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The Theoretical Case Against Criminalized Copyright Infringement in Canada

by

Maria C. Dugas

Submitted in partial fulfillment of the requirements  
for the degree of Master of Laws

at

Dalhousie University  
Halifax, Nova Scotia  
December 2017

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## **Abstract**

Criminalized copyright infringement has existed in Canada for close to a century. It has continued to expand in scope and severity since its first appeared in the *Copyright Act, 1921*. As Canada approaches 2017's scheduled review of the *Copyright Act*, the time has come to ask whether the criminalization of copyright and its enforcement is theoretically justifiable. Yet, Canadian scholarship on criminalized copyright infringement is particularly scarce; there is a noteworthy gap in the existing literature wherein no one has systematically argued against criminalized copyright infringement from a theoretical perspective. This thesis aims to fill that gap, setting out a systematic legal and theoretical argument that criminalized copyright infringement, whether for personal use or financial gain, cannot be theoretically justified. In the absence of theoretical justification, the Government should move to decriminalize copyright enforcement.

## **List of Abbreviations Used**

ACTA	Anti-Counterfeiting Trade Agreement
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
IP	Intellectual Property
ISP	Internet Service Provider
NET Act	No Electronic Theft Act
SCC	Supreme Court of Canada
TPM	Technological Protection Measure
TPP	Trans Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
WIPO	World Intellectual Property Organization

## Acknowledgements

This thesis is not about race; its words show no outside indication that race is, in any way, a factor in its production. And yet, to me, that is the most important part. As an African Nova Scotian woman, I am thankful for my education and the opportunity to pursue an LL.M; an opportunity that, for various intersecting reasons, is often not available to people like me.

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## Chapter 1 - Introduction

Canada has a unique tradition of copyright law.<sup>1</sup> This uniqueness is evident from Canada's early struggles to break from the *Imperial Copyright Act of 1842* and enact its own copyright legislation.<sup>2</sup> The Canadian copyright narrative is inextricably linked to the British Empire; "England is whence the soil from which the Canadian narrative comes."<sup>3</sup> Canada's connectedness to the British Empire, its geographical proximity to the United States, and the influence of international obligations shaped the early development of Canadian Copyright Law, as they continue to shape its present-day development.<sup>4</sup> The molding of Canadian Copyright Law through outside influence can be seen through the criminalization of copyright infringement and the continual increase of associated conduct and penalties.<sup>5</sup>

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<sup>1</sup> See e.g. Meera Nair, "The Copyright Act of 1889: A Canadian Declaration of Independence" (2009) 90:1 *The Canadian Historical Review* 1 ["Canadian Declaration"].

<sup>2</sup> *Ibid* at 2. See also 22-23. The British Empire resisted this move toward an independent Canadian copyright regime for two predominant reasons: first, they were concerned about the impact it would have on their attempts to negotiate an Anglo-American copyright agreement. Second, they believe that because Canada was a signatory of the Berne Convention, there was no need to enact independent legislation.

<sup>3</sup> Daniel Gervais, "A Canadian Copyright Narrative" (2008) 11:5-6 *Journal of World Intellectual Property* 432.

<sup>4</sup> Nair, "Declaration of Independence," *supra* note 1. For modern influence, see e.g. Miriam Bitton, "Rethinking The Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures" (2012) 102:1 *J Crim L & Criminology* 67 ["Rethinking ACTA"]. Bitton discusses how ACTA "mimics the U.S. approach" for criminalizing copyright law. Canada signed ACTA in 2011. Canada also signed and ratified TRIPS, the first international agreement with enforcement measures against intellectual property infringement. See also, David Vaver, "Opinion: Harmless Copying" (2012) 25:1 *IPJ* 19 at 21 ["Harmless Copying"], referring to W Hayhurst, "Intellectual Property Laws of Canada: The British Tradition, the American Influence and the French Factor" (1996) 10 *IPJ* 265 ["Canadian IP Laws"]: "Canada has usually looked for inspiration for its intellectual property reforms to the United States for reasons of proximity and competitiveness, and to Europe for reasons of tradition and culture."

<sup>5</sup> The criminal copyright provisions are codified in the *Copyright Act*, RSC 1985, c C-42, ss 42(1.1), (2.1) [Copyright Act]; they are not in the *Criminal Code* RSC 1985, c C-46. Typically this would mean that the provisions are regulatory in nature, not true crimes. However, criminalized infringement is called a "Criminal Remedy" in the *Copyright Act*, and it meets the Criminal Law requirements pursuant to Constitutional principles and the division of powers: it is a public purpose, backed by a prohibition and penalty. See e.g. *Reference Re Validity of Section 5(a) of The Dairy Industry Act* [1949] SCR 1, at 49 – 50,



As the Government moves into the next wave of copyright reforms scheduled to begin in November 2017, it is important for Canada to continue to adopt its own copyright narrative and break from American and European influences.<sup>6</sup> One way for Canada to achieve this objective is to buck an historical trend and instead move to decriminalize the copyright regime.

## **1. Historical Context & the Trend Towards Criminalized Infringement**

Although criminal copyright provisions have existed in Canada for close to a century, they have played a minimal if almost non-existent role in the copyright regime until recently.<sup>7</sup> The increase in importance of criminalized copyright infringement is largely due to digitization, the internet, and the threats they pose to copyright protection and enforcement.<sup>8</sup> Together, digitization and the internet allow for (almost) simultaneous

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1 DLR 433: “A crime is an act which the law, with appropriate penal sanctions, forbids.” See e.g. Canada, Royal Canadian Mounted Police, *2012 Intellectual Property (IP) Crime Statistics* (Ottawa: Government of Canada, 2013) online: <www.rcmp-grc.gc.ca> [*RCMP Report*], where the RCMP refers to “copyrighted works” in their statistical report on Intellectual Property crimes. Sections 42(1.1) and (2.1) are also referred to as criminal provisions by copyright scholars, see e.g. See e.g. Steven Penney, “Crime, Copyright, and the Digital Age” in Law Commission of Canada ed, *What is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press 2004) at 62, discussing the history of “criminal punishments for copyright infringement.”

<sup>6</sup> See Daniel Gervais, “Canadian Copyright Narrative,” *supra* note 3; David Vaver, “Opinion: Harmless Copying,” *supra* note 4 at 21 – 22. Referring to the need to amend the *Copyright Act* to better accommodate Users rights, “...there is more in heaven and earth than is dream of in these American- or European-inspired philosophies.”

<sup>7</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 62, note 3. The *Copyright Act* SC 1921 c 24 [*Copyright Act, 1921*] contained criminal penalties enforced by way or summary conviction.

<sup>8</sup> Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 66, 67: “Digitization weakens the material and legal barriers to copyright infringement.” Penney also notes that civil enforcement may not be sufficient in the digital world because non-commercial infringers are unlikely to have insufficient assets to satisfy a civil judgment. Other scholars make similar arguments. See e.g. Irina D Manta, “The Puzzle of Criminal Sanctions for Intellectual Property Infringement”(20011) 42:2 Harv JL & Tech 469 [“Puzzle of Criminal Sanctions”] at 503, noting copyright infringers often “do not have deep-pockets;” Christopher Buccafusco & Jonathan S Masur, “Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law” (2014) 87 S Cal L Rev 275 [“Innovation and Incarceration”] at 306 discussing “judgment proof” defendants. Deterrence also plays a role in the shift from civil to criminal sanctions. This argument is premised on the fact that civil remedies are insufficient to deter infringement. See e.g. Trotter

reproduction and dissemination of copyright protected content.<sup>9</sup> This has induced “copyright panic,” and a global push toward “Copyright Protectionism.”<sup>10</sup>

Copyright protectionism has many manifestations, all of which are significant intrusions on user rights, which are rights held by the public to use copyright protected content without needing to worry about copyright infringement.<sup>11</sup> Bartholemew & Tehranian have argued that copyright protectionism is partially responsible for the “secondary liability revolution.”<sup>12</sup> It is also responsible for the considerable and continued expansion of author’s<sup>13</sup> rights.<sup>14</sup> Copyright now protects so much content that only the “truly trivial or mechanical... goes unprotected.”<sup>15</sup> In fact, all that is required to attract copyright protection is an exercise of “skill and judgment.”<sup>16</sup> The *Copyright Act* has also expanded to protect against actions that may not amount to infringement by

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Hardy, “Criminal Copyright Infringement” (2002) 11:1 Wm & Mary Bill Rts J 305 at 312; Manta, “Puzzle of Criminal Sanctions,” *supra* note \_\_\_\_\_ at 503.

<sup>9</sup> See e.g. Penney, “Crime, Copyright and the Digital Age,” *supra* note 5 at 66.

<sup>10</sup> Mark Bartholomew & John Tehranian, “The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law” (2006) 21 Berkely Tech LJ 1363, at 1403 [“Secret Life”]. *Agreement on trade-related aspects of intellectual property rights*, 15 April 1994, BTS 10 (1996) (entered into force 1 January 1995) [*TRIPS*], the *Anti-Counterfeiting Trade Agreement*, 1 October 2011 (not yet in force) [*ACTA*], and other International Treaties (some of which are addressed in Chapter 6) are evidence of international protectionism.

<sup>11</sup> See e.g. David Vaver, *Intellectual Property Law*, 2nd Ed (Toronto: Irwin Law Inc, 2011), at 215–57.

<sup>12</sup> Bartholemew & Tehranian, “Secret Life,” *supra* note 10 at 1364, 1366, 1403 – 1405. Secondary liability is the “imposition of liability on a defendant who did not directly commit the violation at issue.” As applied to copyright infringement, secondary liability typically refers to lawsuits against Internet Service Providers, Network Operators and Software Providers for the copyright infringing actions of their users. *MGM Studios v Grokster*, 545 US 913 (2005) and *A&M v Napster*, 239 F3d 1004 (2001) are examples of secondary liability cases.

<sup>13</sup> I have used “authors” throughout this Thesis to refer to the people who create copyright protected content and are typical the beneficiaries of copyright protection. However this is an oversimplification. Large Movie and Music companies are often the owners of copyright protected content, not the artists or authors. Additionally, in work place settings, employers own copyrights, not authors. Any reference to author should be taken to also include a reference to copyright owners.

<sup>14</sup> See e.g. David Vaver, “Harmless Copying,” *supra* note 4. Vaver argues that copyright have continued to expand since the *Statute of Anne*, *Copyright Act, 1710* 8 Ann c 21 [*Statute of Anne*].

<sup>15</sup> *Ibid* at 20.

<sup>16</sup> See e.g. *CCH Canada v Law Society of Upper Canada*, 2004 SCC 13 at 16, 1 SCR 339.

prohibiting the circumvention of Technological Protection Measures (TPMs).<sup>17</sup> The anti-circumvention provisions leave no room to consider whether the TPM's were circumvented for the purpose of lawfully using the copyright protected content. In some circumstances, it is possible that the content being protected by a TPM does not warrant copyright protection; yet circumventing the TMP to access this content is nevertheless prohibited.

Subjecting copyright infringement to criminal sanction is a significant component of copyright protectionism. In Canada, criminalized copyright infringement has continued to expand in scope and severity since its first appeared in the *Copyright Act, 1921*.<sup>18</sup> The *Act* initially contained summary conviction offences punishable by a maximum fine of \$200 per transaction for a first offence, and up to two months imprisonment “with or without hard labour” for a subsequent offences.<sup>19</sup> Through a series of amendments spanning close to a century, the *Copyright Act* now contains significantly more severe penalties. Offenders are liable on summary conviction to a fine up to \$25,000, imprisonment for a term up to six months, or both.<sup>20</sup> Offenders are liable on indictment to a fine up to \$1,000,000, imprisonment for a term up to five years, or both.<sup>21</sup>

## **2. Identifying a Gap: The Need for a Systemic Theoretical Argument Against Criminalized Copyright Infringement**

As Canada approaches 2017's scheduled review of the *Copyright Act*, the time has come to ask whether the criminalization of copyright and its enforcement is

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<sup>17</sup> See *Copyright Act, 1985 supra* note 5, s 41.1.

<sup>18</sup> *Copyright Act, 1921, supra* note 7.

<sup>19</sup> *Ibid* at s 24(1).

<sup>20</sup> *Copyright Act, 1985, supra* note 5 at s 41(2.1)(b).

<sup>21</sup> *Ibid* at s 41(2.1)(a).

theoretically justifiable. Asking this question is important because these copyright reforms typically result in further expansion of criminal liability,<sup>22</sup> and the copyright regime is currently failing to achieve its objective of incentivizing creation and ensuring access to information by over-protecting authors rights.<sup>23</sup> It is also important to ask this question given the growing pressure to increase criminalization and police copyright infringement from outside influences, and the far-reaching international implications of criminalized infringement.<sup>24</sup> In our increasingly interconnected world, it is possible to infringe upon the works of creators in different jurisdictions. As a result of extradition agreements and international treaties, there is a possibility that alleged infringers could be subject to extradition to face charges of criminal copyright infringement, which further exacerbates the costs of criminalization both to the alleged offender and the prosecuting jurisdiction.<sup>25</sup>

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<sup>22</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 63, note 10; David W Scott QC & Timothy Collins, “Criminal Copyright Offences: The Defence Perspective: Part I: Copyright Offences Under the Copyright Act and the Criminal Code” 1995 38 Crim LQ 104 [“Part I”]. At 105 – 106 discuss the 1988 copyright revisions, the reports and documents considered during the revision, and note that the criminal provisions of the copyright act were strengthened following that process.

<sup>23</sup> See generally, Daniel Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5:1&2 University of Ottawa Law & Technology Journal 1 [“Making Copyright Whole”]; David Vaver, “Creating a Fair Intellectual Property System for the 21<sup>st</sup> Century” (2001) 10:1 Otago L Rev 1 [“Creating Fair IP”]; Vaver, “Harmless Copying,” *supra* note 4.

<sup>24</sup> See e.g. Josh Rubin, “Canadians using illegal software less and less” *The Star* (12 May 2011), online: <www.stestar.com>. The United States continues to put Canada on their Piracy “Priority Watch List,” despite a decline in software piracy rates, and despite Canada having one of the lowest piracy rates in the world. The U.S. is urging Canada to ratify the WIPO treaty and has “called for stricter border enforcement and heavier penalties for copyright law violators, including jail time.”

<sup>25</sup> See e.g. *USA v Dotcom et al*, 23 December 2015 District Court at North Shore, CRI -2012-092-001647 [unreported decision] [*Dotcom*]. This matter has been ongoing since 2012 and has yet to be heard on the merits. In 2012 New Zealand police arrested Kim Dotcom on charges stemming from the United States (charges include: conspiracy to commit racketeering; conspiracy to commit copyright infringement; conspiracy to launder monetary instruments; multiple counts of criminal copyright infringement; multiple counts of aiding and abetting criminal copyright infringement; fraud by wire; and, aiding and abetting fraud by wire). Dotcom has challenged his extradition to the United States. In 2015, Dotcom was found eligible for surrender to the United States on all 13 counts charges. Dotcom appealed this decision to the High Court in 2016. On February 19, 2017, The High Court ruled that Dotcom could be extradited to the United

Yet, Canadian scholarship on criminalized copyright infringement is particularly scarce, with Steven Penney and David Vaver the two predominant scholars on point. In 2004 Steven Penney explored and evaluated the criminalized infringement landscape in Canada and the United States.<sup>26</sup> Penney acknowledged that any criminalization of copyright infringement should be “scrutinized” through both Criminal Law and Copyright Law lenses.<sup>27</sup> However despite concluding that there is no societal consensus that copyright infringement is immoral – one of Criminal Legal Theory’s justification requirements – he nevertheless chose not to argue against criminalized infringement.

Similarly, and perhaps even more surprisingly, renowned copyright scholar David Vaver has not taken a definitive stand against criminalized infringement. Vaver’s work is heavily grounded in Copyright Legal Theory. He has continually argued that Canadian copyright regime is unbalanced due to the continual expansion of creator’s rights and diminution of users rights.<sup>28</sup> He has even gone so far as to call criminal copyright sanctions “draconian,”<sup>29</sup> and the severity of enforcement “particularly troublesome.”<sup>30</sup>

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States. Dotcom plans to appeal the extradition order. See e.g. Elenor Ainge Roy, “Kim Dotcom extradition to US can go ahead, New Zealand high court rules” *The Guardian* (20 February 2017), online: <<https://www.theguardian.com/world/2017/feb/20/kim-dotcom-eligible-for-extradition-to-us-new-zealand-high-court-rules>>. In addition to the extradition hearings, there were various interim applications in both New Zealand and the United States where Dotcom challenged the lawfulness of the police raid of his home, and his arrest, the seizure of his assets, and sought stays of proceedings against him. See e.g. Chris Tognotti, “Kim Dotcom’s 2012 asset seizure upheld by U.S. appeals court, appeal hearing set for Aug. 29” *Daily Dot* (14 August 2016) online: <[www.dailydot.com](http://www.dailydot.com)>; Rachel Weiner, “Kim Dotcom loses appeal to keep millions” *Washington Post* (August 12, 2016) online: <[www.washingtonpost.com](http://www.washingtonpost.com)>.

<sup>26</sup> Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5.

<sup>27</sup> *Ibid* at 68.

<sup>28</sup> David Vaver, “Harmless Copying,” *supra* note 4 at 19 – 28. See also, Vaver, “Creating Fair IP,” *supra* note 23 at 8 – 11.

<sup>29</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 673.

<sup>30</sup> David Vaver, “Harold G Fox Intellectual Property Lecture for 2012: Intellectual Property: Is It Still A “Bargain”?” (2012) 24:2 IPJ 143 at 156 [“Is IP Still a Bargain”].

Yet he has not explicitly argued against criminalized infringement, nor undertaken a deeper or more comprehensive theoretical or legal analysis.

Other Canadian authorities and scholars have also failed to undertake such an analysis. Keys and Brunet<sup>31</sup> and the Sub-Committee on the Revision of Copyright<sup>32</sup> were divided during the 1985 copyright review process. While Keys and Brunet argued for the abolition of summary conviction offences,<sup>33</sup> the Sub-Committee argued that the full force of the criminal law should protect copyrights.<sup>34</sup> Neither Keys and Brunet, nor the Sub-Committee recognized the need to ground their work in legal theory, and therefore failed to analyze criminalized infringement from a systematic theoretical perspective. Similarly, Alan Young,<sup>35</sup> and Scott & Collins<sup>36</sup> discussed criminalized infringement from a practical perspective. They both argued against criminalized infringement, though their work was substantially doctrinal rather than theoretical.

In the United States there has been a broader discussion of criminalized copyright infringement. Yet, the American scholars as a group have not argued against criminalized copyright infringement from a systematic theoretical perspective, similarly to Canadians. American scholars can be divided into two groups: (1) skeptics: who have argued for a degree of restraint, either by not increasing penalties, or limiting criminal sanctions to

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<sup>31</sup> A A Keyes & C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Supply and Services Canada, 1985) [*Copyright in Canada*].

<sup>32</sup> Canada, House of Commons, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators* (October 1985) (Chair: Gabriel Fontaine, MP) [*Charter of Rights*].

<sup>33</sup> Keys & C Brunet, *Copyright in Canada*, *supra* note 31 at 185.

<sup>34</sup> Sub-Committee, *Charter of Rights*, *supra* note 32 at 97.

<sup>35</sup> Alan Young, “Catching Copyright Criminals: *R v Miles of Music Ltd.*” (1990) 5 IPJ 257 [*Catching Copyright Criminals*].

<sup>36</sup> Scott & Collins, Part 1, *supra* note 22; “Criminal Copyright Offences: The Defence Perspective: Part II: Statutory Presumptions and Defences in Criminal Copyright Prosecutions” 1995 38 Crim LQ 158 [“Part II”].

infringement on a commercial scale, and not personal use infringement;<sup>37</sup> and (2) expansionists: who have argued in favour of criminalized copyright infringement, and increasing criminal liability.<sup>38</sup>

Irina D Manta,<sup>39</sup> Geraldine Szott Moohr<sup>40</sup> and the other skeptics have utilized legal theory to an extent in their work. As a group Skeptics have been critical of enforcing copyrights through the Criminal Law. They tend to argue that criminalization is either unjustified, or the associated penalties should not be increased. In certain circumstances, skeptics were prepared to accept that criminalized infringement might be appropriate.

Conversely, Trotter Hardy,<sup>41</sup> Michael M. DuBose,<sup>42</sup> and the Task Force on Intellectual Property<sup>43</sup> fully embraced criminalized copyright infringement. They have not only argued that it is appropriate and necessary to protect creators rights, but they have also argued that increased criminalization is necessary to deter potential infringers.

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<sup>37</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5; Manta, “Puzzle of Criminal Sanctions,” *supra* note 8; Geraldine Szott Moohr, “The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory” (2009) 83 BUL Rev 731 [“Crime of Copyright Infringement”], “Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws” (2005) 54 Am U L Rev 783 [“Defining Overcriminalization”]; Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8; Eric Goldman, “A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement” (2003) 82 Or L Rev 369 [“Road to No Warez”].

<sup>38</sup> See e.g. Hardy, “Criminal Copyright Infringement,” *supra* note 8; Miriam Bitton, “Rethinking ACTA,” *supra* note 4 at 115, arguing that governments should consider adopting lower copyright protection thresholds, among other, non-criminalization based approaches; Michael M DuBose, “Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century” (2006) 29 Colum JL & Arts 481 [“Criminal Enforcement of IP”]; US, Department of Justice, *Progress Report of the Department of Justice’s Task Force on Intellectual Property* (Washington, DC: Department of Justice, 2006) [“Progress Report”]; *Report of the Department of Justice’s Task Force on Intellectual Property* (Washington DC: Department of Justice, 2004) [“Report”].

<sup>39</sup> Irina D Manta, “Puzzle of Criminal Sanctions,” *supra* note 8.

<sup>40</sup> Geraldine Szott Moohr, “Defining Overcriminalization,” *supra* note 37, “Crime of Copyright Infringement,” *supra* note 37.

<sup>41</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8.

<sup>42</sup> Michael M DuBose, “Criminal Enforcement of IP,” *supra* note 38.

<sup>43</sup> Task Force, *Report*, *supra* note 38; *Progress Report*, *supra* note 38.

The exceptionists have usually invoked “theft” and “piracy” discourse when referring to copyright infringement, arguably in an attempt to invoke society’s instinctual response that the activity is wrong, and copyright “thieves” should be despised.<sup>44</sup>

In short, there is a noteworthy gap in the existing literature wherein no one has systematically argued against criminalized copyright infringement from a theoretical perspective. This thesis aims to fill that gap, setting out a systematic legal and theoretical argument that criminalized copyright infringement, whether for personal use or financial gain, cannot be theoretically justified. I conduct a systematic theoretical analysis of criminalized copyright infringement. I argue against criminalization from the perspective of Criminal Legal Theory, Law and Economic Theory and Property Theory; and argue in favour of non-criminal enforcement from the perspective of Copyright Legal Theory and *Charter* values. This theoretical analysis of criminalized enforcement is necessary to understand why the regime should be decriminalized. It not only focuses the discussion on what the current law is and what it ought to be, but it also anchors the discussion to the Canadian justifications for treating conduct as criminal, in a manner that is reflective of our fundamental values as a country. As will be seen in more detail in Chapter 2, this perspective is missing from the current North American legal scholarship on this topic. Overall, this work is located at the intersection of Criminal and Copyright Law. Methodologically, I employ a systematic theoretical, doctrinal, and policy-based

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<sup>44</sup> See e.g. Patricia Loughlan “‘You Wouldn’t Steal a Car’: Intellectual Property and the Language of Theft” (2008) 29:10 Eur IP Rev 401 at 407 [“You Wouldn’t Steal”].



approach to analyze criminalized infringement through multiple lenses, and ultimately to suggest potential reforms to the *Copyright Act*.

### **3. Thesis Structure and Outline**

In Chapter 2 I summarize necessary background information for criminalized copyright infringement in Canada and the United States. I provide a literature review of Canadian and American scholarship on criminalized infringement and outline how Criminal Legal Theory, Law and Economic Theory, Property Theory and Copyright Theory have been levied to justify criminalized infringement.

In Chapter 3 I begin to disassemble the theoretical case for criminalized infringement. I argue that criminalized infringement cannot be justified by Criminal Legal Theory because it is neither morally wrong, nor causes sufficient harm to warrant criminalization. With respect to harm, I also adopt a Law and Economic Theory perspective to conduct a cost-benefit analysis of criminalized infringement's deterrent value. This highlights how criminalized infringement is more harmful than beneficial, undermining the deterrence justification for criminalization. I conclude by arguing that the Doctrine of Restraint advocates against criminalization because it is not an "unavoidable necessity."

In Chapter 4 I argue against the Property Theory of copyright. Property Theory arguably justifies criminalization on the basis that copyrights are property and infringement is therefore akin to theft. Although this is an effective rhetorical strategy, it is not theoretically valid. Property Theory cannot justify criminalized copyright enforcement. Copyrights are not property; they are legal rights that exist in opposition to

user rights. Even if we accept a property theory of copyrights, copyright infringement is not theft. Copying intangible property is fundamentally different than taking tangible property. Because intangible property is non-rivalrous, it does not require the same degree of protection as tangible property. The Property Theory justification for criminalization is also circular, assuming rather than proving that copyright is property.

In Chapter 5 I shift perspectives and begin to make a positive case for non-criminal copyright enforcement. Applying a Copyright Legal Theory lens, I argue that non-criminal enforcement is consistent with the *Copyright Act's* dual-objectives to incentivize creation and ensure public access to information. The copyright regime is justified by Balance Theory, which advocates that both authors and users rights must be liberally interpreted to ensure both group's rights are adequately protected. Non-criminal enforcement mechanisms, such as the Notice-and-Notice regime, TPMs and Blockchain Technology, are capable of effectively enforcing copyrights in a way that respects the need to balance users' and authors' rights. In this Chapter I also argue that non-criminal copyright enforcement is more consistent with *Charter* values than criminalized enforcement. I focus particularly on section 1, and the minimal impairment requirement.

Finally, in Chapter 6 I re-iterate that Criminal Legal Theory, Law and Economic Theory, and Property Theory cannot justify criminalized copyright infringement, and that non-criminal copyright enforcement is consistent with both Copyright Legal Theory and the *Charter*. I then discuss the important implications of this conclusion. Ideally the Canadian Government should move to decriminalize copyright infringement during the 2017 *Copyright Act* review process. Every effort should be made to step-out of

international provisions that require criminalized enforcement. If this is not possible given Canada's international obligations, then the Government should at the very least avoid further criminalizing copyright infringement. This will require the Government to refrain from entering into international treaties and obligations that require criminal copyright provisions, and refrain from expanding the existing provisions and applicable penalties. While this approach may be inconsistent with the global trend towards further criminalization it is consistent with Canadian values, and in keeping with our push to develop a uniquely Canadian *Copyright Act*.

## **Chapter 2 – Legal Scholarship & the Theoretical Justifications for Criminalized Copyright Enforcement**

In this Chapter I lay the foundation for understanding the trend toward increased criminalization in Canada and the U.S. I accomplish this objective in four parts. In Parts 1 and 2 I conduct a literature review of the prominent Canadian and American scholars who have addressed the issue of copyright infringement. This review seeks to expose a gap in the literature, wherein no other scholars have definitively argued against criminal copyright infringement, for personal use or commercial gain, from a systematic theoretical perspective.<sup>45</sup> A theoretical perspective is necessary because it poses and seeks to answer important questions about the law, including: what is the nature and function of the law, and why and when is the law valid?<sup>46</sup> The answers to these questions guide the discussion of what criminal copyright infringement is, what it seeks to achieve, and whether it reflects our societal values. Theory, then, provides a unified story to understand the nature and functions of criminal copyright law. This architecture is necessary to both critique and support criminalized infringement from an informed perspective.

I begin the discussion of Canadian scholars in Part 1 with Stephen Penney, who canvassed the issue of criminalized copyright infringement in 2004.<sup>47</sup> Penney's description of the history of criminal copyright provisions in Canada and the U.S. is helpful, as is his discussion of the moral ambiguity of copyright infringement. However

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<sup>45</sup> I focus on Criminal Legal Theory, Law and Economic Theory, Property Theory, and Copyright Theory, as they are the four theories commonly used to justify criminalized copyright infringement.

<sup>46</sup> See e.g. Terry Eagleton, *The Significance of Theory* (USA: Blackwell, 1990) at 24 – 25.

<sup>47</sup> Steven Penney, "Crime, Copyright, and the Digital Age," *supra* note 5.

Penney's analysis is problematic and incomplete. Now only was he unwilling to definitively argue against criminalized copyright infringement despite acknowledging that it likely fails to meet the morality requirements of Criminal Legal Theory, he also did not consider other theories that potentially support criminalization.

I move from Penney to notable copyright authority, David Vaver. Vaver is very critical of the copyright regime in Canada, but he has not taken his criticisms to the ultimate conclusion with respect to criminalized copyright infringement; he has gone to the precipice, but has not taken the final step to argue against criminalization. Vaver has been vocal about the need to reform the copyright regime and to lessen the scope and length of copyright protection. From this I infer he is against criminal penalties, but he has not been explicit about this, nor has he argued against criminalization from a theoretical perspective.

In this Part I also discuss various sources pertaining to the 1985 *Copyright Act* revision process. Although the *Copyright Act* was amended many times since its inception in 1921, it was revised for the first time in 1985. Leading up to this revision, parties spoke out in favour of both users' and authors' rights, often pitting them against each other. A. A. Keys & C. Brunet argued to abolish criminal penalties for copyright infringement,<sup>48</sup> while the Sub-Committee on the Revision of Copyright argued to expand them.<sup>49</sup> Surprisingly, neither Keys & Brunet, nor the Sub-Committee provided any theoretical support for their arguments despite suggesting significant reforms to the copyright regime.

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<sup>48</sup> A A Keyes & C Brunet, *Copyright in Canada*, *supra* note 31 at 185 – 187.

<sup>49</sup> Sub-Committee, *Charter of Rights*, *supra* note 32.

Finally in this Part I discuss two sources that address criminal copyright infringement in practice. Alan Young conducted a case study of *Miles of Music*, a 1990 criminal case involving a company that creates compilation CD's for D.J.'s.<sup>50</sup> Young's work reads more as a doctrinal analysis of abuse of process, rather than a theoretical argument against criminalized copyright infringement. Similarly, defence attorneys David W. Scott, Q.C. and Timothy Collins' article also engages in a doctrinal analysis.<sup>51</sup> They discussed what elements are necessary to ground a criminal conviction for copyright infringement and subject the criminal provisions to a constitutional analysis. Both Young, and Scott & Collins, argued against criminalized infringement, but they only minimally engaged with legal theories to support their conclusions.

In Part 2, I move into a discussion of American scholars, who I divide into two groups: skeptics and expansionists. Irina D. Manta<sup>52</sup> and Geraldine Szott Moohr<sup>53</sup> lead the American skeptics. They are comfortable with criminalized infringement in limited circumstances, specifically for commercial gain, and do not believe that it should be further expanded. While they have relied on some legal theory to support their arguments, they have not engaged in a systematic theoretical analysis that addresses the main theories used to justify criminalization, nor have they argued against all forms of criminalization, whether for personal use or commercial gain. In this section I also discuss Christopher Buccafusco & Jonathan Masur,<sup>54</sup> and Eric Goldman.<sup>55</sup> These scholars

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<sup>50</sup> Young, "Catching Copyright Criminals," *supra* note 35.

