

COPYRIGHT LAW FOR THE DIGITAL WORLD: AN EVALUATION OF REFORM PROPOSALS

Nathan Irving*

I. INTRODUCTION

Since 1997, Canada has acknowledged that its copyright laws need to be updated to attain relevance in the age of digital technologies and the Internet.¹ In the same year, Canada signed the *World Intellectual Property Organization Copyright Treaty*.² Thereafter, successive governments have studied, debated and promised copyright reform, yet the law remains by and large unchanged.³

Copyright reform in Canada is an urgent matter. The law of copyright has not kept pace with technological advancements. The law as it currently stands embodies an outdated statute which was written prior to, and not for, the digital world. Accordingly, the law provides insufficient guidance to creators and content users as to their respective rights – it no longer adequately safeguards the interests it was created to protect.⁴

The antiquated state of the law is also injurious to the public's respect for the rule of law.⁵ A disconnect between the state of the law and the current digital reality has created a "legitimacy crisis" for

* B.A. (Hons.) (U of C); LL.B. (UM)

¹ Barry Sookman, "Copyright Reform for Canada: What Should We Do? A Submission to the Copyright Consultation" (2009) 22 I.P.J. 1 at 2 [Sookman, "Copyright Reform"].

² *WIPO Copyright Treaty*, 20 December 1996, (adopted in Geneva December 20, 1996), online: WIPO <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [*WIPO Copyright Treaty*].

³ Sookman, "Copyright Reform" *supra* note 1 at 2-3.

⁴ According to a recent report of The Conference Board of Canada, "Digital technology has destabilized the ability to implement both rights of protection and rights of access in the manner intended when the current Copyright Act was drafted." The Conference Board of Canada, *Intellectual Property in the 21st Century* (2010) at 85, online: Conference Board of Canada <http://www.conferenceboard.ca/temp/c07c81f0-9143-4316-8946-2d1cce5e3e45/10-186_IPRreport_WEB.pdf>.

⁵ For a discussion on the discrepancy between the law and social norms, see *ibid.* at 49-51.

copyright law in Canada.⁶ As one blogger candidly noted, copyright law is “a joke to anyone under the age of 30...maybe 40.”⁷

On March 3, 2010, the Conservative Government announced its commitment to strengthening Canada’s copyright laws.⁸ The presence of copyright reform on the Government’s agenda was not unexpected, particularly in light of nationwide copyright consultations during the previous summer. At the official launch of those consultations, the Honourable James Moore, Minister of Canadian Heritage and Official Languages, announced that the Government was “on track to introducing modern and responsive copyright legislation in the fall.”⁹

On June 2, 2010, the Government introduced Bill C-32, the *Copyright Modernization Act*.¹⁰ However, whether this bill will become law and bring copyright reform to Canada is far from certain. The last two reform bills did not even make it to second reading.¹¹ The likelihood that a relevant, up-to-date copyright regime will be realized in Canada in the near future will increase, if stakeholders tone down the inflammatory rhetoric and adopt a more principled approach to reform. As noted in a recent report by the Conference Board of Canada, “[c]opyright reform need not be viewed as a zero-sum game. As with traditional retail marketplaces in advanced countries, everyone benefits from orderly, unambiguous rules that facilitate transactions at fair market value.”¹²

Nobody benefits from the current state of copyright law in Canada. The law fails to protect copyright owners in the digital environment, while making lawbreakers out of otherwise law-abiding citizens who simply want to make use of the new technologies on the market. By failing to acknowledge each other’s legitimate interests,

⁶ Laura J. Murray, *Submission to Consultation*, online: < <http://www.digital-copyright.ca/aggregator/sources/45>>.

⁷ *Ibid.*

⁸ *A Stronger Canada. A Stronger Economy. Now and for the Future, Speech From the Throne* (3 March 2010) at 7 (The Rt. Hon. Michaëlle Jean), online: <http://www.speech.gc.ca/grfx/docs/sft-ddt-2010_e.pdf> [*Speech from the Throne*].

⁹ Industry Canada, News Release, “Government of Canada Launches National Consultations on Copyright Modernization” (20 July 2009), online: Industry Canada <<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04840.html>>.

¹⁰ Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess., 40th Parl., 2010, [Bill C-32].

¹¹ See Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005 and Bill C-61, *An Act to amend the Copyright Act*, 2nd Sess., 39th Parl., 2008 [Bill C-60 and Bill C-62].

¹² *Speech from the Throne*, *supra* note 8 at 57.

stakeholders impede progress and effectively maintain an intolerable status quo. With yet another copyright bill before the House, a shared framework for approaching reform is needed, now more than ever.

In a trilogy of cases, the Supreme Court of Canada set forth a perspective on the *raison d'être* of copyright law which highlighted the need to achieve a balancing of interests.¹³ In what follows, I make a case for adopting this perspective to guide the current efforts at legislative reform. I begin by providing a general overview of copyright law in Canada and an account of its inadequacies in today's digital world. Next, I outline the Court's perspective on the purpose of copyright law and explain how pursuing a balanced approach would facilitate the realization of practical and principled copyright reform. This is followed by an examination of a number of reform proposals to determine whether each could be implemented in a manner that achieves a proper balancing of stakeholders' interests. Because each of these proposals has, or has not, been included by the Government in Bill C-32, this piece also serves as a critique of the Bill (as at first reading). However, the reader is forewarned that while this piece speaks to a number of the Bill's provisions (or absent provisions, as the case may be), Bill C-32 addresses far too many aspects of copyright law to be addressed here in its entirety. What follows is not a clause-by-clause assessment of Bill C-32; instead, this piece evaluates a handful of what are arguably the more popular and/or contentious proposals discussed in recent years.

