent to discuss the development and rise of the ICT age. The focus will be on the digital computer system, the world wide web, internet and social networking technologies/platforms. It is not within the scope of my research to delve into technical details or to give a comprehensive historical account of the emergence of ICT. Rather, my intention is to offer a brief introduction to these technologies in order to contextualize their impact on the copyright system.

### **2.2.1 The Digital Computer System**

Computing technology has experienced phases of rapid advancement and development over time. Present digital technology seems to be an unprecedented phenomenon that has transformed, arguably, almost every facet of human endeavour. It seems inconceivable that the

humble beginnings of Charles Babbage’s computing invention<sup>17</sup> and several other improvements thereafter in computing technology have transitioned us from the analogue system<sup>18</sup> to digital computing.<sup>19</sup> The change heralded the digital revolution,<sup>20</sup> which has not ceased to impact the world and continues to beget further innovation. The adoption of personal computers grew rapidly and facilitated the processing of data – this became known as *information technology*. Digital technology in the information age facilitates enhanced data processing activities such as creation, editing, manipulation, storage/retrieval, transfer and reproduction at very high speed. A remarkable achievement by which digital technology dwarfed analogue and pre-ICT technologies was the ability of personal computers to make perfect and multiple copies of the original at very low cost; for an individual, such cost could include purchasing a computer, purchasing Microsoft Office application and internet subscription payment. Unlike the previous technologies, this became a serious concern because computer technology through digital means proved that copyrighted content could be duplicated perfectly, easily, and practically instantly. It

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<sup>17</sup> Encyclopedia Britannica, “Digital Computer”, at online: < <https://www.britannica.com/technology/digital-computer> > accessed May 15, 2017. “Charles Babbage is credited with having first conceived the automatic digital computer. During the 1830s Babbage devised his so-called Analytical Engine, a mechanical device designed to combine basic arithmetic operations with decisions based on its own computations. Babbage’s plans embodied most of the fundamental elements of the modern digital computer. For example, they called for sequential control—i.e., program control that included branching, looping, and both arithmetic and storage units with automatic printout. Babbage’s device, however, was never completed and was forgotten until his writings were rediscovered over a century later.”

<sup>18</sup> Techopedia, “Analogue Computer”, at online: < <https://www.techopedia.com/definition/5955/analog-computer> > accessed May 15, 2017. “An analog computer is a computer which is used to process analog data. Analog computers store data in a continuous form of physical quantities and perform calculations with the help of measures. It is quite different from the digital computer, which makes use of symbolic numbers to represent results. Analog computers are excellent for situations which require data to be measured directly without converting into numerals or codes. Analog computers, although available and used in industrial and scientific applications like control systems and aircraft, have been largely replaced by digital computers due to the wide range of complexities involved.”

<sup>19</sup> Supra note 17 “Digital computer, any of a class of devices capable of solving problems by processing information in discrete form. It operates on data, including magnitudes, letters, and symbols, that are expressed in binary code—i.e., using only the two digits 0 and 1. By counting, comparing, and manipulating these digits or their combinations according to a set of instructions held in its memory, a digital computer can perform such tasks as to control industrial processes and regulate the operations of machines; analyze and organize vast amounts of business data; and simulate the behaviour of dynamic systems (e.g., global weather patterns and chemical reactions) in scientific research.

<sup>20</sup> Wikipedia, “Digital Revolution”, at online: < [https://en.wikipedia.org/wiki/Digital\\_Revolution](https://en.wikipedia.org/wiki/Digital_Revolution) > accessed May 15, 2017. “The Digital Revolution is the change from mechanical and analogue electronic technology to digital electronics which began anywhere from the late 1950s to the late 1970s with the adoption and proliferation of digital computers and digital record keeping that continues to the present day. Implicitly, the term also refers to the sweeping changes brought about by digital computing and communication technology during (and after) the latter half of the 20th century. Analogous to the Agricultural Revolution and Industrial Revolution, the Digital Revolution marked the beginning of the Information Age.”

meant that users could dispense with the original if a functionally equivalent and identical copy was made. Additionally, of course, the information age brought another phenomenon: the internet and worldwide web.

### **2.2.2 Internet and World Wide Web**

The internet and the world wide web (hereinafter referred to as “the web”) can be categorized as information transmission technologies. They were developed around the same budding period as digital computing technology. The internet is a global communication network that connects computers around the world;<sup>21</sup> it was created in 1969 as ARPANet (Advanced Research Projects Agency network) for the U.S. Department of Defense.<sup>22</sup> In his account of the purpose for creating the internet and the early stages of its development, Samuel explains:

The network was designed to break information into separate packets and send the packets over various routes from computer to computer, rerouting the information as necessary to circumvent the breakdown or failure of parts of the system. In the first year, there were four host computers connecting Stanford, UCLA, UC-Santa Barbara, and the University of Utah. In 1981, several academic institutions formed BITNET, a wide-area network to serve the academic community. In 1990, after ARPANet and various other networks had connected over 300,000 host computers, ARPANet was decommissioned as a project of the Department of Defense and allowed to develop as a civilian enterprise...By 1992, the number of host computers connected to the Internet surpassed 1 million; by 1998, there were nearly 50 million Internet users in the United States; and by 2000, Internet users were estimated at over 133 million in North America, and 228 million in the rest of the world.<sup>23</sup>

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<sup>21</sup> Samuel, *Story of Copyright*, supra note 3 at online: < <http://www.edwardsamuels.com/illustratedstory/isc5.htm> > accessed May 16, 2017.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

As the take-up of the internet progressed, the web was created; it is an information space where documents and other web resources are identified by Uniform Resource Locators (URLs), interlinked by hypertext links, which can be accessed via the Internet.<sup>24</sup> The web was developed by Tim Berners-Lee in 1989;<sup>25</sup> as a scientist employed at CERN (European Organization for Nuclear Research) in 1989, Tim Berners-Lee came up with an idea to let users (especially scientists) browse each other's papers on the internet.<sup>26</sup> He wrote the Hypertext Markup Language (HTML) and a protocol called the Hypertext Transfer Protocol (HTTP) that could be implemented on any computer.<sup>27</sup> Additionally, he created the Universal Resource Locator (URL) system for naming, locating and retrieving content on the internet.<sup>28</sup> In 1991, using the system he had developed, the World Wide Web was launched,<sup>29</sup> quickly becoming central to the development of the information age and the primary tool used by many millions—now billions—to connect on the internet.<sup>30</sup>

Put simply in the words of Samuel, the value of the web is that using straightforward HTML language, “just about anybody with a computer and a place to store the information could create a Web page, or series of interrelated pages, that could be accessed by anybody else on the Internet.”<sup>31</sup> The launch of the mosaic web browser is a significant milestone achievement to mention in the early days of internet usage. The mosaic web browser was created by the National Center for Supercomputing Applications (NCSA) at the University of Illinois-Urbana Champaign in 1992 and was launched in 1993.<sup>32</sup> The mosaic browser was the first web browser

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<sup>24</sup> Wikipedia, “World Wide Web”, at online: < [https://en.wikipedia.org/wiki/World\\_Wide\\_Web](https://en.wikipedia.org/wiki/World_Wide_Web) > accessed May 16, 2017.

<sup>25</sup> Ibid.

<sup>26</sup> Samuel, *Story of Copyright*, supra note 19.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Supra note 24.

<sup>31</sup> Supra note 26.

<sup>32</sup> Wikipedia, “Mosaic Web Browser” at online: < [https://en.wikipedia.org/wiki/Mosaic\\_\(web\\_browser\)](https://en.wikipedia.org/wiki/Mosaic_(web_browser)) > accessed July 8, 2019.

to display graphical images,<sup>33</sup> and the impact on internet usage by the public was huge because it so enhanced the average user experience, allowing the internet to become what it is today.

The internet and the web are two separate creations<sup>34</sup> but work together to make a tremendous difference in the ease of sharing and accessing cultural works in the digital age. The timing and creation of the internet and the web were apposite; an amalgam of digital computing on the one hand, and the internet and the web on the other hand facilitated an exponential growth in digital technology that created what can only be described as a paradigm shift. This has become the springboard and inspiration for further innovation, resulting in the creation of innumerable communication platforms and systems, from electronic mail (email), instant messaging (IM) and chat rooms to voice over internet protocols (VoIP), video-conferencing, and social networking.

### **2.2.3 Social Networking Platforms**

The emergence of social networking platforms is attributable to the rise of the ICT age under the auspices of the internet and the web. Access to the internet is the foundation on which social networking thrives; the proliferation of digital computing and advances in mobile telephony empower ordinary individuals to be active participants in the ICT age. For ordinary users of the internet, the mobile phone is the most commonly used means to access the internet and social networks. Around the end of the 20<sup>th</sup> century and the beginning of the new millennium, mobile telephony evolved from voice and text messages services into a mini-

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<sup>33</sup> Ibid.

<sup>34</sup> The “Internet” and “WWW” are two terms used frequently in the digital age and may sometimes be confused as one system even if they are separate creations. Samuel attempts to explain the difference thus “The Internet is the infrastructure that connects various local area networks of computers (at universities, companies, and government agencies) to each other to form a global network of networks. It’s not connected by any particular type of transmission lines, but consists of all ways in which computers are connected to other computers—including telephone lines, cable, fiber optics, microwave dishes, and satellite links.

The World Wide Web is a subset of the Internet, but it doesn’t exist in any particular location on the Internet. Rather, the World Wide Web is simply a protocol for exchanging information, and a system for identifying the location of particular items of information on any of the computers linked by the Internet. To view the http code for any Web site, simply click on view page source, or view source in your browser.” Samuel, *Story of Copyright*, supra 26.

computer with the ability to accomplish almost everything a personal computer could achieve. In digital technology parlance, mobile phones are built with such enhanced features to be regarded as *smartphones* because of the functions they are designed to accomplish through installable apps compared to a non-smartphone, allowing users to access the internet, instant messaging and multimedia services, and any number of other apps for every conceivable purpose. Smartphone technology contributes to the deepening of the social networking phenomenon, with the world's leading social networking platforms, such as Facebook, Qzone (in China), LinkedIn, Google+, WhatsApp, YouTube, Twitter, Snapchat and so forth, providing the means for users all over the world to connect and share ideas and content and disseminate information.

Daily, billions of social media users engage in communicating, creating, sharing and accessing information over these networking platforms. Knowledge and cultural flows are freed of traditional barriers to access. Social media is used by many as a means of political, economic and spiritual empowerment, social mobilization and creative self-expression. A vast volume of creative content is shared free of charge for all to access, use and find inspiration in, enabling them to further practice and share their creative abilities. Furthermore, on the political scene, social media has proved to be a useful instrument in mobilizing citizens' protests against oppressive governments. An example is the critical role social media played in the protests that occurred in the Middle East and North Africa popularly known as Arab Spring, which involved Tunisia, Egypt and Libya.<sup>35</sup> Even in the more immediate context of Canadian copyright reform, the political power of social networking has been aptly demonstrated by Michael Geist's use of

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<sup>35</sup> Habibul Haque Khondker, "The Role of the New Media in the Arab Spring" (2011) 8 *Globalizations* 676-679 at online: < <https://doi.org/10.1080/14747731.2011.621287> > Accessed February 12, 2018.

Facebook as a means to mobilize the Fair Copyright for Canada campaign,<sup>36</sup> speaking out against the legal protection for TPMs.

Of course, these technologies (digital computers, internet, the web and social networking applications) are much more technologically complex and sociologically significant than I can capture here. For our purposes, however, the point is that their influence on the copyright system has been enormous and far reaching, and continues to present pressing policy issues for discussion. Their impact is perhaps best explained by showing the sharp contrast between the pre-ICT and the ICT era.

### **2.3 Differences between the Pre-ICT and ICT Periods**

The categorization of the copyright system into non-ICT and ICT periods reveals marked differences. My analysis of the impact of ICT on the copyright system will rely chiefly on the identification of these distinguishing features, which I have categorized under three themes, discussed below.

#### **2.3.1 Loss of Control over Access**

... until the advent of the photocopier, copyright owners substantially controlled the production and dissemination of copies of works of authorship, as the public could not obtain the work without purchasing a copy, or borrowing one from a library or a friend. Before mass-market audio and video recording equipment, copyright owners also controlled access to works made publicly available through performances and transmission, because the public could not see or hear the work without attending a licensed live performance, or viewing or listening to it through licensed media. With the arrival of these technologies, the *de facto*, and often the *de jure*, balance substantially shifted to users.<sup>37</sup>

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<sup>36</sup> Michael Geist, Wikileaks Confirms Public Pressured Forced Delay of Canadian Copyright Bill in 2008, at online: <<http://www.michaelgeist.ca/2011/04/wikileaks-cable-copyright-delay/>> accessed May 17, 2017.

<sup>37</sup> Ginsburg, *Copyright and Control*, supra note 10.



The emergence of digital technology altered the equation in the copyright industry; copyright owners gradually lost the reins of power to control access to creative works to a new copyright world in the digital age. As content became digitized and ubiquitous, the accessibility of information goods flourished, empowering users to share and distribute. ICT equips users not just to passively consume creative works, however, but also to interact with and manipulate them. ICT currently aids creativity and the development of new works as well as disseminating them worldwide. As the subject-matter of copyright is, by definition, expression, the greater power to convey this message to the world, to educate and communication ideas, is a welcome development for the user community. While copyright law has never granted exclusive rights over access as such, this change to the medium presented a phenomenal change from the realities of the pre-ICT copyright period. Nevertheless, the degree of accessibility to creative works continues to change with technology, as content owners use encryption technology to restrict access to digitized content.

### **2.3.2 Emergence of Digital Creative Communities**

In the pre-ICT regime, creativity could only take place in the real world where physical copies of works were created and the means of distributing and accessing these works were also physical. The advent and influence of ICT and the internet creates a paradigm shift, which enables digital creativity and distribution of content easily. This gradually led to the creation of digital creative communities offering content creators the opportunity to create and share content without being constrained by time, space and distance. There are innumerable platforms and sites that exemplify this digital creative community, but perhaps none more so than YouTube, on which millions of users each day are inspired to create and share content. Today, YouTube has become a reservoir of video content on virtually any subject. This digital creative community did

not displace the traditional copyright system or the printing press, of course, as we still have book publishers publishing books in hard copies. The digital creative community, however, fostered cohesion, motivation and empowerment among like-minded creators. Additionally, as the YouTube example powerfully illustrates, creative works are easily accessible by the user community, bringing knowledge and entertainment through the communicative exchange of ideas in the digital space. The power of the digital creative community also enhanced the cultural behaviour of sharing—sharing knowledge and information thereby promoting innovation and creativity. The rise of social media plays a significant role in encouraging digital creative communities in terms of disseminating content that emanate from digital creative communities, thereby establishing audiences and receiving feedback on platforms such as Facebook, Google+, WhatsApp, Instagram, and Twitter.

My reference to digital creative community, it should be stressed, does not encompass or pretend to unify all communities in the digital space or social media. There are diverse communities in the digital space who are drawn together for different interests other than creativity *per se*. For the sake of my research, my reference to digital creative communities mean platforms in the digital space that bring content creators together for the purpose of creative expression. The emergence of digital creative communities nurtures the culture of content sharing at an exponential rate that could not have been possible in the pre-ICT era. To illustrate the power and benefits of this digital creative communities and sharing culture, the following statistics as at April 2017 give an indication of monthly active users of leading social networking platforms: Facebook, 1.94 billion;<sup>38</sup> WhatsApp, 1.2 billion;<sup>39</sup> YouTube, 1 billion;<sup>40</sup> Twitter, 319

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<sup>38</sup>Statista, “Most famous social network sites worldwide as of April 2017, ranked by number of active users (in millions)” at online: < <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>> accessed May 17, 2017.

million;<sup>41</sup> Instagram, 600 million;<sup>42</sup> Qzone, 595 million;<sup>43</sup> and LinkedIn, 106 million. The exchange of content that occurs on a daily basis within and across these platforms from individual users and digital creative communities worldwide thus contributes to the dissemination of knowledge and inspires creativity.

### 2.3.3 Free Culture

The concept of free culture,<sup>44</sup> is discussed in detail subsequently in this chapter; to avoid repetition, it would suffice here to give a general explanation and how it benefits the copyright system under the aegis of ICT. The concept of free culture in the context of this research connotes the liberty of creators to share their works or make it accessible for others to use. Contrary to a common misconception, free culture does not necessarily mean the absence of price or money. Even if it inheres in the free culture philosophy that creators allow their works to be accessed without paying, the underpinning objective is not absence of money but the freedom to share and access content.

Free culture therefore leverages the benefits of ICT to encourage the dissemination of creative works. Arguably, in the pre-ICT period, content creators may have practised free culture by permitting their works to be shared, but it is markedly different in the ICT age due to the scale at which it happens and how easily it can be achieved. The digitization of content makes it possible to easily replicate content and following the free culture philosophy, to distribute it

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Free culture, in copyright parlance has been subject to different interpretations. The concept of free culture arguably originated from Richard Stallman's free software idea in the early 1980s. In subsequent explanation, I will discuss the concept free culture (liberty to share) that Stallman articulates and the four attributes it must have. Furthermore, I distinguish Stallman's free software concept from Open Source Software (OSS) and show how they differ ideologically. I also explain Creative Commons Licensing in relation to free culture in the context of Stallman's four pillars of freedom.

freely and make it accessible for users. The benefit that free culture brings in the copyright digital landscape is that knowledge and creative works are now more available and accessible for consumptive use, enlightenment and inspiration to continue the circle of creativity. The free exchange of creative works happens online by the second on a daily basis and the benefits can hardly be quantified. Free culture fosters the sharing of creative content across the globe through ICT, which undeniably fuels the development of new ideas and creative works. It also provides a means to communicate artistic expression with extraordinary potential;<sup>45</sup> this should be embraced as one of the unique opportunities that ICT brings in the creative industry. Today, it is estimated that there are over 3 billion internet users in a world of over 7 billion persons.<sup>46</sup> Majority of content shared by daily internet users is made possible through the free culture philosophy.

The combination of the culture of *sharing* and *free culture* concepts in the digital age have significantly advanced the dissemination of knowledge and learning in the copyright system in the digital period.

The relative loss of control over access to copyright works, the emergence of digital creative communities, and the emergence of a free culture ideal represent significant differences between the before- and after-ICT copyright systems. These are, for our purposes, the major relevant differences between the copyright in the ICT era and copyright in the non-ICT period, although this list is by no means exhaustive.

## **2.4 Impact of ICT on the Copyright System**

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<sup>45</sup> Lawrence Lessig, “Free(ing) Culture for Remix”, (2004) Utah L. Rev. 961 at 965.

<sup>46</sup> Internet World Statistics, “Internet Users in the World by Regions – March 25, 2017” at online: < <http://www.internetworldstats.com/stats.htm> > accessed May 17, 2017.

The impact of ICT on copyright has generated unending controversy, which of course is not surprising given the different stakeholders in the copyright system and their differing normative approaches to legitimizing their goals. Various stakeholders justify their viewpoints on the impact of ICT to suit the pursuit of their interests and goals. My aim here is to examine the views and present, as much as possible, an objective analysis.

The discourse on the influence of ICT on copyright is of great concern to a whole range of copyright stakeholders. A discussion on stakeholders' analysis will follow subsequently but suffice it to say here that copyright stakeholders broadly encompass the following: creators, authors, users, libraries, governments, legislators, judiciary, collective societies (these are organizations that act on behalf of its members to license copyrighted works, collect royalties and assist members with copyright enforcement), academics, copyright lawyers, media and entertainment corporations, and other corporate intermediaries (tech and telecom companies, digital platforms, etc.). Following the rise of digital technology, data have become a precious and invaluable commodity. There is now a shift towards a *data-based* economy where access to and control of data is deemed to be competitive advantage over others in information-driven businesses. Debora Halbert observes that, "...information, access to it, and its control are the foundations of the new wealth made possible by the information age."<sup>47</sup> A publication in *The Economist* referred to data as *the oil of the digital era*;<sup>48</sup> it also states that, "...there is cause for concern. Internet companies' control of data gives them enormous power."<sup>49</sup> It is undeniable that since the acquisition, control and distribution of data in the ICT era has become a lucrative

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<sup>47</sup> Debora J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (New York: Routledge, 2014) 3.

<sup>48</sup> *The Economist*, "The World's Most Valuable Resource is no longer Oil, but Data" at online: < <http://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource?fsrc=scn/fb/te/bl/ed/regulatingtheinternetgiantsdetheconomydemandsanewapproachtoantitrust> > accessed May 23, 2017.

<sup>49</sup> *Ibid.*

business, capitalists (some of whom are profit-making corporate entities in the cultural industry) have greater incentive to maintain control of creative works for commercial gain. Furthermore, for stakeholders (free culture advocates), who seemingly do not seek financial rewards but promote the ideology of free access to information also in a non-monetary way, gain some form of empowerment in the copyright system in the technology era. The access to creative content and information is a means of social enlightenment and empowers the masses, politically and socially, to challenge any move to inhibit their access to information. As noted earlier, a perfect example of this is the Fair Copyright for Canada campaign.<sup>50</sup>

As we have seen, in the pre-ICT age, control of creative works was not a major issue for concern because creative content was more readily under the control of copyright owners.<sup>51</sup> As ICT has substantially altered the status quo, enabling users to access and share content, so too has it changed the market structure or copyright business model. Commenting on the impact of ICT on the copyright system and its disruption of the market structure, Haggart states:

Because of the economies of scale related to commercial reproduction and distribution, the content industries fulfilled an important social and economic function of making works accessible to the general public. But with technology (computers) and a distribution system (the Internet) that renders copying and distribution trivially easy, the content industries are in danger of losing their *raison d'être*. Unlike the hierarchical nature of the previous market, a digitized, networked economy involves “decentralized peer production”<sup>52</sup> and has less need for large corporate structures to coordinate creative production and distribution, particularly when one considers the degree to which digitization reduces the cost of copying and even shifts it almost completely to the consumer.<sup>53</sup>

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<sup>50</sup> Geist, *Canadian Copyright Bill*, supra note 35.

<sup>51</sup> Ginsburg, *Control over New Technologies*, supra note 10.

<sup>52</sup> Jeremy de Beer, “Copyright and Innovation in the Networked Information Economy” (Working Paper) 2009, p.4 at online: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1410158](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410158) > accessed May 23, 2017.

<sup>53</sup> Haggart, *Copyfight*, supra note 11.

Haggart's view nicely summarizes the power shift in the creation and transmission of data from the content industry to users and the attendant effect this has on the market structure. He conveys the impression that the content industry is at a loss since the traditional model upon which their copyright business is built has suffered severe disruption. While I agree, I would add that the content industry also benefits in the sense that the digitization of content now provides a new means to generate revenue. I examine this subsequently when I discuss copyright stakeholders.

Similarly, commenting on the influence of ICT on the copyright system, but with an added concern about unauthorized access, Davies notes:

Digital technology has transformed the marketplace for copyright-protected works. It has opened up new ways of doing business and given right owners access to new on-line markets via digital networks. Text, music and images are reduced to digital data, which can be transmitted in digital form at high speed throughout the world to everybody with a connection to the internet. This is posing new challenges in relation to enforcement of rights, since the internet also increases the ease with which intellectual property rights in works in digital form can be infringed. This means that two perennial problems for right owners, commercial piracy and copying for private use, have become ever more difficult to control. At the same time, digital technology offers the promise of enabling right owners to control the use of their protected material and access thereto by technical means.<sup>54</sup>

Davies expresses views similar to those of Haggart on the effect of ICT on copyright but goes further to highlight the challenges that digital technology presents to copyright owners. Inherent in the views of Haggart and Davies are a number of salient points at the core of the impact of ICT on copyright. The invention of digital computing technology made it possible for creative works to be created and expressed in digital form by anyone who had access to a digital

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<sup>54</sup> Davies, *Public Interest*, supra note 14 at 305-6.

computer. It simplified the process of idea expression and artistic creation, manipulation and reproduction of perfect copies of the original. After the creation of an artistic work, the next goal of most creators is to put their work out for others to see, use, appreciate, be inspired by, criticize and evaluate. In the pre-ICT period, the dissemination of works was limited in the number of people it could reach; however, with the web and the internet, works can be made available to millions of people instantaneously. Thus, the dissemination of cultural works can be done at no or very low cost. For copyright owners, it reduces the cost of production and dissemination while for users, it enables easy access to information for consumptive use. For individuals who engage in the sale of unauthorized copies of creative works, it makes infringement easier, which raises genuine concerns for the copyright owner. Sheldon Halpern aptly captures this thus:

...the World Wide Web provides a framework for vast access to an array of information, from favourite family recipes and newspaper articles to scholarly treatise and music, all available at the click of a mouse. Yet the same technology that provides vastly enhanced access also raise difficult fundamental issues concerning intellectual property, because the technology that makes access so easy also greatly aids copying – both legal and illegal...<sup>55</sup>

Furthermore, Halpern expresses his views on the economics of copyright market structure in the ICT age and the dilemma it poses:

Information in digital form has radically changed the economics and ease of reproduction. Reproduction costs are much lower for both rights holders (content owners) and infringers alike. Digital copies are also perfect replicas, each a seed for further perfect copies. One consequence is an erosion of what were once natural barriers to infringement, such as the expense of reproduction and the decreasing quality of successive copies in analog media...Computer networks have radically changed the economics of distribution. With transmission speed approaching a billion characters per second, networks enable sending information products worldwide, cheaply and almost instantaneously. As a

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<sup>55</sup> Sheldon Halpern, "The Digital Threat to the Normative Role of Copyright Law" (2001) 62 Ohio State L.J. 569.



consequence, it is easier and less expensive both for a rights holder to distribute a work and for individuals or pirates to make and distribute unauthorized copies.<sup>56</sup>

The impact of ICT bestows undeniable benefits to both copyright owner and user, and at the same time, the challenges that accompany the benefits must be acknowledged. For the copyright owner, ICT reduces the cost of production and transmission of copyright content and opens up a new platform to generate revenue. The downside of ICT for the copyright owner arises when her exclusive right under the copyright law is compromised by unauthorized use and copyright infringement. It is pertinent here to clarify that not all copying is illegal as the rhetoric and clampdown on piracy often suggests. Davies recognizes this distinction and she uses the words, “...*commercial piracy and copying for private use*...”<sup>57</sup> when highlighting the challenges copyright owners face in the digitized copyright system. Copyright law prohibits the sale of illegal copies,<sup>58</sup> but this should be distinguished from *copying for private use*, which is often permissible under the law as an exception to the bundle of exclusive rights under copyright law. It is important to mention that the term “private use” used by Davies should be interpreted cautiously because permissible use does not necessarily have to be private use (nor vice versa). For example, under Canadian copyright law, news reporting, which is not private use, qualifies as an exception under fair dealing.<sup>59</sup> Unfortunately, the distinction between unlawful copying and lawful copying such as fair dealing is hardly given due regard in copyright piracy discourse. Also, as Davies notes, despite the challenges that ICT poses to the copyright owner, it presents

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<sup>56</sup> Ibid. at 571.

<sup>57</sup> Davies, *Public Interest*, supra note 14 at 305. The term “piracy” has become a loaded term in copyright parlance, to avoid ambiguity and confusion, I prefer to use the legal or illegal copying instead.

<sup>58</sup> Copyright Act, 1985, R.S.C., c. C-42 s.27.

<sup>59</sup> Ibid. at s.29(2).

new opportunities to use technological<sup>60</sup> means to prevent unauthorized access, whether for lawful or unlawful uses.

For some specific kind of users who mostly seek free access to content, the benefit of ICT removes barriers to access information and creative works. It fosters access to and dissemination of content, creative expression and interaction with a digital community of creativity. Admittedly, ICT enables the user community to access creative works online; however, a possible challenge this poses to copyright enforcement is that the empowerment and access to creative works could be used (by some members of the user community but not all) to perpetrate commercial piracy. Therefore, in a bid to check unauthorized access, the user community may be branded as illegal copiers, and may in some cases be denied access to permissible use of content.

The impact of digital technology on copyright therefore comes with opportunities and challenges. While the free culture community welcomes ICT as an enabling tool to disseminate information and promote learning, the content industry welcomes ICT as a means to reduce cost and generate revenue, except in areas where it is prejudicial to their control over content. Ironically, technology also becomes the tool employed by the content industry to control (by means of encryption technology) access to content. The conflict of views among copyright stakeholders in the digitized era has remained largely unresolved; meanwhile, the development of ICT continues, seemingly oblivious to the tension it generates among stakeholders. This complex situation puts further strain on copyright law to balance the rights of stakeholders. On this note, Neil Netanel remarks:

Copyright law strikes a precarious balance. To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary rights in their works. But to promote public education and creative exchange, it invites audiences and the

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<sup>60</sup> This refers to technological protection measures and I discuss it in detail in chapter five.

subsequent authors to use existing works in every conceivable one that fall outside the province of the copyright owner's exclusive rights. Copyright law's perennial dilemma is to determine where exclusive rights should end, and unrestrained public access should begin.<sup>61</sup>

This dilemma is further complicated with the advent of technology that gives the public easy access to copyrighted materials and at the same time offers copyright owners the means to control/restrict access to content. This conjures up an image of conflict of interest between copyright stakeholders—where each copyright stakeholder is primarily concerned with the achievement of their interests and goals by maximizing beneficial uses of technology.<sup>62</sup>

In 1994 John Perry Barlow's reflections on the influence of ICT on copyright and its seemingly unsolvable challenges prefigures the present challenge:

Throughout the time I've been groping around cyberspace, an immense, unsolved conundrum has remained at the root of nearly every legal, ethical, governmental, and social vexation to be found in the Virtual World. I refer to the problem of digitized property. The enigma is this: If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work? Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as from without. Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal

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<sup>61</sup> Neil Netanel, "Copyright and a Democratic Civil Society" (1996) 106 Yale L.J. 283 at 285, cited in "Halpern, "The Digital Threat, supra note 50 at 573.

<sup>62</sup> The stakeholders my research focuses on are the content industry, which represent commercial interests, and the free culture stakeholders, who represent the user community. These will be discussed in detail in chapters four and five.

penalties, and serene, glassy-eyed denial.<sup>63</sup>

Barlow's position captures the dilemma and challenges of copyright in a digitized work. The attempt to address these challenges culminated in the World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT)<sup>64</sup> and Performances and Phonograms Treaty (WPPT),<sup>65</sup> collectively referred to as the WIPO Internet Treaties. Both treaties deal with the protection of works in the digital environment and strive to balance the interest of parties.<sup>66</sup> Having discussed the general impact of ICT on copyright, it is fitting now to examine the subject from the perspectives of copyright stakeholders.

## PART II

### COPYRIGHT: STAKES AND STAKEHOLDERS

#### 2.5 General Overview of Copyright Stakeholders

The copyright system generally has different stakeholders who influence activities in the cultural industry. As noted earlier, stakeholders in the copyright system in a general sense could include authors, creators, producers, publishers/distributors, legislators, the judiciary, government, and users and so forth. As the copyright stakeholders vary, so do their interests and goals. Their goals may align or conflict. Differences in goals mostly dominate the scene,

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<sup>63</sup> John Perry Barlow, "The Economy of Ideas" (1994) WIRED, at online: < <https://www.wired.com/1994/03/economy-ideas/> > accessed May 25, 2017.

<sup>64</sup> World Intellectual Property Organization, WIPO Copyright Treaty, December 20, 1996, at online: <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295157](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157)> Accessed October 6, 2015. The WCT entered into force on March 6, 2002 [WCT].

<sup>65</sup> World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, December 20, 1996 at online: <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477)> Accessed October 6, 2015. The WPPT entered into force on March 6, 2002 [WPPT].

<sup>66</sup> WCT, supra note 59 at 1; WPPT, supra note 60 at 1. The treaties are designed to serve as an international legal framework for WIPO member countries to implement in their national copyright laws. The implementation of the WIPO treaties in Canada dragged on for several years amidst pressure from the United States for Canada to reform its copyright law in the face of technological advancement. The initiative behind the development of the WIPO Internet Treaties and its implementation in Canada are discussed in detail in chapter 4 of this dissertation.

culminating in conflicts, debates, and the call for copyright law reforms. The lines of distinction drawn among copyright stakeholders may appear blurred sometimes; for example, one person can be both a creator and user. For example, if someone reads a book, she is a user; but if she reads the book for the purpose of writing a review of it, she has engaged in creative use to produce a new work, so she ceases to be merely a user, she becomes both a user and a creator. Similarly, a research student developing a thesis is not just a user, but both a user and author simultaneously because she is consuming the works, which feed into the development of her own thesis. In a broader sense, given that no one creates out of nothing, every author is a user.

For some creators/authors at a given time, the value derived may be the inspiration of ideas and follow-on creativity they get from the works of others; at other times, the value they seek may be monetary rewards for their works. To consumers/users, their interest could be the enlightenment and knowledge that creative works offer as well as their enjoyment and interaction with the works. In the copyright ecosystem, there is the tendency to hold the narrow view that users/consumers engage merely in consumptive use of content without giving anything back. On the face of it, this may be so; but not completely. To reduce users' role in the copyright system to mere consumption demeans the crucial position they occupy, even in their capacity as users. It is arguable that a good number of authors/creators, apart from fulfilling their motivation<sup>67</sup> to create or write, take users' preferences and desires into consideration as they create their work. In fact, in the area of product/service development and design, the Japanese

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<sup>67</sup> This motivation could be for monetary rewards or an innate desire of artistic expression. Deborah Halbert, *The State of Copyright - The complex relationships of cultural creation in a globalized world*, (Abingdon: Routledge, 2014) at 12; Everett E. Hagen, "On the Theory of Social Change: How economic Growth Begins" (1962) 93 "cited in Diane L. Zimmerman, "Copyright as Incentives: Did We Just Imagine That? (2011) 12 *Theoretical Inquiries in Law* 28 at footnotes 25 and 72 at online: < <http://www7.tau.ac.il/ojs/index.php/til/article/view/766/724> > accessed June 26, 2017".

developed a technique known as *kansei engineering*<sup>68</sup> to incorporate users' preferences in the design of products and services. Some copyright owners and content providers rely on the critique and feedback of users to develop and enhance their work for business advantage (for those interested in monetary rewards) and greater acceptability. In my view, creativity has a cycle, and this is not complete until the user (who is part of the creativity cycle) uses and interacts with it. Users complete the final phase or link in the creativity cycle. Julie Cohen underscores the important role of the user as follows:

The situated user appropriates cultural goods found within her immediate environment for four primary purposes: consumption, communication, self-development and creative play. The cumulative result of this behaviour by situated users, and of both planned and fortuitous interactions among them, produces what the copyright system names, and values, as "progress."<sup>69</sup>

One important value of users to the copyright system and society is that they help to foster public interest which could be seen as playing a social engineering function, as articulated by Mtima and Jamar.<sup>70</sup> To business-minded corporations and individuals, while the value they seek may be pecuniary reward, they also place a huge importance on producing high quality works and building reputation through their product. For academics and scholars, the value they seek in their works may mostly be wide readership and critical engagement with their scholarship; although it could be a combination of a wide readership and some monetary rewards. Another dimension of the value of scholarly works by academics is how they impact

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<sup>68</sup> Yu Chen, "Research on optimized Design of Kansei Engineering-based Web Interface" (2013) Computational and Information Sciences 1709 at online: < <http://ieeexplore.ieee.org/document/6643365/?reload=true> > accessed June 26, 2017. The concept of Kansei Engineering was developed by Mitsuo Nagamachi in 1970 and was first known as emotional engineering. Kansei engineering is an approach to product development that involves the statistical deductions of design elements that provide satisfaction to end users at a psychological level, and the conversion of such elements into design parameters. Simply put, KE aims to build consumers' affective perceptions, needs and emotions into products and services.

<sup>69</sup> Julie Cohen, "The Place of the User in Copyright Law" (2005) 74 Fordham L. Rev. 348 at 370.

<sup>70</sup> Lateef Mtima & Steven D. Jamar, "Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information" (2010) 55 NY Law School L. Rev. 78 at 79, 80, 81. My interpretation of the social engineering value of copyright is its capability to enlighten and educate members of the public through their use and interaction with cultural goods. This is further enhanced by ICT which provides a platform makes access to and sharing of information easy.

and influence public policy and law reform; academic scholarship also drive innovation in science, technology and other fields and these have proved very valuable.

According to Haggart, the creator-user distinction may be misleading because creators and publishers (e.g., movie studios) use existing works in order to create new works.<sup>71</sup> Even though the dynamics of copyright stakeholders' analysis admits that one category of stakeholders could easily switch to the other or appear to be a creator and user simultaneously,<sup>72</sup> the attempt is still made to draw a line of distinction.

The government as a copyright stakeholder can be categorized into three sub-units: the legislature, executive and judiciary; though these are arms of one unified government, their interests in copyright can hardly be said to be unified.<sup>73</sup> Even within these three government stakeholders, there exist varied approaches and viewpoints to copyright. For example, different legislators could have different viewpoints on a proposed copyright issue, the executive could have different department with varied approaches to copyright, while in the judiciary, you may not always get a unanimous decision on a particular copyright issue, with some judges expressing dissenting views. These government stakeholders' complexities also manifest in other stakeholders beyond the government structure. With different stakeholders playing varying roles and seeking different values, interests and goals all in one copyright system, it is hardly possible to satisfy the interests of all the stakeholders. While this challenge may not be unique to

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<sup>71</sup> Haggart, *Copyright*, supra note 11 at 63.

<sup>72</sup> An example of this is an academic who authors a scholarly work of her own, but in the process of doing so, she uses other existing scholarly works.

<sup>73</sup> This is discussed in chapter three of this dissertation where I review Canadian copyright law reform. I analyze the roles and interests (whether they align or conflict) of the arms of government in Canada. I also apply the theory of dialogue to examine how these arms of government communicate with each other in the context of copyright law reform. A bill for copyright law reform could emanate from the legislative arm of government, or be sponsored by the executive arm of government if it develops or identifies a policy objective upon which a proposed copyright law reform is based. The executive subsequently sponsors a bill to be passed into law by the legislature; here the bill goes through the conventional but arduous process of lawmaking. Non-contentious bills usually scale through the lawmaking stages without much ado. However, in the case of copyright law reform in the ICT age in Canada, the process (from the policy formulation in executive to the lawmaking process in the parliament) has been characterized by contentious debates, unresolved stakeholders' differences, lobbying, international influence etc. The judiciary in Canada also plays its role and this will be examined as well in chapter 4.

copyright policy-making and law reform, it is certainly a perennial problem that leaves the copyright system in a quandary in Canada and other jurisdictions.

Various writers have given different interpretations on the key copyright stakeholders. Giuseppina D'Agostino identifies creators, owners, users, and the general public as copyright stakeholders.<sup>74</sup> In developing a stakeholder-focused framework for research on business models for information products and open content, Chitu Okoli identifies creators, consumers, distributors and others as stakeholders in information products (which he notes includes copyrightable works and much more).<sup>75</sup> Uma Suthersanen identifies three categories of copyright stakeholders – authors/creators, producers, and the consumers.<sup>76</sup> Haggart discusses copyright stakeholders in Canada by classifying them into Protection Groups and Dissemination Groups.<sup>77</sup> He identifies the Content Industries<sup>78</sup> and Creator's Groups<sup>79</sup> as part of the Protection Groups. According to Haggart, the Dissemination Groups consist of Traditional User Groups,<sup>80</sup> Internet Service Providers<sup>81</sup> and The Public Interests.<sup>82</sup>

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<sup>74</sup> Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (UK: Edward Elgar Publishing Ltd, 2010) at 8.

<sup>75</sup> Chitu Okoli, "A Stakeholder-Focused Framework for Research on Business Models for Information Products and Open Content" (April 28, 2015) at online: < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2600341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600341) > Accessed May 30, 2017.

<sup>76</sup> Uma Suthersanen, "Copyright Law: A Stakeholders' Palimpsest" in F. Macmillian ed, *New Directions for Copyright Law* (2007) 5 Edward Elgar at 119.

<sup>77</sup> Haggart, *Copyfight*, supra note 11 at 166, 169.

<sup>78</sup> Ibid. at 166-7. Haggart explains that content industries refer to multinational corporations that lobby for strong copyright laws which is the foundation of their business models and they spend huge resources lobbying to influence government copyright decisions. Haggart identifies the Canadian Recording Industry Association (CRIA), Canadian Motion Picture Distributor's Association (CMPDA), Canadian Publishers' Association and Entertainment Software Association of Canada (ESAC) as associations through with the content industries advance their agenda.

<sup>79</sup> Ibid. at 168. Haggart explain that creator groups are creators who actively lobby for greater rights in their work

<sup>80</sup> Ibid. at 169. According to Haggart, these are large institutional users such as Association of Universities and Colleges (AUCC), Canadian Library Association, Canadian Association of University Teachers and the Council of Ministers of Education, Canada; they have tended to represent the interest of users in the copyright policy debate in Canada and are against strong protection of TPMs which they believe interferes with ease of use, lending of, and access to books and other materials for educators.

<sup>81</sup> Ibid. ISPs in Canada are dominated by three major providers – Bell Canada (Phone), TELUS Corp. (Phone) and Rogers Communications Inc. (Cable) and are primarily concerned with limiting their liability for infringement actions committed by subscribers and avoid a system that requires them to police the actions of their users.

<sup>82</sup> Ibid. at 170. According to Haggart, these are individual/consumer/public interest groups. They advocate for access to content and oppose strong copyright protection (added).



In line with the focus of my research, I have chosen to identify the *free culture* and the *content industry* stakeholder groups as the focal point for my analysis. It should be stressed that each category of stakeholder, thus defined, will include both creators and users in some capacity. My examination of these two stakeholder groups necessarily includes consideration of how the actions of the executive, parliament (legislature) and the judiciary<sup>83</sup> influence the copyright system.

## 2.6 The Free Culture: Origin and Concept

In copyright parlance, the concept of free culture is arguably attributable to the work of software developer Richard Stallman, who initiated the legacy idea of free sharing of software.<sup>84</sup> Stallman's idea sought to build a community of developers with the liberty to share software amongst themselves; he commenced the software-sharing project in January 1984 known as the GNU Project.<sup>85</sup> The GNU Project used a method called *copyleft* to accomplish its goals; according to Stallman, copyleft applies copyright but flips it over to serve the opposite objective, that is, instead of creating proprietary rights in software, it becomes free.<sup>86</sup> As he progressed in the development of his software initiative, Stallman established the Free Software Foundation, a non-profit to serve as the corporate platform to help achieve the goals of the free software community.

Today, the free culture mantra has expanded beyond the software community into the copyright system generally and the meaning ascribed to it today may not be what Stallman

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<sup>83</sup> This has been discussed in chapter one; it would also be examined in chapter three with focus on the Canadian perspective, and how the activities of executive, parliament and judiciary have shaped the contours of copyright in Canada.

<sup>84</sup> Richard Stallman's concept of free culture originally started with free sharing of software among software developers, but today, the concept has expanded to include other content such as text and multimedia. However, in my opinion, the concept of free can be traced back to the Statute of Anne of 1710, which provides in s.4 & 5 that free copies of published works are to be made available for free. The rationale for this is to enable public access to content for the encouragement of learning.

<sup>85</sup> Free Software Foundation, "Free Software, Free Society: Selected Essays of Richard M. Stallman" (2002) Joshua Gay, ed., p.20 at online: < <https://www.gnu.org/philosophy/fsfs/rms-essays.pdf> > accessed June 5, 2017.

<sup>86</sup> Ibid. at 22.

originally intended. According to Stallman, his philosophy of free refers to a particular kind of “free”:

The term “free software” is sometimes misunderstood—it has nothing to do with price. It is about freedom. Here, therefore, is the definition of free software: a program is free software, for you, a particular user, if: you have the freedom to run the program, for any purpose, you have the freedom to modify the program to suit your needs. (To make this freedom effective in practice, you must have access to the source code, since making changes in a program without having the source code is exceedingly difficult.), you have the freedom to redistribute copies, either gratis or for a fee, you have the freedom to distribute modified versions of the program, so that the community can benefit from your improvements. Since “free” refers to freedom, not to price, there is no contradiction between selling copies and free software. In fact, the freedom to sell copies is crucial: collections of free software sold on CD-ROMs are important for the community and selling them is an important way to raise funds for free software development. Therefore, a program that people are not free to include on these collections is not free software.<sup>87</sup>

From the above, Stallman’s ideology of the concept of free is much broader than the literal interpretation of absence of price or money. It is the creation of liberty (among software developers), to share their software for others to build on and re-distribute for further use, modification and distribution – this, to me, means contributing to the progress of knowledge and dissemination of the same in the sphere of software development. Stallman’s emphasis on the “freedom” to run, modify, and redistribute means that one must have been authorized to do so by the software owner, who has copyright<sup>88</sup> in the software but chooses to adopt a copyleft approach. He further clarifies this by remarking that a program that cannot be added to the collection does not qualify as free software. In other words, Stallman’s ideology does not

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<sup>87</sup> Ibid. 20.

<sup>88</sup> The basis of the exercise of copyleft must rest on copyright, this is because for content (in this case, software codes) to be shared, it must be created, and once created (that is, expressed in a tangible or fixed form) copyright applies by default, but the copyright owner elects not to exploit her proprietary rights in the software code but to freely grant other developers access to it to improve on it and disseminate their improvements.

encourage unauthorized distribution. If the owner of the copyright in a software is interested in exploiting her proprietary rights for monetary gains, this precludes the software from being shared as free software and Stallman does not condemn this; in fact, he encourages the freedom to sell copies to generate funds to promote the free software development. He does not condemn the desire to seek monetary rewards because, in his words, “*there is no contradiction between selling copies and free software.*”<sup>89</sup> Here, Stallman underscores the fact that the desire to seek monetary reward and the choice not to can co-exist.<sup>90</sup>

Stallman’s concept of free software therefore rests on rests on freedom four pillars:<sup>91</sup> 1) freedom to run the program as you wish for any purpose 2) freedom to study the source code of the program and change it to do what you wish 3) freedom to make copies and share with others when you wish, and 4) freedom to distribute or publish modified versions. According to Stallman, any purported claim to free software must have all of these four attributes and if any one of these freedoms is substantially missing or insufficiently available, then it is not free software but proprietary software.<sup>92</sup>

The idea of free software is more than a practical licensing scheme; it is also a philosophical concept. Stallman explains that “*Free software*” is a matter of liberty, not price. To understand the concept, you should think of “free” as in “free speech,” not as in “free beer.”<sup>93</sup> Inherent in the concept of free culture is the outcome or consequence that users will definitely get the software or information product without paying, which Stallman admits when

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<sup>89</sup> Free Software Foundation, *Free Software*, supra note 80.

<sup>90</sup> This echoes my line of thinking (that I develop later in this dissertation) that copyright stakeholders could explore ICT as an instrument to promote the possibility of peaceful co-existence despite their different interests.

<sup>91</sup> Free Software Foundation Europe, “The Free Software Movement and the Future of Freedom” lecture by Richard Stallman at Zagreb, 2006 at online: < <https://fsfe.org/freesoftware/transcripts/rms-fs-2006-03-09.en.html#q6>> accessed July 10, 2019.

<sup>92</sup> Ibid.

<sup>93</sup> Supra note 89 at 43.

he refers to the redistribution of copies gratis.<sup>94</sup> In my view, what is important to Stallman is not for users to obtain software without paying (which inevitably happens), but that software developers have the *authority or liberty to share* without barrier and encourage the improvement of knowledge in the software code development. Despite his effort to give clarity to the meaning of his usage of the word “free,” Stallman laments the ambiguity<sup>95</sup> in the word and its susceptibility to different meanings. For the purpose of my research, it is important to note the foundational meaning of free culture as Stallman enunciates and the meanings that have been ascribed to it in the copyright industry by various stakeholders.

Besides Stallman’s free software initiative, it is apposite to mention the existence of Open Source Software (OSS) and how it compares to Stallman’s free software concept and its four freedoms. The OSS is defined as a computer software where the author releases the source code of the program for users to study, modify and distribute the software for any purpose.<sup>96</sup> While this may appear similar to free software, the underlying ideological motive for OSS differs from free software. The concept of OSS originated from the work of Eric Raymond, and he thought that Stallman’s free software social activism was not appealing to the commercial software industry.<sup>97</sup> Therefore, Raymond and his team chose to rebrand the free software concept to project the commercial potential of sharing and collaborating on software source code and the term “open source” was adopted.<sup>98</sup> So while both free software and OSS are similar in the sense that both believe in the sharing software source code, they are markedly different. The

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<sup>94</sup> Ibid. at 20.

<sup>95</sup> Ibid. “Because of the ambiguity of “free,” people have long looked for alternatives, but no one has found a suitable alternative. The English Language has more words and nuances than any other, but it lacks a simple, unambiguous word that means “free,” as in freedom—“unfettered” being the word that comes closest in meaning. Such alternatives as “liberated,” “freedom,” and “open” have either the wrong meaning or some other disadvantage.

<sup>96</sup> Wikipedia, “Open-source software” at online: <[https://en.wikipedia.org/wiki/Open-source\\_software](https://en.wikipedia.org/wiki/Open-source_software)> accessed July 11, 2019.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

fundamental and ideological difference is that while free software's objective is to benefit users, OSS emphasizes benefits for not only users, but also software developers and vendors, which includes corporate entities. Therefore, despite what they have in common, that is, sharing software code and allowing it to be used, modified, and distributed, their underlying values are fundamentally different. With these differences in mind, even though the term free culture movement may include OSS, they may not subscribe fully to the entire free culture philosophy especially as the term "free" may connote gratis.

The concept of free culture gradually developed and expanded in its area of application beyond Stallman's original idea, which is the software domain into other areas of creative content. Lawrence Lessig used Stallman's free culture concept (with some differences) to promote his idea of making creative works digitally available and easily accessible by everyone. Lessig established the Creative Commons (CC) Organization<sup>99</sup> through which he promotes Creative Commons Licensing (CCL). Lessig is a proponent of Stallman's free culture agenda and has expressly stated this;<sup>100</sup> his establishment of the CC was undoubtedly influenced by Stallman's ideological stance. Lessig's idea of CCL was modelled after Stallman's free culture concept but not all the licenses under CCL scheme fully align with Stallman's four freedoms. Though Lessig generally supports Stallman's notion of free culture (which includes the four freedoms), four of the six licenses under CCL scheme do not align with the four freedoms of free

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<sup>99</sup> Creative Commons, "About CC" at online: < <https://creativecommons.org/category/about-cc/> > accessed June 6, 2017. A detailed analysis of Creative Commons Organization and Creative Commons Licensing is given in chapter four.

<sup>100</sup> Free Software Foundation, *Free Software*, supra note 85 at 11, commenting on Stallman's idea, Lessig states "Through his works and his words, he has pushed us to see the importance of keeping code "free." Not free in the sense that code writers don't get paid, but free in the sense that the control coders build be transparent to all, and that anyone have the right to take that control, and modify it as he or she sees fit. This is "free software"; "free software" is one answer to a world built in code. "Free." Stallman laments the ambiguity in his own term. There's nothing to lament. Puzzles force people to think, and this term "free" does this puzzling work quite well. To modern American ears, "free software" sounds utopian, impossible. Nothing, not even lunch, is free. How could the most important words running the most critical machines running the world be "free." How could a sane society aspire to such an ideal? Yet the odd clink of the word "free" is a function of us, not of the term. "Free" has different senses, only one of which refers to "price." A much more fundamental sense of "free" is the "free," Stallman says, in the term "free speech," or perhaps better in the term "free labor." Not free as in costless, but free as in limited in its control by others."

software. The CCL scheme is discussed in detail in chapter four, but it is important to mention here that four licenses (CC-BY-NC, CC-BY-ND, CC-BY-NC-SA and CC-BY-NC-ND)<sup>101</sup> prohibit creating derivative works and commercial use. In contrast, Stallman's four pillars of free software do not have such restrictions, and according to Stallman, if one of the four freedoms is missing or insufficiently available, the software (which in this case is creative works other than software) is not free software. The two licences under the CCL scheme that conform to Stallman's free software tenets are CC-BY and CC-BY-SA because they require only that one gives attribution to the original author and shares the content under the same licence condition; neither of these two conditions contradicts the four freedoms of free culture.

In fact, Lessig's nuanced approach to free culture was clearly stated by Stallman in 2012:

Creative Commons publishes six principal licences. Two are free/libre licences: the Sharealike licence CC-BY-SA is a free/libre licence with copyleft, and the Attribution licence (CC-BY) is a free/libre licence without copyleft. The other four are nonfree, either because they don't allow modification (ND, Noderivs) or because they don't allow commercial use (NC, Nocommercial).<sup>102</sup>

The foregoing clarifies the extent to which CCL scheme conform to Stallman's free culture philosophy and its four freedoms: while the CC organization broadly supports the free culture idea, only two of its licences confirm to Stallman's free software precepts. For the purpose of my research, it is important to highlight the different approaches and conceptions to free culture as conceived by Stallman (free software), OSS supporters, and the CC organization.

In his writings, Lessig advocates free culture in the digital era and his works offer compelling critiques of the copyright system; he also provides an initiative for owner and user

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<sup>101</sup> Licence code meaning: BY (attribution), SA (ShareAlike), NC (Non-commercial), ND (Non-derivative work).

<sup>102</sup> Richard Stallman, "On-line education is using a flawed Creative Commons licence" at online: <<https://stallman.org/articles/online-education.html>> accessed July 12, 2019.

practices to co-exist under the mechanism of the CCL, which enables the freedom to disseminate content encourage and inspire learning. Like Stallman, Lessig is not against seeking monetary rewards, but he articulates a system of control to give artists sufficient incentive to produce while leaving free, as much as possible, for others to build upon and create.<sup>103</sup> This suggests the notion of striking a balance, which is usually difficult in practice.

Lessig's expresses his idea of free culture when he asserts:

A free culture is not a culture without property; it is not a culture in which artists don't get paid. A culture without property, or in which creators can't get paid, is anarchy, not freedom. Anarchy is not what I advance here. Instead, the free culture that I defend in this book is a balance between anarchy and control.<sup>104</sup>

The import of Lessig's conceptualization of free culture as stated above does not mean creators should not get paid or earn financial reward for their creativity. Stallman expresses a similar view when he articulates states his support for selling CD-ROMs of free software.<sup>105</sup> This is worth emphasizing to correct the common but erroneous thinking that free culture means absence of price or free of monetary charge. Lessig agrees that the free culture idea does not preclude, neither is it against, authors or creators seeking incentives in the form of monetary reward or otherwise. The fundamental idea of the free culture advocacy emphasizes the freedom to make content available and easily accessible, so others can draw inspiration from it, improve on it, and further disseminate their improvement to keep the circle of knowledge and creativity ongoing. Lessig stresses the importance of ownership but decries absolute control.

### **2.6.1 Free Culture Stakeholders and the Intrinsic Approach to Copyright**

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<sup>103</sup> Lawrence Lessig, *The Future of Ideas, The Fate of the Commons in a Connected World*, (Toronto; New York: Random House, 2001) at 249.

<sup>104</sup> Lawrence Lessig, *Free Culture, How big Media uses Technology and the Law to lock down Culture and Control Creativity* (New York: The Penguin Press, 2004) at xvi.

<sup>105</sup> Free Software Foundation, *Free Software*, supra note 85 at 20.

The concept of free culture has become volatile and although it fits within the intrinsic approach to copyright, traces of an instrumental approach arguably abound within it. The conceptual analysis of free culture given above suggests that even within the free culture community, there is no unified understanding or approach to the concept of free culture. Within the broad spectrum of free culture, there are stakeholders who may disagree on the meaning of free culture or have different motives for identifying with free culture. As noted above, Stallman and Lessig's perspective on free culture broadly articulate the *freedom to share content* to encourage its dissemination and the promotion of learning, but marked differences exist; they both construct the concept of free culture on the foundation of copyright but offer creators the opportunity to exercise their rights differently by not exploiting the proprietary interest. The implementation of this idea contemplates that content will be shared gratis even though this is not the fundamental reason for the free culture agenda. Consequently, some stakeholders' understanding of free culture mean no fee is paid to access content. This is only permissible to the extent that the copyright holder authorizes it, and anything contrary to the terms of the licence may amount to copyright infringement. Additionally, the notion that content should be accessed without a fee negates the idea of free culture as envisaged by Stallman and Lessig because they both agree that it is permissible to create proprietary interests in creative content and earn a reward from it<sup>106</sup> in exchange for access to the content. Therefore, free culture stakeholders who posit that content ought to be free of monetary charge represents a different perspective and a more absolute approach to free culture, which ultimately means the abolition of copyright law.<sup>107</sup>

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<sup>106</sup> Lessig, *Free Culture*, supra note 96; Free Software Foundation, *Free Software*, supra note 85 at 22.

<sup>107</sup> See Joost Smiers, "The Abolition of Copyright: Better for Artists, Third World Countries and The Public Domain" (2000) 62 *Gazette*, 379-406 at online: < <http://journals.sagepub.com/doi/pdf/10.1177/0016549200062005003> > accessed June 27, 2017;



The view that calls for content to be necessarily free of monetary charge is not the only challenge among the free culture stakeholders. Even among those who subscribe to Stallman and Lessig's idea of free culture (*freedom to share*), evidence abounds to show that motives for doing so differ. Reflecting on why software developers would spend valuable time to develop code they would eventually share for free, Josh Lerner and Jean Tirole admitted that this is startling;<sup>108</sup> but they also argue that they act on the expectation of future extrinsic rewards<sup>109</sup> such as the enhancement of their reputation, which could increase visibility for greater career opportunities or status in the programming community;<sup>110</sup> this position aligns with OSS principles described above. Also, in CCL, evidence shows that some artists and creators who share their works at no cost attain commercial success through it. In fact, this has been published as part of CC success stories.<sup>111</sup> There is nothing wrong with embracing free culture and benefitting financially from it. In fact, from the examples given above, free culture itself arguably becomes a business model, which business-minded free culture stakeholders and even the content industry can exploit, directly or indirectly. My concern here is that the financial/business motive may erode the free

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Newswise, "Economist Say Copyright and Patent Laws are Killing Innovation; Hurting Economy" (2009) at online: < <http://www.newswise.com/articles/view/549822/?sc=dwhn> > accessed June 27, 2017, "Abolishing patent and copyright law sounds radical, but two economists at Washington University in St. Louis say it's an idea whose time has come. Michele Boldrin and David K. Levine see innovation as a key to reviving the economy. They believe the current patent/copyright system discourages and prevents inventions from entering the marketplace. The two professors have published their views in a new book, *Against Intellectual Monopoly*, from Cambridge University Press."

<sup>108</sup> Josh Lerner & Jean Tirole, "Some Simple Economics of Open Source" (2002) 50 *J. Indus. Econ* 197,198.

<sup>109</sup> Diane L. Zimmerman, "Copyright as Incentives: Did We Just Imagine That?" (2011) 12 *Theoretical Inquiries in Law* 28 at 43, online: < <http://www7.tau.ac.il/ojs/index.php/til/article/view/766/724> > accessed June 27, 2017.

<sup>110</sup> *Supra* note 108 at 218.

<sup>111</sup> *The Power of Open*, Bloomsbury Academic: Publishing Openly, at online < [http://thepowerofopen.org/assets/pdfs/tpoo\\_eng.pdf](http://thepowerofopen.org/assets/pdfs/tpoo_eng.pdf) > Accessed October, 26, 2016. This publication chronicles success stories of Creative Commons Licensing. Some examples are: Bloomsbury Academic - a publisher of academic journals distribute free online versions of its research publications under the non-commercial Creative Commons licence while still continuing to sell hard copies; British photographer Jonathan Worth met science-fiction writer Cory Doctorow, who was giving his book away and making money from it. Worth photographed him once and asked him what the deal was and Cory proposed an experiment. Worth signed on. They put a Creative Commons BY licence on the image and shared high-resolution copies for free online while selling signed prints at various prices and levels of exclusivity. "The most expensive sold first. No one had ever heard of me, but they were paying good money for my prints. Doctorow had given Worth a lesson on the new digital world and people's digital habits. Now I can understand how to leverage the forces of people using my images for free, says Worth. It's like putting a message in a bottle and the tides can take it anywhere under its own steam and you can take advantage of those forces; see also Mihaly Ficsor, "How did we arrive here? The Evolution of Copyright Legislation" at 13 online: <[http://www.ebu.ch/CMSimages/en/B.1%20M.%20Ficsor\\_tcm6-43830.pdf](http://www.ebu.ch/CMSimages/en/B.1%20M.%20Ficsor_tcm6-43830.pdf)> accessed December 6, 2014.

culture philosophy if it becomes a means to an end rather than an end in itself. With success story reports that CCL promises future financial rewards, it is not surprising that businesses that offer online content have evolved a “freemium” business model —i.e., offering users some part of their content for free with the expectation of converting them into paying customers later.

The discourse on free culture reveals that stakeholders who embrace the concept do not share unity of understanding and purpose. There are variants within the free culture fold and this divide is based on their perception of the concept and underlying motive. For the purpose of clarity, my reference to free culture as implemented by CC under its licensing scheme partly embraces the position of Stallman. It gives copyright owners the liberty to share their works for users to access and use as they please, and at the same time accommodates content owners who desire to make content available under certain conditions and even for a fee. In other words, free culture envisions a copyright system where there is liberty to share creative content to promote innovation and further creativity. A possible explanation for having diverse perspectives in the free culture community is due to stakeholders’ perception and approach to copyright. In the theoretical framework section of this dissertation I examine the concepts that underpin different stakeholder approaches to copyright while contrasting the instrumental and intrinsic approach to copyright.

There appears to be a connection between intrinsic approach to copyright and free culture stakeholders. To summarize, the intrinsic approach postulates that creative production is chiefly motivated by factors other than solely for monetary rewards; it further posits that creative works in themselves are valuable and ought to be accessible for use by others. This perspective of copyright aligns with the position of Stallman and Lessig, and consequently, their approach to copyright resonates with the intrinsic approach. The instrumentalist approach, on the other hand,

advocates for a copyright system that operates on the assumption that creativity is based on rewards; copyright protection is construed as a means to an end, with the end largely being financial benefit, which incentivizes creativity.

In my examination of the intrinsic school of thought on copyright, I did argue that one of the problems it may have is that de-emphasizing extrinsic rewards may undermine the value of reward for creativity. There is the possibility of having some free culture *faithfuls* who are not absolute in their support for free culture and exhibit some traits of seeking financial rewards. Others claim to be free culture stakeholders but with an instrumentalist mindset; they use free culture as a means to an end – that is, they use free culture platform principally as a means to gain financial rewards for their creative works. The CCL success story highlighted above is instructive here.

The instrumental and intrinsic justification for copyright explains why the free culture concept can hardly be absolute as different stakeholders in the free culture community have different understandings of, and divergent approaches, to copyright and its role.

### **2.6.2 Free Culture Perspectives on ICT in the Copyright System**

It is fitting at this stage to consider the impact of ICT on the copyright system from the free culture point of view. It is not debatable that the various shades of free culture agenda would embrace ICT, welcoming it as having a positive impact on the operation of the copyright system, albeit for different reasons. Despite their nuances, there is a confluence of interest in the sense that, in general terms, free culture advocates in the copyright system support the dissemination of, and free access to, information and cultural works.<sup>112</sup> The free culture perspective on ICT in

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<sup>112</sup> Despite this common ground, their motives differ as I have explained. To each of them, the ICT plays a positive role to achieve their purpose. For example, to promote the sharing of cultural works, ICT is needed for dissemination. To the free culture stakeholder who expects to get content free, digital technology is arguably the means to get access content. The incentive-

the copyright system is premised on its catalytic role in fostering free sharing and access to information.

In my analysis of the free culture advocates' perspective on ICT in the copyright system, the focus will be on social networking and CCL. In the last decade, digital technology and the internet have aided the proliferation and massive uptake of social networking. Social networking platforms undoubtedly foster the encouragement of learning and innovation. For instance, YouTube, as discussed above, is a unique social networking platform with a rich and rapidly growing repository of videos and video sharing features; a significant social benefit of YouTube is advancing access to ideas, knowledge and inspiration on an almost infinitely diverse array on subjects. People freely upload their creative content for others to watch, learn from, and be enriched by. The take-up of such content sharing platforms has increased rapidly, and they attract massive user traffic daily. The enormous scale of creation and sharing of creative works on these digital platforms by millions of users inspire ever more ideas in the creativity cycle, and this, in turn, leads to further creativity, and greater dissemination of knowledge. This aligns with the objectives of free culture stakeholders.