<sup>51</sup> Scott & Collins, "Part I," *supra* note 22.

<sup>52</sup> Manta, "Puzzle of Criminal Sanctions," *supra* note 8.

<sup>53</sup> Moohr, "Defining Overcriminalization," *supra* note 37, "Crime of Copyright Infringement," *supra* note 37.

<sup>54</sup> Buccafusco & Masur, "Innovation and Incarceration," *supra* note 8.

have invoked legal theory to a lesser extent than Manta and Moohr. Buccafusco & Masur's work is (almost) exclusively set in Law and Economic Theory, while Goldman's work is more doctrinal than theoretical. Similarly to Manta and Moohr, they do not systematically argue against all forms of criminalization from a theoretical perspective.

Michael DuBose<sup>56</sup> and Trotter Hardy<sup>57</sup> lead the expansionists. They have not only argued that criminalized copyright infringement is justified, but they have also argued that the scope and penalties of criminal liability need to be increased.<sup>58</sup> Both Hardy and DuBose's works are theoretically incomplete. Hardy relied heavily on Law and Economic Theory, but did not support his assumption that increased criminalization necessarily leads to increased deterrence.<sup>59</sup> He also attempted to explain away conclusions that do not support his claim that Criminal Legal Theory justifies criminalization.<sup>60</sup> DuBose's work is incomplete insofar as it is noticeable lacking any theoretical analysis, and heavily dependent on fear-inducing rhetoric.<sup>61</sup>

In this section I also discuss the Department of Justice's Task Force on Intellectual Property,<sup>62</sup> and Grimm, Guzzi & Rupp.<sup>63</sup> While the Task Force blatantly argued for increased criminalization, Grimm et al only acknowledged the existence of

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<sup>55</sup> Eric Goldman, "Road to No Warez," *supra* note 37.

<sup>56</sup> DuBose, "Criminal Enforcement of IP," *supra* note 38.

<sup>57</sup> Hardy, "Criminal Copyright Infringement," *supra* note 8.

<sup>58</sup> See generally, Dubose, "Criminal Enforcement of IP," *supra* note 38; Hardy, "Criminal Copyright Infringement," *supra* note 8.

<sup>59</sup> Hardy, *ibid*.

<sup>60</sup> *Ibid* at 332 – 39.

<sup>61</sup> DuBose, "Criminal Enforcement of IP," *supra* note 38 at 482, 484, 485 – 86.

<sup>62</sup> Task Force, *Report*, *supra* note 38.

<sup>63</sup> John Grimm, Stephen Guzzi & Kathleen Rupp, "Intellectual Property Crimes" (2010) 47:2 Am Crim L Rev 741 ["IP Crimes"].

criminalization as a response to increased intellectual property “theft.”<sup>64</sup> This is arguably acceptable from Grimm et al given the objective of their work was a summary of Intellectual Property Law. However, this oversight, or blatant disregard, for legal theory to justify increased criminalization by the Task Force undermines the integrity of their work. As a group, the American Expansionists have not only argued in favour of criminalization and increased penalties, but they have not expressly or thoroughly invoked legal theory to justify their arguments.

In Part 3 I briefly define and discuss the four predominant legal theories that have been levied to justify criminal copyright infringement. First, Criminal Legal Theory arguably justifies criminalization on the basis that copyright infringement is immoral and causes harm to copyright owners through lost revenue, and harm to society through lost incentive to create. Second, Law and Economic theory arguably justifies criminalization on the basis that criminal penalties are better suited than civil liability to deter potential infringers. Third, Property Theory arguably justifies criminalization by analogy. Because tangible and intangible properties are analogous, and there is social consensus that taking tangible property is a crime, copyright infringement should also be criminalized. Finally, Copyright Theory arguable justifies criminalization on the basis that copyrights need stronger protection due to digital technologies enabling large-scale copyright infringement.

In Part 4 I provide a summary of this Chapter and a road map for the remainder of this thesis. In subsequent chapters I systematically set out each theory, explain how it has

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<sup>64</sup> *Ibid.*



been interpreted to support criminalization, and ultimately know each justification down. I also argue that Copyright Legal Theory and *Charter* values actually support non-criminalized enforcement. This process will show that criminalized copyright infringement is theoretically unsound. In the absence of sustainable theoretical justification, the Canadian Government has no grounds to criminalize copyright infringement and should therefore take necessary steps to decriminalize the copyright regime. Decriminalization is a step away from copyright conformity with the United States and Britain, upon whom much of Canadian copyright legislation and policy is based. But Canada has been attempting to enact its own copyright legislation for more than a century.<sup>65</sup> The Government should see decriminalization as reforming the *Copyright Act* to more accurately reflect Canadian culture and values. I conclude by explaining the steps the Government should take to decriminalize copyright infringement in Canada.

### **1. Canadian Legal Scholarship**

Very few Canadian scholars and practitioners have discussed the use of criminal law to enforce copyright infringement. Those who have written about criminal copyright infringement have stated that it is unnecessary, inappropriate, or draconian; that it should be used with restraint; or that the associated penalties should be increased. These critiques have minimal theoretical foundations. While Criminal Legal Theory, Property Theory, Law and Economic Theory and Copyright Theory are all relevant to the discussion of criminalized copyright infringement, as I will explain in this part, the

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<sup>65</sup> See generally, Nair, “Canadian Declaration,” *supra* note 1.

Canadian Scholars do not (to varying degrees) consider and apply these theories in their respective arguments.

In 2014, Professor Steven Penney set out to “describe and evaluate efforts to criminalize copyright law in the digital era.”<sup>66</sup> To accomplish this objective, Penney began by tracing the history of criminal copyright infringement in Canada and the United States, and explaining how digitization “weakens the material and legal barriers to copyright infringement.”<sup>67</sup> From there, Penney shifted into an analysis of whether copyright infringement warrants criminal punishment. He first defined crime as “a publicly-enforced legal wrong punishable by sanctions that include the possibility of imprisonment,”<sup>68</sup> before subjecting it to a normative theoretical analysis.

Penney assessed criminal copyright infringement from both a moral and economic perspective.<sup>69</sup> From a moral perspective, Penney considered whether copyright infringement is inherently wrong. He queried whether copyright infringement was culpable by analogy to “uncontroversially criminal” behaviour like theft of ordinary property,<sup>70</sup> whether there is societal consensus that copyright infringement is culpable,<sup>71</sup> and whether it is culpable because it causes harm.<sup>72</sup> He concluded that the moral approach did not demonstrate that “criminalizing infringement is itself morally

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<sup>66</sup> Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 61.

<sup>67</sup> *Ibid* at 66 – 68. This weakening of copyright protection gives rise to two responses: a minimalist response, which argues that digitization should not lead to stricter copyright protection; and a maximalist response, which argues that copyright protections need to be strengthened to achieve the objectives of the copyright regime.

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

<sup>69</sup> *Ibid* at 42 – 80.

<sup>70</sup> *Ibid* at 69 – 71.

<sup>71</sup> *Ibid* at 71 – 72.

<sup>72</sup> *Ibid* at 72 – 74.

unjustifiable.”<sup>73</sup> From an economic perspective, Penney evoked a traditional approach to Economic Theory to question whether criminalization is necessary for optimal deterrence. He considered the negative effects of the Government imposing punishments that are “out of proportion with social norms,” including increased criminality and reduced deterrent value;<sup>74</sup> and the need for “stiff penalties” to compensate for low detection rates.<sup>75</sup> He concluded that criminalizing commercial infringement accords with economic criminalization theory, while criminalizing non-commercial infringement is problematic.<sup>76</sup>

Ultimately, Penney did not take a definitive stand on whether copyright infringement should be criminalized. Although his introduction suggested that he “concludes by recommending restraint regarding the expansion of criminal copyright law,” in effect, his conclusion did not live up to this expectation. He conceded that “the push to criminalize copyright is understandable” in light of how digitization has expanded the scope of copyright infringement.<sup>77</sup> However he also acknowledged skepticism with respect to the criminal law’s ability to “solve complex social problems.”<sup>78</sup>

Penney incorporated the most theoretical discussion in his work, compared to the other scholars that I will discuss in this section. He briefly touched on Copyright Theory,

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<sup>73</sup> *Ibid* at 74.

<sup>74</sup> *Ibid* at 75 – 76.

<sup>75</sup> *Ibid* at 77.

<sup>76</sup> *Ibid* at 76

<sup>77</sup> *Ibid* at 80.

<sup>78</sup> *Ibid*.

noting the balance it strives to create between authors and creators,<sup>79</sup> and briefly engaged in a discussion of the differences between intellection and tangible property.<sup>80</sup> Penney provided an in depth discussion of both Criminal Legal Theory and Law and Economic Theory. However, there are two main issues with Penney's work. First, despite acknowledging that there is considerable debate as to whether intellectual property and tangible (ordinary) property are analogous, Penney avoided answering the question.<sup>81</sup> More problematic, however, is Penney's decision not to argue for decriminalized infringement despite asserting many times that moral and economic theories do not justify criminalization.<sup>82</sup> Operating from the perspective that criminal conduct requires justification, which Penney himself accepted,<sup>83</sup> his willingness to accept criminalized infringement as legally valid was theoretically unsound.

David Vaver is a recognized Canadian copyright scholar. He is frequently cited by the Supreme Court of Canada and is the author of *Intellectual Property Law*,<sup>84</sup> a predominant source on the Intellectual Property regime in Canada. Throughout his various works, Vaver has criticized many aspects of the copyright regime. In *Intellectual Property Law*, he questioned whether copyright can and should exist in the digital world.<sup>85</sup> Compared to other scholars who have critiqued digital technologies for allowing large-scale copyright infringement and disrupting the balance between authors and users

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<sup>79</sup> *Ibid* at 66.

<sup>80</sup> *Ibid* at 66 – 67.

<sup>81</sup> *Ibid* at 69.

<sup>82</sup> See e.g. *Ibid* at 70, 72 – 73, 75 – 76. Penney states at 72, “the current consensus that copyright infringement isn't morally culpable does not provide a sufficient reason to oppose criminalization.”

<sup>83</sup> See e.g. *Ibid* at 68 - 69, where Penney explains that normative theories should be used to “decide whether conduct warrants criminal punishment.”

<sup>84</sup> Vaver, *Intellectual Property Law*, *supra* note 11.

<sup>85</sup> *Ibid* at 673.

rights, Vaver instead sees digital technologies as a highlighter. He argued that digital technologies “highlight the illogicalities and inequalities in the current workings of the intellectual property system, and the consequent need for radical reform.”<sup>86</sup>

Vaver has accused both civil and criminal copyright sanctions as being draconian.<sup>87</sup> He has argued that since copyright’s inception in the *Statute of Anne*, “legislatures worldwide have succumbed to a seemingly irresistible impulse to protect more and more for longer and longer, and ask less and less from beneficiaries in return.”<sup>88</sup> He has criticized legislatures for curtailing users rights, while simultaneously expanding authors rights without the ethical or empirical support usually required to justify restricting individual liberty and competition.<sup>89</sup> He noted this critique is especially true because copyright law is uncertain and ill attuned to societal habits.<sup>90</sup> Vaver has also called the severity of intellectual property enforcement “particularly troublesome.”<sup>91</sup>

Despite these critiques, Vaver has not explicitly argued against criminalized infringement. He has argued for copyright reform as a means to re-set the balance

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<sup>86</sup> Vaver, “Creating Fair IP,” *supra* note 23 at 7.

<sup>87</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 673.

<sup>88</sup> David Vaver, “Harmless Copying,” *supra* note 4 at 19 – 28. See also, Vaver, “Creating Fair IP,” *supra* note 23 at 8 – 11 for a detailed discussion on how copyright law protect too much for too long. Vaver argues that Copyright law should protect fewer things for less time. The threshold established by *CCH*, *supra* note 16 is low and encompasses a lot of material; copyright protection attaches to expressions of ideas that require an exercise of skill and judgment. In Canada, a single sentences, or tweet could be considered an “original work” and be protected for the life of the author plus 50 years.

<sup>89</sup> Vaver, “Harmless Copying,” *supra* note 4 at 21.

<sup>90</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 674. Vaver references the work of J. Berryman, “Copyright Remedies: An Ever Tightening Noose” in *Copyright Reform: The Package, the Policy and the Politics* (Toronto: Insight Press, 1996) at 19. He also refers to Young, “Catching Copyright Criminals,” *supra* note 35.

<sup>91</sup> Vaver, “Is IP Still a Bargain,” *supra* note 30 at 156.

between authors' and users' rights.<sup>92</sup> From this I may be correct to infer that he thinks criminalization is too extreme and unnecessary to protect authors' rights, however Vaver has not expressly addressed criminalized copyright infringement, nor has he definitely argued against it from a theoretical perspective.

In 1977, during a period when Canadian Copyright Law was under revision, A. A. Keys and C. Brunet argued for the abolition of summary conviction offences in the *Copyright Act*.<sup>93</sup> From their perspective, summary offences were inconsistent with the principle that copyright, as a private right, “should not be enforced by the government but rather by those who have a legal interest in obtaining redress for their infringed rights.”<sup>94</sup> While they noted the temptation of enforcing copyright infringement by way of criminal sanction, and acknowledge arguments that “effective criminal remedies exist not only to punish... but also to act as a deterrent,” Keys & Brunet were of the view that copyright infringement was “not so antisocial as to be considered offensive to the fundamental values of society.”<sup>95</sup> While this reference to fundamental values alluded to moral justifications of crime, Keys & Brunet did not expressly invoke Criminal Legal Theory in their argument.

Surprisingly, in suggesting revisions for the *Copyright Act*, Keys and Brunet only dedicated four paragraphs of their 245-page book to a discussion of Copyright Theory.<sup>96</sup>

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<sup>92</sup> *Ibid*, at 157 – 58. See generally, David Vaver, “Copyright Defences as User Rights” (2013) 60:4 Journal of the Copyright Society of the USA 661 [“Copyright Defences”]; “Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties” (2007) 54:4 Case Western Reserve Law Review 731 [“Copyright and the Internet”].

<sup>93</sup> Keys & C Brunet, *Copyright in Canada*, *supra* note 31 at 185.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* at 186.

<sup>96</sup> *Ibid* at 4.

They noted the Canadian *Copyright Act* developed from English Law, which views copyrights as a “species of property rights;” contrasted this to the European approach to copyright, which emphasizes the protection of pecuniary and moral rights; and ultimately concluded their theoretical discussion noting, “concern with the underlying social philosophy of copyright law is unwarranted unless different theories lead to different conclusions.”<sup>97</sup> This conclusion is baffling, not only because the authors did not recognize that different theoretical understandings of copyright law necessarily lead to different conclusions with respect to authors’ and users’ rights; but also because they did not provide concrete theoretical support for their suggested revisions throughout their work.

The Sub-Committee on the Revision of Copyright released *A Charter of Rights for Creators* in 1985.<sup>98</sup> The Sub-Committee made a total of 137 recommendations relating to all aspects of copyright law. With respect to criminal offences, the Sub-Committee recommended they be retained and that their monetary penalties be increased to \$1million.<sup>99</sup> In making this recommendation the committee noted copyright “theft,” costs copyright owners “millions of dollars every year.”<sup>100</sup> As such, “copyright owners need the full force of the criminal law to protect their intellectual property.”<sup>101</sup> These increased penalties were meant to signal to the Courts the seriousness of copyright infringement.<sup>102</sup>

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<sup>97</sup> *Ibid* at 5.

<sup>98</sup> Sub-Committee, *Charter of Rights*, *supra* note 32.

<sup>99</sup> *Ibid* at 98.

<sup>100</sup> *Ibid* at 97.

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

<sup>102</sup> *Ibid* at 98.

Although the Sub-Committee analogized copyright infringement to theft, they did not provide any support, theoretical or otherwise for their necessary assumption that copyright infringement is equivalent to theft. As I will discuss in more detail in subsequent chapters, this assumption is theoretically unsound. Furthermore, the Sub-Committee did not discuss Criminal Legal Theory, despite recommending “the full force of the criminal law” be exerted to protect intellectual property.<sup>103</sup> Even more surprisingly, however, is their blatant disregard for Copyright Theory, despite their purpose being to “modernize and improve” the *Copyright Act*.<sup>104</sup> Similarly to Keys & Brunet, the Sub-Committee made a significant amount of recommendations to amend the *Copyright Act*, but provided zero theoretical support for their recommendations.

Similarly to Keys & Brunet, Alan Young also questioned the use of criminal law to vindicate private rights.<sup>105</sup> Young viewed the criminal process as a trap, and used *R v Miles of Music*<sup>106</sup> as a case study to articulate the dangers of resorting to criminal prosecutions to remedy copyright violations.<sup>107</sup> Although Young made reference to Keys & Brunet’s argument against criminal copyright infringement, he argued that

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid* at 3.

<sup>105</sup> Young, “Catching Copyright Criminals,” *supra* note 35 at 273. At 257, Young notes, “Arguably, ... civil remedies should be adequate to secure the artist’s protection; however Parliament has also included summary criminal remedies as an option.”

<sup>106</sup> *R v Miles of Music Ltd*, 74 OR (2d) 518, 48 CCC (3d) 96. Roch was a disk jockey in Ontario and owner of Miles of Music. He would produce compilation tapes to use while performing DJ services, recording songs onto blank cassette tapes, and provide them to other disk jockeys. Roch became concerned that this practice required a copyright license and sought legal advice. His lawyer contacted the Canadian Recording Industry Association, who indicated that licenses for DJ’s would not be available “in the immediate future.” However, the CRIA agent had previously made public statements that license would be soon available, and were in fact available shortly after Mr. Roch’s inquiry. Following a dispute between Mr. Roch and a franchisee, the CRIA made an undertaking not to prosecute the franchisee, and actively pursued charges against him for breach of copyright. Ultimately, the extensive search and seizure by the RCMP of Mr. Roch’s DJ equipment put him out of business.

<sup>107</sup> Young, “Catching Copyright Criminals,” *supra* note 35 at 258.



*Miles of Music* “should renew interest in the issue of whether criminal sanctions are an appropriate and proportionate response to copyright infringement.”<sup>108</sup>

Young did make some reference to both Criminal and Copyright Theory in his work. He questioned whether copyright infringement was sufficiently immoral to warrant criminal sanction,<sup>109</sup> and noted the dual purpose of the Copyright regime to protect the interests of creators and the public.<sup>110</sup> However, Young did not actively engage with either theory; rather, he stated a few principles of each to frame his doctrinal analysis of *Miles of Music*.<sup>111</sup> While this was effective for his discussion of the courts’ misapplication of the abuse of process doctrine, it provided little guidance whether criminalized infringement was theoretically justified.

Lawyers David W. Scott, Q.C. & Timothy Collins, reviewed criminal copyright infringement from a criminal defence perspective in a two-part series of articles published in 1996.<sup>112</sup> Ultimately, they concluded that copyright infringement should not be criminalized. Similarly to Young, the bulk of Scott & Collins’ first article was primarily focused on the criminal copyright provisions in practice.<sup>113</sup> They engaged in a doctrinal analysis discussing the essential elements the Crown must prove to secure a criminal copyright conviction.

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<sup>108</sup> *Ibid* at 272. Note: Young’s article was published five years after Keyes & Brunet, *Copyright in Canada*, *supra* note 31.

<sup>109</sup> Young, “Catching Copyright Criminals,” *supra* note 35 at 273.

<sup>110</sup> *Ibid* at 257, 267.

<sup>111</sup> *Ibid* at 257, 267, 273.

<sup>112</sup> Scott & Collins, “Part I,” *supra* note 22; “Part II,” *supra* note 36.

<sup>113</sup> *Ibid*. Part II will not be addressed in detail here. Briefly, it discusses legal presumption in the *Copyright Act* and whether they are constitutionally valid. It also discusses possible defences to criminal copyright infringement.

Scott & Collins did engage in some theoretical analysis in their work. They discussed Criminal Legal Theory with significant reference to the Law Reform Commission of Canada's and the Department of Justice's comments on the purpose and scope of the criminal law during the 1970's *Criminal Code* review process.<sup>114</sup> In applying the Law Reform Commission's criminality test,<sup>115</sup> they made some reference to Copyright Legal Theory and the purposes of the copyright regime, though the scope of this discussion was minimal.<sup>116</sup> The authors also mentioned the concept of deterrence, though they did not ground it in Law and Economic Theory.<sup>117</sup> Finally, Scott and Collins did not address, let alone mention, Property Theory.

Given the goal of their article was to discuss criminalized copyright infringement from the criminal defence perspective, the lack of theoretical analysis in Scott & Collins work is not surprising. However, because they did not engage in a thorough theoretical analysis, Scott & Collin's article does little to help us understand whether criminalized copyright infringement is theoretically justified.

The scholars discussed in this part not only vary in their opinions on whether copyright infringement should be criminalized, but they also vary with respect to the amount of theoretical analysis used to support those opinions. As a group, they have

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<sup>114</sup> Scott & Collins, "Part I," *supra* note 22 at 106 – 107, referring to Law Reform Commission of Canada, *Our Criminal Law* (1976) [*Our Criminal Law*]; Government of Canada, *The Criminal Law in Canadian Society* (Department of Justice, 1982) [*Criminal Law in Canada*]. These documents will be discussed in detail in more detail in Chapter 3.

<sup>115</sup> Scott & Collins, "Part I," *supra* note 25 at 107 – 108. The test poses the following questions: "does the act seriously harm other people; does it in some other way seriously contravene our fundamental values as to be harmful to society; are we confident that the enforcement measure necessary for using criminal law against the act will not themselves seriously contravene our fundamental values; give that we can answer "yes" to the above three questions, are we satisfied that criminal law can make a significant contribution in dealing with the problem?"

<sup>116</sup> *Ibid* at 108.

<sup>117</sup> *Ibid*.

discussed Criminal Theory, Property Theory, Law and Economic Theory and Copyright Theory. However, none of these scholars have provided a succinct, systematic argument against criminalized copyright infringement from a theoretical perspective. The scholars in the following Part deserve the same critique.

## **2. U.S. Legal Scholarship**

Compared to Canada, the U.S. has a denser discussion of criminal copyright infringement. Generally, American scholars writing on this topic may be divided into two groups: skeptics and expansionists. Skeptics are critical of the use of criminal sanctions to enforce copyright infringement. They have typically argued that criminal sanctions are unjustified; they should be used with restraint; they should only apply to commercial infringement; or that the penalties associated with criminalized copyright infringement should not be increased. Conversely, expansionists support criminal copyright infringement and have typically argued that the provisions should be expanded and the applicable penalties should be increased.

In this Part I reviews some of the prominent sources of both American skeptic and expansionist arguments. In doing so I highlight an apparent gap in the literature wherein no American scholars, skeptics or expansionists alike, have explicitly argued either for or against criminalized copyright infringement from a theoretical perspective. Similarly to Canadian Scholars, both groups of American Scholars engage in some theoretical analysis in the respective works. Skeptics have usually invoked Copyright Theory and Property Theory in their arguments, while expansions have usually focused heavily on Law and Economic Theory and the concept of deterrence. Both groups have failed to

engage in a thorough theoretical analysis of criminalized infringement. In subsequent chapters, I will fill in this gap in the literature. Not only will I compile and explain the various theories that have been used to justify criminalized copyright infringement in one cohesive document, but I will also systematically argue against all forms of criminalized copyright infringement from a theoretical perspective.

### **A. American Skeptics**

Irina Manta suggested that the U.S. should consider eliminating criminal sanctions for non-commercial copyright infringement.<sup>118</sup> Manta broadly canvassed the criminalization of “soft IP” (trademarks and copyrights), and patents. She argued that although there are criminal sanctions for infringing soft IP, the inherent difference between soft IP and patents, and public choice rationales, have resulted in patent infringement not being criminalized.<sup>119</sup> To even the playing field, Manta’s solution was to decriminalize non-commercial infringement, rather than criminalize patent infringement.<sup>120</sup> In making this suggestion, Manta noted that the potential harms of criminalization, including chilling effects and the cost of prosecution, might outweigh its potential benefits.<sup>121</sup>

Manta’s analysis was heavily grounded in theory. Throughout her article she repeatedly referenced and discusses Criminal Theory, Intellectual Property Theory,

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<sup>118</sup> Manta, “Puzzle of Criminal Sanctions,” *supra* note 8 at 517.

<sup>119</sup> *Ibid* at 492 – 512.

<sup>120</sup> *Ibid* at 518.

<sup>121</sup> *Ibid*. See also, Note, “The Criminalization of Copyright Infringement in the Digital Era” (1999) 112:7 *Harv L Rev* 1705 at 1706 [“Criminalization in the Digital Era,”], arguing, “digital technology has challenged the feasibility of criminal copyright law by undermining many of its conceptual underpinnings.” The authors also argue that Congress’s response to digital technologies, including the *Digital Millennium Copyright Act* Pub L No 105 – 304, 112 Stat 2860 [*DMCA*], and *No Electronic Theft Act*, Pub L No 105-147, 111 Stat 2678 (1997) [*NET Act*] (among others) cause more problems that it solves.

Copyright Theory, and Property Theory. In fact, the first Part of her article discussed why taking of physical property is considered theft, and the trend towards treating intellectual property infringement as theft.<sup>122</sup> Manta also made reference to Law and Economic Theory's conceptions of deterrence and using a cost-benefit analysis to determine legal efficiency.<sup>123</sup> However, because Manta's objective was to explain why patent infringement was not criminalized, she did not take a definitive stand against criminalized infringement. Her article cannot stand alone as a complete argument for decriminalizing copyright infringement.

Geraldine Szott Moohr interpreted this cost-benefit analysis through the lens of over criminalization.<sup>124</sup> Similarly to Manta, she was skeptical about imposing criminal sanctions on personal use infringement, as criminalization could "undermine the reasons for enacting the law in the first place," which is to encourage creation.<sup>125</sup> Moohr suggested that civil laws are more appropriate to remedy copyright infringement as they are better suited to balance authors' and users' interests, and "do not run the risk of over deterrence."<sup>126</sup> This balance is important, as copyright law has a dual purpose: to encourage innovation, and to ensure access to information.<sup>127</sup> The use of criminal law to narrow public uses of information "seem almost perverse ... at a time when the potential for access has never been more promising."<sup>128</sup>

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<sup>122</sup> Manta, "Puzzle of Criminal Sanctions," *supra* note 8 at 473 – 480.

<sup>123</sup> See e.g. *Ibid* at 503, 518.

<sup>124</sup> Moohr, "Defining Overcriminalization," *supra* note 37 at 785. Overcriminalization occurs "when the costs of treating conduct as a crime exceed the benefits of the new criminal law."

<sup>125</sup> *Ibid* at 783. See also, Moohr, "Crime of Copyright Infringement," *supra* note 37.

<sup>126</sup> Moohr, "Defining Over Criminalization," *supra* note 37 at 804.

<sup>127</sup> Moohr, "Crime of Copyright Infringement," *supra* note 37 at 761.

<sup>128</sup> *Ibid* at 762.

Together, Moohr's articles actively engaged Law and Economic Theory and Criminal Theory. In "Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws," she conducted a cost-benefit analysis, which is an invocation of Kaldor-Hicks efficiency,<sup>129</sup> and she also explained both the Internal and External Control Theories of deterrence.<sup>130</sup> In "The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory," Moohr assessed the harm and morality of copyright infringement.<sup>131</sup> She also discussed Copyright Theory, and the dual purpose of the copyright regime.<sup>132</sup> However, Moohr did not actively discuss Property Theory, nor did she definitively argue against criminalized copyright infringement.<sup>133</sup>

Christopher Buccafusco & Jonathan Masur also argued for a limited role for criminalization, from an economic perspective.<sup>134</sup> They noted that criminal sanctions, including imprisonment, might have some deterrent value; however, they argued that to be efficient, criminal sanctions must be limited in scope.<sup>135</sup> According to Buccafusco & Masur, criminal penalties may be more efficient when self-help is costly, and civil

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<sup>129</sup> Kaldor-Hicks Efficiency is a utilitarian cost-benefit analysis. It asks whether the benefits of a collective decision are sufficient to outweigh its costs, such that a net-benefit accrues to society in general. See e.g. Michael J Trebilcock, "Economic Analysis of Law," in Richard F Devlin, ed, *Canadian Perspective on Legal Theory*, (Toronto: Edmond Montgomery Publications, 1991) 103 at 108 ["Economic Analysis of Law"].

<sup>130</sup> Moohr, "Defining Overcriminalization," *supra* note 37 at 795 – 96.

<sup>131</sup> Moohr, "Crime of Copyright Infringement," *supra* note 37.

<sup>132</sup> See e.g. Moohr, "Defining Overcriminalization," *supra* note 37 at 788 – 89; "Crime of Copyright Infringement," *supra* note 37 at 744 – 747.

<sup>133</sup> See e.g. Moohr, "Defining Overcriminalization," *supra* note 37 at 804; "Crime of Copyright Infringement," *supra* note 37 at 783. Moohr suggests that criminalization may be ineffective for personal use infringement, and that civil law may be a more appropriate remedy.

<sup>134</sup> Buccafusco & Masur, "Innovation and Incarceration," *supra* note 8.

<sup>135</sup> *Ibid* at 309.

remedies do not efficiently deter behaviour.<sup>136</sup> They suggested imposing three limits on the use of criminal sanctions. First, criminal sanctions should only apply to “exact duplication of copyrighted works that will directly substitute for legitimately available copies.”<sup>137</sup> Second, criminal liability should be subject to a strict *mens rea* requirement.<sup>138</sup> Finally, they suggested that the circumvention of technological protection measure should only be criminalized where it is not done for purposes of fair use, or to access content that is not copyright protected.<sup>139</sup>

The Buccafusco & Masur article is, unsurprisingly, heavily based in Law and Economic Theory. From this perspective they did provide some analysis of Copyright Theory, noting the use of copyright law to incentivize creation.<sup>140</sup> Unfortunately, in their discussion of property related crime, they did not to differentiate between tangible and intangible property, and instead incorporated a “theft” analogy into their assessment.<sup>141</sup> Similarly to some of the other scholars discussed in this part, they did not provide a

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<sup>136</sup> *Ibid.* The authors discuss the concept of “self-help” at 298 – 302. They use the term “self-help” to refer to copyright owners’ efforts to deter unauthorized uses of their works. Self-help includes: not publishing their work or making it available to the public, and the use of digital rights management, which restricts the ability to make copies and transfer a work.

<sup>137</sup> *Ibid* at 316.

<sup>138</sup> *Ibid.* This would require proof that the defendant knew the work was protected by copyright infringement, and knew their conduct was unlawful.

<sup>139</sup> *Ibid.* As it currently stands, the *DMCA*, *supra* note 121, criminalizes all circumvention of technological protections measure, despite the fact that offenders may circumvent TPMs for legitimate, lawful purposes. Similarly, Canada criminalizes the circumvention of TPMs in s.42(3.1) of the *Copyright Act 1985*, *supra* note 5.

<sup>140</sup> See e.g. Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8 at 280 – 284. The authors note, whether copyright law actually provides an incentive to create is the subject of debate, though they proceed with their article on the assumption that the copyright regime does provide some incentive to create.