II. THE COPYRIGHT ACT

The law of copyright in Canada falls within Parliament's exclusive jurisdiction.¹⁴ The *Copyright Act*¹⁵ provides an exhaustive bundle of rights and remedies which cannot be supplemented by the common law.¹⁶

The traditional subjects of copyright are literary, dramatic, musical and artistic works.¹⁷ In general, the *Act* grants a Canadian

¹³ *Théberge v. Galerie d'art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 [*Théberge*]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH*]; and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 [*SOCAN*].

¹⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 91(23), reprinted in R.S.C. 1985, App. II, No. 5.

¹⁵ *Copyright Act*, R.S.C. 1985, c. C-42 [*Act*].

¹⁶ *Théberge*, *supra* note 13 at para. 5.

¹⁷ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 27.

copyright to every original and fixed literary, dramatic, musical, and artistic work that is connected to Canada or to a country that is a member of the World Trade Organization and/or a party to the *Berne Convention* or *Universal Copyright Convention*.¹⁸ The first owner of the copyright of a work is typically its creator; however, there are some exceptions.¹⁹ In general, the term of the copyright is the life of the creator plus 50 years. Thereafter, the work belongs to the public domain.²⁰ The *Act* grants copyright owners the

sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof

as well as a number of other related rights.²¹ To truly understand these rights, it is necessary to appreciate that copyrights protect the expression of ideas in works, not the ideas per se.²² Furthermore, these rights are derived from a conception of works as “articles of commerce”; accordingly, they can be bought and sold either in part or in whole.²³ Note that this summary describes the law as it applies to the traditional subjects of copyright. In 1997, the *Act* granted similar rights, albeit with slight variations, to performers and enhanced rights to broadcasters and makers of sound recordings.²⁴

The *Act* stipulates that

[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this *Act* only the owner of the copyright has the right to do.²⁵

¹⁸ *Copyright Act*, *supra* note 15, ss. 5, 2.

¹⁹ *Ibid.*, s. 13(1). See note 65.

²⁰ *Ibid.*, s. 6.

²¹ *Ibid.*, s. 3(1).

²² *CCH*, *supra* note 13 at para. 8.

²³ *Théberge*, *supra* note 13 at para. 12. Note that the *Act* also grants authors (as distinguished from copyright owners although they are often the same person) so-called moral rights that last for the length of the term of the copyright. These rights include the right of the author to the integrity of their work as well as the right to proper attribution or the right to remain anonymous (see *Copyright Act*, *supra* note 18, ss. 14.1, 14.2). The focus of this paper is on copyrights, not moral rights.

²⁴ *Vaver*, *supra* note 17 at 1, 30. See *Copyright Act*, *supra* note 15, , ss. 15-26.

²⁵ *Copyright Act*, *supra* note 15, s. 27(1).

However, this provision is qualified by a number of exceptions which have been dubbed “user- rights”. In general, fair dealing for the purpose of research, private study, news reporting, criticism, or review does not infringe copyright.²⁶ Educational institutions, libraries, archives, and museums are also granted freedom to undertake certain activities that would otherwise infringe copyright.²⁷ Additionally, incidental inclusion of a copyrighted work in another work will not infringe copyright.²⁸ Broadcasters may also make temporary recordings in limited circumstances.²⁹ Moreover, owners of a copy of a computer program may make a backup copy or a copy that is compatible with their computers.³⁰ Also, the advent of a blank audio recording media levy brought with it an exception for reproducing music “onto an audio recording medium for the private use of the person who makes the copy”.³¹ It is also not an infringement to make a copy of a work accessible to persons with perceptual disabilities in certain circumstances.³² There are also exceptions that apply when a statute requires a person to do something which would ordinarily infringe copyright.³³ The Act also provides a number of other miscellaneous exceptions.³⁴

III. THE INADEQUACIES OF THE ACT IN TODAY’S DIGITAL WORLD

The last major revisions to the Act were made back in 1997.³⁵ Society has changed dramatically over the past 13 years, but the law has not kept pace. According to one study, 40% of Canadian households had Internet access in 1999.³⁶ By contrast, it is currently estimated that 94% of households have access to a minimum of 1.5 Mbps Internet connectivity; the remaining 6% are considered unserved (i.e. have dial-up service only or no Internet) or underserved (i.e. have broadband speeds

²⁶ *Ibid.*, ss. 29, 29.2, 29.1.

²⁷ *Ibid.*, ss. 29.4 – 30.5.

²⁸ *Ibid.*, s. 30.7.

²⁹ *Ibid.*, s. 30.8, 30.9. See Vaver, *supra* note 17 at 181-183 for a good plain-language explanation of these sections.

³⁰ *Copyright Act, ibid.*, s. 30.6.

³¹ *Ibid.*, s. 80(1). See generally *ibid.*, ss. 79-88; Vaver, *supra* note 17 at 223-225.

³² *Copyright Act, supra*, note 15, s. 32.

³³ *Ibid.*, s. 32.1.

³⁴ *Ibid.*, s. 32.2.

³⁵ *An Act to Amend the Copyright Act*, S.C. 1997, c. 24.