In the pre-ICT copyright regime, the sharing and access to cultural works could not have been envisaged at this magnitude: it exemplifies the opportunity that ICT and the internet bring to the copyright system. In addition to connecting people socially, ICT facilitates the purpose of copyright law through the advancement and dissemination of knowledge and learning. ICT presents the opportunity for stakeholders to advance their goals and interests in the copyright system. This is precisely the argument I make to support the claim that ICT presents immense opportunities for stakeholders in the copyright system. Copyright stakeholders are already taking

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oriented upcoming artiste and free culture advocate, ICT is a means to reach millions of users hoping to create awareness about her content and consequently financial reward.

advantage of this ICT-driven opportunity; for example, as we shall see, free culture stakeholders are using ICT to promote their objectives. The exponential growth in the free sharing of content under the aegis of ICT is a strong indication that free culture stakeholders welcome the impact of ICT in the copyright industry.

The same could be said of the CCL scheme, which is the next basis for reviewing free culture stakeholders' view on the impact of ICT on copyright. The CCL is discussed extensively in chapter four, but a brief explanation will serve our purposes here. The CCL is a scheme that empowers authors and creators to exercise their rights (exclusive rights granted by copyright law) differently by making it possible for users to freely access and make certain uses of their works,<sup>113</sup> which may inspire transformative use leading to follow-on creativity and innovation. The terms of the ShareAlike licence in the CCL scheme is similar to Stallman's copyleft<sup>114</sup> idea, although there are some differences.<sup>115</sup>

CCL taps directly into the huge benefits of ubiquity of the internet to promote its idea. Content owners who subscribe to the CCL scheme provide their works in digital form online; users who agree to abide by the conditions of use access the creative works online. Since its inception in 2001, the CCL has attracted large numbers of owners and users who have keyed into the concept. In 2016, 1.2 billion<sup>116</sup> CC licensed-works were found on the internet. The number of licensed-works under the CCL scheme indicates that stakeholders of free culture embrace ICT as

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<sup>113</sup> The works are licensed using various licence categories, which provide some restrictions on the use of the content. This is discussed in detail in chapter four.

<sup>114</sup> Free Software Foundation, *Free Software*, supra note 85 at 22.

<sup>115</sup> The Open Source Software specifically deals with the sharing of software codes while CCL deals with creative works generally, which could be text, audio, images, videos and multimedia creations. For more on the differences between Open Sources Licences and CCL, see Yi-Hsuan Lin et al, "Open Source Licences and the Creative Commons Framework: Licence Selection and Comparison" (2006) 22 *Journal of Information Science and Engineering*, 1-17 at online: < [https://www.iis.sinica.edu.tw/page/jise/2006/200601\\_01.pdf](https://www.iis.sinica.edu.tw/page/jise/2006/200601_01.pdf) > accessed June 27, 2017.

<sup>116</sup> Creative Commons, "State of the Commons" at online: < [https://stateof.creativecommons.org/?utm\\_campaign=2014fund&utm\\_source=carousel&utm\\_medium=web](https://stateof.creativecommons.org/?utm_campaign=2014fund&utm_source=carousel&utm_medium=web) > accessed June 15, 2017.

an opportunity to advance their interests in the copyright system. The objective of sharing and use of copyright works under CCL promotes a digital community of limitless knowledge creation and artistic expression; it utilizes the capabilities of ICT to further promote access to and use of creative works for the public interest. From the free culture stakeholders' perspective, ICT in the copyright system is seen as a positive impact as it aligns with their interest.

From the perspective of social networking platforms and CCL, ICT has offered great and undeniable opportunities to promote free culture interests and the dissemination of knowledge and creativity in the copyright system. However, it must be noted that despite these opportunities, social networking and CCL have raised some concerns. The emergence of a digital community has created a seemingly different world (online world) from the real world. This has beneficial uses as I have articulated above, unfortunately, it comes with negative consequences. Social networking platforms have been used as instruments to perpetrate child pornography, cyber-bullying, pedophilia and terrorism propaganda, etc. Taking advantage of the global reach of the internet and the anonymity it offers, perpetrators of heinous crimes, under masked identities, prey on the vulnerable and gullible. The harm that this has caused is undeniable; however, I argue that such activities pre-date digital technology and the internet and while technology may amplify and distort these activities, the root cause lies with the individuals that engage in these unlawful acts through whatever technological means are available to them. This field however is outside the scope of my research and is best left to experts for analysis.

Another concern associated with social network and the internet is the general obsession with it specifically among teenagers. Marion K. Underwood<sup>117</sup> and Robert W. Faris<sup>118</sup> in

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<sup>117</sup> Marion K. Underwood is a professor of Behavioural and Brain Sciences at the University of Texas in Dallas. <<https://www.purdue.edu/hhs/about/meet-the-clean.php>> accessed October 25, 2019.

collaboration with CNN's Anderson Cooper 360 carried out a research project involving a survey conducted among 200 13-year-olds to identify what they are doing online.<sup>119</sup> The research reveals the overarching influence of ICT on teenagers and often negative definitions of self. Teenagers' reliance on social network for affection, affirmation and approval could be the consequences of broken societal values and relationships. The findings<sup>120</sup> of the research are quite disturbing and prompt the rhetorical question - are we using technology or is technology using us? Again, this subject is not within the purview of my research project, although it is a general societal problem: the lockdown of digital technology (assuming it were possible) or labeling it "a threat" is not however a decisive way of dealing with the challenge.

Another concern (which is mostly from the content industry) is nicely articulated by Davies' comment when she says:

...two perennial problems for right owners, commercial piracy and copying for private use, have become ever more difficult to control. At the same time, digital technology offers the promise of enabling right owners to control the use of their protected material and access thereto by technical means.<sup>121</sup>

While maintaining the distinction between sale of illegal copies of works and copying for private use,<sup>122</sup> digital technology makes it easy to indulge in sale of illegal copies by some individuals or entities. To keep this in check, copyright owners use encryption technology to restrict

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<sup>118</sup> Robert W. Faris is a professor of Sociology at the University of California at Davis. <

<http://sociology.ucdavis.edu/people/rwfaris> > accessed October 25, 2019.

<sup>119</sup> Marion K. Underwood & Robert W. Faris, "Being 13: Perils of lurking on social media" at online: <

<http://www.cnn.com/2015/10/05/opinions/underwood-faris-being-thirteen-lurking-social-media/index.html> > Accessed April 9, 2016.

<sup>120</sup> Ibid. Part of the findings of the survey show that youth who are less socially secure, who might be vulnerable to feeling lonely or sad or socially anxious, likely face several perils of lurking online. First, the more time they spend lurking, the more likely they are to observe friends having a wonderful time without them. In our study, nearly half said they had felt excluded by seeing social media posts about friends doing things together without them, and more disturbingly, over a third said they themselves had posted on social media in ways that made others feel excluded.

<sup>121</sup> Davies, *Public Interest*, supra note 14 at 305-6.

<sup>122</sup> Commercial piracy is unauthorized access to and reproduction of copyright-protected content and exploiting them for commercial gain— this is prejudicial to the exclusive rights of the copyright owner and by law it is deemed to be copyright infringement, see *Copyright Act*, 1985, R.S.C., c. C-42 s.27; copyright for private use is not copyright infringement as it fall within the exception to copyright, see s.29, *Copyright Act*, 1985.

unauthorized access. However, on the one hand, while it can be argued that the use of encryption hardly makes a distinction between sale of illegal copies and permissible use, on the other hand, a counter argument could be that the use of encryption by copyright owners ensures that only authorized users access their content thereby distinguishing between legal and illegal access. Insofar as the internet and digital technology provide novel means to restrict access to content, free culture stakeholders will perceive this as an inhibition on their continued access and use. For now, it is important to keep this in mind; more discussion specifically addressing the harms of TPMs will follow in Chapter Five.

Regarding CCL, some scholars and free culture stakeholders have also expressed concerns about the arrangement, raising issues about confusion around its purpose and conceptualization, including, unsurprisingly, critical comments from Stallman.<sup>123</sup> Additionally, as noted above, some concerns have been raised about how CCL is being used as a business model for financial rewards, which, to an extent, contradicts the spirit of CCL and arguably distorts the free culture ideology.

The concerns notwithstanding, it does appear, however, that the free culture community may incline more towards the view that ICT presents, broadly speaking, more of an opportunity than a threat in the copyright industry. However, it should be acknowledged that some free culture stakeholders, particularly those whose interests and access to content may be significantly affected by technical controls, will not regard the rise of ICT as purely positive for the copyright system.

## **2.7 Content Industry Stakeholders: Origin and Concept**

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<sup>123</sup> Richard Stallman, “Fireworks in Montreal (2005-07-01 to 2005-07-05)” (2010) at online: < <https://www.fsf.org/blogs/rms/entry-20050920.html> > accessed February 20, 2018.



The content industry stakeholders' ideology is that copyright owners are entitled to financial reward for the content they create; this, in turn, incentivizes them to produce more creative works for the progress of knowledge and creativity, which ultimately serves the public interest. Sandra Aistars *et al*, while citing Justice Reed in the United States case of *Mazer v. Stein*,<sup>124</sup> note that although copyright seems to grant authors exclusive rights for personal gain, the progress of science is achieved through the proliferation of knowledge to the public.<sup>125</sup> Aistars *et al* further note that *in ensuring the protection of authors' rights, the focus of copyright law has properly been first on authors, but the ultimate effect is a benefit to society at large*.<sup>126</sup> This position arguably relies on the provision of the United States Constitution, which states that:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>127</sup>

Furthermore, a more controversial perspective of content industry stakeholders in the ICT age is captured by Halbert's view: "...information, access to it, and its control are the foundations of the new wealth made possible by the information age."<sup>128</sup> The motive to acquire content and control access to it (create artificial scarcity) for financial gain predates the ICT age and perhaps the concept of copyright itself. In chapter one, I explained that prior to the existence of a formal system recognized by copyright law through the enactment of the Statute of Anne in

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<sup>124</sup> 347 U.S. 201, 219 (1954), "the economic philosophy behind the clause empowering Congress to grant patents and copyright is the conviction that the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts. Sacrificial days devoted to such creative activities deserve reward commensurate with the services rendered." With due respect to Justice Reed, I disagree with his opinion that incentivizing individual authors is *the best way* to achieve public welfare or public interest. I acknowledge that, as at that time (1954), this may be the prevalent view, it cannot be said to be the best way now, certainly not in the era of digital technology. It could be *one of the ways*, but certainly not the best way.

<sup>125</sup> Sandra Aistars *et al*, "Copyright Principles and Priorities to Foster a Creative Digital Marketplace" (2016) 23 Geo. Mason L. Rev. 769 at 771.

<sup>126</sup> *Ibid.* at 771-2; see Terry Hart, "Copyright Is for the Author First and the Nation Second", Copyhype, (2012) at online: < <http://www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/> > accessed June 19, 2017.

<sup>127</sup> *United States Constitution*, Art. 1, §8, cl.8, 1789.

<sup>128</sup> Halbert, *The State of Copyright*, *supra* note 47.

1710, authors did manage to secure some remuneration for the content they created. Salathiel Masterson's view suggests that there is evidence that in ancient centers of learning, authors secured compensation for their works<sup>129</sup> in Greece. Although there was no copyright law, the author or creators' ownership of the work and value in it was appreciated to the extent that it attracted financial rewards.

Additionally, in chapter one, I gave a detailed analysis of the origin and rise of the Stationers' Company, which, according to Daniel Gervais, can be regarded as the forefather of the present-day publishers,<sup>130</sup> in other words, content industry advocates. The exploits of the Stationers' Company in the 16<sup>th</sup> century to monopolize and control the book trade precedes the control of access to content, as the content industry stakeholders advocate. In fact, it can be argued that the recognition of a proprietary interest in creative works started with the Stationers' Company which had the approval and support of the monarch through the royal charter to achieve their business-oriented interest in creative content, then mostly book publishing. As we saw, even after the abolition of the monopoly rights of the Stationers' Company and the enactment of the Statute of Anne, the Stationers desperately wanted to revive their monopoly by invoking common law rights through litigation.

Arguably, the origin of the content industry is therefore traceable to the Stationers' Company's advocacy and activities both before<sup>131</sup> and after<sup>132</sup> the enactment of the Statute of Anne; their aims and those of the modern-day content industry stakeholders remain largely the same. The similarities include an incentive-based system (financial reward), creation of artificial

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<sup>129</sup> Salathiel Masterson, "Copyright: History and Development" (1940) 28 California L. Rev. 620 at 620, 621. Instances of compensation to orators were not infrequent and orators were not in the habit of writing for free.

<sup>130</sup> Daniel J. Gervais, "A Canadian Copyright Narrative" (2009) 21 I.P.J. 269 at 274.

<sup>131</sup> Lyman Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 28-41 and 43-77.

<sup>132</sup> *Ibid.* at 143-179.

scarcity through controlled access to content, support for strict copyright law and longer terms of protection, and the power and influence of such industries.<sup>133</sup>

Just like the free culture community, the content industry stakeholders' approach to copyright is largely influenced by their underlying ideology (instrumental approach) and understanding of copyright.

### **2.7.1 Content Industry Stakeholders and the Instrumental Approach to Copyright**

The term *content industry* is rather encompassing and broad. According to Haggart's classification of copyright stakeholders in Canada, the category (Protection Groups<sup>134</sup>) is made up of content industry and creator groups. As noted, multinational corporations dominate the content industry with links to the United States and a shared tendency to advocate for stronger copyright laws.<sup>135</sup> Creator groups, as the name implies, are those who actually create the content, and according to Haggart:

Traditionally, actual creators have served two purposes in the copyright debate. On the one hand, creators were used to legitimize industry demands for greater copyright protection to copyright owners, even though this protection does not necessarily translate into money revenues for the artists. On the other hand, creator groups have actively lobbied for greater rights in their own work. Industry and creator groups have in the past formed temporary coalitions, such as the Copyright Coalition of Creators and Producers<sup>136</sup> in the run-up to the 2005 copyright bill.<sup>137</sup>

The content industry stakeholders (the powerful multinational corporations) have lobbied their cause leveraging their relationship with creators and authors as a means to achieve their aim without much benefit going to the authors or creators themselves. This comes as no surprise

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<sup>133</sup> Haggart, *Copyright*, supra note 78.

<sup>134</sup> Ibid. at 72.

<sup>135</sup> Ibid. at 73.

<sup>136</sup> Simon Doyle, *Prey to Thievery: The Canadian Recording Industry Association and the Canadian Copyright Lobby, 1997 to 2005*, (Master of Journalism, Carleton University, 2006) [unpublished].

<sup>137</sup> Haggart, *Copyright*, supra note 133 at 168.

because these same tactics was employed centuries ago. The content industry stakeholders' subtlety in legitimizing their interests can be traced back to the lobbying tactics used by the Stationers' Company when, after several lobbying efforts failed, they put forward authors' interests to justify their demands.<sup>138</sup> Although, according to Haggart, the content industry and creators or authors forged a coalition in the past, such an alliance may not always last as their interests differ in some areas. For example, while content industry stakeholders favour greater copyright and the use of TPMs to restrict access, creators tend to support strong protection for performers but not necessarily TPMs.<sup>139</sup> In Canada, the preferences of creator groups tend to diverge depending on linguistic and geographical interest:

...Creator groups tend to divide along linguistic and provincial groups, with Quebec-based creators and performers forming their own associations. Both traditional English-and French-French-Canadian creator groups, however generally support WIPO implementation (because, besides other provisions, the WIPO Copyright Treaty contain provisions that enable content creators and/or owners use TPMs to restrict access to content) ...while primarily domestically focused creator groups also maintain loose affiliations with foreign and international groups.<sup>140</sup>

For the purpose of my research, I will focus on the content industry (thinking, in particular, of national and multinational corporations); however, individual creators and authors may also be referenced if the need arises, at least to show a different perspective of the broad Protection Group category. The common interest that content industry and creators/authors share is that

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<sup>138</sup> I noted in chapter one that "Defoe's rhetoric, it has been argued, influenced the Stationers change of strategy; quoting Mark Rose, Ronan Deazley states "...it was Defoe's agitation on behalf of authorial rights that provided the London stationers with a new strategy for pursuing their own interest, M Rose, *Authors and Owners: The Invention of Copyright* (London, Harvard University Press, 1993) at 35. "Cited by Ronan Deazley, *The Statute of Anne, On the Origin of the Right to Copy*, (Oxford: Hart Publishing, 2004) at 32.

<sup>139</sup> Haggart, *Copyright*, supra note 137.

<sup>140</sup> Ibid. "The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), for example, works internationally through the International Federation of Actors, and was deeply involved through the FIA in the negotiations that led to the WPPT" (Garry Neil, policy adviser, ACTRA, interview by Haggart, Toronto, 19 May, 2008).

both generally approve of the rewards system of copyright, based on their underlying perception of copyright.

The basis of the content industry stakeholders' copyright approach is rooted in the instrumental approach to copyright discussed in the introduction of this dissertation. The crux of this approach embraces the proposition that providing an economic incentive through a system of intellectual property is crucial to progress without which there would be less motivation to create.<sup>141</sup> The content industry stakeholders position is that any reduction in the level of protection would invariably lead to diminished creativity.<sup>142</sup> This explains why the content industry stakeholders make financial rewards an integral objective of their approach to copyright. The content industries claim that the ultimate aim of their approach to copyright is to serve the public interest in the sense that incentivizing creativity leads to more creative works being made available to the public<sup>143</sup> to inspire follow-on creativity.

Based on their interest in financial rewards, content industry stakeholders are therefore business-minded copyright stakeholders who use various strategies to achieve their business goals. It would not be correct to make an absolute claim that all content industry and individual creators/authors are business-focused (that is, always expect financial reward), but neither would this category of "content industry stakeholders" qualify as free culture advocates. However, there is proof that they do exhibit some traits of free culture while the motive for doing so could speculatively be expectation of financial rewards. As alluded to in the discussion of free culture stakeholders, there is a trend for content industry and creators/authors to use the free culture

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<sup>141</sup> Deborah Halbert, *The State of Copyright*, supra note 128 at 12.

<sup>142</sup> Ibid.

<sup>143</sup> Sandra Aistars et al, *Copyright Principles*, supra note 125.

concept presumably for the benefit of their business motives<sup>144</sup> among other reasons. Some content industry and individual creators have used the CCL (free culture platform) as a *business model* to gain financial rewards. While the dynamics of copyright stakeholders could possibly allow for stakeholders who genuinely are partly free culture and partly rewards-inclined, there are clearly those who are fully rewards-inclined but use the CCL as a stepping stone to financial reward.<sup>145</sup> This creates an instrumentalist overlap between free culture stakeholders and content industry. It also provides proof that, in the digital era, the categorization of copyright stakeholders may not be absolute due to varying and shifting motives, which continues to evolve. Perhaps this blurred distinction between the free culture and the content industry stakeholders could prove positive in the sense that it could help prevent or reduce extremities on both spectrums.

This analysis shows that despite the content industry's adherence to the instrumentalist approach to copyright, they may, at some point, identify (genuinely or as a means to an end) with the intrinsic approach (free culture) to copyright.

## **2.7.2 Content Industry Perspective on ICT in the Copyright System**

One of the most compelling impacts of ICT in the copyright system is that it enables the ubiquity of content through digitization. This can be referred to as the democratization of content: making content available to as many people as possible. This trend distorts the existing

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<sup>144</sup> The Power of Open, *Bloomsbury Academic*, supra note 111.

<sup>145</sup> This trend raises several issues. First, it may be a demonstration of the misuse of CCL as different from what was originally intended by Lessig. Just like Stallman's free culture idea was/is misunderstood to mean absence of price. Secondly, it could be that the promoters of CCL themselves are responsible for this misconception because of the way they have promoted the licences. From the publication (supra note 111), showcasing the success of CCL in the form of financial rewards gives the impression that it can be used as business model for creators and authors to make money. Third, it may be proof that the proposal I make in this dissertation can actually work. That is, in the age of digital technology, copyright stakeholders can use ICT to achieve their different interests without much friction. Clearly, free culture advocates are benefitting from CCL as well as rewards-inclined users who subscribe to the licences.

business model for the content industry<sup>146</sup> and consequently can be perceived by it as undermining the model. Another reason why the content industry frowns at the impact of ICT on the copyright system is that it enables unauthorized sale of illegal copies of works.<sup>147</sup> This emergence of ICT and its impact on the copyright system has prompted three different perspectives or responses from the content industry.

The first response captures the industry's embrace of the beneficial aspect of ICT, which is exploiting online-based business models to generate revenue. Second, is the usage of a tactic that William Patry<sup>148</sup> calls *moral panic* to create propaganda that ICT poses a threat to copyright and should be checked. The third response is that the content industry is using technology to restrict access to content in a bid to restore their scarcity-based business model through the use of TPMs.

The first response can be regarded as the primary response of the content industry to ICT, which leverages the immense opportunities that ICT offers to make their content ubiquitous, and easily accessible to millions of users around the world and increase their revenue generation. While digital technology may have contributed to toppling the content industry's traditional business model, paradoxically, the same digital technology provides immense opportunities for financial gain. Digital technology provides online-based business models that enable the content industry to reach millions of users with low production and distribution costs while generating revenue. In the music industry, iTunes and Amazon are selling online music, in the film industry, Netflix, Amazon Prime, Microsoft Xbox, HBO Go, Xfinity and Hulu Plus are providing online

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<sup>146</sup> Haggart, *Copyright*, supra note 137 at 60; Davies, *Public Interest*, supra note 121; Halpern, *The Digital Threat*, supra note 56.

<sup>147</sup> Halpern, *The Digital Threat*, supra note 55.

<sup>148</sup> See generally William Patry, *Moral Panic and the Copyright Wars* (Oxford University Press, New York, 2009).

video services, and in book publishing, the advent of Apple's iBooks, Amazon's Kindle<sup>149</sup> are examples of business models that digital technology made possible.

On the one hand, while the emergence of ICT serves as a boost to the content industry's business opportunities, a major challenge it presents is that it also enables unauthorized access to and sale of content. Naturally, the content's industry's response would be to devise means to check illegal downloading, which is justifiable as it poses a threat to their financial interests and investment. Unfortunately, this has led to branding ICT as a threat to copyright enforcement. I examine a classical example to illustrate this point. As previously discussed, centuries before the emergence of digital technology, reprographic and sound recording technologies threatened the interest of copyright owners.<sup>150</sup> Similarly, and not too far in history, branding technology as a threat to the content industry was seen in the 1984 United States case of *Sony Corp. v. Universal City Studios*.<sup>151</sup> Sony had developed a technology (videotape recorders) that enabled viewers at home to record programs for later viewing (i.e. time-shifting). Universal Studios resisted this technology on the ground that recording programs for which it owned copyright amounted to copyright infringement. The case was litigated all the way to the Supreme Court. In a bid to stifle this technology and prior to the decision of the Supreme Court, Jack Valenti<sup>152</sup> on April 12, 1982, testified before the US Congress on the alleged dangers posed to the motion picture industry by the videotape recorders and called it a troubling assault.<sup>153</sup>

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<sup>149</sup> Stephen A. Merrill & William J. Raduchel eds., *Copyright in the Digital Era: Building Evidence for Policy* at online: < <http://www.nap.edu/download/14686>> (Washington DC: National Academies Press: 2013) at 23, 25 and 26 accessed June 26, 2017.

<sup>150</sup> Haggart, *Copyright*, supra note 133 at 60.

<sup>151</sup> *Sony Corp. v. Universal City Studios* 464 U.S. 416 (1984) at online: < <https://supreme.justia.com/cases/federal/us/464/417/>> accessed June 24, 2017.

<sup>152</sup> Jack Valenti was a longtime president of the Motion Picture Association of America (MPAA). During his 38-year tenure in the MPAA, he created the MPAA film rating system, and he was generally regarded as one of the most influential pro-copyright lobbyist in the world. Wikipedia, "Jack Valenti" at online: < [https://en.wikipedia.org/wiki/Jack\\_Valenti](https://en.wikipedia.org/wiki/Jack_Valenti)> accessed June 24, 2017.

<sup>153</sup> William Patry, *Moral Panic*, supra note 148 at 144.



Jack Valenti, with clever rhetoric and the use of moral panic, attempted to influence Congress to silence the technology; fortunately, the apex court ruled that the recording of the programs did not constitute copyright infringement but fair use.<sup>154</sup> The Supreme Court also held that the manufacturer of the videotape recorder was not liable for infringement.<sup>155</sup> Contrary to the fear that the videotape recorder was a threat to the movie industry, the popularity of the technology significantly benefited the industry through the sale of pre-recorded movies.<sup>156</sup> This suggests that the purported claim of labeling digital technology as a bane to the copyright industry is somewhat short-sighted. Pamela Samuelson notes that the advocacy to silence technology by some publishers is intended to control not only public and commercial use of their copyright materials, but also all private uses as well.<sup>157</sup> They claim this would better fulfill the constitutional purpose of copyright on the basis that the more financial benefit to them, the greater their incentive to make works.<sup>158</sup> Although Samuelson notes that the Sony Betamax thwarted the effort to silence technology,<sup>159</sup> it did not entirely extinguish the claim that technology poses a threat to the copyright industry.

There are clearly genuine concerns about unauthorized access to content on the internet but a generalization that the internet and ICT threaten the business of copyright corporations may not represent an objective analysis of the dynamics of digital technology. I believe such a one-sided argument stem from the concern that copyright may no longer have relevance if ICT is not checked. Lessig may have alluded to this when he commented that the concern is that cyberspace

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<sup>154</sup> *Sony Corp. v. Universal City Studios*, supra note 151.

<sup>155</sup> Ibid.

<sup>156</sup> Wikipedia, "Sony Corp. of America v. Universal City Studios Inc.", at online: <[https://en.wikipedia.org/wiki/Sony\\_Corp.\\_of\\_America\\_v.\\_Universal\\_City\\_Studios,\\_Inc.](https://en.wikipedia.org/wiki/Sony_Corp._of_America_v._Universal_City_Studios,_Inc.)> accessed June 24, 2017.

<sup>157</sup> Pamela Samuelson, "The Copyright Grab" online: <<http://archive.wired.com/wired/archive/4.01/white.paper.html?pg=1&topic=>at> 1, accessed June 24, 2017.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

will become the arena where copyright can be defeated.<sup>160</sup> He further buttresses his point by asserting that using MP3 technology, for instance, a CD recording can be significantly compressed and in seconds emailed to one hundred friends worldwide.<sup>161</sup>

It is important to acknowledge as well that technological applications come with inevitable concerns relating to new modes of infringement.<sup>162</sup> It is undeniable that ICT and the internet have been used to perpetrate illegal activities. On this point, Peter Yu, quotes excerpts from a report published by MarkMonitor (a company that specializes in helping companies protect their brand online) in January 2011, which states that:

...traffic to sites suspected of offering pirated digital content or counterfeit goods amounted to more than 146 million visits per day and 53 billion visits per year. According to the report, the top-three websites classified as “digital piracy”- rapidshare.com, megavideo.com, and megaupload.com- collectively generate more than 21 billion visits per year.<sup>163</sup>

The statistics presented here appears quite alarming and raises cause for concern from the perspective of copyright owners. However, while not asserting that the statistics could be false, the possibility of bias in the reporting could exist and some comments on it is necessary. My examination of the reporting is to consider the objectivity of the reporting since some of MarkMonitor’s clients are members of the content industry. Firstly, MarkMonitor is a corporate organization and one of its service offerings to corporate organizations and owners of copyright works is to police their copyright protected content online and identify illegal downloading.<sup>164</sup> Their reporting on file sharing could be geared towards corporate interest. Secondly, the figures they quoted refer only to visits and is not disaggregated into actual downloads or quantified in

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<sup>160</sup> Lawrence Lessig, *Code and other laws of cyberspace* (New York: Basic Books, 1999) at 49.

<sup>161</sup> *Ibid.*

<sup>162</sup> Mtima & Jamar, *Copyright Social Justice*, supra note 70 at 79.

<sup>163</sup> Peter K. Yu, “Trade Agreement Cats and the Digital Technology Mouse” in Bryan Mercurio & Ni Kuei-Jung, eds. *Science And Technology In International Economic Law: Balancing Competing Interests* (New York: Routledge, 2014) at 7.”

<sup>164</sup> MarkMonitor, Better Brand Protection, at online: < <https://www.markmonitor.com/> > accessed February 20, 2018.

terms of revenue losses to copyright owners. While there are genuine cases of copyright infringement, caution must be applied in the interpretation of the data. On this subject of using technology to perpetrate infringement, Lateef Mtima and Steven Jamar rightly noted that such concerns are legitimate but must be evaluated from a broader perspective<sup>165</sup> to avoid exaggerating the issue.

The issue of unauthorized use of copyright content is a sensitive issue in the copyright system generating divergent viewpoints, as we have seen. Caution must be taken to properly contextualize the issue and not to brand every internet user as a potential copyright infringer and so to discount the benefits that ICT brings. Copyright owners claim that unauthorized access to creative works dampens their motivation and incentive to create more works and leads to loss of revenue. This claim has been challenged by a 2010 survey on File-Sharing and Copyright, which reports that:

As our survey indicates, the empirical evidence on the sales displacement is mixed. While some studies find evidence of a substitution effect, other findings, in particular, the papers using actual file-sharing data, suggest that piracy and music sales are largely unrelated. In contrast, there is clear evidence that income from complements has risen over the years. For example, concert sales have increased more than music sales have fallen...Looking at the aggregate output - the number of recordings, books, and movies produced every year - we see no evidence that file sharing has discouraged the production of artistic works. However, as with income from complementary goods, aggregate statistics needs to be interpreted with some care. For example, digital formats not only encouraged file sharing; digital technology also lowered cost of producing movies and music and they allowed artists to reach

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<sup>165</sup> Mtima & Jamar, *Copyright Social Justice*, supra note 162. The authors argue that there is a social justice (access to information and knowledge by the public) value in digitizing textual works. They argue that the Google Books Library Project is a means to foster this objective. Wikipedia, "The Google Books Library Project" at online: <[https://en.wikipedia.org/wiki/Google\\_Books\\_Library\\_Project](https://en.wikipedia.org/wiki/Google_Books_Library_Project) explain google book project > Accessed March 22, 2016. "The Google Books Library Project is an effort by Google to scan and make searchable the collections of several major research libraries. The project, along with Google's Partner Program, comprise Google Books (formerly Google Book Search). Along with bibliographic information, snippets of text from a book are often viewable. If a book is out of copyright and in the public domain, the book is fully available to read or to download."

their audience in novel ways...As this essay has made clear, we do not yet have a full understanding of the mechanisms by which file sharing may have altered the incentives to produce entertainment. However, in the industry with the largest impact - music - consumer access to recordings has vastly improved since the advent of file sharing. Since 2000, the number of recordings produced has more than doubled. In our view, this makes it difficult to argue that weaker copyright protection has had a negative impact on artists' incentives to be creative.<sup>166</sup>

The findings presented by Felix Oberholzer-Gee and Koleman Strumpf show that the effect of file sharing on revenue is mixed,<sup>167</sup> which I interpret to mean that the results are inconclusive. They further state that music piracy can explain as much as one-fifth of the recent decline industry sales;<sup>168</sup> but this decline in sales has been judged to be insufficient to weaken authors' incentive to create new works.<sup>169</sup>

While the findings of the survey seem to present empirical evidence and do not speculate or exaggerate any point, neither do they make any absolute claim; careful scrutiny must therefore be applied before arriving at a conclusion based on empirical evidence. The recent case of *Re exp. British Academy of Songwriters, Composers, and Authors v. Secretary of State for Business, Innovation And Skills*<sup>170</sup> is instructive; in this case, the court held that Secretary of State's reliance on empirical evidence to arrive at a decision cannot be justified because the evidence was inadequate/manifestly inadequate.

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<sup>166</sup> Felix Oberholzer-Gee & Koleman Strumpf, "File-Sharing and Copyright" in Josh Lerner & Scott Stern eds., in *Innovation Policy and the Economy* online: < <http://www.nber.org/chapters/c11764.pdf>> (Chicago: University of Chicago Press, 2010) at 49-50.

<sup>167</sup> *Ibid.* at 21.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> [2015] EWHC 1723 at 83 para. 232. The case was an application for judicial review of the decision of the Secretary of State which sought to introduce a new section ("Section 28B") into the Copyright, Designs and Patents Act 1988 ("CDPA 1988") which has the effect of creating an exception to copyright based upon personal private use. Henceforward, any person who legitimately acquires content (music, film, books) can copy that work for his or her own private use without infringing copyright. It can be copied onto other formats or stored in the cloud provided it is for private, non-commercial use. It can now be reproduced without even the theoretical risk of that person being pursued as an infringer of copyright. That purchaser cannot, however, under the exception, copy that content and give it to a family member, friend or colleague and cannot copy it for any commercial use.

The conception that ICT is a threat to the copyright system or the content industry stakeholders raises genuine issues, which I have highlighted. At the same time, this claim often arises from a skewed understanding of the purpose of enacting copyright law itself. Digital technology is not simply perceived as a threat to the copyright because it allegedly leads to loss of revenue, but more because it challenges the content industry's position on copyright, which is based on the propertization ideology and economic rationalization of the purpose of copyright law.<sup>171</sup>

One of the consequences of the perceived threat of ICT to copyright enforcement is the use of TPMs by the content industries. (My treatment of TPMs here will be succinct, more details will be provided in chapter five.) TPMs mean any encryption system designed to prevent unauthorized access to digital content. The content industry, aware of the ease with which ICT enables access to and copying (both legal and illegal) of cultural works, responded by using technology itself to restrict access to content. This perspective of the content industry's response to ICT in copyright has generated much debate in Canadian copyright law reform, as in other jurisdictions such as the United States. A major criticism against the use of TPMs is that they tend to undermine users' right to access creative works for fair use<sup>172</sup> by not distinguishing between the right to fair use and unauthorized use or sale of illegal copies of creative content. The validity of this criticism would rest on whether it is technologically and practically possible for TPMs to distinguish copying for private use from illegal copying for commercial sale. Additionally, it is important to consider the justification to access TPM-protected works since there is, as I have previously emphasized, no exclusive right to access in copyright law. We will

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<sup>171</sup> See generally my discussion on the purpose of copyright law in chapter one.

<sup>172</sup> *Copyright Act*, 1985, R.S.C., c. C-42 s.29 (1) & (2). In Canada, it is called fair dealing.

return to these issues in Chapter Five when I examine the use of TPMs from the perspective of both the content industries and its critics.

The discourse on the impact of ICT on the copyright system should be assessed dispassionately. There is the tendency for copyright stakeholders to express a one-sided view to fulfill their interests. For example, free culture advocates, while strongly emphasizing the need for free sharing of content, may not adequately acknowledge the fact that content industry stakeholders also have a legitimate claim of entitlement to rewards. Similarly, the exploitation of copyrighted works by the content industry stakeholders ought to be sensitive to copyright exceptions. In my view, if this trend continues, the controversy amongst copyright stakeholders will remain a vicious circle with no sign of abating.

## **2.8 Conclusion**

In this second chapter, I have attempted to examine ICT in the copyright system and through the lens of copyright stakeholders. ICT and has become a highly contentious issue in the copyright landscape in Canada and other jurisdictions. I examined the early evolution of technology to its present digital and ever-evolving state. With the advent of digital technology and the internet came unprecedented feat of expressing content in digitized form. This gave individuals enormous ability to create, edit, access and distribute creative content across the world.

On the one hand, while digital technology and the internet are hailed as tremendous opportunities for creativity to thrive, its effect on the business model for reward-seeking copyright businesses appeared to be unwelcome. By making content readily available to users, ICT challenged the scarcity-based business model of business entities that provided content for

a fee. This impact of ICT in the creative industry has been a source of unsettled debates among copyright stakeholders. To properly situate the ICT-copyright discourse, I broadly discussed stakeholders in the copyright industry; then, for the purpose of my research, I narrow my analysis of stakeholders to *free culture* and *content industry* stakeholders. I connect the stakeholders' interest in copyright to their underlying justification and approach to copyright. Here, I show the intersection between my discussions in the theoretical framework section of this dissertation and the stakeholders' interest and the reason for their different inclinations and perspectives on copyright. The desire for both the free culture and the content industry stakeholders to achieve their interests in a copyright system influenced by digital technology seemingly creates a problem as their interests tend to differ.

From my analysis above, it would help if both free culture and content industry would embrace ICT as bringing both opportunities and challenges instead of simply as a challenge or threat to their interests. Digital technology and the internet have brought challenges to both the free culture and the content industry; it has also created immense opportunities to optimize their legitimate interests. It is debatable to evaluate who suffers more ICT-driven challenges between the free culture and the content industry stakeholders; what could be helpful is for copyright stakeholders to adapt to the use of ICT in a non-competitive manner to achieve their goals in the copyright system. Frankly, both free culture and content industry stakeholders do explore opportunities in ICT as a means to achieve their goals and interests; however, the influence of technology created a paradigm shift in the traditional copyright business model. The ease of access to and dissemination of content in the digital space has significantly weakened content industry's market structure. The creation of scarcity is seriously compromised, and the content industries argue that this is a negative trend as it discourages further creativity and leads to loss

of revenue. As the free culture community, aided by ICT, grows strong in empowering users to access content, the content industries perhaps see this as a threat and apply all their resources to *control* this trend – this becomes a source of friction for both stakeholders. However, this reveals that ICT can play a role in regulating the activities in the copyright system besides copyright law. In fact, copyright law is fast becoming inadequate in the regulation of copyright in the digital context. Consequently, one of the suggestions I make in chapter six is to accommodate *regulatory pluralism*, that is to allow the private ordering and multistakeholder initiatives to drive activities in the copyright system.

The issues discussed in this chapter show how the emergence of digital technology creates new opportunities for both the content industry and the free culture stakeholders in the copyright but not without their attendant challenges. These analyses are fundamental for what follows in the next chapter (chapter three) in which I examine the impact of ICT on copyright law reform both globally and, specifically, in Canada.



## **CHAPTER THREE**

### **CANADA’S IMPLEMENTATION OF THE WIPO INTERNET TREATIES**

Chapter three examines Canada’s copyright law reform in the ICT era. The specific focus is the copyright law reforms orchestrated by the WIPO Internet Treaties, which sought to set the legal framework to address the challenges and opportunities for copyright in the digital landscape. This chapter has two parts. Part I explores the genesis and development of the WIPO Internet Treaties, what interest(s) it sought to serve and the intriguing debates surrounding its provisions, especially the controversial TPM and anti-circumvention provisions and their implementation approach. Part II analyzes Canada’s various failed attempts to implement the WIPO Internet Treaties until it finally passed the Copyright Modernization Act (CMA) of 2012. An examination of the reforms made by the CMA aims to ascertain whether it creates the much needed balance in the copyright system. I further analyze whether the CMA reforms favour the content industry or the free culture community or both; and how well they prioritize the purposes of copyright, the public interest and balance within the copyright system.

#### **PART I**

#### **ORIGIN AND DEVELOPMENT OF THE WIPO INTERNET TREATIES**

### **3.0 Background to The WIPO Internet Treaties**

The WIPO Copyright Treaty (WCT)<sup>1</sup> and WIPO Performances and Phonograms Treaty (WPPT)<sup>2</sup> generally referred to as WIPO Internet Treaties (hereinafter “WITs”) were adopted in

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<sup>1</sup> World Intellectual Property Organization, WIPO Copyright Treaty, December 20, 1996, at online: < [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295157](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157) > Accessed May 25, 2018. The WCT entered into force on March 6, 2002. [WCT].

Geneva on December 20, 1996. Ideally, since WIPO membership consists of member states, it is expected that input from these countries would be required in the drafting of treaties such as the WITs that have the potential to shape the international regulation of copyright. Although several countries made contributions to the process, the United States' input dominated and largely shaped the contents of the WITs. Background activities by the United States government revealed its scheme to push its national copyright agenda at the international level, which later manifested in the WITs and served as the basis for the enactment of Digital Millennium Copyright Act (DMCA) in 1998 in the United States. The United States' influence in the WITs is relevant to my research, first, because it ties into subsequent analysis of the United States' influence over Canada's implementation of the WITs. Additionally, internally in the United States, there were conflict of interests between the content industry and the free culture stakeholders; the free culture stakeholders opposed the content industry's approach to copyright reform in the ICT era.

Besides the United States being at the vanguard of championing the reform of copyright in the digital milieu in the early 1990s, WIPO was similarly motivated. According to Mihaly Ficsor, by the time the Trade-Related Aspects of Intellectual Property Rights<sup>3</sup> (TRIPS) Agreement was signed in 1994, the internet had already begun disrupting activities in the traditional copyright setting.<sup>4</sup> Ficsor further notes that:

The international copyright community was unable to celebrate the TRIPS Agreement and sit idle for a long period of time. The

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<sup>2</sup> World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, December 20, 1996 at online: < [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477) > Accessed May 25, 2018. The WPPT entered into force on March 6, 2002 [WPPT].

<sup>3</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Signed Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C. TRIPS is an international agreement between member nations of the World Trade Organization. It stipulates the minimum standard and framework for the regulation of intellectual property by member nations.

<sup>4</sup> Mihaly Ficsor, "The WIPO "Internet Treaties:" The United States as the Driver: The United States as the Main Source of Obstruction – As seen by Anti-Revolutionary Central European" (2006) 17 Marshall Rev. Intell. Prop.L.16 at 19 at online: < <https://repository.jmls.edu/cgi/viewcontent.cgi?article=1113&context=ripl> > accessed May 25, 2018.

phenomena of digital technology and the Internet raised important new questions that required urgent responses. It was impossible to reopen the TRIPS negotiations to address these new questions raised by digital technology and the Internet.<sup>5</sup>

WIPO had made attempts to deal with the issues raised by the new technologies with regards to copyright by establishing two committees charged with the responsibility of dealing with copyright and rights of performers and producers of phonograms.<sup>6</sup> However, according to Ficsor, these committees could not make much progress for several years as it was thought their work may interfere with TRIPS negotiations,<sup>7</sup> which was ongoing at that time. After the adoption of TRIPS, the WIPO committees accelerated their assignment.<sup>8</sup>

It was obvious that despite TRIPS, a vacuum was opening up in the area of copyright due to the emergence of digital technology and the internet. WIPO's foresight in establishing a regulatory framework for copyright in the digital landscape is evinced in the committee of experts it set up to address the issue. The committees of experts were set up as early as 1985; in fact, Ficsor reports that in February 1985, WIPO and UNESCO organized a joint meeting with the Group of Experts on the Copyright Aspects of the Protection of Computer Software.<sup>9</sup> The background work initiated by WIPO in preparation for what later became the WITs was at best rudimentary; the contributions of the United States according to Blayne Haggart, were therefore able to shape, but not determine completely, the negotiations' outcome.<sup>10</sup>

### **3.1 The United States and Pre-WIPO Internet Treaties**

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ficsor, *The WIPO Internet Treaties*, supra note 4.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. at 17, footnote 8.

<sup>10</sup> Blayne Haggart, *Copyright: the global politics of digital copyright reform* (Toronto: University of Toronto Press, 2014) at 93 [Haggart, *Copyright*].

The activities and interests of the United States in copyright regulation were largely domestic in the sense that as at that time, its copyright industry did not expand internationally but mainly operated within the United States. However this changed when the United States joined the global copyright community by acceding to the Berne Convention<sup>11</sup> in 1988 and it entered into force in the United States on March 1, 1989;<sup>12</sup> the United States went from being isolated to an international influencer in copyright.<sup>13</sup> The United States' involvement in facilitating the creation of international norms to regulate activities in the face of ICT originally started out as a move to create a national legislation in the United States. In 1993, the Bill Clinton-led United States government created the Information Infrastructure Task Force (IITF) with the core mandate of regulating the "Information Superhighway."<sup>14</sup> Additionally, the IITF included a Working Group on intellectual property and it had the responsibility of formulating copyright policy in the digital landscape in the United States.<sup>15</sup> The Working Group was chaired by Bruce Lehman<sup>16</sup> and in July 1994 the IITF published a Green Paper,<sup>17</sup> which was supposed to focus on industrial property rights;<sup>18</sup> but of the 141 page Green Paper, only twelve covered patents,

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<sup>11</sup> Berne Convention for the Protection for Literary and Artistic Works was adopted in 1886. According to WIPO the Berne Convention "provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them" at online: < <https://www.wipo.int/treaties/en/ip/berne/> > accessed April 22, 2019.

<sup>12</sup> Supra note 7 at 18.

<sup>13</sup> Ibid. at 16.

<sup>14</sup> Haggart, *Copyfight*, supra note 10 at 110.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid. Haggart reports that at that time, Bruce Lehman was the undersecretary of commerce for intellectual property, director of the Patent and Trademark Office, and a former representative of the computer software industry on copyright issues. He was also the main US representative to WIPO. A forceful personality described by one of Haggart's interviewee as a "pretty tyrant," he also knew more copyright than anyone else in government. Haggart's short but telling description of Bruce Lehman's background seems to suggest that it would not be wrong to call him a copyright maximalist and content industry supporter. The relevance of pointing this out is that his ideology and approach to copyright would influence his copyright policy ideas.

<sup>17</sup> Bruce Lehman, "Intellectual Property and the National Information Infrastructure – Preliminary Draft of the Working Group on Intellectual Property Rights"(1994) at online: < <http://cool.conservacion-us.org/bytopic/intprop/ipwg/> > accessed May 29, 2018.

<sup>18</sup>Ficsor, *The WIPO Internet Treaties*, supra note 7 at 21.

trademarks and trade secrets.<sup>19</sup> The rest of the pages were devoted impact of digital technology on copyright and the possibility of using technological measures and rights management information to protect copyright owners' interests in the digital landscape.<sup>20</sup>

As early as 1993, the Green Paper, being the first strategy document produced by the Working Group under the auspices of Lehman, already articulated the idea of introducing restriction of *access* to and *use* of digitized content. Specifically, the Green Paper stated that unauthorized access to copyrighted works can be denied through technologically restricting access to the source of the work and by limiting the manipulation of the electronic file embodying the work.<sup>21</sup> The Green Paper further elucidated on specific ways to restrict access to and use of digital content thus:

[...] control over protected works can be exerted through control measures tied to the electronic file containing the work. One type of restriction can be implemented through "rendering" or "viewing" software. Such systems require (1) a proprietary or unique file format that can only be read by certain software and that is developed or controlled by the information provider and (2) software that incorporates both a "control" measure to prevent viewing or use of a work without authorization from the information provider and "manipulation" functions to permit the user to view or use the work. Rendering or viewing software can be written to deny access if the user enters unauthorized identification or an improper password [...] Another type of restriction is encryption. In its most basic form, encryption amounts to a "scrambling" of data using mathematical principles that can be followed in reverse to "unscramble" the data. Encryption technologies can be used to deny access to the work in a usable form. File encryption simply converts a file from a manipulatable file format (e.g., a word processor document or a picture file that can be opened or viewed by appropriate general purpose software packages) to a scrambled format. Authorization in the form of

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Lehnam, *Intellectual Property*, supra note 17 at < <http://cool.conservation-us.org/bytopic/intprop/ipwg/tech.html#id4a> > accessed September 3, 2019.

possession of an appropriate password or "key" is required to "decrypt" the file and restore it to its manipulatable format.<sup>22</sup>

It is important to emphasize here that the original intent for the proposals above was to form the basis for copyright policy formulation<sup>23</sup> in the United States with the hope that it would eventually metamorphose into legislation to address the challenges posed by digital technology in the copyright sector. The wording of the quote above as contained in the Green Paper could arguably be regarded as more content industry-friendly: the priority is clearly the protection of owners' content *from* users in the digital environment. This comes as no surprise since Lehman and his team<sup>24</sup> shared the content industry ideology.

According to Ficsor, following the publication of the Green Paper, the Working Group conducted hearings and received testimonies and written proposals by interested organizations and were taken into account in the publication of a White Paper,<sup>25</sup> a sequel to the Green Paper published in September 1995.<sup>26</sup> Ficsor notes that:<sup>27</sup>

The White Paper followed the same structure as the Green Paper. However, at the end, it did not present "preliminary findings and recommendations," as in the Green Paper. Instead, it presented concrete, final recommendations and appendices with the text of the proposed legislation, and with a statutory mark-up of the suggested modifications. In the draft provisions, several elements appeared, which would later become part of the two WIPO Treaties and then the Digital Millennium Copyright Act of 1998 ("DMCA").

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<sup>22</sup> Ibid.

<sup>23</sup> Haggart, *Copyright*, supra note 14.

<sup>24</sup> Ibid. at 110-11, According to Haggart, "Lehman made copyright a primary concern of the PTO, building up its staff of copyright lawyers. Keith Kupferschmid, senior vice-president for intellectual property policy and enforcement at the Software and Information Industry Association, who worked with Lehman at the PTO and helped negotiate the WIPO Internet treaties..."

<sup>25</sup> Bruce Lehman, "*Intellectual Property and the National Information Infrastructure – The Report of the Working Group on Intellectual Property Rights*" (1995) at online: < <https://babel.hathitrust.org/cgi/pt?id=mdp.39015040596903;view=lup;seq=10> > accessed May 29, 2018.

<sup>26</sup> Mihaly Ficsor, *The WIPO Internet Treaties*, supra note 7 at 21.

<sup>27</sup> Ibid.

Ficsor presents the contents of the Working Group's Green and White Papers as generally acceptable and supported by interested organizations that made written and oral submissions to the Green Paper leading to the White Paper. In his analysis, Ficsor did not specifically mention the names of the interest groups that supported the proposal, but it is likely they were pro-content industry stakeholders. This is not surprising, as Ficsor himself seems to subscribe to a maximalist approach to copyright. Ficsor was the WIPO representative who served as the secretary to the Diplomatic Conference in the WIT negotiation and was a supporter of inflexible implementation, subscribing to the view that the treaty must prohibit circumvention of access controls generally, and must extend to trafficking in devices.<sup>28</sup> This suggests that right from the early stages, the WITs enjoyed the support of the content industry lobbyists.

There were, of course, opposing views on the Green and White Papers developed by the Working Group, which may be helpful for us to consider.

In her critique of the White Paper published by the Working Group, Pamela Samuelson, for example, expressed strong criticisms against it and the legislation it proposed.<sup>29</sup> Samuelson's argument revealed the potential harm that would be done if the contents of the White Paper were to be enacted into law; she noted that traditional user rights and freedoms to browse, share, or make non-commercial copies of copyrighted works would be denied.<sup>30</sup> Furthermore, she argued that online service providers would be coerced to monitor users' activities online to identify unauthorized access to digital content.<sup>31</sup> This could potentially lead to invasion of users' privacy

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<sup>28</sup> Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in Michael Geist, ed. *From "Radical Extremism" to "Balanced Copyright", Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 212.

<sup>29</sup> Pamela Samuelson, "The Copyright Grab" at online: <<http://archive.wired.com/wired/archive/4.01/white.paper.html?pg=1&topic=>> at 1, accessed May 30, 2018

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

online. Samuelson insisted that the rationale behind the proposed reform of copyright law in the digital era was politically motivated:

Why would the Clinton administration want to transform the emerging information superhighway into a publisher-dominated toll road? The most plausible explanation is a simple one: campaign contributions. The administration wants to please the copyright industry, especially members of the Hollywood community, who are vital to the president's re-election bid. And what this copyright industry wants in return is more legal control than ever before over the products they distribute.<sup>32</sup>

Samuelson's argument clearly portrays Lehman as favouring a maximalist-oriented agenda<sup>33</sup> in the reform of copyright at that time, which she regarded as favouring the content industry over users and the public. Jessica Litman echoes many of the same views as Samuelson regarding the dangers and consequences of the proposed legislation to regulate the activities of copyright in the face of advancement in ICT. She opined:

Most of the current proposals for interpreting or amending copyright law to apply to digital technology have come from copyright holders or their defenders. They appear to contemplate that the law will henceforth govern all activities of anyone who uses digital media in any capacity. The suggested application of copyright law to digital media potentially affects, indeed prohibits, most common everyday ways one can use a computer or other digital device to read, view, hear or otherwise experience copyrighted works.<sup>34</sup>

The views of Samuelson and Litman suggest that the Lehman's Working Group proposal intended to establish a strong regulatory regime in copyright that would potentially have made every noninfringing and non-commercial access to and use of digital content an infringement. It is clear that the proposed reform was content industry-driven with little or no consideration for the user community and the public interest. This shows the extent to which, at that time, ICT was

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid. at 2.

<sup>34</sup> Jessica Litman, "Revising Copyright Law for the Information Age" (1996) 75 Or. L. Rev. 19 at 24.



perceived as a threat to copyright holders' interests; and that users' right to access and use content was perceived as less significant. On this score, Haggart rightly notes that that Lehman's idea of copyright law reform in the ICT age was heavily biased toward the content industries.<sup>35</sup>

He further reports that:

Lehman's working group was extensively criticized for being too favourable to the content industries. His senior staff, which included former copyright lobbyists for the computer and music and recording industries, controlled the process, maintaining extensive informal communications with private-sector copyright lobbyists.<sup>36</sup> The working group's membership, which came from across the government and the executive branch, complained that they were effectively shut out of the process: "All decisions were made and all documents drafted by the commissioner and his senior staff without any consultation."<sup>37</sup> The 1995 paper reflected these biases. Despite some conciliatory language, it betrays an overwhelming emphasis on protecting the rights of copyright owners and reflected a vision of creative "works" as tradable products. Users' rights were treated as residual. It proposed that copyright owners be "given control over every use of copyrighted works in digital form by interpreting existing law as being violated whenever users make even temporary reproductions of works in the random access memories of their computers," and that online service providers become "copyright police," enforcing copyright law.<sup>38</sup>

While the consideration of the views for and against the Lehman's proposals may simply be interpreted to mean differences in opinion on the face of it, it is much more than that. It encapsulates the bigger picture, representing different approaches and ideologies imbibed by different copyright stakeholders as they navigated the copyright space, which was at that time experiencing a paradigm shift precipitated by ICT. Lehman and his supporters represent one particular vision of copyright, which undoubtedly mirrors a system based on commercial gain for owners; additionally, this approach thrives under the power of control over content and strict enforcement – characteristics which were replete in the Working Group's copyright reform

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<sup>35</sup> Haggart, *Copyright*, supra note 14 at 111.

<sup>36</sup> Jessica Litman, *Digital Copyright*, (New York: Prometheus Books, 2001) at 90.

<sup>37</sup> Ibid.

<sup>38</sup> Haggart, *Copyright*, supra note 35 at 111-12.

proposal. Ficsor, by his viewpoints, can be seen to support this approach. The desire to protect control over content and to sustain monopolies in the copyright industry, as manifested by Lehman in the 1990s, can be said to have emanated from the Stationers' Company bloodline and remains active to date.

Samuelson, Litman and others who expressed similar views represent the broader public interest and free culture community, and this user-centric advocacy has helped to neutralize and push back on some of the copyright proposal that sideline the place of the user and their basic right to access and use content. This sort of opposition was manifested in the United States when the proposed bill to reform copyright law – the National Information Infrastructure Copyright Protection Act of 1995 was introduced in Congress in December 1995.<sup>39</sup> The introduction of this bill was the ultimate aim of the Lehman-led working group but it met with stiff opposition by those who were sidelined, as well as their representatives.<sup>40</sup> According to Haggart, those who had been excluded from the process such as “library groups, online service providers, consumer organizations, computer hardware manufacturers, Internet civil liberties group, telephone companies, educators, consumer electronics manufacturers, and law professors mounted a fierce opposition to the bill.”<sup>41</sup> Consequently, the bill did not survive beyond the House Judiciary Committee.<sup>42</sup> The opposition took shape under the aegis of Digital Future Coalition (DFC), which was convened by Professor Peter Jaszi.<sup>43</sup>

Though the proposed bill was halted by the efforts of the DFC, another strategy was developed by Lehman to achieve the mandate given to the working group by the Clinton

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<sup>39</sup> Ibid. at 112.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Litman, *Digital Copyright*, supra note 36 at 122; Pamela Samuelson, *The US Digital Agenda at WIPO* (1996) 37 Va. J. Int'l L. 369 at online: < <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1881&context=facpubs> > accessed April 29, 2019.

<sup>43</sup> Haggart, *Copyright*, supra note 38.

administration. Originally, the plan was to pass the legislation in the United States, which would then serve as a basis for negotiation at the WIPO Committee of Experts' meeting in February or May 1996;<sup>44</sup> however, faced with domestic opposition, Lehman dealt with the problem in reverse.<sup>45</sup> Referring to how Lehman overcame opposition to the bill, Haggart explains:

As head also of the US delegation to the WIPO Committee of Experts charged with creating the draft treaties, he did not shift the US negotiating position on the WIPO treaties. Bruce Lehman went to Geneva and got [his digital agenda] included in the treaty there and then he came back and said, Oh, we need to implement the treaty.<sup>46</sup>

This explains why the United States was at the vanguard of the WITs negotiation and contributed significantly to the content of the treaties; it was obvious that the United States was driven by both national and international interest. National interests, that is, in the sense that it needed an international treaty<sup>47</sup> obligation to make it easier to implement its digital copyright policy at home, while the international agenda was to influence other countries (as it did Canada, discuss below) to provide the same legal framework for the protection of digital content. This therefore made the United States intensify its effort at the international level during the WITs negotiations.

### **3.2 WIPO's Motivation as an Institution for The Internet Treaties**

It could have easily been taken for granted that WIPO's motivation to initiate the negotiations for the WITs was born simply as a result of its role of providing international leadership and regulatory framework in intellectual property. While this is rightly so, the underlying motivation was perhaps WIPO's bid to stay relevant as an institution in the scheme of

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid. at 114.

<sup>46</sup> Jonathan Band, intellectual property lawyer, interviewed by Haggart, digital recording on June 20, 2008.

<sup>47</sup> Haggart, *Copyright*, supra note 44.

international intellectual property regulation.<sup>48</sup> As the longstanding international regulatory institution for intellectual property, WIPO was at the risk of being sidelined following the negotiation of TRIPS agreement under the auspices of World Trade Organization (WTO).<sup>49</sup> WIPO did not lead on intellectual property issues on TRIPS but was relegated to providing technical support to WTO;<sup>50</sup> therefore, WIPO's successful negotiation of the WITs would amplify its position, reinstating it as the cardinal organization in charge of intellectual property. Furthermore, it would be a plus for WIPO to negotiate the WITs successfully because the TRIPS agreement had a lacuna – it did not address internet-related issues partly because, at the time of its negotiation the internet and digital technology was yet to create such phenomenal change.<sup>51</sup>

The above is relevant not just for information, but because it may have played a role in the speed with which the WITs were negotiated and adopted. So, with a United States hoping to use the WITs to lobby for a national legislation and a WIPO seeking to prove and maintain its relevance in international intellectual property scene, both parties had different but non-conflicting motives to work together and accelerate the WITs negotiation process.

### **3.3 WIPO's Objective for Initiating the Internet Treaties**

Besides these underlying motives for WIPO's interest in initiating talks for international treaties relating to technological developments, the projected objective articulated for initiating the discussions on the proposed treaties can be found in the preamble to the treaties:

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<sup>48</sup> Ibid. at 115.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

*Desiring* to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

*Recognizing* the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

*Recognizing* the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

*Emphasizing* the outstanding significance of copyright protection as an incentive for literary and artistic creation,

*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,<sup>52</sup>

Similarly, the preamble to the WPPT states:

*Desiring* to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

*Recognizing* the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

*Recognizing* the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

*Recognizing* the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.<sup>53</sup>

The above objectives summarize the ostensible rationale for the introduction of the WITs.

However, amongst the objectives stated, the issue of addressing the impact of ICT on copyright

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<sup>52</sup> WIPO, *WCT*, supra note 1 at 1-2.

<sup>53</sup> WIPO, *WPPT*, supra note 2 at 2.

proved to be the most controversial. Additionally, as Haggart notes, for the first time the term “balance”<sup>54</sup> was articulated in the preambles to an intellectual property treaty – a welcome and laudable development. However, how well the concept of “balance” and “public interest” impacts the copyright system through implementation in national legislation is a different issue entirely, as we will see in the case of Canada’s implementation.

### **3.4 WIPO Preparatory Meetings**

As noted,<sup>55</sup> WIPO had already started brainstorming how to provide international leadership in the regulation of copyright in the face of advancement in ICT. Digital technology and the internet were already signaling that they could potentially disrupt the status quo in the copyright industry as cultural works became more digitized. Although these activities were preparatory, they can be said to mark the beginning of the debates and policy-thinking around these issues.

Prior to the Diplomatic Conference in December 1996, several preparatory meetings took place. Geist documents the deliberations of these meeting in what he calls “The WIPO Internet Treaty Legislative History;”<sup>56</sup> according to Geist, meaningful debates on the inclusion of TPM-related provisions started in the fourth session of the Committee of Experts in December 1994.<sup>57</sup> In this meeting, the United States delegation stated that, given how easy it was to copy digitized content, it was necessary to devise technological means to protect digitized content as well as outlaw any attempt to circumvent any such technological means of protection.<sup>58</sup> Geist reports that some representatives of non-governmental organizations present at the meeting as

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<sup>54</sup> Haggart, *Copyright*, supra note 47 at 117.

<sup>55</sup> Ficsor, *The WIPO Internet Treaties*, supra note 4.

<sup>56</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 28 at 212.

<sup>57</sup> *Ibid.* at 213.

<sup>58</sup> *Ibid.*

“observers” were of the opinion that it would be necessary to impose limits and exceptions on the new norm to in order to guarantee freedom for use.<sup>59</sup> The observers did not fight against the implementation of the proposed TPMs as well as their legal protection, which is an indication that they did acknowledge the genuine concern copyright owners had about unauthorized use. However, pursuant to achieving balance, the observers apparently expressed concern over how it would be implemented and its impact on users’ rights to legitimate use. The matter was not resolved conclusively, but the summary prefigured the final outcome – to declare circumvention unlawful and then leave it at the discretion of each Contracting party to determine its implementation approach.<sup>60</sup>

The fifth session took place in September 1995 and discussions on the TPMs and proposed anti-circumvention provisions continued. The United States insisted that it was imperative to have a proposed schedule in readiness for the full Diplomatic Conference in the second half of 1996.<sup>61</sup> The proposition to recognize the use of TPMs under copyright law as well as provide legal protection to prevent its circumvention seemed too overreaching and did not sit well with other representatives. On the United States strong proposal, Geist reports that:

Other delegations expressed some reservation about the issue. For example, the Korean delegation emphasized that it only supported the protection of TPMs “provided that such measure did not prevent normal exploitation of the protected subject-matter.”<sup>62</sup> The European Commission delegation pointed to Article 7(1) (c) of its computer programs directive as a model. This provision applied to distribution or possession of for commercial purposes, and only where the device had the sole intended purpose of facilitating the unauthorized removal or circumvention of a TPM protecting a computer program.<sup>63</sup> Moreover, non-governmental organizations

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<sup>59</sup> *ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> WIPO, Report of the Fifth Session of the Committee of Experts on a Possible Protocol to the Berne Convention (Geneva, 4 to 8 and 12 September 1995 “cited in Geist, *Implementing the WIPO Internet Treaties*, supra note 56 at 214.

<sup>63</sup> *Ibid.*

had their own concerns, with Japan Electronic Industry Development Association stressing the importance of protecting exceptions for fair use and “safeguards for innocent infringers.”<sup>64</sup>

At this stage, then, there was clearly an indication of the potential harm that TPMs and anti-circumvention provision could do to users’ rights.

At the sixth session, which took place in February 1996, written proposals were presented by the United States, Argentina and Brazil;<sup>65</sup> the United States proposal targeted trafficking in circumvention devices or the provision of such services but not the act of circumvention<sup>66</sup> itself. The submission by Argentina and Brazil, unlike the United States, covered acts of circumvention besides trafficking in circumvention devices;<sup>67</sup> however, Geist observed that the major difference between the United States’ submission and that of Argentina and Brazil was that the proposal made by the former were limited to copy controls, with no reference to access controls.<sup>68</sup> With divergent views on TPMs and whether or not to include protection for TPMs, naturally, there was no conclusion on the matter, but this inconclusiveness notwithstanding, the Diplomatic Conference was scheduled for December 1996 to conclude the treaties.<sup>69</sup>

A final (seventh) session took place in May 1996, at which the European Union presented a written proposal that supported anti-circumvention measures with specific reference to trafficking in circumvention devices or provision of services but not targeting acts of circumvention.<sup>70</sup> Again, several country representatives expressly rejected any anti-circumvention provisions. The Canadian delegation explicitly stated that it was unable to support

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<sup>64</sup> Ibid.