<sup>141</sup> See e.g. *ibid* at 289 – 292.

detailed discussion of Criminal Theory, despite arguing that criminal sanctions may be appropriate “with respect to a discrete set of activities.”<sup>142</sup>

Eric Goldman was critical of the language used to discuss copyright infringement.<sup>143</sup> In particular, he criticized the *NET Act*,<sup>144</sup> and its incorporation of the “shoplifter analogy” into criminal copyright infringement.<sup>145</sup> Goldman argued that treating copyright infringement like theft creates a scope problem, whereby the harm of copyright infringement is overstated, as not all infringing copies directly correlate to a “criminally cognizable loss.”<sup>146</sup> For Goldman, this result extended the boundaries of criminal copyright law too far.<sup>147</sup>

While Goldman’s critique of the shoplifter analogy is helpful in arguing against criminalized copyright infringement, his article is predominantly a historical and doctrinal account of the *NET Act*, rather than a theoretical critique. He did discuss some concepts common to Law and Economic Theory. In particular, he conducted a cost-benefit analysis of the *NET Act*,<sup>148</sup> and argued that it may not effectively deter warez<sup>149</sup> traders because it misconstrues their motivation, assuming they act in rationally

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<sup>142</sup> *Ibid* at 334.

<sup>143</sup> Goldman, “Road to No Warez,” *supra* note 37.

<sup>144</sup> The *NET Act*, *supra* note 121, is one of many acts passed to expand the scope of criminal copyright infringement in the United States. For more information on the other Acts, see generally, Note, “Criminalization in the Digital Era,” *supra* note 121.

<sup>145</sup> Goldman, “Road to No Warez,” *supra* note 37 at 370, 426. Under the shoplifting analogy, criminal copyright infringement is treated like physical-space theft.

<sup>146</sup> *Ibid* at 426.

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

<sup>148</sup> *Ibid* at 396.

<sup>149</sup> “Warez” is defined by the Oxford English Dictionary to mean “software that has been illegally copied and made available.” See *The Oxford English Dictionary*, Online ed, *sub verbo* “warez”, online: <<https://en.oxforddictionaries.com/definition/warez>>.



calculated ways.<sup>150</sup> Goldman also alluded to Criminal Theory, suggesting that society did not believe copyright infringement is immoral,<sup>151</sup> though he did not engage in an in depth discussion of the justifications of crime.

The scholars discussed in this section have argued for a limited role for criminal copyright infringement. They have argued that criminal sanctions should be used with restraint, that they are likely only justified for commercial infringement and that they should not be further expanded. Although the Skeptics have used legal theories to varying degrees in their respective works, none have argued that copyright infringement should be decriminalized from a systematic theoretical perspective addressing the four predominant theories that have been used to justify criminalization. Although Manta and Moohr did canvass various theories in their respective works, neither definitively argued against criminalized infringement. Buccafusco & Masur provided a detailed analysis of criminalized infringement from a Law and Economic perspective, however because they did not discuss Criminal Legal Theory and differentiate between tangible and intangible property, and actively use “theft” discourse, their article does not address the need for this thesis. Goldman provided insight into the problematic use of theft discourse through his critique of the shoplifter analogy, though his work was largely historical and doctrinal, and therefore does not alleviate the need for a systematic theoretical argument against criminalized copyright infringement.

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<sup>150</sup> Goldman, “Road to no Warez,” *supra* note 37 at 409. Beginning at 405, Goldman explains that warez traders are often motivated by ego, thrill, the belief that software should be free, and a sense of community, rather than fear of criminal liability.

<sup>151</sup> *Ibid* at 402.

## **B. American Expansionists**

Michael DuBose, former Chief of the Intellectual Property Division of the Computer Crime and Intellectual Property Sections of the Department of Justice, argued for a stronger role for criminal law in enforcing intellectual property rights.<sup>152</sup> He repeatedly referred to infringers as thieves and criminals; drew reference to the use of “counterfeit-goods trafficking” to fund organized crime; compared the sale of illegally copied DVDs to drug trafficking; and stipulated, “there are signs that terrorist organizations are following suit.”<sup>153</sup> This rhetoric was fear inducing, and used to further his position that strong action is required by criminal enforcement.<sup>154</sup>

DuBose made three recommendations to strengthen criminal enforcement of intellectual property rights. Again, his focus was predominantly procedural. First, he recommended updating criminal intellectual property laws to respond to “the exploitation of new technologies,” and global challenge of intellectual property crime.<sup>155</sup> Second, he recommended devoting adequate resources to fund investigations and prosecutions of intellectual property crimes; and finally, he recommended that the United States continue, “to lead in global enforcement efforts.”<sup>156</sup>

In making these recommendations, DuBose made several troubling assumptions. First, he assumed that having dedicated IP enforcement agents would increase

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<sup>152</sup> DuBose, “Criminal Enforcement of IP,” *supra* note 38.

<sup>153</sup> *Ibid* at 482, 484, 495.

<sup>154</sup> *Ibid* at 486.

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid*. Arguably, this recommendation is being implemented, as the United States has spent significant resources to extradite Kim Dotcom to face multiple charges in relation to copyright infringement. See *Dotcom*, *supra* note 25.

prosecutions, and therefore lead to increased deterrence.<sup>157</sup> While this is arguably a reference to Law and Economic Theory, DuBose made no attempt to justify this claim. Second, DuBose referenced what he calls “a disturbing trend,” whereby previously law-abiding citizens were being “easily enticed into criminal behavior on the internet.”<sup>158</sup> Not only did DuBose fail to support this claim with empirical evidence about who, and how many, otherwise law-abiding citizens were “enticed” into intellectual property crime; but he also failed to define criminal behaviour, and made no reference to Criminal Legal Theory. In doing so, DuBose assumed that infringement is a criminal act. This assumption led DuBose to his most troubling statement. He began by acknowledging that many of the people involved in online intellectual property infringement “are professionals, parents, home PC users – not the usual suspects for those likely to commit five- and ten-year felonies.”<sup>159</sup> Then, he concluded this “disturbing phenomenon... challenges law enforcement to maximize the deterrent value of individual convictions.”<sup>160</sup>

Arguably, DuBose acknowledged that this “disturbing phenomenon” was evidence of a lack of societal consensus around the immorality of online infringement. He immediately called for greater publicity of convictions and “encouraging convicted defendants to speak at local schools,” arguably in an effort to convince the public of the wrongfulness of this conduct.<sup>161</sup> Unfortunately, because DuBose did not engage in any Criminal Theory in this article, and did not define what constitutes a crime, he failed to

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<sup>157</sup> DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 490.

<sup>158</sup> *Ibid* at 492.

<sup>159</sup> *Ibid* at 493.

<sup>160</sup> *Ibid* at 493.

<sup>161</sup> *Ibid* at 493.

reconcile his conclusion with the fact that immorality is a fundamental requirement of criminality. If the public needed to be convinced that online infringement was wrong, through publicity and school lectures, then arguable there was no societal consensus, and therefore the criminality requirements were not met.<sup>162</sup> Had DuBose properly engaged in a theoretical analysis, rather than resort to fear-inducing and hyperbolic language, then perhaps he would have arrived at an alternate conclusion as to whether online infringement is criminal.

Trotter Hardy, in somewhat confusing fashion, picked up on the need for greater deterrence of copyright infringement.<sup>163</sup> Hardy began by questioning whether copyright infringement was properly characterized as white-collar crime, without giving a detailed explanation of why this classification was important. Nevertheless, and without expressly stating his shift into Law and Economic theory, Hardy's concern quickly shifted to the deterrent value of increased criminalization.<sup>164</sup> He argued that sever criminal sanctions would lead to greater deterrence where crime was hard to detect and enforce.<sup>165</sup> In such circumstance, "sharply increased penalties become one of the legal system's few *effective* responses."<sup>166</sup>

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<sup>162</sup> The argument could be made that the fact that there is legislation criminalizing copyright infringement equals societal consensus. This is because society elects government officials and delegates to them the authority to make laws, and the legislature has chosen to criminalize copyright infringement. However, I would suggest that the legislature is out of touch with societal consensus as it relates to copyright infringement. I articulate this point more fully in Chapter 3(2)(A), below. Briefly, there is data to suggest that society does not believe that copyright infringement is wrong. If this data is accurate, then the fact that the legislature has criminalized copyright infringement cannot equate to societal consensus.

<sup>163</sup> See Hardy, "Criminal Copyright Infringement," *supra* note 8 at 313.

<sup>164</sup> *Ibid* at 312.

<sup>165</sup> *Ibid* at 313.

<sup>166</sup> *Ibid* at 341, emphasis added.

According to Hardy, copyright infringement fit this description. He noted the likelihood of being caught for copyright infringement online is “almost zero,” and that copyright infringement has increased as a result.<sup>167</sup> In rejecting arguments that copyright law should be abandoned in light of the high incidence with which it occurs, and the low chance of enforceability, Hardy argued, “the deterrence of such activity can nevertheless be brought up to almost any desired level by increasing the punishment for those who *do* get caught.”<sup>168</sup> As such, he concluded that increased criminalization “makes sense.”<sup>169</sup>

Hardy made several assumptions here. First, he assumed that increased penalties actually increase deterrence. In doing so, he assumed that people act in rationally calculated ways, factoring in the “costs, benefits, and probabilities” of getting caught for their wrongdoing.<sup>170</sup> Hardy did not give any indication of how high copyright infringement penalties will need to be in order to achieve optimal deterrence, however he nevertheless concluded that it is possible. In doing so, Hardy assumed the penalty would be proportionate to the crime. From a Canadian perspective, this necessarily raises constitutional issues, as disproportionate penalties may violate the *Charter*.

Hardy briefly discussed Criminal Legal Theory, acknowledging that criminal conduct must be “egregious enough to affect or offend the entire community.”<sup>171</sup> It would seem that Hardy’s argument for increased criminalization to deter copyright infringement failed here because the “public [was] not on board” with treating infringement as criminal. However, rather than acknowledging this defeat, Hardy instead proposed an

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<sup>167</sup> *Ibid* at 313.

<sup>168</sup> *Ibid* at 314, emphasis in original.

<sup>169</sup> *Ibid* at 341.

<sup>170</sup> *Ibid* at 312.

<sup>171</sup> *Ibid* at 312.

alternate theory to explain this disconnect between public opinion and increased criminalization.<sup>172</sup>

First, Hardy believed the public was “ambivalent” to view copyright as property. This was troublesome for him, as “intangible creations and tangible ones – exhibit no inherent, and no logical, differences for the purposes of the legal regime of property ownership;” they are “legally equivalent.”<sup>173</sup> Second, Hardy explained this ambivalence. He argued that our “instincts” about property allow us to view the “unauthorized taking” of physical property as theft, but we do not view the unauthorized taking of intangible property as theft.<sup>174</sup> Because society was more familiar with tangible property, we learned from a young age to associate “property” with tangible objects, and therefore understood stealing as taking a physical object, not an intangible one.<sup>175</sup> Next, because we viewed property in this way, the notion that property is a bundle of rights with respect to an object, and not the object itself, was not intuitive.<sup>176</sup> Finally, Hardy asserted that because we have failed to intuitively understand property as a bundle of rights, we fail to view intangible property as property. This failure led to our inability to see copyright

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<sup>172</sup> Hardy concludes with two hypotheses: the first is about our inexperience with intellectual property that I discuss in more detail. The second, which I do not discuss in the body of my thesis, has to do with decision-making experience. Hardy argues that because “few of us routinely experience making decisions that affect large number of people... we are thus predisposed to give greater weights and significance to small-scale experience... and less likely to appreciate large-scale effects that result only from aggregation of our own, and many strangers’, actions over periods of time.” Copyright infringement results in aggregate harm in this way: downloading a single song has minimal effects, however millions of people downloading a single song creates an aggregate harm.

<sup>173</sup> *Ibid* at 334.

<sup>174</sup> *Ibid* at 332.

<sup>175</sup> *Ibid* at 332 – 33.

<sup>176</sup> *Ibid* at 333.

infringement as a violation of property rights, and therefore our failure to equate infringement with theft, or view it as harmful.<sup>177</sup>

Although Hardy's theory made for an interesting read, it does not stand up to scrutiny. First, Hardy provided minimal, and at times zero, sources to support his conclusions. He acknowledged that he was neither a sociologist nor a psychologist, but did not provide any scientific or sociological evidence to support his hypotheses about our understanding and experience of property.<sup>178</sup> Second, Hardy made no reference to Property Theory to justify his hypothesis, despite his attempt to define property. Rather than a theoretically sound justification of criminalized copyright infringement, Hardy's article seems to instead highlight many of the issues involved in treating copyright infringement as criminal.

In 2004, the Department of Justice commissioned a Task Force with a mandate to "examine the all of the Department of Justice's intellectual property enforcement efforts and to explore ways for the Department of Justice to increase its protection of valuable intellectual property resources."<sup>179</sup> The Task Force produced a Report recommending changes to intellectual property law and enforcement, emphasizing the Department of Justice's commitment to aggressively enforce "theft" of copyrighted works.<sup>180</sup> Included in these recommendations were increased resources, investigations, and prosecutions of

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<sup>177</sup> *Ibid* at 331 – 334.

<sup>178</sup> *Ibid* at 330 – 334.

<sup>179</sup> Task Force, *Progress*, *supra* note 38 at i.

<sup>180</sup> *Ibid* at Appendix A. See also, Task Force, *Report*, *supra* note 38. The report also contains recommendations relating to international cooperation in intellectual property prosecutions, antitrust enforcement, and crime prevention.

intellectual property crimes,<sup>181</sup> enforcing laws that criminalize circumventing technological protection measures;<sup>182</sup> prosecuting the “passive sharing of copyright works;”<sup>183</sup> and creating criminal liability for secondary copyright infringement.<sup>184</sup> According to the Progress Report released in June 2006, the Department of Justice has implemented all the recommendations of the 2004 Report.<sup>185</sup>

Similarly to the Canadian Sub-Committee, the Task Force did not engage in an analysis of Copyright Theory, or Criminal Theory, despite arguing for increased criminalization of copyright infringement. Further, the Report did not discuss Property theory, despite classifying copyright infringement as theft,<sup>186</sup> a crime typically associated with physical property; nor did the Report address Law and Economic theory despite referencing the concept of deterrence.<sup>187</sup>

Finally, Grimm, Guzzi, & Rupp picked up on Hardy’s argument that criminalization increases deterrence. They noted that the increase in intellectually property “theft,” and the ineffective deterrence provided by civil remedies, led the government towards using the criminal law to protect intellectual property.<sup>188</sup> However, their work was more of a summary of the existing intellectual property crime landscape,

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<sup>181</sup> See Task Force, *Progress Report*, *supra* note 38 at 72, Criminal Enforcement Recommendations 1 – 12.

<sup>182</sup> See *Ibid* at 76, Legislative Recommendations.

<sup>183</sup> *Ibid*.

<sup>184</sup> See *ibid* at 77.

<sup>185</sup> *Ibid* at 72.

<sup>186</sup> See e.g. Task Force, *Report*, *supra* note 38 at V, 9, 13, 64, 66.

<sup>187</sup> See e.g. *Ibid* at 27, 51, 54.

<sup>188</sup> Grimm, Guzzi & Rupp, “IP Crimes,” *supra* note 63 at 744.



rather than a comment on the appropriateness of criminal sanctions from a theoretical perspective.<sup>189</sup>

Notwithstanding the perspective of American skeptics, and their recommendations for a limited role for criminal law in regulating copyrights, the criminalization of copyright infringement is progressively evolving in the U.S. This expansion of criminal liability is particularly relevant to Canada. The arguments used to justify criminalization in the U.S. can easily be championed and incorporated into our legislation. This is especially true given our history of connectedness and subordination to the U.S. and British perspectives on Copyright Law.<sup>190</sup> Therefore, in arguing for decriminalization, I will address both Canadian and American perspectives on criminalized copyright infringement, and the theories that have been levied to justify its existence.

In the following Part I will briefly explain how Criminal Legal Theory, Law and Economic Theory, Property Legal Theory, and Copyright Theory have been used to justify criminalizing copyright infringement, and connect these theories to the existing literature. In subsequent chapters I will set out an in depth explanation of each theory and further details on how it arguably justifies criminalization before systematically attacking each of these justifications. In doing so, I argue that criminalized copyright infringement cannot be justified by Criminal Legal Theory, Law and Economic Theory, Property Legal Theory, and that Copyright Theory and *Charter* values support non-criminalized

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<sup>189</sup> See generally, *Ibid.*

<sup>190</sup> See e.g. Nair. “Canadian Declaration,” *supra* note 1; W. Hayhurst, “Canadian IP Laws,” *supra* note 4; Vaver, “Harmless Copying,” *supra* note 4. Gervais, “Canadian Copyright Narrative,” *supra* note 4. (2008)

enforcement. Because crimes must be theoretically justified, and criminalized copyright infringement is not, I conclude by offering steps the Government should take to decriminalize copyright infringement in Canada.

### **3. Theoretical Justifications for Criminal Copyright Infringement**

Criminal copyright infringement has been justified on the following theoretical bases: First, as Penney suggested, Criminal Legal Theory may justify criminalization on the grounds that copyright infringement is immoral and causes harm to both content creators, and society by diminishing the incentive to create. Second, as Hardy, the Task Force, and the other Expansionists suggested, from a Law and Economic Theory perspective, increased criminalization may adequately and effectively deter potential infringers.

Hardy and other American expansionists suggested a third justification for criminalized copyright enforcement. Property Legal Theory may justify criminalization by treating copyright infringement as analogous to tangible property theft. From this perspective, because theft is a criminal offence, copyright infringement should also be treated as such. Finally, Moohr and Manta argued that Copyright Theory arguably justifies criminalized infringement on the basis that it is necessary to achieve the proper balance between authors' and users' rights.

These four theories provide the strongest justifications for criminalized copyright infringement. In subsequent Chapters I disassemble and knock down the Criminal Legal Theory, Law and Economic Theory and Property Theory justifications for criminalized infringement. In particular, I argue that Criminal Theory does not justify criminalization

because there is no societal consensus that copyright infringement is immoral, infringement does not cause serious harm, and criminalization is not an “unavoidable necessity” as required by the Doctrine of Restraint. Law and Economic Theory’s attempt to justify criminalization on its deterrent value is also unsupportable. Criminalization cause more harm than benefit, and therefore fails an efficiency-based cost-benefit analysis. Property Theory also fails to justify criminalization because copyrights are not property, and intangible and tangible properties are fundamentally different such that copying intangible property is not analogous to tangible property theft.

I re-cast Copyright Theory as a positive case for non-criminal copyright enforcement. Non-criminal enforcement is consistent with the dual objectives of the *Copyright Act* and respects the need to balance the interests of authors and users. Existing and future non-criminal enforcement mechanism, including Notice-and-Notice, and digital locks, and Blockchain Technology, can effectively protect both authors and users rights in a balanced manner. This approach is also consistent with *Charter* values, namely the minimal impairment of *Charter*-protected rights. These theoretical analyses combine to highlight the need to decriminalize copyright infringement in Canada during the 2017 copyright review process.

#### **4. Chapter Summary**

Although the authors canvassed above have, to varying degrees, made theoretical references in their respective articles, no one has offered a systematic critique of criminalized copyright infringement from a theoretical perspective. Penney led the Canadian Scholars in terms of theoretical analysis. He incorporated some Copyright and

Property Theory into his work, and provided a more detailed discussion of both Criminal Legal Theory and Law and Economic Theory. However Penney's theoretical analysis was weakened by his unwillingness to discuss the differences between intellectual and tangible property, and his failure to argue for decriminalization despite acknowledging that Criminal Theory does not justify criminalized copyright infringement.

Vaver made a comparable mistake in his work. Despite continuously criticizing the copyright regime for expanding authors' rights and limiting users' rights without empirical or ethical support, and arguing for copyright reform, Vaver never took the final step to argue for decriminalization, nor did he incorporate a systematic theoretical analysis of criminalized infringement into his works. Similarly, both the sources involved in the 1985 *Copyright Act* revision process, and the practitioners that have argued against criminalized infringement all did not argue (to varying degrees) from a theoretical perspective.

The American Scholars cannot escape the same critique. The skeptics, as a group referenced some aspects of Criminal Legal Theory, Law and Economic Theory, Property Theory, and Copyright Theory. However, they did not fully canvass each theory, none addressed all four theories in one cohesive document, and they did not argue against all forms of criminalized copyright infringement. The skeptics readily accepted that in some circumstance, particularly commercial infringement, criminalization is necessary.

The expansionists argued for increased criminalization. Hardy's theoretical discussion was limited to Law and Economic Theory and Criminal theory. His theoretical analysis was weakened by his assumption that criminalization increases deterrence, and

his decision to explain away the lack of societal consensus on the immorality of copyright infringement rather than accept that criminalization cannot be justified by Criminal Legal Theory. Other than Hardy, the expansionists included little to no theoretical analysis in their respective works. DuBose and the Task Force argued for increased criminalization to remedy copyright “theft.” They analogized copyright infringement to theft of tangible property without any theoretical justification or support for their assumption that intangible and tangible properties were analogous. Finally, Grimm et al. provided no theoretical analysis in their work.

This thesis will address the need for a systematic analysis of criminalized copyright infringement from a theoretical perspective. In Chapter 3 and 4 I will address Criminal Legal Theory, Law and Economic Theory’s “deterrence” concept, and the Property Theory of copyright. I will provide a short summary of the arguments that support criminalization based on each theory, before knocking each of them down. In Chapter 5 I make a positive case for non-criminal copyright enforcement. Again I provide a short summary of the arguments that support criminalization before arguing that Balance Theory and *Charter* values favour non-criminal copyright enforcement. In Chapter 6 I conclude by articulating the necessary steps that the Canadian Government must take to decriminalize (or at the very least avoid further criminalizing) the copyright regime. This Chapter highlights the need for Canada to break free from American, British, and international influences to finally realize a uniquely Canadian *Copyright Act*.

## Chapter 3 – Criminal Copyright Infringement is not Justified by Criminal Legal Theory

In Chapter 2 I established that Criminal Legal Theory has been levied to justify criminalized infringement on the basis that copyright infringement is morally wrong and causes serious harm to both copyright owners and society. Proponents argue that criminalized enforcement is necessary to deter potential infringers and prevent the harms caused by copyright infringement. This necessarily implicates Law and Economic Theory, and utilitarianism.<sup>191</sup>

A scholarly discussion of the immorality of copyright infringement is somewhat lacking, given the apparent societal perspective that this conduct is not wrong.<sup>192</sup> Whether copyright infringement is in fact immoral is open for debate.<sup>193</sup> There seems to be a general consensus that commercial, for-profit infringement is morally wrong.<sup>194</sup> However, the immorality of personal use infringement is less clear.<sup>195</sup>

Copyright infringement is said to cause harm to copyright authors through lost revenue and loss of control over their work.<sup>196</sup> Lost revenue occurs when the public chooses to access a free, albeit unlawful, copy of the work rather than pay for a lawful

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<sup>191</sup> Law and Economic Theory is a broad topic. I have limited my focus to the concepts of deterrence and utilitarianism as they are implicated by the Criminal Law. For more on Law and Economic Theory generally, see generally Richard A Posner, “The Law and Economics Movement” (1987) 77:2 American Economic Review 1.

<sup>192</sup> See Part 2(A), below.

<sup>193</sup> See Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 767.

<sup>194</sup> See *Ibid* at 765; Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 326 – 28; Penney, “Crime, Copyright and the Digital Age,” *supra* note 5 at 70 – 72.

<sup>195</sup> See e.g. *Ibid*.

<sup>196</sup> See Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 754. See also, Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8 at 295.

copy.<sup>197</sup> The aggregate harm of multiple unauthorized copies can be significant.<sup>198</sup> Loss of control occurs where copyright infringement deprives authors of their rights to produce, perform, and publish their work, or limit access to it.<sup>199</sup> Copyright infringement harms society when it discourages creators from either creating new works, or making those works available to the public. This can deprive the public of new ideas and information, and ultimately undermine the entire copyright regime.<sup>200</sup>

From a Law and Economic Theory perspective, criminalization is the only way to deter potential infringers and prevent the harms of copyright infringement. If left undeterred, copyright infringement will likely “prove destructive to the country’s production of intellectual output.”<sup>201</sup> Whereas civil sanctions are arguably insufficient to deter potential infringers because they are judgment proof (hard to detect online, unable to satisfy civil judgment, etc.),<sup>202</sup> criminal conviction has greater deterrence value and “is

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<sup>197</sup> See Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 296.

<sup>198</sup> See e.g. *Ibid* at 756, 762. Moohr uses the terms “accumulative harm” instead of “aggregate harm”

<sup>199</sup> These rights are granted to Creators/owners by the *Copyright Act 1985*, *supra* note 5, s 3(1). They are not exclusive; they exist in opposition to Users rights, which are codified in ss 29 – 32.2. Creators rights, Users rights, and the balance between them will be discussed in detail in Chapter 5. Copyright owners still benefit from the protection of the copyright regime even when they choose not to share their work with the public, which is the very reason why they are granted copyright protection in the first place. On this point, see e.g. Vaver, *Intellectual Property Law*, *supra* note 11 at 15 – 16: “Yet much inventiveness and research are kept secret, and the law rigorously protects that decision, whether or not disclosure would be more socially useful than secrecy. Whoever finds the cure for AIDS or cancer can lock the recipe in a drawer forever. Copyright law, too, allows an author not to publish his work and shades off into a tool of censorship.

<sup>200</sup> See e.g. Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 753 – 762; Graeme Dinwoodie, “Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring” (2004) 160 *Journal of Institutional and Theoretical Economics* 161 [“Private Ordering”] at 162: improper balancing can undermine the copyright regime. The foundations of the copyright regime will be discussed in more detail in Chapter 5. Briefly, Copyright Law is justified by the need to balance the interests of Users and Creators, to incentivize creation and insure access to information.

<sup>201</sup> Hardy, “Criminal Copyright Infringement,” *supra* note at 323.

<sup>202</sup> *Ibid* at 312 – 13; DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 493; See e.g. Penney, “Crime, Copyright and the Digital Age,” *supra* note 4 at 67; Manta, “Puzzle of Criminal Sanctions,” *supra* note 8 at 503; Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8 at 315. The authors note that criminalization is “especially important” for “poorly capitalized infringers...” They note that it would be

appropriate for activities that would otherwise be difficult to deter.”<sup>203</sup> The threat of criminal punishment, and criminally punishing infringers who do get caught, increases deterrence.<sup>204</sup> Criminal penalties become one of the “few *effective* responses” to infringement.<sup>205</sup>

In this Chapter, I argue against both the Criminal Legal Theory and Law and Economic Theory justifications for criminalized copyright infringement. Copyright infringement is *malum prohibitum*, not *malum in se*: wrongful because statute says so, not because it is inherently wrongful.<sup>206</sup> In Part 1 I set the theoretical foundations for criminalizing conduct. In doing so, I highlight the two predominant schools of thought on crime, and two limitations on the State’s ability to assert the coercive power of the Criminal Law: the morality school, the harm school, the harm principle, and the doctrine of restraint. Those who follow the morality school typically believe that the Criminal Law is meant to enforce existing morality; any act deemed immoral by society is properly the subject of the Criminal Law.<sup>207</sup> This is commonly known as the “morality principle.” Conversely, those who ascribe to the harm school typically believe that the Criminal Law

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objectionable to disproportionately target and prosecute poor offenders, but focusing on them makes sense where they are responsible for large-scale infringement.

<sup>203</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 312.

<sup>204</sup> See e.g. *Ibid* at 314. DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 493 argues there should be greater publicity of individual convictions to “maximize the deterrent value.” This should apparently be done by “encouraging convicted defendants to speak at local schools... and greater media exposure given to victims.”

<sup>205</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 341.

<sup>206</sup> Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 71.

<sup>207</sup> See generally, Lord Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1959).



is only justified in enforcing morality insofar as it causes harm. This limit is commonly known as the “harm principle.”<sup>208</sup>

In Part 2 I argue that Criminal Legal Theory and Law and Economic Theory cannot justify criminalized copyright infringement, discrediting pro-criminalization arguments throughout my analysis. I argue that copyright infringement does not meet the minimum requirement of social immorality necessary to justify criminalization; that although copyright infringement may cause some harm to copyright owners, this is not serious enough to warrant criminalization; and that criminalized copyright infringement fails a cost-benefit analysis.

In Part 3 I apply the Doctrine of Restraint to criminalized copyright infringement. The Doctrine of Restraint is a further limit on the Criminal Law’s ability to enforce morality. It suggests that criminal sanctions should only be used whether they are an “unavoidable necessity.”<sup>209</sup> I argue that because copyright infringement can be addressed through non-criminal means, criminalized enforcement is not an unavoidable necessity.

I conclude in Part 4 that because Canada is a democratic society, criminalizing conduct needs to be a Constitutionally valid exercise of State power pursuant to s.91(27).<sup>210</sup> To be legitimate, any criminalization must have some internal coherence that would be recognized through some lens of legal theory. Because Criminal Legal Theory and Law and Economic Theory are not effective lenses for this purpose, in subsequent

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<sup>208</sup> See e.g. John Stuart Mill, *On Liberty*, electronic ed (Luton: Andrews UK, 2011) at 26.

<sup>209</sup> See Government of Canada, *Criminal Law in Canada*, *supra* note 114 at 44.

<sup>210</sup> *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, s 91(27).

chapters I will assess whether Property theory and Copyright Theory justify criminalized infringement.

## 1. Criminal Legal Theory

Canadian Criminal Law is created by both statute and common law. The *Criminal Code*<sup>211</sup> creates and defines the “specific part” i.e. offences, while the “general part” i.e. mental elements and defences develop largely through the common law.<sup>212</sup> The majority of crimes are found in the *Criminal Code*, while others may be found in other statutes, such as the *Controlled Drugs and Substances Act*,<sup>213</sup> the *Crimes Against Humanity and War Crimes Act*,<sup>214</sup> and most relevant here, s.42 of the *Copyright Act*.<sup>215</sup>

The purpose of criminal law is to help maintain “a just, peaceful and safe society” by developing a system that deals appropriately “with culpable conduct that causes or threatens serious harm to individuals or society.”<sup>216</sup> This purpose is achieved through a primarily punitive framework that encompasses aspects of denunciation, deterrence, incapacitation and rehabilitation.<sup>217</sup> I will not discuss all of these aspects in detail, however I will explore the concept of deterrence in Part 2B(ii).

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<sup>211</sup> *Criminal Code* RSC 1985, c C-46.

<sup>212</sup> See e.g. Don Stuart, *Canadian Criminal Law: A Treatise, 7th ed* (Toronto: Carswell, 2014) at Chapter 2, 3.

<sup>213</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19.

<sup>214</sup> *Crimes Against Humanity and War Crimes Act*, SC 2000 c 24.

<sup>215</sup> I am considering s.42 to be a criminal offence even though it is not in the criminal code. It could be argued as a regulatory offence, but in effect it is criminal. The *Copyright Act*, *supra* note 5 even refers to it as “Criminal Remedies.” It also meets the requirements of division of powers criminal head of power from the constitution – valid purpose, backed by prohibition and penalty.

<sup>216</sup> Government of Canada, *Criminal Law in Canada*, *supra* note 114 at 52.

<sup>217</sup> See *Ibid* at 39.

Criminal Legal Theory justifies criminalizing conduct, and can be both normative and analytical.<sup>218</sup> My focus is on normative theories that define what criminal conduct is in Canadian society, and what it ought to be.<sup>219</sup> While there is value in a purely analytical approach to criminal law, my thesis goes beyond strictly analyzing the existence of criminalized copyright infringement to argue for a particular outcome. This necessarily involves some reliance on analytical theory to set the foundational values, goals, scope, etc. that will ground the pursuit of non-criminalized infringement.