³⁶ Andrew Reddick & Christian Boucher, *Rethinking the Information Highway: Rethinking the Dual Digital Divide* (Ottawa: Depository Service Program, 2001) at 26.

that are less than 1.5 Mbps).³⁷ A federal program has even been established to connect the latter group with broadband services.³⁸ Clearly, Internet access is no longer seen as a privilege. As more and more businesses, services, and cultural works move from the physical to the digital world, high-speed access has become a necessity of daily life.

What do these changes have to do with copyright reform? Why does this movement online necessitate revisions to the *Act*? Is it possible for the application of legal rules drafted for analog technologies to simply extend to digital technologies? Professor Lessig has provided the following insight into why an extension of old rules to new media simply won't do:

Copyright law at its core regulates “copies”. In the analog world, there were very few contexts in which one produced “copies”...Thus there were many ways in which you could use creative works in the analog world without producing a copy. Digital technology, at its core, makes copies...There is no way to use any content in a digital context without that use producing a copy...When you do anything with digital content, you technically produce a copy...While in the analog world, life was sans copyright law; in the digital world, life is subject to copyright law. Every single act triggers the law of copyright...The emergence of digital technologies has thus radically increased the domain of copyright law...³⁹

As it currently reads, the *Act* makes lawbreakers out of ordinarily law-abiding citizens. The *Act* should be modernized to embrace innocuous uses of new digital technologies.

Not only must the law contend with the fact that new technologies offer novel ways of accessing and using creative works, it must also respond to the reality that new technologies make it easier to bypass copyright owners when compensation is right and proper. Digital technologies enable people to access and distribute creative works without providing payment to their authors, producers, and distributors

³⁷ Government of Canada, “Broadband Canada: Connecting Rural Canadians” online: Government of Canada <<http://www.plandaction.gc.ca/initiatives/eng/index.asp?initiativeID=96&mode=2>>.

³⁸ *Ibid.*

³⁹ Lawrence Lessig, *Code Version 2.0* (New York: Basic Books, 2006) at 192-193 [Lessig, *Code*]. See Tech Terms, “Analog”, online: The Tech Terms Computer Dictionary <<http://www.techterms.com/definition/analog>> for a definition of “analog”.

on a scale that was heretofore unfathomable. As stated by intellectual property expert Mark Hayes in his article:

As copyright protected content has become available in a digital form, copyright owners have had to deal with the ease with which exact copies of works can be made. In the past, when dealing with analog data, there were inherent physical limitations that prevented many types of copying. Each analog copy of a work is of lower quality than its source, resulting in a type of physical barrier on the number of copies that can be made... In addition, the equipment necessary to create high-quality analog copies was expensive and would not be found in an average household. Most users were generally only capable of producing low-quality duplications. Today, near-exact duplicates of digital content can be made an unlimited number of times. This copying can now also be done easily at little or no cost using electronic equipment found in most homes...and high-speed Internet connections have increased the ability to distribute...⁴⁰

Today, peer-to-peer file sharing networks are heavily used for obtaining and distributing copyrighted works free of charge, thereby depriving copyright owners of compensation for their work. Copyright legislation, however, was not written to respond to this widespread infringement at the end-user level.⁴¹ Some have argued that copyright was not designed to target end-users but rather to deter professional exploitation of a work or investment in a work.⁴² In any event, the existing enforcement provisions and penalties seem ill-equipped to redress the scope of infringement in today's world.

[H]eavy fines, which are effective towards a limited number of intermediaries, cannot deter massive copyright infringement. Not only does the expected value of the fine diminish with the number of infringers, but the misfortune of being caught appears more and more unfair to society since the size of the

⁴⁰ Mark S. Hayes, "The Impact of Privacy on Intellectual Property in Canada" (2006) 20 I.P.J. 67 at 77.

⁴¹ See e.g. Daniel J. Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 U.O.L.T.J. 315, online: U.O.L.T.J.

<<http://www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Gervais.315-356.pdf>>.

⁴² *Ibid.* at 329.

fine increases and since there is no longer a commercial intent on the behalf of these infringers.⁴³

This sense of unfairness may help to explain why social norms have not emerged to deter end-user infringement. Copyright owners in the United States who have attempted to enforce their rights with the traditional tools (i.e. suing individual consumers and users of creative content) have been vilified and accused of greed.⁴⁴ The absence of social norms in Canada to deter end-user infringement may also be explained in part by the *Act's* failure to distinguish activities that are akin to theft in the analog world from otherwise legitimate uses of technology that have simply been caught by an outdated statute. Whatever the reason, it seems that neither social norms nor the current law adequately prevent infringements which are injurious to authors, producers, distributors, and other copyright owners.

In summary, the copyright regime in Canada is long overdue for an overhaul. Many novel, innocuous activities are deemed illegal, yet legitimate rights of owners have been rendered difficult to enforce effectively. Since 1997, Canada has acknowledged the need to update its copyright legislation to account for the Internet and the rise of digital technologies.⁴⁵ Successive governments have studied, debated and promised copyright reform.⁴⁶ Numerous reports have been issued. Several committees have been struck. Stakeholders across the nation have been consulted. Three copyright reform bills have been introduced. But as yet, "Canada has nothing to show for it".⁴⁷

IV. THE SUPREME COURT'S PERSPECTIVE ON COPYRIGHT: A LENS THROUGH WHICH TO VIEW REFORM

Although the Government of Canada has undertaken to modernize copyright laws in the current session, success is far from certain. If the debate in the House takes on the character of the public debate, Canada will not likely see copyright reform anytime soon. As the Conference Board of Canada noted in a recent report:

⁴³ Olivier Bomsel & Heritiana Ranaivoson, "Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response" (2009) 6(2) *Review of Economic Research on Copyright* 13 at 2.