<sup>65</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 56 at 214.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> WIPO, Comparative Table of Proposals and Comments Received by the International Bureau, Geneva 1 to 9 February, 1996, “cited in Geist, *Implementing the WIPO Internet Treaties*, supra note 56 at 215.

<sup>69</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 56 at 216.

<sup>70</sup> WIPO, Proposal of the European Community and its Member States, Geneva, 22 to 24 May, 1996, “cited in Geist, *Implementing the WIPO Internet Treaties*, ibid.



any of the proposals due to ongoing domestic studies and was concerned about the impact of the proposals on lawful uses.<sup>71</sup> Other country delegates expressed their concerns about the European Union proposal.<sup>72</sup>

From accounts of the WIPO preparatory meetings, the debates and views expressed by the different country delegations make some important facts obvious. First, the United States expressly supported the implementation of TPMs and its protection. Reactions from other country representatives to the United States' proposal were twofold: while representatives of many states were prepared to accept a case for the use of TPMs, they were not comfortable with a blanket application which did not distinguish between copy control and access control; and most country delegations had less tolerance for the proposed legal protection for TPMs because of the perceived harm it could do to users' rights to access digital content.

The second point to note from the deliberations at the preparatory meetings was that there was no consensus on the controversial issue of legal protection for TPMs, and yet the provisions eventually became part of the treaties. This is indicative of the fact that the United States, WIPO and other supporters of the controversial provisions must have persuaded the countries that were not in support of the provisions to compromise on the issue. Of course, in copyright law reform, and indeed legislative processes generally, it is difficult to get all stakeholders to agree

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<sup>71</sup> WIPO, Report of the Seventh Session on the Committee of Experts on a Possible Protocol to the Berne Convention, 22 to 24 May, 1996, cited in Geist, *Implementing the WIPO Internet Treaties*, supra note 69 at 216.

<sup>72</sup> Ibid. Geist summarized the concerns expressed by the various country delegates as follows: Singapore felt that the proposal would interfere with legitimate uses, harm industry, create a barrier to innovation, and capture both licit and illicit uses; Thailand delegation viewed the proposal as too vague, and would lead to confusion; Korean delegation felt protection of TPMs would do harm to the public interest, and inappropriately impose liability on manufacturers of lawful products for the illicit acts of others; the Chinese delegation thought the entire issue might not fit within the sphere of copyright; the Ghanaian delegation thought that protection of TPMs could be oppressive to developing countries and called for a reconsideration; the Brazilian delegation stated that the rationale for protecting TPMs needed more clarification; the Moroccan delegation stated that it did not fully support the European Union proposal; the South African delegation was concerned about the ambiguity in language of the European Union proposal and raised questions of allocation of liability; the Nigerian delegation, speaking on behalf of the African Group, expressed concerns about vagueness of language, impact on access to knowledge, and economic and social impact, and called for a reassessment with due consideration for developing countries; the delegation from Guinea supported the views of the Nigerian delegation, and the Egyptian delegation supported the views that called for further clarification.

unanimously on problematic issues; such controversies are sometimes resolved through trade-offs within and across treaties. In this case, however, it seems to have been more of “an imposition” of the provisions than a trade-off.

### **3.5 WIPO’s Diplomatic Conference: Negotiating the Internet Treaties**

The deliberations and submissions for the proposed treaties commenced in earnest during the WIPO Diplomatic Conference in December 1996, which eventually led to the agreement on the treaties.<sup>73</sup> The duration of the WIPO Diplomatic Conference happened over the course of three weeks, which was impressive for agreeing on two international treaties<sup>74</sup> on a complex and controversial topic. This could be attributable to the keen interest of the United States and WIPO to get the treaties adopted. The United States came prepared with robust draft submissions for the treaty negotiations. Representatives from 127 countries attended the Diplomatic Conference, the United States had 30 representatives and Canada had 7.<sup>75</sup> The proposal submitted by the United States at the Diplomatic Conference was derived largely from its White Paper<sup>76</sup> and was arguably the most significant contribution to the process that culminated in the WITs.<sup>77</sup>

It is surprising to note that just about seven months prior to the Diplomatic Conference, there was no consensus on anti-circumvention legislation and country representatives raised significant concerns on the subject. It hardly seems possible that all of these could have been satisfactorily resolved during the three weeks of the Diplomatic Conference. Indeed, as a matter of fact, it seems the WITs were adopted amidst significant opposition. The same issues raised at

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<sup>73</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 69 at 212.

<sup>74</sup> Haggart, *Copyright*, supra note at 54 at 117.

<sup>75</sup> Ibid.

<sup>76</sup> *ibid.* at 118; Ficsor, *The WIPO Internet Treaties*, supra note 55 at 22.

<sup>77</sup> Ian Brown, “The Evolution of Anti-Circumvention Laws” (2006) 20 *Int’l Rev. Law and Comp.* 239 at 241 at online: <<https://www.tandfonline.com/doi/pdf/10.1080/13600860600852119?needAccess=true>> accessed April 29, 2019.

the preparatory meetings were also echoed at the Diplomatic Conference.<sup>78</sup> As Ficsor acknowledged:

Certain groups have never ceased to criticize the new provisions, in particular, the provisions regarding the protection of technological protection. These groups both at the 1996 Diplomatic Conference, and during the preparatory work for the DMCA, strongly oppose these provisions, and when their arguments were not accepted, they continued their fight in other forms and in the media. These groups mainly work in the United States, and when they appear at the international level, their U.S. dominance is also conspicuous. [...] these groups are in favour of (i) a more liberal, sometimes “ultraliberal,” copyright policy, (ii) the preservation of as much total freedom in the cyberspace as possible, (iii) the restriction of the scope of protection, and (iv) the broadening of exceptions and limitations in the digital networked environment.<sup>79</sup>

While Ficsor recognizes and articulates the free culture views opposed to the controversial anti-circumvention provision, he does not seem to acknowledge their relevance and ultimate contribution to the WITs. It is understandable that Ficsor has sympathies for the content industry, and there is nothing wrong with this; in fact, I have previously explained in chapter two that approach to copyright can be influenced by different ideological perspectives. However, with respect, there are two instances in which I sense that he contradicts himself. First, Ficsor notes that, “The Diplomatic Conference adopted two well-balanced and sufficiently flexible Treaties: the WCT and the WPPT.” The contradiction here is that in the making of such international copyright treaties, in order for them to be “well-balanced,” there ought to be significant input from various copyright stakeholders, and after making compromises and trade-offs, the stakeholders ought to reach a compromise. Ficsor, in the quote above appears to undermine the input of the free culture community, which surely makes a serious dent on this

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<sup>78</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 73 at 219-21. To avoid repetition, the critical comments here are largely the same as stated in footnote 68.

<sup>79</sup> Ficsor, *The WIPO Internet Treaties*, supra note 55 at 28.

purported “balance.” Similarly, at the Diplomatic Conference in 1996, Ficsor was dismissive of the views of a coalition<sup>80</sup> and noted that:<sup>81</sup>

First, although for different reasons, they all opposed multiple aspects of the proposed updating of the international copyright norms. Second, they were “newcomers” at WIPO; their level of copyright knowledge was still relatively low, which resulted in certain misgivings that were not truly justified.<sup>82</sup>

Ficsor did not specifically mention the reasons members of this coalition were opposed to the treaties, but from the composition of the coalition,<sup>83</sup> the library and educational association would typically be concerned about access to content being trumped; the other technology and business-focused members of the coalition would be concerned about TPMs, anti-circumvention provision, ISP liability, and circumvention devices. I construe Ficsor’s condescension as representative of the views of the institution he represents – WIPO. This suggests that although WIPO’s objectives for updating copyright norms at the international level articulated balance and the public interest, it is doubtful if this is reflected in the treaty-making process, wherein expressing a different viewpoint was dismissed as ignorance in international copyright lawmaking. The use of “balancing” rhetoric is not sufficient to effectuate actual balance.

The second contradiction noticeable in Ficsor’s views is that he claims the treaties did not add any new level of protection: “the two Internet Treaties have led to neither a larger scope of copyright protection and related rights, nor a higher, more demanding level of protection. The treaties take into account all of the various legitimate interests, but they have done nothing

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<sup>80</sup> Ibid. at 22, according to Ficsor, at the Diplomatic Conference, besides country delegations and owners’ rights representatives, there existed a coalition – this consisted of educational and library association, as well as representatives of certain industries, some of which are financially stronger than the copyright industries. The industrial members of the coalition included telecommunications organizations, Internet service providers, other information technology industries, entertainment equipment, and recording material manufacturers.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

more.”<sup>84</sup> He then makes a seemingly contradictory statement: “[...] the new Treaties clarified the application of the existing norms in the digital environment, and, in particular, on the Internet, adapted the existing norms for the purpose, and introduced new norms where they were indispensable to maintain an appropriate level of protection for copyright and related rights and to effectuate public policy considerations.”<sup>85</sup> In my view, Ficsor’s usage of the term “new norms” acknowledges that a new law was introduced, which resulted in a new kind of additional protection, even if the rationalizing logic was merely maintaining the existing level of protection. The new norms referred to here are provisions that introduced the protection of TPMs, which had never previously been protected through copyright law. Haggart offers a corroborative statement when referring to legal protection for TPMs:

This article introduced something new to international copyright laws and treaties: “While the other provisions of the Treaty consist more or less of interpretation and certain adaptations of the existing international copyright norms at the Berne-*plus*-TRIPS level, Article 11, along with Article 12 [on rights management information], includes wholly new provisions.”<sup>86</sup> These provision, “for the first time, provide protection for copyright owners outside the usual framework of a law of authors’ rights [...].”<sup>87</sup>

In chapter five, I will discuss the levels of protection available to copyright and how TPMs, DRM and their legal protection have further expanded that protection; the resultant implication of this development is therefore the constriction of users’ rights to access content, which in turn undermines the public interest. My purpose in highlighting these facts is to show the circumstances under which the WITs were adopted and these developments occurred and how it impacts on the overall purpose of copyright.

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<sup>84</sup> *ibid.* at 24.

<sup>85</sup> *Ibid.*

<sup>86</sup> Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, (Oxford: Oxford University Press, 2002) at 544.

<sup>87</sup> Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: Berne Convention and Beyond*, 2d. ed. (Oxford: Oxford University Press, 2006) at 152.

Despite these criticisms against the WITs, it should be noted that the negotiation of the treaties did permit some degree of flexibility—and potentially some degree of balance—by deferring to the discretion of WIPO Member States on their implementation approach. Furthermore, significant balance actually came from a revised version of the original draft proposed by the United States through its White Paper. As Carys Craig notes, the final text adopted reflects a dilution of the anti-circumvention provisions originally proposed by the United States.<sup>88</sup>

### **3.6 Controversial Provisions of the WIPO Internet Treaties**

The WCT has 25 Articles and the WPPT consists of 33 Articles; amongst the provisions of these treaties, the most controversial are the legal protection against circumvention of TPM and removal of DRM.<sup>89</sup> Article 11 of the WCT provides for obligations concerning technological measures as follows:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>90</sup>

Furthermore, Article 12(1) & (2), provides for obligations concerning rights management information as follows:

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the

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<sup>88</sup> Carys Craig, “Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism” (2010) 13 *JWIPL* 503 at 506 at online: < <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-1796.2009.00394.x> > accessed April 25, 2019.

<sup>89</sup> WIPO Copyright Treaty, *supra* note 1 Arts. 11 & 12; WIPO Performances & Phonograms Treaty, *supra* note 2 Arts. 18 & 19.

<sup>90</sup> *Ibid.* WIPO Copyright Treaty, Art. 11.

following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.<sup>91</sup>

Similarly, WPPT contain analogous provisions as Articles 11 and 12 of WCT; Article 18 of WPPT provides for obligations concerning technological measures as follows:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.<sup>92</sup>

The rights management provision under WPPT states as follows:

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

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<sup>91</sup> Ibid. Art. 12(1) & (2)

<sup>92</sup> WIPO Performances & Phonograms Treaty, supra note 2 Art. 18.

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.<sup>93</sup>

Unsurprisingly, the implementation of WITs by WIPO Member States proved problematic, including in Canada, as I discuss in Part II below.

### **3.7 Implementation of the WIPO Internet Treaties**

While the WITs did favour rights owners, it left room for efforts to create a fair balance between the free culture and the content industry stakeholder communities; and this was by virtue of the implementation approaches available to WIPO Member States when incorporating the provisions into its national copyright laws. WIPO Member States could take advantage of the manner in which the controversial provisions of the WITs were expressed. The provisions are more advisory than prescriptive, which leaves the WIPO Member States with some margin of discretion in their implementation process. In other words, the WITs *recommend* how these provisions are to be implemented but do not *coerce* WIPO Member States to do so in a particular

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<sup>93</sup> Ibid. at Art. 19(1) & (2).



way. A close examination of the WITs language corroborates this argument. For instance, Article 11 of WCT states that, “Contracting Parties shall provide adequate legal protection and effective legal remedies.”<sup>94</sup> The key terms here are *adequate legal protection* and *effective legal remedies*. In my opinion, adding this language, which gives each Member State implementation discretion, was perhaps a possible way to reach a compromise. While it is hardly possible for each WIPO Member State to arrive at the same interpretation or meaning for adequate legal protection and effective legal remedies, it is possible that some countries may be influenced by others in their implementation model. WIPO deliberately inserted this provision to give Member States the leeway to implement the provisions as they see fit. Recall that in making of the WITs, several countries opposed a blanket approach to the implementation of legal protection for circumvention of TPMs. This perhaps explains why the final language refrained from being overly prescriptive or specific, thereby creating the liberty for WIPO Member States to implement as they deem fit, within the broad scope of the treaty language.

However, a downside of this discretion is the absence of uniformity in the implementation of the WITs by WIPO Member States. Commenting on this, Geist notes that:

In view of the broad range of interpretations open to the anti-circumvention provisions in the WIPO Internet treaties, it should come as little surprise to find that there is a wide divergence among ratifying countries in the way they have implemented their anti-circumvention obligations into national law.<sup>95</sup>

Geist undertakes a brief review of how some countries have implemented the provision into national law; it is fitting here to highlight some examples such as the United States, Switzerland and New Zealand.

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<sup>94</sup> WIPO Copyright Treaty, *supra* note 89 Arts. 11; similar provision in WIPO Performances & Phonograms Treaty, *supra* note 89 Art. 18.

<sup>95</sup> Geist, *Implementing the WIPO Internet Treaties*, *supra* note 78 at 222.

### 3.7.1 The United States' Implementation Approach

The United States was one of the first countries to implement the WITs and it did not happen without opposition. Senator John Ashcroft introduced a bill called the Digital Copyright and Technology Education Act of 1997;<sup>96</sup> also, Rick Boucher and Tom Campbell tabled a similar bill in the House of Representatives as the Digital Era Copyright Enhancement Act of 1997.<sup>97</sup> Surprisingly, neither bill had provisions on anti-circumvention devices, which the United States clamoured for during the making of the WITs. Howard Coble introduced what later became the DMCA but triggered serious concerns in that it went beyond what was required by the WITs.<sup>98</sup> Even Lehman, during his congressional testimony admitted that the provisions (especially the prohibiting trading in circumvention devices) went above the requirements of the WITs. Lehman's justification for this was that approval of the law and ratification of the WITs would serve as a motivation for other countries to accede to the treaties, which are of significant benefit to United States copyright interests.<sup>99</sup> Furthermore, the then United States registrar of copyright, Marybeth Peters opined that:

Some have argued that the legislation does not address the provision of products or services, but focus solely on acts of circumvention. They state that the treaties do not require such coverage, and argue that devices themselves are neutral, and can be used for either legitimate or illegitimate purposes. It is true that the treaties do not specifically refer to the provision of products or services, but merely require adequate protection and effective remedies against circumvention. As discussed above, however, the treaty language gives leeway to member countries to determine what protection is appropriate, with the question being whether it is adequate and effective.<sup>100</sup>

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<sup>96</sup> Ibid. at 223.

<sup>97</sup> Ibid. at 224.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid. at 225.

<sup>100</sup> Marybeth Peters, Registrar of Copyrights, Statement Before the House Subcommittee on Courts and Intellectual Property, 1997, cited in "Geist, *Implementing the WIPO Internet Treaties*, supra note 95 at 226."

Peters' statement above explains that including more than what the WITs required was within the contemplation of the WITs because the treaties only provide for minimum requirements. Furthermore, giving leeway to states meant that their implementation could go beyond the minimalist provisions of the treaty. The WITs were framed to give countries liberty to include more provisions in their implementation. The United States' implementation of the WITs included more provisions in its implementation approach than was required. The United States DMCA in s.1201 provides for prohibition against circumvention;<sup>101</sup> on circumvention devices, it prohibits the manufacture, import, offering to the public, provision, or otherwise trafficking in any technology, product, service, device, component, or part thereof that primarily circumvents TPMs.<sup>102</sup> These provisions constrict access to content and expand the copyright owner's control.

Pamela Samuelson, in her critique of the DMCA asserts that the initial prohibition of circumvention was simpler and more consistent,<sup>103</sup> and even if it did contain anti-circumvention provisions, it was less harmful to growth of the digital economy.<sup>104</sup> The United States government, at that time admitted that the DMCA went over what the WITs required, but argued

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<sup>101</sup> DMCA s.1201 (1)(A), "The provision states: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."

<sup>102</sup> *ibid.* S.1201(2) significantly impairs access in the sense that besides prohibiting circumvention, it outlaws various activities that could aid circumvention: "(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that— "(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; "(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or"(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title."

<sup>103</sup> Pamela Samuelson, "Intellectual Property and The Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised" (1999) Berkeley Tech. L.J.14 1 at 18 at online: < <http://people.ischool.berkeley.edu/~pam/papers/Samuelson.pdf>> Accessed April 25, 2019.

<sup>104</sup> *Ibid.* at 19.

it was necessary so that such standards could be used to influence other countries to pass similar strong law.<sup>105</sup>

The DMCA provides opportunity, every three years,<sup>106</sup> to review cases of users who may have been adversely affected by the harshness of the ban on circumvention and consider granting an exception to such users. While this creates the possibility of granting users exceptions, it should not be triennial because it gives the impression that the DMCA favours the content industry over the user community. Instead of a triennial review to consider the possibility of granting exception, a better option would have been an administrative process available immediately to consider such cases and make decisions. One of the primary purposes of enacting a law is to prevent harm and injustice; in the DMCA, the default appears to be the reverse: it allows the user to suffer harm before being considered for an exception for non-infringing activities. Admittedly, the rationale for the three-year review in the DMCA is deserving of commendation because it seeks to incorporate the possibility of new exceptions without a lengthy law review process, potentially supporting the cause of balance and the user community.

### **3.7.2 The Switzerland and New Zealand Implementation Approach**

In my view, the Switzerland implementation exemplifies a liberal and more balanced approach. The Swiss Copyright Act in Article 39a(1) states that effective TPMs may not be circumvented;<sup>107</sup> Article 39a(2) defines effective TPM as, “technologies and devices such as access control, copy control, encryption, scrambling and other modification mechanisms that are intended and suitable for preventing or limiting the unauthorized use of works and other subject-

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<sup>105</sup> Ibid.

<sup>106</sup> DMCA s.1201(B) & (C).

<sup>107</sup> Switzerland *Federal Act on Copyright and Related Rights*, 1992 as Amended in 2017 at online: <

[https://www.admin.ch/opc/en/classified-compilation/19920251/201701010000/231\\_1.pdf](https://www.admin.ch/opc/en/classified-compilation/19920251/201701010000/231_1.pdf)

> accessed April 29, 2019.

matter.”<sup>108</sup> Article 39a(3)(a)-(c) proscribes the manufacture, import, offer for sale or use of devices that facilitate the circumvention of TPMs.<sup>109</sup> These provisions are similar to those of the United States, but the Swiss provision adds in Article 39a(4) that, “the ban on circumvention may not be enforced against those persons who undertake the circumvention exclusively for legally permitted uses.”<sup>110</sup> Article 34a(4) in the Swiss Copyright Act makes a fundamental difference by creating an exception to the ban on circumvention to mirror exceptions and limitations in existing copyright protection; this exception attempts to create a balance among copyright stakeholders. The Swiss approach to the implementation of the WITs depicts flexibility; it exercises its discretion to address the genuine concern of unauthorized access to content, while at the same time guaranteeing that user’s right to legally permitted use is not trumped.

At this juncture, it is pertinent to highlight the New Zealand WITs implementation approach, which goes further than the Swiss approach in mitigating the possible harms of TPM protections. The New Zealand law also prohibits distribution of circumvention devices,<sup>111</sup> but this is not an absolute bar. The New Zealand law expressly allows circumvention for permitted

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<sup>108</sup> Ibid. at Art. 39a (2).

<sup>109</sup> Ibid. at Art. 39a (3)(a)-(c).

<sup>110</sup> Ibid. at Art. 39a (4).

<sup>111</sup> New Zealand, *Copyright (New Technologies) Amendment Act*, 2008, s. 226A (1)A person (A) must not make, import, sell, distribute, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a TPM circumvention device that applies to a technological protection measure if A knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work. “(2)A person (A) must not provide a service to another person (B) if—

“(a)A intends the service to enable or assist B to circumvent a technological protection measure; and “(b)A knows or has reason to believe that the service will, or is likely to, be used to infringe copyright in a TPM work. “(3)A person (A) must not publish information enabling or assisting another person to circumvent a technological protection measure if A intends that the information will be used to infringe copyright in a TPM work.

purposes.<sup>112</sup> Furthermore, if a user is prevented from engaging in such permitted purposes by a TPM, he or she has an administrative route to submit a petition in order to be granted access.<sup>113</sup>

In terms of implementing the WITs, compared to the US DMCA, the New Zealand and Swiss models seem to be more liberal, creating limits and exceptions to TPM protection, as well as ensuring that users are actually able to enjoy them in practice.

### 3.8 WIPO Internet Treaties: Justifying Different Implementation Approaches

The varying viewpoints and approaches to the implementation of WIT do not come as a surprise given that they pertain to a subject as controversial as copyright and involve several countries. The differences in implementation approaches are obviously not just a function of the

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<sup>112</sup> Ibid. at s.226D, this provision lists the permitted purposes and those who enjoy such rights: (1) The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the exercise of a permitted act.

(2) The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the making, importation, sale, or letting for hire of a TPM circumvention device to enable—

(a) a qualified person to exercise a permitted act under Part 3 using a TPM circumvention device on behalf of the user of a TPM work; or

(b) a person referred to in section 226E (3) to undertake encryption research.

(3) In this section and in section 226E, *qualified person* means—

(a) the librarian of a prescribed library; or

(b) the archivist of an archive; or

(c) an educational establishment; or

(d) any other person specified by the Governor-General by Order in Council on the recommendation of the Minister.

(4) A qualified person must not be supplied with a TPM circumvention device on behalf of a user unless the qualified person has first made a declaration to the supplier in the prescribed form.

(5) In this section —

*archive* has the same meaning as in section 50(1)

*archivist* includes a person acting on behalf of the archivist

*encryption technology* means the scrambling and descrambling of information using mathematical formulae or algorithms

*librarian* includes a person acting on behalf of the librarian

*prescribed library* has the same meaning as in section 50(1).

(6) In this section and in section 226E, *encryption research* means identifying and analysing flaws and vulnerabilities of encryption technology.

<sup>113</sup> Ibid. at s.226E states that: (1) Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3.

“(2) The user of a TPM work who wishes to exercise a permitted act under Part 3 but cannot practically do so because of a TPM may do either or both of the following:

(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act;

(b) engage a qualified person (*see* section 226D (3)) to exercise the permitted act on the user’s behalf using a TPM circumvention device, but only if the copyright owner or the exclusive licensee has refused the user’s request for assistance or has failed to respond to it within a reasonable time.

existence of different copyright stakeholders who adhere to different ideologies from different jurisdictions, but also the interplay of power and bargaining influence motivated by economic, cultural and political interests. The content industry stakeholders are more likely to incline towards an implementation model that enables them to achieve their interests and goals (economic gains) guarantees their proprietary interests, while free culture advocates would embrace an approach that benefits the user community to the extent possible. An implementation model that caters for and balances the interests of both stakeholders is preferable though, of course, difficult to attain.

The existence of different approaches to implementation is to be expected when the legal framework of the anti-circumvention provisions defers to WIPO Member States the power to exercise discretion in their implementation approaches. While the deference to WIPO Member States may prima facie seem like a benefit to the various states by giving the liberty to decide the implementation details, in actual fact, it was tactical effort at compromise to get countries to buy-in to the WITs.

There is no consensus among copyright scholars as to which approach should be adopted in the implementation of the WITs; however, as Geist notes:

[...] scholars from around the world have concluded that there is considerable flexibility in the implementation of the anti-circumvention provisions that do not necessitate the inclusion of provisions barring the distribution of circumvention tools nor unduly limit adding exceptions to the anti-circumvention rules.<sup>114</sup>

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<sup>114</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 95 at 236. To properly understand Ficsor's pro-content industry position, at the time of writing Geist explained that Ficsor "serves as a consultant to International Intellectual Property Alliance (IIPA), a private sector coalition of seven US trade associations that include Motion Picture Association of America and the Business Software Alliance."

In defining what is deemed “a flexible implementation of TPMs and its legal protection” as stated in the quote above, it is crucial to recall that TPMs seek to add a new layer of protection in addition to what already exists in copyright law and allow for its unregulated use/abuse. The United States’ approach highly favours TPMs and legal protection against their circumvention and Ficsor supports this approach. Geist describes him as “the unquestioned leader of those arguing for an inflexible implementation, complete with limited exceptions and strong anti-device provisions.”<sup>115</sup> According to Ficsor:

Contracting Parties may only fulfill their obligation under Article 11 if they provide protection and remedies: against preparatory acts (manufacture, importation and distribution of tools and offering of services); against circumvention of access controls and copy controls (and any other control of exercise rights); against dual-or multi-use devices which are “primarily designed” for circumvention, have only limited commercial use other than circumvention, or are marketed for use for circumvention; and against individual components of such a device.<sup>116</sup>

Silke von Lewinski and Jorg Reinbothe seem to concur with Ficsor’s idea of implementing the WITs and they articulate that:

By its nature, Article 11 WCT provides for minimum protection, which Contracting Parties are free to go beyond in their domestic law. The question arises, whether this minimum protection only covers acts of circumvention. It seems that limiting the protection to such acts would not correspond to the objective of the provision. ...Accordingly, the obligation to provide for “adequate protection” under Article 11 WCT would seem to require that rightsholders enjoy protection also against preparatory acts of circumvention themselves.<sup>117</sup>

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<sup>115</sup> Ibid.

<sup>116</sup> Ficsor, *The Law of Copyright*, supra note 86 at 562.

<sup>117</sup> Jorg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002) at 142.



Lewinski and Reinbothe were members of the European Union delegation at the 1996 Diplomatic Conference<sup>118</sup> and are strongly in favour of creating extra protections beyond what the WITs requires without any limitation or permitted exceptions to accommodate access to works. Notwithstanding that the views of Ficsor, Lewinski and Reinbothe are cited as authority for inflexible implementation of the WITs, other experts think differently.<sup>119</sup>

With regards to implementation of the WITs in Canada, in 2000, Mark Hayes, a Toronto-based copyright lawyer was retained by Industry Canada to advise on their implementation.<sup>120</sup> Hayes concluded that access controls were beyond the requirements of the treaties<sup>121</sup> and he opined:

In order to constitute “adequate legal protection” under the WCT and WPPT, one does not have to go so far as to provide a right to prevent the circumvention of effective technological measures protecting access to a work. Nevertheless, in order for the right granted to be truly adequate, some measure of prohibition or limitation of certain devices may be necessary.<sup>122</sup>

Similarly, in Canada, Ian Kerr, in his extensive analysis of TPMs posited that:

[...] any newly introduced access-control right must be counter-balanced by a newly introduced access-to-a-work right. Under this approach, copyright owners would have a positive obligation to provide access-to-a-work when persons or institutions fall within an exception or limitation set out in the *Copyright Act*. Such an obligation might entail the positive obligation to allow access-to-works in the public domain, or to provide unfettered access-to work to

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<sup>118</sup> Geist, *Implementing the WIPO Internet Treaties*, supra note 114 at 237.

<sup>119</sup> *Ibid.* at 237-8.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> Industry Canada, *Memorandum Concerning the Implementation in Canada of Articles 12 and 18 of the WIPO Treaties Regarding the Unauthorized Circumvention of Technological Measures Used in Connection with the Exercise of a Copyright Right* by Mark Hayes (Ottawa: Ogilvy Renault, 2000. Cited in Geist, *Implementing the WIPO Internet Treaties*, supra note 108.

educational institutions and other organizations that are currently exempted from a number of the provisions in the *Copyright Act*.<sup>123</sup>

The import of Kerr's opinion is that copyright owners' right to implement anti-circumvention measures, which could include prohibition of circumvention and the manufacture, importation, distribution and sale of circumvention devices, must be balanced with the rights of users to access works, which are (at least) equally deserving of recognition and enforceability.

The different views expressed above on how the provisions of the WITs should be implemented is indicative of the challenges inherent in implementing the treaties into domestic laws. In my view, the liberal approach seems to be more appropriate because it does not entirely oppose anti-circumvention provisions and the ban on the use of circumvention devices but suggests that exceptions should be created and processes established to accommodate permissible uses traditionally beyond the scope of the copyright owner's control. This represents a more balanced approach compared to an approach that seemingly advocates for an absolute ban on circumvention and other related activities and/or devices that aid circumvention. Proponents of the inflexible approach appear not to consider accommodating users' right to access even in a limited way; and this violates user rights by depriving users of the benefits of exceptions recognized in the national copyright laws of most countries. It is pertinent to mention here that, while I may have a bias for free culture, my intention is not demonize content industry stakeholders but when their motive is to deny users their right to access in the name of implementing WITs, such attempt is detrimental to the public interest and the purpose of copyright law as discussed in this research.

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<sup>123</sup>Ian Kerr, "Technological Protection Measures: Part II – the Legal Protection of TPMs, Department of Canadian Heritage, Copyright Policy Branch," at online: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=705081](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=705081) > accessed September 15, 2019, at 66-7.

The WITs implementation quagmire is what WIPO member states, including Canada, have had to deal with to incorporate the treaties into their national copyright law. Considering the subjective nature of the controversial TPMs and anti-circumvention provisions, one country's implementation inevitably influenced another's. Presumably, being one of the early implementers of the WITs, the United States' implementation model, which culminated in the DMCA, influenced other countries in their implementation by effectively setting the default model. It is in the context of this dilemma that Canada struggled to shape the contours of its copyright law reform to bring it in line with the WITs.

Besides influencing other countries by its implementation example, the United States exerts pressure using an even more powerful tool – international trade agreements. Since IP is now a key area of focus in international trade, foreign trade agreement (FTA) between or among countries usually include IP provisions. Consequently, it is expected that the IP regime in these countries should align. Usually, the country with strong international economic and trade influence, such as the United States, calls the shot. A typical example is United States-Australia FTA. Australia initially implemented the WITs under the *Digital Agenda Act, 2000*,<sup>124</sup> following a flexible approach, but was pressured by the United States to adopt a less flexible approach through the Australia-United States Free Trade Agreement (AUSFTA) of 2004. AUSFTA

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<sup>124</sup> Australia *Copyright Amendment (Digital Agenda) Act, 2000*, at online: <<https://www.legislation.gov.au/Details/C2004C01235>> Accessed April 26, 2019. This amended the Copyright Act of 1968.

required Australia to implement a TPM regime modeled after the United States DMCA.<sup>125</sup> Australia had to adopt stricter measures in terms of TPMs and a ban on circumvention devices.<sup>126</sup>

Having assessed the implementation of the WITs by certain countries, we can turn now, in Part II of this Chapter, to consider in greater detail Canada's implementation of the Treaties.

## PART II

### CANADA'S COPYRIGHT LAW REFORM IN THE DIGITAL AGE

#### 3.9 Background to Canada's Implementation of WIPO Internet Treaties

Canada's implementation of the WITs did not happen as swiftly as it did in the United States. Indeed, the WITs was not implemented in Canada until 2012, after passing through a laborious process that was influenced by several factors. Canadian copyright law reform can be classified as one of the highly controversial subjects that have come before the Parliament of Canada.<sup>127</sup> The delay/implementation is attributable to a combination of different factors such as copyright policy formulation, competing stakeholders' interests, lack of robust articulation of the purpose of copyright law in Canada, international obligation as a signatory to WIPO, and inter-departmental rivalry between Canadian Heritage and Industry Canada. Some of these factors have been discussed extensively in previous chapters (such as the competing interests of stakeholders; competing understandings of the purpose(s) of copyright law in Canada; and the international divergence of approaches to implementing controversial provisions within the

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<sup>125</sup> Matthew Rimmer, "Robbery under arms: Copyright Law and Australia-United States Free Trade Agreement" (2006) 11 First Monday at online: < <https://firstmonday.org/ojs/index.php/fm/article/view/1316/1236#r3> > Accessed April 26, 2019.

<sup>126</sup> For extensive discussion on this, see Robert Burrell and Kimberlee Weatherall, "Exporting Controversy? Reactions to the Copyright Provisions of The U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy" (2008) 2 JLTP 259-319 at online: < <http://illinoisjltp.com/journal/wp-content/uploads/2013/10/WeatherallBurrell.pdf> > Accessed April 26, 2019.

<sup>127</sup> Sara Bannerman, "Copyright: Characteristics of Canadian Reform" in Michael Geist, ed, From "Radical Extremism" to "Balanced Copyright": *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 17.

WITs). Here, my focus will be on the United States' influence and the challenges of copyright policy formulation in relation, in particular, to the apparent conflict between Canadian Heritage and Industry Canada. Canada's delayed implementation of the WITs was perhaps partly due to a commitment to achieve a copyright reform that reflects a balanced approach. Arguably, the fact that the implementation was not hastily passed like that of the United States could be a sign of the checks and balances at play.

### **3.10 United States' Influence in Canada's Implementation of the WIPO Internet Treaties**

The discussions below show the United States' influence on Canada's implementation of the WITs. However, this should not be interpreted to mean that the United States controlled the reform process; in fact, Canada demonstrated its resistance to the United States' influence in the implementation of the WITs, as we shall see.

Besides pressure on Canada arising from its international commitment, as a WIPO member state and signatory to implement the WITs, the United States, to some degree, did influence how Canada implemented the WITs. The United States is the world leader and net exporter of cultural goods, and to maintain this dominant position, it seeks to align as closely as possible, the copyright laws of the rest of the world with its copyright law.<sup>128</sup> The obvious rationale for this is to ensure that works of United States origin enjoy the same level of protection in a foreign jurisdiction. Being its next-door neighbor, Canada provides a strategic

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<sup>128</sup> The self-interest of the United States is overly overbearing and runs contrary to norms in international IP lawmaking as advocated by IP scholars. For example, the draft IP provisions of the Trans-Pacific Partnership have been criticized for its lack of balance and potential harm to developing countries, Jeremy de Beer, "Applying Best Practice Principles to International Intellectual Property Lawmaking", (2013) 44 Int. Rev. of Intell. Prop. & Comp. Law, 884-901 at online: <<https://link.springer.com/article/10.1007/s40319-013-0133-3>> Accessed April 26, 2019. For more analysis on international IP lawmaking see generally: Kimberlee Weatherall, "ACTA as a New Kind of International IP Lawmaking", (2010) PIJIP, Research Paper No. 12, at online: <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1013&context=research>> Accessed April 26, 2019; Graeme Dinwoodie, "The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering" in Daniel Gervais, ed., *Intellectual Property, Trade, and Development: Strategies to Optimize Economic Development in a TRIPS PLUS Era* (Oxford: Oxford University Press, 2007) 61-114.

market for the United States' copyright industry.<sup>129</sup> The United States capitalizes on its diplomatic and trade relations with Canada to influence Canada's implementation of the WITs. The United States government utilizes its diplomatic tools to influence the Canadian government;<sup>130</sup> for example, the United States used the Security and Prosperity Partnership of North America meeting platform to ask about Canada's lack of WITs implementation thus:<sup>131</sup>

Then-US ambassador to Canada Davis Wilkins also met with Canadian officials on several occasions during his tenure from 2005 to 2009 and was not shy about expressing the American pro-content-industry position. At an April 2008 Public Policy Forum conference on intellectual property, Wilkins remarked: "The USTR continues to have concern about Canada's failure to ratify and implement the two WIPO Internet treaties."<sup>132</sup> Michael Shapiro, attorney-adviser from the Office of Intellectual Property Policy and Enforcement of the US Patent and Trademark Office, elaborated on the US position, arguing for Canadian DMCA-type legislation. He posited that that difficult nature of copyright policy "should not be a reason for further delay in ratifying and fully implementing the WIPO Internet treaties."<sup>133</sup> The United States has also placed Canada on its Special 301 Watch List every year save one (1993). In 2009, it "upgraded" Canada to the Priority Watch List where Canada remained until 2013, when it was downgraded back to the Watch List.<sup>134</sup> Since 2004, Canada's lack of movement on the Internet treaties figured prominently in its placement of these lists.<sup>135</sup>

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<sup>129</sup> This could also be advantageous for Canadian content creators as well to try and explore the United States market for their content.

<sup>130</sup> Haggart, *Copyright*, supra note 74 at 164.

<sup>131</sup> Michele Austin, former chief of staff, Industry Minister Maxime Bernier, interviewed by Haggart on April 30, 2008.

<sup>132</sup> David Wilkins, speech at Public Policy Forum, Intellectual Property Reform: Innovation and the Economy, April 28, 2008 "Cited in Haggart, *Copyright*, supra note 130 at 165.

<sup>133</sup> Michael Shapiro, speech at Public Policy Forum, Intellectual Property Reform: Innovation and the Economy, April 28, 2008 "Cited in Haggart, *Copyright*, supra note 130 at 165.

<sup>134</sup> Office of the United States Trade Representative, 2013 Special 301 Report, May 2013, at 59, Cited in Haggart, *Copyright*, supra note 130 at 165. Haggart states that the downgrade was partly a response to the passage of the 2012 Copyright Modernization Act; Wikipedia, "Special 301 Report," "The Special 301 Report is prepared annually by the Office of the United States Trade Representative (USTR) that identifies trade barriers to United States companies and products due to the intellectual property laws, such as copyright, patents and trademarks, in other countries. By April 30 of each year, the USTR must identify countries which do not provide "adequate and effective" protection of intellectual property rights" at online: < [https://en.wikipedia.org/wiki/Special\\_301\\_Report](https://en.wikipedia.org/wiki/Special_301_Report) > accessed July 17, 2019.

<sup>135</sup> Haggart, *Copyright*, supra note 130 at 165.

In response, Canada discounts the United States' Special 301 Watch List contending it is "deeply flawed and inappropriate... It's reflective of industry views"<sup>136</sup> and that Canada does not recognize the 301 Watch List process because it is unreliable and lacks objective analysis.<sup>137</sup> Despite Canada's rejection of the United States' monitoring process, the United States' influence on Canada cannot just be brushed aside. The presence of American content industry corporations in Canada and Canada's dependence on the United States creates caution in dealing with the United States on copyright reform issues.<sup>138</sup> So even without the United States' influence, in my view, the United States' copyright market is important to Canada and is worth exploring. Therefore, there has to be some form of alignment in the copyright laws of both countries. The crucial question is what degree of copyright law alignment is possible given that both countries may have differing viewpoints on some areas of copyright as well as different pressures from domestic stakeholders. Managing the influence of the United States proved very challenging for Canada in its implementation of the WITs.

It is worth mentioning here that the power dynamics and the relationship between United States and Canada were recently demonstrated once again in the renegotiation of NAFTA, which has now culminated in the Canada-United States-Mexico Agreement (CUSMA) being signed (although not yet ratified at the time of writing) on November 30, 2018 after a long period of back and forth. Although CUSMA is a trade deal, and so broader in its coverage than intellectual property, as shown above in the AUSFTA, the negotiation of such trade deals offers a robust opportunity for the United States to pressure Canada on the intellectual property portfolio, especially where Canada's export interests for industries like auto, lumber and dairy are at stake.

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<sup>136</sup> Yannick Mondy, first secretary, trade policy, Embassy of Canada in the United States, interviewed by Haggart on August 6, 2008.

<sup>137</sup> Nancy Segal, Testimony (edited) before Standing Committee on Public Safety and National Security, House of Commons, 1st Session 39th Parliament. Interviewed by Haggart on August 6, 2007.

<sup>138</sup> Supra note 117.

Specifically, on IP, for example, Canada has committed through CUSMA to a copyright term extension by twenty years, which means an increase from fifty to seventy years.<sup>139</sup> The implication for this is that it would take twenty more years for works to enter the public domain, and, until then, more money will be spent on accessing copyright content. In fact, the cost implications for Canada could run into tens of millions, which would mostly go to the United States copyright market.<sup>140</sup>

### **3.11 Inter-Departmental Conflict: Canadian Heritage and Industry Canada**

When it comes to copyright policy-making in Canada, the involvement of different government departments makes it problematic to identify whose forte it is to superintend over copyright policy formulation. In fact, one of the determinant factors to identify which government department would be involved depends on whether it is strictly intellectual property, or intellectual property imbedded in trade policy.

Haggart<sup>141</sup> identifies three government departments in Canada that have some responsibility in dealing with copyright-related issues: Department of Foreign Affairs, Trade and Development (DFATD)<sup>142</sup> (formerly Department of Foreign Affairs and International Trade [DFAIT]), Industry Canada<sup>143</sup> and Canadian Heritage.<sup>144</sup> The Department of Foreign Affairs, Trade and Development assumes the primary role in copyright policy during international trade

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<sup>139</sup> Jesse Hirsh, “How Will the Digital Economy Fare Under the USMCA?” 2018 at online: <<https://www.cigionline.org/articles/how-will-digital-economy-fare-under-usmca>> Accessed April 26, 2019.

<sup>140</sup> Jeremy de Beer, “Intellectual Property Chapter of USMCA Proves Canada’s Pragmatism” 2018 at online: <<https://www.cigionline.org/articles/how-will-digital-economy-fare-under-usmca>> Accessed April 26, 2019.

<sup>141</sup> Haggart, *Copyright*, supra note 117 at 157.

<sup>142</sup> Government of Canada, About the New Department of Foreign Affairs, Trade and Development, at online: <[http://www.international.gc.ca/protocol-protocole/policies-politiques/circular-note\\_note-circulaire\\_ftm-001.aspx?lang=eng](http://www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_ftm-001.aspx?lang=eng)> accessed April 29, 2019.

<sup>143</sup> Ibid. Innovation, Science and Economic Development, at online: <[http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h\\_00007.html](http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h_00007.html)> accessed April 29, 2019.

<sup>144</sup> Ibid. Canadian Heritage, at online: <<https://www.canada.ca/en/canadian-heritage.html>> accessed April 29, 2019.



negotiations that have intellectual property components.<sup>145</sup> In other words, in the absence of international trade negotiations and when such negotiations are focused chiefly on intellectual property, DFATD would not assume primary role. Industry Canada, now Innovation, Science and Economic Development (ISED), has the mandate to foster and grow a competitive knowledge-based economy in Canada;<sup>146</sup> intellectual property, which includes copyright, plays a key role in building a knowledge-based economy.

According to the Canadian Heritage website:

Canadian Heritage and its portfolio organizations play a vital role in the cultural, civic and economic life of Canadians. Arts, culture and heritage represent \$53.8 billion in the Canadian economy and more than 650,000 jobs in sectors such as film and video, broadcasting, music, publishing, archives, performing arts, heritage institutions, festivals and celebrations.<sup>147</sup>

It is apparent that the mandate given to Canadian Heritage also includes significant responsibility to build and promote cultural works and artistic expression, which involves copyright. It is evident that these three government departments in Canada have some copyright policy-making role, and that this overlapping mandate could cause some friction in the exercise of their functions. For DFATD, deference may be given to its role in copyright when the negotiations involve international trade agreements, a good example here are negotiations related to the TRIPS Agreement and fittingly under the auspices of the World Trade Organization (WTO). For chiefly intellectual property related negotiations, for instance, in the WIPO Internet treaties, ISED and Canadian Heritage led the Canadian delegation, while the DFAIT (now

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<sup>145</sup> supra note 141.

<sup>146</sup> Ibid. ISED Mandate, at online: <[https://www.ic.gc.ca/eic/site/icgc.nsf/eng/h\\_00018.html](https://www.ic.gc.ca/eic/site/icgc.nsf/eng/h_00018.html)> accessed April 29, 2019. Though Industry Canada has now been subsumed under ISED, all references to Industry Canada in this research are valid as they refer to its activities prior to the reorganization by the Trudeau government.

<sup>147</sup> Government Canadian, *Heritage*, supra note 144.

DFATD) played a coordinating role.<sup>148</sup> The role of DFAIT here was more diplomatic than actual copyright policy-making. In the implementation of the WITs, DFAIT played a supporting role, acting as a link to convey Canada's position to United States and communicating the United States' position to Canada.<sup>149</sup> Admittedly, while there is always an element of international trade in intellectual property, WTO's mandate deal fundamentally with trade, which encompasses intellectual property and much more. This is why DFATD would be the appropriate department to lead on trade issues involving intellectual property. On the other hand, WIPO's mandate is chiefly intellectual property-related, which may involve some aspects of international trade and the appropriate Canadian departments to lead on intellectual property issues with WIPO would be ISED and Canadian Heritage.

The main challenge is the determination of how Industry Canada and Canadian Heritage manage and share responsibility in copyright policy issues in Canada. In examining this issue, Haggart reports:

Canada is unusual in that the responsibility for copyright is shared between two departments.<sup>150</sup> The Copyright Act gives formal responsibility for copyright to the minister of industry. In practice, however, Industry Canada and Canadian Heritage share the copyright file.<sup>151</sup> While Industry Canada is involved by statute, Canadian Heritage owes its involvement to its responsibility for the Canadian Radio-television and Telecommunications Commission (CRTC), and aspects of the broadcasting industry, as well as its "broad heritage and cultural mandate that includes citizenship and Canadian identity, cultural development and heritage, and national politics."<sup>152</sup> Although the Canadian Heritage's responsibility is not enshrined in the

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<sup>148</sup> Denis Gratton, former manager, copyright policy, Department of Canadian Heritage, interviewed by Haggart on February 7, 2008.

<sup>149</sup> Haggart, *Copyright*, supra note 141 at 158.

<sup>150</sup> Simon Doyle, *Prey to Thievery*, (Ottawa: Simon Doyle, 2006) at 146-7, cited in "Haggart, *Copyright*, supra note 149 at 158."

<sup>151</sup> *Ibid.*

<sup>152</sup> Haggart, *Copyright*, supra note 149 at 158. Haggart further states that "Before 1993, the predecessor to industry Canada, the Department of Consumer and Corporate Affairs handled the file. The Department of Canadian Heritage is treated as a joint partner; in practice, the two departments must negotiate in order to bring forth copyright legislation."

Copyright Act, copyright has assumed a greater relative importance for Canadian Heritage than Industry Canada.<sup>153</sup>

Copyright is challenging enough for one government department; sharing the responsibility between two or more government departments is unlikely to make the job easier; if anything, it has the potential to make it more difficult as each department may be loyal to its mandate, interests, and copyright stakeholders who influence a particular agenda. In this case, if conflict arises, ISED may assert its authority originating from the statute to claim the power to make the final decision; on the other hand, Canadian Heritage could seek to establish its authority and mandate, which is designed to preserve and promote equally important sectors in Canada such as media and broadcasting, culture, artistic expression and the richness of Canadian culture. In practice, the power sharing formula between these two government departments is not easy to delineate.

The challenges are further heightened as the departments are sometimes seen to be divided along the lines of their approach to copyright: albeit a generalization (and while it might seem counter-intuitive at first glance) Industry Canada appears to lean towards a free culture position, while Canadian Heritage more typically favours a content industry perspective. This controversial relationship is corroborated in an interview with a close aide to Maxime Bernier (former minister of Industry Canada). Haggart reports his findings thus:

The departments' opposing mandate institutionalize copyright's user-creator, or protection-dissemination, dichotomy and complicate any efforts to pass copyright legislation. As Michele Austin, chief of staff to Maxime Bernier while he was the Conservative industry minister, from February 2006 to August 2007, told the author, were copyright policy to be made the purview of only one department, "life would be a thousand times easier."<sup>154</sup>

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<sup>153</sup> Ibid. at 159.

<sup>154</sup> Austin, *Interview*, with Haggart, supra note 131.

Furthermore:

Industry Canada's mandated focus on innovation is biased towards dissemination, ensuring that copyright law does not hinder access to knowledge and information. Canadian Heritage's goal, meanwhile, is to maximize protection for creators for cultural reasons, though in practice this means maximizing copyright protection for copyright owners; that is, record companies and movie studios, which are usually not Canadian.<sup>155</sup> Interest groups tend to gravitate towards one department or another. Groups representing performers, writers, creators, and the content industry coalesce around Canadian Heritage, while Industry Canada is seen as the representative of ISPs, consumers, businesses, investors, and "user industries, such as the broadcasting sector."<sup>156</sup>

These findings could perhaps be responsible for some of the delays in decision-making and copyright policy formulation, which ultimately delays copyright legislative reform. This may have also been partly responsible for the delayed implementation of the WITs. Such delays are to be expected when two Canadian government departments that are supposed to work together on copyright policy and reform hold opposing views on copyright. As I posited earlier, despite the criticisms against two government departments having mandate on copyright issues, there is the possibility that it may have some advantages in ensuring fairness and balance in the process.<sup>157</sup>

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<sup>155</sup> Laura Murray, "Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 16 note 2: "The Heritage Department has not been reticent to declare that it sees only to represent the rights-holder side of copyright: in the Canadian Heritage Performance Report for the period ending March 31, 2003, then-Minister Sheila Copps reported that "with Industry Canada, the Department is analyzing World Intellectual Property Organization (WIPO) treaty issues, and working with collective societies, industry associations and various creators' organizations to develop concrete proposals for copyright reform," Canadian Heritage Performance Report: For the period ending March 31, 2003 (Ottawa: Treasury Board of Canada Secretariat, 2003), .Similarly, on November 6, 2003, Minister Copps suggested to the Standing Committee on Canadian Heritage that given cabinet's reluctance to press forward with WIPO treaty ratification, "...the best course of action to achieve your objectives might be to hear from CRIA [the Canadian Recording Industry Association] to see what would be an acceptable wording," Standing Committee on Canadian Heritage, 37th Parliament, 2nd Session, Evidence (6 November 2003).

<sup>156</sup> Bruce Doern and Sharaput Markus, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests*, (Toronto: University of Toronto Press, 2000) at 131, 24; Doyle, *Thievery*, supra note 150 at 134, Doyle notes that the Canadian Heritage, despite its support for the content industry, its officials "expressed concerns about the DMCA-like protection for TPMs even though their main clients, the Canadian Recording Industry Association and Canadian Motion Picture Distributors Association were strongly in favour of them," cited in "Haggart, *Copyfight*, supra 153 at 159-160."

<sup>157</sup> The different departments represent different copyright stakeholder groups; therefore, it is expected the departments would oppose any copyright law reform or policy formulation that may potentially adversely affect the stakeholders they represent. However, it is expected that both departments should arrive at a compromise, where the law or policy does not unduly favour one stakeholder group over the other. This is what balancing the interests of stakeholders means, which is a core argument my research supports. There is merit if the making of laws and policies could avoid unnecessary delays; however, the hasty passage

Canada's assignment of copyright policy formulation responsibility to two departments could be used to ensure that the interests of stakeholders that each department represents are duly considered in copyright reform. In addition to the bureaucratic delays,<sup>158</sup> however, differences in their mandate create, by default, a recipe for disagreement not just between the departments, but also among the stakeholders. The bottlenecks of having two departments work on a copyright cannot be ignored and should possibly be reviewed.

In my opinion, this unusual arrangement reflects Canada's understanding of the purpose of copyright law (which is now evolving, arguably due to the Supreme Court's elucidation on the issue, for example, the *Theberge* case). Canada's copyright policy more than a decade ago, showed that it did not prioritize or have a well-articulated purpose of copyright law until the explanation by Justice Binnie in *Theberge*,<sup>159</sup> which posits that the purpose of copyright law should give recognition to the dissemination of information and the encouragement of learning, while at the same time not undermining the expectation to earn a just reward from creative works. In fact, prior to *Theberge*, the understanding of the purpose of copyright law as stated in *Bishop v Stevens*<sup>160</sup> was that the Copyright Act was passed for a single purpose – to benefit all kinds of authors. The articulation of the purpose of copyright law in *Bishop v Stevens* obviously did not include the public interest and access to content by the user community, which was an incomplete conceptualization of the purpose of copyright law in Canada. If there had been a well-defined purpose of copyright law, it may have to some extent provided guidance on the limits of the copyright mandate given to Industry Canada and Canadian Heritage.

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of *some* laws may be to serve interests other than those of the public and common good. The United States DMCA is a typical example of a law passed with a short time but does cater for the public interest.

<sup>158</sup> Austin, *Interview* with Haggart, supra note 154, "The vigour with which each bureaucracy defends its mandate often interferes with the timely pursuit of reform, even when the ministers are in agreement about what should be done."

<sup>159</sup> *Theberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34 at 355-6 at online: < <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do> > accessed September 15, 2019.

<sup>160</sup> *Bishop v. Stevens* [1990] 2 S.C.R. 2 467

A possible resolution of any inter-departmental impasse between Industry Canada and Canadian Heritage could possibly be settled politically when the Prime Minister's Office (PMO)<sup>161</sup> and Privy Council Office (PCO)<sup>162</sup> intervene in the matter. Donald Savoie opines that "the role of the Prime Minister's Office and his secretariat in Canadian policy-making should never be ignored, particularly at a time when political power has been centralized more than ever in the hands of the prime minister and his aides."<sup>163</sup> Where necessary, the PMO/PCO can intervene in copyright cases.<sup>164</sup> However, when the PMO/PCO decides to intervene, it may still not be insulated from criticisms as political reasons and influential copyright stakeholders may shape its decision.

The intervention of the PMO could be influenced by both national political interests and international diplomatic ties with other countries, for example, the United States' influence in implementing the WIT; the PMO under the Stephen Harper administration advised that Canada should please the United States:<sup>165</sup>

The PMO has specific, if vague, views on what should be done: "satisfy the United States." Says Austin: "The Prime Minister's Office's position was: move quickly, satisfy the United States. And both of our positions were, politically speaking, 'Listen, there have been mistakes made in the DMCA, there are a list of exceptions that have been created by the court, can we have a DMCA lite?' And they said, 'We don't care what you do, as long as the U.S is satisfied.'"

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<sup>161</sup> Wikipedia, "Office of the Prime Minister (Canada) at online:

<[https://en.wikipedia.org/wiki/Office\\_of\\_the\\_Prime\\_Minister\\_\(Canada\)](https://en.wikipedia.org/wiki/Office_of_the_Prime_Minister_(Canada))> accessed August 27, 2018.

<sup>162</sup> Government of Canada, "Privy Council Office" at online: <<https://www.canada.ca/en/privy-council.html>> accessed August 27, 2018.

<sup>163</sup> Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*, (Toronto: University of Toronto Press, 2008), cited in "Haggart, *Copyright*, supra 153 at 160."

<sup>164</sup> Haggart, *Copyright*, supra note 152 at 160, "In the Canadian political system, the PMO/PCO can and does arbitrate and facilitate and facilitate inter-departmental disputes. This role is particularly important in a case like that of copyright, where two departments share responsibility. In the 1997 debates over Bill C-32, the PMO of the Liberal prime minister Jean Chretien had to arbitrate between Industry Canada and Canadian Heritage, whose polarization reflected that of their main constituents. According to then-Chretien heritage minister Sheila Copps, the two departments were at such loggerheads that the Prime Minister Chretien had to set part of the balance in the bill, eventually deciding that, "because Canadian universities had recently received substantial funding, they could make do with limited copying exception."

<sup>165</sup> Austin, *Interview* with Haggart, supra note 158, cited in "Haggart, *Copyright*, Ibid. at 181."

The compromise above may be attributable to the 2005-6 election where Stephen Harper promised to improve strained relations with the United States.<sup>166</sup>

### **3.12 Evaluation of WIPO Internet Treaties' Implementation Attempts by Canada**

One can hardly dispute Bannerman's view that Canadian copyright law reform is one of the highly controversial subjects to have come before the Parliament of Canada.<sup>167</sup> Canada's implementation of the WITs was protracted and laborious, resulting in three failed bills (Bill C-60, Bill C-61 and Bill C-32) until Bill C-11 was passed in 2012 (*Copyright Modernization Act*). Although these Bills attempt to make a number of amendments in the name of modernizing Canadian copyright law, the focus of the following discussion is the introduction of legal protection for anti-circumvention of TPMs.

#### **3.12.1 Bill C-60**

The first legislative attempt to implement the WITs was Bill C-60; it was introduced in the House of Commons as an Act to amend the Copyright Act by the erstwhile Canadian Heritage Minister, Liza Frulla, and it went through first reading on the June 20, 2005.<sup>168</sup> Besides the need to implement the WITs, background explanations to the bill reveal that the reform was also influenced by judicial opinions, which indirectly flag the need for Parliament to review copyright legislation in Canada. The background narrative to Bill C-60 explained that<sup>169</sup>:

The current law in Canada has been affected by a series of court decisions, the most important of which are the Federal Court decisions

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<sup>166</sup> Haggart, *Copyright*, supra note 164 at 182, "Stephen Harper had distinguished his Conservatives from the Liberal party by promising to improve relations with the United States that had been strained by Canada's refusal to join the United States in the Iraq war or to sign on to the US Ballistic Missile Defence program, and by the long-standing trade dispute over Canadian softwood-lumber exports to the United States.

<sup>167</sup> Bannerman, *Copyright: Canadian Copyright*, supra note 127 at 17.

<sup>168</sup> Parliament of Canada, "Bill C-60: An Act to Amend the Copyright Act" prepared by Sam N Banks & Andrew Kitching at online:

[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/381LS512E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/381LS512E) > Accessed April 8, 2018.

<sup>169</sup> Ibid.

in *BMG Canada Inc. v. John Doe*<sup>170</sup> and the Supreme Court of Canada decisions in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*<sup>171</sup> (*Tariff 22*) and *CCH Canadian Limited v. Law Society of Upper Canada*.<sup>172</sup> [...] In the case of *BMG v. John Doe*, music companies sought to force Internet service providers (ISPs) to divulge the names of customers who were making infringing material available on the Internet. The Federal Court in *BMG v. John Doe* held that Canadian law allows the downloading of copyright-protected files for personal use, and the making of those files available to others on peer-to-peer networks. The Federal Court of Appeal upheld the decision, although it cited privacy concerns and the weakness of the music companies' evidence, rather than a right to personal use of downloaded files. In *Tariff 22*, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) asked the Copyright Board to impose royalties, known as *Tariff 22*, on ISPs that facilitated the transfer of published works over the Internet. The case ultimately reached the Supreme Court of Canada, which concluded that ISPs could not be held liable for illegal downloading on their networks, since section 2.4(1)(b) of the Act provided protection when a person or company merely provides the means of communicating copyrighted works to the public. In the case of *CCH Canadian Limited v. Law Society of Upper Canada*, the Law Society of Ontario was sued by legal publishers for providing a photocopy service and maintaining self-service photocopiers in its library for use by patrons. The Supreme Court of Canada held that the "fair use" sections of the Act allowed libraries to have photocopiers available for people to make private copies of works held by libraries for research purposes.

The text cited above confirms the assertion I advanced in chapter one: although copyright legislative reform falls within the purview of the legislative arm of government in Canada, the parliament's legislative function may be influenced through a dialogue with the judicial arm of government. The interpretative role of the judiciary, especially in areas where the law is obsolete, nudges parliament to play its legislative role—ideally informed by the broad principles articulated in the jurisprudence. Bill C-60 is a good example.

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<sup>170</sup> [2004] 3 FC 241, 2004 FC 488.

<sup>171</sup> [2004] 2 SCR 427.

<sup>172</sup> [2004] 1 SCR 339.



Despite the pressures for the United States on Canada to implement the WITs following its DMCA approach, Canada resisted the United States' influence and adopted a more minimalistic approach in this Bill, especially concerning the implementation of the highly debated TPM provisions. Section 34.02(1) of Bill C-60 prohibited the circumvention of TPMs;<sup>173</sup> s.34.02(2) prohibits the offering of services to aid circumvention of TPMs.<sup>174</sup> The two provisions are typical of what content industry stakeholders advocate for, but Bill C-60 went further in s.34.02(3) (a)-(d) to attempt to create a balance and safeguard users' access to content, stating:<sup>175</sup>

(3) If a technological measure protecting a material form of a work, a performer's performance or a sound recording referred to in subsection (1) is removed or rendered ineffective in a manner that does not give rise to the remedies under that subsection, the owner of copyright or holder of moral rights nevertheless has those remedies against a person who knows or ought to know that the measure has been removed or rendered ineffective and, without the owner's or holder's consent, does any of the following acts with respect to the material form in question:

(a) sells it or rents it out;

(b) distributes it to such an extent as to prejudicially affect the owner of the copyright;

(c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public; or

(d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c).

The plain interpretation of this provision is that it only prohibits circumvention for commercial purposes and/or infringement. This means that any circumvention that is not prejudicial to the market interest of the copyright holder is not liable for copyright infringement. Industry Canada and Canadian Heritage cooperated with each other and endorsed the balanced

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<sup>173</sup> Parliament of Canada, "Bill C-60 2005: An Act to amend the Copyright Act" at online: < <http://www.parl.ca/DocumentViewer/en/38-1/bill/C-60/first-reading/page-24> > accessed September 20, 2018.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

and minimalist approach adopted by Bill C-60 in a bid to implement the WITs.<sup>176</sup> Haggart notes that “Canadian Heritage did not view the protection of TPMs and the outlaw of circumvention devices as the best solution to the problem, claiming that a maximalist approach was not smart.”<sup>177</sup> The decision to allow circumvention for non-commercial purposes was, in my view a deliberate move not to follow the DMCA. As Haggart puts it, the US example served as a cautionary tale about what not to do – a form of reverse emulation.<sup>178</sup>

Jane Bailey argued that Bill C-60 had the potential to protect freedom of expression more than the United States’ DMCA.<sup>179</sup> Stretching this point made by Bailey, freedom of expression here in my view does not simply mean freedom of speech, but broadly speaking, it encompasses freedom as envisioned by the free culture philosophy – the freedom to access creative works, engage with the content, and in some cases, for creative minds, this engagement could foster further creativity. Bailey further advised that the Canadian government should stand firm and resist pressures from the United States to expand legal protections for TPMs and tailor the Bill to better protect the constitutional rights of users.<sup>180</sup> Unfortunately, Bill C-60 was not passed into law. In fact, deliberations on Bill C-60 was short-lived as it only went through first reading in the legislative process due to dissolution of parliament on November 29, 2005.<sup>181</sup> If Bill C-60 had progressed for further scrutiny, no doubt, it would have faced fierce opposition by stakeholders who were expecting a DMCA-styled approach.

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<sup>176</sup> Doyle, *Thievery*, supra note 150 at 138, “cited in Haggart, *Copyright*, supra note 166 at 129.”

<sup>177</sup> Haggart, *Copyright*, supra note 166 at 176.

<sup>178</sup> *Ibid.*

<sup>179</sup> Jane Bailey, “Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Reform Process” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 127-8.

<sup>180</sup> *Ibid.* at 128.

<sup>181</sup> Wikipedia, “An Act to Amend the Copyright Act (38th Canadian Parliament, 1st Session)”, 2005 at online: < [https://en.wikipedia.org/wiki/An\\_Act\\_to\\_amend\\_the\\_Copyright\\_Act\\_\(38th\\_Canadian\\_Parliament,\\_1st\\_Session\)](https://en.wikipedia.org/wiki/An_Act_to_amend_the_Copyright_Act_(38th_Canadian_Parliament,_1st_Session)) > accessed September 24, 2018.