Retributive and consequentialist conceptions of harm and morality are typically used to justify criminalization in Canada.<sup>220</sup> Retributive theory is backward looking, and posits that wrongful acts should be punished.<sup>221</sup> Consequentialist theory is forward looking, and justifies punishment only where wrongdoing results in negative effects.<sup>222</sup> Retributive and consequentialist theories are intertwined: both use punishment as means to ensure justice for those wronged, to act as a deterrent, to denounce wrongful conduct, to rehabilitate wrongdoers, and (where necessary) to incapacitate wrongdoers.<sup>223</sup> The application of both theories within the justice system is limited by the fundamental rights

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<sup>218</sup> See Antony Duff, *Theories of Criminal Law* in summer 2013 ed by Edward N Zalta online: <<http://plato.stanford.edu/entries/criminal-law/>>.

<sup>219</sup> *Ibid.* See also, Alan Brunder, “The Wrong, the Bad and the Wayward: Liberalism’s Mala in Se” in *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law*, eds François Tanguay-Renaud & James Stribopoulos (Portland: Hart Publishing, 2012) 55. Unfortunately there is minimal empirical data on the rate of copyright infringement in Canada. I will discuss some sources in this Chapter, however I have also expanded my scope to consider North American sources. Given the cultural similarities between Canada and the United States I think this expansion is justified and will not hinder or obscure my analysis.

<sup>220</sup> See e.g. Government of Canada, *Criminal Law in Canada*, *supra* note 114 at 45.

<sup>221</sup> See e.g. *Ibid* at 38.

<sup>222</sup> See e.g. *Ibid.* The consequentialist approach is also referred to as a utilitarian approach.

<sup>223</sup> *Ibid.*

of the wrongdoer as recognized in the *Charter* and reflected in the procedural requirements of the Criminal Law.<sup>224</sup>

In the following sections I will address both the morality and harm justifications for criminalization.<sup>225</sup> The theoretical justifications for criminalization change depending on which school of thought is adopted. Those who advocate in favour of the morality justification do not ascribe to the harm principle; immorality is sufficient to warrant criminalization. Proponents of the harm principle argue that criminalization can only be justified by immorality *and* serious harm. Criminalization, then, requires *at least* immoral conduct. I address both the immorality and harmfulness of copyright infringement in Part 2. In Part 3 I discuss the concept of deterrence, and arguments that criminalization deters potential wrongdoers from engaging in immoral and harmful conduct.

### **A. The Morality Justification for Criminalization**

Lord Devlin is one of the predominant voices of the Morality School. He argued that criminal law is meant to enforce morality as such. Unlike the Harm School, Lord Devlin argued that the State power to legislate against immorality cannot possibly be limited by legal theory.<sup>226</sup> The Criminal Law is fundamentally a moral system,<sup>227</sup> built on the foundations of what is considered right and wrong in a given community.<sup>228</sup> Immoral

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<sup>224</sup> See e.g. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 7 – 12.

<sup>225</sup> See e.g. Morris Manning, QC & Peter Sankoff, *Criminal Law*, 5th ed (Ontario: Lexis Nexis Canada, 2015) at 33. A detailed discussion of the merits of each school is beyond the scope of this Thesis.

<sup>226</sup> Lord Devlin, *The Enforcement of Morals*, *supra* note 207 at 14.

<sup>227</sup> *Ibid*, “[S]ociety may use the law to preserve morality in the same way it uses it to safeguard anything else if it is essential to its existence,” quoted in Ronald M Dworkin, “Lord Devlin and the Enforcement of Morals” (1996) 75 *Yale L J* 986 at 989.

<sup>228</sup> Lord Devlin, *The Enforcement of Morals*, *supra* note 207 at 23.

conduct is inherently wrong and should be criminalized;<sup>229</sup> any act condemned by the public on moral grounds is properly the subject of Criminal Law.<sup>230</sup>

A distinction is often drawn between public and private morality, where only the former is subject to legal intervention.<sup>231</sup> Public immoral conduct is defined by fundamental social values, and can therefore differ from one community to the next.<sup>232</sup> Fundamental social values can be subdivided into two categories: values generally essential to the very existence of society, and values essential to the existence of a particular society.<sup>233</sup> Broadly speaking, “essential values are those without which social life would be impossible.”<sup>234</sup> These values include: the sanctity of life, the inviolability of the person, the virtue of truth, and the necessity of order.<sup>235</sup> They correlate to crimes of violence, fraud, and crimes against the peace, order, and good governance of society.<sup>236</sup>

The morality principle advocates that criminal responsibility should attach to immoral acts as a means for society to maintain moral integrity, and reaffirm social values.<sup>237</sup> Crimes require both a prohibited (immoral) act and a requisite mental state, or *actus reus* and *mens rea*, both of which are typically defined in the specific criminal

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<sup>229</sup> See e.g. Law Reform Commission, *Our Criminal Law*, *supra* note 114 at 19. See also Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 20.

<sup>230</sup> See e.g. Manning & Sankoff, *Criminal Law*, *supra* note 225 at 33 in reference to Lord Devlin.

<sup>231</sup> Again, there is a debate here as to whether criminal law should enforce private morality, which is beyond the scope of this paper. However, see e.g. Patrick Devlin, *The Enforcement of Morals* at 3; Gerald J Postema, “Public Faces – Private Places: Liberalism and the Enforcement of Morality” in *Morality, Harm, and the Law*, ed Gerald Dworkin (Colorado: Westview Press, 1994) at 76 – 77. This is a liberal conception of morality, whereas conservative perspectives insist, “there is no matter of genuine moral concern that is not, in principle at least, a proper basis for legislation.”

<sup>232</sup> See e.g. Law Reform Commission, *Our Criminal Law*, *supra* note 114 at 20; Lord Devlin, *The Enforcement of Morality*, *supra* note 207 at 23.

<sup>233</sup> Law Reform Commission, *Our Criminal Law*, *supra* note 114 at 20.

<sup>234</sup> *Ibid.*

<sup>235</sup> See *Ibid.*

<sup>236</sup> See *Ibid.*

<sup>237</sup> See *Ibid.*

provision itself, or a relevant section of the *Criminal Code*. While the requirement of an unlawful act is straightforward, the *mens rea* requirement deserves some elaboration.

There are typically two broad types of mental fault – subject and objective.<sup>238</sup> Subjective fault refers to what is in the accused’s mind at the time the prohibited act is committed.<sup>239</sup> The accused must have the “required guilty knowledge in relation to the specified circumstances or consequences.”<sup>240</sup> Subjective fault is easy to reconcile with the Morality Principle; people who chose to engage in immoral activity should be held criminally responsible. Objective fault is a lower standard, based on the reasonable person. It requires “that a reasonable person in the accused’s position would have had the required guilty knowledge or would have acted differently.”<sup>241</sup> Criminal negligence is an offence based on objective fault.<sup>242</sup> It requires a “marked departure” from the standard of care.<sup>243</sup> The Morality Principle can justify criminalizing negligence on the basis that people are expected to meet the standard of care necessary to reaffirm social values. Those who depart significantly from this standard of care are not moral actors, and deserve criminal punishment.<sup>244</sup>

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<sup>238</sup> See e.g. Kent Roach, *Criminal Law*, 6th ed (Toronto: Irwin Law, 2015) at 172.

<sup>239</sup> *Ibid* at 13.

<sup>240</sup> *Ibid* at 172, 186 – 98 . There are various types of subjective fault, including: intent, purpose, willfulness, knowledge, willful blindness, and recklessness.

<sup>241</sup> *Ibid* at 172.

<sup>242</sup> *Ibid* at 13, “The criminal law increasingly accepts objective negligence as a legitimate form of criminal fault.”

<sup>243</sup> *Ibid*. The marked departure requirement distinguishes criminal negligence from civil negligence, and is a higher standard.

<sup>244</sup> See e.g. Victor Vridar Ramraj, *A Theory of Criminal Negligence* (PhD Thesis, University of Toronto Graduate Department of Philosophy, 1998) [unpublished], at ii - iii. Ramraj argues, “Negligence is a legitimate basis for imposing criminal liability because, in a least some defined circumstances, it is morally culpable. According to the character theory of responsibility, which this thesis defends, negligence is culpable because we are responsible, as moral agents, not only for our actions, but for our moral characters. Specifically, we are responsible for our moral view of the world... and for any unreasonable and

## B. The Harm Justification for Criminalization

John Stuart Mill, H. L. A. Hart, and Joel Feinberg are the predominant voices of the Harm School.<sup>245</sup> They believed that immorality alone is insufficient to justify the State's interference with individuals through the coercive power of the Criminal Law. Mill famously stated, "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."<sup>246</sup> Criminalization must be exercised with restraint because the Criminal Law is a serious restriction on our inherent right to act in accordance with our will.<sup>247</sup> The Criminal Law "out to be reserved for reacting to conduct that is seriously harmful."<sup>248</sup> This begs the question: "what constitutes harmful conduct?"

The "harm" concept is open to wide variation and interpretation.<sup>249</sup> Harm generally refers to "a set-back to a person's interests, measured with respect to some baseline."<sup>250</sup> Feinberg defines criminally recognizable harm as "setbacks of interests that

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inadvertent actions that flow from a defect in our moral outlook... particularly in situations involving serious risk to fundamental rights and interests of other persons. In these situations, we have a criminal law duty to hold their fundamental rights and interests in proper moral regard so as to avoid inadvertently harming others." See also, *Donoghue v Stevenson*, [1932] AC 562, at 580. Lord Atkin states, "liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay" (quoted in James Goudkamp, "The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence" (2004) 32 *Melbourn UL Rev* 342 at 343). Although *Donoghue v Stevenson* is a tort case, the rationale behind tortious liability for negligence can be expanded to criminal liability for negligence where the accused's conduct is a marked departure from the requisite standard of care.

<sup>245</sup> John Stuart Mill, *On Liberty*, *supra* note 208; Joel Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984) vol 1 [*Harm to Others*]; H L A Hart, *Law, Liberty, and Morality* (New York: Random House, 1907).

<sup>246</sup> Mill, *On Liberty*, *supra* note 208 at 26.

<sup>247</sup> See e.g. Government of Canada, *Criminal Law in Canada*, *supra* note 114 at 42

<sup>248</sup> *Ibid* at 45.

<sup>249</sup> See *Ibid* at 46.

<sup>250</sup> Hamish Stewart, "The Limits of the Harm Principle" (2010) 4 *Crim Law and Philos* 17 at 19.

are wrongs, and wrongs that are setbacks to interests.”<sup>251</sup> Criminally harmful conduct includes: inflicting harm, or threatening to inflict harm, to the physical safety or integrity of an individual; interference with an individual’s property; and, threatening the collective “safety or integrity of society,” through direct damage or “undermining... fundamental or essential values.”<sup>252</sup> Mill limited criminal harm at the individual; he argued that the harm principle did not apply to strictly personal conduct.<sup>253</sup> Criminal conduct must interfere with at least one other member of society; “in the part which merely concerns himself, his independence is, of right, absolute.”<sup>254</sup> For Mill, the use of deterrence is only justified where the un-deterred conduct is “calculated to produce evil to someone else.”<sup>255</sup>

The harm principle limits the State’s ability to enforce morality through the Criminal Law. To be criminal, conduct must: (1) be morally wrong based on fundamental social values, and (2) cause serious harm to someone other than the person engaging in the conduct.<sup>256</sup>

Both schools of thought see immorality as a baseline requirement. Harm is an additional requirement if we adopt the harm principle. Rather than endorse one school of thought and limit my theoretical analysis of criminalized copyright infringement to their

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<sup>251</sup> Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984) at 36.

<sup>252</sup> *Ibid* at 45.

<sup>253</sup> Mill, *On Liberty*, *supra* note 208 at 26.

<sup>254</sup> *Ibid*.

<sup>255</sup> *Ibid*.

<sup>256</sup> The *mens rea* requirements discussed above also apply to the harm principle. Subjectively, people who chose to engage in harmful conduct should be punished. Objectively, those who depart from the standard of care expected of all citizens to the extent that it causes harm to others should also be punished.



understanding of crime, in Part 2 I will discuss both the immorality and harm of copyright infringement.

## **2. Criminal Legal Theory does not Justify Criminalized Infringement**

Having established the theoretical justifications for criminalization, I now shift into an argument that neither Criminal Legal Theory, nor Law and Economic Theory justify criminalized infringement. I argue that copyright infringement does not meet the minimum requirement of immorality and it does not cause the requisite level of harm to warrant criminalization. I also argue that the deterrence justification for criminalization is weak, and on balance, the harms of criminalization outweigh its potential benefits. In Part 3, I build on this position and argue that the doctrine of restraint supports the argument against criminalized copyright infringement.

### **A. There is no Consensus that Copyright Infringement is Immoral**

As outlined above, morality is based on fundamental social values. To criminalize copyright infringement on the basis of morality, the protection of creators' copyright interests must amount to at least one fundamental social value.<sup>257</sup> An argument could be made that copyright infringement invokes the virtue of truth, and correlates to the crime of fraud. However, the United States Supreme Court, in a manner consistent with Canadian law and statutory interpretation, has ruled that copyright infringement is not fraud.<sup>258</sup> They reasoned that copyrights are statutorily defined and distinct from possessory interests to tangible property, that copyright infringement does not deprive an

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<sup>257</sup> Recalling from above that fundamental social values include: the sanctity of life, the inviolability of the person, the virtue of truth, and the necessity of order, and correlate to crimes of violence, fraud, and crimes against the peace, order, and good governance of society.

<sup>258</sup> See e.g. *Dowling v United States*, 473 US 207 (1985) at 216 – 17.

owner of physical control, and that infringement implicates more complex interests than theft, conversion, or fraud.<sup>259</sup>

We must consider, then, whether the inviolability of copyright a fundamental value, and ascertain what society's view of copyright infringement is.<sup>260</sup> These considerations beg for a definition of society. For the purposes of this thesis, I am defining "society" as the aggregate of people living in Canada. However I will note that society is not a homogenous group with unified interests. Any discussion of copyright infringement typically divides between authors and users, however this is an oversimplification.<sup>261</sup> Not all copyright authors share the same beliefs about copyright. For example, in 2007 Radiohead released *In Rainbows* on their website, asking fans to "pay what you wish."<sup>262</sup> Large record companies would likely not be onboard with this business model.<sup>263</sup> Similarly, not all users share the same beliefs about copyright protection and infringement.<sup>264</sup>

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<sup>259</sup> *Ibid* at 214 – 18.

<sup>260</sup> Penney, "Crime Copyright and the Digital Age," *supra* note 5 at 23 asks a similar question: "whether people consider the sanctity of copyright to be a fundamental value."

<sup>261</sup> See generally Teresa Scassa "Interests in the Balance" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law Inc, 2005) 41 ["Interests in Balance"]. She argues that the typical reference to Users and Creators oversimplifies the issue. It wrong to assume that creators, users and owners are all homogenous groups such that the individual interests of members of each group are identical.

<sup>262</sup> See e.g. Paul Thompson, "Radiohead's *In Rainbows* Success Revealed", *Pitchfork* (15 October 2008) online: <[www.pitchfork.com](http://www.pitchfork.com)>.

<sup>263</sup> Radiohead received a lot of criticism. See e.g. Eric Garland, "The 'In Rainbows' Experiment: Did it Work?", *NPR* (16 November 2009) online: <[www.npr.org](http://www.npr.org)>. Garland point out various comments made about the experiment. In particular, it was criticized as "demeaning music," and called one of the "101 Dumbest Moments in Business."

<sup>264</sup> See e.g. the comments section of Unknown, "Change My View: Copyright is immoral and an infringement of my human rights", (16 November 2016) *Reddit* (blog) online: <<https://www.reddit.com>>. Comments include: "Without copyright then no one would be able to make a living as an author, composer, film maker, etc. in modernity;" "VIRTUALLY NOTHING WILL GET MADE UNDER THIS SYSTEM;" "If people couldn't get paid well to produce art, they would produce less art. That would be bad. Everyone benefits from from copyright;" "I would argue that you do have certain entitlements because once a work

In this section I will not prove that copyright infringement is moral; I do not have that burden. Onus is on the Government to justify criminalization.<sup>265</sup> Part of that justification is proving that copyright infringement is immoral. In the absence of proof, and considering the ongoing debate of copyright infringement's immorality, the Government cannot justify criminalized infringement on the basis of morality.<sup>266</sup> The morality principle requires evidence sufficient to support the conclusion that the majority of society believe copyright infringement is immoral. There is insufficient data to support this conclusion.

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has been made public it then becomes a part of our culture and in a sense is owned by everyone;" "In a world of plenty, I might agree with you. Unfortunately we are a set of greedy bastards and money is necessary in order to live. If you want to have that art in the first place, you need to allow the artist to benefit monetarily. Your rights do not trump theirs."

<sup>265</sup> Once enacted, there is a presumption that statutes are constitutional until challenged. However, once a statute has been constitutionally challenged and constitutional invalidity has been proven on a balance of probabilities, onus shifts to the Government to justify their legislation. The burdens of a complainant challenging the constitutionality of legislation and the Government in seeking to justify, pursuant to s.1, legislation that has been found to violate a *Charter* right, are different. The Supreme Court of Canada makes this clear for e.g. in *Bedford v Canada (Attorney General)*, 2013 SCC 72. They note at para 172: "To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right." They also state at para 126: At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. *Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole*" (emphasis added). Although this was stated directly in reference to s.1, I would suggest that the idea that the Crown/Government is better suited to call social science to justify the law's impact on society as a whole is relevant in this context, where the law itself suggests, and indeed exists, based on the premise that copyright infringement should be criminalized to benefit society by adequately protecting authors' rights. I will not conduct a thorough constitutional analysis of the criminal copyright provisions, as that is beyond the scope of this thesis though I suggest they likely violate ss 7 and 12 of the *Charter*. I do discuss constitutionality in more detail in Chapter 5 where I argue that non-criminal copyright enforcement is more consistent with *Charter* values than criminalized enforcement.

<sup>266</sup> Because copyright infringement has been a frequent topic of conversation since the days of Napster, Grokster and other Peer-to-Peer file sharing programs, I would expect to see some empirical data showcasing the extent and frequency of copyright infringement. And yet, there is a significant lack of data.

***i) Survey Data Shows no Societal Consensus that Copyright Infringement is Immoral***

I have been unable to find any Canadian surveys that directly ask whether copyright infringement is immoral. Conducting an empirical study is unfortunately beyond the scope of this thesis, so I am left to expand my search beyond the Canadian border. There are three surveys from the U.S. and one Danish study that speak to this issue. Stuart P. Green and social psychologist Matthew Kugler conducted an empirical study in 2010 with the objective of determining whether society agrees that the means by which “theft” is committed and the form of the stolen property is irrelevant to blameworthiness and punishment.<sup>267</sup> Green believes their study is evidence that “lay observers draw a sharp distinction between file sharing and genuine theft.”<sup>268</sup> Their data shows that “theft” of tangible goods is seen as more blameworthy than theft of intangible goods: “All else being equal, our subjects consistently ranked the theft of tangible goods as more blameworthy than theft of intangibles.”<sup>269</sup>

Robert M. Siegfried released “Student attitudes on software piracy and related issues of computer ethics” in 2005.<sup>270</sup> Siegfried surveyed 224 students from two American universities. They were asked questions relating to their perception of software piracy, and their attitudes about downloading music, among others.<sup>271</sup> Siegfried observed,

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<sup>267</sup> Stuart P Green & Matthew B Kugler, “Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation” (2010) 7:2 J Empirical Leg Stud 511 [“Theft Study”]. Their method is detailed at 520 – 33. Briefly, Their study involved 172 first year law students from Rutgers-Newark. They completed the study during orientation, before the start of classes. I have put theft in quotations because I argue in Chapter 4 that copyright infringement is not theft.

<sup>268</sup> Stuart P. Green, “When Stealing Isn’t Stealing”, *New York Times* (28 March 2012) online: <[www.newyorktimes.com](http://www.newyorktimes.com)> [“NY Times Article”].

<sup>269</sup> See Green & Kugler, “Theft Study,” *supra* note 267 at 534.

<sup>270</sup> Robert M Sigfried, “Student attitudes on software piracy and related issues of computer ethics” (2004) 6 *Ethics and Information Technology* 215.

<sup>271</sup> See *Ibid* at 215.

“it is very clear that students do not see any problem with downloading music over the internet. The permission of the artist... is insignificant.”<sup>272</sup> According to Siegfried’s data, 82% of those surveyed “think it’s ok to download music from the Internet,” while 84% “think it’s ok to download music from the Internet if the musicians say it’s OK.”<sup>273</sup>

The Pew Research Centre conducted a survey on downloading music in 2000.<sup>274</sup> They found that 78% of those surveyed who downloaded music did not think it was stealing.<sup>275</sup> They found that a 53% majority of general internet users did not believe downloading was stealing, while 31% said it was stealing.<sup>276</sup> The study also found that 61% of the music downloader’s surveyed stated they did not care whether the music they were downloading was protected by copyright.<sup>277</sup>

A Danish study released in 2010 shows a similar trend.<sup>278</sup> The study contained questions on morals and ethics, and asked participants which laws they believed were socially acceptable to break.<sup>279</sup> The study shows that 70% of those surveyed find unauthorized downloading to be socially acceptable.<sup>280</sup> A 1997 study had similar results.<sup>281</sup> Together, these studies show that despite the Denmark entertainment

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<sup>272</sup> *Ibid* at 219.

<sup>273</sup> *Ibid* at 217.

<sup>274</sup> Amanda Lenhart & Susannah Fox, “Downloading Free Music” (website) (28 September 2000) online: <<http://www.pewinternet.org>>. Their full report is available on their website.

<sup>275</sup> *Ibid* at 2.

<sup>276</sup> *Ibid* at 2.

<sup>277</sup> *Ibid* at 2.

<sup>278</sup> I was unable to find a copy of this study in English, so I have relied on secondary sources to understand the content of the study, including: Enigmax, “70% of the Public Finds Piracy Socially Acceptable” (28 February 2011), *Torrent Freak* (blog), online: <<https://torrentfreak.com/piracy-socially-acceptable-110228/>> [Enigmax]; Mike Masnick, “New Study: 70% of People Find ‘Piracy’ Socially Acceptable [Updated]” (2 March 2011), *Tech Dirt* (blog), online: <<https://www.techdirt.com>>. [New Study].

<sup>279</sup> See Enigmax, *Ibid*; Masnick, “New Study,” *Ibid*.

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

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

industry’s “extra aggressive” efforts to “crack down” on, and educate the public about unauthorized file sharing, societal consensus that copyright infringement is not immoral has remained unchanged.<sup>282</sup> This trend also speaks to the law’s inability to teach morality.<sup>283</sup>

These surveys do not definitively conclude that copyright infringement is not immoral from a societal perspective.<sup>284</sup> However, they do show that there is no general consensus that copyright infringement is immoral, despite lobbying efforts to suggest otherwise.<sup>285</sup>

Part of the push to view copyright infringement as morally wrong is based on the false assumption that it is analogous to theft, which I address in detail in Chapter 4. Briefly, the immorality of theft is not heavily contested (in most situations).<sup>286</sup> If copyright infringement is seen as analogous to theft, then it is easy to say that it is

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

<sup>283</sup> Recall DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 493, where DuBose argues that “convicted defendants” should speak at local schools to “maximize the deterrent value of individual convictions through greater publicity.” He also argues that “more public education and greater media exposure given to victims.”

<sup>284</sup> Some scholar’s have argued this point more concretely, see Mosheen Manesh, “The Immorality of Theft, the Amorality of Infringement” (2006) 5 Stan Tech L Rev, at para 6, “file-sharers seems to share a collective believe that copyright infringement is not morally wrong.” See also, Ken Burleson, “Learning from Copyright’s Failure to Build its Future” (2014) 89:3 Ind LJ 1299 at 1307: “Fundamentally, people who engage in file sharing do not seem to believe their action are actually morally *wrong*.”

<sup>285</sup> See e.g. Burleson, “Learning from Copyright’s Failure,” *Ibid* at 1313; or the beginning of almost any DVD purchased since 2015 for the Motion Picture Association’s public service announcement: “You

wouldn't		steal	a	car,
you	wouldn't	steal	a	handbag,
you	wouldn't	steal	a	television,
you	wouldn't	steal	a	movie.
Downloading	pirated	films	is	stealing,
stealing	is	against	the	law,

PIRACY IT'S A CRIME.”

<sup>286</sup> I would suggest that theft might be considered less immoral in a situation where someone is “stealing” food because they are hungry and starving and have no money.

morally wrong and should be criminalized.<sup>287</sup> However, because society does not equate copyright infringement with taking physical property,<sup>288</sup> contrary to what the recording industry and other large scale lobbying groups would have us believe,<sup>289</sup> copyright infringement cannot be criminalized on the basis that it is analogous to theft of tangible property.<sup>290</sup> As Green & Kugler argue, “where people consistently regard two or more types of conduct as different in terms of blameworthiness, the law ought to reflect those differences.”<sup>291</sup>

As Penney and others have suggested, copyright infringement is *malum prohibitum*, not *malum in se*.<sup>292</sup> Copyright infringement is, technically speaking, an illegal act, but this is only because the Government and the *Copyright Act* says that it is. This does not settle the dispute as to whether copyright infringement is morally wrong. In fact, Canada has a history of criminalizing conduct at odds with society’s moral compass, for example same-sex relationships.<sup>293</sup> In these situations the law is being used in an attempt to teach society values, rather than as a reflection of established fundamental values. This is a theoretically invalid purpose; the Criminal Law is meant to enforce

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<sup>287</sup> See e.g. Stuart P Green, “NY Times Article,” *supra* note 268. Greene states prosecutors and complainants of copyright infringement presumably “invoke the language of “theft” and “stealing” ... to obtain the moral high ground.”

<sup>288</sup> See e.g. *Ibid*.

<sup>289</sup> See *supra* note 285 for the Motion Picture Association’s public service announcement.

<sup>290</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 70. See also, *R v Stewart*, [1988] 1 SCR 963 at para 47, 50 DLR (4th) 1.

<sup>291</sup> Green & Kugler, “Theft Study,” *supra* note 267 at 517.

<sup>292</sup> See Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 71; Gervais, “Canadian Copyright Narrative,” *supra* note 3 at 306 – 307. Gervais notes, “social norms do not reflect an understanding as downloading as *malum in se*, as a natural rights justification would suggest, but rather as an (annoying) *malum prohibitum*, and a prohibition that should be revisited.

<sup>293</sup> See e.g. “Timeline: Same-sex rights in Canada”, *CBC News* (12 January 2012), online: <www.cbc.ca>. In 1965, the SCC upheld a ruling labeling Everett Klippert a “dangerous sexual offender” for admitting he was gay. Homosexuality was decriminalized in Canada in 1969.

morality, not teach it; teaching morality is society's responsibility.<sup>294</sup> When society fails to meet this responsibility, it is inappropriate to "fruitlessly pin all our hopes on criminal law. Law cannot do it all, nor should it be ask it to."<sup>295</sup>

## **B. Criminalization is More Harmful than Copyright Infringement**

In this Part I make two arguments. First, I argue that the types of harm typically attributed to copyright infringement are insufficient to warrant criminalization. Second, I argue that the deterrence justification for criminalization fails a cost-benefit analysis.

### ***i) Copyright Infringement does not Cause the Requisite Level of Harm.***

There are generally three types of harm attributed to copyright infringement: (1) harm to copyright owners through lost revenue, (2) harm to copyright owners through lost control over their work, and (3) harm to society through lost incentive to create, which deprives the public of innovative and creative works. While each of these categories may involve some degree of harm, it is not serious enough to justify criminal sanctions. This is especially true where there is no societal consensus that copyright infringement is morally wrong for violating fundamental social values.

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<sup>294</sup> Penney, "Crime, Copyright, and the Digital Age," *supra* note 5 at 71 argues that because copyright infringement is *malum in se*, "criminal sanctions are either inappropriate or justifiable on purely instrumental grounds." He goes on to acknowledge that an instrumental purpose is questionable because societal norms "are changeable." However for an argument that the law is not meant to teach morality, see e.g. Lord Devlin, *Enforcement of Morals*, *supra* note 207 at 24. "The instrument of the criminal law is punishment; those of the moral law are teaching, training, and exhortation. If the whole dead weight of sin were ever to be allowed to fall upon the law, it could not take the strain. If at any point there is a lack of clear and convincing moral teaching, the administration of the law suffers." Although Lord Devlin's argument is set in Christianity, and the belief that the Church ("moral law") is meant to teach morality, his point is nevertheless clear: the criminal law is meant to enforce morality (through punishment), not teach morality. See also, Law Reform Commission, *Our Criminal Law*, *supra* note 114 at 17. The criminal law is meant to reaffirm values through enforcement. The prime duty of teaching values belongs to families, schools, churches, etc. There is "no need, then, when these have failed to should their responsibilities, to fruitlessly pin all our hopes on criminal law. Law cannot do it all, nor should we ask it to;" see Ken Burlison, "Learning from Copyright's Failure to Build its Future" (2014) 89:3 Ind LJ 1299 at 1312, "Increasing sanction will not change the public's view of what is or is not morally sound conduct."

<sup>295</sup> Lord Devlin, *Enforcement of Morals*, *supra* note 207 at 24.



First, the harms associated with copyright infringement are often times hard to quantify, and typically over stated.<sup>296</sup> Whereas there is minimal data available on the immorality of copyright infringement, there is minimal objectively quantifiable data on the harm caused by copyright infringement. In 2012 the RCMP released *Intellectual Property Crime Statistics for 2005 – 2012*.<sup>297</sup> This report details the value of counterfeited good seized from 2005 – 2012.<sup>298</sup> It lists the types of commodity seized in 2012 by percentage and total retail value.<sup>299</sup> In 2012, “audio-visual and copyright works” represented 20% of the total documented cases of counterfeit and pirated goods. The total retail value of all items seized in 2012 was \$38,102,195.00, the Report does not breakdown this value by commodity, and there is no way of determining what percentage of this value is attributable to copyright infringement. Despite numerous searches, this is the only objective report that I was able to uncover, and it does not explicitly state the financial harm caused by copyright infringement, nor does it indicate what percentage of the \$38 million represents lost revenue.

Lost revenue is difficult to quantify. One way to calculate the loss is by multiplying the value of the protected content by the number of infringing copies created. If an album download is \$10, Infringer X makes it available online and 40 people

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<sup>296</sup> See e.g. Burleson, “Learning from Copyright’s Failure,” *supra* note 284 at 1301: “economic claims of damages cause by infringement are unsubstantiated at best and patently false at worst.” See also Moohr, “Defining Overcriminalization,” *supra* note 37 at 792; Goldman “Road to no Warez,” *supra* note 37 at 426; Bitton, “Rethinking ACTA,” *supra* note 4 at 80. Movie and Record companies claim copyright infringement has cost them billions of dollars. However this information cannot be taken at face value. For starters, this is a self-interested argument. See e.g. United States Department of Justice, News Release, “Owner of Most-Visited Illegal File-Sharing Website Charged with Criminal Copyright Infringement” (20 July 2016) online: [www.justice.gov](http://www.justice.gov) [“Vaulin Complaint,”]. Vaulin is alleged to have illegally distributed \$1 Billion worth of copyright protected content.