⁴⁴ See Matthew Rimmer, "Hail to the Thief: A Tribute to Kazaa" (2005) 2(1) *U.O.L.T.J.* 173 at paras. 57-59, online: *U.O.L.T.J.* <<http://www.uoltj.ca/articles/vol2.1/2005.2.1.uoltj.Rimmer.173-218.pdf>>.

⁴⁵ Sookman, "Copyright Reform" *supra* note 1 at 2.

⁴⁶ *Ibid.* at 2-3.

⁴⁷ *Ibid.* at 1. See generally *ibid.* at 1-4.

One startling feature of recent copyright debates can hardly go unnoticed: the use of inflammatory and vitriolic language for the sake of advocacy. In forums ranging from scholarly articles to town-hall debates, people on one side of the fence are sometimes depicted as pirates, throttlers, criminals, or cheaters, while those on the other side are called luddites, dinosaurs, or corporate bullies.⁴⁸

The Supreme Court of Canada has offered a perspective on copyright which could be used as a platform to “raise the level of debate”⁴⁹ above the standard rhetoric. If employed, further delay in copyright reform may be avoided.

Writing for a majority of the Court in *Théberge*, Justice Binnie stated the following about the purpose of copyright law in Canada:

The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).⁵⁰

Justice Binnie went on to emphasize that to achieve a proper balance among these public policy objectives, it is necessary to recognize not just the rights of creators, but also that these rights are limited:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement...which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology...⁵¹

Two years later, in *CCH*, a unanimous Court affirmed Justice Binnie’s perspective on copyright. The Court verified that the *Act* has

⁴⁸ Conference Board of Canada, *supra* note 4 at 57.

⁴⁹ *Ibid.* at 86

⁵⁰ *Théberge*, *supra* note 13 at para. 30.

⁵¹ *Ibid.* at para. 32.

dual objectives which should be balanced: promoting the public interest in the encouragement and dissemination of creative works and obtaining just rewards for creators.⁵² After reiterating that creator's rights are not absolute, the Court noted that exceptions in the *Act* are not to be interpreted as defences or "loopholes" but rather as integral components of the *Act*, namely user's rights.⁵³ Finally, the Court noted that to achieve the proper balance, user's rights must not be interpreted restrictively.⁵⁴

In *SOCAN*, the Court had its first opportunity to apply this perspective to the online context. After affirming what had already been said about copyright in *Théberge* and *CCH*, the majority provided the following insight:

The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.⁵⁵

Taken together, this jurisprudence offers a perspective through which to view copyright reform. Specifically, reform proposals may be assessed based on their effect on this balance of interests. By measuring proposals against this standard, a principled compromise may be reached among those who struggle to secure appropriate compensation for creators (and other copyright owners) and those who struggle to ensure that creative works are available for users to enjoy and/or build upon in developing new creative works. Furthermore, this approach to copyright reform could facilitate rational debate among stakeholders, thereby improving the prospect of securing reform in the current session. This would also make imminent reform more likely because it is a perspective that encourages temperate as opposed to radical reform. To be sure, there are many stakeholders on both sides of the debate who desire radical reform. As Professor Lessig has observed:

We could, with the RIAA, decide that every act of file sharing should be a felony. We could prosecute families for millions of dollars in damages just because file sharing occurred on a family computer. And we can get universities to monitor all computer traffic to make sure that no computer is used to commit this crime....Alternatively, we could respond to file

⁵² *CCH*, *supra* note 13 at paras. 10, 23.

⁵³ *Ibid.* at para. 48.

⁵⁴ *Ibid.*

⁵⁵ *SOCAN*, *supra* note 13 at para. 40.

sharing the way many kids act as though we've responded. We could totally legalize it. Let there be no copyright liability, either civil or criminal, for making copyrighted content available on the Net...⁵⁶

Professor Lessig went on to reject these extreme responses because they fail to recognize the "truth in both."⁵⁷ I would add that because both responses protect only one set of interests, neither would proceed through the House in a timely manner, if at all. Moreover, as Professor Geist noted, "[i]f the law tilts too far in one direction, the other side is virtually guaranteed to put the issue of reform back on the table and the changes do not last."⁵⁸

There is yet another reason that a balanced approach is apt to guide legislative reform. Even if implementing radical reforms is the way to proceed (though I am not conceding that it is), it must be recognized that Canada is privy to a number of international treaties. These treaties place parameters around permissible copyright reform.⁵⁹ By adopting a balanced approach to copyright reform Parliament is less likely to put Canada at risk of breaching its international commitments.

V. PROPOSALS FOR REFORM

a. New exceptions to copyright infringement

Many uses of new digital technologies, which had not been conceived when the *Act* was drafted, infringe copyright. Some of these activities are innocuous, whereas others are more injurious to copyright owners. While everyone tends to agree that new exceptions to infringement are needed, there is disagreement about which activities should qualify.

Some have called for the adoption of a new general fair-use exception or an expanded open-ended fair dealing exception.⁶⁰

⁵⁶ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004) at 180, cited in Rimmer, *supra* note 44 at 5.

⁵⁷ *Ibid.*

⁵⁸ Michael Geist, "The Copyright Consultation: My Submission" (11 September 2009), online: Michael Geist <http://www.michaelgeist.ca/content/view/4377/125/> [Geist, "Copyright Consultation"].