Despite the laudable and bold move by the parliament of Canada to implement the WITs independent of external pressure, and linked circumvention to infringement, Ian Kerr still faulted Bill C-60 on the grounds that it offered little or no protection for user privacy. He argued:

It is my contention that statutory silence about the permissible scope of use of TPMs *risks too much* from a privacy perspective. In particular, I am of the view that any law protecting the surveillance technologies used to enforce copyright must also contain express provisions and penalties that protect citizens from organisations using those TPMs to engage in excessive monitoring or the piracy of personal information. The best solution from a privacy perspective is no legal protection for TPMs at all. However, if the copyright industries and government insist on claiming a legitimate need for new laws to prevent the circumvention of TPMs, then similar provisions are needed to protect citizens from organisations that use both TPMs and the law of contract as a kind of privacy circumvention device.<sup>182</sup>

Privacy in the digital era is a broad subject, and it is not the focus of my research. However, it is pertinent to mention here that the privacy arguments articulated by Kerr raises serious concerns, which mostly impact on the user community. I agree with Kerr that, for the interest of balance and fairness, permitting the use of intrusive technologies for copyright enforcement should be checked by legal provisions that protect users, who are mostly unaware of the subtle ways in which these intrusive technologies work and how much of their data are collected. Laura Murray echoes the same privacy argument, stating that consumers may be unaware of these invasions of their privacy.<sup>183</sup>

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<sup>182</sup> Ian Kerr, "If Left to Their Own Devices...How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law*" (Toronto: Irwin Law, 2005) at 170.

<sup>183</sup> Laura Murray, "Commentary: Bill C-60 and Copyright in Canada: Opportunities Lost and Found", (2005) 30 CJC at online: < <https://www.cjc-online.ca/index.php/journal/article/view/1663/1804> > accessed September 26, 2018.

Notwithstanding these shortcomings of the erstwhile Bill C-60, it represented a step in the right direction in that it was attentive to the need to create balance among copyright stakeholders as envisioned by the Supreme Court of Canada per Justice Binnie in *Theberge*.<sup>184</sup>

### 3.12.2 Bill C-61

Three years after Bill C-60 was cut short, Bill C-61, the second attempt to implement the WITs was introduced (First Reading) on June 12, 2008. Bill C-61, which adopted less of a made-in-Canada approach<sup>185</sup> and, as has been argued, was largely modeled after the United States' Digital Millennium Copyright Act<sup>186</sup> in the sense that it expunged the non-infringing use exception to digital locks circumvention and prohibited trade in circumvention devices. Unlike in Bill C-60, where Industry Canada and Canadian Heritage reached a consensus, Bill C-61 emerged in the midst of inter-departmental conflict between Industry Canada and Canadian Heritage.<sup>187</sup> Haggart reports that:

By May 2007, Bernier<sup>188</sup> and Industry Canada had prepared a presentation to the PCO to outline Industry Canada's views on copyright – dealing mainly with TPMs, education, and private copying – and to receive permission to write a bill. Austin<sup>189</sup> describes discussion with the PCO and PMO as “intense.” While Heritage's initial reaction to the Industry package was less than positive, by July 2007, Bernier and Oda<sup>190</sup> reached an agreement, entitled “Moving Forward on Copyright Reform,” on all WIPO-related issues except TPMs, ISP liability and the treatment of publicly accessible material. However, these two bureaucracies were unable to come to an agreement on these issues.<sup>191</sup>

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<sup>184</sup> *Theberge*, supra note 159.

<sup>185</sup> Bannerman, *Copyright: Canadian Copyright*, supra note 1467 at 34

<sup>186</sup> Cory Doctorow, “Canadian DMCA is worse than the American one” June 12, 2008, at online: < <https://boingboing.net/2008/06/12/canadian-dmca-is-wor.html> > accessed September 26, 2018 “cited in Bannerman, *Copyright: Canadian Copyright*, supra note 167 at 34 footnote 77.

<sup>187</sup> Haggart, *Copyfight*, supra note 177 at 181.

<sup>188</sup> Maxime Bernier was the then Industry Minister in Canada.

<sup>189</sup> Michele Austin was Maxime Bernier's chief of staff

<sup>190</sup> Bev Oda was the then Heritage Minister

<sup>191</sup> Haggart, *Copyfight*, supra note 187 at 181; Haggart's interview with Michele Austin, supra note 165.

Usually, when the departments are unable to reach a consensus, the PCO and PMO would intervene to resolve the matter,<sup>192</sup> but in this case, it was different; the PMO and PCO were unwilling to intervene and overrule either department,<sup>193</sup> but instead succumbed to international pressure from the United States. On this issue, Michele Austin, former chief of staff to the Industry Minister, reports that: “The PMO itself had specific, if vague, views on what should be done: ‘satisfy the United States’”<sup>194</sup> regardless of the approach to do so.<sup>195</sup>

This, unfortunately for Canada, is a demonstration of United States influence over its internal law-making process emanating from diplomatic and trade deals. Prior to assuming office, Stephen Harper had promised to improve relations with the United States.<sup>196</sup> In order to score political points with the United States and maintain diplomatic relations, the Harper-led government had to make a judgment call on the copyright file between maintaining diplomatic relations with government and a made-in-Canada approach to WITs implementation and a political decision was made to favour the United States. Austin concludes by saying that the Prime Minister (Harper) considered the matter from only one perspective, and that is from a Canada-US relations point of view and not as an internal affair of Canada.<sup>197</sup> The decision to please the United States creates a one-sided approach to the creation of Bill C-61, which eventually marred any attempt to follow a balanced approach to the bill. This also created a significant shift from the approach adopted in Bill C-60 and the concept of balance as laid down by Justice Binnie in *Theberge*.

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<sup>192</sup> Ibid. at 160.

<sup>193</sup> Ibid. at 181.

<sup>194</sup> Austin, *Interview* with Haggart, *supra* note 165.

<sup>195</sup> Haggart, *Copyright*, *supra* note 191.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

The crucial issue or provision that created a paradigm shift is the fact that circumvention did not distinguish between circumvention for commercial purpose and circumvention for non-commercial purpose. Bill C-61 in s.41.1 1(a) generally prohibited circumvention;<sup>198</sup> s.41.1 1(b) prohibited the offering of circumvention services;<sup>199</sup> s.41.1 1(c) prohibited the manufacture, import, renting and sale of technology devices that are designed primarily to be used for circumvention.<sup>200</sup> Unlike Bill C-60, Bill C-61 did not create any exception to circumvention. Even copyright law creates exceptions to exclusive rights that it grants to copyright owners – as we have seen, this is to create balance in the copyright system in order not to punish users for non-infringing access to and use of works. The absence of an exception in Bill C-61 undermines the purpose of copyright law and the fundamental concept of *access* to creative content. While a blanket approach to circumvention and TPMs may be a welcome development for the content industry stakeholders, it runs contrary to the free culture perspective on promoting access to content to foster creativity. Jeremy de Beer sums up Bill C-61 as follows: “Bill C-61 basically says that technology trumps whatever rights consumers or competitors might have otherwise had. So, the law no longer matters. People only have whatever rights content owners choose for them.”<sup>201</sup>

While Bill C-61 was in the pipelines, Industry Canada Minister, Bernier, was appointed to Foreign Affairs and was replaced by Jim Prentice.<sup>202</sup> Prentice’s preparation to introduce Bill C-61 unsurprisingly generated a lot of criticisms, which gained momentum and led to a public

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<sup>198</sup> Parliament of Canada, “An Act to amend the Copyright Act, Bill C-61” 2007-2008 at online: < <http://www.parl.ca/DocumentViewer/en/39-2/bill/C-61/first-reading/page-57#11> > accessed October 1, 2018

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Jeremy de Beer, “Jeremy de Beer on Canada’s Copyright Bill: Win-win or Spin-spin?” National Post, 13 June 2008, cited in “Haggart, *Copyright*, supra note 195 at 188.”

<sup>202</sup> Haggart, *Copyright*, supra note 195 at 183. Haggart believes that Bernier reappointment to Foreign Affairs was partly due to his argument against following the United States’ DMCA approach to Bill C-61.

outrage against the Bill. The most prominent protest against Bill C-61 was the Facebook activism started by Geist on December 1, 2007.<sup>203</sup> According to Geist, he started the “Fair Copyright in Canada” campaign by creating a Facebook page to get people to engage with the ongoing copyright reform at that time;<sup>204</sup> but to Geist’s amazement, and fortunately, the concept went viral, gathering 10,000 members within a week<sup>205</sup> and becoming a movement with individuals creating their own “Fair Copyright For Canada” chapters across the country.<sup>206</sup> The Copyright For Canada campaign created a social activism around copyright law in Canada, with tens of thousands members of the public leveraging on the power of digital technology and the internet to voice their opinion on copyright reform. These were just regular members of the public whose right to access content would be limited if Bill C-61 were passed into law. The public protests and outcry obviously got the attention of the government. Geist notes the Facebook group led to hundreds of letter and phone calls to Minister Prentice, Prime Minister Harper and other MPs.<sup>207</sup>

The immediate impact of the protests against Bill C-61 was that it delayed the presentation of the Bill by six months.<sup>208</sup> On June 12, 2008, Bill C-61 was presented for first reading.<sup>209</sup> In an interview conducted by Haggart with Jean-Sébastien Rioux (who at the time was the chief of staff to former Industry Minister, Jim Prentice), Rioux notes that the bill tabled before Parliament was 90-95 per cent the same as the one in December 2007.<sup>210</sup> This essentially meant that the controversial provisions of TPM and legal protection for circumvention remained

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<sup>203</sup> Ibid. at 184.

<sup>204</sup> Michael Geist, “Copyright’s 10k” December 9, 2007 at online: < <http://www.michaelgeist.ca/2007/12/copyrights-10k/> > accessed October 10, 2018.

<sup>205</sup> Ibid.

<sup>206</sup> Haggart, *Copyright*, supra note 202 at 185.

<sup>207</sup> Ibid.

<sup>208</sup> Parliament of Canada, *Bill C-61*, supra note 198.

<sup>209</sup> Ibid.

<sup>210</sup> Jean-Sébastien Rioux, interview with Haggart, February 26, 2009, cited in “Haggart, *Copyright*, supra note 206 at 187.”

unchanged<sup>211</sup> and critics of the bill argued that it was born in the USA by pointing to its treatment of TPMs.<sup>212</sup> In response, the government's justification for Bill C-61 was political; it stated that the policy rationale for the bill would settle the strained relationship with the United States,<sup>213</sup> indicating that Canada was indeed trying to please the United States by drafting a bill modeled after the DMCA in its implementation of the WITs. This suggests to me that the national interest of Canada was relegated and not afforded due consideration (except to the extent that US approval is in Canada's national self-interest). Haggart articulates that:

Rather than the minimal changes of Bill C-60, Bill C-61 proposed a significant reorientation of Canadian copyright law towards the US-desired position that the presence of digital locks should effectively trump user rights, adding a new layer to copyright that could potentially eliminate any user-owner balance in the law decidedly in favour of the owner.<sup>214</sup>

At first glance, it may seem that the impact of the Facebook activism against Bill C-61 did not achieve the desired outcome since the TPM and anti-circumvention provisions remained unchanged. This may not be completely true, especially considering the fact that the bill never made it beyond first reading. The possibility that the online protests and other opposition may have led to a change in the TPM and anti-circumvention provisions can only be a matter of speculation since that opportunity did not arise. However, the significance of the online mobilization and protests against Bill C-61 is indicative of the fact that, with regards to copyright, the online platform provides a formidable opportunity to educate and mobilize the general public to promote the public interest and the purpose of copyright.

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<sup>211</sup> Haggart, *Copyright*, supra note 206 at 188.

<sup>212</sup> *Ibid.* at 187.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.* at 188.



Bill C-61 suffered the same fate as Bill C-60, becoming a victim of an election in three months (September 7, 2008) after it was tabled for first reading in the House of Commons and never progressed beyond that point due to political circumstances.<sup>215</sup>

### **3.12.3 Bills C-32, C-11 and the Copyright Modernization Act, 2012**

After the ill-fated legislative journey of Bill C-61 was cut short, it was not until almost two years later that another attempt was made to implement the WITs. On June 2, 2010, Bill C-32 was tabled for first reading before the House of Commons.<sup>216</sup> Bill C-32 was referred to as the Copyright Modernization Act,<sup>217</sup> but even if it advanced further in the legislative process than Bills C-60 and C-61, it did not go beyond the House committee stage.<sup>218</sup> Yet again, Bill C-32 died on the order of the paper following the dissolution of the Parliament of Canada in March 2011. Closely following Bill C-32 was Bill C-11, which was essentially identical to Bill C-32 but given a different number.<sup>219</sup> Bill C-11 eventually broke the jinx, made it through the legislative process and was assented to on June 29, 2012;<sup>220</sup> Bill C-11 became the Copyright Modernization Act (CMA), 2012.<sup>221</sup> Finally, seven years and nine days after Bill C-60 was introduced,<sup>222</sup> and fifteen years since Canada signed the WIPO treaties in 1997, they had been implemented and the government could heave a sigh of relief that the United States would no longer be breathing down their neck. But it is pertinent to ask if the CMA incorporated the concerns raised by the Geist-led protest against TPMs and anti-circumvention provisions. Since Bills C-61 and C-32

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<sup>215</sup> Ibid. at 189.

<sup>216</sup> Parliament of Canada, “An Act to amend the Copyright Act, Bill C-32” June 2, 2010 at online < <http://www.parl.ca/DocumentViewer/en/40-3/bill/C-32/first-reading> > accessed October 17, 2018.

<sup>217</sup> Haggart, *Copyfight*, supra note 211 at 190

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.; Parliament of Canada, “An Act to amend the Copyright Act, Bill C-11” June 2, 2010 at online < <http://www.parl.ca/DocumentViewer/en/41-1/bill/C-11/royal-assent/page-ToC> > accessed October 17, 2018.

<sup>220</sup> Ibid.

<sup>221</sup> *Copyright Modernization Act* S.C. 2012, c. 20.

<sup>222</sup> Parliament of Canada, *Bill C-60*, supra note 168.

were largely the same as Bill C-11, which was eventually became the CMA, it suffices to review some of the key provisions in CMA.

In my view, the provisions of the CMA attempt to balance the interests of users and creators. Some provisions favour the user community, while others favour copyright owners/content industry. Therefore, the question to be asked is whether, when taken as a whole, this Act successfully achieved the appropriate balance, or whether one set of stakeholders was ultimately favoured over the other. My review of the key provisions of the CMA and their implications will provide some insight on the possible answer to this question.

The CMA attempts to safeguard the rights and interests of both users and copyright owners. However, the limitations or restrictions placed on the user rights, discussed further below, do not foster balance between copyright users and owners. Additionally, what could be regarded as the major benefits to copyright owners are the provision on TPMs and their legal protection, which I discuss extensively in chapter five. As we now know, TPMs are digital locks for creative works in digital form that effectively control or restrict access to works.<sup>223</sup> Additionally, these digital locks now also enjoy legal protection in the sense that the law prohibits breaking or circumventing these locks.<sup>224</sup> These two provisions in the CMA favour copyright owners and bestow on them enormous rights to control *access* to and *use* of their digitized works. It has been argued that digital locks and anti-circumvention provisions nullify the relevance of the user right exceptions contained in the CMA.

First, to show that the CMA favours the content industry more, it is necessary to look at the TPM and anti-circumvention provisions. The CMA defines TPMs and its functions thus:

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<sup>223</sup> *Copyright Modernization Act*, supra note 221, s.41(a).

<sup>224</sup> *Ibid.* s.41(1).

technological protection measure” means any effective technology, device or component that, in the ordinary course of its operation,  
(a) controls access to a work, to a performer ’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or  
(b) restricts the doing ... of any act referred to in section 3 [copyright and moral rights], 15 [performers’ rights] or 18 [rights of sound recording makers] and any act for which remuneration is payable under section 19.<sup>225</sup>

By this provision, the use of TPMs now enjoy legal support, which further strengthens the content industry’s control over content. The law also prevents circumventions of TPMs, and circumvention in the CMA is defined to mean:

“circumvent” means,  
(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition “technological protection measure”, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and  
(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition “technological protection measure”, to avoid, bypass, remove, deactivate or impair the technological protection measure.<sup>226</sup>

The CMA prohibits the circumvention of TPMs and the distribution of circumvention devices; s.41.1 states that:

No person shall:  
(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition “technological protection measure” in section 41;  
(b) offer services to the public or provide services if  
(i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure,  
(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or

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<sup>225</sup> *Copyright Modernization Act*, supra note 221, s.41.

<sup>226</sup> *Ibid.*

- (iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or
- (c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component...<sup>227</sup>

Unlike the Swiss and New Zealand flexible implementation approaches, Canada adopts stricter approach that does not allow circumvention for permitted or noninfringing purposes and this gives a near absolute control over content to copyright owners. However, the CMA tries to create balance by expanding the scope of fair dealing in favour of users. The CMA in s.21<sup>228</sup> expands the scope of fair dealing in s.29 of the Copyright Act of 1985 to include research, private study, education, parody or satire; prior to this addition, the existing scope of fair dealing included news reporting, criticism or review.<sup>229</sup> The expansion of fair dealing in Canada is, in my view, a positive development because it is an addition to user rights<sup>230</sup> potentially allowing users to make further uses of works without fear of being liable for infringement.<sup>231</sup>

However, a critical look at the entire provisions of the CMA reveals that the expansion of fair dealing may not be as beneficial as it purports to be, especially in the face of TPMs and anti-circumvention provisions discussed above. Carys Craig, while acknowledging the expansion of the scope of fair dealing, at the same time points out that these expansions are undercut by the existence of TPMs.<sup>232</sup> We will return to consider the relationship between fair dealing's expansion in the face of TPMs and legal protection for digital locks in chapter five. For now, it

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<sup>227</sup> Ibid. s.41.1.

<sup>228</sup> Ibid. at s.21; Haggart, *Copyfight*, supra note 217 at 191.

<sup>229</sup> *Copyright Act*, R.S.C., 1985, c. C-42, s.29(1) & (2).

<sup>230</sup> Haggart, *Copyfight*, supra note 228.

<sup>231</sup> Michael Geist, "What the New Copyright Law Means for You" November 13, 2012 at online: <<http://www.michaelgeist.ca/2012/11/c-11-impact/>> accessed October 24, 2018.

<sup>232</sup> Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright"*, *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 191-2.

suffices to point to the enlargement of fair dealing as a perceived counterweight to the addition of industry-favouring TPM protections, creating the overall impression of a balanced legislative package. Further justification for the expansion of fair dealing is that the use of TPMs create an extra layer of protection for content owners in addition to the existing protection under copyright law, therefore it is justifiable to call for the expansion of fair dealing in the interest of balance.

The CMA also provides a bundle of new exceptions, which consider the day-to-day actions of consumers in the digital space in relation to how they access and use digitized content. The intent here is to make these activities non-infringing when users interact with content. The CMA in s.29.23 creates a new exception called *fixing signals and recording programs for later listening or viewing*;<sup>233</sup> this means that a user would not be liable for copyright infringement if he or she records a work or sound recording to watch or listen to it later.<sup>234</sup> This is also called format and time-shifting right.<sup>235</sup> This is a plus for the user community as it eliminates the worry over possible copyright infringement for individuals engaged in this kind of reproduction. However, it is expected that this kind of right would be curtailed by some restrictions to avoid abuse and to balance the interests of users and copyright owners. In order for the exception to apply, the work or sound recording must have been obtained legally,<sup>236</sup> this means that if the sound recording or work was procured illegally, the exception does not apply, and the individual could be liable for copyright infringement. Other limitations include that the work or sound recording, must not have been obtained by circumventing a TPM,<sup>237</sup> the recording must not be made more than once,<sup>238</sup> it must not be kept longer than necessary,<sup>239</sup> it must not be shared and

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<sup>233</sup> *Copyright Modernization Act*, supra note 221 at s.29.23.

<sup>234</sup> *Ibid.* at 29.23(1).

<sup>235</sup> Haggart, *Copyfight*, supra note 228.

<sup>236</sup> *Copyright Modernization Act*, supra note 221, s.29.23(1)(a).

<sup>237</sup> *Ibid.* s.29.23(1)(b).

<sup>238</sup> *Ibid.* s.29.23(1)(c).

must only be used for the individual's private purposes,<sup>240</sup> in other words, it cannot be used for commercial purposes. Additionally, the exception does not apply to works obtained through on-demand services.<sup>241</sup>

In my opinion, the restrictions placed on the permission to record for later listening or viewing seem reasonable to the extent that they seek to preserve a competitive market for products and services offered online without unduly curtailing the regular activities of consumers. The limitations to this exception discourage or deter *some* consumers from engaging in unauthorized commercial exploitation copyright owners' content, which is a major concern for content owners.

Also for the benefit of users, especially content creators who engage in video and music remixes, the CMA provides for an exception called non-commercial user-generated content (UGC - also known as the YouTube exception).<sup>242</sup> Before the passage of the CMA, Daniel Gervais, in his analysis of UGC in the proposed Bill C-32 defines it as content that is created with the aid of tools specific to the online environment and disseminated using such tools.<sup>243</sup> In other words, this exception is designed to apply to digital and internet-based content. Under this exception, it would not be an infringement of copyright if an individual uses an existing work made available to the public to create a new work and disseminate or permit it to be disseminated.<sup>244</sup> In other words, it means an individual can create a derivative work based on an existing work publicly available even though that work has copyright. This exception fosters

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<sup>239</sup> Ibid. s.29.23(1)(d).

<sup>240</sup> Ibid s.29.23(1)(e) & (f).

<sup>241</sup> Ibid s.29.23(2); In s.29.23(3), on-demand service means where a person can choose when to access a performer's performance or sound recording.

<sup>242</sup> Ibid. s.29.21(1).

<sup>243</sup> Daniel Gervais, "User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32" in Michael Geist, ed. *From "Radical Extremism" to "Balanced Copyright", Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 465.

<sup>244</sup> Ibid.

creativity by allowing access to existing works upon which a new work is created. The safeguard measures to ensure the proper balance of rights between copyright users and owners are that the dissemination of the new work should not be for commercial gain,<sup>245</sup> if the name of the creator of the original work is known and where it is deemed reasonable, credit should be given to him or her,<sup>246</sup> the original work should be non-infringing on another's copyright,<sup>247</sup> and the dissemination of the new work should not adversely affect the market or financial exploitation of the existing work.<sup>248</sup> The UGC exception is a made-in-Canada provision and has formed the basis of Peter Yu's proposal for its legal transplant to Hong Kong,<sup>249</sup> which speaks to the fact that Canada got it right with the UGC.

These exceptions discussed above represent a trade-off wherein the user is expected to abide by the limitations in return for access to and modification of creative works. On the part of the copyright owner, their commercial interests are protected in return for allowing access to and modification of their work. Arguably, these limitations or conditions attached to the non-commercial user-generated exception appear to be fairly balanced and definitely a plus for users. It also fosters creativity and innovation in the digital space and significantly eliminates the fear of liability for copyright infringement.

A further benefit to the user community is the CMA provision that caps the statutory damages for non-commercial copyright infringement at \$5,000 (five thousand dollars).<sup>250</sup> In my view, the intent of this provision is to reduce the likelihood of lawsuits against individuals for

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<sup>245</sup> *Copyright Modernization Act*, supra note 204, s.29.21(1)(a).

<sup>246</sup> Ibid. s.29.21(1)(b).

<sup>247</sup> Ibid. s.29.21(1)(c).

<sup>248</sup> Ibid. s.29.21(1)(d).

<sup>249</sup> Peter Yu, "Can the Canadian UGC Exception be Transplanted Abroad?" (2014) 26 IPJ 177-205 at online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2405821](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405821)> accessed April 27, 2019.

<sup>250</sup> Supra note 245 s.38.1(1)(b), s.38.1 (1)(a) for copyright infringement bordering on commercial purposes, the court can award statutory damages in the sum of less than \$500 and not more than \$20,000; other mitigating provisions in the statutory provisions are if the defendant is unaware of the infringement – s.38.1(2), and in a special case – s.38.1(3).

non-commercial activities, including unauthorized downloading or mistaken reliance on fair dealing.<sup>251</sup> This provision seeks to create fairness that benefits both the copyright owner and the user. This is because most copyright owners (especially large multinational corporations) may not bother to pursue a non-commercial infringement activity for a possible damage award that is infinitesimal and would perhaps not even cover attorney's fees. For those cases that are unintentional infringement, they may be spared a copyright lawsuit. If a large corporation decides to institute legal action for non-commercial infringement, then it may be motivated by something else other than the meagre damage award of five thousand-dollars or less. Additionally, some non-commercial infringing activities could be mistakenly based on fair dealing, and so it helps curb the institution of unnecessary lawsuits against individual for activities that are non-commercial and not at a scale to pose potential threat to the copyright owner's market exploitation of the creative work. However, there may be smaller corporations or individuals who may decide to initiate lawsuits against non-commercial infringers. Perhaps, the benefit in this for such corporations or individuals is that it could serve as deterrence against persons who wilfully engage in infringement albeit for non-commercial purposes.

Generally, scholars agree that the provisions or exceptions in the CMA are welcome developments<sup>252</sup> that benefit users and afford them the opportunity to access, use, modify and share content on the internet without fear of infringing copyright. In fact, these exceptions and

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<sup>251</sup> Geist, *The New Copyright Law*, supra note 231.

<sup>252</sup> Haggart, *Copyright*, supra note 228 at 191; Geist, *The New Copyright Law*, supra note 231; and Craig, *Locking Out Lawful Users*, supra note 232 at 186-8. It pertinent to state that Craig's work focused on the proposed Bill C-32 and not the CMA, however, her analysis is still relevant because the CMA contains the same provisions as Bill C-32. See also Samuel Trosow, "Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing" in Michael Geist, ed. *From "Radical Extremism" to "Balanced Copyright", Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 541-568; Gervais, *User-Generated Content*, supra note 243.



user rights were not in the bills prior to Bill C-32 and so it could be regarded as the achievement of the Fair Copyright for Canada protest.<sup>253</sup>

However, the presence of digital locks on a work effectively overrides many of these new user rights;<sup>254</sup> for example, under fair dealing, the user must first access the work in order to create a parody, but if the work is TPM-protected, the user cannot access the work in the first place let alone create a parody out of it. The same is applicable to the non-commercial user-generated content: access is needed in order to enjoy the right to modify the work. Craig also argues that these exceptions (user right exceptions) are undercut by technological capabilities;<sup>255</sup> she further states that users' right to research, study, criticize, transform, even read and listen can be prevented by the use of technical controls.<sup>256</sup> Craig concludes that TPMs prevent users from exercising their rights and this tips the balance away from users and the public interest<sup>257</sup> in favour of copyright owners.

### **3.13 Statutory Review of the Copyright Act**

Before Bill C-11 was passed into law, Geist observed that the bill, though flawed, was fixable.<sup>258</sup> A further opportunity to fix the flaws in the Copyright Act may finally have arisen; at the time of writing this dissertation, the five-year mandated statutory review of the Copyright Act has been conducted and it is hoped that the restrictive digital locks and anti-circumvention provisions will be reconsidered and amended to mitigate the limitations that they impose on users in terms of access to work. In the course of the review, a plethora of submissions was made

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<sup>253</sup> Michael Geist, "The Battle over C-11 Concludes: How Many Canadians Changed the Copyright Debate" June 18, 2012 at online: < <http://www.michaelgeist.ca/2012/06/canadian-copyfight-success/> > accessed November 7, 2018.

<sup>254</sup> Haggart, *Copyfight*, supra note 252.

<sup>255</sup> Craig, *Locking Out Lawful Users*, supra note 232 at 193.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> Geist, *The Battle over C-11*, supra note 253.

to the Standing Committee on Industry, Science and Technology. In line with the focus of my research, it is pertinent to review, in particular, submissions from the Creative Commons organization, Canadian intellectual property law scholars and stakeholders in the content industry.

Ryan Merkley, the CEO of Creative Commons made a written submission that unsurprisingly called for a freeze on copyright term extension, expansion of user right and he decried how TPMs limit users' access to content in the digital age.<sup>259</sup> Merkley's submission urged the review committee not to consider any increase to Canada's current copyright term (which is currently the life of the author plus first years) but this call was ultimately ignored in the conclusion of the CUSMA, which was signed (November 30, 2018) after Merkley's submission (May 15, 2018). As mentioned earlier, though the CUSMA is yet to come into force, if and when it does, Canada is obliged to honour its international obligation under the agreement and increase the current copyright term by twenty years (making it life plus seventy years). Therefore, works that would otherwise have been available for the public to use without any restriction would be delayed by another twenty years.

While advocating for the expansion of user rights, Merkley observed that TPMs — as well as private contracts — must not restrict users' ability to exercise their legal rights to access and reuse works under limitations and exceptions to copyright.<sup>260</sup> Merkley's suggestion here is to review the TPM provisions. Similarly, on TPMs and in terms of expanding user rights, the submission by the Canadian intellectual property law scholars suggests the inclusion of remedies

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<sup>259</sup> Ryan Merkley, Submission to Standing Committee on Industry, Science and Technology on Statutory Review of the Copyright Act, May 15, 2018 at online: < <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9887146/br-external/CreativeCommons-e.pdf> > accessed April 27, 2019.

<sup>260</sup> Ibid.

for users who are improperly restrained by TPMs from making legitimate uses of content.<sup>261</sup>

They submit thus:

While the Act confers a broad range of remedies to copyright owners against infringement of copyright and moral rights, and the circumvention of TPMS, it provides no remedies for users who are improperly restrained in making legitimate uses of copyright works. Explicitly providing general common law and equitable remedies to users facing such limitations, coupled with an administrative procedure facilitating legitimate access to copyright works (e.g. to exercise fair dealing or for interoperability purposes on a work protected by TPMs) would be the natural next step toward solidifying copyright user rights. Similar administrative procedures mediating between copyright owners and users deprived of legitimate access to their works currently exist in, e.g., France and the UK.<sup>262</sup>

This is an interesting recommendation as it speaks to the heart of balance in copyright law. Incorporating this recommendation would to some extent mitigate the harshness of TPM and anti-circumvention provisions, and is an idea to which we will return in Chapter Five.

On the content industry side, the submission by Rogers Communications focused on incorporating provisions that would tackle the problem of streaming piracy, which it claims is now the new trend in unauthorized access to exclusive content. Rogers Communications state that as follows:

For the last several years, Rogers has been actively involved in the fight against online content theft, as we have increasingly seen Canadians migrate away from downloading piracy – which was a material problem when the Copyright Modernization Act was considered – to streaming piracy which, in our experience, the current iteration of the Act is ineffective in preventing.<sup>263</sup>

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<sup>261</sup> Myra Tawfik et al, Brief - Statutory Review of the Copyright Act submitted by Myra Tawfik on behalf of Canadian intellectual property law scholars, October 22, 2018 at online: <<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10278308/br-external/BannermanSara02-e.pdf>> accessed April 27, 2019. The other signatories include: Pascale Chapdelaine, Sara Bannerman, Olivier Charbonneau, Carys Craig, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, and Samuel E. Trosow.

<sup>262</sup> Ibid.

<sup>263</sup> Rogers Communications, Written Submissions of Rogers Communications on section 92 Copyright Act Review, December 10, at online: <<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10268870/br-external/RogersCommunicationsInc-e.pdf>> 2018, accessed April 27, 2019.

As a major broadcasting and content services provider in Canada, Rogers Communications is concerned about unauthorized access to its exclusive content, which it claims is facilitated by the proliferation and widespread adoption of set-top boxes and unlicensed Internet Protocol Television (IPTV) services.<sup>264</sup> Therefore, Rogers Communications recommends the inclusion of criminal prohibition against perpetrators who communicate exclusive content to the public on a commercial scale, introduce injunctive relief against ISPs. While I agree that unauthorized access is a genuine concern that should be tackled, it should be done in a manner that would not prejudice the right of the user or restrict his or her access to and legitimate use of content.

These submissions give us a taste of the kinds of changes that the various copyright stakeholders would like to see implemented. Parliament now has the opportunity to ensure that the outcome of the review reflects and advances balance within the Canadian copyright system. Since the enactment of the CMA in 2012, the judiciary (federal court of Canada) has also had the opportunity to interpret the TPM provisions, as will be discussed in detail in chapter five. Besides legal reforms, it is also possible to explore other means outside the law to achieve balance in the copyright system. In chapter two, I discussed how the dynamics of ICT has altered the status quo in the copyright system and continues to evolve to this day. It is clear, by now, that the law generally struggles to keep up with the pace of technological advancement, and this is at least equally true of copyright law in particular. Therefore, to adapt to a technology-driven copyright environment, the law must be complemented with innovative ways of ensuring that copyright stakeholders achieve their goals while still having due regard for the public interest.

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<sup>264</sup> Ibid. IPTV service is the provision of TV content through the internet unlike the traditional means, which is done through satellite or cable.

### **3.14 Conclusion**

Copyright law reform in Canada has come a long way. After series of setbacks and delays, Canada eventually implemented the WITs through the enactment of the CMA. However, Canada chose to implement the TPM provisions following an approach that does not adequately balance the interests of copyright stakeholders; this imbalance does not advance the public interest and creates challenges in the exercise of users' rights. The analysis in this chapter suggests that the legislative reforms still leave much to be desired in terms of achieving copyright balance in Canada. This points to the fact that the copyright system needs innovative and stakeholder-led regulatory initiatives to complement the effort of the law in regulating the activities of the copyright industry in the information age. This is the reason I suggest embracing a regulatory pluralism approach in chapter six.

Having examined the law reforms, it is apposite to discuss how copyright stakeholders take action to achieve their goals through the existing copyright legal structure. The focus will remain on the free culture and the content industry stakeholders. Therefore, chapters four and five provide a detailed analysis comparing and contrasting the strategies of the free culture and content industry stakeholders by examining their strategic use of CCL and TPMs respectively.

## CHAPTER FOUR

### THE FREE CULTURE STAKEHOLDERS AND CREATIVE COMMONS LICENSING

This chapter forms the first part of the case study analysis and examines the free culture narrative through the lenses of CCL. I discuss the origin and concept of CC organization as well as review CCL and the various categories. First, I examine the narrative on CCL through the views of scholars and their critical comments, and then I consider the CCL as a catalyst for the realization of free culture agenda in a copyright system where ICT plays a significant role.

#### 4.0 Background to the Establishment of Creative Commons

The establishment of the CC organization is traceable to the buildup of critical comments on what is arguably a one-sided and content industry-controlled copyright system. It is pertinent to show how specific developments in copyright law (which the free culture advocates oppose) paved the way for the creation of CC. The crux of the seemingly unending free culture-content industry copyright face-off fundamentally stems from what has been described as copyright law's perennial inability to determine where exclusive rights should end, and unrestrained public access should begin.<sup>1</sup> Some scholars are critical of the copyright law reform trend and how it is modeled to favour the content industry. This conflict continues unabated especially in the wake of ICT, which heightens the ongoing controversy.

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<sup>1</sup> Neil Netanel, "Copyright and a Democratic Civil Society" (1996) 106 Yale L.J. 283 at 285, cited in "Sheldon Halpern, "The Digital Threat to the Normative Role of Copyright Law" (2001) 62 Ohio State L.J. 569 at 573.

In 1994, John Barlow expressed the view that intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression.<sup>2</sup> In 1996 Pamela Samuelson criticized the attempt by the then Clinton administration in the United States of America to turn the emerging information superhighway into a publisher-dominated toll road.<sup>3</sup> She further stated:

The administration wants to please the copyright industry, especially members of the Hollywood community, who are vital to the president's re-election bid. And what this copyright industry wants in return is more legal control than ever before over the products they distribute.<sup>4</sup>

Similarly, in 1996, Jessica Litman stated that the current copyright statute (the Copyright Act of 1976, which is currently in force as at the time of writing this dissertation) in the United States of America and those before it were composed by representatives of copyright-related industries to govern interactions among them.<sup>5</sup> Litman further noted that most of the proposals for copyright amendment came from copyright holders or their defenders.<sup>6</sup> Samuelson and Litman were responding to the Clinton Administration's Information Infrastructure Task Force proposal to reform copyright law in a report titled "Intellectual Property and the National Information Infrastructure".<sup>7</sup>

Since the enactment of the DMCA, copyright scholars have continued to denounce its harmful impact on the copyright system in the digital era. For example, in 2001, Jane Ginsburg asserted that:

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<sup>2</sup> John Barlow, "The Economy of Ideas" (1994) WIRED, at online: < <https://www.wired.com/1994/03/economy-ideas/> > accessed July 17, 2017.

<sup>3</sup> Pamela Samuelson, "The Copyright Grab" (1996) online: < [http://archive.wired.com/wired/archive/4.01/white\\_paper.html?pg=1&topic=>](http://archive.wired.com/wired/archive/4.01/white_paper.html?pg=1&topic=>) at 1, accessed July, 17, 2017.

<sup>4</sup> *ibid.* The issue of the Clinton administration seeking to please the copyright industry has likely been a characteristic of most previous American administrations and is not unique to the Clinton administration.

<sup>5</sup> Jessica Litman, "Revising Copyright Law for the Information Age" (1996) 75 Or. L. Rev. 19 at 23.

<sup>6</sup> *Ibid.* at 24.

<sup>7</sup> *Ibid.* at 20. The report was the proposal that initiated the bid to implement WIPO Internet Treaties and despite critical comments against it, it was passed into law two years later; it is the current Digital Millennium Copyright Act of 1998 (DMCA).

The confluence of new technologies of access control and copy control, and the new legislation in the 1998 Digital Millennium Copyright Act (DMCA) preventing their circumvention, may in fact have enhanced the ability of copyright owners to wield electronic protective measures to control new kinds of exploitation of their works. In reaction to this, critics assert that the goal of copyright law has never, and should not now become, to grant “control” over works of authorship, but rather to accord certain limited rights over some kinds of exploitation.<sup>8</sup> Economic incentives to create may be needed to achieve the constitutional goal of public instruction, but those incentives should be as modest as possible.<sup>9</sup>

Lawrence Lessig articulates five ways through which copyright law increasingly gains controls over cultural works:<sup>10</sup> the extension of copyright duration, copyright scope expansion, regulatory extension of copyright, technological regulation, and corporate monopoly. First, Lessig identifies that copyright duration has been extended eleven times by the United States Congress for existing works with the latest being the Sonny Bono Copyright Term Extension Act.<sup>11</sup> Lessig argues that in practice (regardless of theory), there has been established a system of perpetual copyright by installment,<sup>12</sup> which is reminiscent of the pre-1774<sup>13</sup> perpetual copyright system.<sup>14</sup> In the second dimension, Lessig talks about the scope of copyright, stating that as at 1790 copyright covered maps, chart and books. He noted that there were 174 publishers in the United States in 1790 and the law principally functioned to regulate publishers.<sup>15</sup> This has

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<sup>8</sup> Jessica Litman, *Digital Copyright* (New York: Prometheus Books, 2001) at 81-86 cited in “Jane Ginsburg, “Copyright and Control over New Technologies of Dissemination” (2001) 101 *Columbia L. Rev.* 1613 at 1615.

<sup>9</sup> *Ibid.*

<sup>10</sup> Lawrence Lessig, “The Creative Commons” (2004) 65 *Mont. L. Rev.* 1 at 4-8.

<sup>11</sup> *Ibid.* at 5, the Sonny Bono Copyright Term Extension Act increased copyright term in the United States from life of the author plus 50 years to life of the author plus 70 years; Susan Corbett, “Creative Commons Licenses, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?”, (2011) 74 *Modern Law Review* 503 at 509

<sup>12</sup> *ibid.*

<sup>13</sup> As explained in chapter one, the case of *Millar v. Taylor* favoured perpetual copyright but the decision was reversed in 1774 in *Donaldson v. Beckett*.

<sup>14</sup> *Supra* note 10 at 4.

<sup>15</sup> *Ibid.* at 5; additionally, on the international level, the Berne Convention for Protection of literary and Artistic Works, adopted on September 9, 1886 (as amended in Paris, 1971) also expanded the scope of copyright, Article 2(1) states, “The expression



evolved over time and the scope of copyright not only covers maps, charts and books, but all works of authorship in tangible form.<sup>16</sup> Third, is the expansion of copyright reach due to the advent of digital technology and the internet.<sup>17</sup> Lessig explains that traditionally, some uses of copyright materials are unregulated by law, for example, reading a book, giving it to a friend to read or even selling it.<sup>18</sup> However, the architectural features of the internet function in such a way that copies are made in the process of accessing digitized content.<sup>19</sup> Lessig notes that controls are built into technology to regulate previously unregulated uses of content bringing it within the reach of copyright.<sup>20</sup> The fourth dimension is, according to Lessig, a shift in the regulation of copyright from the courts to technology.<sup>21</sup> Lessig stated that:

But increasingly, it is no longer courts that are enforcing copyright law. Increasingly, it is technology. Increasingly, it is the software, or generically, “code” that controls how you get access to the copyrighted works that determine what your freedom is. Increasingly, that means your freedom is restricted by code. And not just code. As if code was not powerful enough, Congress is now passing laws that purport to protect the code that protects the copyrighted (and noncopyrighted) material. These protections often extend beyond the protections of copyright law itself.<sup>22</sup>

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“literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

<sup>16</sup> Ibid.; Susan Corbett, *Creative Commons*, supra note 11 at 509: “there are few exceptions – players of sports are not protected by performer’s rights and advertisement slogans and titles remain unprotected by copyright in most jurisdictions (although this appears to have changed in New Zealand; see S. Corbett, ‘*Sunlec v. Electropar*: Copyright in a Slogan’ Literature for Market?’ (2009) 15 NZBLQ 227)”

<sup>17</sup> Ibid. at 6.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. at 7.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid at 7-8.

The fifth dimension is the existence of corporate monopoly in the cultural industry notwithstanding that the copyright law initially vests copyright in authors.<sup>23</sup> Lessig argues that this is a concentrated form of control producing a kind of homogenous culture, a culture, which is increasingly tailored to the vision of a certain mainstream market and, therefore, protects that market against different kinds of creativity.<sup>24</sup> Lessig concludes:

If you add all of these changes together – the changes in the duration, scope, reach, force, and concentration – then you reach a point that is important for us to see: Never in our history have fewer exercised more control over the development of our culture than now. Not when copyrights were perpetual, because even then the reach of the right was only narrowly about republishing a particular work. Never has the concentration been as significant as it is now. And so, just at the time when the technology enables extraordinary range of new creativity, the new creators, the new Walt Disneys, must fight this system of legal regulation to find a right to speak.<sup>25</sup>

According to Lessig, in response to the imbalance in the copyright system described above, the copyright world could be governed by two extremes; the first is where all rights must be controlled and the second is where no rights should be controlled.<sup>26</sup> He identifies yet another copyright world where three blocs exist – all rights reserved, no rights at all and some rights should be controlled but not all.<sup>27</sup> The concept of some rights reserved alludes to the concept of CCL, which free culture advocates believe could potentially tilt the copyright scale to achieve balance.

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<sup>23</sup> Ibid. at 9. In the United States, despite vesting copyright in the author, corporate monopoly exists because some of the works are usually what is called “work for hire”, meaning that corporate organizations hire authors to create the work but the copyright in the work is assigned to the corporation.

<sup>24</sup> Ibid.

<sup>25</sup> Lessig, *Creative Commons*, supra note 10 at 9

<sup>26</sup> *ibid.* at 10.

<sup>27</sup> *ibid.*

While Lessig's views above are compelling, it is necessary to accommodate critical comments on his opinion; these counter views will be discussed in detail when I offer a critique of CC organization and the CCL. However, Jeffrey L. Harrison's critique in 2003 is a good example to consider briefly at this point. Harrison notes that he agrees with some of Lessig's conclusions and that there is an imbalance in the copyright system.<sup>28</sup> The imbalance referred to by Harrison is the inequality that exists between users' rights and those of copyright owners. However, in a counter argument, Harrison contends that some of the views expressed by Lessig are one-sided and are characterized by a lack of discernable and consistent reasons underlying the rationale for his views.<sup>29</sup> Presumably, what Harrison refers to as Lessig's one-sided view could be his advocacy for the liberty to share and access content in the digital world as opposed to restriction of access to content by copyright law. This of course, is necessary for the much-needed balance that Harrison himself agrees with. However, perhaps Harrison's concern is that the CCL disregards the interests of copyright owners who seek to exploit their content for financial reward. Despite the views of critics, Lessig and other supporters of the free culture decided to devise a means to make *some rights reserved* a reality, especially since the well-resourced and multinational content industry stakeholders<sup>30</sup> show no sign of changing their stance on copyright. In support of the CC cause, Michael Carroll argues that copyright law follows a one-size-fits-all approach and assumes that all authors seek maximum legal control over their respective works.<sup>31</sup> The creation of CC can be regarded as self-help in the copyright system riding on the platform of ICT.

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<sup>28</sup> Jeffrey L. Harrison, "Creativity or Commons: A Comment on Professor Lessig" (2003) 55 Fla. L. Rev. 795 at 795.

<sup>29</sup> Ibid.

<sup>30</sup> Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (Toronto: University of Toronto Press, 2014) at 166.

<sup>31</sup> Michael Carroll, "Creative Commons as Conversational Copyright" in Peter K. Yu, ed, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (USA: Praeger Publishers, 2007) 445 at 447.

#### 4.1 Creative Commons Organization: Establishment and Concept

Following the background given above and to locate a midpoint between *all rights reserved* (complete control) and *no rights at all* (complete freedom), the CC was born. It developed as a response to a challenge presented by online creativity.<sup>32</sup> As noted briefly in chapter two, Lessig was the brain behind the creation of CC, which was established in 2001 as a non-profit organisation;<sup>33</sup> it received generous support from the Center for the Public Domain and is led by education experts, technologists, legal scholars, investors, entrepreneurs and philanthropists.<sup>34</sup> Other founding members of the CC include James Boyle, Michael Carroll, Hal Abelson, Eric Saltzman and Eric Eldred.<sup>35</sup> It is pertinent to mention here that references to “Creative Commons or CC” are to the non-profit organization while the usage of “Creative Commons licensing or CCL” connotes reference to the licensing scheme by which owners of content license their works.

CC has employed the internet to advance the free culture agenda and promote the dissemination of knowledge. As noted in chapter two,<sup>36</sup> Lessig explicitly states his support for Stallman’s GNU Project so it is unsurprising that CC was partly inspired by Stallman’s free software project<sup>37</sup> with the goal of building flexibility into the copyright system amidst increasingly restrictive default rules.<sup>38</sup> CC helps creators and authors to share their knowledge and creativity by providing free and easy-to-use copyright licences that authorize licensees to use

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<sup>32</sup> Susan Corbett, *Creative Commons Licenses*, supra note 11 at 503.

<sup>33</sup> Wikipedia, “Creative Commons” at online: < [https://en.wikipedia.org/wiki/Creative\\_Commons](https://en.wikipedia.org/wiki/Creative_Commons) > accessed July 19, 2017.

<sup>34</sup> Creative Commons, “History”, at online: < <https://creativecommons.org/about/history/> > accessed July 19, 2017.

<sup>35</sup> Nick Scharf, “Creative Commons-ense? An analysis of tension between copyright law and the Creative Commons”, (2017)12 *Journal of Intellectual Property Law & Practice* 376 at 377.

<sup>36</sup> Chapter two of this dissertation.

<sup>37</sup> Bas Bloemsaat & Pieter Kleve, “Creative Commons: A business model for products nobody wants to buy” (2009) 23 *Int. Rev. of Law, Computers & Technology* 237 at 238; Susan Corbett, *Creative Commons*, supra note 11 at 505

<sup>38</sup> *ibid.*

these creative works under certain licence conditions.<sup>39</sup> In other words, the CC organization conceived a scheme of licensing called Creative Commons licensing (CCL) through which creators and authors of cultural works can choose to provide their works in digitized formats for free, but users of such works must comply with certain licence conditions. Lessig envisions the proliferation of ICT as a phenomenon that facilitates the sharing of creative works for users and creators to use and be inspired to continue the line of innovation.<sup>40</sup> He published three successive works,<sup>41</sup> which could be said to herald the establishment of the CC and further strengthen the free culture agenda in the copyright system.

#### **4.1.1 Objective and Ideology of the Creative Commons Organization**

As I understand it, the CC initiative rests on three basic ideological foundations. Firstly, to *promote the free culture agenda* so that creative works are made accessible through the internet for future users/creators to build on. It was intended that this ideology would enrich the society and foster public interest in the use of creative works. Secondly, the CC ideology promotes the creation of a *commons* as a key to enhance creativity<sup>42</sup>. In articulating the meaning of *commons*, Michael A. Heller describes it as “a legal regime, in which multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude the other.<sup>43</sup>” The name “Creative Commons” derives from the *commons* concept where authors and creators freely share their works creating a knowledge-based source accessible to all for free and to be used under certain conditions. The third CC ideology is its *recognition and assertion of copyright* in a

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<sup>39</sup> Creative Commons, “What we do” at online: < <https://creativecommons.org/about/> > accessed July 20, 2017.

<sup>40</sup> Susan Corbett, *Creative Commons*, supra note 32 at 507.

<sup>41</sup> Lawrence Lessig, *Code and other laws of cyberspace*, (New York: Basic Books, 1999); Lawrence Lessig, *The Future of Ideas, The Fate of The Commons in a Connected World*, (Toronto; New York: Random House, 2001); Lawrence Lessig, *Free Culture: How Big Media uses Technology and the Law to lock down Culture and Control Creativity*, (New York: The Penguin Press, 2004).

<sup>42</sup> Niva Elkin-Koren, “What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons (2005) 74 *Fordham Law Review* at 389.

<sup>43</sup> Michael A. Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets” (1998) 111 *Harv. L. Rev.* 621,623-4, cited in “Elkin-Koren, *What Contracts Cannot Do*, supra note 42.”

manner that promotes its free culture agenda to help promote balance in the copyright system. Copyright as provided by the law is recognized by the CC organization but instead of exploiting proprietary right in creative works, the right is used to give liberty to access and use of creative works, while requiring licensees of such works to adhere to certain licence conditions.

The CC was established to give authors and creators the opportunity to exercise their rights differently from the traditional copyright method through a licensing scheme that is free and easy to use. The promotion of free culture is the core ideology of CC – on the one hand, this gives authors and creators the liberty to share their works, and on the other hand, users are given the freedom to access these works and abide by some terms stipulated by the author or creator of the work. This ideology of the CC is realized through the introduction of the CCL, that promotes creators' rights by giving them the opportunity to exercise their rights (exclusive rights under copyright law) in a way that makes it possible to provide their works for free to users and inspire transformative use, which in turn leads to follow-on creativity and innovation. The ideology of CC does not conflict with the existing copyright system or attempt to establish an alternative to copyright; on the contrary, copyright is the foundation on which it actualizes its objectives. But, this is somewhat misunderstood as I clarify subsequently.

The fundamental objective that underpins the CC initiative is to respond to the obstacles to creativity, which copyright law ironically creates through the restriction of access to content. This objective is achieved through the creation of a flexible option within the copyright system to accommodate the preferences of authors and creators who choose to freely make their cultural works available for use by others who in turn agree to adhere to the licence conditions. By making their works accessible to the public, some users build on them through transformative use (only applicable to some licences) and inspire the continuation of innovation and creativity.

Consequently, CC seeks to transmit a vast number of creative works into the “commons.”<sup>44</sup> Niva Elkin-Koren states that copyright law provides owners with a set of exclusive rights to their works and this imposes a correlative duty on non-owners to seek owners’ permission for every use (except fair use) of their works protected by copyright.<sup>45</sup> In her reasoning, Elkin-Koren identifies two barriers to access: first is the legal right to restrict access and second is the information costs associated with obtaining a licence.<sup>46</sup> CC accepts the first and focuses on the later.<sup>47</sup> Elkin-Koren further explains that the information costs associated with obtaining permission to use copyrighted materials are prohibitively high;<sup>48</sup> the expression “protected by copyright” is not readily evident and would require elaborate legal analysis.<sup>49</sup> Additionally, the process of identifying the owners, determining the legal status of the work, and negotiating terms of use is often very expensive<sup>50</sup> and in some cases, impossible. Similarly, Bloemsaat and Kleve observe that it is necessary for almost any use of a work to clear copyright,<sup>51</sup> which consists of locating all the copyright holders that (still) have rights to a work and getting their permission.<sup>52</sup> This task of clearing copyright can pose a huge obstacle for a potential user or distributor of a work.<sup>53</sup>

Overcoming the obstacles to creativity is precisely what Lessig and other free culture advocates wanted to achieve when the CC organization was established,<sup>54</sup> and the intention was to achieve this without specifically altering the existing legal structure of the copyright system

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<sup>44</sup> Severine Dusollier, “The Master’s Tools v. The Master’s House: Creative Commons v. Copyright” (2006) 29 *Columbia JL & Arts* 271 at 272.

<sup>45</sup> Elkin-Koren, *What Contracts Cannot Do*, supra note 42 at 379.

<sup>46</sup> Ibid.

<sup>47</sup> *ibid.* Accepting the first means CC acknowledges copyright owners’ exclusive rights in their works; focusing on the second means CC seeks to eliminate the barrier associated with seeking owners’ permission to use their works.

<sup>48</sup> Ibid. at 379-80.

<sup>49</sup> *ibid.* at 380.

<sup>50</sup> Ibid.

<sup>51</sup> Meaning to obtain permission to use the work.

<sup>52</sup> Bloemsaat & Kleve, *Creative Commons*, supra note 37 at 238.

<sup>53</sup> Ibid.

<sup>54</sup> Wikipedia, *Creative Commons*, supra note 33; Scharf, *Creative Commons-sense?* note 35.

thereby creating a new way to share creative works and enable the dissemination of knowledge for the benefit of all. The ultimate purpose for CC is to create a balance in the system. As Lessig puts it:

Take this world that is increasingly a world by default regulating and change it into a world where once again we can see the mix between all, none, and some, using the technology of the Creative Commons. This change is done through the voluntary action by individuals - creators, content owners. They take voluntary action by marking their content with a tag that expresses a kind of freedom. They use these tags then to build a kind of balance into the system to restore this reasonableness into the system by giving people a way to say, "I don't believe in this extremism."<sup>55</sup>

According to Lessig,<sup>56</sup> technology has become a means to regulate copyright. Interestingly, it is the same instrument of technology that CC creatively uses to create balance in the copyright system.<sup>57</sup> The freedom created by CC has enabled a simple way of lawfully using creative content through a less cumbersome process.

#### **4.1.2 Creative Commons Organization and Copyright**

One of the misconceptions about CC is the lack of understanding on how its agenda fits within the copyright system. The lack of clarity on CC-copyright relationship may even be found among supporters of CC; perhaps, some extra-zealous CC supporters, conceive CC erroneously as the new copyright. This may have informed the critical statement of Severine Dusollier, a CC advocate, who, as a project leader for CC in Belgium, in 2006, writes that "it is not clear whether the Creative Commons initiative seeks only to eliminate the excesses in the copyright regime or if its ultimate objective is to dispose of copyright altogether. I will assume that the purpose of the

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<sup>55</sup> Lessig, *Creative Commons*, supra note 10 at 11.

<sup>56</sup> Ibid. at 7,8.

<sup>57</sup> This also aligns with the narrative I develop in chapter five, that ICT can be used as an instrument by copyright stakeholders to achieve their respective goals without much ado.



Creative Commons project is the former not the latter.”<sup>58</sup> Dusollier, in my view is expressing her concern over people’s understanding of CC, its agenda, and its relationship with the copyright system. Her statement suggests that there are some CC advocates, who seem to miss the point about CC (or what it claims to be or has become), its ideology and objective in relation to the existing legal structure of copyright. It is therefore necessary to clarify the relationship between CC and copyright.

The CC organization promotes the CCL scheme, which operates within the copyright system and it is not a separate copyright regime. CCL is not an alternative to copyright system; rather, it works alongside copyright so that authors can always easily modify the default copyright terms to best suit their needs.<sup>59</sup> To say CCL is an alternative means for creators to exercise their rights differently within the copyright system is appropriate and captures its purpose; on the contrary, to say that CCL is an alternative to copyright is not a correct understanding of what CCL stands for. CCL is not a substitute to copyright but operates on the foundation of the copyright system. This means that the CCL scheme recognizes the author’s ownership of the work before and after she licenses it under any of the CCL. Therefore, it uses the traditional copyright system to achieve its aim. This point is crucial in the light of the concern raised by Dusollier.<sup>60</sup>

Scharf’s articulation presents a clear understanding of the relationship between CC and copyright when he states that:

Although CC has its own different rules, copyright and CC can operate jointly over music content and are therefore co-existent; copyright provides the underlying protection from which use can be administered via the CC licence. The fact

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<sup>58</sup> Dusollier, *The Master’s Tools*, supra note 44 at 273 footnote 5.

<sup>59</sup> Creative Commons, “About” at online: < <http://creativecommons.org/about/> > accessed July 24, 2017.

<sup>60</sup> Dusollier, *The Master’s Tools*, supra note 58.

that CC operates with copyright law as its regulatory underpinning is perhaps its most workable aspect as it does not require any restructuring of copyright law itself and is unlikely to prejudice the commercial interests served by the existing regime.<sup>61</sup>

Rather than calling for an outright displacement of copyright (which in itself is counter-intuitive because CC relies on copyright), it is in line with the goals of CC to aspire to neutralize control around digitized works and remove barriers to creativity.

In my view, the free culture community realized that the writings and critical comments against the copyright system were not yielding the desired change. Therefore, a change of strategy was needed. In 2004, Lessig notes that, referring to his outspokenness against the repression of culture, “I have been in the middle of this debate now for five years. It has only gotten worse.”<sup>62</sup> The CC strategy, as Scharf notes, does not seemingly upset the content industry stakeholders’ interest and also appears to offer the free culture stakeholders the freedom they seek. The CC idea to create a balance in the copyright system comes from within the copyright system and not without. It is quite an ingenious arrangement though not flawless, as I show later.

## **4.2 Creative Commons Licensing**

Pursuant to its aim of creating liberty to easily share creative works and contribute to the progress of science, the CC organization created and deployed online, various licence categories. The CCL arrangement helps to make works available for both consumptive and transformative use such as reading a book or article, viewing a video and listening to musical works as well as building on these works to create something new. CCL leverages the internet as an enabler to

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<sup>61</sup> Scharf, *Creative Common-sense*, supra note 35 at 378.

<sup>62</sup> Lessig, *Creative Commons*, supra note 10 at 12.

provide a wider reach for access and usability of copyright works; and this in turn promotes the free culture idea in the copyright system. In the copyright system, there are authors and owners who desire to exploit the copyright in their works for economic gain and there are those who do not; the latter, in particular, take advantage of the CCL scheme to make their works available for others to use under certain licence conditions. However, nothing precludes some financially motivated copyright owners to license their works under the CCL arrangement to create awareness on such works, which may hopefully generate financial reward in the long run. Before proceeding to discuss the various categories of the CCL scheme, it is necessary to clarify whether or not the CC licenses are contracts.

#### **4.2.1 Is the Creative Commons Licensing Scheme also a Contract?**

A good starting point in the analysis is to briefly explain what these concepts (licence and contract) mean. A licence is special permission to do something on, or with, somebody else's property which, were it not for the licence, could be legally prevented.<sup>63</sup> Similarly, The Law Dictionary states that a licence is a permission, accorded by a competent authority, conferring the right to do some act, which without such authorization would be illegal, or would be a trespass or a tort.<sup>64</sup> From these definitions of a licence, it is important to emphasize that for a licence to exist, there must be an issuing authority, who unilaterally confers the privilege to do certain acts, which would otherwise be illegal. Using the term "privilege" means that the licensee does not offer the licensor anything (in monetary value or otherwise) in exchange for the privilege. In the copyright system therefore, a copyright owner is at liberty to grant a licensee the privilege or permission to access and use her content under certain terms, otherwise such would amount to

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<sup>63</sup> Lloyd Duhaime, "Licence Definition" at online: < <http://www.duhaime.org/LegalDictionary/L/License.aspx> > accessed August 8, 2019.

<sup>64</sup> The Law Dictionary, "What is a Licence?", at online: < <https://thelawdictionary.org/license/> > accessed August 8, 2019.

copyright infringement. In other words, if the terms of a licence are violated, the licensee can be sued for copyright infringement but not breach of contract where there was no contract as such.

A contract on the other hand, is an exchange of promises by two or more persons backed up by consideration; consideration in the eyes of the law does not have to always be of monetary value, it could be the promise to do an act. In the formation of a valid contract, the essential elements necessary for the formation of a valid contract are offer, acceptance and consideration. For example, Mr. A says to Mr. B, if you mow my lawn during the summer months, I will pay you \$100 monthly. In Canada, United States and common law jurisdictions, this is an offer from Mr. A to Mr. B, and Mr. B can choose whether or not to accept the offer. If he does accept the offer, a contract is formed, and the consideration is the \$100. If any of the parties does not fulfil their obligation or promise, an action for breach of contract can be instituted against the defaulting party.

There are differences between a licence and a contract. The fundamental differences are that licences are revocable at will, but contracts are not;<sup>65</sup> licences can be created unilaterally,<sup>66</sup> while contracts require mutual consent; and licences create privileges, but contracts create duties.<sup>67</sup> Furthermore, in the context of copyright, if the terms of a licence is not complied with, the licensor can sue the licensee for copyright infringement, but if the licence is embodied in a contract (i.e. it has an offer, acceptance and consideration), violation of the terms makes the licensee liable for copyright infringement and breach of contract.

With the foregoing, we might ask whether the CCL scheme operates as a contract or, in other words, whether the licences are contractual. As far as my research reveals, the CC

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<sup>65</sup> Christopher Newman, "A Licence is Not a Contract Not to Sue: Disentangling Property and Contract in the Law of Copyright Licences" (2013) 98, Iowa L. Rev. 1101 at 1127.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

organization has consistently branded its permission scheme as a “licence” and the word “contract” is not used interchangeably with “licence.” In the formation of these licences, each licensor chooses a particular licence (discussed below) under which she desires to give consent for her work to be used. This could imply that the licence is effectively a unilateral creation, which is one of the characteristics of a licence. There is no meeting between the licensor and licensee to bargain over the terms of the licence. A prospective licensee can either accept the terms and abide by them or leave it. Regarded in this way, it may appear that a CC licence does not involve an offer, acceptance and consideration--it is simply the grant of a permission to use the licensor’s content.

Arguably, these characteristics of the CC licences do not quite align with the traditional definition and formation elements of a contract as discussed above, and instead, fitting more readily with the description of a licence. However, contrary to the norm,<sup>68</sup> the CC organization claims that licences issued under its scheme are not revocable<sup>69</sup> and this oddity seems to mimic a contract. Nonetheless, there may be some justification for this oddity, at least from a practical point of view. A work licensed under CC has one licensor but may have thousands of licensees, so it may be practically impossible to communicate a revocation to all the licensees. The CC offers licensors what I call a *pseudo revocability* by allowing them stop the distribution of the work under the licence at any time;<sup>70</sup> technically, this means revocation, but the drawback is that its effect may be minimal because anyone who already has access to the distributed work may still redistribute it under the same licence.<sup>71</sup> Perhaps CC’s rationale for making the licences irrevocable is that revocation may prove ineffectual because it is impossible to completely retract

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<sup>68</sup> Supra note 65.

<sup>69</sup> Creative Commons, “Frequently Asked Question” at online: < <https://creativecommons.org/faq/#can-i-change-the-license-terms-or-conditions> > accessed August 9, 2019.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

materials distributed online. Arguably, the irrevocability of the CCL stems from the exchange of promises in the licensing scheme where the licensor offers an irrevocable licence on the grounds that the licensee promises to use the CCL and adhere to the terms of whichever licence she chooses. Therefore, the use of the work or acceptance of the licence on those terms implies a promise from the licensee in return for a promise of irrevocability on the part of the licensor. Regarded in this way, the relationship (exchange of promises) arguably makes the CCL scheme more of a contractual relationship than merely a free licence.

In sum, I would argue that, notwithstanding the irrevocability anomaly, CC's permission scheme, though branded a licence, does have elements that could constitute a contractual relationship.

#### **4.2.2 Creative Commons Licence Categories**

The CC licences have been designed to, as much as possible, accommodate creator and user preferences. Therefore, in my opinion, these licence categories are not just for convenience, but tailored to suit both creators and users. The different categories of CCL are:

- i. **Attribution Licence:** This licence (CC-BY) authorizes the public to do whatever they like with the work such as copy, disseminate and even produce derivative works for financial reward. The only condition the licence requires is that credit must be given to the author for the original work. It is regarded as the most accommodating of all licences offered by CC.<sup>72</sup>
- ii. **Attribution Share Alike Licence:** This licence also permits modification of the licensor's work and even for commercial purposes. The licence condition requires that credit must be given to the original author and whatever derivative works the user generates and wishes to license it, it

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<sup>72</sup> Creative Commons, "About The Licences" at online: < <http://creativecommons.org/licenses/> > accessed July 25, 2017.

must be the same terms under which the original work was licensed.<sup>73</sup> That is, a CC BY-SA licence.

iii. **Attribution Non-commercial Licence:** This licence permits others to modify your work and even produce derivative works based on your work. The licence condition is that credit must be given to the original author and derivative works must be non-commercial. Licensing of derivative works does not have to be under similar terms as the original work.<sup>74</sup> This licence is denoted as the CC BY-NC.

iv. **Attribution Non-commercial Share Alike Licence:** This is the same as number (iii) above except that the derivative work has to be licensed under identical terms as the original work and it is represented as CC BY-NC-SA.

v. **Attribution Non-Derivative Licence:** This licence authorizes copying and redistribution of the work both for commercial and non-commercial purposes, but credit must be given to the author and derivative works are not allowed.<sup>75</sup> This is represented as CC BY-ND.

vi. **Attribution Non-commercial No Derivative Works Licence:** This is the most restrictive licence compared to all the other categories;<sup>76</sup> Here the work may only be used for non-commercial purposes and you must give credit to the author and cannot modify the work; it is denoted as CC BY-NC-ND.