<sup>297</sup> RCMP, *Report*, *supra* note 5.

<sup>298</sup> See *Ibid.*

<sup>299</sup> See *Ibid.*

download an infringing copy, then the copyright owner loses \$400 in revenue. The problem with this approach to lost revenue, is that it potentially overestimates the harm. It does not account for the fact that some people who downloaded a free copy would have never paid \$10 for the album. If Downloader Y was never going to pay for the album in the first place then the copyright owner has not actually lost any revenue.

In 1996, the Nova Scotia Provincial Court sentenced a 17 year-old young offender, J.P.M. to 18 months probation and 150 hours of community service for criminal copyright infringement.<sup>300</sup> J.P.M ran an online bulletin board that hosted copyright protected software and allowed users to download the software for free.<sup>301</sup> Sixteen users were granted access to the content, and J.P.M. also downloading some of the software to his friends' computers himself. Unfortunately, the lower court decision is unreported. The Court of Appeal upheld the conviction and sentence of the lower court. The Court of Appeal decision makes no reference to the alleged financial loss suffered by the software companies as a result of J.P.M's bulletin board, or any indication of the financial profit he received. In spite of this, the lower court notes, J.P.M's actions were "clearly prejudicial to the owners of the copyright in that they were deprived of control over their product which they required to ensure quality and also interferes with a legitimate commercial distribution and sale of the product for profit."<sup>302</sup>

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<sup>300</sup> *R v JPM*, 1996 CanLII 8701 (NSCA).

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*, citing the lower court decision. Loss of control will be addressed later in this sub-part.

The lost revenue argument is often based on the concept of “aggregate harm.”<sup>303</sup> The harm caused by one infringer may be insignificant, for example where they download a single song from the internet. The cumulative harm of multiple infringers downloading the same song has the potential to significantly affect copyright owner’s financial interests.<sup>304</sup>

Another method used to quantify copyright owner’s financial harm looks to the profits of the alleged infringer. The accusations against Kim Dotcom et al. provide a nice example.<sup>305</sup> Dotcom et al have been accused of depriving copyright owners of upwards of \$500,000,000. Their estimated income is in excess of \$175,000,000.<sup>306</sup> The United State Department of Justice argues that this revenue is evidence of their wrongdoing and that Dotcom et al. have “financially benefitted directly from the infringement of copyrighted works.”<sup>307</sup> Similarly, Artem Vaulin, the alleged proprietor of KickAss Torrents is alleged to have illegally distributed \$1 billion worth of copyright right protected content, and is alleged to make between \$12-22 million per year in advertisement revenue.<sup>308</sup>

This focus on profit is not surprising, as criminal copyright infringement requires a potential financial deprivation to the copyright owner, be it through a sale, rental, or trade by the copyright infringer.<sup>309</sup> However using an infringer’s profit as a measure of

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<sup>303</sup> See e.g. Moorh, “Crime of Copyright Infringement,” *supra* note 37 at 756, 762. Moorh uses the term “accumulative harm,” and defines it as “an accumulated or total loss from many small infringements by many individuals.”

<sup>304</sup> I will discuss aggregate harm in more detail in Part 2B(ii) with reference to deterrence.

<sup>305</sup> See *Dotcom*, *supra* note 25.

<sup>306</sup> *Ibid* at para 1.

<sup>307</sup> *Ibid* at para 27.

<sup>308</sup> USDOJ, “Vaulin Complaint,” *supra* note 296.

<sup>309</sup> See generally, *Copyright Act, 1985 supra* note 5, s 42. All of the listed offences in s.42 involve some type of financial deprivation to the copyright owner.

harm and lost revenue is problematic because it assumes a direct correlation between the two. Neither Dotcom's indictment nor the Vaulin complaint explains how the Department of Justice calculated the copyright owners lost revenue.

Second, the harm associated with loss of control is insufficient to justify criminalization. While the *Copyright Act* does give authors the right to control access, reproduction and dissemination of their work,<sup>310</sup> these rights are not absolute. Authors' rights are limited by users rights, which are also codified in the *Copyright Act*,<sup>311</sup> and allow certain content uses outside of the author's control. Authors are also able to maintain an allowable degree of control over their work through non-criminal means, such as Digital Rights Management (DRM) and TPMs.<sup>312</sup>

Third, whether copyright infringement actually causes harm by undermining the incentive to create is impossible to calculate. Burleson argues, "the apocalyptic rhetoric" that copyright infringement will destroy the creation incentives is unsupportable; File-sharing has continued for over a decade and new artists continue to emerge and thrive."<sup>313</sup>

Assuming that infringement does undermine the incentive objectives is problematic. Whether the copyright regime actually incentivizes creation is up for debate.<sup>314</sup> It is bad practice to base criminalization on such a contested premise. If the

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<sup>310</sup> *Ibid*, s 3(1).

<sup>311</sup> *Ibid*, ss 29 – 32.2. The extent of both Creators and Users rights and the need to balance them is addressed in detail in Chapter 5.

<sup>312</sup> I will address non-criminal enforcement in Chapters 5.

<sup>313</sup> Burleson, "Learning from Copyright's Failure," *supra* note 284 at 1300. Burleson notes that in 2010 75,00 new albums were released compared to 38,000 in 2003.

<sup>314</sup> This issue is beyond the scope of this thesis. See e.g. Christopher Buccafusco & David Fagundes, "The Moral Psychology of Copyright Infringement" (2015) 100 *Minn L Rev* 2433 ["Moral Psychology"]. They

copyright regime does not actually incentivize creation, and we base criminalized infringement on the premise that it undermines the incentive to create – thereby depriving society of knowledge and information – then in effect we are criminalizing conduct that does not actually disrupt the copyright regime, and therefore, in reality, does not cause harm to society.

Additionally, copyright infringement does not cause physical harm. The harm involved is typically described as purely financial, though some scholars suggest that copyright infringement also harms the morality and sensibility of creators.<sup>315</sup> While it is possible that creators are emotionally harmed by copyright infringement, this type of wrong is more appropriately addressed by civil and tort law rather than government intervention through the Criminal Law.<sup>316</sup>

***ii) The Deterrence Justification for Criminalization is Weak.***

Law and Economic Theory has a history with Intellectual Property Law.<sup>317</sup> Traditionally its focus is on reconciling production incentive and access.<sup>318</sup> I am particularly focused on Law and Economic Theory’s criminalization justification – that criminalization is the only effective way to deter the harms of copyright infringement.<sup>319</sup> The chief economic rationale for criminalized infringement is the “expectation that

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argue that “copyright’s origin story,” the “incentivist narrative” is not true; that creators create for reasons other than financial gain. They also argue that copyright owners feel wronged by copyright infringement for reasons unrelated to money. See also Eric E Johnson, “Intellectual Property and the Incentive Fallacy” (2012) 39 Fla St UL Rev 623.

<sup>315</sup> See e.g. Buccafusco & Fagundes, “Moral Psychology,” *supra* note 314 at 2435, 2437.

<sup>316</sup> See e.g. Keyes & Brunet, *Copyright Infringement in Canada*, *supra* note 31 at 185; Law Reform Commission, *Criminal Law in Canada*, *supra* note 114 at 42 – 43.

<sup>317</sup> See e.g. Richard A Posner, “Intellectual Property: The Law and Economics Approach” (2005) 19:2 Journal of Economic Perspectives 57.

<sup>318</sup> *Ibid.*

<sup>319</sup> See e.g. Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 341, Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8 at 315.

detering some harmful copyright will generate more beneficial behavior.”<sup>320</sup> To assess this claim, I am adopting a utilitarian lens.<sup>321</sup> I invoke Kaldor-Hicks efficiency<sup>322</sup> and apply a cost-benefit analysis to show that the costs criminalized copyright infringement outweigh its potential benefits.

Criminalized infringement may have some deterrent benefits. It may increase public awareness that copyright infringement is illegal, which could reduce the rate of infringement. In Chapter 5, I argue that this educative benefit is being effectively achieved through the Notice-and-Notice regime. The risk of criminal sanctions may deter potential infringers who believe “the contemplated wrong “costs” more than it is worth.”<sup>323</sup> This is a form of External Control Theory.<sup>324</sup> However, this reasoning assumes that potential infringers will act in rationally calculated ways, which is increasingly untrue online.<sup>325</sup> It also fails to account for the fact that “it is more difficult to induce law-

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<sup>320</sup> Buccafusco & Masur, “Innovation and Incarceration,” *supra* note 8 at 315.

<sup>321</sup> Moohr employed a utilitarian approach in “Defining Overcriminalization,” *supra* note 37 at 785 – 86. Utilitarianism assesses actions as right or wrong based on the net benefit that accrues to society. See e.g. John Stuart Mill, *Utilitarianism and the 1868 Speech on Capital Punishment*, 2nd ed by George Sher (Indianapolis: Hackett Publishing Company, 2001) at 6–26: “...actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the deprivation of pleasure. ... the happiness which forms the utilitarian standard of what is right in conduct is not the agent’s own happiness but that of all concerned.”

<sup>322</sup> Kaldor-Hicks efficiency is a cost-benefit analysis, asking whether the benefits of a collective decision are sufficient to outweigh its costs, such that a net-benefit accrues to society in general. See e.g. Trebilcock, “Economic Analysis of Law,” *supra* note 129 at 104. Richard F Devlin, ed, *Canadian Perspective on Legal Theory*, (Toronto: Edmond Montgomery Publications, 1991) at 108.

<sup>323</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 312.

<sup>324</sup> See e.g. Moohr, “Defining Overcriminalization,” *supra* note 37 at 794 – 95. The External Control Theory of deterrence “suggests that people will act in ways that avoid the costs of breaking the law; rational potential offenders weigh the penalties and the likelihood of being prosecuted against what they hope to gain. Internal Control Theory “suggests that people instinctively obey the law because they have internalized a set of values that mirrors social norms. Individuals who have internalized those values become self-regulating.

<sup>325</sup> See e.g. Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 756, 762. Moohr uses the term “accumulative harm,” and defines it as “an accumulated or total loss from many small infringements by many individuals.”

abiding behavior when underlying social norms do not support the law.”<sup>326</sup> Because copyright infringement’s immorality is not an underlying social norm, it is unlikely that increased criminalization will be an effective deterrent.

Criminalized infringement comes with significant costs. First, criminalized enforcement has direct monetary costs associated with detection, enforcement, prosecution and sanction, which can be significant.<sup>327</sup> Second, it undermines Copyright Law’s objectives by overdetering lawful uses of copyright protected content. These chilling effects undermine both the incentive and access objectives. The former is undermined as users are deterred from building on existing works to develop new socially valuable content. The latter is undermined too, as users are deterred from lawfully accessing content out of fear that their use may be considered illegal.<sup>328</sup> Buccafusco & Masur acknowledge that there is an “efficient level of copying,” where some copyright may be socially beneficial.<sup>329</sup> In some circumstances copyright infringement may actually

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<sup>326</sup> Moorh, “Defining Overcriminalization,” *supra* note 37 at 794.

<sup>327</sup> See Buccafusco & Masur, “Innovation & Incarceration,” *supra* note 8 at 312; Moorh, “Defining Overcriminalization,” *supra* note 37 at 801.

<sup>328</sup> See Buccafusco & Masur, “Innovation & Incarceration,” *supra* note 8 at 313; Moorh, “Crime of Copyright Infringement,” *supra* note 37 at 759 – 760; “Defining Overcriminalization,” *supra* note 37 at 802 – 804; Buccafusco & Fagundes, “Moral Psychology,” *supra* note 314 at 2441 argue that from the perspective of Law and Economic Theory, “any copyright protection that exceeds the minimum necessary to encourage creativity is costly to social welfare.” See also Jon Penney, “Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study (May 27, 2017)” (2017) Internet Policy Review (Forthcoming), online: <<https://ssrn.com/abstract=2959611>> [“Internet Surveillance”]. In Scenario 3, the “DMCA Scenario,” which discusses in part the chilling effects/overdeterrence of copyright infringement by notice-based enforcement, like the *DMCA* approach in the U.S. and the notice-and-notice system in Canada. Penney suggests that these types of enforcement approaches are not only effective in deterring copyright infringement by users, but they may also be creating chilling effects on legal activities. For more on the chilling effects of online surveillance, Jon Penney, “Whose Speech is Chilled by Surveillance?” *Slate* (7 July 2017) online: <[www.slate.com](http://www.slate.com)> [“Whose Speech”].

<sup>329</sup> Buccafusco & Masur, “Innovation & Incarceration,” *supra* note 8 at 295 - 97. For example, authors may not be willing to license their work for criticism, parody, etc. but these are socially beneficial activities.

increase the popularity and recognition of a particular work, benefitting the copyright owner.<sup>330</sup>

Criminalized infringement also harms the integrity of the criminal justice system.<sup>331</sup> As discussed above, there is no societal consensus that copyright infringement is immoral. Criminalizing and punishing behaviors that society does not believe are wrong “jeopardizes the law’s legitimacy and credibility.”<sup>332</sup> It may also produce a counter effect, whereby society sees no benefit in complying with the criminal law,<sup>333</sup> which could undermine society’s ability to ever see copyright infringement as immoral.<sup>334</sup>

The justice system’s integrity is further jeopardized by the “aggregate harm” approach to punishing copyright infringers. This approach attributes the harm of multiple small *de minimus* infringements to one infringer and punishes them accordingly.<sup>335</sup> This is done because copyright infringers are often hard to detect, and those who are charged/convicted are used as a means of general deterrence. This approach not only

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<sup>330</sup> See e.g. Buccafusco & Fagundes, “Moral Psychology,” *supra* note 329 at 2435.

<sup>331</sup> See e.g. Moohr, “Defining Overcriminalization,” *supra* note 8 at 804–805.

<sup>332</sup> See Burleson, “Learning from Copyrights Failure,” *supra* note 284 at 1301: “As citizens reject copyright, not only does the law fail its constitutional purpose, it also undermines the effectiveness of the legal system.” See also, Daniel Gervais, “The Price of Social Norms: Towards a Liability Regime for File-Sharing” (2003) 12:1 J Intell Prop L 39 at 50.

<sup>333</sup> Gervais, “Price of Social Norms,” *supra* note 332 at 50, referring to Eric A Posner, “Law and Social Norms: The Case of Tax Compliance” (2000) 86 Va L Rev 1781.

<sup>334</sup> See e.g. Moohr, “Defining Overcriminalization,” *supra* note 37 at 805.

<sup>335</sup> See e.g. Bitton, “Rethinking ACTA,” *supra* note 4 at 80; Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 756, 762.



violates the proportionality principle, but deterrence is also ineffective for increasing legal compliance.<sup>336</sup>

On balance, the costs of criminalized infringement significantly outweigh its benefits.<sup>337</sup> I am not suggesting that copyright infringement does not cause harm. However the harm caused to the copyright regime and the integrity of the criminal justice system by criminalization is far greater than the harm to copyright owners through potential lost revenue and lost control over their work.<sup>338</sup> As such, the deterrence justification for criminalization is weak.

### **3. Criminalized Infringement is Inconsistent with the Doctrine of Restraint.**

The doctrine of restraint is a further limit on the State's ability to use the Criminal Law's coercive power to enforce behaviour.<sup>339</sup> Both the Law Reform Commission and the Department of Justice heavily discussed this doctrine during the 1982 *Criminal Code* amendment process.<sup>340</sup> The doctrine of restraint's proponents argue that because the Criminal Law is a "blunts instrument," with punitive and coercive sanctions, restraint must be exercised in classifying conduct as criminal.<sup>341</sup> The doctrine argues for a careful examination of the "appropriateness, the necessity, and the efficacy of employing the

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<sup>336</sup> See Burleson, "Learning from Copyright Failure," *supra* note 284 at 1306. Burleson notes, "A number of studies have found that deterrence is the least effective method of garnering legal compliance." General deterrence is especially ineffective, while specific deterrence is slightly better.

<sup>337</sup> See e.g. Moorh, "Defining Overcriminalization," *supra* note 37 at 805. Moorh does not make as bold a statement, but she does acknowledge that the benefits of criminalized infringement "may be limited," and the costs "may be large."

<sup>338</sup> This is a theoretical argument, rather than an argument that is demonstrably true based on evidence. It is difficult, if not impossible, to quantify the harm caused to the integrity of the justice system, or the harm caused by the lost incentive to create. As I have already discussed, it is also difficult to quantify the exact harm cause to copyright owners by copyright infringement.

<sup>339</sup> Law Reform Commission of Canada, *Our Criminal Law*, *supra* note 114 at 21, 31 – 33; Government of Canada, *Criminal Law in Canada*, *supra* note 114.

<sup>340</sup> *Ibid.*

<sup>341</sup> Government of Canada, *Our Criminal Law*, *supra* note 114 at 42.

criminal law.”<sup>342</sup> Criminal sanctions should not be used where there are less coercive means available to address social problems;<sup>343</sup> and criminal sanctions are only appropriate whether they are an “unavoidable necessity.”<sup>344</sup> From this perspective, the Criminal Law is limited in scope and function.<sup>345</sup>

The doctrine of restraint has been given minimal attention from both sides of criminalized copyright infringement debate. Scott & Collins briefly discussed both the Law Reform Commission and Department of Justice’s comments in their work, noting, “the criminal offence provisions of the *Copyright Act*... do not fall within the Law Reform Commission’s classification of “criminal” acts.”<sup>346</sup> Instead, they are “individual economic rights, the protection and enforcement of which should be the responsibility of the rights holders themselves.”<sup>347</sup>

The doctrine of restraint has yet to be used to justify criminalized infringement. I suspect that it may be argued that criminalization is an absolute necessary because civil sanctions are ineffective.<sup>348</sup> However, even if copyright infringement was immoral and cause serious, quantifiable harm, the doctrine nevertheless supports arguments against criminalization. Criminalized infringement does “not fall within the Law Reform

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<sup>342</sup> *Ibid* at 41;

<sup>343</sup> See *Ibid*; Law Reform Commission, *Our Criminal Law*, *supra* note 114at 17, 31; Stuart, *Canadian Criminal Law*, *supra* note 212 at 86.

<sup>344</sup> Government of Canada, *Criminal Law in Canada*, *supra* note 114at 44.

<sup>345</sup> Alan W Mewett, *The Proper Scope and Function of the Criminal Law*, (1960-1961) 3 Crim L Q 371 at 391.

<sup>346</sup> Scott & Collins, “Part I,” *supra* note 22 at 108.

<sup>347</sup> *Ibid*.

<sup>348</sup> Whether civil sanctions are ineffective will be discussed in further detail in Chapter 5. See e.g. Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 323, 341; DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 482 – 83; Penney, “Crime, Copyright and the Digital Age,” *supra* note 4 at 66.

Commission’s classification of “criminal” acts.”<sup>349</sup> Copyrights are “individual economic rights, the protection and enforcement of which should be the responsibility of the rights holders themselves.”<sup>350</sup> Copyright infringement is a private, social problem; it is not a public wrong, such that resort to Criminal Law and coercive state power is necessary or legitimate.<sup>351</sup> Resort to the criminal law is inappropriate where it cannot be justified by Criminal Legal Theory; it is not necessary where there are other effective, non-criminal enforcement mechanisms;<sup>352</sup> and, it is ineffective where it undermines the justice system’s integrity and the *Copyright Act*’s objectives.<sup>353</sup> Criminal copyright infringement is not appropriate, necessary, effective, nor an unavoidable necessity.

#### **4. Chapter Summary**

In this Chapter I looked to Criminal Legal Theory to understand how criminalization is justified. The morality principle explains that Criminal Law is used to enforce moral behavior based on fundamental social values. Both the harm principle and the doctrine of restraint limit the Criminal Law’s ability to enforce morality as such. The harm principle asserts that criminalization is only justified where wrongdoing cause serious harm, while the doctrine of restraint asserts that criminalization is only justified where it is an unavoidable necessity. I also explored Law and Economic Theory and the concept of using criminal penalties as a deterrence mechanism.

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<sup>349</sup> Scott & Collins, “Part I,” *supra* note 22 at 108.

<sup>350</sup> *Ibid.*

<sup>351</sup> See e.g. Manning, Mewett & Sankoff, *Criminal Law*, *supra* note 225 at 42: “as a general rule... crimes should be regarded as public, as opposed to private, harms.”

<sup>352</sup> I discuss non-criminal enforcement mechanisms in detail in Chapter 5.

<sup>353</sup> The objectives of the *Copyright Act 1985*, *supra* note 5 will be discussed in detail in Chapter 5.

I argued that Criminal Legal Theory and Law and Economic Theory cannot justify criminalized copyright infringement. There is no societal consensus that copyright infringement is morally wrong. There is minimal empirical data available on the morality/immorality of copyright infringement. The data that is available suggests that the majority of those surveyed do not think copyright infringement is immoral. In the absence of data capable of proving societal consensus that copyright infringement is morally wrong, the government is unable to justify the need for criminal laws to police copyright infringement pursuant to Criminal Theory or the Criminal head of power in the *Constitution*.<sup>354</sup>

Although copyright infringement may cause financial harm to copyright owners in some circumstance, this harm is not sufficiently serious to justify criminalization. At most, copyright infringement cause purely financial, non-physical harm to copyright owners. Copyright infringement may actually benefit copyright owners in some circumstances. The deterrent value of criminalization is also questionable. Deterrence does not work where society has not internalized copyright infringement's immorality.

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<sup>354</sup> Society does delegate to the Government the power to make and enforce rules about what is criminal behavior. An argument could be made that this delegation and subsequent criminalization is an expression of the will of the Legislature (and therefore society by extension) that copyright infringement is immoral. However, in this case the will of the legislature does not adequately reflect the will of the general public; it reflects as the will of a select group of rights holders. See e.g. Penney, "Crime, Copyright, and the Digital Age," *supra* note 5 at 62 – 65. Penney explains that the recording, movie, and software industries lobbied the government for increased criminalization, especially in the wake of the Internet and digital technologies disrupting their ability to sell physical copies of content. This lobbying was largely done in an effort to ensure their ability to profit from their existing business models rather than adapting their approach to new technologies. See e.g. Vaver, "Creating Fair IP," *supra* note 23 at 7. "Intellectual property rights holders simply have to discover, and sooner rather than later, how to make the new technologies work for them. Record and film companies have belatedly realized that they are not in the record or film industry at all, but rather in the business of distributing entertainment, and that the new digital technologies have provided them with another opportunity to expand their distribution. Those which capitalize on that insight will survive."

Criminalization may also cause harm where it over deters lawful conduct, and undermines the objectives of the *Copyright Act*.

I concluded that even if copyright infringement was immoral, seriously harmful, and criminalization was an efficient deterrent, the doctrine of restraint nevertheless supports arguments against criminalized infringement. As I outline in detail in Chapter 5, copyright infringement can be effectively enforced through non-criminal mechanisms. Criminalization is therefore not an unavoidable necessity.

Neither Criminal Legal Theory nor Law and Economic Theory justify criminalized infringement. With this conclusion I must move on to consider whether other theories can justify criminalization. In Chapter 4 I turn to Property Legal Theory and unpack the argument that copyright infringement is theft. The property theory of copyright fails to justify criminalization because copyrights are not property, tangible and intangible property are not analogous and copyright infringement is not theft. In Chapter 5 I argue that non-criminal copyright enforcement is consistent with Copyright Legal Theory and the *Charter*. This leads me to conclude in Chapter 6 that criminalized infringement cannot be justified and the Canadian copyright regime should therefore be decriminalized.

## Chapter 4 – Property Legal Theory does not Justify Criminalized Copyright Infringement

Property Theory is used to justify criminalization on the basis that copyrights are property. Because unlawfully taking property is theft, copyright infringement must also be theft. The invocation of theft-language is a rhetorical strategy. Theft is widely accepted as a criminal offence. By calling copyright infringement theft, proponents of criminalized infringement are able to bypass the fact that criminalization cannot be justified by Criminal Legal Theory.

DuBose’s use of theft discourse is heavy handed. He repeatedly refers to copyright infringement as “theft” and infringers as “thieves” and “pirates.”<sup>355</sup> Although he does not bother to propose or explain a property theory of copyright unlike Hardy and the Sub-Committee, we can infer from his discourse that he sees copyrights as property. Hardy argues that there are no inherent and logical differences between tangible and intangible property “for the purposes of the legal regime of property ownership.”<sup>356</sup> He is saying that copyrights, intangibles, are legally equivalent to property, tangibles. It follows that because taking tangible property is theft, taking intangible property should also be theft. The Sub-Committee views copyrights in similar ways to Hardy. Not only do they reject the proposition that intellectual property rights are different from tangible property rights, they also assert, “ownership is ownership is ownership.”<sup>357</sup> They argue that

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<sup>355</sup> Dubose, “Criminal Enforcement of IP,” *supra* note 38.

<sup>356</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 334.

<sup>357</sup> Sub-Committee, *Charter of Rights*, *supra* note 32 at 9.

copyright ownership is the same as land ownership.<sup>358</sup> The Sub-Committee’s use of “theft” and “piracy” discourse in reference to copyright infringement invokes an image of tangible property.<sup>359</sup>

Both Goldman and Buccafusco & Fagundes highlight the effect “theft” and “pirate” discourse has on perceptions of copyright infringement. Goldman argues that comparing copyright infringement to shoplifting creates a “scope problem” by treating every infringing copy as “a criminally cognizable loss.”<sup>360</sup> This results in an overstatement of copyright owners’ harms, and extends the boundaries of criminal copyright law too far.<sup>361</sup> Buccafusco & Fagundes argue that the metaphors used to critique unauthorized uses of copyrighted works indicate which moral foundations are involved.<sup>362</sup> Comparing copyright infringement to theft triggers the authority/subversion foundation, concepts of respecting authority, and fear for social stability.<sup>363</sup> The authors argue that equating unauthorized copying with theft “raises concern that more than just a formal legal violation has occurred. ... It suggests that the infringing conduct threatens the stability of the social order.”<sup>364</sup> Referring to copyright infringers as pirates has a similar effect.<sup>365</sup>

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<sup>358</sup> *Ibid* 9. However they immediately say “that does not mean to say that there are no differences at all between ownership in works of the mind and ownership in physical objects.”

<sup>359</sup> *Ibid* at 97.

<sup>360</sup> Goldman, “Road to No Warez,” *supra* note 37 at 426.

<sup>361</sup> See *Ibid*.

<sup>362</sup> Buccafusco & Fagundes, “The Moral Psychology,” *supra* note 314 at 2437, 2459, 2476. The authors argue that Moral Foundations Theory (MFT) “provides a systematic framework for understanding and explaining the psychology of infringement.” MFT identifies six moral foundations that guide societies instinctive judgments of right and wrong: care/harm, fairness/cheating, sanctity/degradation, authority/subversion, loyalty/disloyalty, liberty/oppression.

<sup>363</sup> See *Ibid* at 2476.

<sup>364</sup> *Ibid*.

<sup>365</sup> See *Ibid* at 2477.

Those who blindly equate copyright infringement with theft fail to realize that although invoking a theft metaphor achieves the desired outcome of seeing copyright infringement through a criminal lens, it does not mean that copyright infringement in itself is, or should be, a criminal act. Copyright infringement is literally, legally, philosophically, and cognitively different than theft.<sup>366</sup> In this Chapter I argue against the property theory of copyright, and the justification of criminalized infringement through analogy tangible property theft.

Analogizing copyrights to property is at worst “an inaccurate and manipulative distortion of legal and moral reality,”<sup>367</sup> and at best a rhetorical exercise.<sup>368</sup> The analogy seeks to shift the discussion away from what rights are statutorily granted by the *Copyright Act* to a discussion of how copyright infringement is equivalent to theft.<sup>369</sup> In Part 1 I argue that although copyrights have property-like characteristics, they are not property; they are legal rights. This argument is supported by the fact that the *Copyright Act* refers to copyrights as “rights,” not “property. Similarly, the Supreme Court of Canada has repeatedly stated that exceptions to copyrights are “users rights,” not “exceptions to property use.” The concept of users rights is readily accepted in the literature by leading Canadian copyright scholars.<sup>370</sup> The existence of users rights, and

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<sup>366</sup> Burleson, “Learning from Copyright’s Failure,” *supra* note 284 at 1314 - 1319.

<sup>367</sup> Patricia Loughlan “‘You Wouldn’t Steal,’” *supra* note 44 quoted in Burleson, “Learning from Copyright’s Failure,” *supra* note 284 at 1319.

<sup>368</sup> See Loughlan, *supra* note 44. See also, Moorh, “Crime of Copyright Infringement,” *supra* note 37 at 755 – 766.

<sup>369</sup> See Moorh, *Ibid*. Moorh argues that copyright infringement is sometimes called immoral because it is like stealing. This makes infringement per se immoral. This comparison is grounded on the assumption that copyrights are property rights, which allows “lawmakers and copyright holders to equate infringement with theft.”

<sup>370</sup> See e.g. Daniel Gervais, “Making Copyright Whole,” *supra* note 23 at 3; Vaver, “User Rights,” *supra* note 92; Abraham Drassinower, “Taking User Rights Seriously” in Michael Geist, ed, *In the Public*



the fact that copyrights are limited in time and scope by the *Copyright Act*, means copyrights are neither exclusive nor absolute, unlike property.

In the alternative, I argue in Part 2 that even if we adopt a property theory of copyright, copyright infringement is not theft.<sup>371</sup> The analogy between tangible and intangible property is not sound. Contrary to what Hardy argues, there are both inherent and logical differences between tangible and intangible property.<sup>372</sup> In particular, intangible property is non-rivalrous; one person's consumption of intangible property does not make it unavailable to others.<sup>373</sup> As a result, intangible property does not need the same protections as tangible property.

In Part 3 I argue that the property justification for criminalization is circular. Tangible property theft is criminal. This is largely accepted in Canadian society. For copyright infringement to equal theft, copyright must be property. But, in equating copyright infringement to theft, the premise that copyright is property is assumed, rather than proven.

I conclude in Part 4 that like Criminal Legal Theory and Law and Economic Theory, Property Legal Theory also fails to justify criminalized copyright infringement, necessitating the need to consider additional theories.

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*Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law Inc, 2005) 563 [“Taking User Rights Seriously”].

<sup>371</sup> See Burlinson, “Learning from Copyright’s Failure,” *supra* note 284 at 1313.

<sup>372</sup> For reference, Hardy, “Crime of Copyright Infringement,” *supra* note 8 at 334 states, “The two contexts – intangible creations and tangible ones – exhibit not inherent, and no logical, differences for purposes of the legal regime of property ownership.”

<sup>373</sup> See e.g. Penney, “Crime, Copyright and the Digital Age,” *supra* note 5 at 70.

## 1. Copyrights are not Property; they are Legal Rights.

Conceptualizing “copyrights” as “property” is a stretch.<sup>374</sup> Vaver suggests that neither the “intellectual” nor the “property” component of Intellectual Property “can be taken too seriously.”<sup>375</sup> Just because copyright is labeled a form of “intellectual property” does not mean that either the “intellectual” or “property” components “do or should exist.”<sup>376</sup> Rather than blindly relying on an abstract title to define copyrights as property, we should instead focus on the legislative content of copyrights. In doing so, we recognize that copyrights are better understood as a specific set of legal rights that exist in opposition to user rights, rather than property. We also recognize that to achieve the *Copyright Act*’s objectives, copyrights do not need to be as extensive as ordinary property rights.<sup>377</sup>

The common conception of property as a bundle of rights can be applied to copyrights. The *Copyright Act* does grant creators a certain “bundle” or rights. These rights do share some of property’s characteristics: they can be “valued, located, bought and sold, licensed, and used to obtain credit,” among others.<sup>378</sup> However, the rights granted by the *Copyright Act* are fundamentally different than the rights that we typically associate with property ownership. As Vaver notes, “IP gets and expects less respect than land and goods... IP is nothing like land or goods.” The *Copyright Act* provides relevant insight into the differences between copyrights and property.