⁵⁹ *Ibid.*

Proponents of this solution have noted the flexibility that would be introduced into the law if the current list of exceptions was made illustrative (rather than exhaustive) and if people were free to use works fairly without permission.⁶¹

A new general fair-use exception or an expanded open-ended fair dealing exception was rightly rejected by the Government in excluding it from Bill C-32. The problem with these exceptions is not that they are incapable of balancing the public interest in the encouragement and dissemination of creative works and providing a just reward for creators; on the contrary, such a balance could be achieved in time by the courts. The problem is that this would require copyright owners and users to spend considerable time and money litigating the acceptable boundaries of fair use.⁶² In the meantime, Canadians would be left with uncertainty as to their rights.⁶³ As Professor Lessig has noted, fair use offers people little more than “the right to hire a lawyer.”⁶⁴ This is not an acceptable solution, particularly in light of the fact that the new digital reality has made copyright a matter that affects ordinary Canadians every day.

A corollary of rejecting a general fair use exception is the need to identify specific exceptions—which is what the Government elected to do in Bill C-32⁶⁵. A number of proposed exceptions are unlikely to disrupt the balance of interests. For instance, it is currently against the law to copy music from a CD onto an MP3 player.⁶⁶ Making an exception for this activity—an exception found in Bill C-32⁶⁷—would permit users to take advantage of new technologies for listening to music for which they have, at some time, compensated the copyright owners.

Ibid. Note that on March 16, 2010, MP Charlie Angus (NDP) made a motion to support a flexible fair dealing exception that would make the existing fair dealing categories merely illustrative.

⁶¹ *Ibid.*

⁶² Sookman, “Copyright Reform” *supra* note 1 at 25-26. See also Barry Sookman & Dan Glover, “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” (2009) 22 I.P.J. 29 [Sookman & Glover, “Joint Submission”].

⁶³ *Ibid.*

⁶⁴ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004) at 187, cited in Sookman & Glover, “Joint Submission” *supra* note 62 at 30.

⁶⁵ Bill C-32, *supra* note 10.

⁶⁶ *Copyright Act*, *supra* note 15, ss. 3(1), 27(1) & 80(1); *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, [2005] 2 F.C.R. 654 at paras. 133-165 [*Canadian Private*].

⁶⁷ Bill C-32, *supra* note 10, s. 22.

Another example of a proposed exception, which is included in Bill C-32⁶⁸ and would be unlikely to upset the balance of interests, is allowing consumers to make back-up copies of their “digital data” for personal use.⁶⁹ While all kinds of digital data are stored on frail media, consumers at present may only make a back-up copy of a musical work or computer program.⁷⁰ For other kinds of data, such as movies, when the media are compromised consumers are required to compensate the copyright owners a second time. Expanding this exception would permit users to prolong their enjoyment of works for which they have already compensated the copyright owners. There are other proposed exceptions which should be adopted because they would benefit users while having little (if any) adverse effect on copyright owners. As with the two proposed exceptions above, these proposals have not been overly controversial and have been included in Bill C-32.⁷¹

Currently, it is against the law to make a copy of a book, newspaper, periodical, photograph, or videocassette for use on another device (i.e. format shifting).⁷² It is also a violation of copyright to record a television or radio program for later viewing or listening (i.e. time shifting).⁷³ Making exceptions for these activities would permit users to enjoy new technologies on the market without hurting copyright owners (as they are still compensated for their work). Moreover, legitimizing everyday activities such as these would go a long way towards restoring the relevancy of the *Act* and the public’s respect for the law of copyright.

Other proposed exceptions have been more controversial. For instance, it has been suggested that an exception be made for music file sharing over peer-to-peer networks, together with a compensatory levy system for copyright owners.⁷⁴ In 2007, the Songwriters Association of Canada advocated the legalization of music file sharing, accompanied by a five dollar per month levy on Internet subscriptions to compensate copyright owners.⁷⁵ The Government did not include anything of this

⁶⁸ *Ibid.*

⁶⁹ Geist, “Copyright Consultation” *supra* note 58.

⁷⁰ *Copyright Act*, *supra* note 15, ss. 80, 30.6.

⁷¹ Bill -32, *supra* note 10, s. 22.

⁷² Government of Canada, “Format Shifting” (June 2008), online: Balanced Copyright < <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01158.html>>.

⁷³ Government of Canada, “Time Shifting” (June 2008), online: Balanced Copyright < <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01159.html>>.

⁷⁴ See generally Gregory R. Hagen & Nyal Engfield, “Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test” (2006) 3:2 U.O.L.T.J. 477.

⁷⁵ Michael Geist, “Songwriters Association of Canada Calls for Legalized P2P File Sharing” (3 December 2007), online: Michael Geist

sort in Bill C-32.⁷⁶ Using levy proceeds to compensate copyright owners is not a novel concept. In 1997, when an exception to infringement was introduced for private copying of music onto blank audio recording media, a levy was imposed on manufacturers and importers of such media to compensate copyright owners.⁷⁷ In considering whether this levy system should be extended to compensate owners for music file sharing, one must appreciate that a levy system is not inherently at odds with the purpose of copyright law. In regard to the levy for blank audio recording media, the Federal Court of Appeal noted that "the levy was created for the purpose of supporting the creators and the cultural industries by striking a balance between the rights of creators and those of users."⁷⁸ Professor Hagen and Nyall Engfield added the following:

This reference to balancing the rights of owners and users suggests that the levy could be seen not merely as a second-best corrective device to compensate copyright owners (because of their inability to control the use of their subject matter), but instead as a primary means of providing a reward for creators in the context of the balanced goals of the Copyright Act.⁷⁹