The image below represents the licences explained above.

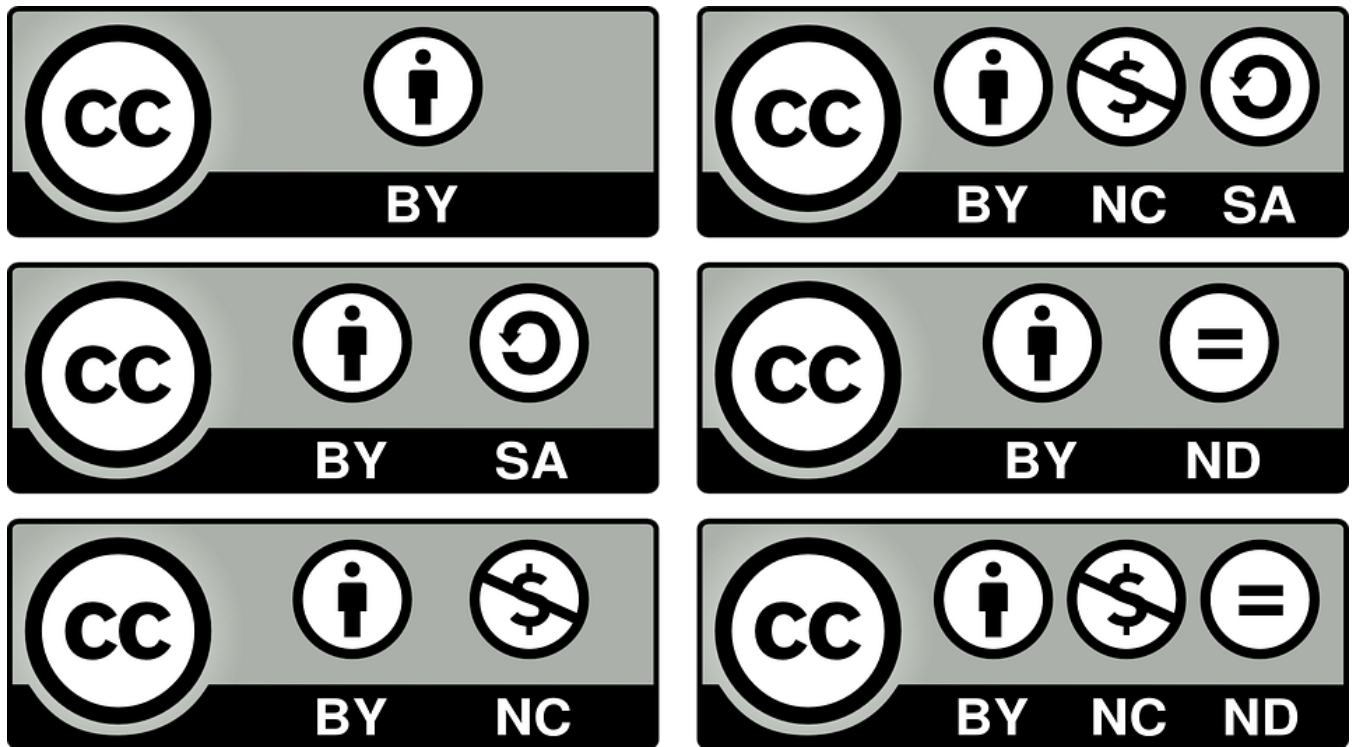
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<sup>73</sup> Creative Commons, *The Licences*, supra note 59.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.



Source: Pixabay <https://pixabay.com/vectors/creative-commons-licenses-icons-by-783531/>

The CC also provides an “all rights granted” licence category, which gives licensors, who choose to, the opportunity to dedicate their work to the public domain and is represented as CC0<sup>77</sup> and I will discuss it subsequently.

### 4.3 Three Layers of Creative Commons Licences

It is common practice that licences are embodied in some form of legal documentation which stipulates what the licensee can and cannot do. The same applies to CCL, except that the documentation comes in three layers – legal code, commons deed (not used in the sense of a legal instrument) and machine readable version of the licence.<sup>78</sup> The legal code is the actual

<sup>77</sup> Creative Commons, *The Licenses*, supra note 59.

<sup>78</sup> Ibid.; Lessig, *Creative Commons*, supra note 10 at 11.



licence and it contains the rights and obligations of the parties;<sup>79</sup> it ensures that the terms are enforceable in court.<sup>80</sup> The commons deed, according to CC is a summary of the important terms and conditions for licensors and licensees;<sup>81</sup> in other words, it does not contain legal technicalities that are difficult for non-lawyers to decipher. The simplified language of the commons deed essentially dispenses with the need to seek the professional legal services (which is mostly unaffordable for the ordinary user) to draft a contract to permit the use of content. Some users just want to access and use content “on-the-go” so the commons deed is fast and easy and eliminates barriers to creativity. It is by far one for the most valuable benefits of the CCL scheme; from the outset, users know the terms and conditions of use. The third layer of licence is not for human consumption but designed to convey the licence data to computer programs such as search engines.<sup>82</sup> According to CC:

“In order to make it easy for the Web to know when a work is available under a Creative Commons licence, we provide a “machine readable” version of the licence — a summary of the key freedoms and obligations written into a format that software systems, search engines, and other kinds of technology can understand. We developed a standardized way to describe licences that software can understand called CC Rights Expression Language (CC REL) to accomplish this.”<sup>83</sup>

For every work that a licensee uses under the CCL scheme, it has these three licence layers, according to Lessig, these three layers live together in a Creative Commons tag.<sup>84</sup> So in a nutshell, the way CCL works is that if an author chooses to make her work available for use, she

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<sup>79</sup> Dusollier, *The Master's Tools*, supra note 44 at 276.

<sup>80</sup> Ibid.; Elkin-Koren, *What Contracts Cannot Do*, supra note 42 at 391.

<sup>81</sup> Creative Commons, *About The Licences*, supra note 72.

<sup>82</sup> Bloemsaat & Kleve, *Creative Commons: A business model*, supra note 37 at 242.

<sup>83</sup> Supra note 81.

<sup>84</sup> Lessig, *Creative Commons*, supra note 78.

selects a CCL of her choice and attaches it to the work. Users who come across her work online are free to use it provided they agree to keep within the licence conditions.

#### 4.4 Creative Commons Licences and Litigation

There have been some cases of alleged violation of CCL terms by users, resulting in litigation. In 2016, in *Äventyrsgruvani Tuna Hästberg v. Gunnarsson*, a photographer licensed a photo in Sweden using CC-BY-NC-ND version 2.5,<sup>85</sup> the defendant reused the photo, he attributed the company that published the photograph but not the original photographer.<sup>86</sup> The plaintiff's photo attribution claim was dismissed by the Swedish court on the grounds that the plaintiff could not prove their copyright in the photograph.<sup>87</sup> This case demonstrates one of the risks in using works licensed under the CCL and indeed other forms of intellectual property such as patents or trade-marks, you may not be entirely sure the licensor is the bona fide owner of the intellectual property. On a speculative note, if the plaintiff had been able to establish rights in the photograph, relief sought could be compelling the defendant to comply with the CC licence conditions, or such other acts/relief according to the applicable law in Sweden. In another case, *Chang v. Virgin Mobile*,<sup>88</sup> a mobile phone company in Australia did a commercial in 2007 using the photograph (licensed under CC-BY 2.0) of a minor. The plaintiffs sued the company under various causes of action (invasion of privacy, copyright infringement and breach of contract).<sup>89</sup> The plaintiffs also brought suit against CC alleging it had negligently failed to sufficiently warn creators that CC licences only address copyright and not privacy and publicity rights. The case

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<sup>85</sup> Creative Commons, "Case Law" at online: < [https://wiki.creativecommons.org/wiki/Case\\_Law](https://wiki.creativecommons.org/wiki/Case_Law) > accessed May 22, 2019.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Creative Commons, *Case Law*, supra note 85, at < [https://wiki.creativecommons.org/wiki/Chang\\_v.\\_Virgin\\_Mobile](https://wiki.creativecommons.org/wiki/Chang_v._Virgin_Mobile) > Accessed May 22, 2019. The direct citation of the case is *Chang v. Virgin Mobile USA, LLC*, Civil Action No. 3:07-CV-1767-D (N.D. Tex. Jan. 16, 2009), at online:< <https://casetext.com/case/chang-v-virgin-mobile-usa> > Accessed May 22, 2019.

<sup>89</sup> Ibid.

was dismissed by the Texas District court for lack of personal jurisdiction.<sup>90</sup> Apparently, the minor, whose picture was used resides in the United States. In this case, initially, the plaintiffs included CC in the suit for failing to warn creators that CCL only cover copyright and not privacy or rights of publicity but later dropped the claims against CC and removed it from the lawsuit. However, the plaintiffs proceeded against *Virgin Mobile* and lost. The court held:<sup>91</sup>

Defendant's motion to dismiss presents questions concerning the court's constitutional power to exercise personal jurisdiction over an Australian defendant arising from its use in Australia of a photograph downloaded from a public photo-sharing website. Concluding that plaintiffs have failed to make the required prima facie showing of personal jurisdiction, the court grants defendant's motion and dismisses this action without prejudice.

In 2016, CC reports that in a German case (names of parties were redacted in the published decision), the court ordered the removal of hyperlink to a CC-licensed image that was used in violation of licence conditions.<sup>92</sup> In that case, a website in Germany posted a hyperlink to an image on another website, and the image was licensed under a CC licence, but the website where the image was posted from had not complied with the CC licence terms and was therefore in violation of the copyright.<sup>93</sup> The photographer who had taken the image filed a lawsuit requesting that the German website take down the link;<sup>94</sup> the court ordered the German website to remove the link due to violation of the licence terms.<sup>95</sup>

The cases discussed above show that there might be instances where the purported owner of the copyrighted work licensed under CCL may be challenged as the Swedish case above

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<sup>90</sup> Ibid.

<sup>91</sup> *Chang v. Virgin Mobile USA, LLC*, Dist. Court, ND Texas 2009 at online: <  
[https://scholar.google.ca/scholar\\_case?case=9985369727006284376&q=Chang+v.+Virgin+Mobile&hl=en&as\\_sdt=2006&as\\_vis=1](https://scholar.google.ca/scholar_case?case=9985369727006284376&q=Chang+v.+Virgin+Mobile&hl=en&as_sdt=2006&as_vis=1)

> accessed September 16, 2019.

<sup>92</sup> Supra note 80, at <https://wiki.creativecommons.org/wiki/Spirit>

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

shows. Furthermore, users of works under CCL can be sanctioned (in Canada, a licensor can sue for copyright infringement and also be entitled to statutory damages) if they violate the terms of their licence, but this may only happen if the copyright owner of the licensed work sues for copyright infringement. The determination of whether there has been copyright violation or breach of terms would be treated in its own merit by the courts.

The cases above show that, just as in the conventional all-rights-reserved copyright system that is fraught with challenges and litigation, the CCL initiative is not immune to similar controversies, disputes, and lawsuits. While the lawsuits may seem generally unpalatable, they do prove that the licences are enforceable and therefore establish a workable system with the backing of law. After all, the CC organization envisaged and designed the licenses, but did not promise that licensing practises would be perfect and problem-free, and some of the sources of controversy are clearly outside its immediate control. Admittedly, the CCL is not a flawless arrangement; nonetheless, it has had a huge impact on the copyright system, which I now examine.

#### **4.5 Impact of Creative Commons Licensing**

Since its inception in 2001, the Creative Commons licensing scheme has gradually received the buy-in of authors and creators who choose to freely license their works under the Creative Commons Licences. From the humble beginnings of launching its first set of licences in December 2002,<sup>96</sup> CCL has grown into an expansive online free culture community. The popularity and continued expansion of CCL proves one thing – the founders of CC were right about some *rights reserved* theory and that there are creators who would prefer to exercise their

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<sup>96</sup> Creative Commons, *History*, supra note 34.

copyright differently from the traditional model. What Carroll referred to as a work in progress and ongoing experiment<sup>97</sup> has turned out to be an established concept that promotes access to creative works at very low cost while leveraging the immense capabilities of ICT. Despite sharp criticisms, CCL has survived; Harrison stopped short of calling it a dumb idea when he said in 2003:

[...] think about the creative commons for a second. They are not a pretty sight. They are not like the fragile and pristine commons one might envision. Indeed, the creative commons are littered with all manner of trash and debris-written versions of abandoned refrigerators or eight-track cassette player.<sup>98</sup>

It is doubtful if Harrison would still hold the same view today about the CCL. At the very beginning, CCL demonstrated the potential to create a unique impact in the copyright system. In 2004, shortly after the launch of the first set of CCLs, Lessig reports that:

...in four months, more than 400,000 pages have appeared on the internet linking back to these licences. Four hundred thousand have said, we believe in a kind of freedom associated with our content that is not extreme. Now we want this 400,000 to turn into 10,000,000. Because if there are 10,000,000 people out there who say we don't believe in extremes, then this debate is no longer a debate between copyright owners and anarchists. Instead, it is increasingly a debate between extremists and those who believe in a tradition that expresses a freedom more fundamental. Beyond the permission of fair use, these licences give people ways to say go ahead, sample me, share me, copy me, liberate me, and together they restore something of balance in this debate. And this balance, we believe, will enable a different kind of creativity: creativity built upon a tradition of building upon the works of others, freely. A free culture, not the permission culture that our law has produced.<sup>99</sup>

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<sup>97</sup> Carroll, *Conversational Copyright*, supra note 31 at 448.

<sup>98</sup> Harrison, *Creativity or Commons*, supra note 28 at 796.

<sup>99</sup> Lessig, *Creative Commons*, supra note 10 at 12.

The current copyright system is largely based on a permission culture, which reflects the instrumentalist approach to copyright. Such permissions are tied to the payment of a fee before access is granted. In other cases, it may involve a lawyer and the laborious negotiation of terms before access is granted. On the contrary, even though the CCL, by virtue of how it operates, is still permission-based, it is a lot better because users access content easily free of charge; and as I mentioned earlier, with the simple and clear language of the commons deed, you do not require the services of a lawyer.

The aspirations of Lessig for the growth CCL and increase in the number of users of CC licensed-works came to pass; Zachary Katz notes that by August 2005, it was reported that more than 50 million web pages linked back to CCL.<sup>100</sup> He further reports that Duke Law Journal, Harvard Journal of Law and Technology, and Michigan Law Review have published content under CC licences;<sup>101</sup> and that Google and Yahoo enable users to search for CC-licensed works.<sup>102</sup> The CC organization reports that works CC-licensed works increased from 1.2 billion in 2016 to 1.4 billion in 2017.<sup>103</sup> This implies a positive impact in accessing, sharing and use of content to inspire creativity; it offers great and undeniable opportunities to promote the dissemination of knowledge and creativity in the copyright system. To access and use works online, creators and users are free to do so under the CCL scheme and they do not even need to know or contact the original author but simply adhere to the licence terms. Another impact is that the popularity of CC has gained the support of some content platforms who now act as intermediaries to enable the discovery, sharing and collaboration on creativity and knowledge.<sup>104</sup>

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<sup>100</sup> Zachary Katz, "Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing," (2006) 46 IDEA391 at 392.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Creative Commons, "State of the Commons", at online: < <https://stateof.creativecommons.org/> > accessed July 29, 2017.

<sup>104</sup> Ibid.

Such partnerships include Jamendo Music,<sup>105</sup> Vimeo,<sup>106</sup> Flickr,<sup>107</sup> Free Music Archives,<sup>108</sup> Wikipedia<sup>109</sup> etc.

It can hardly be challenged that the CCL has yielded positive impact in the copyright system by creating an opportunity for the democratization of access to and use of cultural works. However, these claims are general in nature and there is no concrete evidence or data to specifically quantify this impact. CC is aware of this, and in articulating its research agenda for 2012-2013, noted that Creative Commons needs to measure the impact of its licences to better make the case for the social and economic value of open licensing.<sup>110</sup> As at the time of writing (six years after the research agenda was initiated), no updates on the project save the preparatory work for the research, which include identifying thirteen research questions<sup>111</sup> and five research

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<sup>105</sup> Jamendo Music, “About us” at online: < <https://www.jamendo.com/about> > accessed July 31, 2017. “In the rise of more permissive models and movements such as Open Source and the Free Culture Movement, new ideas on how to digitally share creative works came to life. Creative Commons brought an alternative to the automatic “all-rights reserved” copyright, eventually leading a small group of people in Luxembourg to found in 2004 the pioneering website Jamendo.com, the first platform to legally share music for free from any creator under Creative Commons licenses.”

<sup>106</sup> Vimeo, “About” at online: < <https://vimeo.com/about> > accessed July 31, 2017. “Vimeo was born in 2004, created by a group of filmmakers who wanted an easy and beautiful way to share videos with their friends. Word started to spread, and an insanely supportive community of creators began to blossom. Now Vimeo is home to more than 50,000,000 creators worldwide”

<sup>107</sup> FLICKR, “Explore/Creative Commons” at online: < <https://www.flickr.com/creativecommons/>> accessed May 10, 2018

<sup>108</sup> FMA, “Creative Commons” at online: < [http://freemusicarchive.org/curator/Creative\\_Commons/](http://freemusicarchive.org/curator/Creative_Commons/)> accessed May 10, 2018.

<sup>109</sup> WIKIPEDIA, “Creative Commons” at online: < [https://wiki.creativecommons.org/wiki/Main\\_Page](https://wiki.creativecommons.org/wiki/Main_Page)> accessed May 10, 2018.

<sup>110</sup> Creative Commons, “Research”, at online: < <https://wiki.creativecommons.org/wiki/Research> > accessed July 29, 2017.

<sup>111</sup> Ibid. 1. What is the number and growth rate of CC licensed materials worldwide?

2. What is the use of CC licensed materials worldwide?

3. We aspire to answer: what is the reuse of CC licensed materials worldwide?

4. We aspire to identify: what is the ratio of 'best practice' attribution and 'best practice' reuse of CC licensed materials to total CC licensed materials?

5. What is the ecosystem in which CC operates?

6. We aspire to answer: in the absence of CC what would the open ecosystem look like?

7. What is the broader public perception of CC? and

8. What is the impact of CC activities?

To achieve this before December 2012 is an aggressive but vital ambition and is a rare opportunity to show how the work of CC (4.0 is core to all CC operations) affects the commons. Other important performance metrics to be captured within the CC organization include:

9. Large scale/high profile adopters of CC licenses;

10. Translations of CC license deeds;

11. Indications of a strengthening CC Affiliate network; and

12. Diversification in the funding base of CC.

Concurrent with the above metrics is an ongoing case study of CC impact. It seeks to highlight the performance of CC intervention in the open education field, specifically by answering:

13. How does the active CC-led intervention for U.S. Dept. of Labor (US DOL) Trade Adjustment Assistance Community College Career Training (TAACCCT) grantees achieve the goals of the US DOL TAACCCT program?

projects<sup>112</sup> that will help address the thirteen research questions. The measurement of the impact of CCL would further strengthen the free culture cause in the copyright system, but unfortunately, there is no new information to indicate what progress has been made.

Nevertheless, specific cases of impact of CCL can be cited from a publication that showcases CC success stories<sup>113</sup> that was mentioned in chapter two. For example, in the publication, June Cohen shares the impact of releasing TED Talk for free using CCL and that five years after publishing all TED Talks online under Creative Commons licences, more than 200 million viewers have experienced the innovative thinking of TED speakers.<sup>114</sup> June Cohen reports that the phenomenal growth is solely driven by free and open distribution, and that CC licensing has enabled sharing in ways well beyond what TED Talk could have achieved on its own.<sup>115</sup> For Cohen, embracing CCL was challenging especially as precise predictions could not be made on the outcome. It turned out that the impact on their business was positive. She explained that:

When we decided to open our library, we had one single goal: to spread ideas. Every decision we made was based on that goal. Creative Commons was the most efficient way to empower the growth of our product and free us from conversations about what could or couldn't be done with our videos. Sharing online was a very controversial decision. People feared it would capsize our business, discourage people from paying for our conference, and be rejected by speakers. The first year after releasing videos of talks for free, we raised the cost of the conference by 50 percent and sold out in one week with a 1,000-person waiting list," Cohen says. "Not only do speakers lobby for the talks to be posted as soon as possible

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<sup>112</sup> 1) CC Licensed Material Metrics, 2) CC Ecosystem, 3) Public Perception of CC, 4) Impact of CC Activities, and 5) Open Education Resources (OER) case study.

<sup>113</sup> The Power of Open, Bloomsbury Academic: Publishing Openly, at online < [http://thepowerofopen.org/assets/pdfs/tpoo\\_eng.pdf](http://thepowerofopen.org/assets/pdfs/tpoo_eng.pdf) > accessed July, 29, 2017.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.



but paying conference participants are anxious to share talks they just heard with family, friends and colleagues.<sup>116</sup>

Similarly, Nina Paley, a New York City filmmaker and cartoonist released her self-produced animated movie “Sita Sings the Blues” under CCL BY-SA.<sup>117</sup> The work is also available for purchase on DVD, and theatrically through other distributors. It has been viewed millions of times worldwide through archive.org, YouTube, and innumerable torrent sites.<sup>118</sup> The impact of licensing her work under the CCL, according to Paley was positive and also brought her financial rewards and exposure. She states that she has seen artists who refused to create unless they got paid and that for her, it is the opposite.<sup>119</sup> On financial rewards and exposure, she states “I’ve never had more money coming at me than when I started using Creative Commons BY-SA. I have a higher profile. I don’t spend anything on promotion. My fans are doing it for me and buying merchandise. Sharing put me on the map.”<sup>120</sup>

To further demonstrate the far-reaching impact of CCL in promoting culture, remix and creativity, the example of Pratham Books, a small nonprofit publisher in India is instructive. Pratham started disseminating its books and illustrations under CC licences on Flickr and Scribd in 2008.<sup>121</sup> Speaking on behalf of Pratham Books, Gautam John states:

As a small publisher, we do not have the bandwidth to customize licences every time a concerned party wants to use our content in a certain manner. What the Creative Commons licences have allowed us to do is engage with multiple partners without the attendant overhead of legal negotiations and the

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

time and money that it would take for such negotiations to run their course.<sup>122</sup>

According to the report, Pratham Books simply sends users a link to the book download and licence page, which John says takes them “all of one minute to do.” Pratham Books has recorded favourable outcomes, which are attributable directly to their use of CCL. On the impact of CCL on the business of Pratham Books, John reports that:

Using CC has resulted in a variety of reuses and increased community engagement. Our communities have created multiple derivative works ranging from iPad and iPhone applications, to porting our works to OLPC (One Laptop per Child) laptops, to creating entirely new books from existing illustrations. Organizations and individuals have converted our books to audio books, Braille and DAISY that has allowed the visually impaired access to our content – something that would not have been possible without the Creative Commons licences. To our mind, all the derivative works were outcomes specifically linked to our Creative Commons licence model. Without the Creative Commons licence, we would not have engaged with communities because of the internal overhead required to support these multiple efforts.<sup>123</sup>

The publication<sup>124</sup> by CC contains several other accounts demonstrating the positive impact on culture and creativity from using CCL. In the absence empirical evidence to quantify the impact of CCL in fostering creativity, these real-life accounts demonstrate that at the very least, the concept works and has been embraced by a lot of people who believe in the ethos of sharing their content free of charge and have in turn benefitted from doing so. I wish to mention here that interpreting the success must be done cautiously; the success stories do not necessarily mean any creator who licenses her works using the CCL would experience similar benefits. Additionally, what I can glean from the success stories is that an author or creator could

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> The Power of Open, supra note 88.

potentially gain financial benefits and popularity by sharing their works using CCL scheme. This may sound counter-intuitive because why would users purchase something when they can get it for free? While the analysis here may be unclear, perhaps its logic could be similar to a freemium model. For instance, an author who produces several works releases a piece of content for free and fortunately, the usage goes viral. There is the possibility that this could lead to an increase in demand and sales of other works from the same author. However, though the freemium business model is quite popular and effective, a lot still depends on market dynamics such as the nature of the content, existence of substitutes, demand for the content, etc.

As reported above, there are over a billion CC-licensed works but certainly not all the licensors have remarkable or exceptional stories. The success stories could be misleading to other potential CC licensors that they achieve financial success through CCL. The appropriate mindset of potential CC licensors is to at least have the desire to make their content available for other to access to use. A spin-off from this broad ideal could maybe lead to fame and/or financial success but this is not guaranteed. Nonetheless, the success stories show that there are authors and creators who prefer to embrace the idea of *some rights reserved* with the possibility of gaining financial rewards as well. The simplicity of the CCL and ease of use dwarfs the arduous and expensive process of copyright licensing in the conventional copyright system. In some cases, some authors may simply decline requests for permission to use their works for fear that they may not be able to control how their works are used. In the face of such rigidity and restricted access to cultural works, the flexibility of the CCL brings in tremendous change. Culture and creativity, especially in the ICT age, flourish under the auspices of freedom to share, access, use, remix and disseminate creative works. It is this kind of atmosphere of creativity that CC promotes; the buy-in of authors and creators world-wide into the CCL concept is an

indication that the two extremes of *all rights reserved* and *no rights at all* impede creativity and result in imbalance in the copyright system.

Lastly, it is important to mention how CC activities have impacted education. In the area of open education,<sup>125</sup> CC states that an initiative called the Open Education Resources (OER) provides access to teaching, learning and research materials in any medium that reside in the public domain or have been released under an open licence that permits no-cost access, use, adaptation and redistribution by others.<sup>126</sup> The CC reports that the “OER Commons” online repository has 120 content providers and about 30,000 content.<sup>127</sup> This certainly makes significant contributions to education. The OER Commons website contain educational materials and courses at primary, secondary and post-secondary levels; this creates the opportunity to access knowledge for free, which is in the public’s interest.

The concept of CCL does not negate the ownership and exploitation of proprietary rights in copyright, in fact, it would be self-defeating to do so because the CCL idea relies on copyright (ownership and financial exploitation of content) to achieve its aim. This is because an author or creator must first have proprietary rights in a work before choosing to license it under CCL. On the overall, my view is that in furtherance of the free culture objective, CC has succeeded in establishing a “*commons*” that holds a rich repository of valuable content. Through its advocacy of promoting the culture of sharing, many content creators have come to support the idea of

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<sup>125</sup> University of British Columbia Wiki, “Open Education’ means different things to different people. But essentially it can be understood as a collection of practices that utilize online technology to freely share knowledge. It can mean sharing: scholarly research (open access), teaching and learning materials (open educational resources), tools or computer code (open source), research data in a machine-readable format (open data), how you work/learn (open practice), access to your classes (open courses), at online: < [https://wiki.ubc.ca/Documentation:Open\\_Education](https://wiki.ubc.ca/Documentation:Open_Education)> accessed May 23, 2019.

<sup>126</sup> Creative Commons, Education/OER at online: < <https://creativecommons.org/about/program-areas/education-oer/>> accessed May 23, 2019.

<sup>127</sup> Ibid.; OER Commons at online: < <https://www.oercommons.org/>> accessed May 23, 2019.

sharing their content so that others can use, benefit from it, and perhaps produce more works. Content owners share their works by choosing a license from a suite of licences designed by CC. In my view, the CCL has increased users' access to content, which in turn provides public interests benefits and supports the pursuit of balance in the copyright system. Furthermore, CCL has benefitted licensors by making their works have a wider audience, which may lead to renown and make their works more visible in the creative digital space. The CC organization has made significant progress in achieving its aim through the CCL initiative.

#### **4.6 Misconceptions and Critique of Creative Commons Licensing**

Despite the numerous benefits that the CCL has introduced in the copyright system, its system of licensing and its entire concept have come under sharp criticisms from various analysts. CCL appears to have some advantages even though it is far from being perfect or completely solving the challenges in the content industry. While I endeavour to assess the views of critics objectively, I wish to observe that some criticisms may be premised on misconceptions about CC as an organization and what it promotes through its unique licensing scheme. Therefore, the intention here is to clarify some misconceptions as well as to critique the CCL scheme. I will assess these misconceptions before reviewing the comments of critics.

As noted earlier, Dusollier has expressed concern that some CC supporters may in error think that the motive of CC organization is to displace the copyright system.<sup>128</sup> While this may give the impression that CC may have the intention to oust the present copyright system and establish CCL as the norm, it is not correct. The CC organization has not stated that its motive is to ultimately unseat copyright. Presently, the CCL runs on the copyright system, therefore, it

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<sup>128</sup> Dusollier, *The Master's Tools*, supra note 58.

would be counter-intuitive to eliminate copyright, which in itself is unlikely. In analyzing the ideology of CC, Elkin-Koren echoes a similar view, suggesting that CC is seeking to establish an alternative copyright system:

Creative Commons is a form of political activism and is best understood as a social movement seeking to bring about a social change. It responds to proposals calling for political activism against the enclosure of Intellectual Property. Like its predecessor the Open Source Movement and Free Software, it seeks to change the social consequences of copyright law by instantiating an alternative. Unlike its predecessors, which focused on software and addressed a rather small and homogenous community of professionals, Creative Commons seeks to become a popular movement that addresses the public at large. A key to its success is its ability to convince as many people as possible that Creative Commons is the best method for using creative works.<sup>129</sup>

I agree with Elkin-Koren in her assertion that CC's ideology seeks to bring about social change in the copyright system just like Stallman did with free software (though as explained in chapter two, four of CC licences do not fully conform with free software ideology; she is also right to compare the ideology of Open Source Movement with CC because both advocate for free culture even though they differ in some aspects – for example, as she notes, CC addresses a broad range of creative works. Elkin-Koren is right to articulate that CC aims to convince as many people as possible to adopt the CCL – CC's effort in this area has indeed yielded considerable amount of success considering that there exist over 1.2 billion CC-licensed works. But her conception of CC's ideology becomes confusing when she brands CC as a political activist group and that *it seeks to change the social consequences of copyright law by*

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<sup>129</sup> Elkin-Koren, *What Contracts Cannot Do*, supra note 42 at 387-8. It is important to note here that while Elkin-Koren generally implies that free software and open source software as similar to CC, I explained their differences in chapter two.

*instantiating an alternative*. Further comments from Elkin-Koren suggest that she perceives CC's motive is to eliminate copyright even if CC does not articulate what happens next:

Creative Commons' ideology, as expressed in its publications and practices, reflects a minimalist approach, seeking to enhance access to creative works. Copyright law is clearly identified as an obstacle for achieving this goal; however, its vision of what would happen when it is removed is less coherent<sup>130</sup>

While CC may be involved in advocacy that pressures political authority to create balance in the copyright system, it may be misleading to brand CC as a political activist group. Admittedly, while the advocacy of the CC may seek to influence the political order with specific reference to copyright, the CC, in my view is not in the business of partisan politics as the term "political activist group" may suggest. While Elkin-Koren's assertion that copyright law is an obstacle that needs to be removed may appear controversial, the interpretation in my view is that she was referring to the 'barriers' that copyright law creates, which inhibit free access to and use of cultural works. The CC organization's desire to instantiate an alternative to copyright is another way of saying that each creator should be given the liberty to exercise his or her exclusive rights differently. Furthermore, the CC organization does not perceive copyright law to be the obstacle but challenges the *way* copyright law is used to restrict access, which is a paradox. The right understanding of CCL or the ideology that the CC organization promotes is one that incorporates copyright in the scheme; an understanding that dissociates CCL from copyright does not align with the vision of CC and how its licences operate.<sup>131</sup> The basis for this reasoning is that CCL asserts copyright. A CC licensor must possess copyright ownership in the

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<sup>130</sup> Ibid. at 388.

<sup>131</sup> It is pertinent to mention here that the cautionary remarks by Dusollier and Elkin-Koren were made in 2006 and 2005 respectively and these were the early years of CC and probably its vision was still not very clear to some supporters.

work before any valid licensing can take place. A licensor under CC derives the authority to license from the ownership of the work in the first place. This is in line with the Latin maxim – *nemo dat quod non habet* – meaning you cannot give what you do not have. The core issue that CC identifies is not “what is wrong with copyright” but “that copyright is used in a manner that inhibits the free culture idea.”

The second misconception about CC or misuse of the CCL arrangement is that some licensors use it as a business model for commercial gain but may not be specifically interested in the ethos of making creative content available and accessible by users per se. This may probably be due to unintended consequences of using CCL and realizing its potential to generate financial gain. Before I proceed to discuss this misconception or misuse of the CCL scheme, I deem it fit to refer to my explanations<sup>132</sup> in chapter two on the different interpretations given to free culture by Stallman, the OSS community, and CC so that my analyses here are properly understood. The same way Stallman’s ideology of free culture was misunderstood and probably still is today to mean absence of price, perhaps the purpose of CCL is being turned around to function solely as money-making vehicle. Admittedly, apart from CCL categories marked NC (non-commercial), all other licences permit the licensee to use the content for commercial purpose. Also, CC does not preclude a licensor from benefitting financially by reason of sharing creative content under CCL. In other words, apart from NC restriction, the CC organization does not generally discourage licensors and licensees from benefitting financially through the CCL.

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<sup>132</sup> Stallman’s idea of free software articulates a community where software developers share their source code as well as give unlimited liberty to users to use the software for any purpose they wish. In other words, the concept of free culture here focuses on the users’ right to access content without any limitation or restriction; this is summed up in the four freedoms: liberty to use the program for whatever purpose the user wishes, modify the program, make copies and share the program, and distribute/publish modified versions of the program. Stallman’s free culture philosophy is user-focused. CCL scheme align with Stallman’s free culture idea only with regards to two of its licences (CC-BY and CC-BY-SA) because they ensure the four freedoms are present. The other four licenses do not align with free software either because they prevent modification of the work or preclude use for commercial purpose. OSS believe in the principle giving freely sharing content but do not subscribe to the four freedoms as stated by Stallman and they prioritize commercial gain over the interest of the user community.



However, my concern is that in reality, the creators or authors who license their works using CCL are much more multifaceted than it appears; some creators believe in the ideology of CC and share their works using CCL to promote creativity and may not be concerned with financial reward, some share their works to promote creativity and also expect financial reward. There may also be the category that share their works using CCL solely for financial gain – for this category, CCL becomes a *business model* and a *means to an end*, the *means* being CCL and the *end* being monetary gain. In this case, the business model operates as a freemium, which means giving users free access to their content or some part of their content with the hope of converting them to paying users later. Regardless of the motive of the CC licensor, the arrangement is still beneficial to the public or users in the sense that cultural works are made available and can be accessed easily. The CC organization may be partly responsible for this misconception or misuse of the CCL because of the amplification of financial success of its licensors in the success story report. The success story cases I discussed above are instructive here.<sup>133</sup> It is axiomatic from these success story accounts that for some artists or creators, using CCL brings them popularity, exposure and financial success. Although the CC organization does not expressly brand the CCL as a business model, it may be implicit in their advocacy. Therefore, the over one billion licensed-works under the CC licensing scheme could be made up of licensors with motives other than promoting CC sharing culture.

In my view, which I believe aligns with the objective of CC, the philosophy of sharing and promoting access to creative content is the primary purpose for launching the licensing scheme; other benefits such as fame, exposure and pecuniary rewards are secondary. But it appears the reverse may now be the case due to misinterpretation of the purpose of the licensing

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<sup>133</sup> The Power of Open, supra note 113.

partly due to the way CC projects its achievements. This trend has the possibility to dilute the free culture philosophy.

Since its inception, the CCL scheme has been the subject of critique notwithstanding its seemingly far-reaching benefits to the ordinary creators and users of creative works. The CCL arrangements have some limitations,<sup>134</sup> which perhaps stem from various interpretations of the purpose of the CC organization (which is not to depose copyright law as some may think) and its licensing scheme. In addressing the idea that CC seeks to replace copyright, Dusollier articulates her critique using the metaphor “the master’s tools will never dismantle the master’s house;”<sup>135</sup> which could be interpreted to mean that copyright is the *master’s house* and CCL is the *master’s tools* and that CCL is seeking to dismantle copyright, which is currently impracticable because CCL asserts copyright. Put differently, the *master’s house* is in disarray and the *master’s tool* is trying to restore normalcy to the house. However, Dusollier seems to recoil on this line of thought when she was comparing the attribute of CC and Stallman’s Free Software Movement when she states that:

The main purpose of the Creative Commons parallels that of the free software movement which seeks to use copyright to authorize, rather than to inhibit, copying, distribution, modification, and re-use of software and other copyrighted works. Moreover, the Creative Commons and open source software projects such as the General Public Licence (GPL) initiative, share a common strategy: they do not want to abolish copyright, as some have argued, or require copyright owners to relinquish their rights and dedicate their works to the public domain...Instead, both Creative Commons licences and GPL licences assert copyright in the specific works or software at issue. Therefore, Creative Commons licensing

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<sup>134</sup> Dusollier, *The Master’s Tools*, supra note 44 at 271.

<sup>135</sup> *Ibid.* at 272.

regime clearly rests upon the proprietary regime of copyright but seeks to exercise it differently.<sup>136</sup>

Dusollier's articulation above, I assume, is a general reference about free software movement, CC and OSS and how each of these contribute to the culture of sharing content and making them easily accessible for others to use. However, as explained earlier in chapter two, there are nuances in their specific approaches to the free culture ideology. It is necessary to clarify that the free software movement and the CC organization are similar to the extent that the CC's CC-BY and CC-BY-SA licences conform to the four freedoms of the free software movement as Stallman articulates. Additionally, while the free software movement and OSS community both share the same principle of sharing content for others to use, the former prioritizes the interests of users, while the latter emphasizes the interests of the content creator, vendor and even corporate interests. However, I agree with Dusollier's point that CCL uses copyright to achieve its aim. The CC's approach of achieving its aim through the use of licences has attracted various opinions. The licences created by CC are structured by consent, which enable authors determine how they want their works to be used. The various licences have terms attached to them, which potential licensees have to give consent to before using the licensor's work. In other words, the CC licences are not contracts. However, these licences have been incorrectly interpreted to mean a contract and that the reliance on contract could be the Achilles' heels of the CC plan<sup>137</sup> because the ownership and exploitation of copyright is structured at every turn by consent embodied in a contract.<sup>138</sup> It is the same contract that copyright employs to

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<sup>136</sup> Ibid. at 274. It is important to clarify here that the similarity that Dusollier talks about between the free software movement and Creative Commons is not absolute as there are differences as I explained previously. Creative Commons is similar to the free software movement with regards CC-BY and CC-BY-SA licences.

<sup>137</sup> Dusollier, *The Master's Tools*, supra note 44 at 282.

<sup>138</sup> David Nimmer, Eliot Brown & Gary N. Frischling, "The Metamorphosis of Contract into Expand" (1999)87 Cal. L. Rev. 17 at 24. For further reading on contract and copyright see Niva Elkin-Koren, "Copyright Policy and the Limits of Freedom of

advance its restriction on access to creative content. While agreeing with Elkin-Koren, Dusollier<sup>139</sup> asserts:

By using contract provisions to enforce the will of the author, Creative Commons is doing exactly what it denounces in copyright. I would join Niva Elkin-Koren in saying that it is doubtful that Creative Commons, despite its declared objective of eventually changing copyright, will ever be able to dismantle copyright by using the very tools that have created the monstrous creature that Creative Commons seeks to fight.

According to Dusollier, Elkin-Koren is of the view that the use of licensing tool symbolically represents that reliance on contracts is a valid strategy in copyright that aids the cause of private ordering.<sup>140</sup> She asserts that Elkin-Koren concludes that, “creating an alternative to copyright could only result from the legal reform of copyright and not from a doomed attempt to use the same tools that have transformed copyright into an unbalanced body of law.”<sup>141</sup>

It is unclear whether by the expression “the use of licensing tool symbolically represents that reliance on contracts...,” Elkin-Koren as cited by Dusollier was arguing metaphorically that CC’s use of licences conjures the image of a contract or whether she regarded the various CC licences as contracts. I already examined the issue and my analysis shows that the CC licences are not contracts. If Elkin-Koren’s contention is that CC licences are contracts, then her arguments would not apply because they are not. On the other hand, her argument may simply mean that licences reflect a permission culture just as contracts do; this suggests that the use of licences by CC limits access to content through authorial control just like contracts. In the traditional copyright system, contract is used by the copyright owner to expand the power of

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Contract” (1997)12 Berkeley TLJ 93 at 105; J.H. Reichman & Jonathan A. Franklin, “Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information” (1999)147 PA. L. Rev. 875 at 899.

<sup>139</sup> Supra note 137 at 283.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

control through the terms articulated in the contract. The concept of “*contract*” as a barrier to access or limit the use of creative works functions in two ways – when the contract is obtained and when it is refused. First, when the contract is obtained, the contractual agreement expressly specifies what can and cannot do with the creative work. In the second case, which is where a contractual arrangement cannot be reached, it occurs either because the copyright owner refuses or the owner could not be identified. In the absence of express permission, any use of such content is “use without permission, which potentially becomes copyright infringement. So, my interpretation of Elkin-Koren’s arguments is that since contract is a means of asserting and enforcing ownership in copyright, the fear is that the CC may be promoting proprietary regime through its licensing arrangement, which mirrors a contractual relationship. I reiterate my earlier position that Elkin-Koren’s argument would apply if CC licences are also contracts, otherwise the argument does not apply.

While acknowledging the above criticism against CC by Dusollier and Elkin-Koren, Shun-ling Chen agrees that CC could strengthen the proprietary regime of copyright but for a different reason. In her experience as inaugural project co-lead of CC in Taiwan between 2004 and 2005, she observed that Creative Commons outreach could implicitly be a promotion rather than an effective critique of copyright law.<sup>142</sup> At the event, she explained that while some persons may be surprised at how restrictive copyright law can be, others become more conscious about how they can become proprietors through the ways they can exploit their copyrighted works.<sup>143</sup> These are serious criticisms not just because they question the CC as a means for advancing the free culture agenda, but because they are coming from people who actually are

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<sup>142</sup> Shun-ling Chen, “To Surpass or to Conform – What are Public Licenses” (2009) JLT & Policy 107 at 122.

<sup>143</sup> Ibid.

involved in promoting the licensing scheme. Apart from Chen's experience in Taiwan, Dusollier's analysis of CC is based on her experience as project leader in Belgium as at 2006.

While these arguments are compelling, it seems that the fears expressed by the authors' over ten years ago may have turned out to be less serious especially in the absence of proof of their claim. Furthermore, using these licences, CC-licensed works has surpassed one billion and counting. While I agree that the use of licences could reflect a permission culture akin to the content industry approach, CC may have succeeded in using it to achieve a different outcome – to promote access to works and encourage creativity. The fact that there are authors who identify with “some rights reserved” and make their works available for use is potentially a positive sign towards private ordering and authors' ability to control how their works are used. CCL does not seek to take away authorial rights but provides an avenue to exercise authorial right in determining how their works are used. Dusollier, Elkin-Koren and Chen's argument could still have some validity based on further scrutiny of the CCL and its consequences carried out by other writers. In fact, these analyses may suggest that the CC approach may be detrimental to its acclaimed goal of promoting free culture and to remove the barriers to creativity.

It is good to articulate CCL statistics as a mark of progress in advancing the cause of balance in the copyright industry, but the licensing process may have some queries. In his comparison of CCL and Free Software Movement, Benjamin Mako Hill concludes that unlike

the Free Software Movement, CCL does not define or have a standard of freedom.<sup>144</sup> Hill reiterates the four freedoms articulated by Stallman:<sup>145</sup>

- i. the freedom to run the program, for any purpose;
- ii. the freedom to study how the program works, and adapt it to your needs;
- iii. the freedom to redistribute copies either free or for a fee;
- iv. the freedom to improve the program, and release your improvements to the public, so that the whole community benefits;

Hill argues that despite claiming to apply the principles of Free Software, the CC organization does not define a standard principle of freedom; he asserts that:

For the CC founders and many of CC's advocates, FOSS's success is a source of inspiration. However, despite CC's stated desire to learn from and build upon the example of the free software movement, CC sets no defined limits and promises no freedoms, no rights, and no fixed qualities. Free software's success is built upon an ethical position. CC sets no such standard.<sup>146</sup>

Hill clearly reiterates Stallman's position on free culture, and that though the CC claims to support the free culture agenda, its licensing arrangements do not have some defined freedoms common to all of them. The CC licensing categories do not give users such liberty and this, to an extent prioritizes the interest of the creators and gives them the right to determine how their works should be used. To this extent, Hill makes a distinction between the philosophy of free in Free Software Movement and CC organization when he points out that: Creative Commons licences are designed to give artists choice. Lessig personally describes how Creative Commons, "gives creators the freedom to choose how their works are used." This is not freedom in the sense

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<sup>144</sup> Benjamin M. Hill, "Towards a Standard of Freedom: Creative Commons and the Free Software Movement" (2005) at online: < [https://mako.cc/writing/toward\\_a\\_standard\\_of\\_freedom.html](https://mako.cc/writing/toward_a_standard_of_freedom.html) > accessed August 12, 2017.

<sup>145</sup> Ibid; Free Software Foundation, "Free Software, Free Society: Selected Essays of Richard M. Stallman" (2002) Joshua Gay, ed., p.20 at online: < <https://www.gnu.org/philosophy/fsfs/rms-essays.pdf> > accessed August 12, 2017.

<sup>146</sup> Ibid.

that the term is used in Free Software. With the current structure of the CC approach through the use of licences, the baseline or definition of “freedom” as Hill argues is not possible and it does reveal marked differences between Free Software Movement and CC organization. Consequently, the CC organization and its licensing scheme do are not in full conformity with the free software ideology. Nonetheless, some part of the work may still be free, for an author could allow her CC-licensed work to be used in every other way save for commercial purpose (NC) and no derivative (ND) work could be made out of it.

In my view, a counter argument to this is that the CC organization even though inspired by Stallman’s ideology, is not bound to follow the precisely the same model. The CC organization advocates for the promotion of creativity through the mantra of “some rights reserved” and to give creators a *choice* to determine how they want their works to be used. The promotion of free culture according to CC organization simplifies the process for users to access works, which ordinarily would have been near impossible following the conventional copyright model. The creators offer their works for free by voluntarily subscribing to any of the various licences of CC and determine what part of their rights they want to reserve and what part they wish to let users exploit.

Another criticism could emerge from the existence of several variations of the CCL; Zachary argues that the proliferation of CCL may give rise to confusion whereby licensors struggle to decide on which licence is properly suited to their need and licensees fail to understand the precise limits and obligations attached the licensed work.<sup>147</sup> For the licensor, she faces the difficulty of deciding which licence to choose and what conditions to attach because the

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<sup>147</sup> Katz, *Pitfalls of Open Licensing*, supra note 100 at 393.



CCL is irrevocable,<sup>148</sup> once a licence is attached to a work, it cannot be changed. This is a rigid condition under the CC licensing scheme; perhaps it is because it is a licence, which authorizes a licensee to do certain acts with the licensed content, you can choose to accept the licence terms and abide by them. But if you are not comfortable with the terms of the licence, you can choose to avoid the licence altogether. Additionally, it would be cumbersome to get CC licensors to revise their licences, some may be unreachable; besides, this would lead to the hardship that exists using the conventional method of searching for a copyright owner. However, in the conventional copyright contracts, terms can be revised, of course with the consent of both parties and usually in writing.

So, a prospective licensor under the CCL scheme has the liberty to choose what condition(s) she wishes to attach to her work, and a prospective licensee agrees to abide by these terms. The CCL has four conditions (BY-Attribution, NC-Non-commercial, ND-Non-derivative and SA-Share Alike) and six combinations (CC-BY, CC-BY-SA, CC-BY-ND, CC-BY-NC, CC-BY-SA and CC-BY-NC-ND). There is also the responsibility to read and comprehend the legal code and deed.<sup>149</sup> The deed according to Bloemsaat and Kleve is a summary, it summarizes what the actual licence entails and does not go into detail and is aimed at people who want to use the work drafted in plain language.<sup>150</sup> The legal code is the actual licence containing legal details and is aimed at professionals rather than ordinary users.<sup>151</sup> The challenge with the deed is that detail is sacrificed on the altar of brevity and simplicity; if the licensor or licensee choose to read only the deed, she would definitely not get the vital details of the licence before agreeing to it. On the

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<sup>148</sup> Creative Commons, “Considerations for licensors and licensees” at online: < [https://wiki.creativecommons.org/wiki/Considerations\\_for\\_licensors\\_and\\_licensees](https://wiki.creativecommons.org/wiki/Considerations_for_licensors_and_licensees) > accessed August 12, 2107. The irrevocability notice states “Once you apply a CC license to your material, anyone who receives it may rely on that license for as long as the material is protected by copyright and similar rights, even if you later stop distributing it.”

<sup>149</sup> Ibid.

<sup>150</sup> Bloemsaat and Kleve, *Creative Commons*, supra note 37 at 242.

<sup>151</sup> Ibid.

hand, if the licensor or licensee reads the legal code inundated with legalese, the chances are she may not fully comprehend all the details except if she hires a lawyer. Additionally, the licensor is expected to have copyright in the work she is sharing or have cleared such rights before licensing it under CC scheme; in the event that the licensor's ownership is challenged, this raises infringement issues for both the licensor and licensee and CC organization will not provide or pay for legal services.<sup>152</sup> The licensors and licensees under the CCL scheme have to deal with these challenges in order to license or access work as the case may be on the CC platform. The CC's claim to administer a simplified licensing process does appear to have some complexities with the three layers of licensing involved. However, the rate of dissemination under the CCL scheme is enormous as a single work could be assessed by millions of people whereas this would be highly problematic under the traditional model.

Zachary further posits that the licence proliferation under CC scheme leads to incompatibility problems where conflicting licence provisions prevent the creation of new works contrary to the wishes of the creators of the original work.<sup>153</sup> In his intricate analysis of the interrelationship between CCL, he identifies incompatibilities. For clarity, Zachary defines compatibility thus: "Works released under the compatible licences can be combined in or used as the joint basis for derivative works; work released under incompatible licences cannot."<sup>154</sup> Zachary's analysis focuses on derivative works and he observes that ND licences (prohibits licensees from making derivative works) cannot be combined with other works and are thus

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<sup>152</sup> Creative Commons, *License*, at online: < <https://creativecommons.org/licenses/by/3.0/legalcode> > accessed August 12, 2017. The disclaimer by Creative Commons says "Creative Commons corporation is not a law firm and does not provide legal services. Distribution of this license does not create an attorney-client relationship. Creative Commons provides this information on an "as-is" basis. Creative Commons makes no warranties regarding the information provided, and disclaims liability for damages resulting from its use."

<sup>153</sup> Katz, *Pitfalls of Open Licensing*, supra note 147.

<sup>154</sup> Ibid.

incompatible with other CC works.<sup>155</sup> The second incompatibility issue identified by Zachary relates to the SA licences. In line with the SA licence, any derivative work that uses a SA-licensed work as an input must itself be licensed under SA.<sup>156</sup> Zachary identifies incompatibility issues “when a follow-on innovator seeks to create and distribute a derivative work based on multiple pre-existing works subject to different licences. As with all CC licences, in determining what restrictions apply to a derivative work, licences to input works with more restrictive terms trump licences to input works with less restrictive terms.”<sup>157</sup> To further elucidate this observation, Zachary gives the following hypothetical scenario:

Imagine a Beatles song released under a BY-SA and a digital musician who wishes to make and release a remix of the song. She can only do so if she releases the remix under a BY-SA licence...Now imagine that the artist wants to “mash” or mix together a Jay-Z song, released under BY, with the BY-SA Beatles song. The resulting mash-up must be released under BY-SA...Finally, imagine that the Jay-Z song is released under BY-NC-SA, and again the musician wants to mash it with the BY-SA Beatles song. The Beatles song requires the mash-up to be released under BY-SA, while the Jay-Z song requires it to be released under BY-NC-SA. BY-NC-SA requires imposing the NC restriction on all derivative works, but the BY-SA prohibits the imposition of any additional terms – such as – NC – on derivative works. The licences thus block the musician from distributing the mash-up...<sup>158</sup>

From the intermingling of licences illustrated above, it shows that the CC licensing scheme appears to pose a challenge to creativity due to restriction terms of some licences. Though this may be unintended, it is the reality of using these licences and deeper examination of combining licences. The shortcomings of CCL revealed by Zachary show that CC licensing strategy may not support creative combination in all cases; but the indeterminacy of the degree of this

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<sup>155</sup> Ibid. at 401.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

perceived limitation is another question. If the concerns raised by Zachary are on the outliers, the impact on creativity may not be significant; but if the degree is significant, then the impact on creativity could be far reaching. However, in the absence of evidence, Zachary's argument cannot be absolute. Furthermore, even if these two licences (CC-BY-NC-SA and CC-BY-SA) cannot be combined, existing separately, they still promote creativity, which is better than all rights reserved – a situation where they cannot be used at all or to clear copyright to use them may prove challenging. On the face of it, the licence combination limitations may appear to restrict creativity. However, the very existence of these licences, made available free of charge and without the arduous process of clearing copyright, immensely facilitates users' easy access to content and creativity – this outweighs Zachary's licence combinations limitations.

An important question about the CC arrangement is to identify who stands to gain or gain more from the licensing scheme – the creator, user, the public or all? On the face of it, it appears the creator/author offers her works without any immediate benefit in return, except in some cases as I explained above where some licensors have benefitted financially and otherwise from licensing their works under CC licence. On the other hand, users who access works for free seem to be more favourably disposed to benefiting more from the CC free culture agenda. However, in the CCL initiative, the author has a central position, she retains her rights and determines how her work is used and gives them back their long-lost autonomy,<sup>159</sup> which dates back the Stationers' Company era and even after the Statute of Anne was enacted (discussed in chapter one) – where authors did not even have the right to publish their work or acquire copyright in it; and even when the Statute of Anne vested them with copyright in their works, they still were at

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<sup>159</sup>Dusollier, *The Master's Tools*, supra note 137 at 286.

the mercy of the Stationers' Company and its monopolistic power in the book publishing market as at that time.

The aspect of CC organization objective that focuses on making content accessible to users has been criticized as giving more regard to users. Dusollier contends that the focus on users does not take into consideration that there are users who are not subsequent creators, but merely consumers.<sup>160</sup> The CC vision is not only about helping creators and the industry to make derivative works, but also about not branding end-users or consumers as breaking the law when they access copyrighted works.<sup>161</sup> Dusollier argues that this could be the reason the vision of CC is rooted in the aspirations of consumers.<sup>162</sup> To further articulate Dusollier's point, if the greater percentage of users is just consumers, the amount of follow-on creativity would be minimal, which is contrary to the stated ideal of the CC. I assume many authors would appreciate it more if their works were used, enjoyed and inspire further creativity than just merely good for consumer enjoyment.

On the face it, one could argue that a work that is merely used and enjoyed serves mostly consumer interests and less the public interest; similarly, online readers or content consumers have been referred to as free-riding parasites who benefit from the work of others and contributing little.<sup>163</sup> However, a different perspective is to consider the learning gained by consumers as contributing to the public interest albeit passive or remote. Furthermore, the knowledge and enlightenment consumers gain may not be used instantly for creativity, however, in future, such knowledge could prove valuable to the public when the consumer directly engages in creativity or shares such knowledge with someone who may be inspired by it to

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<sup>160</sup> Ibid. at 290.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Chitu Okoli et al, "Wikipedia in the eye of its beholders: A systematic review of scholarly research on Wikipedia readers and readership" (2014) 65 *Journal of the Association for Information Science and Technology*, 2381 at 2382.

create. To further buttress my argument, Chitu Okoli et al in their literature on Wikipedia readers and readership are of the view that non-contributory readership is not a bane but valuable in itself.<sup>164</sup> The value lies in the fact that consumption is a source of inspiration, motivation for creators to produce more work and eventually contributes positively to the public interest.

The public interest and consumer interests, I would argue, are markedly different; public interest benefits the society at large as opposed to consumer interest, which is personal interest and benefits only the individual. For example, if the result of successful medical research is made available through CC, other medical practitioners could tap into that knowledge to help save lives – this serves the public interest. This is different from a case where a consumer just enjoys a piece of music made freely available – this is personal or consumer interest. However, the personal interest argument may not be absolute as there could be an overlap with public interest. For example, assuming the user above who enjoys a piece of music and is inspired by it to create a remix of the original and shares it with the public. Arguably, this is public interest.

Dusollier argues that copyright should be about controlling the exploitation of works and not their reception or private enjoyment.<sup>165</sup> She further states that:

...Consumerism is as much a threat to copyright as the increasing commodification of copyright (not surprisingly, since consumerism is a by-product of increasing commodification in our modern society). Turning copyrighted works into commodities has recast the public as individual consumers and focusing on consumers makes explicit the recognition of a copyright regime that considers creative works solely as commodities to be exchanged in the market.<sup>166</sup>

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

Dusollier's argument suggests that there is the possibility that the CC risks contributing to the commoditization of works through its emphasis on end-user/consumer benefits. This bears a semblance to what content industries promote. CC would be doing disservice to its free culture philosophy if this were to be the case.

On the contrary, Julie Cohen's concept of a situated user portrays the user beyond the parochial view of labeling her as one who merely consumes creative works. She states:

The situated user appropriates cultural goods found within her immediate environment for four primary purposes: consumption, communication, self-development and creative play. The cumulative result of this behavior by situated users, and of both planned and fortuitous interactions among them, produces what the copyright system names, and values, as "progress."<sup>167</sup>

Julie Cohen's analysis of who a user is and how she interacts with creative works reveals a multi-dimensional perspective of a user in the copyright system. The interpretation of her argument implies that a user's consumption of content does produce value in the copyright system. Interestingly, it is possible that all four purposes of engaging with creative works identified by Cohen could be achieved in a simple but realistic scenario as this: two guitarists come together to play a song and take turns to play; they are consumers of a song, communicating with each other, developing their skills, and playing creatively. So, arguably, consumers' engagement with content contributes to the public interest though in varying degrees. The consumer who actively engages with content to produce a derivative work from it may have a stronger public interest impact than a consumer who engages with content for satisfaction and enjoyment.

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<sup>167</sup> Julie Cohen, "The Place of the User in Copyright Law" (2005)74 Fordham L. Rev. 348 at 370.

Besides the six licence combinations, CC organization purports to offer a special public domain licence that allows licensors to waive their rights in their work and dedicate it to the public domain – all rights granted.<sup>168</sup> This raises some concern especially since the licensing model of CC organization relies on and asserts copyright. CC organization ideology is to find a midpoint between *all rights reserved* and *no rights at all*; this gives rise to *some rights reserved* mantra, which the CCL scheme represents.

The public domain licence under the CCL scheme needs clarification on how it co-exists with the notions of public domain in copyright; moreover. The principle of *some rights reserved*, and the assertion of copyright is understandable with the six CC licences; but for the public domain licence, it is a contradiction to *grant all rights* and simultaneously assert copyright; *all rights reserved* (copyright) and all rights granted (CC public domain licence) cannot co-exist. It may appear that the CC seems to be operating double standards – the standard for *some rights reserved* asserts copyright and the standard for the public domain licences operates without copyright. Since the CC0 (public domain licence) cannot exist alongside copyright or rest on the foundation of copyright, it is arguably and practically impossible for it to exist. The existence of CC0 creates an absurdity where a licensor purports to relinquish her copyright in a work before the expiration of the copyright term and release the work into the public domain. According to CC, this absurdity or incongruence does not arise because the CC0 is not simply a licence like the others, but also a means for a licensor to waive her copyright or dedicate her work to the public. CC organization states that:

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<sup>168</sup> Creative Commons, *Creative Commons Licences*, at online: < <https://creativecommons.org/share-your-work/licensing-types-examples/> > accessed October 11, 2019.



Creative Commons licences do not affect the status of a work that is in the public domain under applicable law, because our licences only apply to works that are protected by copyright.<sup>169</sup>

Furthermore, CC explains that depending on the jurisdiction, the CC0 could be a dedication or a licence:

...no legal instrument can ever eliminate all copyright interests in a work in every jurisdiction. CC0 doesn't affect two very important categories of copyright and related rights. First, just like our licences, CC0 does not affect *other persons' rights* in the work or in how it is used, such as publicity or privacy rights. Second, the laws of some jurisdictions don't allow authors and copyright owners to waive all of their own rights, such as moral rights. When the waiver doesn't work for any reason CC0 acts as a free public licence replicating much of intended effect of the waiver, although sometimes even licensing those rights isn't effective. It varies jurisdiction by jurisdiction. While we can't be certain that all copyright and related rights will indeed be surrendered everywhere, we are confident that CC0 lets you sever the legal ties between you and your work to the greatest extent legally permissible.<sup>170</sup>

This clarifies the issue of absurdity and clarifies that when a complete dedication is not possible, the CC0 acts a licence. It creates a shortcut to the public domain; but the question of justification of waiver of copyright term before it expires remains unanswered. Is it justifiable to opt out of copyright as CC organization suggests?<sup>171</sup> In response, CC acknowledges the difficulty in achieving this or whether it is even impossible under various copyright laws in different jurisdiction and it is precisely why it initiated the CC0 as a means for authors and creators to

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<sup>169</sup> Creative Commons, "Public Domain" at online: < [https://wiki.creativecommons.org/wiki/Public\\_domain](https://wiki.creativecommons.org/wiki/Public_domain) > accessed August 22, 2017.

<sup>170</sup> Creative Commons, "CC0 FAQ" at online: < [https://wiki.creativecommons.org/wiki/CC0\\_FAQ#Does\\_CC0\\_really\\_eliminate\\_all\\_copyright\\_and\\_related\\_rights.2C\\_everywhere.3E](https://wiki.creativecommons.org/wiki/CC0_FAQ#Does_CC0_really_eliminate_all_copyright_and_related_rights.2C_everywhere.3E) > accessed July 29, 2019.

<sup>171</sup> Creative Commons, "CC0" at online: < <https://creativecommons.org/share-your-work/public-domain/cc0> > accessed August 22, 2017.

have the liberty to dedicate their works to the public domain.<sup>172</sup> In the absence of CCL, nothing precludes creators from giving express permission to the public to have unconditional access to and use of their works, and so this may bear the semblance of a public domain work even if the copyright term in the work still subsists. While copyright in a work becomes active immediately the idea is expressed in a fixed medium, copyright law also generally does not preclude a creator from dedicating her creation to the public domain.

Copyright scholars have expressed various views on CCL and the public domain under the copyright system. I identify two strands of views; first, views expressed about CCL in relation to the public domain under the copyright system. Second, the legal justification of the dedicating works to the CC's public domain while its copyright term still subsists. In order to properly situate the discussion on the CCL and the public domain in the copyright system, it is fitting to briefly discuss the meaning and concept of the public domain.

The public domain is a contested area and copyright scholars and other commentators hold different viewpoints on the subject. A good starting point in explaining the public domain is that prior to the emergence of the copyright system, everything that existed was in the public domain. This implies that the public domain was the default. The advent of copyright introduced the concept of exclusivity right and the right to exclude others. The name, *public domain*, easily conjures up the notion of a space in the incorporeal world that holds works whose copyright term have expired and are therefore accessible (without any restriction) to the public for creative inspiration. This view seeks to answer the questions: *what* is the public domain and *where* does it exist? These questions have provoked a variety of responses. Carys Craig's argues that the public

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<sup>172</sup> Ibid.

domain, like almost everything in intellectual property is a metaphor;<sup>173</sup> she further reasons that the public domain could be nowhere and everywhere, nowhere in the sense that it is conceived as a metaphor and not a metaphysical territory or a geographically separate preserve;<sup>174</sup> and yet it is everywhere because it is anywhere where people create and communicate.<sup>175</sup> Craig's response, though may appear simple, has a deeper significance in the sense that it suggests the futility of attempting to concretely determine what the public domain means or where it is located. Craig finds that it is better to ask what we need the public domain to be, and she suggests that the public domain should encourage the processes of culture in the face of restrictive intellectual property regime.<sup>176</sup>

In her analysis of the public domain, Pamela Samuelson identifies two debatable notions of the public domain - a virtual wasteland of undeserving detritus or the fount of all new creation.<sup>177</sup> Surprisingly, Samuelson concurs with these seemingly contradictory notions of the public domain admitting that some contents in the public domain are detritus and some are valuable and better utilized if propertized. Understandably, the notion of contents in the public domain as worthless seem to stem from the fact that after the exploitation of a particular work for the life of the author plus another 50 years (if in Canada) there might be nothing of value left to exploit. This point of view is relative and depends on the circumstance surrounding the use of content in the public domain. Some works in the public domain might actually be of little value if they no

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<sup>173</sup> Carys J. Craig, "The Canadian Public Domain: What, Where and to What End?" (2010) 7 Canadian J.L.T. 221 at 230.