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<sup>374</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 9. Vaver makes this statement about IP generally.

<sup>375</sup> *Ibid* at 13.

<sup>376</sup> *Ibid*.

<sup>377</sup> See Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 22.

<sup>378</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 8.

### **A. The *Copyright Act*: “Rights;” not “Property.”**

In some circumstances it can be safely assumed that if a certain event had occurred, evidence of it could be discovered by qualified investigators. In such circumstances it is perfectly reasonable to take the absence of proof of its occurrence as positive proof of its non-occurrence.<sup>379</sup>

Copyrights are not property. While it may be difficult to prove a negative, a close examination of the *Copyright Act*'s language helps us to understand what copyrights are. Because the *Copyright Act* provides an exhaustive definition of copyrights, if the notion that copyrights are property is valid, then we should expect to see some indication of this in the *Act*. The absence of evidence in the *Copyright Act* to support the notion that copyrights are property, combined with a lack of Supreme Court decisions on the topic should be determinative. However, as I discuss in more detail below with respect to “exceptions” and “users rights,” the *Copyright Act*'s language is subject to interpretation by the Court. The Supreme Court has explicitly stated that copyrights are not property:

...copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute (emphasis added).<sup>380</sup>

The *Copyright Act*, as the name suggests, deals with *copyrights*. Copyrights are a specific set of actions that authors are allowed to do. They are defined in section 3(1) of

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<sup>379</sup> Irving Copi, *Introduction to Logic*, 6th ed (London: MacMillan Publishing, 1982) at 102.

<sup>380</sup> *Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357 at para 23, 105 DRL (3d) 249.

the *Act* as, “the sole rights to produce or reproduce... perform... publish the work or any substantial part thereof.”<sup>381</sup> Section 3(1) contains a list of specific illustrations of these rights in subsections (a) – (j).<sup>382</sup> The *Copyright Act* also stipulates that “copyright shall subsist” in an original work under the specific conditions listed in section 5(1).<sup>383</sup> It does not state that “property rights” shall subsist in the work.

Nowhere in the *Act* does it specifically refer to these rights as property. In fact, the word “property” is only used in the *Act* five times.<sup>384</sup> None of these five uses of “property” are done in a manner to suggest that the *Act* intends for copyrights to be property. In sections 14.2(2)(c) and 17.2(2)(c), the *Act* states that “moral *rights*” pass on similarly to property where the creator or performer dies intestate.<sup>385</sup> In section 32.1(1)(c), “property” is part of the title of the *Cultural Property Export and Import Act*.<sup>386</sup> Sections 38(1)(b) and 44.12(9) use “property” in the context of recovering possession of unlawful copies (and plates used to make infringing copies in 38(1)).<sup>387</sup> In

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<sup>381</sup> *Copyright Act 1985*, *supra* note 5 s 3(1).

<sup>382</sup> *Ibid* s 3(1)(a)-(j). In *Entertainment Software Association v SOCAN*, 2012 SCC 34, [2012] SCR 231 [ESA], The Supreme Court split 5:4 over the principle definition of copyright. The Majority argued that there are three general categories of copyright, reproduction, performance and publication, and the rights listed in subparagraphs (a) – (j) are illustrative of one of these three general rights. The dissent argued that all of the rights in s.3 are independent, and that subparagraph (a) – (j) are not just examples of reproduction, performance or publication rights. For comment on *ESA*, see e.g. Elizabeth F. Judge, “Righting a Right: *Entertainment Software Association v SOCAN* and the Exclusive Rights of Copyright for Works” in Michael Geist, ed. *The Copyright Pentology How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 403. In a 2015 decision, the Supreme Court upheld the *ESA* decision that (a) – (j) are illustrative of the rights in s.3(1). See *Canadian Broadcast Corporation v SODRAC*, 2015 SCC 57, [2015] 3 SCR 615 [CBC v SODRAC].

<sup>383</sup> *Copyright Act 1985*, *supra* note 5 at s 5(1). Importantly, copyright does not subsist in ideas, only the expression of ideas.

<sup>384</sup> *Ibid*, ss 14.2(2)(c), 17.2(2)(c), 32.1(1)(c), 38(1)(b), 44.12(9).

<sup>385</sup> *Ibid*, ss 14.2(2)(c), 17.2(2)(c).

<sup>386</sup> *Ibid*, s 32.1(1)(c).

<sup>387</sup> *Ibid*, s 38(1), 44.12(9).

these provisions “property” is used in references to taking physical possession of infringing copies (and plates); it does not say that copyrights *are* property.

**B. The *Copyright Act*: “Exceptions to infringement” not “Exceptions to Property Use.”**

The *Copyright Act* refers to copyrights – what authors are allowed to do with copyright protected works – and “exceptions to infringement” – lawful uses of copyright protected works.<sup>388</sup> Because what the *Act* grants to authors are copyrights and not property, it follows that the exceptions, which have come to be seen as “users rights” are exceptions to rights, not exceptions to property.

The *Copyright Act* does not define “exceptions” in relation to property use. It defines “exceptions” in relation to copyright infringement. “Exceptions,” as used in the *Copyright Act* refers to acts that would otherwise constitute infringement pursuant to section 27.<sup>389</sup> Copyright infringement is defined as doing “anything that by this Act the owner of the copyright has the right to do” without their consent.<sup>390</sup> In other words, a user infringes copyright when they reproduce, publish or perform a work without the copyright owners consent, unless their action is an exception to infringement, as defined in sections 29 – 32.2.

**C. Copyrights are neither Exclusive nor Absolute.**

The *Copyright Act* facilitates a final attack on the notion that copyrights are property: copyrights are neither exclusive nor absolute.<sup>391</sup> Because copyrights are

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<sup>388</sup> *Ibid*, ss 3(1), 29 – 32.2.

<sup>389</sup> *Ibid*, s 27.

<sup>390</sup> *Ibid*.

<sup>391</sup> Richard Posner refers to copyright as an “incomplete” property right. See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 22 referring to Richard Posner, *Law and Literature* (Cambridge, Massachusetts: Harvard University Press, 1998) at 392.

statutorily created, the *Copyright Act* defines their scope and content, subject to the Court's interpretation of the *Act*.

Copyrights are limited in two specific ways. First, they are limited in time; they last for the life of the creator plus 50 years.<sup>392</sup> Once this limitation period has ended, the work passes into the public domain and can be freely used. Conversely, property exists in perpetuity and can be passed on through generations. Property never passes into the “public domain.”

Second, copyrights are limited in scope. Copyright owners only have the rights afforded to them by the *Copyright Act*, namely reproduce, perform or publish their work.<sup>393</sup> Property rights are generally absolute. In terms of real property, a fee simple is the fullest possible ownership interest. While a fee simple can be divided into smaller interests, such as a life estate and remainder, all of the rights to a particular parcel of land must be assigned at all times; there can be no gaps in seisin.<sup>394</sup> Copyrights are further limited by users rights, which must be liberally interpreted.<sup>395</sup> Owners/creators rights cannot be absolute or exclusive because they exist in opposition to users rights.<sup>396</sup> Property does not contain similar “exceptions” or “users rights.” I, personally, do not have a statutory right to enter onto or use your property for any reason without your permission.<sup>397</sup>

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<sup>392</sup> See *Copyright Act 1985*, *supra* note 5 at s 6.

<sup>393</sup> *Ibid*, s 3(1). Subparagraphs (a) – (j) contain specific examples of these rights. See *supra* note 382.

<sup>394</sup> See e.g. Bruce Ziff, *Principles of Property Law*, 5th ed (Ontario: Carswell, 2010, at 268–70.

<sup>395</sup> See Vaver, *Intellectual Property Law*, *supra* note 11 at 215.

<sup>396</sup> See e.g. Vaver, “User Rights,” *supra* note 92; *CCH*, *supra* note 16 at para 48.

<sup>397</sup> In certain life or death situations I may have a defence of necessity if I unlawfully enter onto your property. However this is properly characterized as an excuse or defence to conduct that is otherwise unlawful, not a statutorily created right or exception. There are also situations where municipalities carve

For these reasons, intellectual property, and copyright by association, has been called “property carried to the highest degree of abstraction – a right *in rem* to exclude, without a physical object or content.”<sup>398</sup>

## **2. The Analogy Between Theft and Copyright infringement is Unsound.**

Alternatively, even if we accept that copyrights are property, the analogy between property theft and copyright infringement is unsound. Theft and copyright infringement are incompatible paradigms.<sup>399</sup> Regardless of whether copyrights are property, they cannot be the objects of theft pursuant *Criminal Code* section 322(1).<sup>400</sup> Taking tangible property is fundamentally different than unlawfully copying intangible property.

Two assumptions are necessary to criminalize copyright infringement on the basis of theft: tangible and intangible property are analogous, and the correlative assumption that copyright infringement and theft are analogous. Neither of these assumptions can be supported. There are inherent differences between tangible and intangible property. Comparing them is “an exercise in contrast more than anything else.”<sup>401</sup> There are also inherent differences in the legislative definitions of “theft” and “copyright infringement.”

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out certain exceptions to the absolute rights of property owners, such as for plumbing, electrical, etc. I would suggest that these exceptions are different than users rights to copyright protected material. Municipal by-laws are created to ensure the government has the ability to provide necessary services to the public, and to facilitate a uniform process for doing so. For example, it would be ineffective if every time there was a sewage issue the government had to seek permission from landowner to enter onto their property to repair the issue. Municipal by-laws enable the municipality to perform this work without first having to ask permission. This is fundamentally different than giving copyright users the right to use copyright protected content for purpose of private study, fair dealing, etc.

<sup>398</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 9 quoting M D Howe, ed, *Holmes-Pollock Letters* (Cambridge, Mass: Harvard University Press, 1946) at 53.

<sup>399</sup> See Bitton, “Rethinking ACTA,” *supra* note 4 at 72, referring to Stuart P Green, “Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights” (2002) 54 *Hastings LJ* 167 at 240 – 41.

<sup>400</sup> See *Stewart*, *supra* note 290 at 40.

<sup>401</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 13.

Together, these differences prevent the analogy that copyright infringement is theft. I will discuss each analogy in turn

### **A. Tangible and Intangible Properties are not Analogous.**

Tangible and intangible properties are not the same.<sup>402</sup> “Tangible property” refers to physical property that can be held in possession.<sup>403</sup> Land, an MP3 player, a book, a car, etc. are all forms of tangible property. “Intangible property” refers to property that is non-possessory in nature; intangible property is an abstract entity, like the expression of an idea.<sup>404</sup> Intellectual property, and copyrights in particular, are intangible property.

There are some similarities between tangible and intangible property. Both types of property can be owned, valued, bought, and sold.<sup>405</sup> However there are significant differences between the two types of property. The main difference is that intangible property is non-rivalrous, and therefore not a scarce resource.<sup>406</sup> Unlawfully copying intangible property “does not diminish the quantity or quality of the work available to the author or others;” it cannot be over-consumed.<sup>407</sup> On this point, Paul Goldstein has stated:

A loaf of bread, once eaten, is gone. But 'Oh, Pretty Woman,' once sung and heard, is still available for someone else to sing and to hear. Countless

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<sup>402</sup> David Vaver, “Harmless Copying,” *supra* note (2012) 25:1 IPJ 19 at 26.

<sup>403</sup> See Ziff, *Principles of Property Law*, *supra* note 4 at 76 – 77.

<sup>404</sup> See *Ibid*.

<sup>405</sup> See e.g. Vaver, *Intellectual Property Law*, *supra* note 11 at 8.

<sup>406</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 22; Manta, “Puzzle of Criminal Sanctions,” *supra* note 8 at 480.

<sup>407</sup> Penney, “Crime, Copyright, and the Digital Age,” *supra* note 5 at 22



fans can listen to the song, indeed copy it, without diminishing its availability to anyone else who wants to sing or listen to or copy it.<sup>408</sup>

This is reminiscent of Thomas Jefferson's famous quote, "[h]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."<sup>409</sup> Conversely, tangible property is rivalrous. My consumption of tangible property makes it unavailable to you.<sup>410</sup> Tangible property therefore deserves strong protection through property rights, while intangible property does not require the same degree of protection.<sup>411</sup>

## **B. Copyright Infringement is not Analogous to Theft.**

Just as tangible and intangible properties are fundamentally different, so too are copyright infringement and theft. Not only are the definitions of copyright infringement and theft different, but the harms they cause are also different, and offenders are subjected to different penalties upon conviction. In this sub-Part, I will address each of these issues.

Both copyright infringement and theft are statutorily defined. Copyright infringement is defined in section 27(1) of the *Copyright Act* as doing anything that the *Copyright Act* says copyright owners have the right to do, without consent of the copyright owner.<sup>412</sup> Authors' rights are defined in section 3(1) of the *Copyright Act* and include the right to produce, reproduce, perform or publish the work. As discussed above,

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<sup>408</sup> Paul Goldstein, *Copyrights Highway: From Gutenberg to the Celestial Jukebox*, (California: Stanford University Press, 1994) at 16.

<sup>409</sup> Wayne Franklin, ed, *The Selected Writings of Thomas Jefferson*, (New York City: WW Norton & Company, 2009).

<sup>410</sup> Penney, "Crime, Copyright, and the Digital Age," *supra* note 5 at 22

<sup>411</sup> See *Ibid.*

<sup>412</sup> *Copyright Act 1985*, *supra* note 5, s 27(1).

users' rights limit authors' rights. The "exceptions" in sections 29.9 – 32.2 of the act detail situations that amount to producing, reproducing, performing, or publishing a work, but nevertheless are not copyright infringements.<sup>413</sup> Doing one of the permitted acts in sections 29.9 – 32.2 is "not just taking advantage of a limitation, exception, exemption, defence, 'loophole,' or gracious indulgence extended by the copyright owner... [it] is exercising a right inherent in the balance the *Copyright Act* strikes between owners and users." Theft is defined in s.322(1) of the *Criminal Code*. A person commits theft when they take or convert "anything, whether animate or inanimate," with requisite intent as outline in subparagraphs (a) – (d), fraudulently and without colour of right.<sup>414</sup>

These definitions do not map nicely onto each other; they are not equivalent.<sup>415</sup> What happens when someone infringes copyright is different from what happens when someone commits theft. To say that copyright infringement is theft, "the law must grapple with the question of what exactly is taken or stolen."<sup>416</sup> The term "anything" in s.322(1) can include intangibles.<sup>417</sup> However to be theft, what is stolen must "(1) be property of some sort; (2) be property capable of being (a) taken – ... intangibles are excluded; or (b) converted – ... may be an intangible; (c) taken or converted in a way that

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<sup>413</sup> See e.g. Vaver, *Intellectual Property Law*, *supra* note 11 at 215: "What the Act specifically permits is not an infringement."

<sup>414</sup> *Criminal Code*, *supra* note 211, s 322(1).

<sup>415</sup> Buccafusco & Masur, "Innovation & Incarceration," *supra* note 8 at 294 states, "although copyright is a form of intellectual property, and although many people refer to copyright infringement as "theft," infringement is importantly different from theft of real or personal property."

<sup>416</sup> Manta, "Puzzle of Criminal Sanctions," *supra* note 8 at 475.

<sup>417</sup> See *Stewart*, *supra* note 290 at 41.

deprives the owner of his proprietary interests.”<sup>418</sup> Copyrights do not meet these requirements. Copyrights cannot be taken or converted because their owner never suffers deprivation.<sup>419</sup>

At most copyright infringement causes a potential reduction in profit, which is a purely intangible harm.<sup>420</sup> It does not deprive the owner of any proprietary rights, as theft does. The Court clarified this point in *Stewart*:

Copyright is defined as the exclusive right to produce or reproduce a work in its material form [s.3]. A mere copier of documents ... does not acquire the copyright nor deprive its owner of any part therefore. No matter how many copies are made of a work, the copyright owner still possesses the sole right to reproduce or authorize the reproduction of his work. Such copying constitutes infringement of the copyright under s.17 [now s. 27] of the Act, but it cannot in any way be theft under the criminal law.<sup>421</sup>

The United States Supreme Court reached a similar decision in *Dowling*.<sup>422</sup> In holding that copyright infringement is not theft, the Court explained that copyrights comprise “a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.”<sup>423</sup> As a result, copyright infringement does not

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<sup>418</sup> *Ibid* at para 41.

<sup>419</sup> *Ibid*. See also, Buccafusco & Masur, “Innovation & Incarceration,” *supra* note 8 at 294.

<sup>420</sup> See Manta, “Puzzle of Criminal Sanctions,” *supra* note 8 at 475.

<sup>421</sup> *Stewart*, *supra* note 290 at para 40.

<sup>422</sup> *Dowling*, *supra* note 258. My discussion of *Dowling* is guided by Manta, “Puzzle of Criminal Sanctions,” *supra* note 8 at 477 – 78.

<sup>423</sup> *Dowling*, *ibid* at 216.

implicate the same property interests as theft; an infringer cannot “assume physical control over the copyright... nor... wholly deprive its owner of its use.”<sup>424</sup>

“Theft” connotes something more permanent and substantial than “infringement” or “unauthorized use.”<sup>425</sup> Saying property has been stolen means “its owner has not only been denied the right to exclude others from use, but that he has also been denied the right to possess and make full use of the property himself.”<sup>426</sup> Theft triggers both of these requirements, copyright infringement does not. A creator does not lose their possessory rights when their work has been unlawfully copied.<sup>427</sup>

Further, the significant penalty differences for criminal copyright infringement and theft suggests they are different. Theft can be both an indictable or summary conviction offence.<sup>428</sup> Theft over \$5000 is an indictable offence, punishable by up to ten years imprisonment.<sup>429</sup> Theft under \$500 is a hybrid offence. On indictment it is punishable by up to two years imprisonment, while there is no set penalty for summary conviction.<sup>430</sup> Comparatively, criminal copyright infringement can also be both an indictable or summary conviction offence.<sup>431</sup> On indictment, copyright infringers are liable to a fine up to \$1,000,000, up to five years imprisonment, or both.<sup>432</sup> On summary

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<sup>424</sup> *Ibid* at 217 – 218.

<sup>425</sup> Stuart P Green, *Thirteen Ways to Steal a Bicycle*, (Cambridge: Harvard University Press, 2012) at 207.

<sup>426</sup> *Ibid*.

<sup>427</sup> See *Stewart*, *supra* note 290 at para 40, Bucafusco & Masur, “Innovation & Incarceration,” *supra* note 8 at 294.

<sup>428</sup> See *Criminal Code*, *supra* note 211, s 334.

<sup>429</sup> See *Ibid*, s 334(a).

<sup>430</sup> See *Ibid*, s 334(b).

<sup>431</sup> See *Copyright Act 1985*, *supra* note 5, ss 42(2.1), (3.1) for circumvention offences.

<sup>432</sup> See *Ibid*, ss 42(2.1)(a), (3.1)(a).

conviction, copyright infringers are liable for a fine up to \$25,000, up to six months imprisonment, or both.<sup>433</sup>

These penalties are incomparable. First, theft involves no monetary fines despite basing the length of imprisonment on the value of the stolen property. Criminal copyright infringement involves significant monetary fines, despite no mention of the value of harm caused by the infringement. Second, on indictment, a thief may spend twice as long in prison than someone convicted of indictable copyright infringement. Third, there is a possibility that someone who steals \$100,000,000 worth of CD's will spend up to ten years in prison, while someone who illegally downloads \$100,000,000 worth of MP3's will spend only five years in jail, and be required to pay \$1,000,000 in fines. Both people may also be required to pay restitution pursuant to ss 732.1(3.1)(a), 738 or 742.3(2)(f) of the *Criminal Code*.<sup>434</sup> If the copyright infringer is ordered to pay restitution in addition to fines, they could be required to pay a total of \$2,000,000 and spend five years in jail, while the thief will spend ten years in jail and pay a total of \$1,000,000. These penalties are drastically different, and undermine the parity principle.

The purpose and principles of sentencing are codified in s.718 of the *Criminal Code*. Section 718.2(b) codifies the parity principle: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."<sup>435</sup> This principle suggests that if copyright infringement is akin to theft, then the penalties for both crimes should at least be similar, if not identical. The fact that

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<sup>433</sup> See *Ibid*, ss 42(2.1)(b), (3.1)(b).

<sup>434</sup> Restitution order are considered an additional sentence under *Criminal Code*, *ibid*, s 738, a condition of probation under s 732.1(3.1)(a), or a condition of a conditional sentence under s 742.3(2)(f).

<sup>435</sup> *Ibid*, s 718(2)(b).

the penalties for theft and copyright infringement are drastically different undermines the argument that copyright infringement is theft.

### **3. The Property Justification for Criminalization is Circular.**

The property justification for criminalization is circular. It assumes that copyrights are property because doing so makes copyright infringement *per se* theft, and therefore criminal. Calling copyright infringement “theft” “assumes what is being argued for – that it is theft.”<sup>436</sup> It evades the need to prove that copyrights are property, and that copyright infringement is harmful and immoral, and deserves criminal punishment.<sup>437</sup>

Two premises must be true for property theory to justify criminalized copyright infringement. First, theft of property must be criminal. As I outline in Part 2(B) above, theft is codified in s.322(1) of the *Criminal Code* and widely accepted as a criminal offence.<sup>438</sup> Second, copyright must be property. As I argued in Part 2(A), copyrights are not property; they are legal rights. Those who argue for criminalized infringement attempt to evade this fact by blatantly stating that copyright infringement is theft or stealing and that infringers are thieves and pirates, without offering any proof to support their statement.<sup>439</sup>

Calling copyright infringement “theft” does not make it a legal fact. Instead, copyright infringement is called theft to “draw upon and mobilize the ordinary, almost

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<sup>436</sup> Green, “NY Times Article,” *supra* note 268.

<sup>437</sup> See Moohr, “Crime of Copyright Infringement,” *supra* note 37 at 766. Moohr argues that equating infringement with theft ignores several realities. “[M]ost significantly, recourse to the property argument is circular: it assumes what is at issue, which is whether the taking is immoral (or harmful) and therefore subject to criminal treatment.”

<sup>438</sup> See generally, Part 2B, above; *Criminal Code*, *supra* note 211, s 322(1).

<sup>439</sup> See generally DuBose, “Criminal Enforcement of IP” *supra* note 38; Hardy, “Criminal Copyright Infringement,” *supra* note 8.

instinctive response of ordinary people to dislike, disdain and despise the unauthorized user of copyright works as they would dislike, disdain and despise the ordinary thief.”<sup>440</sup>

#### **4. Chapter Summary**

In this Chapter I tackled the Property Theory justification for criminalized copyright infringement. I argued that although copyrights have property-like characteristics, they are legal rights. The *Copyright Act* supports this conclusion. It refers to “copyrights,” not “property,” and limits copyright both in time and scope. Conversely, property exists in perpetuity; it is both absolute and exclusive.

In the alternative, I argued that even if copyrights are property, the analogy between tangible and intangible property is not sound, which leads to correlative point that copyright infringement is not theft. Unlike tangible property, intangible property is non-rivalrous and not a scarce resource. Copying intangible property does not physically deprive the copyright holder of any proprietary rights, as does physically property theft. Additionally, the statutory definitions of copyright infringement and theft are different, as are their applicable penalties, which violate the parity principle in Criminal Law.

Finally, I argued that the Property Theory justification for criminalization is circular and unsupported. While using rhetorical theft-language avoids the need to prove that copyrights are property, and that copyright infringement is immoral and causes sufficiently serious harm to warrant criminalization, it does not in fact mean that copyrights are property or that copyright infringement should be criminalized. As Green

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<sup>440</sup> Loughlan, “You Wouldn’t Steal,” *supra* note 44 at 407.

rightfully acknowledges, “framing illegal downloading as a form of stealing doesn’t and probably will never work.”<sup>441</sup>

In Chapter 5, I shift my theoretical lens to Copyright Legal Theory. I also shift my analytical technique from a negative, attack-based approach to a positive one.

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<sup>441</sup> Green, “NY Times Article,” *supra* note 268.



## Chapter 5 – Copyright Legal Theory & the Positive Case for non-Criminal Enforcement of Copyright Infringement

In previous Chapters I critiqued criminalized copyright infringement from the perspectives of Criminal Legal Theory, Law and Economic Theory and Property Theory. Now I make a positive case for non-criminal enforcement. I argue that non-criminal enforcement is consistent with the underlying justifications of Copyright Law, that non-criminal enforcement mechanisms are effective, and that they are consistent with *Charter* values.

In Part 1 I set out the predominant theoretical justification for Copyright Law: Balance Theory. Canadian Copyright Law has a dual purpose: to provide an incentive for authors, and to ensure public access through dissemination.<sup>442</sup> These objectives often contradict each other. Balance Theory posits that Copyright Law exists to balance the competing interests of content authors, who want to profit from their work, and content users, who want access to information.<sup>443</sup> I argue that non-criminal enforcement is consistent with Copyright Law's justifications. Although some of the scholars referred to in Chapter 2 argue that criminalized infringement is necessary to properly balance authors and users interests, criminalization tips the scales too far in favor of authors rights, to the significant detriment of copyright users.

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<sup>442</sup> See e.g. *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 at 30 [*Théberge*].

<sup>443</sup> See e.g. *Ibid*; Vaver, "Copyright and the Internet," *supra* note 92 at 747; Vaver, "Creating Fair IP," *supra* note 23.

In Part 2 I argue that non-criminal copyright enforcement mechanisms are effective. First, I discuss the Notice-and-Notice regime, an integral part of the *Copyright Modernization Act*. There has been a significant decline in copyright infringement since the Notice-and-Notice provisions came into force in 2015.<sup>444</sup> Second, I address two effective TPMs or DRMs: digital locks and Blockchain Technology. Digital locks allow authors to control which users have access to their content, where they can geographically access the content, and what uses they can make of the content. Blockchain is a derivative of DRM technology. It can help copyright authors protect their rights by requiring their digital signature for any use of their content, and keeping a time-stamped registry of all authorizations.<sup>445</sup> Notice-and-Notice, digital locks, and Blockchain Technology are better suited than the criminal law to protect both authors' and users' rights.

Building on this foundation, I argue in Part 3 that non-criminal enforcement is consistent with *Charter* values, particularly minimal impairment as recognized in section 1.<sup>446</sup> To be minimally impairing, the limit on *Charter*-protected rights must be reasonably tailored to the objectives of copyright protection and enforcement.<sup>447</sup> If there are less harmful means of achieving these objectives, then the enforcement provisions are not minimally impairing.<sup>448</sup> I argue that non-criminal copyright enforcement is less harmful

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<sup>444</sup> See Part 2, below.

<sup>445</sup> Jean-Pierre Buntinx, "Future Use Cases for Blockchain Technology: Copyright Registration" (4 August 2015), *News* (website) online: <[www.news.bitcoin.com](http://www.news.bitcoin.com)> "Future Use Cases"].

<sup>446</sup> Non-criminal enforcement is also more consistent with the cost-balance requirements of s.1, as I discussed above in Chapter 3, with reference to law and economic theory.

<sup>447</sup> *R v Nur*, 2015 SCC 15, at para 116, 1 SCR 773.

<sup>448</sup> *Ibid*. See also, *RJR-Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1: "the government must show that the measures at issue impair the right of free expression as

than criminal enforcement, and consistent with the minimal impairment requirements of section 1. This consistency reinforces my main argument that copyright infringement should not be criminalized in Canada.

## 1. Copyright Legal Theory

Copyrights are creatures of statute.<sup>449</sup> They are created, defined, and limited by the *Copyright Act*. But the *Copyright Act* does not state the purpose of Copyright Law.<sup>450</sup> Fortunately Copyright Legal Theory seeks to explain why the copyright regime was created and what its objectives are. Overtime there have been different theories levied to justify Copyright Law, including Moral Theory, Economic Theory, and Bargain Theory.<sup>451</sup> However, Balance Theory is widely accepted as the predominant justification by both the Supreme Court of Canada and leading Canadian copyright scholars.<sup>452</sup> The Supreme Court has stated:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the

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little as reasonably possible in order to achieve the legislative objective. The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary.”

<sup>449</sup> See e.g. Vaver, *Intellectual Property Law*, *supra* note 11 at 19. The *Copyright Act* 1985, *supra* note 5, creates copyrights in Canada. See e.g. John S McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed (Ontario: Carswell, 2000) at 1 [*Fox Canadian Law*].

<sup>450</sup> See Daniel Gervais, “The Purpose of Copyright Law in Canada” (2005) 2:2 *University of Ottawa Law & Technology Journal* 315 at 318 [“Purpose of Copyright”]. See also, Scassa, “Interests in the Balance,” *supra* note 261 at 41 – 42. Scassa notes that the public policy underlying the *Copyright Act* has “been unclear since the law’s inception.”

<sup>451</sup> See Vaver, *Intellectual Property Law*, *supra* note 11 at 15 – 24. Vaver discusses five justifications for copyright law: 1) moral theory, which suggest creators have a “natural right” to the products of their brain; 2) Lockean “fruits of labour” theory; 3) economic theory, which encourages sharing information with society; 4) bargain theory, which argues there is a contractual-like relationship between the creator and the public; and 5) balance theory. Vaver argues that all of the theories are flawed, except balance theory, which has been commonly accepted since the eighteenth century.

<sup>452</sup> See e.g. *Théberge*, *supra* note 442 at 30; *CCH*, *supra* note 16; *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, 2 SCR 427 [*SOCAN v CAIP*]; Vaver, “Copyright and the Internet,” *supra* note 92 at 747; Gervais, “Purpose of Copyright,” *supra* note 450; Abraham Drassinower, “Taking User Rights Seriously,” *supra* note 370.

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.<sup>453</sup>

Vaver makes a similar comment, "Since the eighteenth century it has been common in Anglo-American theory to treat IP as the product of competing interests."<sup>454</sup> He goes on to quote Lord Mansfield, which is helpful here:

[We] must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>455</sup>

Balance Theory operates from the assumption that Copyright Law is a public policy initiative,<sup>456</sup> necessary to incentivize creation and insure public access to works

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<sup>453</sup> *Théberge*, *supra* note 442 at 30 – 31. See also, *SODRAC*, *supra* note 382 at para 146, Justice Abella notes, "this Court has consistently recognized, maintaining the balance that best supports the public interest in creative works is the central purpose of the *Copyright Act: Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (CanLII), [2004] 2 S.C.R. 427 (*SOCAN v. CAIP*), at paras. 40-41; *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at paras. 69-70; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 (CanLII), [2007] 3 S.C.R. 20, at paras. 76-84; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 S.C.R. 326 (*SOCAN v. Bell*), at paras. 8-11; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (CanLII), [2012] 2 S.C.R. 345, at para. 19; *Entertainment Software Association*, at paras. 7-8, per Abella and Moldaver JJ., for the majority, and paras. 47 and 123-25, per Rothstein J., dissenting; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283 (*Rogers v. SOCAN*), at para. 40; *Cinar Corporation v. Robinson*, 2013 SCC 73 (CanLII), [2013] 3 S.C.R. 1168, at paras. 23 and 28."