While it may be the case that the levy for blank audio recording media achieves a proper balance, a levy to compensate owners for the legalization of music file sharing would not likely have the same outcome. Peer-to-peer music file sharing networks allow users to share their entire digital music libraries with the world. These networks permit reproduction of music on a markedly greater scale than that permitted under the existing private copying exception. As Barry Sookman has noted, this proposed exception could ultimately have the effect of removing musical works and recordings from the scope of copyright, making musicians and other owners of such rights entirely dependent on a levy for compensation.⁸⁰

<<http://www.michaelgeist.ca/content/view/2435/125>> [Geist, "SOCAN"]. For a critique of this proposal, see Barry Sookman, "The SAC Proposal for the Monetization of the File Sharing of Music in Canada: Does it Comply with Canada's International Treaty Obligations Related to Copyright?" (2008) 21 I.P.J. 159 [Sookman, "SAC Proposal"].

⁷⁶ *Bill C-32*, *supra* note 10.

⁷⁷ *Copyright Act*, *supra* note 15, ss. 79-88. See generally Vaver, *supra* note 17 at 223-225.

⁷⁸ *Canadian Private*, *supra* note 64 at para. 51.

⁷⁹ *Supra* note 74 at para. 9.

⁸⁰ Sookman, "SAC Proposal" *supra* note 75 at 183.

b. Anti-circumvention Provisions

Given the ease with which copyrighted material can be duplicated and distributed without authorization in the digital world, copyright owners have developed technologies which control access to, and use of, their works.⁸¹ Technological protection measures (TPMs) have been employed since the mid 90s.⁸² More recently, digital rights management (DRM) systems have been introduced which combine TPMs with databases containing the terms of licensed works.⁸³

TPMs and DRMs are not panaceas for copyright owners. While owners erect barriers to impede access to, and use of, their works, others search for ways to knock them down. Accordingly, many have demanded that the *Act* be amended to prohibit circumvention of these technologies. Legislators have responded to these demands, as evidenced by the inclusion of anti-circumvention provisions in Bill C-32,⁸⁴ as well as the last two failed copyright reform bills introduced in Parliament.⁸⁵ All the same, this is possibly the most contentious subject of copyright reform.

Proponents of anti-circumvention provisions argue that such protections would facilitate e-commerce and encourage new ways of doing business.⁸⁶ Proponents are also quick to point out that the *WIPO Copyright Treaty* (which Canada has signed) requires contracting parties to

provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights...and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.⁸⁷

However, supporters of anti-circumvention provisions are not of one mind as to what constitutes “adequate legal protection”. For instance, some argue that these provisions should only prohibit manufacturing, distributing, and importing circumventing devices.⁸⁸

⁸¹ Robert J. Tomkowicz & Elizabeth F. Judge, “The Right of Exclusive Access: Misusing Copyright to Expand the Patent Monopoly” (2006) 19 I.P.J. 351 at 353.

⁸² *Ibid.* at 356.

⁸³ *Ibid.* at 357.

⁸⁴ Bill C-32, *supra* note 10, s.47-48.

⁸⁵ See Bill C-60 and Bill C-61, *supra* note 11 .

⁸⁶ See Sookman, “Copyright Reform” *supra* note 1 at 18.

⁸⁷ *WIPO Copyright Treaty*, *supra* note 2, art. 11; see *ibid.* at 18-19.

⁸⁸ Selena Kim, “The Reinforcement of International Copyright for the Digital Age” (2002) 16 I.P.J. 93 at 118.

Others argue that all of these activities should be banned as well as the very act of circumvention.⁸⁹ The United States adopted the latter approach and made anti-circumvention an offence per se, regardless of whether it is accompanied by a copyright violation.⁹⁰ This was also the approach adopted by the Government in Bill C-32, although it should be noted that the Bill does contain a few narrow exceptions where circumvention is permitted and it gives cabinet the authority to implement additional exceptions via regulations.⁹¹ Many have expressed concern about adding anti-circumvention provisions to Canada's copyright regime.⁹² They argue that TPMs and DRMs are devices capable of limiting access to works and uses that would otherwise be permitted as exceptions to infringement: “[u]nlike the rules in the *Copyright Act*...rules expressed in... DRM code do not necessarily reflect the interests of individuals or the public at large, the long term interests of society as a whole, or any other limitation inherent in copyright.”⁹³ Indeed, many user rights granted in Bill C-32, including the four new exceptions discussed above, are expressly limited by the proviso that the user may not exercise the right if doing so necessitates circumvention.⁹⁴ By preventing consumers from circumventing these devices to exercise their rights, anti-circumvention provisions pose “a serious threat to the traditional balance of rights between copyright holders and the public, which both legislators and courts have been trying to achieve.”⁹⁵ The public's ability to access and use creative works would be diminished, which would ultimately thwart the creative cycle. As one author noted, copyright owners' short-term interests in compensation and control over their works would come at the expense of the society's long-term interest in encouraging innovation.⁹⁶

If adopted, broad anti-circumvention provisions like the ones in Bill C-32 would be detrimental to the balance that copyright law aims to strike between obtaining just rewards for creators and encouraging the dissemination of creative works. To make circumvention an offence per se would “eviscerate[e] fair dealing [and other exceptions] in the digital

⁸⁹ Sookman, “Copyright Reform” *supra* note 1 at 18-19.

⁹⁰ *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁹¹ Bill C-32, *supra* note 10, ss. 47-48.

⁹² See Geist, “Copyright Consultation” *supra* note 58; Kim, *supra* note 88; Lessig, *Code supra* note 39; and Tomkowicz & Judge, *supra* note 81.