<sup>174</sup> *Ibid.* at 222.

<sup>175</sup> Julie E. Cohen, "Copyright, Commodification, and Culture: Locating the Public Do- main" in L. Guibault & P.B. Hugenholtz, eds., *The Future of the Public Domain* (Netherlands: Kluwer Law International, 2006) 121 at 157, cited in "Craig, *Canadian Public Domain*, supra note 142 at 222."

<sup>176</sup> Craig, *Canadian Public Domain*, supra note 173.

<sup>177</sup> Pamela Samuelson, Mapping the Digital Public Domain: Threats and Opportunities (2003) 66 L. & Contemp. Probs. 147. According to Samuelson, among those who seem to adhere to the former characterization are Benjamin Kaplan, An Unhurried view of Copyright 45-46 (1967) and Robert DeNicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 521-22 (1981). Among those who adhere to the latter are James Boyle, Shamans, Software, & Spleens at x-xi (1998) and Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990).

longer fit into contemporary times; however, if a user or creator accesses public domain works and decides to engage in transformative use, then it may be of value. The function of works in the public domain is not just for consumptive use, but to motivate the creation of new and probably better works.

Another reason to look down on the content in the public domain may be that it is perceived not to be part of the copyright system. This is an incorrect perception of the public domain; I argue that the public domain is an integral aspect of the copyright system and in fact, it existed before the copyright system. So, even before the copyright regime under the Stationers' Company and the subsequent enactment of the Statute of Anne, the public domain was already in existence. Prior to the time when the Stationers' Company enjoyed exclusive monopoly rights in book publishing with no term limits<sup>178</sup> the public domain was the default. The copyright system contributes to and enriches the public domain in the sense that following the enactment of the Statute of Anne, which provided for term limit in copyright,<sup>179</sup> works whose copyright term had expired went into the public domain. Notwithstanding the term limits in the Statute of Anne, the provision was highly contested until judicial pronouncement in *Donaldson v Beckett* <sup>180</sup> finally settled the matter. Though the term "public domain" may be regarded as relatively new in copyright discourse featuring in the late nineteenth century,<sup>181</sup> on the contrary, it had been recognized as a common Latin term – *publici juris* meaning a thing or right (air, water, etc) that

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<sup>178</sup> This was made possible by the Royal Charter granted to the Stationers' Company by the Crown.

<sup>179</sup> *The Statute of Anne* 1710, 8 Anne, c.19 s.1.

<sup>180</sup> 4 Burr.2408, 2 Bro. P.C 129, 98 Eng. Rep. 257 (H.L. 1775) cited in "Thomas Morris, Jr., "The Origins of the Statute of Anne" (1962) 12 Copyright L. Symp. 222 at 227."

<sup>181</sup> Jane C. Ginsburg, "'Une Chose Publique'? The Author's Domain and the Public Domain in Early British, French and U.S. Copyright Law" (2006) Cambridge L.J. 636 at 637, cited in "Craig, *Canadian Public Domain*, supra note 142 at 222."

is open to, or exercisable by all persons.<sup>182</sup> It was also applicable to other forms of intellectual property, for instance, a trademark may not be approved if the term was regarded as *publici juris*. The point to emphasize here is that the concept of public domain is not new, and it is an active component of the copyright system, which is arguably and vicariously provided for by copyright law through copyright term limitation.

The Supreme Court of Canada endorses the value in the public domain when it states through Justice Binnie:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to property utilization.<sup>183</sup>

The pronouncement of the Supreme Court of Canada buttresses the argument that the public domain is an active component of the copyright ecosystem and a wellspring of creativity. In very concise language, the public domain is a concept recognized by copyright law and part of the copyright system; it holds expired copyright works accessible to the public without any restrictions and serves to promote creativity as much as copyright itself. Also, Corbett notes that the public domain is generally considered to hold all works that have no copyright protection and can therefore be used freely by anyone.<sup>184</sup>

With regards to CCL and the public domain, critics have complained that CCL confuse notions of public domain and the commons, and that, in so doing, they contribute to the decline

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<sup>182</sup> Wikisource, “Publici Juri” at online: <

[https://en.wikisource.org/wiki/Page:Black%27s\\_Law\\_Dictionary\\_\(Second\\_Edition\).djvu/973](https://en.wikisource.org/wiki/Page:Black%27s_Law_Dictionary_(Second_Edition).djvu/973) > accessed September 12, 2019.

<sup>183</sup> *Théberge v. Galerie d'art du Petit Champlain*, [2002] 2 S.C.R. at 336 at 356[*Théberge*] at online: < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1973/1/document.do> > accessed May 10, 2018.

<sup>184</sup> Corbett, *Creative Commons*, supra note 40 at 518.

of the public domain.<sup>185</sup> The confusion perhaps arises from the existence of the *commons* repository under the CCL scheme that holds resources for users to access. Corbett argues that the works licensed under CC are placed in a *commons*, which she says is similar to the public domain because it is a theoretically constructed place that serves public good.<sup>186</sup> This may appear similar to the public domain, which is also a repository of resources that cannot be confined to a particular space whether in the corporeal or incorporeal world. Works licensed under CC are held in the information / knowledge resource for others to access and use. The criticism against CC here is that this creates confusion as to the notion of the public domain, which is already subject to various conceptions. Craig notes that with regards to CC, it is not clear whether, and to what extent, content under this scheme can be conceptually located within the public domain.<sup>187</sup> Samuelson explains that content licensed under CC is not public domain in the sense of being unencumbered by intellectual property rights.<sup>188</sup> Samuelson's argument rightly addresses any perceived confusion between CCL and the public domain. The core distinguishing feature between CCL and the public domain is that the former is encumbered by copyright and the latter is not. Additionally, works licensed under CCL plans are further encumbered by the various licence restrictions; but works that have officially (when the copyright term expires) passed on to the public domain are available to be exploited without any limitation.

Corbett and Craig express some ideas that portray the connection between the CCL and the public domain in a positive light. Corbett thinks the “commons” under CC is similar to the public domain and that it serves public good;<sup>189</sup> Craig reasons that CC content is at least deemed to be

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<sup>185</sup> D. M. Berry, “A Contribution to a Political Economy of Open Source and Free Culture” in Fiona Macmillian ed, *New Directions in Copyright Law* (London: Elgar, 2007) 195, 218. “Cited by Corbett, *Creative Commons*, supra note 184.

<sup>186</sup> *Supra* note 184.

<sup>187</sup> Craig, *The Canadian Public Domain*, supra note 173 at 230.

<sup>188</sup> Samuelson, *Digital Public Domain*, supra note 177 at 151.

<sup>189</sup> Corbett, *Creative Commons*, supra note 184.

functionally equivalent to public domain material because it furthers the goal of wide dissemination and use.<sup>190</sup> This suggests that the free culture agenda of the CC organization aligns with the purpose the public domain serves; in other words, they are both achieving the same thing, albeit in similar but different ways. The functional equivalence argument by Craig in my view does not suggest that CCL and the public domain are the same, but that there is unity of purpose – which is to enable access to and use of creative works, encourage creativity and wide dissemination of cultural works. In my opinion, notwithstanding the perceived confusion or difference(s) between CCL and the public domain, the benefits of CCL to the public domain or to creativity, arguably outweighs any possible demerit. The conception of the public domain is a general source of controversy in copyright law besides adding the CC mix. The most important point to buttress is that the “commons” under the CC serves to add value to the copyright system by providing access to and use of content, then it is not causing a decline to the public domain. On the contrary, it is adding value to it.

However, the CCL-public domain relationship is further complicated with the existence of a public domain licence under the CCL arrangements. It is difficult to comprehend how it can be applied in practical terms and recalls the question I asked above, whether it is legally justifiable or possible to voluntarily opt out of copyright?<sup>191</sup> The CC organization, through its public domain licence (CC0) encourages copyright owners to dedicate their work(s) for which copyright still subsists to the public domain. To broach the issue becomes even more problematic in the absence of any express provision in copyright law in Canada or United States. According to Corbett, critics have warned that this is misleading and fails to acknowledge the complexities surrounding the legality of an author voluntarily choosing to relinquish copyright in her works

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<sup>190</sup> Carys J. Craig, *supra* note 187 at 231.

<sup>191</sup> Creative Commons, *CC0*, *supra* note 171.

and dedicating same to the public domain.<sup>192</sup> A counter argument could be made that the absence of any express provision may suggest that copyright law did not intend to bar such dedications. Typically, in scenarios like this where the law is silent, it is necessary to review the comments of scholars. Corbett engages with the analysis of this argument by identifying the opposing views of Phillip Johnson<sup>193</sup> and Timothy Armstrong.<sup>194</sup> I also consider the arguments by Emily Hudson and Robert Burrell.<sup>195</sup> My examination attempts to summarize the arguments as the discourse is broad enough to be a distinct research of its own.

In the absence of legal implications, there is hardly anything wrong with giving up something to a person or for public use and I believe that this applies to copyright. With regards to an author dedicating her work to the public, Johnson's<sup>196</sup> view is that without considering the legal effects, an author is free to dedicate her work to the public and should not be precluded from doing so. The legal implication under copyright law therefore changes the equation by preventing this altruistic gesture. For clarity, it is necessary to explain terms that have been used interchangeably to describe an author gifting her work completely for public use. These are "forfeiture," "abandonment," "surrender," and "dedication to public domain." Johnson clarifies these terms and how they impact on the legal effect of placing or attempting to place a work in the public domain. He makes a distinction between involuntarily forfeiting copyright in a work and voluntarily giving it up<sup>197</sup> even though courts in the United States have historically equated forfeiture with dedication to the public domain.<sup>198</sup> Forfeiture occurs when a work is published

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<sup>192</sup> Corbett, *Creative Commons*, supra note 184 at 518-19; Dusollier, *The Master's Tools*, supra note 159 at 274.

<sup>193</sup> Phillip Johnson, "Dedicating" Copyright to the Public Domain" (2008) 71 MLR 587-610.

<sup>194</sup> Timothy Armstrong, "Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public (2010) 47 Harvard Journal on Legislation 359-423.

<sup>195</sup> Emily Hudson and Robert Burrell, "Abandonment, Copyright and Orphaned Works: What Does it Mean to Take The Proprietary Nature of Intellectual Property Rights Seriously?" (2011) 35 Melbourne University L. Rev. 971.

<sup>196</sup> Johnson, *The Public Domain*, supra note 196 at 590.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.; *American Press v Daily Story* 120 F 766 (7th Cir 1902); *Holt Howard v Goldman* 111 F Supp 611 (DC NY 1959)



without proper copyright notice or where statutory requirements so that copyright does not exist in the work<sup>199</sup> ab initio. This was the position in the United Kingdom until July 1, 1912 when the Copyright Act of 1911<sup>200</sup> came into force and abolished all statutory requirements.<sup>201</sup> Similarly, in the United States and according to Armstrong, the copyright law operated as an opt-in system – meaning that for copyright to attach, notice and registration of copyright and deposition of a copy of the work at the Library of Congress were mandatory formalities otherwise copyright in the work would be forfeited.<sup>202</sup> By these formalities, the author expressed her intention to opt-in to copyright. This position ended in the United States on January 1, 1978, which was the effective date of the United States Copyright Act of 1976<sup>203</sup> and the Act caused copyright to attach automatically once the work is fixed in a tangible medium of expression;<sup>204</sup> though some formalities were retained, noncompliance did not vitiate copyright in the work.<sup>205</sup> The requirement of formalities was abolished on March 1, 1989, the effective date of the Berne Implementation Act (bringing the United States in compliance with the Berne Convention).<sup>206</sup> Based on the foregoing, I concur with the argument of Johnson that forfeiture (which happens involuntarily or through inaction) should not be equated with voluntarily dedicating a work to the public domain.<sup>207</sup>

With regards to copyright, Johnson construes abandonment to mean that copyright in a work ceases to exist and falls into the public domain;<sup>208</sup> he further states that with other forms of IP (patents and trademarks) in the United Kingdom, the proper terminology is “surrender” and

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<sup>199</sup> Ibid.

<sup>200</sup> An Act to amend and consolidate the law relating to copyright, Geo.6 5(1911) c.46.

<sup>201</sup> Ibid.

<sup>202</sup> Armstrong, *Shrinking the Commons*, supra note 194 at 388; Johnson, *The Public Domain*, supra note 193.

<sup>203</sup> Pub. L. 94-553.

<sup>204</sup> Ibid. § 102(a).

<sup>205</sup> Armstrong, *Shrinking the Commons*, supra note 194 at 389.

<sup>206</sup> Ibid. at 390; Johnson, *The Public Domain*, supra note 193.

<sup>207</sup> Johnson, *The Public Domain*, supra note 193 at 590-1.

<sup>208</sup> Ibid. at 591

not abandonment.<sup>209</sup> To avoid confusion, Johnson prefers to use the term “dedicating a work to the public domain.” While the academic discourse on these terminologies by Johnson and Armstrong is appreciated, the crucial point is that the work gets into the public domain and freely accessible by the public. The clarification on terminology narrows down the issue to examining the legal basis for voluntary dedication of a work to the public domain before the expiration of the copyright term.

On the legal basis for dedicating an unexpired work in to the public domain, Armstrong is of the view that, from the United States perspective, the 1976 Copyright Act does not give any statutory provision that enables dedicating a work to the public domain during the lifetime of the author or seventy year after.<sup>210</sup> He argues that although United States case law, for over a century upheld that copyright owners could disclaim their copyright, the courts were entangled in terminology confusion and used terms like, “abandonment” and “dedication to the public domain” to mean noncompliance with formalities.<sup>211</sup> My earlier explanation on formalities is relevant here to further buttress the point that these cases cannot be used as the authority for voluntarily dedicating copyright to the public domain because of ambiguity in the usage of terms and the legal requirement for formalities, which has now ceased. Armstrong opines, “Nothing in the Copyright Act contemplates a voluntary extinguishment of the rights vested by the creator of a work; and the courts have been highly reluctant to find copyright abandonment.”<sup>212</sup> The

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<sup>209</sup> Ibid.; *UK Patents Act 1977* s.29(1); *UK Trade Marks Act, 1994* s.45(1).

<sup>210</sup> Armstrong, *Shrinking the Commons*, supra note 194 at 391.

<sup>211</sup> Ibid. at 392, according to Armstrong, Judge Learned Hand's opinion in *National Comics Publications v. Fawcett Publications* is often cited for the general proposition that authors may abandon their copyrights. The court stated-unfortunately, without citing authority-that: We do not doubt that the "author or proprietor of any work made the subject of copyright" by the Copyright Law may "abandon" his literary property in the "work" before he has published it, or his copyright in it after he has done so; but he must "abandon" it by some overt act which manifests his purpose to surrender his rights in the "work," and to allow the public to copy it."

<sup>212</sup> Ibid at 396.

summary of Armstrong's position therefore is that existing law does not contemplate the dedication of works voluntarily into the public domain.

Examining the issue from the United Kingdom perspective, Johnson considers divesting a legal right under English<sup>213</sup> and Scots law. Under English law, the courts have been averse to allow anyone divests rights;<sup>214</sup> in fact the House of Lords held in *Clarke v. Hart*<sup>215</sup> that it is not possible to waive or abandon a right except by acts which are equivalent to an agreement or licence.

Under Scots law and in contrast to English law, divesting of a legal right is possible, but it must pass to the Crown and cannot cease to exist.<sup>216</sup> Johnson concludes that:

There is no authority in English or Scots law that copyright can be dedicated to the public domain. The authorities relied on in favour of the proposition are ancient and sketchy at best (*Miller*,<sup>217</sup> *Rundel*,<sup>218</sup> and *Platt*<sup>219</sup>) or widely discredited (*Catnic*<sup>220</sup>). Combine this with the English court's long reluctance to allow a person to give up a legal right and the Scots rule transferring rights to the Crown, and it is difficult to see how copyright can be dedicated to the public domain.<sup>221</sup>

Furthermore, under the United Kingdom Copyright, Designs and Patents Act, 1988, there is no express provision to dedicate copyright in a work to the public domain, which is similar to Armstrong's articulation of the position under United States copyright law. However, Johnson

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<sup>213</sup> Johnson, *The Public Domain*, supra note 193 at 592. According to Johnson, English lawyers have engaged in protracted debates on whether a thing could be ownerless. See S. Thorne (ed), *Bractoris De Legibus Et Consuetudinibus Anglie* (On the laws and customs of England) (Cambridge, Mass.: Harvard UP, 1968) vol 2,41; A. Hudson, 'Abandonment' in N. Palmer and E. McKendrick (eds), *Interests in Goods* (London: LLP, 2nd ed, 1998) 616; A. Hudson, 'Is Divesting Abandonment Possible at Common Law' (1984) 100 LQR 110.

<sup>214</sup> *Ibid.* *Haynes Case* [1614] 12 Co. Rep 113 (77 ER 1389).

<sup>215</sup> [1858] 6 HLC 633 (10 ER 1443).

<sup>216</sup> Johnson, *The Public Domain*, supra note 193 at 594.

<sup>217</sup> *Miller v Taylor* [1769] 4 Burr 2303 (98 ER 201).

<sup>218</sup> *Rundell v Murray* [1821] Jac 311 (37 ER 868).

<sup>219</sup> *Platt v Button* [1815] 19 Ves 447 (34 ER 583).

<sup>220</sup> *Catnic Components v Hill & Smith* [1978] FSR 405,427-428.

<sup>221</sup> *Supra* note 193 at 599.

disagrees with Armstrong that United States' law does not permit divesting of a legal right, he argues asserts that the abandonment of both tangible and intangible property (which includes copyright) is less controversial in the United States and that state<sup>222</sup> and federal common law<sup>223</sup> support this. He also cites the Uniform Unclaimed Property Act of 1995 and maintains that any legal right can be given up under the United States law. Furthermore, it is important to note that though copyright law confers a legal right on the copyright holder to exclusively enjoy the rights in her work, there is no provision in the law that compels her to do so. There is no legal obligation to coerce her into exercising this right. In other words, there is no sanction if the copyright holder gifts her work to the public. Copyright law confers a legal right but does not impose a legal duty to exercise this right. Therefore, this strongly supports the arguments that one can dedicate her work to the public even while the copyright in it subsists. Similarly, Emily Hudson and Robert Burrell,<sup>224</sup> while acknowledging counter reasoning,<sup>225</sup> support the view that copyright can be abandoned. They argue that copyright scholars in the United States generally support the view that copyright could be abandoned:<sup>226</sup>

the copyright system is an incentive system, not a coercive one. ... [N]othing in the Constitution or the Copyright Act compels an author to accept the benefits of copyright; nothing compels him to distribute his work to the public. An author is free to destroy or withhold the work rather than to distribute the work.

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<sup>222</sup> *Dluhos v. The New York*, 162 F.3d 63, 70 (2d Cir. 1998) "cited in Johnson, *The Public Domain*, supra note 193 at 594 n105."

<sup>223</sup> *US v. Shivers*, 96 F.3d 120 (5th Cir 1996) "cited in Johnson, *The Public Domain*, supra note 193 at 594 n105."

<sup>224</sup> Hudson and Burrell, *Abandonment*, supra note 195.

<sup>225</sup> Admittedly, there are some jurisdictions in which abandonment arguments have recently been rejected. One example is the *Wall Pictures* case from Germany. That case was brought by artists who had painted largescale murals on the Berlin Wall in the mid to late 1980s. A number of years later, following the reunification of Germany and dismantling of the Wall, segments of these were sold at an auction in which the defendant was involved. The plaintiffs sought a share of the proceeds. One of the preliminary matters dealt with by the German Federal Court of Justice was whether the owner of property on which an artistic work was unlawfully created had unfettered discretion in how to deal with that property. It was held that he or she did not, and that while removal of the work might be permissible, commercial exploitation was not. The defendant's argument that the artists had abandoned their rights could not be accepted, as 'an abandonment of rights comparable to dereliction in the law of property is unknown to copyright law. There is no "ownerless" copyright.'

<sup>226</sup> Robert A Kreiss, 'Abandoning Copyrights to Try to Cut Off Termination Rights' (1993) 58 *Missouri Law Review* 85, 99, "cited in Hudson and Burrell, *Abandonment*, supra note 223 at 986."

Hudson and Burrell further opine:<sup>227</sup>

It is therefore submitted that the position adopted in the US provides a safer guide than the position adopted in Germany, where copyright cannot be fully alienated... The possibility of abandoning copyright is also important given the recent focus on developing new forms of copyright management that facilitate public access and re-use. While some of these mechanisms are predicated on the creator or rightsholder retaining his or her copyright (such as the prospective licensing used by Creative Commons and others), in other examples the owners seek to divest themselves of any rights by dedicating the work to the public domain.

Though Corbett remarks that based on the opposing views of Johnson and Armstrong on voluntary dedication a work to the public domain demonstrates the unsettled nature of the concept,<sup>228</sup> a practical approach may be seen in the opinion of Emily and Hudson, which cites public interest as one of the reasons for copyright abandonment through the CCL.<sup>229</sup> The CC organization acknowledges the murkiness of this debate and issues a subtle caveat that:

And while no tool, not even CC0, can guarantee a complete relinquishment of all copyright and database rights in every jurisdiction, we believe it provides the best and most complete alternative for contributing a work to the public domain given the many complex and diverse copyright and database systems around the world.<sup>230</sup>

Two other concerns over CCL are its prospects to generate revenue and Stallman's disavowal of the CC scheme. My earlier discussion on the potential misconception of CCL as a business model lays the foundation to examine Scharf's scrutiny on the subject. In sum, and to reiterate my discussion on CCL being used as a business model, I observed that although CC

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<sup>227</sup> Hudson and Burrell, *Abandonment*, supra note 224 at 986-7.

<sup>228</sup> Corbett, *Creative Commons*, supra note 192 at 519.

<sup>229</sup> Supra note 227.

<sup>230</sup> Creative Commons, *CC0*, supra note 171.

organization or its licensing scheme were not setup as a business model, it is fast becoming so due to the opportunity it creates through the CCL and the publicity around success stories and financial success of licensors. Consequently, the CCL scheme attracts diverse copyright stakeholders regardless of whether they support free culture ethos or not; the main motivation for some stakeholders is to gain exposure and financial success. CCL therefore runs the risk of becoming a money-making tool – a means to an end. Scharf examines the use of CCL as a means to generate revenue and possible hindrances; he articulates that the philosophy of sharing suggests that the economic model for CCL is based on gratuity.<sup>231</sup> Examining this subject from the perspective of music, Scharf reports that very few artists using CCL can make a living solely from their music and therefore expresses doubt as to whether creators would have enough motivation to produce more works in a free culture system.<sup>232</sup> Scharf rightly observes that although the author of a CC-licensed work (music) is not barred from commercially exploiting the work, he notes that the chances of doing so successfully are impossible.<sup>233</sup> He supports this extreme view by arguing that record labels would be unwilling to promote musical content that is already available for free<sup>234</sup> and that this is a clear distinction compared to the conventional mode of operation in the music industry that relies heavily on market success and their interest.<sup>235</sup> Scharf acknowledges that this perceived difficulty for creators to make money from their works through the CCL platform is not intentional and that the real benefit that CC organization offers is to aid creators to exploit their works themselves without being exploited.<sup>236</sup>

A counter view on Scharf's position is that music artists who are not signed on by any record

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<sup>231</sup> Scharf, *Creative Common-sense*, supra note 61 at 382.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> M Fox et al, "Creative Commons: An Alternative Web-based Copyright System" (2005) Ent. LR 111 at 116, cited in "Scharf, *Creative Common-sense*, supra note 231."

label could gamble with CCL, and while the outcome of such gamble is unpredictable, some artists, motivated by success stories of other CCL licensors may stand a chance.

Scharf's concern is that although the CCL scheme presents an opportunity for licensors to make money, the free culture principle may make this problematic; this reasoning contrasts with CC success stories, which presents evidence, albeit limited, of licensors who are able to gain both exposure and financial benefits through CCL. The CC organization or its licensing scheme is unsurprisingly vulnerable to analyses similar to Scharf's because of the success stories publicity, which fuel the understanding or rather, misunderstanding that CCL is a business model. In my view, Scharf approached his examination from an instrumentalist point of view, which may provide some justification for his reasoning, otherwise broaching the CCL from an intrinsic angle, Scharf's conclusions may not be relevant. From the intrinsic perspective, which is a more suitable framework for assessing CC organisational objectives or its licensing initiative, Scharf fails to consider that some creators are motivated to create for reasons other than financial gain; his analysis also does not acknowledge the value that CCL-works provide in the cultural industry by making creative works available and easily accessible. Scharf's argument inappropriately compares CC with traditional copyright in terms of revenue generation. It is understandable and permissible to seek commercial gain through copyright because the law permits it, but CC itself relies on copyright, and even if it does (indirectly) provide a means for creators to make money, the money-making aspect is a spin-off from the main focus of the CC organization.

Some other related issues for considerations are questions raised by Andrew Rens:<sup>237</sup> 1) if something held in the commons can be a basis to generate revenue? 2) can a commons-based enterprise generate sufficient revenue to sustain itself? and 3) will generating revenue from the commons erode the values of the commons? Unlike Scharf, Rens raises these questions for clarification purposes.<sup>238</sup> Rens first explicates the meaning of the commons by citing Yochai Benkler who puts it thus:

The salient characteristic of commons, as opposed to property, is that no single person has exclusive control over the use and disposition of any particular resource in the commons. Instead, resources governed by commons may be used or disposed of by anyone among some (more or less well-defined) number of persons, under rules that may range from “anything goes” to quite crisply articulated formal rules that are effectively enforced.<sup>239</sup>

Benkler’s articulation on the nature of the commons suggests that ownership is collective and each adherent to the commons is free to use or dispose (which could mean revenue generation) of the resources in the commons in accordance with formal or informal rules of the commons as the case may be. Rens hints of a number of businesses using the CC as a platform (already discussed in the success stories) and that the success stories show no indication that revenue generation from the commons will destroy the commons.<sup>240</sup> Rens further argues that the *network effect* sustain the commons;<sup>241</sup> Rens explains the network effect to mean that the more people belong to a network, the more connections are available in the network.<sup>242</sup> Rens believes

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<sup>237</sup> Andrew Rens, “Managing risk and opportunity in the Creative Commons enterprise” (2006) 11 First Monday at online: < <https://firstmonday.org/ojs/index.php/fm/article/view/1336/1256> > accessed September 21, 2017.

<sup>238</sup> It is pertinent to note that Andrew Rens appears to be a supporter of CC; as at 2006 when he wrote this article, he was the CC Legal Lead in South Africa. This gives some insight into his perspective.

<sup>239</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, (New Haven & London: Yale University Press, 2006) at 61.

<sup>240</sup> Rens, *Creative Commons Enterprise*, supra note 199.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.



that this principle applies to the commons so that the more people use it, the more value it has and useful it becomes.<sup>243</sup> Rens considers the possibility that people who contribute to the commons do so for ideological or utilitarian motives but maintains that in some cases, an author may gain more benefit from a growing commons compared to creating or using a copyright-protected work.<sup>244</sup> Admittedly, from the CC success stories, there is reason to believe Rens' view is correct, but amongst the teeming artists and creators, it is not ascertainable if 50 percent of the number can make a living off revenue from a commons enterprise. The conclusion therefore is that such claims are not absolute.

The last concern is about the position of Stallman on CC, which according to him, he no longer endorses because the CC does not give everyone a minimum level of freedom and on this score, he agrees with the argument of Hill.<sup>245</sup> Furthermore, Stallman explains that:

I don't think that licences which deny that minimum freedom are legitimate at all. Since people tend to treat Creative Commons as a unit, disregarding the details like which one of their licences is being used, it is not feasible to support just part of Creative Commons--so I can't support it at all now. I asked the leaders of Creative Commons privately to change their policies, but they declined, so we had to part ways.<sup>246</sup>

Stallman's disagreement is partly rooted in the fact that CCL adopts a concept of free culture that differs from his; Stallman encourages a crusade in support for free culture, specifically, free software. CC organization does the same thing but following a different approach. My concern is that the free culture community is not only trying to promote its agenda in the face of a content-industry controlled copyright system, it may also be dealing with

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<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Richard Stallman, "Fireworks in Montreal (2005-07-01 to 2005-07-05)" (2010) at online: < <https://www.fsf.org/blogs/rms/entry-20050920.html> > accessed September 21, 2017; Hill, *Towards a Standard of Freedom*, supra note 144.

<sup>246</sup> Stallman, *Fireworks in Montreal*, supra note 207.

differences in principles (that is, free software, OSS and CCL approaches to free culture) within the free culture community. For ease of understanding, I have tried to clarify each party's approach to free culture but a common similarity among them is that they all promote the culture of sharing content, which benefit users, creators and the creative society though in varying degrees. The free culture community advocacy could be stronger if the disagreement did not exist.

#### **4.7 Creative Commons Licensing and the Free Culture Agenda**

It is incontestable that the CC organization and its licensing scheme aim to promote and mainstream the free culture philosophy into the copyright system as a response to the perceived content industry-dominated copyright industry. The campaign by the CC organization and its proponents seeks to instil a particular consciousness on the purpose of copyright law – which, arguably, at least from the free culture perspective, primarily aims to promote innovative ideas and creativity before. This relates to the focus of my discussion in chapter one and is relevant to the free culture cause and the goals of the CC organization. Chapter one revealed that the present feud between the present-day free culture and content industry advocates is traceable to the early squabbles right from the era of the Stationers' Company monopoly (royal privileges) to the enactment of the first copyright law. Additionally, the discourse in chapter one shows the less than harmonious relationship among the arms of government on copyright matters and how this has left most copyright stakeholders largely unsatisfied. The copyright debate has endured for more than three centuries with no possible easy solution, despite countless copyright law reforms. The purpose of enacting copyright law remains largely contestable; it is possible for

both the free culture and the content industry supporters to justify the fact that the purpose of copyright aligns with their interests.

My conjecture is that the free culture advocates have observed that the Stationers' Company-like control of the copyright system is still very visible today even after more than three centuries have passed. The knowledge of these historical facts has nudged the free culture proponents to believe that unless an out-of-the-box initiative is introduced, they run the risk of just merely existing in name in a copyright system dominated solely by the property approach to copyright. Consequently, this led to the emergence of the free culture ideology and subsequently, the CCL scheme.

The rate of success recorded by the CC organization in pushing forward the free culture goals through the CCL is attributable to the phenomenal effects of ICT, which I examined in detail in chapter two. There I discussed the intricacies of the concept of free culture and how both the intrinsic and instrumentalist approach to copyright are embedded in it because of the differing motives of the free culture adherents. Nonetheless, for the purpose of advancing the free culture objectives, the CCL, under the auspices of ICT, seems to be making progress and is, perhaps, on track to achieve more. The proliferation of the internet and digital technology supports the growth and increased use of CCL, notwithstanding the inherent concerns about the CCL discussed above and the inability or lack of evidence to empirically show its positive impact on creativity. Digital technology and the internet largely serve as a catalyst for the exponential growth of the CCL, which furthers the free culture agenda. In chapter two, I discussed ICT and examined the free culture perspectives on it. I reiterated the position that ICT fosters the free culture goals as it provides a platform that makes access to and sharing of cultural works fast and easy, which in turn, keeps the circle of creativity unending and dynamic. This is

what the free culture agenda stands for: freedom to access works, be inspired by them, and engage in transformative use and disseminate the results of one's creative efforts for the interest of the creative community.

#### **4.8 Conclusion**

In this chapter, I have attempted to give an in-depth analysis of the free culture interests and goals. More specifically, I examined the free culture ideology from the context of CCL to understand its impact in copyright in the digital setting. I discussed the arguments both for and against free culture and its overall impact on the copyright system. The free culture community posit that their activities as actors in the copyright system enhance the purpose of copyright and foster the creation of a balanced copyright system by safeguarding the public interest. While the free culture initiative is not perfect, its activities seem to be more aligned to the purpose of copyright law and foster balance in the copyright system in a manner consistent with the principles enunciated by the Supreme Court of Canada in *Theberge*.

**CHAPTER FIVE**  
**THE CONTENT INDUSTRY STAKEHOLDERS**  
**AND TECHNOLOGICAL PROTECTION MEASURES**

Chapter five forms the second part of my case study analysis and focuses on TPMs, how they work and why they are used. My inquiry seeks to understand the motive behind the content industry's support for the use of TPMs as a means to further protect content despite copyright law's protection. As we will see, while free culture advocates for the liberty to share and access content in the digital era, the content industry stakeholders promote a permission culture – that is, access to content should be controlled.

**5.0 About Digital Rights Management (DRM) and TPMs**

In the digital space, copyright owners manage their rights using DRMs and TPMs and it is appropriate to explain what they mean and how they interact with each other. DRMs refer to any technology system that facilitates the trusted and dynamic management of rights in any kind of digital information, throughout its life cycle, irrespective of how and where the digital information is distributed.<sup>1</sup> This definition means that DRMs are a form of intellectual property management system in the digital space; it also helps manage licensing of digital content; as Kerr explains:

DRMs are designed to manage an entire array of related activities by using various automation and surveillance

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<sup>1</sup> Nic Garnett, "Outline of Presentation of Nic Garnett, representing InterTrust Technologies" (paper presented to the ALAI Congress 2001, June 2001) [unpublished], [www.alai-usa.org/2001\\_conference/pres\\_garnett.doc](http://www.alai-usa.org/2001_conference/pres_garnett.doc) at 1, cited in "Ian Kerr, "Digital Locks and the Automation of Virtue" in Michael Geist, ed, *From "Radical Extremism" to Balanced Copyright" Canadian Copyright and the Digital Agenda*, (Toronto: Irwin Law, 2010) at 272 footnote 87." Kerr notes that, according to the author, this is a fairly broad definition of DRM, as the authors notes, "the term DRM has no come to be applied to a variety of different technologies, most of which relate to control of access to information or to its copying."

technologies to identify digital property and those seeking to use it, in order to technologically enforce certain licensing conditions. In so doing, DRMs can be used to automate permission automatically.<sup>2</sup>

DRMs enforce in the digital sphere what contracts do in the physical world, the difference being that DRMs are more advanced and sophisticated and leverage technology to achieve their functions automatically without any necessary consent on the part of the user. DRMs are much more than a contract/licensing-like system, Kerr states that DRMs are comprised of two components:

The first component is a set of technologies that could include encryption, authentication, access control, digital watermarking, tamper-resistant hardware and software, and risk management architectures. In the copyright context, such technologies are used to enforce corporate copyright policies and pricing schemes through a registration process that requires purchasers to hand over certain bits of personal information. The second component is a licensing arrangement. This set of legal permissions establishes the terms of use for the digital property by way of contract.<sup>3</sup>

From Kerr's articulation, it can be gleaned that DRMs may bear some similarities with TPMs, especially, the technology component that uses encryption technology; there is also a distinction in the sense that DRMs administer the legal terms of use attached to a digital content by the content owner. Kerr uses an analogy to aptly describe the difference by saying that if a TPM is a virtual fence, then a DRM is a virtual surveillance system.<sup>4</sup> However distinct they may be, there are obvious overlaps.

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<sup>2</sup> Kerr, *Digital Locks*, *ibid.* at 272.

<sup>3</sup> *Ibid.* 273. In note 88, Kerr reports that Hugenholtz has defined a DRM similarly as a contract, typically a licensing agreement, coupled with technology, typically, a technological protection measure such as encryption.

<sup>4</sup> *Ibid.*

There are, of course, some concerns with the use of DRMs; some DRMs enable the collection of personal data, which include customer identities, consumer habit profiling, and tracking and recording of the various uses of works under copyright protection.<sup>5</sup> Besides authenticating user access and administering terms of use for digital content, DRMs are potentially invasive and violate user privacy and this extends beyond copyright protection and enforcement to entirely new grounds.<sup>6</sup> The foregoing explanation on DRMs set the foundation to discuss TPMs, which I analyze below.

The use of some form of technique to encrypt messages existed long before the advent of TPMs in its current sophisticated form. According to Ian Kerr et al, Mitchell McInnes reports that Julius Caesar utilized encryption and decryption techniques to send messages to his governors to prevent his messengers from tampering with them.<sup>7</sup> Admittedly, though Caesar's cryptography method could be regarded as primitive compared to the contemporary techniques used today in the digital era, nonetheless, they are generally referred to as technology/technological protection measures (TPMs) insofar as they function to restrict access to content.

There are various types of TPMs and they are designed to regulate how content is accessed and used. TPMs could be as simple as creating a password to restrict access or involve complicated and technical computer programming. Although I will briefly describe some technical aspects of TPMs, it is not intended to be exhaustive; an exhaustive analysis on TPMs

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Mitchell McInnes et al, *Managing the Law: The Legal Aspects of Doing Business* (Toronto: Pearson Education, 2003) at 382, cited by "Ian Kerr et al, "Technical Protection Measures: *Tilting at Copyright's Windmill*" (2002) 34 *Ottawa Law Review* 7 at 14." "Encryption is the coding of plain text in to an unreadable form called ciphertext so that it cannot be understood by those who are not privy to the code. Caesar created a rather simple system in which each character in his messages was replaced by a character three positions ahead of it in the Roman alphabet. Authorized recipients of his messages were provided with the means of decrypting them. Decryption is the process of converting ciphertext back into its original form so that it can be understood and acted upon."

requires delving into technicalities, which is not intended here. The description I give is only intended to provide foundational knowledge that serves as basis to scrutinize TPM policy considerations and why most content industry stakeholders favour them.

TPMs are multifaceted so a perfect definition is futile since they are associated with encryption and a broad range of technologies.<sup>8</sup> Authors tend to adopt a very broad and simplified definition that give a general insight into the meaning of TPMs. According to Haggart, TPM is a technological method aimed at encouraging authorized use of digital content.<sup>9</sup> This definition suggests that TPMs help encourage authorized use of digitized works especially from the viewpoint of the content industry stakeholders. This could be contestable, especially if TPMs are defined as technological systems that prevent unapproved use of content in digitized form. TPMs are defined from a positive perspective (to encourage authorized access and use), and from a negative perspective (to prevent unapproved access and use); the fact remains that they are, according to Kerr et al, “virtual fences around digitized content.”<sup>10</sup>

The use of TPMs in their current sophisticated forms have become allowable in the digitized copyright system following their incorporation into the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), usually referred to as WIPO Internet Treaties.<sup>11</sup> The legal debates and background to the adoption of TPMs have been examined in detail in chapter three.

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<sup>8</sup> Michael Geist, “Anti-circumvention legislation and Competition Policy: Defining a Canadian Way?” in Michael Geist, ed, *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 220.

<sup>9</sup> Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (Toronto: University of Toronto Press, 2014) at 18; Kerr et al, *Technology Protection Measures*, supra note 7 at 13.

<sup>10</sup> Ibid. Kerr et al.

<sup>11</sup> World Intellectual Property Organization, WIPO Copyright Treaty, December 20, 1996, at online:

<[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295157](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157)> Accessed October 6, 2015. The WCT entered into force on March 6, 2002. [WCT]; World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, December 20, 1996 at online:

<[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477)> Accessed October 6, 2015. The WPPT entered into force on March 6, 2002. [WPPT]



## 5.1 How TPMs Work

TPMs can function simply as creating a password to restrict access or prevent copying of content; its functionality could be more intricate, involving the use of encryption technology and software programming. However simple or advanced TPMs are, they can be classified into two categories: TPMs that regulate *access* to digital works and those that control *copying* of digital content. My explanation of access control and copy control TPM dichotomy is drawn largely from the work of Kerr et al<sup>12</sup> on the subject.

### 5.1.1 Access Control TPMs

In order to make use of a piece of content in digital form, access is essential. Access control TPMs attempt to ensure that users comply with authorized means to gain access. In other words, they prevent unauthorized persons from accessing digital content.<sup>13</sup> Passwords and cryptography are forms of access control.<sup>14</sup> The use of password is common; it can be used to prevent access to cellphones, laptops, documents, online accounts etc. Passwords are used for both copyright-protected and non-copyright-protected material. It is generally used to safeguard material from public view or limited access to authorized persons only. Cryptography is much more advanced compared to passwords. My earlier discussion on Caesar's means of safeguarding messages is an example of example of cryptography.<sup>15</sup> Cryptography in its simplest form is to mask content so it appears unintelligible to third parties but can be deciphered by the person(s) to whom it is directed using decryption tools they have received from the sender.

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<sup>12</sup> Kerr et al, *Technology Protection Measures*, supra note 10

<sup>13</sup> Ibid.

<sup>14</sup> Ibid. at 14.

<sup>15</sup> McInnes et al, *Managing the Law*, supra note 7.

Cryptography technology has been developed to enable its use in various forms to protect copyright content in digital form. Kerr et al identify some of the forms – Access TPM Devices and Players, Content Scramble System, Asymmetric Application Segmentation (AAS) and Digital Tickets.<sup>16</sup> Access TPM Devices and Players are designed to function such that a linkage is established between encrypted content and devices or players;<sup>17</sup> the content can be accessed only by using devices that are technically linked to the content.<sup>18</sup> The implication of this for users is that to access the content, they must possess not just any device but specific devices that are technologically linked to the content. Kerr et al list different methods using this technique.<sup>19</sup> Despite the classification of TPMs as *access* and *copy* control oriented, some TPMs (for example, the trust-enabled player) also control whether a legally obtained content can be copied, stored or printed.<sup>20</sup> Additionally, it is unfair to users who legitimately purchase content only to be barred from use because their device is not compatible or a component in the user's computer responsible for the link fails and is replaced.<sup>21</sup>

The Content Scramble System, for example is mostly applied to protect movies in DVDs, the DVD contents are encrypted and can only be assessed with DVD players manufactured in accordance with the CSS licence.<sup>22</sup> The content of the DVD is scrambled and can only be accessed by the DVD players manufactured with the capability of reading the content of the DVD. This implies that possession of the encrypted DVD needs a DVD player designed to access or read the content on the DVD.

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<sup>16</sup> Kerr et al, *Technology Protection Measures*, supra note 12, at 15, 17 and 19.

<sup>17</sup> Ibid. at 15.

<sup>18</sup> Ibid.

<sup>19</sup> According to Kerr et al, C. Risher identifies a number of Access TPM Devices and Players methods, which include: device binding, trusted player, trust-enabled player, trusted device (close environment), trusted device (detection), online access control, multiple-key high security; for more detailed description of these methods see Kerr et al, *Technology Protection Measures*, ibid. at 16.

<sup>20</sup> Ibid. at 17.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

Kerr et al identify AAS as a form of access control TPM that prevents or reduces the chances of making software susceptible to copying.<sup>23</sup> To put it simply, a piece of the software known as “executable code” is deliberately removed and placed on a server;<sup>24</sup> when a user runs the application, it identifies that there is a missing code and seeks to locate it on the server; besides locating the missing code, the software also verifies that the user is authorized to run the system. The rationale behind this mechanism is to prevent unauthorized access to the software. Digital Tickets essentially function by means of a code incorporated in a computer, the code determines if a user has the right to access content in digitized form,<sup>25</sup> and when a ticket is presented, it is electronically punched to indicate that a right was used.<sup>26</sup>

### 5.1.2 Copy Control TPMs

Besides controlling access to digitized content, TPMs might also have the capacity to regulate how content is used, which includes copying, distribution, performance, and display.<sup>27</sup> The technology for copy control TPMs manifests in different forms. Kerr et al explains Macrovision, Serial Copy Management System (SCMS), and Digital Transmission Content Protection (DTCP)<sup>28</sup> as forms of copy control TPMs. These forms of *access* and *copy* control TPMs summarily described here are actually more technical than I have presented.

While I have categorized TPMs into access and copy control TPMs, a more important categorization should be TPMs that distinguish between lawful and unlawful uses. But presently, TPMs have not reached the level of sophistication (and it is doubtful if this can be attained)

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<sup>23</sup> Ibid. at 19.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Kerr, *Digital Locks*, supra note 2 at 267, note 70.

<sup>28</sup> Kerr et al, *Technology Protection Measures*, supra note 26 at 21-22. Macrovision is a copy protection method for analogue VHS videocassette recorders (VCRs). It is used to prevent copying of pre-recorded videotapes. SCMS uses watermarks to prevent the illegal production of multiple generations of digital copies from a copyright-protected original (see note 44). A watermark is information that is digitally encoded in a hidden manner into digital work (see note 45). DTCP prevents unauthorized distribution of audiovisual content received in the home in digital form once it has been decrypted (see note 50).

required to distinguish between infringing and non-infringing copying and authorized and unauthorized access.<sup>29</sup> The expectation of the attainment of this sophistication may not be technologically realistic.

Unsurprisingly, content industry stakeholders have embraced the use of TPMs and in contrast, it is widely viewed as an unwelcome development (especially if they are implemented without exceptions) within the free culture community or even from the perspective of the balance of rights in the copyright system. A vital point to note about TPMs is that in spite of their sophistication, they can be defeated;<sup>30</sup> this will be analyzed subsequently and how this flaw in TPMs have become a justification for the content industry stakeholders to clamour for legal protection against circumvention of TPMs.

## 5.2 TPMs in a Digitized Copyright Industry

According to Haggart:

TPMs and digital rights management (DRM) systems predate the 1990s and the Internet treaties, although the Internet treaties brought them into the mainstream of political debate. Depending on how they are used and regulated, TPMs have the potential to shift the balance of power between copyright owners in subtle ways related to authorization and access, effectively overturning any legislated balance set in copyright laws. TPMs effectively transfer control over a work from the purchaser of the work to whoever put the lock on the work. In the absence of digital locks, a user can exercise her statutory rights without having to seek anyone's authorization. If a work is locked, however, the purchaser effectively must seek the permission of the content owner (or whoever locked the content) in order to exercise her legal rights. As a result, TPMs

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<sup>29</sup> Haggart, *Copyright*, supra note 9 at 19.

<sup>30</sup> Ibid. at 21; Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright"*, *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 208.

can allow owners to impose restrictions more onerous than are available to them in the non-digital world.<sup>31</sup>

The emergence of ICT and how it empowers users to share and access content in the digitized form created a paradigm shift in the balance of power to access works in favour of the user. Additionally, ICT created avenues to aid illegal downloading or illegal access to copyright-protected works. This ultimately strengthened the argument for increased use of TPMs, and the content industry stakeholders were at the vanguard of this move. The capabilities ushered in by digital technology seemed to have given users unfettered access to content, which, seemingly compromised content owners' legal rights to fully exploit their copyright in the digital context. In a bid to maintain control over how their content is used, the content industry stakeholders adopted technological means to curtail digitally empowered users' unauthorized access to proprietary content. In other words, the strategy was to use technology to fight technology. It is fitting here to use the words in Charles Clark's book title: "the answer to the machine is in the machine."<sup>32</sup>

So just as technology empowers users to access content in the digital age, the content industry community have also found a way to leverage technology (through TPMs and DRM systems) to control access to content for their benefit. Herein lies the irony of digital technology - the same ICT that presents opportunities for the user community to access digitized content also enables the content industry to devise multiple means to restrict access to digital content.

### **5.3 The Content Industry's Justification and Use of TPMs**

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<sup>31</sup> Supra note 29.

<sup>32</sup> Charles Clark, *The Answer to the Machine is in the Machine: And Other Collected Writing*, Jon Bing and Thomas Dreier eds. (Norway: Norwegian Center for Computers and Law, 2005).

As noted above, Haggart<sup>33</sup> examines how the use of TPMs in the copyright industry could potentially favour the content industry to the bane of users or the free culture community. It places the content industry in a position to reclaim the near absolute control it used to have in the copyright industry in the pre-ICT era. Content industry stakeholders have taken advantage of ICT to explore ICT-based business models since the traditional copyright business model (a model that thrives on physical control to create artificial scarcity in order to minimize unauthorized access and maximize revenue generation) has gradually lost the grip of control in a copyright era that thrives on the digitization of content. The content industry stakeholders now explore ICT-based business models by providing online access to generate income. This is indeed a welcome development: in the music industry, iTunes and Amazon are selling online music through downloads and paid streaming services, in the film industry, Netflix, Amazon Prime, Microsoft Xbox, HBO Go, Xfinity and Hulu Plus are providing online video services, and in book publishing, the advent of Apple's iBooks, and Amazon's Kindle<sup>34</sup> are examples of business models that digital technology supports.

In the digital space, the ease with which content is made accessible (both legally and illegally) is worrisome for the content industry stakeholders. These concerns to some degree are genuine, as Kerr et al acknowledge that digital technology poses challenges to the enforcement of intellectual property, such as copyright in digitized form;<sup>35</sup> this therefore creates a justification, albeit contestable, for the use of TPMs, which is perceived to provide further and greater control over online content,<sup>36</sup> as well as serving as a means to enforce and protect their

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<sup>33</sup> Haggart, *Copyright*, supra note 29.

<sup>34</sup> Stephen A. Merrill & William J. Raduchel eds., *Copyright in the Digital Era: Building Evidence for Policy* at online: <<http://www.nap.edu/download/14686>> (Washington DC: National Academies Press: 2013) at 23, 25 and 26 Accessed July 18, 2016.

<sup>35</sup> Kerr et al, *Technology Protection Measures*, supra note 7 at 12.

<sup>36</sup> Geist, *Anti-Circumvention Legislation*, supra note 8 at 220.

rights.<sup>37</sup> This justification has two implications: first, the content industry stakeholders conclude that the statutory protection in copyright law is insufficient; secondly, the use of TPMs amounts to self-help due to lack of confidence in the ability of the law to guarantee protection in the digital space. To fill in for the inadequacy of the law, the content industry stakeholders' resort to private technologies to regain control over digitized content.

Despite the desirability of TPMs and the reliance on them by the content industry community, the security protection they offer is susceptible to compromise. Consequently, Geist states, companies explore new ways of using TPMs that are less conspicuous, which enable them to manipulate markets to the detriment of consumers.<sup>38</sup> A couple of examples are identified to buttress this point. DVDs with regional codes cannot be played in another region and the consumer is often unaware of the regional code;<sup>39</sup> so if such a DVD is purchased while on vacation, the purchaser is unable to play the DVD when he returns home.<sup>40</sup> Similarly, in 2005, Geist reported that Hewlett –Packard began to install TPMs into printer cartridges to prevent the use of cartridges bought in another region;<sup>41</sup> according to Geist, the rationale is to enable the company to maintain different prices for the same product in different markets around the world.<sup>42</sup> In my view, this suggests that the argument can be made that the use of TPMs have been extended beyond what was originally intended by the WIPO Internet Treaties.

An assessment of the justification and use of TPMs by content industry calls for a critical review. The threat of unauthorized access to digital content should not be underestimated and

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<sup>37</sup> Kerr et al, *Technology Protection Measures* supra note 35.

<sup>38</sup> Geist, *Anti-Circumvention Legislation*, supra note 8.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 220-1.

<sup>41</sup> *Ibid.* at 221. This also forestalls refiling of empty cartridges from sources other than HP.

<sup>42</sup> *Ibid.*

scholars acknowledge that fact.<sup>43</sup> This reason might offer extenuating circumstances for the use of TPMs if their use could be targeted at unauthorized access intended for commercial copying of digital content. TPMs however, are yet to reach that level of intelligence where it could distinguish between cases where it is legal or illegal to copy, access or use a work.<sup>44</sup> Consequently, Craig argues that the extensive protection of TPMs without any consideration for lawful uses of copyright content has the potential to effectively eviscerate fair dealing in the digital age.<sup>45</sup> Further to inappropriate uses of TPMs by corporations to gain market advantage,<sup>46</sup> the situation is worsened by the fact that TPMs are not implemented to identify illegal access to content but apply generally to all users. This significantly impacts on the rights of users to access content for lawful uses.

The content industry's coveted use of TPMs does not absolutely put an end to unauthorized access because it is trite that TPMs do not offer perfect protection, and their protective integrity can be easily compromised. For instance, in 2000 the Secure Digital Music Initiative (SDMI) tested the integrity of its technology protection by inviting the public to attempt to break it.<sup>47</sup> The protection was easily cracked by a team of security researchers, illustrating that TPMs are not foolproof.<sup>48</sup> Therefore, the articulation by Clark<sup>49</sup> that the answer

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<sup>43</sup> Kerr et al, *Technology Protection Measures*, supra note 35; Sheldon Halpern, "The Digital Threat to the Normative Role of Copyright Law" (2001) 62 Ohio State L.J. 569.

<sup>44</sup> Haggart, Copyfight, supra note 33.

<sup>45</sup> Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright"*, *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 179; see also Carys Craig, "Digital Locks and the Fate of Dealing in Canada: In Pursuit of "Prescriptive Parallelism" (2010) 13 J.W. Intell. Prop. at 503 at 508, at online: <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-1796.2009.00394.x> > accessed May 25, 2019.

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<sup>46</sup> Geist, *Anti-Circumvention Legislation*, supra note 38-42.

<sup>47</sup> Janelle Brown, "Crack SDMI? No thanks!" *Salon* (14 September 2000), [www.salon.com/technology/log/2000/09/14/hack\\_sdmi/index.html](http://www.salon.com/technology/log/2000/09/14/hack_sdmi/index.html) cited in "Michael Geist, *Implementing the WIPO Internet Treaties*, supra note 30 at 208-9."

<sup>48</sup> Scott A. Craver et al, "Reading Between the Lines: Lessons from the SDMI Challenge" (paper presented to the 10th USENIX Security Symposium, Washington, D.C, August 15 2000), [www.usenix.org/events/seco1/craver.pdf](http://www.usenix.org/events/seco1/craver.pdf) cited in "Michael Geist, *Implementing the WIPO Internet Treaties*, supra note 30 at 209."

<sup>49</sup> Clark, *Answer to the Machine*, supra note 32.



to the machine is in the machine is not complete without adding that there is always a new machine in answer to the last. Halpern notes, this (encryption and decryption) could easily turn into an endless circle of rivalry:

This seemingly endless game of catch-up, as encryptors and decoders leapfrog one another, take place usually in a context in which there is a large class of consumer-infringers (as well as consumers who are not infringers) who either do not consider the copying involved to be an infringing act or do not believe that the law ought to inhibit or punish their conduct.<sup>50</sup>

The vulnerability of TPMs in the hands of skillful hackers leaves the content industry dissatisfied and exploring new ways to protect their content. This culminates in seeking legal protection to prevent circumvention of TPMs.

#### **5.4 TPMs and Legal Protection Against Circumvention**

The content industry's effort to maximize protection of digital content led to the use of TPMs in the digital space, then, dissatisfied with the efficacy of TPM, they sought legal protection for the technologies that protect copyright;<sup>51</sup> these are known as anti-circumvention laws. The act prohibited by law is the circumvention or bypassing TPMs to and/or copy content. The ordinary meaning of the word circumvention is to evade or avoid or bypass something. In copyright parlance, circumvention is construed broadly to mean both directly breaking the TPM and/or bypassing it to access content under digital locks. This makes sense because the prohibition here is to prevent access to digital content under protection. At this juncture, it is important to mention that while in some cases "access" may not necessarily amount to

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<sup>50</sup> Halpern, *The Digital Threat*, supra note 43 at 576; Kerr, *Digital Locks*, supra note 27 at 266.

<sup>51</sup> Ian Kerr, "If Left to Their Own Devices...How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy" in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 167. Note, some of these technologies may also be protected by patents. Since majority of these technologies are software-driven, computer programs per se are not patentable. However, where a software is part of an invention, it is patentable. Copyright may be preferable since it can cover technologies that are entirely software-driven.

circumvention, it is not the case with copying.<sup>52</sup> This implies that circumventing copy control TPMs amounts to infringement. While this (legal protection against circumvention) may be construed as excessive considering the existing protection for creative works, the position of copyright holders (including a number of large and powerful corporations) is that the existing laws do not provide adequate protection against massive illegal dissemination of digital works. Therefore, it is justifiable to call for legal protection of TPMs.<sup>53</sup> Extra protection besides traditional copyright, itself could be regarded as copyright-plus, or according to Jeremy deBeer, “paracopyright.”<sup>54</sup> The legal backing for the use of TPMs as well as legal protection for them has its foundation in the WCT and, (which largely a product of the United States White Paper<sup>55</sup> as discussed in chapter 3).

As we have seen, Article 11 of the WCT states that:

Contracting Parties shall provide adequate legal protection and effective remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>56</sup>

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<sup>52</sup> *Copyright Modernization Act*, S.C. 2012, c. 20, in s.41.11 to 41.18 provides for exceptions where gaining access through circumvention does not amount to infringement if done for specific reasons (other than commercial copying) such as law enforcement investigation, interoperability of computers, encryption research, personal information protection, computer security assessment, to enable accessibility by persons with perpetual disability, broadcasting purposes, to gain access to telecommunications services through radio apparatus.

<sup>53</sup> Kerr et al, *Technology Protection Measures*, supra note 43 at 42.

<sup>54</sup> Jeremy deBeer, “Constitutional Jurisdiction Over Paracopyright Laws” in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 89.

<sup>55</sup> In chapter three of this dissertation, I discussed the US White Paper (Bruce Lehman, “*Intellectual Property and the National Information Infrastructure – The Report of the Working Group on Intellectual Property Rights*” (1995) at online: < <https://babel.hathitrust.org/cgi/pt?id=mdp.39015040596903;view=1up;seq=10> > accessed May 25, 2019) and the role it played in origin and development of the WIT. In chapter three also, I examined criticisms against the US White Paper by Pamela Sameulson and Jessica Litman.

<sup>56</sup> WIPO, *WCT*, supra note 11, Art. 11.

The WPPT contain a similar provision.<sup>57</sup> These provisions have been discussed extensively in chapter three, and so it suffices here to reiterate here that they set the foundation for WIPO member countries to incorporate the use of TPM and their legal protection into their respective national copyright laws. The WCT and the WPPT provide a framework for the implementation of anti-circumvention laws by WIPO members; but this framework is directive and therefore gives member countries the discretion to determine how to incorporate anti-circumvention provisions into national copyright laws. Arguably, it also affords the opportunity to ensure that the content industry stakeholders are not unduly favoured over users or free culture stakeholders. The fairness of anti-circumvention provisions is determined by the implementation approach adopted.

Haggart identifies two approaches consistent with the treaties' provisions – minimalist and maximalist:<sup>58</sup> the minimalist approach would make it illegal to break TPMs only if it was intended to infringe copyright;<sup>59</sup> the maximalist approach on the other hand makes it illegal to break a digital lock regardless of whether the use is infringing or not.<sup>60</sup> Therefore, where the minimalist approach is adopted, in an alleged case of breaking digital lock, the copyright owner has the burden to prove that the intention was to commit copyright infringement; where a maximalist approach is adopted, breaking the digital lock is illegal and intent is immaterial except the alleged offender can show otherwise.

The content industry stakeholders cite inadequacy of the law to provide effective protection against unauthorized access in the digital landscape as a justification to use TPMs and its attendant legal protection. Content industry stakeholders claim that the use of TPMs and its

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<sup>57</sup> WIPO, *WPPT*, supra note 11 Art. 18.

<sup>58</sup> Haggart, *Copyright*, supra note 44 at 21.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

legal protection is to further reinforce copyright protection, but in actual fact, the nature of protection offered by anti-circumvention provisions primarily protects the technologies deployed to protect digital content rather than the content itself. On this score, Geist argues that:

Although characterized as copyright protection, this layer of legal protection does not address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn attempts to ensure that the underlying content is only accessed and used as controlled by the copyright owner.<sup>61</sup>

Traditional copyright legislation protects expression in the work and not the physical embodiments in which the work reposes; based on this fundamental principle of copyright, I agree with Geist, that anti-circumvention does not directly protect copyright as it seems. If at all there is the semblance of any such protection, it is too remote from that provided by traditional copyright. Legal protection for TPMs therefore establishes another layer of protection besides that afforded by traditional copyright law. Furthermore, it can be argued that legal protection for TPMs is specific in the kind of technology (TPMs) it targets, which gives preferential treatment to content industry to the detriment of users. In matters of technology, the Supreme Court of Canada has ruled that the approach is to adopt a technology neutral approach and not favour a particular technology over another.<sup>62</sup>

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<sup>61</sup> Geist, *Anti-Circumvention Legislation*, supra note 46 at 222.

<sup>62</sup> *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.* [2015] 3 S.C.R. at 652 “In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user”: ESA, at para. 5. Similarly, in the valuation of a right, technological neutrality requires that different technologies using reproductions of copyright-protected work that produce the same value to the users should be treated the same way;” Cary Craig, “Technology Neutrality: (Pre)Serving the Purposes of Copyright Law” in Michael Geist ed, in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Toronto: University of Ottawa Press, 2012) at 291-2. She further argues that “technology neutrality can be derived directly from the face of the *Copyright Act*, it is generally found in the wording of section 3(1) and the owner’s exclusive right to reproduce the work “in any material form whatsoever.” This provision undoubtedly demonstrates an ambition toward a technologically neutral copyright but, in itself, it demands nothing more than extending the reach of owners’ right to new media, thereby ensuring non-discrimination in the applicability of the law to different technologies, and, to a certain degree, “future-proofing” the law.”

In response to the heightened challenges of illegal access to proprietary content in the digital space, it is not out of place for content owners to respond by safeguarding their content in the hope of gaining some financial rewards. However, the degree and manner of response is an issue for consideration. In this case, does the additional layer of legal protection for, and use of TPMs amount to adequate response or is it far out of proportion? Currently, there are now several regimes of protection available to content industry stakeholders.

## **5.5 Regimes of Protection available to Content Industry Stakeholders**

According to Kerr et al, three levels of protection exist for copyright owners: existing copyright law, contract law and TPM and DRM technologies.<sup>63</sup> In chapter one, I gave a detailed analysis of the origins of the first copyright law<sup>64</sup> in 1710, which granted authors copyright in their book for them to exclusively exploit rewards from it for a period of fourteen years.<sup>65</sup> Since then, copyright subject matter and term have been expanded enormously. In Canada, even leaving aside the addition of neighbouring copyright for sound recordings, broadcast signals and performers' performances, the categories of works in which copyright may subsist include literary, dramatic, musical and artistic works,<sup>66</sup> and the term of protection for these works is life of the author plus fifty years<sup>67</sup> (which is likely only to increase in the light of the CUSMA as discussed in Chapter Three). These protections also extend to works in digital form as long as they meet the criteria for protection, which in Canada are originality, expression of the idea, and that such expression be fixed or embodied in a medium of more or less permanent endurance. Furthermore, because literary works include software, whether in human-readable or object code,

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<sup>63</sup> Kerr et al, *Technology Protection Measures*, supra note 53 at 43.

<sup>64</sup> *The Statute of Anne* 1710, 8 Anne, c.19.

<sup>65</sup> Ibid. s.1

<sup>66</sup> *Copyright Act*, 1985, R.S.C., c. C-42 s.5(1).

<sup>67</sup> Ibid. s.6.

even software-based TPMs may themselves be protected by copyright law<sup>68</sup> as literary expression in their own right. As Dusollier writes:

When the technical protection measure that prevents copying, accessing the work or ensures its authentication, is a computer program, hacking it could constitute an infringement of the copyright vested in the software. Tampering with the protective mechanism could arguably imply a reproduction, even if transient, of the software.<sup>69</sup>

This issue raised by Kerr et al and Dusollier undeniably strengthens the use of TPMs and its legal protection. In fact, to protect digital content online, most of the protective mechanisms are likely to be based on protocols and software codes, which in themselves enjoy copyright protection. So, this now creates a multiplicity of protection to the advantage of copyright owners.

David Nimmer et al, observe that the ownership and exploitation of copyright is structured at every turn by contract.<sup>70</sup> In the traditional copyright system, contract is used by the copyright owner to expand the power of control through licences which spell out the terms of the contract. Contracts have been a means of asserting proprietary rights and ownership in copyright. Contracts also exist in the online space where digital content is made available and owners of content endeavour to control how their content is accessed and utilized. This is done through online licences where users are made to accept terms and conditions (contracts) that stipulate how the content should be used. Such licences, according to Kerr are often incorporated into

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<sup>68</sup> Kerr et al, *Technology Protection Measures*, supra note 63.