<sup>454</sup> Vaver, *Intellectual Property Law*, *supra* note 11 at 22.

<sup>455</sup> Lord Mansfield in *Sayre v Moore* (1785) 1 East 361n, 102 ER 139n, quoted in Vaver, *Intellectual Property*, *supra* note 11 at 22.

<sup>456</sup> See e.g. *Théberge*, *supra* note 442 at para 31; Gervais, "Purpose of Copyright," *supra* note 450 at 318.

“of the arts and intellect.”<sup>457</sup> In order to achieve this dual purpose, copyrights cannot be absolute; they are limited by the contours of the law.<sup>458</sup> Not only does Copyright Law grant certain rights to authors, such as the right to reproduce and distribute the work, it also grants certain rights to users, such as fair dealing, and use for private study.<sup>459</sup> From this perspective, Copyright Law is justified as a balance between authors’ and users’ interests.<sup>460</sup>

The Supreme Court has recognized the need to interpret both authors and users rights liberally to give effect to the dual purpose of Copyright Law.<sup>461</sup> In *Théberge* the majority acknowledged that the exceptions to copyright infringement contained in ss.29-32.2 of the *Copyright Act* protect the public domain in both traditional and novel ways.<sup>462</sup> The Court builds on this position in *CCH*, where they refer to the “exceptions” as “users rights.”<sup>463</sup> They articulate that users rights must not be interpreted restrictively to

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<sup>457</sup> *Théberge*, *supra* note 442 at 30. See also, Gervais, “Making Copyright Whole,” *supra* note 23 at 3.

<sup>458</sup> See e.g. McKeown, *Fox Canadian Law*, *supra* note 449 at 3; *Théberge*, *supra* note 442 at para 31.

<sup>459</sup> See *Copyright Act* 1985, *supra* note 3 at Parts I, II, and ss 29 – 32.2.

<sup>460</sup> The reference to authors and users significantly oversimplifies the issue. See generally, Scassa, “Interests in the Balance,” *supra* note 261. Scassa argues that copyright owners are also an important party to the copyright balance, and that is it wrong to assume that creators, users and owners are all homogenous groups such that the individual interests of members of each group are identical.

<sup>461</sup> See e.g. *CCH*, *supra* note 16 at para 48.

<sup>462</sup> *Théberge*, *supra* note 442 at para 32. *Théberge* argued that the Galerie d’Art violated his copyrights by lifting the ink from paper posters of his work and transferring it onto canvases. A Majority of the Supreme Court of Canada disagreed. They reasoned that the transferring procedure used by Galerie d’Art was not a reproduction of *Théberge*’s work, but instead was a lawful exercise of their rights as owners of the physical posters of *Théberge*’s work.

<sup>463</sup> *CCH*, *supra* note 16 at para 48. *CCH* argued that the Law Society of Upper Canada infringed their copyrights by providing photo copy services and maintaining self-service photocopiers in the Great Library. The Court disagreed, reasoning that a single copy does not infringe copyright, and that “research” and “fair dealing” must be given a large and liberal interpretation to ensure users rights are protected. See also, Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) at iii. Geist notes the Copyright Pentology (*ESA v. SOCAN*, *supra* note 382; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326; *SOCAN v CAIP*, *supra* note 482; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, 2 SCR 283 [*Rogers v SOCAN*]; *Re:Sound v Motion Picture Theater Association of Canada*, 2012 SCC

“maintain the proper balance” between users and authors.<sup>464</sup> In this way, users’ rights are not loopholes.<sup>465</sup> They are an integral part of the copyright regime.<sup>466</sup> Both authors and users rights must “be given the fair and balanced reading that benefits remedial legislation.”<sup>467</sup> Failing to interpret both categories liberally will tip the balancing scales too far in the direction of either authors or users rights, undermining the purpose of the copyright regime.<sup>468</sup>

The Supreme Court’s re-labeling in *CCH* is important to the concept of balance, as rights cannot be balanced against exceptions.<sup>469</sup> Language that refers to users rights as exceptions or limitations, “treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activated to be narrowly construed and not extended.”<sup>470</sup> This is incompatible with the concept of balance; the scales start weighted in authors’ favour.<sup>471</sup>

### **A. Non-Criminal Enforcement is Consistent with Copyright’s Balance Theory**

Vaver has argued that the copyright regime is shifting such that authors’ rights seem to be continually expanding, while users rights become increasingly narrow. This

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38, 2 SCR 376 [*Re:Sound*]) “provided an unequivocal affirmation that copyright exceptions... should be treated as users’ rights... The user rights analysis affects virtually all copyright cases, forcing all courts to ensure that there is a fair balance between the interests of creators and users.”

<sup>464</sup> *CCH*, *supra* note 16 at para 48.

<sup>465</sup> See Vaver, *Intellectual Property Law*, *supra* note 11, quoted in *CCH* at para 48.

<sup>466</sup> See *CCH*, *supra* note 16 at 49; Gervais, “Purpose of Copyright,” *supra* note 450 at 320; Drassinower, “Taking User Rights Seriously,” *supra* note 370 at 463, argues “user rights are as central to copyright law as author rights ... then centrality of user rights is absolutely non-negotiable.”

<sup>467</sup> David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 171.

<sup>468</sup> See e.g. Vaver, “Copyright and the Internet,” *supra* note 92 at 747. See also Dinwoodie, “Private Ordering,” *supra* note 200 at 162. Dinwoodie notes, “intricate balancing of competing considerations is necessary to ensure that copyright does not undermine the public policy objectives that it purports to advance.”

<sup>469</sup> See Vaver, “Copyright and the Internet,” *supra* note 92 at 747.

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

<sup>471</sup> See *Ibid.*

ignores the Supreme Court of Canada’s caution that balance, “lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”<sup>472</sup> Criminalized copyright perpetuates this trend by overprotecting authors’ rights. Whereas civil enforcement is a private remedy between the copyright owner and user, resort to criminal law brings the coercive power of the state into what is a private matter. This creates a significant power imbalance between the Department of Justice, with all of their available resources, and copyright users. It also creates a bias in copyright policy that emphasizes protection over public use.<sup>473</sup>

Civil law is better equipped than the Criminal Law to balance the competing interests at stake in the copyright regime. Whereas criminal enforcement may result in chilling effects, such as reducing public use of copyrighted material, “civil laws can achieve a better balance because they do not run the risk of overdeterrence.”<sup>474</sup> Additionally, civil enforcement provides a direct remedy to creators, whereas criminal remedies are indirect. Civilly, creators can be award statutory damages actual damages, injunctions, etc.<sup>475</sup> An offender convicted of criminalize copyright infringement is liable to serve time in jail/prison, or pay a fine. Fines are not payable to the copyright owner; rather they are paid to the Court.<sup>476</sup> Criminalized infringement’s only potential benefit to

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<sup>472</sup> *Théberg, supra*, note 442 at paras 30-33.

<sup>473</sup> See Moohr, “Defining Overcriminalization,” *supra* note 37 at 802.

<sup>474</sup> *Ibid.*

<sup>475</sup> See *Copyright Act* 1985, *supra* note 5, ss 34, 38.1.

<sup>476</sup> In some circumstances, the offender may be required to pay restitution to the copyright owner pursuant to *Criminal Code, supra* note 211, ss 732.1(3.1)(a), 738 or 742.3(2)(f).

copyright owners is through general deterrence, which I argued in Chapter 2 is ineffective.<sup>477</sup>

Non-criminal enforcement is also consistent with the principle of technological neutrality. Through the *Copyright Modernization Act*,<sup>478</sup> and the Copyright Pentalogy,<sup>479</sup> both the Legislature and the Supreme Court of Canada have incorporated the concept of technological neutrality into Canadian Copyright Law.<sup>480</sup> Technological neutrality requires that unless Parliament indicates a contrary intent, the *Copyright Act* must be interpreted in a way “that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.”<sup>481</sup> In other words, just because content is digitized does not mean it should be more heavily protected than analogue content. “Copyright should not stand in the way of technological progress and potentially impede the opportunities for greater access afforded by the internet through the imposition of additional fees or restrictive rules that create extra user costs.”<sup>482</sup>

The internet has been repeatedly accused of facilitating large-scale copyright infringement, and necessitating a resort to criminal law to protect authors’ rights.<sup>483</sup> Mark Bartholemew and John Tehranian argue this has induced “copyright panic,” which has lead to a wave of copyright protectionism.<sup>484</sup> Copyright panic manifests as increased

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<sup>477</sup> See Chapter 2, Part 2(B), above.

<sup>478</sup> *Copyright Modernization Act*, SC 2012, c 20.

<sup>479</sup> See *supra* note 463.

<sup>480</sup> See generally, *Copyright Modernization Act*, *supra* note 478; Geist, *The Copyright Pentalogy*, *supra* note 463.

<sup>481</sup> *ESA v SOCAN*, *supra* note 382 at para 9.

<sup>482</sup> Geist, *The Copyright Pentalogy*, *supra* note 463 at ix.

<sup>483</sup> See e.g. Penney, “Crime, Copyright, and the Digital Age,” *supra* note 8 at 66; Note, “Criminalization in the Digital Era,” *supra* note 121 at 1705; DuBose, “Criminal Enforcement of IP,” *supra* note 38 at 482 – 83; Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 340.

<sup>484</sup> Bartholemew & Tehranian, “Secret Life,” *supra* note 10 at 1405.



legal protection for authors.<sup>485</sup> Criminalized infringement is one example of this manifestation. Both Hardy and the Sub-Committee argue through the lens of copyright protectionism. Hardy argues that the Executive and Legislative branches of the U.S. Government agree that intellectual property is “vulnerable” such that increased penalties are necessary to protect intellectual output.<sup>486</sup> The Sub-Committee argues that because “piracy costs copyright owners millions of dollars every year,” the “full force of the criminal law” is needed to protect intellectual property.<sup>487</sup>

However, Carys Craig reminds us that technological neutrality is part and parcel of the copyright balance: “If copyright in general requires this balance, then it must surely follow that copyright in the digital era requires the *preservation* of this balance, which must mean that the law should have the same effect... whether applied offline or online.”<sup>488</sup> This means that the Legislature cannot exponentially expand authors’ rights, through resort to criminal law and increasing criminal penalties, simply because we are operating in a digital realm.

In Part 2, I discuss three effective non-criminal enforcement mechanisms. Two of these approaches, Notice-and-Notice and Digital Locks, already exist in the *Copyright Act*.<sup>489</sup> I highlight their proven effectiveness, and address potential adjustments to bring ensure they provide balanced protection. The third mechanism, Blockchain Technology

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<sup>485</sup> See *Ibid.* See also Vaver, “Harmless Copying,” *supra* note 4 at 20. Vaver argues that since the *Statute of Anne*, *supra* note 14, legislatures continue to protect “protect more and more for longer and longer” while simultaneously asking “less and less” from content Creators.

<sup>486</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 323.

<sup>487</sup> Sub-Committee, *Charter of Rights*, *supra* note 32 at 97.

<sup>488</sup> Carys J Craig, “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law” in Michael Geist, ed *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 271 at 292.

<sup>489</sup> See *Copyright Act, 1985*, *supra* note 5 at ss 41, 41.25 – 41.27.

has yet to be applied to copyright. I outline how this novel technology may enforce copyright more efficiently than existing laws or regulatory systems.

## **2. Non-Criminal Enforcement is Effective.**

Copyright has been enforced by non-criminal means since the *Statute of Anne*.<sup>490</sup> The majority of copyright infringement cases proceed through civil rather than criminal courts.<sup>491</sup> While there may be a valid argument that copyright infringers are potentially judgment proof, this does not automatically mean that all non-criminal enforcement mechanisms are ineffective. Just because a civil suit may not provide a financial remedy to copyright owners does not mean that we should automatically resort to criminal enforcement.

The non-criminal enforcement methods that I discuss in this Part have either been proven to be effective, as is the case with the notice-and-notice approach, or have the potential to be effective, as is the case with the technological approaches.<sup>492</sup> These methods provide both front-end, and after-the-fact enforcement remedies to creators without having to resort to costly litigation.<sup>493</sup> They operate in a manner that is consistent with Copyright Law's dual purpose to incentivize and disseminate. They adequately protect authors' rights in a way that is consistent with users rights. In the following sub-

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<sup>490</sup> *Statute of Anne*, *supra* note 14.

<sup>491</sup> See e.g. Hardy, "Criminal Copyright Infringement," *supra* note 8 at 310. "Civil cases have always outnumbered criminal ones by a considerable margin" in the United States.

<sup>492</sup> See e.g. Michael Geist, "What's next, after the 2012 copyright overhaul?", *Policy Options* (12 June 2017) online: <[www.irpp.org](http://www.irpp.org)> ["What's Next"]. Geist notes, "the days of labeling Canada as a "piracy haven" are over... Canada is a far different place than it was in 2012." He continues, "on the back of music streaming revenues, the Canadian music market has leaped past Australia to rank 6th in the world, while music collective SOCAN is generating record earnings. Nearly half of English-speaking households in Canada subscribe to Netflix, theatre box office revenues have hit new highs, software piracy is at an all-time low."

<sup>493</sup> Criminally, the state bears the cost of prosecuting alleged infringers, while civilly, authors bear the costs of litigation.

Parts, I will explain Notice-and-Notice, DRM and digital locks, and Blockchain technology, and address how each approach can effectively remedy (or prevent) copyright infringement.

### **A. Notice-and-Notice**

The Notice-and-Notice regime is codified in ss.41.25 – 41.27 of the *Copyright Act*. It was incorporated into Canadian Copyright Law through the *Copyright Modernization Act* in 2012. Parliament deferred the coming into force of these provisions until January 2015 to allow for stakeholder consultations.<sup>494</sup> However Internet Service Providers (ISPs) voluntarily used the Notice-and-Notice regime for years before its codification.<sup>495</sup>

Notice-and-Notice works as follows: first, a copyright owner (claimant) who believes their copyrights are being infringed online sends a notice to the users' ISP in accordance with section 41.25 of the *Copyright Act*.<sup>496</sup> The notice must identify the claimant, the work infringed, the claimant's copyrights/interests in the work, specify the claimed infringement, and provide alleged infringers IP address or "electronic location,"

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<sup>494</sup> Bob Tarantino, "Take Notice! Notice-and-Notice Coming Into Force January 2015 (18 June 2014) *Entertainment & Media Law Singal* (blog), online: <[www.entertainmentmedialawsignal.com](http://www.entertainmentmedialawsignal.com)>.

<sup>495</sup> See e.g. Canada, Legal and Legislative Affairs Division, Parliamentary Information and Research Service, *Legislative Summary: Bill C-11: An Act to amend the Copyright Act* by Dara Lithwick & Maxime-Olivier Thibodeau, Revised 20 April 2012 (Ottawa: Library of Parliament) at 27; Amanda Carpenter, "Bill C-32: Clarifying the Roles and Responsibilities of Internet Service Providers and Search Engines" (15 June 2010) *IPilogue* (blog), online: <[www.iposgood.ca](http://www.iposgood.ca)>; Athar K Malik, Josh JB McElman & Kristen D Murphy, "DMCA the Canadian Way, Eh?: Canada's New Notice-and-Notice Regime for Copyright Infringement" (2015) 19:1 *Copyright & New Media Law* (website) online: <[www.copyrightandnewmedialaw.com](http://www.copyrightandnewmedialaw.com)>; Michael Geist, "Notice the Difference? New Canadian Internet Copyright Rules for ISPs Set to Launch" (24 December 2014) *Michael Geist* (blog), online: <[www.michaelgeist.ca](http://www.michaelgeist.ca)> ["Notice the Difference"].

<sup>496</sup> *Copyright Act, 1985, supra* note 5, s 41.25.

among other requirements.<sup>497</sup> Upon receipt of an infringement notice, the ISP has two obligations.<sup>498</sup> First, the ISP must forward the notice to the alleged infringer “as soon as feasible,” and inform the claimant that the notice has been forwarded.<sup>499</sup> Second, the ISP must retain records that identify the person associated with the IP address for at least six months beginning the day they receive the claimant’s infringement notice.<sup>500</sup> ISP’s may be liable for statutory damages in the range of \$5,000 - \$10,000 for failing to perform their obligations under the Notice-and-Notice regime.<sup>501</sup>

Users have two choices when they receive an infringement notice: they can remove the allegedly infringing content, or they can leave it online and potentially face litigation. If the User believes that they have not infringed copyright, that their use of the copyright protected content is within the scope of their User rights, then they are likely to leave the content online. However it may be the case that the User was unaware that their use of the work constituted copyright infringement. In this case, the notice serves an educational purpose and provides the User with an opportunity to remedy the situation before potentially facing litigation. Geist notes, “unlike the content takedown or access cut-off systems, the Canadian notice approach does not feature any legal penalties. The

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<sup>497</sup> *Ibid*, s 41.25(2)

<sup>498</sup> See *Ibid*, s 41.26(1).

<sup>499</sup> *Ibid*, s 41.26(1)(a). If the ISP is unable to forward the notice to the alleged infringer, they must inform the claimant of the reasons why they were unable to forward it.

<sup>500</sup> See *Ibid*, s 41.26(1)(b). The ISP must retain the records for up to 1 year after they receive the infringement notice, if they are subsequently notified that the claimant has commenced infringement proceedings.

<sup>501</sup> See *Ibid*, s 41.26(3).

notices do not create any fines or damages, but rather are designed as educational tools to raise awareness of infringement allegations.”<sup>502</sup>

The Notice-and-Notice approach is balanced, respecting both Users and Creators rights, compared to the United State’s Notice-and-Takedown regime. The Notice-and-Takedown procedure was passed into law as part of the *Digital Millennium Copyright Act* in 1998.<sup>503</sup> In order to benefit from Safe Harbour provision and not be liable for copyright infringement for hosting infringing content on their server, ISPs must act “expeditiously to remove or disable access to material that is *claimed* to be infringing or to be the subject of infringing activity.”<sup>504</sup> In other words, once an ISP receives notice that content hosted on their server allegedly infringes copyright, they must “takedown” the content, otherwise they face liability for “monetary relief” as defined in s.512(k)(2).<sup>505</sup> While this approach protects authors’ rights, it does not protect users’ rights. ISP’s are required to remove the content, but are not required to notify the User of the alleged infringement. Users are given no opportunity to defend their actions as a legitimate use of the content.<sup>506</sup>

The Notice-and-Notice regime has proven to be effective in curtailing copyright infringement. In 2011, during a *Bill C-32* Committee discussion meeting, Rogers released

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<sup>502</sup> Geist, “Notice the Difference,” *supra* note 495.

<sup>503</sup> *DMCA*, *supra* note 121.

<sup>504</sup> *Ibid*, § 512(c)(1)(C), emphasis added.

<sup>505</sup> *Ibid*, § 512(k)(2): “As used in this section, the term “monetary relief” means damages, costs, attorneys’ fees, and any other form of monetary payment.”

<sup>506</sup> See e.g. Electronic Frontier Foundation, “Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets” (27 February 2014) *Electronic Frontier Foundation* (blog), online: <[www.eff.org](http://www.eff.org)>. Harvard Law School Professor, and Creative Commons co-founder Lawrence Lessig posted a lecture containing clips of the song “lisztomania” to youtube. Youtube removed the content after receiving a take down notice from Liberation Music. Lessig then filed a counter-notice asserting that his use of “lisztomania” amounted to fair use. Liberation Music threatened to sue Lessig. The matter was eventually settle out of court, with Liberation Music paying Lessig a confidential sum for harm caused.

data that 67% of notice recipients did not repeat-infringe after receiving their first notice, and 89% did not repeat-infringe after receiving two notices.<sup>507</sup> The Entertainment Software Association of Canada provided similar data for 2010: 71% of notice recipients did not re-post infringing content on BitTorrent systems.<sup>508</sup> GEK TEK, a U.S.-based anti-piracy firm, claims the Notice-and-Notice regime has caused “massive changes in the Canadian market.”<sup>509</sup> GEK TEK claims the following decreases in piracy rates across various Canadian ISPs: Bell Canada – 69.6% decrease; Telus Communications – 54.0% decrease; Shaw Communications – 52.1% decrease; TekSavvy Solutions – 38.3% decrease; and Rogers Cable – 14.9% decrease.<sup>510</sup> Although there is speculation that some of these decreases may be attributed to CEG TEK’s inclusion of settlement demands in their letters, Geist nonetheless states, “the evidence has long suggested that the notices alone have an education effect that leads to a significant reduction in infringement.”<sup>511</sup>

Given the effectiveness of the Notice-and-Notice regime, some U.S. based copyright owners have begun petitioning the Government to adopt a similar approach.<sup>512</sup>

In 2015, the Internet Security Task Force, a group of “small businesses banding together

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<sup>507</sup> See e.g. Michael Geist, “Rogers Provides New Evidence on Effectiveness of Notice-and-Notice System” (23 March 2011) *Michael Geist* (blog), online: <[www.michaelgeist.ca](http://www.michaelgeist.ca)> [“Evidence on Effectiveness”]; Geist, “Notice the Difference,” *supra* note 495.

<sup>508</sup> Geist, “Evidence on Effectiveness,” *supra* note 507; “Notice the Difference,” *supra* note 495.

<sup>509</sup> See Michael Geist, “Canadian Piracy Rates Plummet as Industry Points to Effectiveness of Copyright Notice-and-Notice System” (May 20, 2015) *Michael Geist* (blog), online: <[www.michaelgeist.ca](http://www.michaelgeist.ca)> [“Piracy Rates Plummet”].

<sup>510</sup> See *Ibid.* See also Internet Security Task Force “Six Strikes And You’re (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System” Internet Security Task Force, 12 May, 2015 online: <<http://www.prnewswire.com>> [“Six Strikes”].

<sup>511</sup> Geist, “Piracy Rates Plummet,” *supra* note 509. See also, Penney, “Internet Surveillance,” *supra* note 538 at 4. Penney’s data suggests that users who receive personal legal threats via notice-based enforcement are strongly deter from reposting the content and may also be chilled from engaging in other legal activities.

<sup>512</sup> See e.g. Internet Security Task Force, “Six Strikes,” *supra* note 510.

to protect content creators and consumers from the negative effects of piracy” strongly recommended that the U.S. implement a system “based on the Copyright Modernization Act.”<sup>513</sup>

My discussion of Notice-and-Notice would not be complete without pointing out the misuse of the regime by copyright authors/the companies that represent their interests.<sup>514</sup> Within a week of the provisions coming into force, rightsholders began “exploiting a loophole,” sending payment demand letters.<sup>515</sup> In some cases, the demand letter state that recipients could be liable for up to \$150,000 per infringement, or have their internet services cut-off.<sup>516</sup> However these are U.S. penalties and are not applicable in Canada.<sup>517</sup> Some U.S.-based anti-piracy companies have been sending thousands of demand letters that do reference Canadian Law.<sup>518</sup> These letters are also inaccurate, using fear of a potential lawsuit to bully Canadians into paying settlements.<sup>519</sup> As a result, copyright scholar Michael Geist has called on the Government to adopt regulations

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<sup>513</sup> *Ibid.*

<sup>514</sup> See e.g. Michael Geist, “Rightscorp and BMG Exploiting Copyright Notice-and-Notice System: Citing False Legal Information in Payment Demands” (8 January 2015) *Michael Geist* (blog), online: <www.michaelgeist.ca> [“Rightscorp and BMG”]; Michael Geist, “Misuse of Canada’s Copyright Notice System Continues: U.S. Firm Sending Thousands of Notices with Settlement Demands” (March 5, 2015) *Michael Geist* (blog), online: <www.michaelgeist.ca> [“Misuse”].

<sup>515</sup> Geist, “Rightscoro and BMG,” *supra* note 514.

<sup>516</sup> See *Ibid.*

<sup>517</sup> See *Ibid.*

<sup>518</sup> See Geist, “Misuse,” *supra* note 514.

<sup>519</sup> See Michael Geist, “Canadian Government on Copyright Notice Flood: ‘It’s Not a Notice-and-Settlement Regime’” (29 April 2015) *Michael Geist* (blog), online: <www.michaelgeist.ca> [Government on Notice Flood]; Michael Geist, “Canada is now home to some of the toughest anti-piracy rules in the world”, *The Globe and Mail* (6 March 2017), online: <www.theglobeandmail.com> [“Globe and Mail article”]. See also, Sophie Harris, “Analysis: ‘Feels like blackmail’: Canada needs to take a hard look at its piracy notice system: Copyright infringement notices spark fear and confusion among some Canadians” *CBC New* (2 November 2016) online: <www.cbc.ca>. This article discusses various Canadians who have received notices, include a “shocked grandmother,” and a “panicked foreign university student.”

detailing what may be included in infringement notices, and prohibiting settlement demands.<sup>520</sup>

Despite the misuse of the Notice-and-Notice regime, it is still an effective, non-criminal enforcement mechanism. Notice-and-Notice respects both authors and users rights when it is appropriately used. It allows authors to assert their copyrights and have their infringing content removed from the internet, while also respecting users rights. The notices also have an important educational component, wherein they alert recipients of their allegedly infringing content.<sup>521</sup> This is important given that many people may be unaware that their online actions may infringe copyright.<sup>522</sup>

## **B. Technological Approaches – Digital Rights Management**

Digital technology has been repeatedly credited with facilitating large-scale reproduction and dissemination of copyright protected works.<sup>523</sup> However, digital technologies are also a potential source of protection for copyright owners. DRM technology allows creators to digitally protect their content from potential infringers. In

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<sup>520</sup> See e.g. Geist, “Copyright Misuse Emerges as a Political Issue: QP Questions on Notice-and-Notice Abuse” (9 June 2017) *Michael Geist* (blog), online: <[www.michalegeist.ca](http://www.michalegeist.ca)>; Geist, “Misuse,” *supra* note 514; “Government on Notice Flood,” *supra* note 519.

<sup>521</sup> See e.g. Megan Haynes, “Canadians have ‘no obligation’ to pay U.S. piracy firm”, *Metro News* (22 April 2015) online: <[www.metronews.ca](http://www.metronews.ca)>. Industry Canada has stated that there is no obligation to pay settlement demands, and that the notice-and-notice regime’s aim is to combat online piracy by educating consumers that it is illegal, not by penalizing them.

<sup>522</sup> See e.g. Jason Mick, “Nearly Half of Americans Pirate Casually, But Pirates Purchase More Legal Content” (21 January 2013) *Tech Dirt* (website) online: <http://www.dailytech.com/Nearly+Half+of+Americans+Pirate+Casually+But+Pirates+Purchase+More+Legal+Content/article29702.htm>. Mick notes a study released in 2013 “that most people in the U.S. believe private copying is legal, when in fact it carries severe criminal penalties. See also, Masnick, “New Study,” *supra* note 279; Andrew Ramadge, “Most pirates say they’d pay for legal downloads” (3 September 2011), *News* (website), online: <[www.news.com.au](http://www.news.com.au)>; Rob Price, “The ‘Game of Thrones’ season 7 premiere was pirated a staggering 90 million times” (21 July 2017), *Business Insider* (website), online: <[www.uk.businessinsider.com](http://www.uk.businessinsider.com)>; Paul Tassi, “The Morality of ‘Game of Thrones’ Piracy” (19 April 2015) *Forbes* (website), online: <[www.forbes.com](http://www.forbes.com)>.

<sup>523</sup> See *supra* notes 8, 9 referring to Penney “Crime, Copyright and the Digital Age,” *supra* note 8 at 66, 67, and others.



this Part I discuss two types of DRM technology: digital locks, and Blockchain Technology.

***i) Digital Locks***

Digital locks (TPMs) exist in various forms.<sup>524</sup> The oldest and most common type of digital lock is anti-copy devices or technology.<sup>525</sup> These devices prevent, or make it difficult for users to copy the work they protect.<sup>526</sup> Commonly, anti-copy technology is applied to DVDs, CDs, video games, etc. to prevent users for copying the work.<sup>527</sup> Other digital locks are used to prevent access to content.<sup>528</sup> For example, DVDs can be geographically restricted such that a DVD purchased in Europe will not play through a Canadian DVD player.<sup>529</sup> Similarly, the iTunes Store used DRM to limit the number of devices that users can use access their downloaded content until 2009.<sup>530</sup>

The *Copyright Act* makes reference to two types of digital locks in s.41. The *Act* defines TPMs as: “any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work... or, (b) restricts the doing...” of any act that copyrights owners have the exclusive right to do.<sup>531</sup> Digital locks, then, as they appear in the *Copyright Act* either restrict access to a work, or restrict particular uses

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<sup>524</sup> See e.g. Séverine Dusollier, “Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright” (1999) 6 Eur IP Rev 285 [“Electrifying the Fence”].

<sup>525</sup> See *Ibid* at 287.

<sup>526</sup> See *Ibid*.

<sup>527</sup> See e.g. Pamela Samuelson & Jason Schultz, “Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measure?” (2007-2008) 6 J on Telecomm & High Tech L 41 at 45 [“Have to give Notice”].

<sup>528</sup> Dusollier, “Electrifying the Fence,” *supra* note 524 at 287.

<sup>529</sup> See e.g. Samuelson & Schultz, “Have to give Notice,” *supra* note 527. Geographical restriction or “region-coding” is also used by Netflix. Canadian users are unable to access American Netflix without using a Virtual Private Network (VPN) located in the United States.

<sup>530</sup> See e.g. Peter Cohen, “iTunes Store goes DRM-free” (6 January 2009) *Macworld* (website), online: <www.macworld.com>.

<sup>531</sup> *Copyright Act, 1985, supra* note 5, s 41.

of the work. The *Copyright Act* prohibits circumventing TMP's that restrict access, and offering services or manufacturing devices that are primarily for the purpose of circumventing TPMs.<sup>532</sup>

The digital lock provisions of the *Copyright Act* are controversial, and received significant criticism during the Copyright Modernization process. Critiques of the provisions argued that they went too far in protecting owners' rights.<sup>533</sup> Geist, in particular, argued that circumventing a TPM should only be a violation where it is linked to actual copyright infringement.<sup>534</sup> He rightfully argues that there should be a fair dealing exception to the digital lock rules.<sup>535</sup>

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<sup>532</sup> *Copyright Act, 1985*, *supra* note 5, s 41.1(1).

<sup>533</sup> Michael Geist, "Canadian DMCA in Action: Court Awards Massive Damages in First Major Anti-Circumvention Copyright Ruling" (3 March 2017) *Michael Geist* (blog), online: <www.michaelgeist.ca>. Geist discusses a 2017 case where Nintendo was awarded \$11.7 million in statutory damages and a further \$1 million in punitive damages from a company that created a "modchip" used to circumvent Nintendo's TPMs. Geist argues that this case is "an exceptionally aggressive application of the new anti-circumvention rules. See *Nintendo of America Inc v King*, 2017 FC 246 (CanLII). Nintendo brought an action against King for manufacturing and selling devices (mod chips) allegedly designed to circumvent TPMs on Nintendo DS, 3DS, and Wii. King argued that its devices were "for the purpose of making the Applicant's game consoles 'interoperable' with homebrew software" (para 118). Interoperability of computer programs is a defence to circumventing technological protection measures under s.41.12 of the *Copyright Act*. The Court rejected this defence, accepting the argument that the primary purpose of the Respondent's devices was to enable users to play pirated copies of Nintendo games (para 121). With respect to damages, the Court accepted Nintendo's argument that statutory damages for circumventing TPMs should be calculated on a "per-work" basis, in the range of \$500 - \$20,000 per work (\$294,000 – \$11,700,000 for the 585 Nintendo games involved). In rejecting King's argument that circumventing TPMs should not be subjected to statutory damages because no actual copyright infringement has been proven, the Court noted: (1) actual infringement of copyright is not necessary for an award of statutory damages for TPM circumvention; (2) a work-based award is more harmonious with the wording of the act, among other reasons. Ultimately, King was ordered to pay Nintendo \$11,700,000 in statutory damages for circumventing their TPMs, \$60,000 for copyright infringement of their "Header Data," and \$1,000,000 in punitive damages for showing "callous disregard for the Applicant's rights," (para 171) and the "strong need to deter and denounce such activities" (para 174). The Court also notes at 174 that the punitive damages award "is also consistent with the scale of penalties available if this were a criminal proceeding under s.42 of the *Act*," despite this being a civil proceeding, and no indication of a criminal proceeding against King.