⁹³ Alex Cameron & Robert Tomkowicz, “Competition Policy and Canada's New Breed of “Copyright” Law” (2007) 52 McGill L.J. 291 at 307

<http://lawjournal.mcgill.ca/documents/1219610424_Cameron__Tomkowicz.pdf>

⁹⁴ Bill C-32, *supra* note 10, s. 22.

⁹⁵ Tomkowicz & Judge, *supra* note 81 at 391.

⁹⁶ Cameron & Tomkowicz, *supra* note 93 at 314.

environment.”⁹⁷ On the other hand, given the vulnerability of copyrighted works in the digital world, it would be imprudent to dismiss anti-circumvention provisions out of hand without first considering whether they could be implemented in a manner respectful of the balance of interests. Indeed, anti-circumvention provisions could be implemented in this manner. The key is to require a connection between circumvention and an infringement of copyright. In other words, circumvention should only be considered an offence if done for the purpose of infringing copyright. Circumvention should be permissible if done to exercise a user’s rights.⁹⁸ An alternative approach that would also respect the balance of interests would be to reject making circumvention an independent offence. Instead, it could be made an aggravating factor for courts to consider when ordering a remedy.⁹⁹

Professor Geist has made a number of other recommendations which could help to maintain the balance of interests. First, he has suggested that devices with non-infringing uses should not be banned because “if Canadians cannot access the tools necessary to exercise their user rights under the Copyright Act, those rights are effectively extinguished.”¹⁰⁰ Second, he has proposed the creation of “authorized circumventors” so that users who do not have the skills, knowledge, or means to circumvent have access to people who do.¹⁰¹ Finally, he has proposed that copyright owners who use TPMs or DRMs have a positive obligation to disable these devices upon a user’s request when required for a non-infringing purpose.¹⁰² All of these suggestions are worthy of consideration to supplement the requirement that circumvention be permitted when done for non-infringing purposes.

c. A Clearly Defined Role for Intermediaries in Copyright Enforcement

In 1988, the *Act* was amended to provide immunity to those who merely provide

the means of telecommunication necessary for another person to so communicate the work or other subject-matter.¹⁰³

⁹⁷ Geist, “Copyright Consultation” *supra* note 58.

⁹⁸ *Ibid.*

⁹⁹ Cameron & Tomkowicz, *supra* note 93 at 327.

¹⁰⁰ Geist, “Copyright Consultation” *supra* note 58.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Copyright Act*, *supra* note 2515, s. 2.4(1)(b). See *SOCAN*, *supra* note 13 at para. 86.

The Supreme Court of Canada has interpreted this provision to mean that an Internet intermediary, such as an Internet Service Provider (ISP) or a host server provider, will not incur liability when acting merely as a conduit for information communicated by others.¹⁰⁴ The Court has noted that such immunity makes sense given that intermediaries generally lack awareness of when infringing content is communicated via their services and cannot reasonably be expected to monitor the massive amounts of communications for possible infringements.¹⁰⁵

Given the indispensable role played by Internet intermediaries in facilitating, among other things, the encouragement and dissemination of creative works, the Court has emphasized that such limited immunity “is not a loophole but an important element of the balance struck by the statutory copyright scheme.”¹⁰⁶ Nevertheless, the Court has also noted that Internet intermediaries are not shielded from liability in all circumstances. Immunity attaches only to a particular function, namely facilitating Internet use.¹⁰⁷ In obiter, the Court has noted that an intermediary may be liable if it is given notice that its servers are hosting infringing content but fails to remove such content.¹⁰⁸

Proposals have been made to update the *Act* so as to clearly delineate the circumstances under which Internet intermediaries will be liable for copyright infringement.¹⁰⁹ Additionally, proposals have been made to ramp up the duties of intermediaries in actually enforcing compliance with copyright law.¹¹⁰ Perhaps the least contentious proposal in this area is implementation of a “notice-and-notice” scheme. Under this system, a copyright owner may send a notice alleging an infringement to an ISP, which in turn must forward the notice to the accused subscriber or else incur a penalty.¹¹¹ The Government included this scheme in Bill C-32.¹¹²

¹⁰⁴ *SOCAN, ibid.* at para. 92.

¹⁰⁵ *Ibid.* at para. 101.

¹⁰⁶ *Ibid.* at para. 89.

¹⁰⁷ *Ibid.* at para. 102.

¹⁰⁸ *Ibid.* at paras. 110, 124-127.

¹⁰⁹ See Sookman, *supra* note 1 at 24; Geist, “Copyright Consultation” *supra* note 58.

¹¹⁰ See Sookman, *ibid.* 1 at 20-24.

¹¹¹ This system would have been implemented had Parliament passed Bill C-60. See Michael Geist, “Bill C-60 User Guide: The ISPs and Search Engines” (21 June 2005), online:Michael Geist

<<http://www.michaelgeist.ca/content/view/824/125/>> [Geist, “Bill C-60”].

¹¹² Bill C-32, *supra* note 10, s.47.