<sup>69</sup> Severine Dusollier, "Situating Legal Protections for Copyright-Related Technology Measures in the Broader Legal Landscape: Anti-Circumvention Protection Outside Copyright" (General Report Presented to the ALAI Congress, June 2001) [unpublished], at online: ALAI 2001 Congress [http://www.law.columbia.edu/conference/2001/Reports/GenRep\\_ic\\_en.doc](http://www.law.columbia.edu/conference/2001/Reports/GenRep_ic_en.doc) cited by "Kerr et al, *Technology Protection Measures*, supra note 68 at 43-4." However, note that not all "access" violates circumvention if they fall within stipulated exceptions, and because not all circumventions are done for the purpose of copying.

<sup>70</sup> David Nimmer et al, "The Metamorphosis of Contract into Expand" (1999)87 Cal. L. Rev. 17 at 24. For further reading on contract and copyright see Niva Elkin-Koren, "Copyright Policy and the Limits of Freedom of Contract" (1997)12 Berkeley TLJ 93 at 105; J.H. Reichman & Jonathan A. Franklin, "Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information" (1999)147 PA. L. Rev. 875 at 899.

digital rights management (DRM),<sup>71</sup> which leads to the third level of protection available to content industries – DRMs and TPMs (already discussed above).

With the extant level of expansive protection available to the content industry stakeholders in the physical and digital space, it is indeed worth pondering, whether adding another layer of protection (anti-circumvention laws) is necessary.

## **5.6 Critique of TPMs and their Legal Protection**

The above analysis of TPMs and their legal protections in the copyright system raise some concerns that anti-circumvention protections arguably tend to undermine the achievement of balance in copyright and impact unfavourably on other areas such as access, fair dealing, privacy, control, competition, and the simultaneous availability of multi-level protection.

### **5.6.1 TPMs, Access and Fair Dealing**

Access, in copyright parlance is the opportunity users have to interact with creative works in ways that do not violate the copyright owner's right, and the engagement/use could be reading, viewing, reproduction and transformative use of content. Fair dealing is the permissible use of works without prejudice to the rights and interests of the copyright owner.<sup>72</sup> Users cannot exercise their right to fair dealing if they are unable to have access to the work in the first place, and once you access creative content, use of such content begins (which could be permissible or illegal). So, these two concepts, access and use (fair dealing), are intertwined though different.

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<sup>71</sup> Kerr et al, *Technology Protection Measures*, supra note 68 at 44.

<sup>72</sup> In Canada, the permissible fair dealing use are research, private study, education, parody or satire. *Copyright Act*, 1985, s.29(1) & (2) states: 29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:(a) the source; and(b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer's performance, (iii) maker, in the case of a sound recording, Or (iv) broadcaster, in the case of a communication signal; 29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned: (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer's performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.

Access makes the content available to users, while fair dealing gives users the right to engage with the content. Without access, fair dealing cannot be exercised. Access and fair dealing (referred to as fair use in the United States) are two cardinal principles in copyright law that engender the fulfillment of the purpose of copyright. These principles seem to have been adversely affected by the use of TPMs and legal protection against circumvention.

At this juncture, it is necessary to consider the nature of rights users have to access copyright-protected works and whether or not copyright owners are obliged to grant access. Generally, users of works under copyright protection have rights to those works through the following ways: legitimate purchase, licence or services contract, or through exceptions (fair dealing) provided by copyright law.<sup>73</sup> Access to works through purchasing a legitimate copy or by licence or contract are hardly controversial, in fact, the Supreme Court of Canada in *Theberge* opines that once an authorized copy of a work is sold, the copyright owner cannot control how the purchaser uses the work;<sup>74</sup> the main contention is to what extent do copyright exceptions apply to give users the right to access works other than through legal purchase, licence or contract? That is, can users access content for free and still enjoy copyright exceptions? The *Berne Convention*<sup>75</sup> answers this question in the affirmative; it provides for certain free uses of works, which are still entitled to enjoy copyright exceptions. Article 10 provides for certain free uses of works as follows:<sup>76</sup>

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose,

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<sup>73</sup> Pascale Chapdelaine, “Copyright Use Rights and Remedies: An Access to Justice Perspective” (2018) 7 *Laws*, 1, at online: <<https://ssrn.com/abstract=3204902>> accessed August 14, 2019.

<sup>74</sup> *Theberge v. Galerie d'art du Petit Champlain*, [2002] 2 S.C.R. 336 at 355-6.

<sup>75</sup> *The Berne Convention for the Protection of Literary and Artistic Works* as amended September 28, 1979.

<sup>76</sup> *Ibid.* Art. 10.



including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Additionally, Article 10bis provides for further free uses of works thus:<sup>77</sup>

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

From the provisions of the *Berne Convention* above, it is apparent that users can access content free and enjoy uses covered by copyright exception, provided such uses conform to fair practice (that is, come within the ambit of copyright exception). In my opinion, the fundamental objective here seems to align with the purpose of copyright – to promote the encouragement of

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<sup>77</sup> Ibid. Art. 10bis.

learning and dissemination of intellectual works. These provisions do not give users unlimited access to content to the detriment of copyright owners. For the content to be accessed free of charge, it has to be made available legally, and in line with fair practice. Additionally, the free use of such content must also conform to fair practice (fair dealing). Albeit limited, these provisions give users access to and use of content. As an international treaty, for these provisions to take effect, they have to be incorporated into national copyright laws of members states that are signatories to the *Berne Convention*. Member states have a discretion regarding their implementation approach. Despite the existence of these provisions, it does not seem to have gained much traction in national copyright laws. Nonetheless, it does serve as an authority to show that even without paying for it, users can still access content legally and enjoy copyright exceptions.

Access and fair dealing principles are arguably as old as the first copyright law – the Statute of Anne and were entrenched in the law; though the law (Statute of Anne) did not specifically mention access and fair dealing, nonetheless, they can be inferred from section 5,<sup>78</sup> which provided that nine copies of each book published shall be made available for the use of libraries, and the libraries mentioned were the royal library, libraries of the universities of Oxford and Cambridge, libraries of four universities in Scotland, Sion College library in London, and the library of the faculty of advocates at Edinburgh.<sup>79</sup> Although the Statute of Anne did not explicitly state the rationale for depositing these copies in the libraries, the rationale can be inferred. These books were deposited mostly in universities – citadels of learning, presumably for the lofty ideal of public gain and that members of the public could easily access these books and deal fairly with them. Other possible reasons could be for social, cultural and record purposes. Depositing

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<sup>78</sup> *Statute of Anne*, supra note 64 at s.5.

<sup>79</sup> *Ibid.*

these books in the libraries fostered easy access to them by members of the public for the purpose of fair dealing but it did not mean that they owned the books; in my opinion, and impliedly, it was meant to balance the rights of the authors and the public interest. In the historical context described above, access was provided to the general public even though of a limited nature because only those in close proximity to the location of the libraries, and those willing to travel to such locations could actually have access to the published book. Other alternatives to obtain copies of the published books would be through purchase or from someone who purchased a copy.

In contemporary copyright law, there is no provision or obligation on content creators to deposit copies of their works in public places. Nonetheless, the existence of exceptions to copyright arguably pave the way for access and more recently the discourse on access to works under copyright protection has been raised in favour of the user.<sup>80</sup> Furthermore, the Supreme Court of Canada has interpreted fair dealing (copyright exceptions) to mean “user’s right.”<sup>81</sup> While this articulation by the Supreme Court reinforces the idea of advancing the balance of interests between users and copyright owners, it also calls for a critical analysis. I will examine the meaning of user’s right first by discussing who the Supreme was referring to by the term “user(s)” and secondly, determine the meaning and nature of the “rights” conferred on users. Although the Supreme Court does not specifically define the category of users it was referring to; however, Pascale Chapdelaine gives a hint<sup>82</sup> and identifies the type of access to creative works that proves to be more controversial:

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<sup>80</sup> Marcella Favale, “The Right of Access in Digital Copyright: Right of the Owner or Right of the User?” (2012) 15 *The Journal of World Intellectual Property Law Journal* 1, at online: < <https://doi.org/10.1111/j.1747-1796.2011.00433.x> > accessed August 14, 2019.

<sup>81</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at 364. At online: < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/2125/1/document.do> > accessed August 14, 2019.

<sup>82</sup> Chapdelaine, *Copyright User Rights*, supra note 73.

What is more controversial to some, or at best uncertain to others, is the scope of those user rights including what is traditionally referred to as exceptions to copyright infringement. This is due in great part to copyright law having been predominantly centered on the exclusive rights of authors and copyright holders.<sup>83</sup>

It can be inferred from Chapdelaine's articulation above that a user as contemplated by the Supreme Court is one who legally (by purchase or with the consent of the copyright owner) obtains content, or one who accesses content legally made available for free.<sup>84</sup> This arguably gives such users the justification to enjoy the fair dealing exception. In other words, my point is that users of illegally obtained copies of content do not have the justification to enjoy fair dealing exception to copyright. This clarification on the category of users is necessary to properly contextualize the pronouncement of the Supreme Court of Canada.

The second issue interrogates the scope and nature of rights referred to by the apex court of Canada, that is, equating copyright fair dealing to user's rights advances the idea of balance in the copyright system. The nature of the right, how it should be exercised, whether it can be supported by copyright law and the obligation of the copyright owner seem unsettled. The concept of rights in legal theory is broad and an exhaustive analysis is not within the scope of this research, but a concise explanation is necessary. According to Roscoe Pound, as a noun, the word "right" is used in law books in five senses,<sup>85</sup> but for the context of this discussion, Pound's second articulation of the meaning of right seems apposite:

...the term "right" is used to designate the chief means which the law adopts in order to secure interests, namely, a recognition in persons, or a conferring upon persons, of certain capacities of influencing the action of others. The courts give

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<sup>83</sup> Ibid.

<sup>84</sup> *Berne Convention*, supra note 76 & 77.

<sup>85</sup> Roscoe Pound, "Legal Rights" (1915) 26 *Intl Journal of Ethics* at 92, see generally 92-101, at online: <[https://www.jstor.org/stable/pdf/2376739.pdf?ab\\_segments=0%2Fbasic\\_SYC-4341%2Ftest&refreqid=search%3A9ac5b19b0343c08975db2c991ffc1d0b](https://www.jstor.org/stable/pdf/2376739.pdf?ab_segments=0%2Fbasic_SYC-4341%2Ftest&refreqid=search%3A9ac5b19b0343c08975db2c991ffc1d0b)> accessed August 15, 2019.

effect to these capacities of influence by protecting those in whom they are recognized or upon whom they are conferred in the exercise of them, or by enforcing them specifically against those whom the law holds subject to such influence, or by vindicating them by some form of redress when they are interfered with.<sup>86</sup>

In sum, Pound's definition above connotes that a legal right confers certain benefits, which influences others or places an obligation on them to do certain acts or refrain from doing so; furthermore, that the beneficiary of legal rights can enforce their rights in court and seek redress (remedies) when these rights are interfered with. The availability of remedy to redress a wrong aligns with the Latin maxim *ubi jus ibi remedium* (where there is a right, there is a remedy). The current provisions of exceptions to copyright are not couched as legal rights to fit into Pound's definition above; fair dealing is not couched as an enforceable right in the court of law against the copyright owner with the possibility of seeking remedies. Similarly, in her analysis of the Supreme Court of Canada's interpretation, Chapdelaine opines:

...a perplexing aspect of this jurisprudential development is that it is far from clear that users have rights *per se* under the Canadian Copyright Act, at least in the Hofeldian sense of jural correlatives: i.e., a right implies that someone has a duty towards it...At a minimum, under the current understanding of exceptions to copyright infringements, they would qualify as privilege in the Hofeldian sense of the term. An exception or defense to copyright infringement qualifies as a privilege to the extent that it allows a user to perform certain acts without authorization but does not require copyright holders to facilitate the exercise of these acts (e.g., when constrained by a technological protection measure (TPM)). By contrast, if users have the power to require copyright holders to facilitate the performance of acts that are allowed through exceptions to copyright infringement, the said exceptions would then be more properly characterized as right (in Hofeldian terms).<sup>87</sup>

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<sup>86</sup> Ibid. at 93.

<sup>87</sup> Chapdelaine, *Copyright User Rights*, supra note 82 at 2.

Chapdelaine's position supports the fact that exceptions to copyright law (interpreted to mean user right in *CCH*) do not confer rights in a legal sense and lacks the legal foundation to compel a copyright owner to facilitate the enjoyment of the purported right. Furthermore, she argues that the exceptions qualify as privileges (as different from rights). So, of what use then is this interpretation by Canada's Supreme Court? Just as the Supreme Court of Canada in *Théberge* articulates the purpose of copyright law and opened up a new understanding on the subject, so also, I believe, the *CCH* interpretation carries undeniable rhetorical force and power<sup>88</sup> to orchestrate a dialogue on advancing the rights of users and generally move closer towards the attainment of balance in the copyright system.

In Canada, this point (copyright balance) has been amplified by the Supreme Court in *Théberge* when Justice Binnie articulates that the real meaning of balance is the recognition of the copyright owner's right as well as its limited nature.<sup>89</sup> The rights that access and fair dealing confer on users ideally should be the same both in the physical world and the digital space, but it appears that these principles are being truncated in the digital space. This causes real concern and questions the continued justification of the use of TPMs and their legal protection. Traditionally, copyright holders could not practically restrict access to creative works;<sup>90</sup> once a work is published or publicly disseminated, the author loses the right to control access to the work.<sup>91</sup> At that time, creative content existed chiefly in physical embodiments in the possession of the purchaser. Therefore, once an author's work is legitimately purchased, the author cannot control what the purchaser does with the physical copy of the work. The purchaser can decide to physically give the work to as many persons as she pleases or even sell it. The liberty of the

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<sup>88</sup> Ibid. at 3.

<sup>89</sup> *Théberge*, supra note 74 at 355.

<sup>90</sup> Kerr et al, *Technology Protection Measures*, supra note 71 at 47.

<sup>91</sup> Ibid.

purchaser to share the work with others means giving them access to knowledge, which could possibly lead to follow-on creativity. But currently, with the digitization of content, and the use of DRMs and TPMs, copyright owners in some cases can control how the work is subsequently used or shared or limit how many times the work can be shared. On this score, Craig remarks that:<sup>92</sup>

In the *Théberge* decision, the Supreme Court stated that “once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it” (paragraph 31)...In the analogue world, a person can re-read a favourite novel until it is in tatters, listen obsessively to a favourite record, devotedly watch and re-watch a favourite movie, and then sell or give away the novels, records and videos with which they finally grow bored. In the world of technical controls, reading, listening or viewing can be limited by the number of plays, the number (or even brand) of machines on which content can be played, the time during which the content is available and/or the identity of the would-be listener or viewer.

Attaching digital locks to the content arguably in the long run threatens the public domain because the chances of removing the TPMs placed on works after their copyright term expires cannot be guaranteed. Therefore, to the undiscerning public, works which ought to freely available for their use and engagement may probably become inaccessible due to TPMs. TPMs, therefore have the potential to continue to erect a barrier around creative content even after their legal entrance into the public domain.<sup>93</sup> These inhibitions were not there prior to the digital era, freedom to access and use content in the physical world should also apply in copyright in the digital landscape. With the use of TPMs and protection against circumvention incorporated into copyright law, the content industry stakeholders are now empowered by law to control access.

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<sup>92</sup> Craig, *Digital Locks*, supra note 283 at 509.

<sup>93</sup> Ibid.

From the perspective of the content industry stakeholders, copyright system in the pre-ICT era did not have the challenge of unauthorized access and the ease of replicating content. The copyright digital landscape posed the challenge of unauthorized access which copyright law did not envisage and neither did it allow users to access copies unlawfully.<sup>94</sup> This arguably tilted the balance in the copyright system and necessitated the need for measures (beyond the provisions of the law) to curb unauthorized access to content. This culminated codifying the use of TPMs and protection against circumvention. While to the advocates of TPMs, it is the only effective means to counterbalance the scourge of digital piracy,<sup>95</sup> it further disrupts the volatile and shaky balance in the copyright system. The legal recognition of TPMs creates a legal system that allows the combination of unlimited powers of access control with exclusive copyright in which the balance now tilts more in favour of copyright holders.<sup>96</sup> The control of access to content raises fundamental concerns that adversely impact on not just the free culture philosophy, but more importantly on the purpose of copyright and the public interest. Kerr et al articulate some of these concerns:

Access-control rights raise a number of difficulties, most importantly the question of how to achieve a balance between private rights and the public interest. Allowing copyright holders the ability to control how access is obtained and who is permitted to access poses a threat to the public interest. In particular, creating an access-control right that is not accompanied by a robust and very carefully tailored set of exceptions will impact the public's ability to exercise their fair dealing defense and various statutory exceptions to copyright infringement and will have a broader impact on the bundle rights falling under the banner of free expression. The implementation of an access-control right could potentially allow corporations that collect cultural content to prevent the

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<sup>94</sup> Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017) at 140.

<sup>95</sup> *Ibid.* at 141.

<sup>96</sup> *Ibid.*



legitimate use of a work. This type of prohibition could also have the stifling effect of denying access to works that are in the public domain or works which would otherwise be exempted by fair dealing provisions under the current copyright regime. Since the combination of TPMs and contracts can already be used to prevent access to works that even exceptions to copyright permit, such as fair dealing, a legal prohibition on circumvention of TPMs that control access to public works, depending on how it is drafted, could further prevent the public from exercising their rights.<sup>97</sup>

These concerns above were expressed by Kerr *et al* in 2002, long before Canada implemented the WIPO treaties, and as discussed already in chapter three, they were not given due consideration.

In developing her narrative on the concept of access as it relates to creative works, Litman follows a critical approach<sup>98</sup> and notes that the United States constitution describes the purpose of copyright as “[t]o promote the Progress of Science and useful Arts,”<sup>99</sup> which should entitle the public to reasonably expect access to works inspired by copyright.<sup>100</sup> Litman initially queries the need for public access as a catalyst for the progress of science and arts since scientists and artists can build on each other’s achievements.<sup>101</sup> She conjures a hypothetical scenario that if works were optimally kept secret, then there would be no need for incentives in the exclusive rights as creators could maintain exclusive control through self-help. On the contrary, Litman presents the other part of her argument, which can be interpreted to mean that the concept of copyright as incentive-based is understandable if the rationale is to promote dissemination of works for the public to access them.<sup>102</sup> In other words, Litman’s view is that, to justify creators’

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<sup>97</sup> Ibid. at 48.

<sup>98</sup> Jessica Litman, “Revising Copyright Law for the Information Age” (1996) 75 Or. L. Rev. 19 at 32.

<sup>99</sup> *United States Constitution*, 1789, Art. 1, §8, cl.8.

<sup>100</sup> *Supra* note 98.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid. at 33.

enjoyment of exclusive rights and incentive in the copyright system, the public ought to be given access to their works. According to Litman, the encouragement to disseminate works and public access to them serve the following:

We want the public to be able to read them, view them and listen to them. We want members of the public to be able to learn from them: to extract facts and ideas from them, to make them their own, and to be able to build on them.<sup>103</sup>

In the end, Litman's narrative justifies the need for access and its importance to creativity and learning, which aligns with the free culture ideology. The concept of access may seem counter intuitive as the juxtaposition of access and exclusive rights seem to conflict. In other words, how do we reconcile copyright owners' exclusive right and the public's right to access content? Copyright law attempts to answer this question by striking a balance with, amongst other things, the concept of fair dealing. Under the Canadian copyright law, and as already explained above, certain uses of copyright material are referred to as fair dealing and deemed not to infringe on copyright; such use include: research, private study, education, parody or satire,<sup>104</sup> criticism or review,<sup>105</sup> and news reporting.<sup>106</sup> The rationale for fair dealing ties into the purpose of copyright because the permissible use (research, private study, education, parody or satire) fosters users' interaction with content in a manner that potentially engenders knowledge creation, dissemination and inspiration to create more works. Infringement of copyright would mean any action that violates the copyright owner's exclusive rights – such exclusive rights or bundle of rights include: the right to reproduce, publicly perform, publish or create derivative works from a work subject to copyright. In reality, to draw a dividing line between fair dealing and exclusive

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<sup>103</sup> Ibid.

<sup>104</sup> *Copyright Act*, supra note 267, s.29.

<sup>105</sup> Ibid. s.29(1).

<sup>106</sup> Ibid. s.29(2).

rights may be difficult in some cases. However, the fact remains that users have a right to access and use works in a manner that does not adversely affect the interest of the copyright owner with regards to the exploitation of her exclusive rights, i.e. infringe copyright.

In the wake of the use of TPMs and legal protection against its circumvention, the noose around fair dealing is becoming tighter to the extent that, at least with digital copies, it may now only exist only in theory and not in practice. In fact, in 2004, in an effort to use its interpretative power to explain the importance fair dealing, the Supreme Court in Canada redefined fair dealing by articulating its meaning beyond just an exception to an actual right that users are legally entitled to; the apex court had this to say:

[T]he fair dealing, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained, "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislations."<sup>107</sup>

Furthermore, as Abraham Drassinower argues, this means fair dealing should not be construed negatively as an ordinary exception but should be viewed positively as a user right integral to copyright law.<sup>108</sup> Fair dealing as a *right* and not an exception aims to balance the rights and interest of copyright owners and users so that one party is not favoured more than the other. The concept of fair dealing as a right, places limitations on copyright to create the space for fair dealing. Carys Craig discusses this in detail, arguing that:

...fair dealing and other exceptions are not encroachments upon the creator's rights but rather prevent encroachment of creators' right into the public domain. Exceptions remove

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<sup>107</sup> *CCH Canadian Ltd.*, supra note 81.

<sup>108</sup> Abraham Drassinower, "Taking User Right Seriously" in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 467.

copyright-created obstacles to the proper use of works... The adoption of the language of “user rights” is arguably the most striking manifestation of the inclusion of the public as a primary beneficiary of the copyright system whose interests therefore factor directly into the copyright “balance.” The broad reading of fair dealing that this entailed reflects the evolving role of users in Canadian copyright policy.<sup>109</sup>

The concept of balance in the copyright system will remain elusive as long as the content industry stakeholders possess multidimensional instruments, which include legal, and technological, to continually strengthen their protection of creative content and control access. On this score, the justification for the use of TPMs and the introduction of anti-circumvention laws remain questionable, not just because it is inimical to access and fair dealing, but because it challenges the overarching purpose of copyright law. If TPMs were targeted at copyright-infringing uses, it may be justifiable as merely a technical tool for copyright enforcement; but the blanket application casts a wide net to the detriment of the public interest.

Another disturbing impact of the use of TPMs is their implication on privacy, thereby going beyond their original intended purpose, which is to protect creative content. Presumably, the invasive characteristics of TPMs are exacerbated by the anti-circumvention provisions. In order to detect circumvention of digital locks, there has to be some form of monitoring and surveillance, and most often, these surveillance activities are technical in nature and operate without the consent of the user. According to Haggart, the Sony Rootkit incident in 2005

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<sup>109</sup> Cary Craig, “Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks” (2017) 33 AM. U. Int’l. L. Rev. at 21-2, 23 at online: < [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3667&context=scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3667&context=scholarly_works) > accessed May 20, 2019. For more discussion on the subject see generally David Vaver, “User Rights” (2013) 25 Intell. Prop. L. J. 105; Myra Tawfik, “The Supreme Court of Canada and the “Fair Dealing Trilogy:” Elaborating a Doctrine of User Rights Under Canadian Copyright Law”, (2013) 51 ALTA. L. Rev. 191; Pascale Chapdelaine, “The Ambiguous Nature of Copyright Users’ Rights,” (2013) 26 Intell. Prop. J. 1.

presents an example of the invasive tendencies of the use of TPMs and the monitoring of suspected circumvention activities, albeit unknown to the unsuspecting users. He explains:

In order to prevent people from copying CDs, Sony BMG shipped several titles with a copy-protection TPM that would install itself in a user's computer (those with Windows operating system) and limit CD copying and completely prevent people from "ripping" CDs into MP3 format. However, this TPM was hidden by a "rootkit" – a program that allows basic access to a computer system – that also installed itself (by design and without requiring consent) on people's computers. Unfortunately, Sony did not tell people that this program (which doubled as a "spyware," secretly contacting Sony when the CD was being played), making things exponentially worse. It turned out that the rootkit could be exploited by hackers to gain control of unsuspecting user's computers. What's more, as security expert Bruce Schneier remarks, even "trying to get rid of it damages Windows." This vulnerability was publicized on 31 October 2005 by security researcher Mark Russinovich. The outcry was so great that by 14 November Sony had pulled their copy-protected CDs and were offering to replace customer's infected CDs for free.<sup>110</sup>

The account given by Haggart above depicts, not just a corporation seeking to protect and enforce its copyright, but a clandestine means to secure market control without due regard to the value of balance, and in disregard of users' rights. The consequences are far-reaching, and the users are at the suffering end. These scenarios arguably create significant imbalance and Haggart argues that "the great danger posed by TPMs is that they threaten to replace negotiated copyright law, which balances the interest of several groups, with rules set in the lock itself by whoever controls the lock."<sup>111</sup> Considering the extent to which TPMs, shielded by anti-circumvention provisions, have significantly altered the copyright law regime in the digital era, it is doubtful if their continued use can still be justified as a response to the threat of unlawful access, or simply a

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<sup>110</sup> Haggart, *Copyright*, supra note 58 at 20.

<sup>111</sup> *Ibid.*

desire to achieve total control in the copyright industry. Not only are unsuspecting users denied lawful access to content, their privacy is under threat as well.

Considering the controversial nature of TPMs and anti-circumvention laws, Geist notes that litigation experience from the Digital Millennium Copyright Act (DMCA) 1998<sup>112</sup> raises concerns about its negative effect on research, innovation and competition<sup>113</sup> and he cites a couple of examples to substantiate his point. In 2002, Edward Felten, a researcher in Princeton publicly disclosed plans to release his study on encryption, which included information that could be used to circumvent a TPM;<sup>114</sup> he was served a warning notice that he could face legal liability as release of circumvention information could violate US law.<sup>115</sup> This shows the impact of the DMCA (TPM and anti-circumvention provisions) on competition policy. Similarly, Dmitry Sklyarov, a Russian software programmer was arrested in Las Vegas on account of his presentation which focused on the strength and weaknesses of software used to protect electronic books;<sup>116</sup> he was charged for violating criminal provisions of the US DMCA.<sup>117</sup> According to Geist, although Sklyarov was later released, this had a chilling effect on science and research because researchers with connection to the US reportedly removed information from websites for fear of potential lawsuits.<sup>118</sup>

Research is recognized as one of the exceptions to copyright infringement, but TPMs and anti-circumvention provisions are limiting this exception. It is ironic that copyright law, which is supposed to foster and encourage research, learning and innovation, is now used to achieve the

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<sup>112</sup> The United States implemented the WIPO Internet Treaties by the enactment of the DMCA.

<sup>113</sup> Geist, *Anti-Circumvention Legislation*, supra note 61 at 228.

<sup>114</sup> *ibid.*

<sup>115</sup> Lisa Bowman “Researchers face legal threat over SDMI hack” CNET News.com (23 April 2001), [http://news.com.com/Researchers+face+legal+threats+over+SDMI+hack/2100-1023\\_3-256277.html](http://news.com.com/Researchers+face+legal+threats+over+SDMI+hack/2100-1023_3-256277.html) > “cited in Geist, *Anti-Circumvention Legislation*, supra note 113 at 228.”

<sup>116</sup> Geist, *Anti-Circumvention Legislation*, *ibid.* at 228.

<sup>117</sup> *Ibid.*

<sup>118</sup> Electronic Frontier Foundation, “Unintended Consequences: Five Years Under The DMCA” v.3 (24 September 2003), <[www.eff.org/IP/DMCA/unintended\\_consequences.pdf](http://www.eff.org/IP/DMCA/unintended_consequences.pdf)> “cited in Geist, *Anti-Circumvention Legislation*, *ibid.*”

contrary. Research knowledge geared towards exposing security shortcomings of products and services of corporations ought to be made public to put the corporations in check and charge them to improve on their products and services. Admittedly, research information that details how to circumvent TPMs, if in wrong hands could be used to the detriment of copyright owners.

Kerr et al, note that:

While it may be true that some users entitled to access digital works will be capable of circumventing DRMs, the vast majority of users do not have the inclination to circumvent such TPMs, nor do they possess the technical savvy. The potential power that copyright holders could have is practically unprecedented.<sup>119</sup>

The rhetoric of threat to copyright due to circumvention activities and the response to curtail this perceived threat has been stretched expansively beyond the safeguards that are necessary. This continuous expansion, as stated earlier, has resulted in multi-layered protection<sup>120</sup> for content owners, which seems to provide them with undue advantage in the copyright landscape. It is in matters like this that the interpretative role of the judiciary could be useful to shape the contours of the narrative to ensure the already fragile copyright balance is not distorted further.

## **5.7 TPMs and Anti-Circumvention Litigation in Canada: The Nintendo Case**

As discussed in chapter three, after several failed attempts, Canada eventually implemented the WIT by passing Bill C-11 into law, which became known as the *Copyright Modernization Act* of 2012, this law contains TPM and anti-circumvention provisions; the

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<sup>119</sup> Kerr et al, *Technology Protection Measures*, supra note 90 at 52.

<sup>120</sup> Ibid. at 43, Copyright law, contract law, TPM and DRM.

provisions are restated here.<sup>121</sup> These provisions significantly impact on the already fragile copyright balance of rights and interests in Canada. As discussed in detail in chapter three, the inclusion of TPMs and anti-circumvention provisions mostly benefit the content industry who desire to control access to content. Since these provisions were incorporated into Canada's copyright law in 2012, the courts did not have the opportunity to make pronouncements on the subject matter until 2017. On March 1, 2017, the Federal Court of Canada, in *Nintendo of America Inc. v Jeramie Douglas King & Go Cyber Shopping*,<sup>122</sup> made the first major pronouncement on TPMs and anti-circumvention. In this case, the Applicant, Nintendo of America Inc. brought an action and sought a declaration that the individual (Jeramie Douglas King) and corporate respondents (Go Cyber Shopping) circumvented, offered services to circumvent, and trafficked in devices which circumvented the Applicant's TPMs contrary to s.41.1(1)(a)-(c)<sup>123</sup> of the *Act*, and that the Respondents infringed on the Applicant's copyright in certain works contrary to s. 27(2)<sup>124</sup> of the *Act*.<sup>125</sup>

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<sup>121</sup> *Copyright Modernization Act*, supra note 52, s.41, s.41(1) "technological protection measure" means any effective technology, device or component that, in the ordinary course of its operation,  
(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or  
(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording..."; "circumvent" means,  
(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure", to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and  
(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition "technological protection measure", to avoid, bypass, remove, deactivate or impair the technological protection measure; "No person shall:  
(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure" in section 41;  
(b) offer services to the public or provide services if  
(i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure,  
(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or  
(iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or  
(c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component..."

<sup>122</sup> [2017] FC 246 [Nintendo].

<sup>123</sup> *Copyright Modernization Act*, supra note 121.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Nintendo*, supra note 122 at 2.



Nintendo sells hundreds of video games for its consoles in Canada, which are sold as game cards (in the case of DS and 3DS games) and discs (in the case of Wii games).<sup>126</sup> Users who purchase the Nintendo video games can play these games on the appropriate Nintendo console by inserting the game cards or discs into the corresponding console.<sup>127</sup> Nintendo does not authorize downloading of its games onto devices that mimic its game cards or discs and which circumvent its TPMs.<sup>128</sup> In order to prevent unauthorized access to its video games, as a content industry stakeholder in copyright and given the propensity for unauthorized access to its products, Nintendo implements TPMs to prevent users from playing unauthorized copies of video games and from installing unauthorized software, including counterfeit games and software on its consoles.<sup>129</sup>

Since 2013, the respondent had advertised and offered for sale, either through its websites or at its retail store, certain devices which the applicant contended were designed to circumvent TPMs employed on the Nintendo DS, 3DS, and Wii gaming consoles.<sup>130</sup> The devices (Nintendo referred to them as “Game Copiers”), including mod chips sold by the Go Cyber Shopping could be used to play unauthorized copies of Nintendo DS or 3DS video games.<sup>131</sup> The court had to determine whether Go Cyber Shopping infringed on Nintendo’s copyright (to establish secondary infringement<sup>132</sup>) and contravened the anti-circumvention provisions under s.41.1(1) of the *Act*? The court ruled thus:

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<sup>126</sup> Ibid. at 6.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid. at 8.

<sup>130</sup> *Nintendo*, supra note 125 at 9.

<sup>131</sup> Ibid. at 10.

<sup>132</sup> Ibid. The Federal Court followed the Supreme Court’s three-part test to determine secondary infringement which states: “The Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*] at paragraph 81, [2004] 1 SCR 339, set out the following three-part test for establishing secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established within one of the enumerated acts in s. 27(2).”

The evidence clearly establishes that an unauthorized copy of the Nintendo Logo Data File is present on the devices sold by the Respondent for use on DS consoles [...]. This satisfies the first element of the test for secondary infringement. The second element of the secondary infringement test may be inferred from the Respondent's admission of infringement in respect of the DS Header Data. Given that the Respondent admits knowing that its Game Copiers contain unauthorized copies of the DS Header Data, it is reasonable to infer that it knows, or ought to know, that its Game Copiers similarly contain unauthorized copies of the Nintendo Logo Data File. As for the third element, there is no dispute that the Respondent sells Game Copiers. Accordingly, the Respondent also infringes copyright in the Nintendo Logo Data File.<sup>133</sup>

On the issue of the contravening anti-circumvention provisions, Go Cyber Shopping contended that “the Respondent submits that, in the context of being a ‘protection measure,’ an access control TPM must create a barrier to the work being copied. Thus, the Respondent argues, the shape of the Applicant’s game cartridges fails to meet the statutory requirement of a TPM because it does not establish a barrier to copying.”<sup>134</sup> Go Cyber Shopping made this argument relying on the English case of *Nintendo Co. Ltd et al v Playables Ltd et al*<sup>135</sup> where Floyd J expressed some doubt as to whether physical configuration can amount to effective technological measure.<sup>136</sup> While Justice Campbell of the Federal Court of Canada acknowledges Go Cyber Shopping’s argument, he was convinced otherwise by Nintendo arguments that Floyd’s doubts were strictly obiter<sup>137</sup> (opinion of a judge that do not form part of the court’s decision).

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<sup>133</sup> Ibid. at 15-16.

<sup>134</sup> *Nintendo*, supra note 133 at 27.

<sup>135</sup> [2010] EWHC 1932.

<sup>136</sup> *Nintendo*, supra note 134 at 27.

<sup>137</sup> Ibid.

Furthermore, Justice Campbell distinguished the English case from the case at hand based on the UK provision on TPM,<sup>138</sup> which he perceived adopted a narrow approach, compared to that of Canada, which had no such limitation. Justice Campbell articulates this position thus:

It is evident from the wording and structure of the UK Act that it contemplates a narrower definition of “effective technological measure”, in that the “access control or protection process” is limited to encryption, scrambling or some “other transformation of the work”. Arguably, this implies that access control under the UK Act requires some barrier to copying. The Canadian *Act* has no such limitation. Under part (a) of the definition, a technological protection measure means “any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work ...” There is no suggestion that such effective technology requires transformation of the protected work.<sup>139</sup>

Justice Campbell explains further:

Consistent with the foregoing, the definition of “circumvent” for an access control TPM extends beyond descrambling and decryption (or other similar transformation) to anything else that otherwise avoids, bypasses, removes, deactivates, or impairs the technological protection measure. It is apparent that Parliament intended access control TPMs to extend beyond TPMs that merely serve as barriers to copying. Moreover, since part (b) of the definition for technological protection measure covers “any effective technology, device or component that, in the ordinary course of its operation [...] restricts the doing [...] of any act referred to in section 3”, for example copying, it would be redundant and inconsistent with the structure of s. 41 to require access control TPMs to employ a “barrier to copying”. Thus, having regard to Parliament’s express intent to give copyright owners the power to control

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<sup>138</sup> *UK Copyrights, Designs and Patents Act*, 1988 (as amended), section 296ZF provides: (1) In sections 296ZA to 296ZE, “technological measures” are any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program. (2) Such measures are “effective” if the use of the work is controlled by the copyright owner through— (a) an access control or protection process such as encryption, scrambling or other transformation of the work, or (b) a copy control mechanism, which achieves the intended protection.

<sup>139</sup> *Supra* note 136 at 28.

access to works, the principle of technological neutrality, the scheme of the *Act*, and the plain meaning of the definitions for TPM and “circumvent”, it is clear that access control TPMs do not need to employ any barrier to copying in order to be “effective.”<sup>140</sup>

With the above reasoning, Justice Campbell perhaps unsurprisingly found that Go Cyber Shopping circumvented Nintendo’s TPMs.<sup>141</sup> As a deterrence to circumvention and having found bad faith in the action of Go Cyber Shopping, the court awarded \$20,000 per work in damages in favour of the Nintendo, the amount being the maximum award in damages. Delivering what may be perceived as a harsh judgment, Justice Campbell states:

In respect of the specific need to deter the Respondent, there is evidence of recidivism by the Respondent’s director Mr. King, who has been involved in similar activities in the past (Applicant’s Record, pp. 1203-1205). The Respondent’s business also appears to be dedicated to circumvention activities. Further, the Respondent continues to promote illegitimate activities such as piracy of television programs and circumvention devices for other platforms [...]. All of this demonstrates an acute need for deterrence. In view of the foregoing factors, an award of \$20,000 per work is reasonable and justified. This Court has not previously hesitated to award maximum statutory damages where it was warranted. (*Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at paras 156-158, [2013] 1 FCR 413; *Microsoft Corporation v 9038-3746 Quebec Inc*, 2006 FC 1509 at paras 112-113, 305 FTR 69; *Louis Vuitton Malletiers SA v Yang*, 2007 FC 1179 at paras 18-26, 62 CPR (4th) 362; *Adobe*, above at paras 5-8; *Twentieth Century Fox Film Corp v Hernandez* (3 December 2013), Toronto T-1618-13 (Fed. Ct.), 2013 CarswellNat 6160 at p. 3 (FC) (WL Can)). This is such a case. Therefore, the Applicant is entitled to statutory damages of \$11,700,000 for TPM circumvention in respect of its 585 Nintendo Games, and of \$60,000 for copyright infringement in respect of the three Header Data works...The Respondent’s conduct justifies an award of punitive damages. An award of

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<sup>140</sup> Ibid. at 29.

<sup>141</sup> Ibid. at 32.

\$1,000,000 is warranted in this case in view of the strong need to deter and denounce such activities.<sup>142</sup>

The significance of the 2017 *Nintendo* case in Canada is crucial to my analysis and critique of TPMs and anti-circumvention provisions. I will examine the decision and its implication from two perspectives. First, from the point of view of the parties in the case and the need to do justice; and second, its policy implication for copyright policy in Canada, being a novel case to interpret a legislation that emanated from and was fraught with controversies.

Examining the case from the point of view of the parties, the facts of the case undeniably reveals that Go Cyber Shopping was clearly in breach of copyright and did circumvent Nintendo's TPMs by advertising, offering for sale and trading in devices that aided circumvention and had numerous websites and a physical location in Waterloo for carrying on these activities. Go Cyber Shopping was engaged in copyright infringement and circumvention activities on a commercial scale, and the Federal Court found that this was not just blatantly detrimental to Nintendo, it was clearly in violation of the provisions of copyright law in Canada. In my view, this epitomizes the threat to copyright businesses that the content industry stakeholders complain about, and indeed it is real. There may be other organizations whose business model is analogous to Go Cyber Shopping around the world, some of which may not even have a physical address. In my view, finding Go Cyber Shopping liable for copyright infringement and anti-circumvention activities flow from the facts of the case. Go Cyber Shopping tried to convince the court that it also had other legitimate businesses to show good faith but that could not stand as the court noted that there was no evidence to that effect.

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<sup>142</sup> *Nintendo*, supra note 141 at 47, 48 and 50.

Having found Go Cyber Shopping liable, the award of damages and punitive measures arose for consideration. It was not the first time the Federal Court had awarded maximum statutory damages. In fact, Justice Campbell felt it was reasonable and justified to do so and supported his position with previous cases. The Copyright Act provides<sup>143</sup> for the award of damages for a maximum of \$20,000 CAD per work infringed,<sup>144</sup> therefore, Justice Campbell's award of maximum damages was within the provisions of the law. His reasoning for the award of maximum statutory damages was the bad faith behaviour exhibited by Go Cyber Shopping through its audacious conduct and more importantly, according to Justice Campbell, to serve as deterrence to others who were engaged in such activities or were planning anything similar. Any argument attacking the maximum award of statutory damages cannot discredit it on legal grounds; at best, such arguments would be based on sentiments. For example, the sentiment could be expressed that a US multi-international gaming company worth hundreds of millions of dollars is unduly favoured in the court judgment over a small Canadian company. Given the facts of the case, and the need to do justice, a significantly different outcome may have been unlikely.

The *Nintendo* case has now become precedent for the endorsement of the use of TPMs and anti-circumvention provisions – two provisions that potentially limit access to works. This precedent seems unfortunate considering that the case was undefended – meaning that there was no opportunity to adduce evidence in response to Nintendo's case. This is particularly important not because it would have led to a different decision outcome (which would be unlikely given the facts of the case), but it would have placed a responsibility on the court to make pronouncements on the Go Cyber Shopping's counter-arguments to present a balanced ruling. For example,

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<sup>143</sup> *Copyright Modernization Act*, supra note 123 s.38.1.

<sup>144</sup> According to the Federal Court, the Respondent circumvented 585 games; therefore \$20,000 award in damages per game amounts to \$11,700,000.

Cameron Hutchinson notes that because the case was undefended, pronouncement were not made on some issues;<sup>145</sup> such issues include whether digital locks protection cover locks preventing mere access to a work, unaccompanied by any act of copyright infringement and whether physical configurations, or other devices that play no *direct* role in bypassing a lock, are protected.<sup>146</sup> Perhaps the court should have considered appointing an *amicus curiae*<sup>147</sup> to argue Go Cyber Shopping's case in the interest of justice.

In my view, the policy implication of this judgment in the copyright industry in Canada and even beyond is that it could further worsen the precarious state of *copyright balance*. Given the facts of the case, Go Cyber Shopping clearly circumvented digital locks and Federal Court's interpretation of the TPM and anti-circumvention provision, which culminated in its decision is justified. However, it did not adequately in my view, consider the impact of its decision on broader copyright policy issues such as balance, access and the public interest as the Supreme Court of Canada did in *Theberge*, where it seized the opportunity to articulate the purpose of copyright law in Canada. In view of the copyright sensitivity of the case, and to further ensure balance in the copyright system, the Federal Court, while maintaining its decision, should have further made pronouncements, albeit *obiter dicta*, that support balance and the public interest. While I understand that Justice Campbell had no legal obligation to do so, it is doubtful if doing so would have caused harm, and it could have avoided the potential harm to the copyright balance that this solitary precedent may do.

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<sup>145</sup> Cameron Hutchinson, "Nintendo v. Go Cyber Shopping Glosses Over Important Issues in the New Digital Locks Regime", *Slaw*, Canada's Online Legal Magazine, at online: < <http://www.slaw.ca/2017/04/27/nintendo-v-go-cyber-shopping-glosses-over-important-issues-in-the-new-digital-locks-regime/> > accessed August 6, 2019.

<sup>146</sup> *Ibid.*

<sup>147</sup> Government of Canada, "Legal Representation of Children – Amicus Curiae" at online: < <https://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rjc/p5.html> > accessed August 6, 2019. "The traditional role of *amicus curiae* (also known as a "friend of the court") is to assist the court with its decision-making by ensuring that all relevant evidence and arguments are properly presented to the court."

Nintendo went after Go Cyber Shopping, I assume, not necessarily for the money it hoped to rake in in statutory damages (Nintendo's global income in 2017 was almost a billion dollars,<sup>148</sup>) but to establish its access control rights in the Canadian market in the light of this freshly minted legislation that empowers it to control access. My guess is that Nintendo did their research, bought the Go Cyber Shopping's product and tested it to establish how it infringed in order to gather evidence. It is unfortunate that Go Cyber Shopping presented them with that opportunity, which has now become a point of reference in support of the use of TPMs and the enforcement of anti-circumvention legislation. Admittedly, multi-million dollar transnational corporations like Nintendo, possessing a plethora of intellectual property rights, are prime targets of illegal downloading and counterfeiting activities world-wide; such large corporates cannot go after every suspected unauthorized user, and so their choice of whom to go after is strategic and aimed at creating the most deterrence (for this reason, it would also been necessary for courts to at least, restate the Supreme Court's position on purpose of copyright law and the limitation of copyright owner's rights). Commenting on the judgment, Geist argues that the case reinforces the fact that Canada has strict anti-piracy legislations with one of the most aggressive digital lock laws in the world and suggests that should/will fuel calls to re-examine the effectiveness of the anti-circumvention exceptions in the 2017 copyright review.<sup>149</sup>

Without undermining threats of unauthorized access faced by the content industry, the application and use of TPMs and the codification of anti-circumvention provisions in copyright law amounts, in my opinion, to an overkill to the detriment of the users.

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<sup>148</sup> Statista, "Nintendo's net income from fiscal 2008 to 2017" at online: < <https://www.statista.com/statistics/216625/net-income-of-nintendo-since-2008/>> accessed May 12, 2018.

<sup>149</sup> Michael Geist, "Canada DMCA in Action: Court Awards Massive Damages in First Major Anti-circumvention Copyright Ruling" at online < <http://www.michaelgeist.ca/2017/03/canadian-dmca-in-action-court-issues-massive-damage-award-in-first-major-anti-circumvention-copyright-ruling/>> accessed May 12, 2018. The 2017 copyright law review will be discussed in chapter four.



## **5.8 Conclusion**

This chapter has discussed the content industry stakeholders and their justification for the use of TPMs in the copyright industry. Undoubtedly, the content industry stakeholders play a vital role in the creation and dissemination of cultural works on a massive scale using technological means. However, their support for and use of TPMs and their legal protections seem to place them more at an advantage to the detriment of the user community. While there are genuine concerns which may justify the use of TPMs, a review of how they are implemented to mitigate its blanket approach, which currently raises serious user right concerns. Additionally, the impact of TPMs and their legal protection on the copyright system can be put to constructive use if circumvention is allowed in exceptional cases (as discussed later in chapter six).

The main controversy with TPMs is not their use as such, but how they are used, and the extent to which these uses enjoy the additional protection of copyright law. Any protected use of TPMs should be guided by the tenets of balance, the public interest and in conformity to the purposes of copyright law. As discussed in chapter three, Switzerland and New Zealand have implemented TPMs regimes that attempt to balance the interests of copyright owners and users; the same approach can and should be adopted in Canada.

## **CHAPTER SIX**

### **THE FREE CULTURE AND THE CONTENT INDUSTRY ANALYSIS & RECOMMENDATIONS**

In the first part of this chapter, I engage with the arguments canvassed in chapters four and five with regards to free culture (CCL) and the content industry (TPMs) respectively. I proceed to assess them in relation to ICT, the purpose of copyright law and the concept of balance in the copyright system and make some concluding remarks. In the second part, I make some recommendations that could potentially lead to an improved level of balance in the digitized copyright era in Canada. I start with a succinct recap of the challenges I have analyzed in the previous chapters. Furthermore, I acknowledge that these copyright challenges have become entrenched in the copyright system and cannot simply disappear. Therefore, the recommendations I propose are far from perfect and, even if wholeheartedly embraced, would not be expected to transform the copyright industry instantly. My recommendations will follow what I call “regulatory pluralism” and some necessary reforms to the Canada’s copyright law. First, I argue against the over-reliance on copyright law reforms as the only solution/resolution of copyright issues; however, I also emphasize the importance of the existence of copyright law as necessary foundation on which other extra-legal innovations around copyright regulation ought to stand. Second, I advocate embracing private arrangements (such as Creative Commons) and other creative ways that will enable industry best practices to serve as a means of regulation and organization in addition to formal copyright law. Third, ICT in the copyright system should serve as a regulatory catalyst to advance the overall purposes of the copyright system while at the same time create opportunities for stakeholders to pursue their interests. Finally, I propose a number of reforms to address the current imbalance in the copyright landscape in Canada.

**PART I**

**FOSTERING THE PURPOSE OF COPYRIGHT LAW:**

**FREE CULTURE VS CONTENT INDUSTRY**

**6.0 The Free Culture and Content Industry Perspectives – A Continuous Dialogue**

One of the core aims of this research is to critically evaluate copyright in the digital landscape from the perspectives of free culture and content industry through the lenses of CCL and TPMs respectively. The CCL scheme has been examined in detail from the point of view of the free culture stakeholders and, for them, CCL offers the freedom they advocate for in the copyright system. The freedom (free culture), as opposed to permission culture, is the removal of obstacles to access and use of creative works to foster the encouragement of learning and dissemination of knowledge. As I have shown in the discussion, the copyright system creates barriers to free culture and despite the numerous law reforms, these barriers continue to increase, making it clear that the chances of removing these barriers through copyright law reforms are slim. In response to this, it can be argued that CCL is equivalent to a private ordering scheme that relies on the basic legal structure of copyright to achieve its purpose of removing inhibitions in accessing and using content in the digital world.

On the other hand, the content industry has been analyzed through the frame of the use of TPMs and anti-circumventions protections. The position of the content industry supporters is that despite the existence of protection under copyright law, unauthorized access is still a major concern that impacts on the commercial exploitation of their content. Realizing the inadequacy of the law to deal with the issues, extra protection, besides that afforded by copyright law, becomes necessary in the form of TPMs. Furthermore, realizing that TPMs can be circumvented,

the content industry stakeholders lobby to outlaw such circumvention. Similar to free culture, the content industry's use of TPMs is equivalent to a private ordering scheme, but the difference is that it is used to ensure authorized access to content.

I have attempted to conduct the analysis of both approaches to copyright in the era of digitized content. I discussed both perspectives looking at the merits in their approaches to copyright as well as their weaknesses. The analysis of both perspectives elicits thought-provoking notions of copyright, which are important in understanding the views of the stakeholders and how we might better accommodate their views and concerns.

It is fitting at this juncture to judge the outcome of my analysis from the perspective of the purpose of copyright, as elucidated in chapter one. Judging whether a particular stakeholder's viewpoint of copyright aligns with the purpose of copyright evokes notions of public interest and copyright balance. The determination of which copyright stakeholder category more closely fosters the purpose of copyright becomes more problematic as they both legitimize their perspectives on the ground that their approaches fulfill the purpose of copyright law, advance the public interest and ensure balance in the copyright system. Therefore, it is apposite to more closely examine these concepts.

## **6.1 The Meaning of Public Interest and Balance in Copyright**

These two concepts, *public interest* and *balance* feature prominently in intellectual property narratives and arguments and are often used by intellectual property stakeholders to justify their claims and interests. Similarly, in the copyright sphere, both the free culture and content industry community claim that their copyright agenda upholds public interest and balance in the copyright system. These terms literally evoke notions of justice and fairness in the

copyright system but at the same time are dodgy in the sense that they are amorphous and can be used to justify both free culture and content industry perspectives on copyright. While it is undeniable that free culture and content industry stakeholders of copyright do contribute some good to the public, the terms, public interest and balance have been frequently employed in copyright rhetoric to influence copyright policy and laws for personal and/or commercial interests. Therefore, it is important to understand what these terms mean and what purpose they serve.

A definition of these terms is not straight forward due of some inherent challenges. One of the challenges associated with the concept of public interest has already been mentioned: the meaning ascribed to it can be rationalized to favour any particular interests. As Victoria Owen<sup>1</sup> notes, it is the furtherance of public interest that necessitates the need to create balance; the notion of balance conjures up a scenario where justice is meted out equally and fairness is achieved. In some cases, especially in practical science or concepts, balance may not be so hard to achieve, for example, a measure of 2 molecules of hydrogen and one molecule of oxygen creates the *balance* to achieve water (H<sub>2</sub>O). In legal concepts and theories, where things are more abstract than practical, the attainment of balance is highly debatable, therefore, it is situation-specific.

Nonetheless, the usage of these terms in relation to copyright should be put in perspective by attempting some definitions to give clarity and direction. My definition of public interest and balance is derived from the title of the first copyright law – Statute of Anne and the articulations of the Supreme Court of Canada. The title of the 1710 Statute of Anne was *An Act for Encouragement of Learning by vesting the Copies of printed Books in the Author or Purchasers*

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<sup>1</sup> Victoria Owen, “Who Safeguards the Public Interest in Copyright in Canada” (2012) 59 Journal of Copyright Society of USA 803 at 806.

*of such Copies, during the Times therein mentioned.* This title encapsulates both public interest and balance; the term, *Encouragement of Learning*, according to Owen is indicative of the societal benefit of learning, which amounts to advancing the public interest.<sup>2</sup> Furthermore, and still on the subject of the title of the Statute of Anne, Owen notes that:

The purpose of the original legislation was stated to be the encouragement of learning; the creation of the monopoly legislated for was Parliament's instrument for carrying out the purpose of encouraging learning. Logically, if learning is not encouraged by so "vesting the copies" then a modern Parliament should reconsider such a vesting. But Canada's Supreme Court has articulated that the public interest should not only reflect "promoting the encouragement and dissemination of works of the arts and intellect" (i.e., learning) but should also be balanced with obtaining just reward for the creator." It is this notion of the "public interest" which requires the balancing of the interests of the public in learning with the interests of the public in rewarding creators.<sup>3</sup>

The explanation above shows how the title of the Statute of Anne embodies the concepts of public interest and balance; it further explains how it sought to advance public interest by encouraging learning and dissemination of same. Additionally, it postulates how the grant of limited monopoly (copyright) serves as a means to promote public interest. This is essentially a bargain, "a give and take" arrangement whereby to promote knowledge dissemination and public good, creators are granted copyright for a limited period. However, imbalance sets in *if learning is not encouraged by so vesting the copies, then a modern Parliament should reconsider such a vesting.* The import of this remark by Owen is that if the grant of copyright to creators does not

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<sup>2</sup> Ibid.

<sup>3</sup> Owen, *Who Safeguards the Public Interest*, supra note 1. The concept of balance is controversial as it could also be argued that it should be considered from the perspective of authors, i.e. authors deserve to be rewarded notwithstanding public interest consideration. While this point is acknowledged, the emphasis is that public interest should take priority.

further the public interest of learning, then it behoves parliament to intervene – and this is where law reforms are necessary.

Additionally, Owen further elucidates on the concepts of public interest and balance by examining the nuances articulated by the Supreme Court of Canada (as discussed in chapter one, but also important to reiterate them here again because of its relevance), which leads to the second basis for my view of what constitutes public interest and balance. While the Supreme Court in *Theberge* does not specifically define public interest and balance, it explains what constitutes public interest and balance in the copyright sector. The Supreme Court says that “the Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works on the arts and intellect [...]”<sup>4</sup> Here, the Supreme Court equates the concept of public interest with encouragement of learning and dissemination of works of the intellect. In my view, two things are inherent in the Supreme Court’s conception of the public interest: first, encouragement of works of art and the intellect assumes that these works are accessible to the public, so it can be a source of inspiration for further creativity; second, dissemination of these works should be for more people to access them and build on them.

Besides the public interest, the Supreme Court also recognizes the economic or personal interest of the creator when it states – “obtaining a just reward for the creator (or more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).”<sup>5</sup> In the copyright system, being concerned alone about the public interest would be inequitable; the interest of creators is also a second side of the coin. The Supreme Court captures this by recognizing that creators’ interests matter too and this, the Court expands,

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<sup>4</sup> *Theberge v. Galerie d’art du Petit Champlain*, [2002] 2 S.C.R. 336 at 355.

<sup>5</sup> *Ibid.*

includes two components. First, the creator is entitled to a just reward for the labour and industry he or she has invested in the creation of works of intellect; second, someone else other than the creator should be prevented from benefitting from the creator's labour and industry. Not only does the Supreme Court elucidate on the concept of public interest and creator's interest, it juxtaposes them to strike a balance between the two; it presents a new understanding of balance to mean not merely acknowledging the rights of the creator, but giving due weight to their limited nature.<sup>6</sup> In other words, the inference that can be drawn from this is that the Supreme Court seems to give priority to the public interest over creator's interest. As we have seen, the Supreme Court explained further that:

In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and "ephemeral recordings" in connection with live performances.<sup>7</sup>

Admittedly, it may appear that the Supreme Court expresses a preference for the public interest over creator's interest, but it is an expression of its understanding of the purpose of copyright law and how this has been distorted leading to imbalance in the copyright system

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid. at 355-6.



where the creator's interest overshadows public interest. Furthermore, it reflects the Supreme Court's fair dealing and the purpose of copyright, which is to encourage learning and the dissemination of creative works. The Supreme Court gives insight into what an ideal situation of recognizing the balance between the public interest and creator's interest should be. However, the full attainment of the ideal and desired balance may be difficult to realize.

In her analysis of the concept of balance in intellectual property, Kimberlee Weatherall holds critical viewpoints of its attainment;<sup>8</sup> she argues that the claim of balance is meaningless because it assumes that there exists an objectively determinable perfect balance of rights.<sup>9</sup> She further explains that it makes no sense to expect intellectual property laws to give equal rights to creators and users because intellectual property is built on exclusive rights.<sup>10</sup> In her analysis, Weatherall was not referring to copyright specifically, but to intellectual property in general. I agree with her position on the indeterminate nature of balance but wish to add to her position that *intellectual property is built on exclusive rights*, at least from the copyright perspective. On the face of it, her statement could be controversial and with regards to copyright, it may incline towards the instrumentalist approach. However, my interpretation is that her opinion captures *what is* as against *what ought to be*. By *what is*, I mean that the content industry's instrumentalist approach and ideas significantly dominate and control the copyright system; by *what ought to be*, I mean the aspiration of a copyright system not based on permission culture but free culture. This is currently beginning to gain ground, especially with schemes like CCL, but faces challenges from the content industry.

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<sup>8</sup> Kimberlee Weatherall, "Intellectual Property in the TPP: Not 'The New Trips'" (2016) 17 Melbourne J.I.L. at 21.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

On the exclusive right of the copyright owner, the Supreme Court's opinion on the limited nature of creator's rights and amplifying public interests suggests the beginning of a paradigm shift in copyright thinking; copyright should not be conceived from the creator's perspective only, but from a broader public interest viewpoint. In fact, from the Supreme Court's position in *Theberge*, priority is given to the public interest. Further comments by Weatherall<sup>11</sup> seem to suggest that she considers the possibility of balance among intellectual property stakeholders:

We can, however, treat 'balance' as a shorthand for the legitimate public policy goal of ensuring that IP law accommodates a range of concerns. IP law should promote the legitimate interests of creators, innovators, and distributors and commercialisers through the conferral of exclusive rights which enable exploitation of IP in the market. But IP law should also protect other stakeholders, such as members of the public, public institutions, and follow-on innovators. These broader interests are promoted by appropriately limiting exclusive rights, and allowing some use of copyright content without permission, or payment.

Weatherall's opinion above captures an ideal and balanced copyright system where due weight is given to the limited nature of creator's rights and fair dealing is upheld. With the help of the Supreme Court of Canada and with insight drawn from the title of the Statute of Anne, a sense of what constitutes public interest and balance in the copyright system can be conceptualized even though a perfect definition may be elusive.

The concepts of public interest and balance are pivotal in the assessment of the activities of the free culture and the content industry if we are to gauge which stakeholder's activity aligns more with the purpose of copyright law as enunciated by the Supreme Court of Canada in *Theberge*. The stakeholders relate to the concepts of public interest and balance, albeit through

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<sup>11</sup> Ibid. at 21-2.

different interpretations, and each stakeholder category claims that its activities in the digital age foster the advancement of public interest and balance. This is enigmatic given that some of their interests and goals mostly do not align, therefore, it suggests that their approach to public interest and balance may be tailored to fit specific interests.

The activities of free culture stakeholders were examined using CCL while the content industry stakeholder analysis focused on the use of TPMs. I will assess the extent to which the core values of free culture and content industry in a digitized copyright environment justify or legitimize their claim in relation to advancing the purpose of copyright law.

## **6.2 The Legitimacy of Free Culture Claims**

The core values or benefits of the free culture community in the context of CCL can be summarized in four points as identified by Timothy Armstrong:<sup>12</sup> 1) it legalizes acts that ordinarily would have amounted to copyright infringement, 2) it creates universal access to works, 3) it reduces transaction cost to access works, and 4) it creates freedom and the establishment of a commons. These four benefits highlighted by Armstrong align with free culture ideology and the CCL arrangement. Authors and creators who subscribe to CCL freely make their works available for use by authorizing the users or licensees to engage with the works within the limits of the licence conditions. Ordinarily, some of these authorized actions, such as, making derivative works, commercial use, reproduction and /or performance would have amounted to infringement, but the CC licensing model makes it legal. The ubiquity of the internet makes CC licensed-works universally available and accessible to all, and the ease of accessibility comes with the very low or close to negligible transaction cost. With a CC-licensed

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<sup>12</sup> Timothy Armstrong, "Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public (2010) 47 Harvard Journal on Legislation at 365-6.

work there is no challenge of identifying the owner of the work, lengthy negotiations, complex contract drafting, attorney fees and the back and forth involved in the formal processes of seeking permission from the creator or owner. This therefore engenders the growth of a *commons* in the digital era where there is freedom to access, use, create and disseminate works.

The claim by the free culture community that its philosophy is geared towards fulfilling the purpose of copyright law rests on its core values, which I have stated above. These benefits, when reviewed objectively, contribute to the encouragement of learning and dissemination of works of the intellect, thereby advancing the interest of the public and in a bid to create balance. CCL makes works of the intellect available for the public to use without fear of liability for copyright infringement. Furthermore, CCL leverages the advantages of digital technology and the internet to create the opportunity for the public to access creative works from anywhere in the world with little or no cost; users of CCL-licensed works do not actually have to formally meet the licensors before accessing and using their licensed works, and this makes accessibility straightforward. The CC licensing community has grown into a massive repository of knowledge, creating a *commons* for public good. The benefit in this that the CCL is an ingenious scheme devised to create a balanced copyright system where the acts of users are not branded as infringement. Armstrong supports the idea that making works available in the commons as a catalyst for further creativity when he states that:

[...] making works available for use under open-content licences has a multiplier effect, permitting the creation of new works which may never have come into existence absent the raw materials that the licences place into the commons.<sup>13</sup>

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<sup>13</sup> Ibid. at 368.

Furthermore, CCL scheme also respects the other side of balance by allowing authors to determine the categories upon which they will make their works available for the benefit of the public (and themselves). With this, it is apparent that the CCL embodies and exemplifies the copyright balance as articulated by the Supreme Court of Canada.

Notwithstanding the critical comments and shortcomings of the CCL scheme, analyzed above in Chapter Four, the assessment of its goals and aspirations show that it supports the purpose of copyright law as envisaged by the Supreme Court of Canada in *Theberge*.

### **6.3 The Legitimacy of Content Industry Claims**

From my analysis of the content industry stakeholders using the TPMs and anti-circumvention legislation, the cardinal objectives for the use of TPMs and introducing anti-circumvention provisions is to address the challenges associated with copyright and digital technology and the internet. In this case, my prima facie rationalization of the core value of the use of TPMs and anti-circumvention laws is to prevent unauthorized use or access to digitized content. This aligns with the opinion of the Supreme Court in *Theberge* when it admonishes that a creator is entitled to a just reward, or put differently, to prevent someone else other than the creator from appropriating the benefits due to the creator. The protection of the creator's interest is part of the balance needed in the copyright system to reward the industry and creativity invested by creators to produce works of art and the intellect. The assumption is that since the sophistication of digital technology and the internet facilitates copyright infringements, which amounts to persons other than the creator benefiting from the creator's work, it seemed necessary to introduce digital gatekeepers (digital locks) to content. The perceived benefit in this is that a creator is incentivized to produce more creative works if he is rewarded for past works, in other

words, there would be less motivation to create if the benefit due to a creator is misappropriated as a result of unauthorized access and copyright infringement. It is the belief or common assertion of the content industry stakeholders that rewarding a creator leads to more production of works of art and the intellect and therefore furthers the purpose of copyright, which is to encourage learning and the dissemination of creative works. The content industry copyright stakeholders create works and make them available (mostly for a fee; some may be for free, but the long-term goal is to convert free users to paying customers) in hard copy and soft copies on the internet for people to access and engage with them in the belief that creativity would be inspired.