<sup>534</sup> See, Kazi Statsna, "Copyright changes: how they'll affect users of digital content", *CBC News* (30 September 2011) online: <www.cbc.ca> ["Copyright Changes"]; Michael Geist, "Canadian Copyright Reform Requires Fix to the Fair Dealing Gap" (9 December 2016) *Michael Geist* (blog), online: <www.michaelgeist.ca> ["Fix the Fair Dealing Gap"].

<sup>535</sup> Geist, "Fix the Fair Dealing Gap," *supra* note 534.

However, these criticisms do not completely undermine the potential for TMPs to effectively protect owners' rights in a manner consistent with balance theory. Instead, they provide an opportunity for the Government to amend the *Copyright Act* to more adequately balance users' and authors' rights, in a manner consistent with the underlying purposes of Copyright Law. Geist's concerns should be taken into account, and the *Copyright Act* should be amended to require proof of actual infringement to constitute a violation of the anti-circumvention provisions.

## ***ii) Blockchain Technology***

The Blockchain is another form of DRM technology that could be used to digitally copyrights. Blockchain technology was initially developed as the backbone to Bitcoin. Bitcoin is a decentralized, digital currency that is transferred using peer-to-peer technology.<sup>536</sup> It operates through a system based on cryptographic proof, eliminating the need for a third-party to process transactions.<sup>537</sup> Users download Bitcoin wallets to their devices and use them to transfer Bitcoins to other users via the internet.<sup>538</sup> Wallets contain "private keys," which are secret pieces of data used to sign transactions, proving the currency comes from a particular wallet.<sup>539</sup> All transactions are broadcast on the Blockchain, which creates a time-stamped, chronological, public ledger. A network of cryptographically-linked computers keep a running list of all changes made to the Blockchain and link each new entry to former entries.<sup>540</sup> This prevents double spending

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<sup>536</sup> See Bitcoin, "What is Bitcoin?" (22 March 2011), online: <<https://bitcoin.org>> at 00h:00m:04s.

<sup>537</sup> See Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" online: <<https://bitcoin.org>>.

<sup>538</sup> See Bitcoin, "How does Bitcoin work?" (website) online: <<https://bitcoin.org/en/how-it-works>>.

<sup>539</sup> *Ibid.*

<sup>540</sup> See e.g. Tom W Bell "Copyrights, Privacy, and the Blockchain" (2015-2016) 42 Ohio NUL Rev 439 at 463 ["Copyright and Blockchain"].

and allows users to verify the Bitcoins chain of ownership.<sup>541</sup> It also prevents hackers from altering the Blockchain. Because all changes to the blocks data are linked together through cryptography, even if a hacker could alter the data in one node, the other nodes in the network would reject the changes.<sup>542</sup>

Blockchain technology, and the ledger it creates, has many valuable uses outside of Bitcoin.<sup>543</sup> Though there has been skepticism expressed about its ultimate usefulness for applying or enforcing copyright, it nevertheless offers some unique copyright possibilities.<sup>544</sup> Blockchain technology could be used to create a ledger of content ownership, whereby creators are able to register their ownership on a publically available, time stamped ledger.<sup>545</sup> This would allow authors to easily prove when they created the work, protecting against third party claims of earlier authorship.<sup>546</sup> It would also allow creators to prove authorship, since they would own the private key proving the work

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<sup>541</sup> See Bitcoin, “Vocabulary” (website) online: <<https://bitcoin.org/en/vocabulary#double-spend>>.

<sup>542</sup> Bitcoin, “How does Bitcoin Work,” *supra* note 538.

<sup>543</sup> See e.g. Bell, “Copyrights and Blockchain,” *supra* note 540. Bell argues that Blockchain can be used to protect the privacy interests of content creators who wish to remain anonymous. See also, Mike Montgomery, “Bitcoin Is Only the Beginning for Blockchain Technology”, *Forbes* (15 September 2015), online: <[www.forbes.com](http://www.forbes.com)> [“Only the Beginning,”]. Montgomery suggests that Blockchain could be used to verify copyrights, patents, and even identities, which could lead to “voting via smartphones.” Montgomery also refers to work being done by Mathew Spoke of Deloitte Canada to use Blockchain technology to make audits more precise. See also, Megan Molteni, “Moving Patient Data is Messy, but Blockchain is Here to Help” (1 Feb 2017), *Wired* (blog) online: <[www.wired.com](http://www.wired.com)>, discussing recent efforts to use Blockchain in Healthcare.

<sup>544</sup> See e.g. Jessie Willms, “Is Blockchain Powered Copyright Protection Possible?”, (9 August 2016) *Bitcoin Magazine* (blog) online: <<https://bitcoinmagazine.com/articles/is-blockchain-powered-copyright-protection-possible-1470758430/>>. Willms canvasses different legal opinions on Blockchain’s ability to enforce copyright, and questions whether Blockchain can prevent copyright infringement. Her article highlights some of the alleged implementation issues that may prevent Blockchain from enforcing copyright. These issues include: copyright’s global reach implicates various jurisdictions and differing copyright laws; issues around who actually created the work and whether they are the person who registered it; hashing issues; and how to enforce copyrights once infringement has been detected.

<sup>545</sup> See Jean-Pierre Buntinx, “Future Use Cases,” *supra* note 445.

<sup>546</sup> See Mathijs Koenraadt, “Blockchains for Copyright: Making Use of Bitcoin’s Technology to Protect, Track and Monetize Digital Works” (12 November 2015), *Mathijs Koenraadt* (blog), online: <<https://koenraadt.info>>.

exists.<sup>547</sup> This private key would also allow authors to sell users authorized access to their work.<sup>548</sup> Blockchain eliminates the need for authors to use costly distributors and management companies, insuring that more profit goes directly to the rights-holder.<sup>549</sup>

Recognizing the potential for Blockchain technology in the music industry, Spotify recently acquired Mediachain, which is a blockchain research agenda and open source protocol.<sup>550</sup> Spotify anticipates that Mediachain will help establish a “more fair, transparent and rewarding industry for creators and owners.

### **3. Non-Criminal Enforcement is Consistent with *Charter* Values**

This Part provides further support for non-criminal copyright enforcement. In previous chapters I disassembled the theoretical justifications for criminalization. In this Chapter I have argued that Copyright Theory supports non-criminal copyright enforcement. Now I argue that non-criminal enforcement is also consistent with *Charter* values. This part is not meant to be an exhaustive, comprehensive *Charter* analysis. It is beyond the scope of this thesis to set out and apply the infringement analyses in sections 7, 12, and 1 of the *Charter*. My objective here is to provide an additional angle, one focused on *Charter* values, to my broader argument that copyright infringement is not theoretically justified.

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<sup>547</sup> See *Ibid.*

<sup>548</sup> See e.g. Bruce Gain, “High Hopes for Blockchain For Digital Copyright Protection” (19 December 2016), *Wired* (blog) online: <[www.ip-watch.org](http://www.ip-watch.org)>.

<sup>549</sup> See *Ibid.*

<sup>550</sup> See Mediachain (website) online:<<http://www.mediachain.io/>>; Spotify, “Spotify acquires Mediachain” (16 April 2017) online: <<https://press.spotify.com/us/2017/04/26/spotify-acquires-mediachain-labs/>>; Bill Rosenblatt, “Spotify Acquires Blockchain Startup Mediachain” (27 April 2017) *Copyright and Technology* (blog), online: <<https://copyrightandtechnology.com/2017/04/27/spotify-acquires-blockchain-startup-mediachain/>>.

I am not the first to apply a constitutional lens to criminalized infringement. Scott & Collins argued that the presumptions in the criminal provisions of the *Copyright Act* could violate the *Charter*.<sup>551</sup> In particular, they argued that the presumption that someone who registers a work pursuant to section 53 of the act owns the work and that copyright subsist in the work, may violate s.11(d) of the *Charter*.<sup>552</sup> This violation arises because the accused bears the burden of proving that the complainant does not own the copyrights to the work, or that copyright does not subsist in the work.<sup>553</sup> Scott & Collins conducted a section 11(d) and a section 1 analysis, concluding that this “reverse onus” clause likely violates the *Charter* in a manner that cannot be saved by section 1.<sup>554</sup>

While Scott & Collins’ arguments are valid, my focus is restricted to section 1, and particularly minimal impairment. Minimal impairment is a constitutionally recognized principle derived from s.1 of the *Charter*.<sup>555</sup> It requires the State to “show the absence of less drastic means of achieving the objective ‘in a real and substantial manner.’”<sup>556</sup> With respect to criminalized copyright enforcement, the government is unable to meet this requirement.

Criminal penalties are more severe than civil remedies. This proposition should be undisputed. Imprisonment is the most severe and restrictive penalty permitted under

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<sup>551</sup> Scott & Collins, “Part II,” *supra* note 36.

<sup>552</sup> *Ibid* at 160 – 64.

<sup>553</sup> *Ibid*.

<sup>554</sup> *Ibid* at 164 – 66.

<sup>555</sup> See e.g. *R v Oakes*, [1986] 1 SCR 103, SCJ No 7. Minimal impairment has a long history at the Supreme Court of Canada, including: *Alberta v Hutterian Bretheren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 [*Hutterian Bretheren*]; *Carter v Canada (Attorney General)*, 2015 SCC 5, 1 SCR 331; and *Nur*, *supra* note 447, among others.

<sup>556</sup> *Nur*, *supra* note 447 at 116, with reference to *Hutterian Bretheren*, *supra* note 555 at para 53, 55.

Canadian Law.<sup>557</sup> This is recognized in various *Charter* provisions, including: the right to liberty;<sup>558</sup> the right not to be arbitrarily detained or imprisoned;<sup>559</sup> the right not to be subjected to cruel and unusual punishment;<sup>560</sup> and, the guaranteed protections of these rights in freedoms, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>561</sup>

Criminal conviction, regardless of its mandated penalty, is more significant than civil liability. This is evidenced by the right to be presumed innocent until proven guilty in section 11(d) of the *Charter*, and the requirement for the Crown to prove all elements of a crime beyond a reasonable doubt.<sup>562</sup> Civilly, liability is established on a balance of probabilities, which is a lower standard.<sup>563</sup> Further, the social stigma associated with a criminal conviction does not exist for civil liability. It follows that a person convicted of criminal copyright infringement would suffer a harsher penalty than someone who receives a copyright infringement notice pursuant to the Notice-and-Notice regime, or someone who is subject to a civil copyright infringement lawsuit.

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<sup>557</sup> See e.g. Law Reform Commission, *Our Criminal Law*, *supra* note 114 at 27: “So criminal law must be an instrument of last resort. ...Society’s *ultimate weapon* must stay sheathed as long as possible” (emphasis added).

<sup>558</sup> See e.g. *Charter*, *supra* note 224 at s 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>559</sup> *Ibid* at s 9: “Everyone has the right not to be arbitrarily detained or imprisoned.”

<sup>560</sup> *Ibid* at s 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

<sup>561</sup> *Ibid* at s 1.

<sup>562</sup> See e.g. *R v W(D)*, [1997] 1 SCR 742, 3 CR (4th) 302; *R v Starr*, 2000 SCC 40, at para 96, 2 SCR 144 [“*Starr*”].

<sup>563</sup> See e.g. *Starr*, *supra* note 562: “What is essential is that the charge communicate clearly to the jury that they cannot find the accused guilty on a balance of probabilities. I believe that the charge did this. The opening sentence of the charge clearly implies that proof beyond a reasonable doubt is just one notch lower than absolute certainty; it is the highest level of proof that can be humanly achieved. This negates any suggestion that proof on a balance of probabilities might suffice.”

The proponents of criminalized copyright enforcement also directly support the proposition that criminal penalties are more severe than civil remedies. One of the main arguments in favour of criminalized enforcement is the need for more severe penalties to effectively deter potential copyright infringers.<sup>564</sup> For example, Hardy states, “criminal conviction is typically a harsher punishment than a civil penalty; as such, it has a greater deterrence value.”<sup>565</sup> He adds that copyright infringement “almost cries out for greater deterrence and consequently for more reliance on criminal punishment.”<sup>566</sup> Although I have argued elsewhere that increased criminalization is a weak deterrent, this weakness is largely due to the fallibility of deterrence theory, and not an attack on the inherent increased severity of criminal penalties as compared to civil remedies.

As I have outlined in the previous section, copyright infringement can be enforced through non-criminal means. The Notice-and-Notice regime has proven to be an effective enforcement mechanism, credited with the substantial decreases in copyright infringement since it was proclaimed into force in 2015.<sup>567</sup> DRM approaches like TPMs and Blockchain Technology also have the potential to effectively enforce copyright.<sup>568</sup> Creative, adaptable, technology-based approaches to enforcing copyright infringement, such as TPMs and Blockchain Technology will allow copyright enforcement mechanism

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<sup>564</sup> See e.g. Hardy, “Criminal Copyright Infringement,” *supra* note 8; DuBose, “Criminal Enforcement of IP,” *supra* note 38; Task Force, *Report*, *supra* note 38.

<sup>565</sup> Hardy, “Criminal Copyright Infringement,” *supra* note 8 at 312.

<sup>566</sup> *Ibid.*

<sup>567</sup> See e.g. Part 2(A), above; See Geist, “Piracy Rates Plummet,” *supra* note 509; “Evidence on Effectiveness,” *supra* note 507; “Notice the Difference,” *supra* note 495; See also Internet Security Task Force “Six Strikes,” *supra* note 510.

<sup>568</sup> See e.g. Part 2(B), above; Statsna, “Copyright Changes,” *supra* note 534; Geist, “Fix the Fair Dealing Gap,” *supra* note 534; See e.g. Bell, “Copyrights and Blockchain,” *supra* note 540. See Montgomery, “Only the Beginning,” *supra* note 543.



to evolve in tandem with technological advancements, rather than resort to criminalization as a response to digital technologies.<sup>569</sup> These three examples are less drastic than criminal enforcement, with its reliance on imprisonment and significant fines.<sup>570</sup> Because criminal penalties are more severe than civil remedies, and copyright infringement can be addressed through non-criminal means, it follows that non-criminal enforcement is *more* consistent with minimal impairment than criminal enforcement.

#### 4. Chapter Summary

In this Chapter I argued that Balance Theory primarily justifies Copyright Law. Although the *Copyright Act* does not contain any preamble specifically outlining its purpose, the Supreme Court of Canada has repeatedly stated that Copyright Law exists to balance authors' and users' interests.<sup>571</sup> It aims to “[promote] the public interest in the encouragement and dissemination of works and intellect and [to obtain] a just reward for the creator.”<sup>572</sup> Leading Canadian copyright scholars David Vaver, Michael Geist, and Daniel Gervais have also repeatedly articulated that Balance Theory justifies Copyright Law.<sup>573</sup>

Understanding that Balance Theory serves to balance and protect both creators and users rights, I argued that non-criminal enforcement is consistent with these objectives, rather than criminal enforcement. Criminal enforcement overstates and

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<sup>569</sup> Recall here that increased criminalization was largely a response to digital technology and the internet, and how they have facilitated large scale copyright infringement on a global scale that was not possible in the analogue era. See e.g. *supra* notes 8, 9, referring to Penney “Crime, Copyright and the Digital Age,” *supra* note 5 at 66, 67.

<sup>570</sup> See e.g. *Copyright Act, 1985*, *supra* note 5 at s 42(2.1), (3.1).

<sup>571</sup> See generally *Théberge*, *supra* note 442; *CCH*, *supra* note 16; *SOCAN v CAIP*, *supra* note 452.

<sup>572</sup> *Théberge*, *supra* note 442 at para 30.

<sup>573</sup> See Part 1A, above.

overprotects authors' rights by involving the State in what is meant to be a private matter. This creates a power imbalance between users and creators and disrupts the copyright balance.

Non-criminal enforcement is not only consistent with Balance Theory, but it is also effective. I addressed three specific types of non-criminal enforcement mechanism: Notice-and-Notice, Digital Locks, and Blockchain Technology. Although there are some flaws in the current Notice-and-Notice regime whereby anti-piracy corporations are using notices as demand letters, this issue can be address through regulation and informing the public that they are not required to pay a settlement despite what the notice says. There are also some issues with the current anti-circumvention provisions insofar as they prohibit conduct that may not amount to infringement. Again, this issue can be addressed by amending the provisions to state that only circumvention for the purpose of infringement is prohibited. Finally, although Blockchain Technology has yet to be applied to the copyright regime, its ability to protect copyrights is promising.

Non-criminal enforcement is also consistent with *Charter* values, particularly minimal impairment as codified in s.1 of the *Charter* and interpreted by the Supreme Court of Canada. Minimal impairment requires the State to adopt the least *Charter*-infringing method to achieve its objectives. It is undisputed that civil provisions are less intrusive than criminal penalties. Non-criminal copyright enforcement is therefore inherently more minimally impairing than criminal enforcement.

In Chapter 6 I briefly review the arguments against criminal copyright infringement and in support of non-criminal enforcement. I conclude by offering suggestions on how the Government should move to decriminalize the copyright regime.

## Chapter 6 – Conclusion

Criminalized copyright infringement is an important Canadian issue that involves Constitutional principles and affects the integrity of both the criminal justice system and the Government. Absent theoretical justification, criminalization is not a valid exercise of State power pursuant to s.91(27) of the *Constitution*. During the next wave of copyright reforms, the Government should take the necessary steps to decriminalize and avoid further criminalizing copyright law. This approach may be inconsistent with the current global trend, however it is consistent with Canadian values. Although criminalized copyright infringement has existed in Canada for close to a century, no one has analyzed its legitimacy from a systematic, theoretical perspective, until now. In this Thesis I have argued against the typical theoretical justifications for criminalization and made a positive case for non-criminal copyright enforcement. I have argued that Criminal Legal Theory, Law and Economic Theory and Property Theory all fail to justify criminalized copyright infringement, and that Copyright Theory and *Charter* values actually support non-criminalized enforcement.

In light of these arguments, copyright infringement, whether for personal use or financial gain, should not be criminalized in Canada. The question to answer now, is how does Canada decriminalize the copyright regime, and what are the consequences of this move? I seek to answer these questions in the following parts.

## 1. Towards non-Criminal Copyright Enforcement in Canada

In order to decriminalize copyright law, the Government must amend the *Copyright Act* to remove section 42.<sup>574</sup> The Government reviews the *Copyright Act* every five years. The next review is scheduled to begin in November 2017. This review would be an ideal time to at least raise the possibility of decriminalization. Michael Geist argues that the Government should make modest tweaks to the existing legislation rather than completely overhaul the *Copyright Act*.<sup>575</sup> He argues that because the act was significantly changed in 2012, and some of these provisions only came into force in 2015, the implications of the 2012 changes are still being sorted out.<sup>576</sup> In this situation, “a radical overhaul would do more harm than good.”<sup>577</sup> Amending the *Copyright Act* to remove criminalized copyright infringement is consistent with Geist’s approach; it is a tweak to the existing legislation to remove a problematic provision, not a radical overhaul to the *Act*. This amendment would go a long way for the Government to show its commitment to strike the appropriate balance between authors and creators rights, and actually help achieve a balanced regime.

Despite Canadian sovereignty, and the Canadian Government’s ability to legislate in Canada, there are nevertheless international aspects of copyright law that must be

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<sup>574</sup> Section 42 is the “criminal remedy” provision of the *Copyright Act, 1985*, *supra* note 5. Regardless of whether all of my suggestions in this thesis are accepted, at the very least, the Government should amend the *Act* to decriminalize the circumvention of technological protections measure in s.42(3), as this criminalizes conduct that may not amount to infringement, and may actually be a legitimate user right. Where someone circumvents a TPM in order to use the work in a manner that constitutes fair use, they are nevertheless subject to criminal conviction. This is inconsistent with the need to treat users’ rights liberally, as is a necessary principle of statutory interpretation for remedial legislation.

<sup>575</sup> Geist, “What’s Next,” *supra* note 492.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

considered, including whether the government can decriminalize copyright infringement, and what the implications of decriminalization are. I address these concerns in the following part.

### **A. The Implications of Decriminalization at International Law.**

International copyright law has a lot of depth, to which this Part does not do justice.<sup>578</sup> My venture into International Law in this Chapter is brief, as the international dimensions of copyright law go far beyond the scope of this thesis. Because Canada is a signatory state to various international treaties requiring criminalized enforcement, I focus specifically on *pacta sunt servanda*, and repudiation. A detailed analysis of the intricate arguments that could be made for Canada to justify repudiating its treaty obligations, and the implications of such repudiation could form the subject of an entire thesis. My objective here is to simply raise some of these issues for consideration, as my suggestions on how to decriminalize the copyright regime would be incomplete without at least canvassing these issues. I will speak about them generally.

#### ***i) International Treaties and Criminalized Copyright Enforcement***

Canada is a signatory state to international treaties that require criminalized copyright infringement. I discuss five here: The *Trade-Related Aspects of Intellectual Property Rights (TRIPS)*,<sup>579</sup> the *WIPO Copyright Treaty (WCT)*<sup>580</sup> and *WIPO*

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<sup>578</sup> To begin learning more about this topic, Paul Goldstein & Bernt Hudenholtz, *International Copyright Law: Principles, Law, and Practice*, 3rd ed (Oxford: Oxford University Press, 2012); World Intellectual Property Organization (website) online: <www.Wipo.int>.

<sup>579</sup> *TRIPS*, *supra* note 10. *TRIPS* was annexed to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April, 1994, BTS 57(1996) (entered into force on 1 January 1995). It incorporates art. 1-21 of the *Convention for the creation of an International union for the protection of literary and artistic works, with additional article, closing protocol, and process-verbal of signature*, 9 September 1886, 168 Parry 185 arts 1–21 (entered into force 5 December 1887) [*Berne Convention*].

*Performances and Phonograms Treaty (WPPT)*,<sup>581</sup> the *Anti-Counterfeiting Trade Agreement (ACTA)*<sup>582</sup> and the *Trans-Pacific Partnership (TPP)*.<sup>583</sup>

Canada is a member of the World Intellectual Property Organization (WIPO), a self-funded agency of the United Nations that “[helps] governments, businesses and society realize the benefits of IP.”<sup>584</sup> All WIPO members are required to ratify the treaties that it administers. *TRIPS*, the *WCT*, and the *WPPT* are three of WIPO’s many multilateral treaties. *TRIPS* requires member-States to “provide for criminal procedures and penalties to be applied at least in cases of willful ... copyright piracy on a commercial scale.”<sup>585</sup> Remedies must include “imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.”<sup>586</sup> Both the *WCT* and the *WPPT* also require strong copyright protection. Article 11 of the *WCT*, and article 18 of the *WPPT*, for example, both require contracting parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures... which are not authorized... or permitted by law.” Because the *WCT* strictly prohibits reservations,<sup>587</sup> and the *WPPT* only permits reservations in specific situations,<sup>588</sup> all member-States must

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<sup>580</sup> *WIPO Copyright Treaty* 20 December 1996, 36 ILM 65(1997) (entered into force 6 March 2002) online: <[www.wipo.ict](http://www.wipo.ict)> [*WCT*].

<sup>581</sup> *WIPO Performances and Phonograms Treaty*, 20 December 1996 S Treaty Doc No 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) online: <[www.wipo.int](http://www.wipo.int)> [*WPPT*].

<sup>582</sup> *ACTA*, *supra* note 10.

<sup>583</sup> *The Trans-Pacific Partnership*, 4 February 2016, [2016] ATNIF 2 (not yet in force), at art 18.77 [*TPP*].

<sup>584</sup> WIPO, “Inside WIPO” (website), online: <<http://www.wipo.int/about-wipo/en/>>.

<sup>585</sup> *TRIPS*, *supra* note 10, art 61.

<sup>586</sup> *Ibid.*

<sup>587</sup> *WCT*, *supra* note 580 art 22.

<sup>588</sup> *WPPT*, *supra* note 581 arts 15(3), 21.

comply with all treaty provisions. However, neither the *WTC* nor the *WPPT* specifically require criminalized copyright enforcement.

Although both *ACTA* and the *TPP* have not been proclaimed into force, and are likely dead as a result of the United States' recent withdrawal from both agreements, they are still worth mentioning, as Canada is a party to both. They require member-States to "provide criminal procedures and penalties" for willful copyright "piracy" on a commercial scale, similarly to *TRIPS*.<sup>589</sup> Both agreements also require specific penalty requirements for copyright piracy, including: "sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity."<sup>590</sup>

Evidently these five treaties require Canada to provide for certain criminal penalties for copyright infringement, though they do provide varying degrees of latitude for what these penalties should look like and how they are enforced. The question now is whether Canada can work around, or get out of these requirements in order to decriminalize copyright infringement.

## ***ii) Pacta Sunt Servanda and Repudiating International Agreements***

*Pacta sunt servanda* is a *jus cogens* norm; it is a basic tenet of international law.<sup>591</sup> It requires that States act in good faith to perform their legal undertakings.<sup>592</sup> This

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<sup>589</sup> *ACTA*, *supra* note 10, art 23; *TPP*, *supra* note 583 art 18.77.

<sup>590</sup> *ACTA*, *supra* note 10 art 25; *TPP*, *supra* note 583 art 18.77(6).

<sup>591</sup> John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2000) at 153. Latin for "agreements must be kept." This is an important principle. Because states are sovereign, they have plenary jurisdiction over their territory, and the people and things within their territory. No state can enforce its laws on the territory of another. See e.g. Teresa Scassa & Robert J Currie, "New First Principles? Assessing the Internets Challenges to Jurisdiction" (2011) 24:4 *Georgetown Journal of International Law* 1017 at,



principle has two important implications for decriminalizing copyright infringement: (1) consent to be bound by international treaties cannot be unilaterally withdrawn,<sup>593</sup> and (2) treaties continue to be in force until they are validly terminated or suspended.<sup>594</sup> This is understandable; in order to meet their objectives to settle international legal issues, treaties must continue to be in force. Treaties that can be unilaterally withdrawn or that are easily suspended or terminated will not fulfill this objective.

The *Vienna Convention on the Law of Treaties* codifies international treaty principles.<sup>595</sup> It contemplates suspension and termination in article 42.<sup>596</sup> Treaties can only be terminated or suspended in accordance with the treaty's terms, or bases set out in article 63.<sup>597</sup> These bases include: (a) consent of treaty parties,<sup>598</sup> (b) material breach, (c) supervening impossibility of performance, (d) fundamental change of circumstances, and (e) a conflict with a new *jus cogens* norm.<sup>599</sup> Unfortunately, it is unlikely that any of these bases are appropriate for Canada to repudiate *TRIPS*.<sup>600</sup> Consent would be the most

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1025. International law then, requires principles and mechanism to hold states accountable to their agreements. *Pacta sunt servanda* is one such principle.

<sup>592</sup> Currie, *Public International Law*, supra note 591 at 153.

<sup>593</sup> *Ibid*

<sup>594</sup> *Ibid* at 42, 77. A multilateral treaty is terminated by repudiation. A bilateral treaty is terminated by denunciation.

<sup>595</sup> *Vienna Convention on the Law of Treaties* 23 May 1996, 1155 UNTS 331 (entered into force 27 January 1980) online: <<https://treaties.un.org/>>.

<sup>596</sup> *Ibid*, art 42.

<sup>597</sup> *Ibid*.

<sup>598</sup> See Currie, *Public International Law*, supra note 591 at 155. Parties can also agree in a new treaty to amend, terminate, suspend, or release one or more parties from a former treaty.

<sup>599</sup> *Ibid* at 62.

<sup>600</sup> I refer only to *TRIPS*, supra note 10, in this section. Because the *WCT*, supra note 580 and the *WPPT*, supra note 581 do not specifically require criminalized enforcement, Canada is able to abide by their terms so long as it provides "adequate legal protection and effective legal remedies." The non-criminal enforcement mechanisms I discuss in Chapter 5 meet these requirements. I do not specifically address *ACTA*, supra note 10, and the *TPP*, supra note 583 in this part because they are likely to never be proclaimed into force. In the event that they are proclaimed into, my discussion in this part will likely apply.

viable option, though the U.S. would likely never consent to Canada withdrawing from the criminalization obligations of *TRIPS*, given their continual push to globally enforce copyright infringement.<sup>601</sup> However, Canada may amend the *Copyright Act* to lower the penalties associated with criminalized infringement to bring the provisions more in line with Canadian values, as *TRIPS* does not set specific imprisonment terms or fine amounts.<sup>602</sup>

## 2. Conclusion

While decriminalization is the ideal outcome, Canada may not be able to fully decriminalize the copyright regime as a result of its obligations at international law. At the very least, Canada should commit to not further criminalizing copyright infringement. This would require two things: (1) not amending the *Copyright Act* to increase criminal penalties, and (2) not signing onto any additional treaties that require criminalized infringement, or entering a reservation to specific criminal provisions.<sup>603</sup> Reservations are a valid exercise of State sovereignty, however they must be permissible according to the Treaty's terms, and accepted by the other State parties to the Treaty.<sup>604</sup>

Canada will likely face some international backlash for taking a stand against criminalized copyright infringement. This backlash will most likely come from our American neighbours, who have been steadfast in their criminal enforcement of copyright

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<sup>601</sup> See e.g. *supra* notes 25, with reference to Kim Dotcom.

<sup>602</sup> *TRIPS*, *supra* note 10 art 61.

<sup>603</sup> Reservations are defined in *Vienna Convention*, *supra* note 595 art 2(d). They allow States to consent to a treaty with the exception of particular provision(s). They are permitted by art 17.

<sup>604</sup> See e.g. Currie, *Public International Law*, *supra* note 591 at 147. For a treaty that does not permit reservations, see e.g. *WCT*, *supra* note 580 art 22.

both at home and abroad.<sup>605</sup> It is important for the Government to stand up for Canadian values and not be bullied into submission with respect to criminalized copyright enforcement. The *Copyright Modernization Act* made significant contributions to Canadian Copyright Law, which is now regarded as one of the most innovative and unique approaches in the world.<sup>606</sup>

The Government should carry this momentum forward into the 2017 review process and ensure they make the right changes to bring the *Copyright Act* even further in line with Canadian culture and values. The Government should be committed to Canadian values first, before looking to appease the international community. This approach is consistent with the unique history of Canadian copyright law. We did not fight for decades to break free from the *Imperial Copyright Act* only to succumb to international pressure that is inconsistent with our core values.

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<sup>605</sup> See e.g. *Dotcom*, *supra* note 25, USDOJ, “Vaulin Complaint,” *supra* note 296.

<sup>606</sup> See Geist, “What’s Next,” *supra* note 492.

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