Undeniably, while it may be acknowledged that the content industry activities may appear to contribute to the cause of the purpose of copyright, such support could be merely superficial. In my view, some activities or ideas advocated by the content industry do more harm than good. I do not intend to rehearse these criticisms here as I have already done so in Chapter Five. The objective here is to show how the content industry's use of TPMs ultimately undercuts the purpose of copyright law and negatively affects the public interest.

The existence of several layers of protection<sup>14</sup> for creative works evidences a maximalist approach to copyright, creates imbalance in the system and does not augur well for the public interest. The use of TPMs now regulates access to content, which significantly undercuts the user's right to access; this is evident in Canada in the *Nintendo* case where the Justice Campbell said that "it is apparent that Parliament intended access control TPMs to extend beyond TPMs that merely serve as barriers to copying."<sup>15</sup> The implementation of a TPM that targeted commercial copying would have created a minimalist approach and would have been perhaps

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<sup>14</sup> Ian Kerr et al, "Technical Protection Measures: *Tilting at Copyright's Windmill*" (2002) 34 *Ottawa Law Review* 7 at 43.

<sup>15</sup> *Nintendo of America Inc. v Jeramie Douglas King & Go Cyber Shopping*, [2017] FC 246 at 29.

more tolerable. Additionally, the regulation of access to works contradicts the position of the Supreme Court in *Theberge* when it admonished that the proper balance means recognizing the limited nature of the creator's rights<sup>16</sup> as well as the importance of dissemination. On the contrary, the use of TPMs and anti-circumvention legislations expands the rights of the creator and further constricts those of the user – this does not foster public interest in copyright and therefore works against the encouragement of learning and dissemination of works of art and the intellect. In order to effectively carry out its purpose, TPMs use tracking/surveillance technology to monitor and identify users who gain unauthorized access to content; consequently, this causes serious privacy<sup>17</sup> concerns and may constitute a violation of users' liberty. Some of these privacy-breaching technologies are implemented under the guise of TPMs unknown to the users. The purpose of copyright as articulated by the Supreme Court of Canada aims to benefit the public interest, even if the author's entitlement to reward is duly acknowledged; this certainly does not encourage intrusive technologies that invade users' privacy. Furthermore, the content industry has used TPMs and anti-circumvention provisions to impede research, innovation and competition.<sup>18</sup> The inhibition of research, innovation and competition contradicts the purpose of copyright law as stated by the Supreme Court of Canada. Therefore, the activities of the content industry in this regard are arguably primarily concerned with unlimited proprietary interest (i.e. exclusive and complete control) and this undercuts public interest and balance in the copyright

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<sup>16</sup> *Theberge*, supra note 4.

<sup>17</sup> Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (Toronto: University of Toronto Press, 2014) at 19.

<sup>18</sup> Michael Geist, "Anti-circumvention legislation and Competition Policy: Defining a Canadian Way?" in Michael Geist, ed, *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 228-9; Electronic Frontier Foundation, "Unintended Consequences: Five Years Under The DMCA" v.3 (24 September 2003), <[www.eff.org/IP/DMCA/unintended\\_consequences.pdf](http://www.eff.org/IP/DMCA/unintended_consequences.pdf) > "cited in Geist, *Anti-Circumvention Legislation*, supra note 18 at 228.

system. This casts doubts on the legitimacy of the content industry's claim that its approach to copyright fulfills the purposes of copyright, fosters public interest and balance.

Deborah Halbert argues that the copyright system favours commercial interests to the detriment of the public interest;<sup>19</sup> she further states:

When courts do make the decisions [on where to strike the fair use balance], they are required to be sympathetic to commercial interests by the standards themselves, which are skewed toward protection of the commercial function of a work [...] the political and social interests of the public are not considered in the calculation.<sup>20</sup> Finally, fair use is applied in a case-by-case manner so that no bright lines exist and continued confusion is the result.[...] The principle advocated by content owners and the trend toward more "tethered" technologies suggest that a new balance needs to be struck.<sup>21</sup> To that end, it is not user-generated content that is the problem, but the fact that copyright law itself strikes a balance that favours commercial interests too much. The law has always been written to protect the interests of the entrenched against the interests of future technologies, as Jessica Litman argued in 2001.<sup>22</sup> As Litman notes, current copyright leaves the public interest unprotected,<sup>23</sup> something that needs to change.<sup>24</sup>

Halbert's argument above is in the context of the United States copyright system, which has had significant influence in Canada as I showed in chapter three. Halbert decries maximalist approach and hegemonic copyright regime in the United States; her remarks above highlight three points. First, that commercial interest is given priority and that copyright law is written in their favour. The second point is that the public interest and balance are not given due

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<sup>19</sup> Deborah Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (Oxon: Routledge, 2014) at 196.

<sup>20</sup> Halbert reports that Rebecca Tushnet reminds us that there are other mechanisms to support free speech and a freer public conversation in copyright law as well.

<sup>21</sup> Jonathan Zittrain, *The Future of The Internet-And How To Stop It* (New Haven, CT and London: Yale University Press 2009) "cited in Halbert, *The State of Copyright*, supra note 352."

<sup>22</sup> Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) at 47 "cited in Halbert, *The State of Copyright*, supra note 352."

<sup>23</sup> *Ibid.*

<sup>24</sup> Halbert, *The State of Copyright*, supra note 19.



consideration, and this raises fundamental questions as to the credibility of a copyright system. The third point is that fair use (fair dealing in Canada) is applied narrowly, thereby shrinking its application to the detriment of users. This indirectly impacts on access because what good is it to access content if the user cannot be legitimately engaged with it in ways permissible under copyright law. These points raised by Halbert reveal the importance of the opinion of the Supreme Court of Canada in *Theberge* on the purpose of copyright law and the proper understanding of safeguarding the public interest to strike a fair balance in the copyright system.

Canada and the United States follow a maximalist approach in the implementation of WIPO Internet Treaties, which in summary has the underlying ideology of using different technical apparatuses to dominate the copyright market in the digital era. Unfortunately, this trend does not give legitimacy to the content industry's claim that its activities support the purpose of copyright law and encourage the creation and dissemination of works of art and the intellect.

#### **6.4 A Continuous Dialogue**

Despite the clarification given by the Supreme Court of Canada, commercial interests continue in their desire to dominate the copyright space in a digital environment. In my view, this does not render the pronouncements of the Supreme of Canada inefficacious because it does serve to bring education and enlightenment on the subject of the purpose of copyright and balance, which was lacking for some time in the copyright narrative in Canada. This has brought some degree of progress in the Canadian copyright discourse; however, a lot still needs to happen to close the widening gap in achieving balance among the various copyright stakeholders, especially with the impact of digital technology and the internet. Granted, the

concept of balance is elusive<sup>25</sup> but at the minimum, a desirable level of balance is one where access is not regulated by copyright owners and TPMs are applied specifically to limit commercially infringing copying, but not to impede lawful use or to harm the public interest.

Neither the free culture nor the content industry copyright stakeholders have all the answers to ensuring a better copyright system, however, the dialogue on how best to realize the goals and interests of stakeholders must continue.

## **PART II**

### **RECOMMENDATIONS AND CONCLUSION**

#### **6.5 The Challenges of the Copyright System**

The recommendations I propose in this research are tailored towards addressing the problematic issues in the copyright industry as well as promoting the overarching goals of copyright, which is to encourage creativity, foster unhindered access to knowledge and serve the public interest. First, it is appropriate to succinctly recap the challenges I have discussed in the preceding chapters.

In chapter one, I attempted to trace the contours of the origin and purpose of copyright, which culminated in the enactment of the first copyright law – the Statute of Anne of 1710. One of the contentious issues that copyright faces today is the approach to the right of exclusivity in the exploitation of proprietary interests in creative works; most copyright owners tend to inappropriately interpret this to mean the right to shut out the rest of the world from gaining access to content save for a fee. This, in my opinion is a monopolistic approach to copyright and reminiscent of how the Stationers' Company operated the book publication trade before the

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<sup>25</sup> Cameron Hutchison, *Digital Copyright Law* (Toronto: Irwin Law, 2016) at 2.

Statute of Anne. Prior to the Statute of Anne, Queen Mary, in 1556<sup>26</sup> granted a royal privilege in the form of a Charter to the Stationers' Company; this privilege gave the Stationers' Company exclusive right to book publication, and by necessary implication, the right to exploit proprietary interests from published books. The motivation for the grant of the royal privilege by the British Monarch was for religious and political reasons.<sup>27</sup> The Stationers' Company was chosen to implement this objective in return for exclusive right to book publication. In my view, this was the birth of monopoly in copyright that still exists to this day, albeit in more subtle forms. Another major challenge in the copyright system is that in the midst of divergent views on the purpose of copyright law, there is hardly a consensus. In my research, I examined the Statute of Anne and scholars' views<sup>28</sup> on the rationale for its enactment. This lack of consensus exposes the definition and purpose of copyright law to manipulation.

In chapter two, I examined the advent and impact of ICT on the conventional copyright system. The already tensed copyright industry, due to different approaches to the purpose of copyright law, now faces a paradigm shift created by ICT, which disrupts the traditional copyright business model as well as presents new and easier modes of creativity. Admittedly, while digital technology and the internet have positively transformed and enhanced creativity,

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<sup>26</sup> Daniel J. Gervais, "A Canadian Copyright Narrative" (2009) 21 I.P.J. 269 at 274.; Salathiel Masterson, "Copyright: History and Development" (1940) 28 California L. Rev. 620 at 625; Peter Baldwin, *The Copyright Wars* (Princeton, NJ: Princeton UP, 2014) at 55.

<sup>27</sup> Masterson, *Copyright History*, *ibid.* at 628 "...to prevent the propagation of the Protestant Reformation. After reciting that certain heretical books "both in rhymes and tracks" were daily printed, containing "great and detestable heresies against the Catholic doctrine of the Holy Mother Church," it ordains that for the suppression of this evil ninety-seven named persons shall be incorporated as a society of the art of a stationer. No person is to practice the art of printing unless he be one of this society, and the master and warden are authorized to search for, seize and burn all prohibited books, and to imprison anyone that should exercise the art of printing contrary to their direction."

<sup>28</sup> Oren Bracha "The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The life of a Legal Transplant" (2010) 25 Berkeley T.L.J. 1427 at 1436, Bracha argues that the Statute of Anne was a compromise; *See* Victor Bonham-Carter, 1 *Authors by Profession* 16 (1978) (that the Statute of Anne "established the author's right to his own property, and thereby gave him the power to bargain for better terms"); Lyman Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 143, Patterson argues that the Statute of Anne was more of a trade regulation law; Mark Rose, "The Author in Court: Pope v. Curl (1741)" (1992) 21 *Cultural Critique* 197 at 99, Mark Rose agrees with Patterson that the Statute of Anne was more of trade regulation statute.

they have also spawned considerable challenges due to stakeholders' perspectives on its impact on copyright. The most controversial impact of ICT on the copyright system is how it supports the introduction of new and easy ways to create, duplicate and disseminate content. Consequently, these new technologies have also orchestrated contentious copyright law reforms, most notable being the WITs, which triggered controversial copyright law reforms and debates across WIPO member states, including Canada.

My focus in chapter three captured the background and buildup to the WITs and keen involvement of the United States as a significant player in the development of the WITs. I examined how TPMs and anti-circumvention provisions found their way into the WITs amidst misgivings expressed by several WIPO member states and their potential negative impact on access and user rights. Despite the arguments against the inclusion of TPMs and anti-circumvention provisions, they nonetheless remained in the WITs, giving member states some level of discretion as to how they would be implemented in their national copyright laws. Furthermore, I analyzed Canada's protracted failed attempts to implement the WITs and the arguments for and against the proposed inclusion of TPMs and anti-circumvention provisions in its copyright law. The analysis in chapter three raised a crucial question as to whether copyright law reform in the ICT age can adequately cope with the dynamics in the current system.

Next, I delved into a detailed analysis of the free culture and content industry stakeholders using the CCL and TPMs as case studies respectively. Chapter four featured analysis of the free culture community, while chapter five captured the content industry stakeholders. Both stakeholders advance strong arguments and justification for their approach to copyright. Additionally, I engaged with other challenges, which included the attainment of

proper balance of stakeholders' interests, national and international influence, and the over-reliance on law reform.

Now in this chapter, therefore, I attempt to make some suggestions on how to deal with some of the challenges highlighted in the preceding chapters.

## **6.6 Proposed Recommendations: A Regulatory Pluralism Approach**

The recommendations I propose flow from the arguments in this research and are premised on one central idea – that of regulatory pluralism. At its core, what I mean for this to convey is that copyright law alone as a single regulatory instrument is becoming increasingly insufficient to regulate the activities of industry actors, consumers, users and other copyright stakeholders. The concept of regulatory pluralism does not mean simply allowing and embracing the arbitrary and *ad hoc* creation of different and conflicting mechanisms to regulate an industry, On the contrary, as Cary Coglianese<sup>29</sup> puts it:

By regulatory pluralism, I mean to refer to a rulemaking process that involves a subset of the broad public with a high level of interest in and knowledge about a particular rulemaking. In this sense, pluralism seeks more participation by members of the public than does insulated or secretive decision-making by a few unelected regulatory officials, but it demands less participation than does participatory democracy. The participation that counts in regulatory pluralism is participation by organized interests and experts from outside of government.

Coglianese's position on regulatory pluralism captures the idea that could potentially be implemented in the copyright system; that is, the recognition that copyright regulatory initiatives could also emanate from outside of government and formal copyright law to advance the

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<sup>29</sup> Cary Coglianese, "Expanding Regulatory Pluralism: The Role for Information Technology in Rulemaking," at 13, Paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, at online: < <https://www.belfercenter.org/sites/default/files/files/publication/coglianese.pdf> > accessed October 13, 2019.

interests of its members and the public more broadly. Furthermore, it is pertinent to add here that regulatory pluralism does mean the gathering of the public or empowering every single stakeholder in an industry or community – this would be chaotic and destined to failure. Rather, the notion is that these various interests—in our example the interests of the content industry and free culture community—would be articulated by their respective representatives. The participation that matters in regulatory pluralism is that from organized interests and experts from outside of government.<sup>30</sup> Coglianese’s emphasis on non-governmental actors in regulatory pluralism must be understood with caution; while regulatory pluralism is an industry-led initiative, their proposed regulatory approach must not contravene existing laws that regulate the industry. The CCL is a prime example. Its idea represents a stakeholder-led initiative but still conforms to copyright law, while identifiable representatives have the capacity to lead initiatives and represent the interests of the stakeholders involved.

Similarly, in their support for regulatory pluralism, Neil Gunningham and Darren Sinclair contend that employed a single instrument or single strategy approach to regulation has strengths as well as weaknesses.<sup>31</sup> Therefore, they suggest that a better strategy is to harness the strengths of individual mechanisms leading to a mix of instruments to achieve specific goals.<sup>32</sup> Applying this idea to copyright, formal copyright law has its strengths and weaknesses, while building on its strengths, stakeholder-led initiatives would complement for its weaknesses (in particular its slow pace in the face of rapid technological change) through innovative ideas. Generally, in various areas of a society’s economic life, the government, while providing ground rules and an

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<sup>30</sup> Ibid.

<sup>31</sup> Neil Gunningham & Darren Sinclair, “Regulatory Pluralism: Designing Policy Mixes for Environmental Protection,” (1999) 21 *Law & Policy* at 50 at online: < <http://www.greeneconomics.net/Gun-RegulPlural.pdf> > accessed October 13, 2019.

<sup>32</sup> Ibid.

enabling environment, encourages private initiatives to complement its effort. The same broad strategy can be productively applied to the copyright system.

The copyright system (not just in Canada, but globally) has become very dynamic especially in the context of digital technology, while policy-making and law reform has become increasingly controversial and cumbersome. Therefore, we should be receptive to new regulatory initiatives. I discuss the regulatory pluralism approach under three headings: 1) de-emphasizing over-reliance on copyright law reform, 2) encouraging stakeholder-led regulatory practices and 3) embracing ICT as an instrument to achieve the purposes of copyright as well as serve as a platform for stakeholders to pursue their interests. I wish to emphasize here that my call for a pluralistic regulatory approach seeks to achieve, first of all, the purposes of copyright, and then cater for the needs and interests of copyright stakeholders to the extent possible within that principled framework.

These three recommendations are interconnected in the sense that exploring options besides law reform alone creates opportunities for the emergence of private regulatory initiatives; such private regulatory schemes in an ICT-driven copyright industry may consider the possibility of using ICT as a means for copyright stakeholders to achieve their goals. While these three proposed recommendations have the potential to create positive impact, there is, of course, no guarantee that their impact will be progressively linear, considering the differences and dynamics of the copyright industry. The point, rather, is to reframe the policy quandaries into which we keep wading and to rethink our strategies for improving the copyright system in the future.

### **6.6.1 De-emphasize Over-Reliance on Copyright Law Reform**

Updating copyright law is widely recognized as a popular way of dealing with challenges in the copyright industry. In the pre-ICT era, copyright reform, though an arduous process, was relatively effective. The proposition here is that copyright law alone is increasingly becoming inadequate in keeping up with the pace of advancement in the copyright industry, especially with the impact of ICT. However, the impact of ICT in copyright has been used as a justification to make calls for copyright law reforms to combat unauthorized access to content, which arguably discourages creativity if not adequately and efficiently addressed through copyright law reforms and stricter measures. In fact, this represents the instrumentalist conception of copyright as stated by Glynn Lunney:

...copyright is built on a simple premise: more copyright yields more money for copyright owners, and more money in turn means more and better creative work. In my dream, rent-seeking is part of copyright; to fulfill its purpose, copyright generates rents (or incentives, if you prefer) for copyright owners. But it does so only to the extent that those rents are necessary and inextricably tied to ensuring more and better creative works.<sup>33</sup>

However, prior to his 2018 paper, Lunney had, in 2001, just as sales revenue started to decline in the music industry due to the emergence of Napster and the rise of music file sharing, challenged the instrumentalist notion stated above when he predicted that:

While copyright simplistically assumes that more incentive means more productivity, this assumption is flawed. At some point, higher returns for a given author's work will likely reduce that author's creative output.<sup>34</sup>

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<sup>33</sup> Glynn Lunney, "Copyright Lost," (June 18, 2018), IDEA Vol. 59, Forthcoming), Texas A&M University School of Law, Legal Studies Research Paper Series, at 2, at online: < [file:///Users/aliceogoroh/Downloads/SSRN-id3198147%20\(1\).pdf](file:///Users/aliceogoroh/Downloads/SSRN-id3198147%20(1).pdf) > accessed October 14, 2019.

<sup>34</sup> Glynn Lunney, "The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act," (2001) 87 VA. L. REV. 813 at 890.



Revisiting his brazen prediction in 2018 (seventeen years later), Lunney, armed with empirical data in the music industry confirms his prediction – that contrary to the instrumentalist premise, in the music industry in the United States over the last fifty years, increased revenue led to fewer and lower quality hit songs, and decreased revenue accounted for more and better quality songs.<sup>35</sup> Lunney’s study shows that while file sharing does account for loss of revenue in the music sector, this does not account for less production of music; on the contrary, it leads to more production of music. Therefore, the call to reform copyright law to ensure better incentives for creators to motivate them to produce more is revealed to be flawed.

However, this is not to say copyright law has no place at all. In fact, on the contrary, I must first argue in favour of the need for the continued existence of copyright law because it provides the fundamental legal framework for the copyright system to function, in addition to any other stakeholder-led non-legal regulatory initiative. Copyright law is necessary as a reference point for definitive provisions on the meaning of copyright, when copyright exists, for creating and allocating exclusive right to exploit copyright works, delineating exceptions to

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<sup>35</sup> Glynn Lunney, *Copyright’s Excess: Money and Music in the US Recording Industry* (New York: Cambridge University Press, 2018) “cited in Lunney, *Copyright Lost*, supra note 33 at 4, 6, 7, 12.” Lunney analyzes music data before and during music file sharing as follows: 1) sales of recorded music rose more or less steadily from 1961 through 1999. From under \$4 billion (\$2013) in 1961, sales rose to an initial peak in 1978 of just over \$15 billion (\$2013), and then fell back with second OPEC oil embargo and associated recessions until 1983. After 1983, sales resumed a steady upward trend until they reached record levels and peaked at just over \$20.7 billion (\$2013) in 1999; 2) a steady decline in shipments of recorded music since the advent of file sharing in 1999. From its peak of \$20.7 billion (\$2013) in 1999, revenue from sales of recorded music have fallen in the United States to a low of just under \$7.0 billion (\$2013) in 2014. That is a decline in annual sales of \$13.7 billion (\$2013), or 66.4 percent. Acknowledging that file sharing led to a decline in record sales, Lunney was also interested in seeing the impact it had in music output, that is, more money should lead to more music output and less money should account for less music output. Lunney’s findings were that excess incentives ensure that our most popular artists are vastly overpaid. By providing these excess incentives, copyright encourages our superstar artists to work less. As a result, when revenues were high for the recording industry, as they were in the 1990s, our top artists produced fewer studio albums and fewer Hot 100 hits in the first ten years of their career. In contrast, when revenues were low, both in the 1960s before the sound recording copyright and in the post-file sharing 2000s, our top artists produced more studio albums and more Hot 100 hits. It is no coincidence that the most prolific artists in the study, the Beatles and Taylor Swift, had their first Hot 100 hits in the low revenue years of 1964 and 2006, respectively.

copyright control, etc. In his assertion on the meaning of free culture, it is worth recalling, Lawrence Lessig speaks to the need for the existence of copyright law:

A free culture is not a culture without property; it is not a culture in which artists don't get paid. A culture without property, or in which creators can't get paid, is anarchy, not freedom. Anarchy is not what I advance here. Instead, the free culture that I defend in this book is a balance between anarchy and control.<sup>36</sup>

Lessig's reference to property, and the support for ownership of property<sup>37</sup> implies that there is need for copyright law because without copyright law there can be no proprietary rights in creative works in the first instance. Such a result is not only "anarchy," but is inconsistent with my overarching argument that there must be a balance between rewarding authors and allowing the cultural content industries to flourish and ensuring the access of the public to the content itself, for the benefit of society.

Furthermore, Jeffrey Harrison, while critiquing the relationship between creativity (copyright) and CCL, expresses an opinion that appears to be useful for our purposes here in terms of supporting the need for copyright law:

More generally, in order to get the point of there being a creative commons, there must be creativity in the first place. The richer the creativity, the richer the *potential* commons. Thus, as far as the creative commons is concerned, copyright has a chicken-and-egg quality. Without copyright, it seems doubtful that much would exist to become part of the commons.<sup>38</sup>

On the validity of Harrison's argument, I concur, because CCL does not mean disregard for copyright law. On the contrary, as we have seen, CCL relies on copyright law to build its

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<sup>36</sup> Lawrence Lessig, *Free Culture, How big Media uses Technology and the Law to lock down Culture and Control Creativity* (New York: The Penguin Press, 2004) at xvi.

<sup>37</sup> This refers to copyright as a form intellectual or intangible "property" created by copyright law.

<sup>38</sup> Jeffrey L. Harrison, "Creativity or Commons: A Comment on Professor Lessig" (2003) 55 Fla. L. Rev. 795 at 798.

initiative. Therefore, using Harrison’s opinion in a broader context, copyright law plays a significant role as the foundation that creates an ordered copyright system, which in turn ensures the conditions necessary for creative activities/enterprises to flourish. Other regulatory initiatives can build on the foundation of copyright law.

My recommendation to reduce over-reliance on copyright law reform proposes that, while copyright law is important, it does not possess the required flexibility to adequately adapt to the ever-evolving needs and dynamics of copyright in a digital era with each new technological development. In this regard, the law has obvious limitations. With the advent of digital technology and the internet, it has become increasingly challenging for the law to effectively or comprehensively deal with various ways in which ICT has transformed creativity in the copyright world, and particularly to do so in a balanced and timely way. Therefore, in my view, it is prudent not rely on law reform as the *only* pathway to resolving these challenges. ICT evolves faster than the law could be reformed to catch up with it, therefore, it is unwise to attempt to reform copyright law each time technology changes; nor is it consistent with the principles of technology neutrality as articulated by Carys Craig.<sup>39</sup> Copyright law reform is necessary, and the principal intent should be to strengthen and update copyright law as a legal structure to guarantee balance in the system.

There are a few further reasons worth highlighting in order to explain why legal response to copyright reform may not always be the desired approach. First, with the fast-paced technological advancement, it is incredibly challenging to future-proof the law, which can

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<sup>39</sup> Carys Craig, “Technology Neutrality: (Pre)Serving the Purposes of Copyright Law” in Michael Geist ed, in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Toronto: University of Ottawa Press, 2012) at 291-2. She further argues that “technology neutrality can be derived directly from the face of the *Copyright Act*, it is generally found in the wording of section 3(1) and the owner’s exclusive right to reproduce the work “in any material form whatsoever.” This provision undoubtedly demonstrates an ambition toward a technologically neutral copyright but, in itself, it demands nothing more than extending the reach of owners’ right to new media, thereby ensuring non-discrimination in the applicability of the law to different technologies, and, to a certain degree, “future-proofing” the law.”

therefore easily be rendered obsolete. Secondly, the legislative process to create new law or reform existing laws is generally slow and arduous. It becomes more challenging if the law reform is on a matter as controversial as copyright law. As we have seen, Canada's attempt to implement the WITs took more than a decade to come to fruition, following several failed attempts; it was caught up in the midst of the politics and elections that are important and inevitable features within the structures of democratic government. Third, the outcome of the legislative process may not be free and fair due to influence of copyright stakeholders. In fact, copyright law reform is a battle between copyright stakeholders. Usually, these copyright stakeholders are not equally matched in terms of bargaining power and resourcefulness, and the class of stakeholders with the most financial and political resourcefulness tend to gain the upper hand. The incorporation of TPMs and anti-circumvention provisions into Canadian copyright law is a demonstration of how the process can be influenced to achieve a desired outcome by the content industry stakeholders. It must be noted that, influencing the outcome of the legislation can also come from the free culture stakeholders as was manifested in the Fair Copyright for Canada campaign, which arguably delayed the legislative process. There is therefore sound basis on which to question any assumption that law reform initiatives are necessarily freer from bias or immune to stakeholder self-interest than are stakeholder-led regulatory initiatives. Fourth, there is the possibility (indeed, clear likelihood) that there could be international influence which may prevail over domestic copyright policy goals. This can be by means of an international treaty that a member state is obliged to incorporate into its national copyright law. For example, in the case of the WITs, we saw that Canada and other members states were ultimately obligated to implement treaty provisions into their national law. The international influence could also be in form of diplomatic pressure, such as the influence the United States brought to bear on Canada's

domestic implementation of the WITs, or through broader trade negotiations as seen in the culmination of the CUSMA.

The foregoing captures some serious drawbacks inherent in the legislative process in copyright law reform. In view of this, I am of the opinion that creative ways are needed to maintain and advance copyright's purposes in the face of changing circumstances—ways that do not seek to dismantle the copyright legal structure but rather to build on it to create systems and regulatory initiatives whereby stakeholders can achieve their goals in furtherance of copyright's purposes and with less friction. This could include coordinated arrangements that attract stakeholders who are drawn to get involved in such initiatives. A perfect example of this, as I have argued, is CCL.

#### **6.6.2 Endorse Private Arrangements**

CCL, which I have discussed extensively in this research, is an example of a unique regulatory initiative that creates a platform for both creators and users to achieve their goals. Of course, this is a platform that stakeholders voluntarily sign up for if they are interested and believe in its objective; there is no coercion involved, and nor does it undermine the interests of third parties or the public in the copyright system. Since I have already examined the CCL scheme, as well as its pros and cons, the intention here is not to repeat those arguments but to offer some further justification and support for its existence *as a stakeholder-led private arrangement*.

One obvious justification for the endorsement of CCL is that the content industry stakeholders are already using private arrangements to their advantage to create additional layers of protection for creative works besides the legal framework of copyright law. According to Ian Kerr et al, besides copyright law, other layers of protection for copyright works include contract

law, TPMs and digital rights management (DRM) technologies.<sup>40</sup> Additionally, besides the industry-wide deployment of TPMs and DRM, the content industry's use of copyright collectives<sup>41</sup> is also a manifestation of a private scheme that benefits the content industry stakeholders (and ideally, also, users and the public). The use of TPMs and private arrangement schemes by the content industry can similarly be regarded as self-help schemes. Therefore, through the CCL, creators who have chosen to make their works freely available to the public are given an effective and accessible means by which to do so. This has become a vital initiative in helping to better structuring copyright law in furtherance of the interests of free culture stakeholders, including creators, users and the public at large.

It is important to point out that, although I am using CCL as my principal example here, my support for such ground-up, stakeholder-led arrangements is actually for the copyright industry as a whole, which means, any group of stakeholders with shared interests can similarly work out how to achieve their goals by building upon copyright's foundations. With this being the case, it is important to emphasize that that any such initiative should not adversely affect or actively undercut the purpose of copyright and the public interest. Of course, this creates its own challenges in practice because, as discussed earlier, both the content industry and free culture stakeholders typically lay claim to the legitimacy of their actions within the copyright scheme and insist, directly or indirectly, that satisfying their interests ultimately benefits the interest of the public. Nonetheless, recognizing this principled framework within which private arrangements and regulatory initiatives should flourish is a key feature of my regulatory

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<sup>40</sup> Kerr et al, *Technical Protection Measures*, supra note 14.

<sup>41</sup> A copyright collective is simply a body or agency that centrally manages and collects copyright royalties on behalf of its members.

pluralism proposal (which, as I will demonstrate further below) leaves open the door for legal reform to act as a corrective measure where necessary.

Furthermore, a final reason why industry-led schemes should be recognized as critical to copyright's ongoing development is that, in the aftermath of most copyright reforms, not all stakeholders are happy with the outcome. The law is not a perfect solution to the challenges of copyright therefore, nor a perfect tool with which to achieve delicate balances in particular contexts. Private schemes are therefore necessary (and inevitable) in order to fill in the gap, especially for stakeholders who may be disadvantaged by the outcome of the copyright law reform or amendment (or its absence or delay).

### **6.6.3 ICT as an Instrument to achieve the Purposes of Copyright as well as Reward Stakeholders**

The impact of ICT in the copyright industry is so phenomenal that copyright stakeholders and scholars now acknowledge that this has created a new epoch, a paradigm shift, which now makes it important to conceptualize copyright through the lenses of ICT. Digital technology and the internet have created a new age for copyright such that we now talk of *copyright in the digital era* or *copyright in the internet age*, and so on. It is for these reasons that ICT could potentially play a quasi-regulatory role in the copyright system. In chapter two, I examined the impact of ICT in the copyright system and how it is perceived by the free culture and the content industry stakeholders. It is apparent from my examination of free culture and content industry stakeholders' approach to copyright in a digitized context, ICT serves as a means that can be used to achieve their goals in more than a purely architectural way. For example, the technical ease and availability of CCL has demonstrated that there are authors who support the idea of granting users free access to their works under certain conditions of their choice. The over one

billion works licensed under CCL schemes provide proof that the system works and is acceptable to those who choose to embrace it.

In the same way, though the internet and digital technology creates a disruption in the traditional business model operated by the content industry stakeholders, it also provides new market opportunities to reach more audiences with their content for commercial gain. For example, as mentioned previously, for book publication, Amazon Kindle provides e-books for sale; for movies and TV shows, Netflix provides subscription-based movies/TV show streaming services; for music, Spotify provides subscription-based music streaming services. Amazon, Netflix, Spotify and other organizations with similar business models provide platforms on which creators agree to provide their content for users to access for a fee. Based on an agreed sharing formula, the fee paid by the user is split between the platform owner and the content creator. Millions of users across the world subscribe to these platforms, and this business model generates huge revenue.

With the illustration above, it can hardly be disputed that ICT can be used by both the free culture and the content industry stakeholders to achieve their goals with less friction. This is laudable because ICT could be leveraged to achieve much nobler ideals in the copyright system.

Therefore, it is fair to argue that ICT should not be conceived as either good or bad or as a threat to the copyright industry. So far, ICT has proven to be useful to both free culture and content industry stakeholders. I do not discount that digital technologies come with challenges. For both the free culture and the content industry stakeholders, the new opportunities that digital technology and the internet present come with risks. Resisting a one-sided vision that emphasizes the threats of ICT to incumbent stakeholders threatens to obstruct the pursuit of copyright's objectives made possible by the capacities of ICT. My argument is not to focus on those risks



and on ICT as a threat, but to suggest that copyright policy makers and stakeholders focus on paving the way to leveraging ICT as a regulatory instrument to advance the overarching purposes of copyright law. If given the opportunity and embraced as a means of regulation in the copyright system, the internet and digital technology can facilitate the ultimate goal of encouraging creative learning and the unhindered transmission of knowledge, in addition to creating a platform to reward the creative effort of stakeholders.

## **6.7 Challenges and Opportunities of the Regulatory Pluralism Approach**

Ideally, if all things were equal, then my regulatory pluralism recommendations would run smoothly and advance the interests of all stakeholders including the public at large. Unfortunately, truth be told, this is unlikely to be the case. In order to be realistic with my recommendations, it is important to envisage possible challenges and obstacles.

Currently, ICT is being used as means for stakeholders (free culture and content industry) to achieve their own goals – that is, to provide access to and the dissemination of creative works for free culture, and for the content industry, the ability to monetize their content. Unfortunately, there are still unresolved issues, controversies and disagreements, and ways in which these efforts undermine copyright policy goals and the public interest.

In my view and based on the arguments examined in this research, the plausible explanation for the unending controversies in the copyright system is the desire for some stakeholders to monopolize, control and dominate the copyright industry. At the risk of appearing biased towards free culture community, the desire for control in the copyright sector is mostly attributable to the content industry stakeholders and dates back to the monopoly and control the Stationers' Company had over the book trade, which I examined extensively in

chapter one. Unfortunately, even after 3 centuries, the successors of the Stationers' Company carry on this monopolistic approach to copyright. My point is not to lay blame, for the quest for profit necessarily entails this approach. It is, however, important to appreciate that the tendency of the content industry stakeholders to control, dominate and monopolize the copyright sector is one of the intractable challenges of copyright policy-making today—and it is surely one of the setbacks to my proposed recommendations.

These challenges notwithstanding, I believe that following my recommendation and embracing the realities and potential of regulatory pluralism in the copyright sector could still create significant impact, especially in the area of ICT as technologies continue to evolve. For example, as artificial intelligence pushes new boundaries, it holds limitless possibilities and could be harnessed to foster creativity and balance in the copyright system just like CCL but in ways that we cannot yet imagine. Efforts to regulate AI through legal reform seem more likely, on the other hand, to stall, exacerbate existing conflicts or potentially backfire in a way that undermines copyrights goals and the public interest.

Even in the midst of the copyright hegemony by powerful corporations in the content industry, the CCL model has managed to create an identity, while advancing unhindered access to knowledge and creativity. The CCL scheme is but one example; it proves that, if relying on and building initiatives within the current legal structure of copyright law, private arrangements riding on the bedrock of ICT can make a significant difference in promoting access to content and the encouragement of learning.

## **6.8 Necessary Copyright Reforms in Canada**

A balanced copyright system is one in which the rights given to stakeholders (in this case, copyright owners and users) are not absolute—a trade-off is necessary to maintain balance and to avoid giving undue advantage to one stakeholder over the other. Canada currently operates a strong TPM regime, which concentrates almost absolute rights and powers in the hands of copyright owners. The rationale for my recommended reforms is aimed at addressing the current imbalance. Pascale Chapdelaine aptly summarizes the imbalance thus:<sup>42</sup>

The biggest flaw with strong TPM regimes is that they give almost carte blanche as to how copyright holders may protect their copyright works. Without carefully mapping TPMs with the purpose, function, scope of copyright, its limitations and exceptions, technological measures protected by such strong TPM regimes effectively allow copyright holders to ‘write their own intellectual property statute in computer code...There is generally no requirement that to receive legal protection, technological measures need to embed a mechanism that facilitates the exercise of fair dealing, fair use, or other exceptions to copyright infringement. Without such a requirement, the view that TPMs properly balance the competing interests of right holders, users, and the public domain is not convincing at best.

The use of TPMs is understandable, and represents the kind of private ordering amongst copyright stakeholders that I have endorsed as a potential route towards advancing copyright’s purposes; but their unfettered use, it has been clear, undercuts the copyright balance and negatively impacts on the copyright system. Chapdelaine’s argument above suggests that the implementation of TPMs ought to align with the broader picture of the purpose of copyright and permissible use of protected content. Consequently, the recommendations below are apposite and demonstrate the ongoing role of law reform in the pluralistic regulatory environment that I have described.

### **6.8.1 Rights Instead of Privileges**

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<sup>42</sup> Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017) at 140.

In Chapter Four, I examined the copyright exception through the lenses of rights versus privileges. Notwithstanding the Supreme Court of Canada’s erudition in *CCH* that copyright exceptions are rights, legal theory<sup>43</sup> analysis of the meaning of rights show that copyright exceptions provisions do not meet the strict description of rights but, at best, are realized as privileges. However, in my opinion, the Supreme Court’s jurisprudential reasoning is nonetheless incredibly significant because it has initiated a dialogue, which I regard as a judicial nudge to the legislature to do what is needed – that is, to elevate copyright exceptions, in effect, from privileges to rights. This is an effective way to balance the interests of copyright owners with that of users. As long as copyright owners have rights and users have privileges, rights would always trump privileges and the imbalance continues. Judicial interpretation<sup>44</sup> alone is inadequate to ensure balance in the copyright. The grant of rights to copyright owners and privileges to users bear the characteristics of imbalance ab initio; arguably between users and creators, no one is more important than the other in the copyright ecosystem. Copyright owners need users as much as users need copyright owners. On the one hand, while creators rely on users to consume, purchase, remix, distribute, and critique their works, on the other hand, users depend on creators to produce content necessary for not just entertainment and pleasure, but more importantly, to inspire further creativity. The interdependence of stakeholders among one another in the copyright system enriches creativity and advances the public interest. Therefore,

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<sup>43</sup> Roscoe Pound, “Legal Rights” (1915) 26 *Intl Journal of Ethics* at 92, see generally 92-101, at online: < [https://www.jstor.org/stable/pdf/2376739.pdf?ab\\_segments=0%2Fbasic\\_SYC-4341%2Ftest&refreqid=search%3A9ac5b19b0343c08975db2c991ffc1d0b](https://www.jstor.org/stable/pdf/2376739.pdf?ab_segments=0%2Fbasic_SYC-4341%2Ftest&refreqid=search%3A9ac5b19b0343c08975db2c991ffc1d0b) > accessed August 15, 2019.

<sup>44</sup> Chapdelaine, *Copyright User Rights*, supra note 42 at 136, note 62, Chapdelaine observes that in *Chamberlain Group, Inc v Skylink Techs, Inc*, 381 F (3d) 1178 (Fed Cir 2004) [*Chamberlain*] established a test linking the application of the TPM provisions to copyright infringement; see also *Storage Technology Corp v Custom Hardware Engineering and Consulting Inc*, 431 F (3d) 1374 (Fed Cir 2005); see however *MDY Industries v Blizzard Entertainment and Vivendi Games et al* (n 54) did not link TPM provisions to copyright infringement as was done in *Chamberlain*.

this justifies the proposal that copyright exceptions should be properly expressed—and protected—in copyright law as rights and not privileges.

Just as copyright owners' exclusive rights are limited, it would be appropriate to impose some limitations to how users exercise their proposed right. This leads to the next recommendation.

### **6.8.2 Permitted Uses and Petition for Access**

The proposed user's right I recommend should of course be exercised only in respect to permitted uses as enshrined in the copyright law. In cases where TPMs are implemented and users are unable to exercise their right to permitted uses under copyright exceptions, I recommend that the *Copyright Act of Canada* be amended to include the establishment of an administrative process for the users to petition for access. This recommendation follows New Zealand's implementation of WIT (discussed in chapter three) that establishes an administrative process for user to petition for access.<sup>45</sup> The New Zealand implementation approach appears to strike a balance between the interests of copyright owners and users. To protect the interests of copyright owners, it recognizes TPMs, allows its use and accords rights to copyright owners who use TPMs<sup>46</sup> and prohibits the distribution of circumvention devices.<sup>47</sup> However, the New

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<sup>45</sup> New Zealand, *Copyright (New Technologies) Amendment Act*, 2008 (this Act amended the *Copyright Act*, 1994), at s.226E states that: (1) Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3.

“(2) The user of a TPM work who wishes to exercise a permitted act under Part 3 but cannot practically do so because of a TPM may do either or both of the following:

(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act;  
(b) engage a qualified person (*see* section 226D (3)) to exercise the permitted act on the user's behalf using a TPM circumvention device, but only if the copyright owner or the exclusive licensee has refused the user's request for assistance or has failed to respond to it within a reasonable time.

<sup>46</sup> New Zealand, *Copyright Amendment Act*, *ibid.* at s.226: “TPM or technological protection measure—

(a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work; but

(b) for the avoidance of doubt, does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work)

*Zealand Copyright Amendment Act* curtails the rights of copyright owners by providing exceptions where the rights of the owner of a TPM-protected work do not apply,<sup>48</sup> as well as providing exceptions (permitted acts) to circumvention.<sup>49</sup> The permitted acts are contained in Part 3 of the *New Zealand Copyright Act, 1994*.<sup>50</sup> Note that, while the New Zealand law entitles the user to circumvent TPM in respect of permitted acts, this right cannot be exercised arbitrarily. The user can contact the copyright owner requesting access; but if this fails or the copyright owner does not respond within a reasonable time, the user can seek the assistance of a qualified person<sup>51</sup> to perform the permitted acts using a TPM circumvention device. The New

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S.226B

(1) This section applies if a TPM work is issued to the public by, or under licence from, the copyright owner.

(2) The issuer of the TPM work has the same rights against a person who contravenes section 226A as a copyright owner has in respect of an infringement of copyright.

(3) The issuer of the TPM work has the same rights under section 122 (order for delivery up in civil proceedings) or 132 (order for delivery up in criminal proceedings) in relation to a TPM circumvention device as a copyright owner has in relation to an infringing copy.

(4) Sections 126 to 129 (which relate to certain presumptions) apply in relation to proceedings under this section.

(5) Section 134 (order as to disposal of infringing copy or other object) applies, with all necessary modifications, in relation to the disposal of anything that is delivered up under subsection (3).

47 *Ibid.* s.226A “(1)A person (A) must not make, import, sell, distribute, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a TPM circumvention device that applies to a technological protection measure if A knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work.

“(2)A person (A) must not provide a service to another person (B) if—

(a)A intends the service to enable or assist B to circumvent a technological protection measure; and

(b)A knows or has reason to believe that the service will, or is likely to, be used to infringe copyright in a TPM work.

“(3)A person (A) must not publish information enabling or assisting another person to circumvent a technological protection measure if A intends that the information will be used to infringe copyright in a TPM work.

<sup>48</sup> *Ibid.* “226D When rights of issuer of TPM work do not apply –

(1) The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the exercise of a permitted act.

(2) The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the making, importation, sale, or letting for hire of a TPM circumvention device to enable—

(a) a qualified person to exercise a permitted act under Part 3 using a TPM circumvention device on behalf of the user of a TPM work; or

(b) a person referred to in section 226E (3) to undertake encryption research.

(3) In this section and in section 226E, qualified person means—

(a) the librarian of a prescribed library; or

(b) the archivist of an archive; or

(c) an educational establishment; or

(d) any other person specified by the Governor-General by Order in Council on the recommendation of the Minister.

(4) A qualified person must not be supplied with a TPM circumvention device on behalf of a user unless the qualified person has first made a declaration to the supplier in the prescribed form.

<sup>49</sup> *New Zealand, Copyright Amendment Act, supra note 45.*

<sup>50</sup> *New Zealand Copyright Act, 1994, s.40-93*, the permitted acts cover various areas under these headings – education, libraries and archives, public administration, literary, dramatic, musical or artistic works, computer programs, sound recordings and films, communication works, internet service provider liability.

<sup>51</sup> *Ibid.* s.226D.

*Zealand Copyright Amendment Act* does not directly vest users with the right to circumvent TPM, instead, this right is exercised through qualified persons listed in s.226D, which prevents abuse of this right by users.

In fact, it is fitting at this time (as we anticipate an appropriate response to the Statutory Review of Canada's Copyright Act) to amend Canada's copyright law to incorporate these provisions, which would go a long way to safeguarding balance in the copyright system by moderating the strict application of TPMs and anti-circumvention roles in Canada. Indeed, as we shall see below, this amendment is actually envisaged and arguably endorsed by the Copyright Act Review process because of the observations one of the resulting recommendations in the Report<sup>52</sup> of the Standing Committee on Industry, Science and Technology, which reflects the need to effect this change.

## **6.9 Statutory Review of the Copyright Act: Fixing the Flaws**

The statutory review of Canada's Copyright Act began in December 2017 and the House of Commons designated the Standing Committee on Industry, Science and Technology to conduct the review.<sup>53</sup> Since then, the Standing Committee has held 52 meetings, heard 263 witnesses, received 192 briefs and received 6,000 emails and other correspondence.<sup>54</sup> This in itself demonstrates how complex, resource-draining, and time-consuming law reform (copyright law reform in particular) can be given the need to consult widely with all stakeholders. My examination of the current statutory review and the Standing Committee's report show two things: 1) it supports my earlier position that over-reliance on law reforms alone is inadequate to

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<sup>52</sup> Statutory Review of the Copyright Act, Report of the Standing Committee on Industry, Science and Technology, June 2019, at online: < <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> > accessed October 14, 2019.

<sup>53</sup> *Ibid.* at 1.

<sup>54</sup> *Ibid.*

address the challenges of a fast-paced ICT-driven copyright system; and 2) most of my recommendations align with recommendations in the Standing Committee’s report.

In chapter three, I examined a few submissions<sup>55</sup> (from the content industry and free culture stakeholders) to get a sense of what their concerns are and their recommendations for the Standing Committee. In summary, and as expected, while the free culture stakeholders expressed concern over copyright term extension and the limits placed by TPMs on user access to digital content, the content industry expressed worry over unauthorized access to content through streaming and called for measures to tackle the issue and better protect copyright owner control.

The Standing Committee has consulted widely and submitted a 182-page report<sup>56</sup> to the House of Commons—and it has taken nearly two years to accomplish this. The House of Commons will in turn review the report and decide how to proceed forward with the recommendations – this will also take time given the legislative processes involved, and given that a change in Canada’s government seems immanent. The process can hardly be expedited any more than this without running the risk of being accused of not following due process. As I noted earlier in my discussion on over-reliance on copyright law reform, these are the challenges inherent in law reform processes – they are complex, time-consuming, expensive and susceptible to lobbyist influence. Furthermore, the frequent changes in government entailed by any democratic system (and as likely to occur in Canada due to the October 2019 Federal elections)

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<sup>55</sup> Ryan Merkley, Submission to Standing Committee on Industry, Science and Technology on Statutory Review of the Copyright Act, May 15, 2018 at online: < <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9887146/br-external/CreativeCommons-e.pdf>> accessed April 27, 2019; Myra Tawfik et al, Brief - Statutory Review of the Copyright Act submitted by Myra Tawfik on behalf of Canadian intellectual property law scholars, October 22, 2018 at online: <<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10278308/br-external/BannermanSara02-e.pdf>> accessed April 27, 2019. The other signatories include: Pascale Chapdelaine, Sara Bannerman, Olivier Charbonneau, Carys Craig, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, and Samuel E. Trosow; Rogers Communications, Written Submissions of Rogers Communications on section 92 Copyright Act Review, December 10, at online: < <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10268870/br-external/RogersCommunicationsInc-e.pdf>> 2018, accessed April 27, 2019.

<sup>56</sup> Report of the Standing Committee, supra note 52.



could affect the direction of the review process and obstruct the timely implementation of legal reforms.

### **6.9.2. Review of Five-Year Statutory Review Approach**

The Standing Committee also received recommendations on statutory review process and the need to reconsider the approach. Various views<sup>57</sup> were expressed on the matter, some suggested that a five-year interval was too short to implement new provisions and could make Parliament react prematurely to technological changes; others suggested<sup>58</sup> that deciding when to review the Act should be at Parliament's prerogative and not to be dictated by statute. Further suggestions<sup>59</sup> were to keep the five-year review and even make the interval shorter to ensure quick legislative response to technological changes.

I am of the view that there is no “quick legislative response” to technological changes given how lengthy the process takes. A review process is necessary, but I consider a five-year interval too short. I suggest two options to the review approach. First, if Parliament is keen on retaining a statutory review, the interval should not be less than a decade. Second, Parliament can stop the statutory review, and call for a review when the need arises.

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<sup>57</sup> Ibid. at 21-2, Noting that some of the 2012 amendments are still under litigation, Jeremy de Beer, Professor of Law at the University of Ottawa, argued that five-year intervals do not leave enough time to implement new provisions and interpret them in light of existing principles. Mr. de Beer added that frequent parliamentary reviews are resource-intensive and time-consuming, encourage short-sighted legislation, and hinder progress by postponing the resolution of difficult issues to the next review. Howard P. Knopf, Counsel at Maceral & Jarzyna, argued that short-interval, periodic reviews increase the risk that Parliament could react prematurely to technological change and before the market develops solutions of its own.

<sup>58</sup> Ibid. While he believed the current review to be timely, Casey Chisick, Partner at Cassels Brock & Blackwell, maintained that deciding when to review the Act should remain Parliament's prerogative rather than being dictated by statute. Given the lack of publicly available data on the effects of copyright reform, the Intellectual Property Institute of Canada (IPIC) suggested that the Government refrain from making significant amendments to the Act and instead lay down the groundwork for its next mandated review, scheduled in 2022. According to Michael Geist, Professor of Law at the University of Ottawa, the 2016 and 2018 amendments show that Parliament can change the Act whenever appropriate, outside of the review process.

<sup>59</sup> Ibid. at 22-3, Other witnesses argued that Parliament should retain the five-year review process to keep up with technological change, address outstanding issues, and ensure the Act works properly. Barry Sookman, Partner at McCarthy Tétrault, suggested to keep reviewing the Act on a regular basis, but to increase the interval of the reviews in order to allow more time to implement amendments and thoroughly observe their effects. The Screen Composers Guild of Canada (SCGC) suggested reviewing the Act at much shorter intervals than every five years to ensure quick legislative responses to technological changes.

### 6.9.3 Statutory Review: Standing Committee's Recommendations

The Standing Committee, in its report made various significant recommendations; but for our purposes here, most relevant is the Standing Committee's thoughtful articulation of the need to revisit Canada's implementation of the TPM anti-circumvention provisions, and possibly to allow circumvention of TPMs for non-infringing purposes. The Standing Committee reports thus:

The Committee recognizes that the effective use of TPMs remains important in at least some creative industries and that Canada has international obligations in the matter. However, it agrees that the circumvention of TPMs should be allowed for non-infringing purposes, especially given the fact that the Nintendo case provided such a broad interpretation of TPMs. In other words, while anti-circumvention rules should support the use of TPMs to enable the remuneration of rights-holders and prevent copyright infringement, they should generally not prevent someone from committing an act otherwise authorized under the Act. The Committee therefore recommends: Recommendation 19 That the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes.<sup>60</sup>

This recommendation and the accompanying observations support my suggestion above regarding the need to amend the Copyright Act to allow for exceptions to anti-circumvention provisions. If this is eventually incorporated into Canada's Copyright Act, it would not only neutralize the strict application of TPMs and anti-circumvention provisions but foster more user access to content thereby supporting balance in the copyright system.

Furthermore, some text of the Standing Committee's report on recommendations concerning copyright and indigenous matters support my suggestion on advocating for private

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<sup>60</sup> Ibid. at 72.

arrangement/stakeholder-led regulatory initiatives. Though focused on indigenous affairs, which are vitally important in unique ways that stand alone in the Canadian law reform agenda, it is worth pausing to appreciate what this might also and appropriately signal to other categories of copyright stakeholders. Addressing the concerns of the indigenous people and copyright, the Standing Committee recommends:

The Committee recognizes that, in many cases, the Act fails to meet the expectations of Indigenous peoples with respect to the protection, preservation, and dissemination of their cultural expressions. The Committee also recognizes the need to effectively protect traditional arts and cultural expressions in a manner that empowers Indigenous communities, and to ensure that individual Indigenous creators have the same opportunities to fully participate in the Canadian economy as non-Indigenous creators. Achieving these objectives will require that policymakers approach the matter in creative ways. They could, for example, draw inspiration outside of copyright and intellectual property law and carefully consider how different legal traditions, including Indigenous legal traditions, interact with each other. Such work requires a more focused and extensive consultation process than this statutory review.<sup>61</sup>

From the quote above, I wish to emphasize two points. First, the failure of the Act to meet the expectations of the Indigenous people as a particular community with shared interests in the copyright system; and second, the recognized need to find creative solutions outside copyright and intellectual property law. These two points are at the core of stakeholder-led initiatives. The inability of copyright law to satisfactorily address the needs and interests of all stakeholders necessitates the need for different stakeholder blocs to resort to self-help initiatives and to explore outside-the-box solutions. The implementation of a stakeholder-led initiatives requires creative approaches beyond (but not contrary to) copyright law. Once stakeholders, in conformity with existing copyright law can fashion out a way (as CC did with CCL) to serve their interests, it can reduce the need to frequently engage in copyright law reforms while

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<sup>61</sup> Ibid. at 30.

advancing the overarching objectives of the copyright system. However, private arrangements will thrive more, and with more positive results, if copyright law provides an initial level-playing ground and equal recognition for all stakeholders in the copyright system.

## **6.9 Conclusion**

Premised on the preceding analyses, my position is that ICT can be regarded as essentially a regulatory and problem-solving instrument that can be harnessed by copyright stakeholders to advance their own purposes and also—equally—the purposes that animate copyright law. Indeed, my research shows that, in spite of ongoing conflicts and controversies, ICT has already been performing this role in the Canadian copyright system, as exemplified by uses of TPMs and CCL by content industry and free culture stakeholders respectively. Embracing the regulatory pluralism of the modern copyright system in practice is the most promising route toward ensuring the system's ongoing balance and continued relevance into the future. Though this research has focused on copyright from a Canadian context, to some extent it mirrors the reality of copyright in other jurisdictions (particularly common law and commonwealth jurisdictions) and as such, the arguments and recommendations made here may be usefully applied internationally.

In order to properly situate and understand the current copyright challenges in Canada, chapter one of this research traced the contours of the origin of the Statute of Anne of 1710 – the first copyright law. Additionally, the historical analysis of the Statute of Anne would be incomplete without beaming the search light of my examination on the Stationers' Company, who prior to the Statute of Anne, had exclusive (monopoly) right to book publication.

My research drew two major conclusions from chapter one. The first is that copyright is trapped in a vicious circle; and second, that this challenge continues to linger to this day. I make this claim for several reasons. First, in the debates and arguments leading up to the enactment of the Statute of Anne, the meaning and purpose of copyright law was subject to manipulation and misleading arguments, which undoubtedly happens today. Secondly, the characters in this “copyright,” as Blayne Haggart calls it, remain largely the same. On the one hand, the large multinational corporations and individuals with significant market and lobbying power (whom I refer to in this research as the content industry stakeholders) bear the marks of the Stationers’ Company of old; on the other hand, the present day copyright scholars and all those who believe in the free culture ideology play much the same role as John Milton and Daniel Defoe who called for an end to the exclusive monopoly power granted to the Stationers' Company. Additionally, the legislature (unsurprisingly) continues to be a copyright battle ground, just as it was in the period before the enactment of the Statute of Anne, which was characterised by intense lobbying. The judiciary, just as it played a role in post-Statute of Anne cases in limiting the claim by the Stationers’ Company that their common law rights were forever, continues to play the same dialogic role today in defining the purpose of copyright law and articulating the meaning of balance. My submission is that largely the same circle of challenges has been on autopilot from the first copyright law until now, with the content industry maintaining significant control of the copyright industry—and the copyright system more generally. A sudden disruption of the established pattern emerged, however, with the steady rise of digital technology in the 20<sup>th</sup> century.

The impact of the internet and digital innovation in the 20<sup>th</sup> century has been amazing, and it has revolutionized activities almost in every facet of human life. The content industry

stakeholders had significant control in the activities of the copyright industry, at least from the perspective of monetization of creative works. The control was possible because creative works existed mainly in physical form. This enabled them to more readily control access to copies and so enjoy the artificial scarcity manufactured by the copyright system. Access could be restricted to authorized and typically fee-paying users. This business model was relied upon as a source of revenue generation for the content industry stakeholders for centuries.

In chapter two, I traced the transition and development of early forms of copying technologies to its present digital sophistication, which has tremendously altered the copyright industry. The creation and reproduction of works have become much easier, faster and higher quality with the use of ICT; distribution of content no longer requires the traditional and expensive structures and networks that can only be afforded by large corporations with significant physical and financial resources. The sophistication of ICT enables the broad dissemination works as well as easy access to the works. The easy use and manipulability of digital content in this new era also gives more voice to the user and weakens the traditional business model. My evaluations in chapter two address some salient points to explore the reality of the ICT-driven copyright system – the impact of weakening the traditional business, resistance to ICT, the embrace of ICT, and lastly, the recognition that ICT possesses the potential to ensure peaceful co-existence among stakeholders. Following the new wave of empowerment of users and individual creators to create, distribute and access content, there was resistance to ICT from content industry stakeholders claiming that digital technology and the internet would significantly reduce their revenue and discourage further creativity. While this claim may have been born of some genuine and reasonable concerns, it turns out to have been exaggerated. In fact, the opposite turns out to have been the case. The content industry stakeholders saw the

potential in ICT and increasingly, rather than fighting the development of ICT, they use it to explore and create new business models for digitized content.

The point to emphasize in the examination of the impact of ICT in the copyright industry is that, despite the controversies and arguments it has generated, it has proven to be a useful means for both the content industry and free culture stakeholders to achieve their goals. Therefore, ICT undoubtedly has a significant role to play in the future of copyright, especially as an instrument for stakeholders to realize their goals and co-exist.

The emergence of the information age triggered many urgent calls for copyright law reforms. As such, my research then turned to consider the promises and perils of seeking copyright law reform to address perceived ICT challenges. In particular, I explored efforts at the World Intellectual Property Organization (WIPO) to create, towards the turn of the twentieth century, a legal framework to address the challenges and opportunities of copyright in a networked world. As an example of the difficulties inherent in this approach, Chapter Three captured Canada's struggle and fraught attempts to implement the WITs. Prior to the details on Canada's copyright law reform in the digital age, and to properly contextualize Canada's copyright law reform agenda, I examined the triggers behind Canada's copyright law reform in the ICT age – the WITs. In the first part of chapter three, I analyzed how the origin, development, debates/meeting sessions, controversies and politics culminated in the adoption of the WITs, which included the controversial TPMs and anti-circumvention provisions. The second part of chapter three then focused on Canada's implementation of the WITs.

My analysis unearthed three crucial points, which serve to reinforce my position that ICT, if well utilized, has the potential to engender the peaceful and productive co-existence of the free culture and the content industry stakeholders. First, although the main theme in the WITs

was to provide a framework to make copyright law adapt to the new changes brought by digital technology, it turned out to be that the main idea was to limit users' access to digital works by using technology – TPMs – and supporting them through additional legal protections. The United States was a major proponent of this idea and played a pivotal role in the development of the WITs. Consequently, in Canada's implementation of the WITs, the United States intensely lobbied Canada to include the TPMs and anti-circumvention provisions in its copyright law. In summary, through the incorporation of TPMs and anti-circumvention provisions in Canada's copyright law, extra layers of protection for creative works were created to the advantage of the content industry stakeholders. This demonstrates that the instrumentalist approach to copyright apparently has a better chance of influencing the copyright narrative and law reform to their gain and to the potential detriment of the purpose of copyright and the public interest.

Second, the analysis of the development of the WITs and Canada's copyright law reform provided a typical example of how law reform alone is unable to solve the challenges in the copyright system. After a protracted process of copyright law reform in Canada to implement the WITs, the outcome still leaves many stakeholders unsatisfied. In fact, the introduction of anti-circumvention provisions may have done more harm than good, particularly as implemented in the CMA. The introduction of anti-circumvention following the model adopted by Canada and the United States articulates an incomplete narrative about the influence of ICT in copyright – reflecting the notion that it is a threat that needs to be under surveillance and subject to private control in order to contain the damage it may do to content industries and the copyright system.

Third, it took Canada about sixteen years to implement the WITs after a long and exhausting process, which arguably obstructed progress towards the much-needed balance. On the other hand, CCL, though far from perfect, in its almost eighteen years of existence has



created a platform where over 1 billion works have been licensed. Here the value is not just in the number, but in the intangible benefits that flow from granting so many people free access to so many works, which in turn fuels their creativity and innovation and furthers the public interest. In my view, the development and uptake of the CCL is a significant move towards achieving balance in the copyright system. The CCL initiative leverages the power of ICT to enable creators and users achieve their goals in the copyright system without intense lobbying, debating, controversies and arguments. I strongly believe that the realization of some degree of reasonable balance in the copyright system will depend largely on a stakeholder-driven regulation of this nature while leveraging the capacities of ICT. CCL is, in other words, an example, which should inspire other such initiatives.

The inability of copyright law to adequately regulate the activities in the copyright industry both in Canada and globally creates a situation where stakeholders try to adapt and act pragmatically in order to achieve their goals. This may result in the manipulation of the system by stakeholders to suit their interest at the expense of the purpose of copyright and the public interest.

Chapters Four and Five studied how the free culture and the content industry stakeholders have explored the opportunities created by ICT to adapt and achieve their goals in a technology-driven copyright system. The analyses carried out in these chapters reveal how copyright stakeholders could potentially use ICT as a means to achieve their goals through ground-up initiatives and private ordering. Using the CCL and TPM, I examine the free culture and the content industry stakeholders respectively to reveal how they utilized ICT in the pursuit of their goals.

The free culture community, in a bid to promote access to creative works, encourage the dissemination of content, promote learning and creativity, and give creators and users a new way of creative interaction, created the CCL initiative. The Creative Commons Organization, through its licensing idea, leveraged the immense benefits of the ubiquity and accessibility of the internet to achieve its objective as an organization. On the other hand, using a different private-ordering approach—that is, the use of TPMs and anti-circumvention provisions—the content industry stakeholders also claimed to promote the public interest, support creativity and incentivise creators in the copyright system by ensuring a functioning digital content industry.

The central message that emerges out of the arguments and discussions I articulate in chapters four and five is that ICT in the copyright system can be a double-edged sword. Depending on the intention of who is wielding the sword of ICT, it could be used to promote the public interest and work towards balancing the interest of copyright stakeholders, or it could be used by a particular stakeholder(s) to dominate and control the system to the detriment of the public interest, thereby creating imbalance. While the CCL scheme may be flawed in some of its approaches, and far from perfect, in my view, it significantly advances the public interest, promotes access to, and dissemination of content, fosters creativity, promotes balance in the copyright system, enables creators choose how their works are used and encourages transformative use of content. The content industry also plays a significant role in the copyright system, however, through investment in content creation, job creation, generating huge revenues both nationally and internationally through new business models, inspiring creativity, advocating for incentives for creators, etc. All these undoubtedly promote the purposes of the copyright system, save for the intention to control and monopolize the industry.

The incorporation of TPMs and anti-circumvention provisions in Canada's copyright law following an approach that highly restricts users' access to content is a significant setback and demonstrates the continued existence of copyright hegemony. This approach to ICT in the copyright system stifles creativity and is incongruous with the achievement of the purposes of copyright. By unduly limiting access it forecloses certain benefits to users and the public that technology might otherwise afford, and that copyright has traditionally permitted.

I strongly believe that the copyright system is ripe and primed for regulatory pluralism. The internet and digital technology could potentially play a significant role in enabling the pursuit of stakeholder interests while promoting the core purposes of copyright law. This will require recognizing and supporting a variety of regulatory or quasi-regulatory initiatives undertaken in concert by copyright stakeholders with shared values and common objectives. Law reform processes can and must continue to respond to technological developments, however, maintaining the appropriate balance between owner and user rights, protection and access. The current Statutory Review of the Copyright Act presents an opportunity to fix the flaws in Canada's Copyright Act by effecting the necessary amendments to foster balance among copyright stakeholders—beginning with limiting the harmful effects of TPMs and their over-protection. In my view, embracing this kind of regulatory pluralism is the best hope for ensuring that copyright can continue to advance its purposes and the public interest as technologies evolve and stakeholders strategize.

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