It is generally accepted that a notice-and-notice system does not unduly interfere with user rights. However, not everyone agrees that a notice-and-notice system is sufficient of itself to protect the interests of copyright owners online. For instance, Sookman has argued that, whereas a notice-and-notice system may be an apt response to peer-to-peer file sharing, a “notice-and-takedown” scheme is the proper response for dealing with ISPs when they host infringing content on their servers.¹¹³ Under a notice-and-takedown system, ISPs would only benefit from immunity so long as they remove infringing content when notified.¹¹⁴ A notice-and-takedown scheme is absent in Bill C-32.¹¹⁵ Professor Geist is one of many who have voiced opposition to a notice-and-takedown system, noting that it “creates a free speech and competition chill with a ‘shoot first, aim later’ approach.”¹¹⁶ Opponents point out that it is a system open to abuse, as it offers a convenient pretext for having content removed when it suits one’s interests.¹¹⁷ In response to this criticism, Sookman has argued that given the Court’s obiter remarks in *SOCAN* that ISPs may be liable if they fail to remove infringing content after receiving notice, Canada already has a notice-and-takedown system—albeit without the necessary protections for users.¹¹⁸ Thus, a formal notice-and-takedown system could benefit everyone by stipulating the rules to be applied.¹¹⁹ According to Sookman, the system would ensure due process by requiring allegations of infringement to be “sworn under penalty of perjury” after considering all possible defences to infringement in good faith.¹²⁰ Moreover, a “counter-notice” provision that allows for re-posting in given circumstances could help to uphold the integrity of copyright exceptions and correct abuses that occur.¹²¹

With these arguments in mind, the critical question to consider is what response would best facilitate the balancing of interests? It is immediately apparent that a notice-and-takedown system without protections and guarantees of due process for posters should be rejected. With such a system, a user’s rights could be extinguished at the whim of a copyright owner. On the other hand, a notice-and-notice system

¹¹³ Sookman, “Copyright Reform” *supra* note 1 at 22-23.

¹¹⁴ *Ibid.*

¹¹⁵ Bill C-32, *supra* note 19.

¹¹⁶ Michael Geist, “The Notice and Takedown Effect” (23 November 2005) online: Michael Geist <<http://www.michaelgeist.ca/content/view/1020/274/>> [Geist, “Notice and Takedown”].

¹¹⁷ See *Ibid.*

¹¹⁸ Sookman, “Copyright Reform” *supra* note 1 at 22.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

provides little protection for owners because, while an ISP may be penalized for failing to provide notice of infringement, the poster may ignore this notice with impunity. A notice-and-takedown system with adequate protections and a guarantee of due process for posters of content would serve the legitimate interests of both owners and users; thus, it is to be preferred where it can be applied, and Bill C-32 should be amended accordingly.

Some have suggested that ISPs should play an even greater role in the enforcement process by more directly penalizing subscribers who repeatedly infringe copyright.¹²² Proponents point out that notice-and-takedown cannot be applied in the context of peer-to-peer file sharing (because there is no host server from which to remove the material)¹²³ and lawsuits have been an ineffective deterrent given that only a small fraction of infringers are actually sued.¹²⁴ Thus, some have advocated introducing a “graduated response” system whereby copyright owners notify ISPs of infringements, ISPs provide notice to subscribers, and if subscribers repeatedly ignore the notices, penalties of increasing severity are imposed.¹²⁵ Currently, no model of graduated response is present in Bill C-32.

One particular model of graduated response, dubbed “three strikes and you’re out”, requires ISPs to suspend a subscriber’s Internet access following three alleged infringements.¹²⁶ A “three strikes” system has been criticized for being draconian, particularly where Internet suspension is imposed for mere allegations of infringement.¹²⁷ Opponents have taken issue with the absence of due process and have stressed that Internet access in today’s world is too important to be cut-off in these situations with such ease.¹²⁸ However, as Sookman has noted, Internet

¹²² See Bomsel & Ranaivoson, *supra* note 43 at 25-27; Sookman, “Copyright Reform” *supra* note 1 at 20-22; Barry Sookman & Dan Glover, “Graduated Response and Copyright: An Idea that is Right for the Times”, (20 January 2010), online: *Barry Sookman* <<http://www.barrysookman.com/2010/01/20/graduated-response-and-copyright-an-idea-that-is-right-for-the-times>> [Sookman & Glover, “Graduated Response”]; Olivier Bomsel, “The Costs and Benefits of Graduated Response in Copyright Enforcement”, (1st February 2010), online: Barry Sookman <<http://www.barrysookman.com/2010/02/01/the-costs-and-benefits-of-graduated-response-in-copyright-enforcement/>> [Bomsel, “Costs and Benefits”].

¹²³ See Sookman & Glover, “Graduated Response”, *ibid.*

¹²⁴ See Bomsel & Ranaivoson, *supra* note 43 at 24-25.

¹²⁵ See Sookman & Glover, “Graduated Response” *supra* note 122.

¹²⁶ Barry Sookman has pointed out that “three strikes” is not the only available model of graduated response. See *ibid.*

¹²⁷ See Geist, “Copyright Consultation” *supra* note 58,

¹²⁸ *Ibid.*

suspension is not the only available penalty in a graduated response system.¹²⁹ Other penalties could include blocked access to specific sites or protocols and a reduction in the user's speed of Internet connection.¹³⁰ Sookman has also pointed out that graduated response need not be implemented without guarantees of due process – in fact, he has proposed that the appropriate response be determined by a tribunal or court in each individual case.¹³¹

In theory, a graduated response system with due process and a proportionate range of sanctions could respect the balance of interest. It has great potential to discourage infringement and thereby ensure a just reward for creators. The problem however, is that to ensure user's rights are respected a costly administrative infrastructure would need to be established. At minimum, this would require creation of tribunals throughout the country staffed by persons with expertise in copyright law. Given that one of the main purposes of graduated response is to increase the perceived risk of penalty for infringement, it is likely that a great volume of cases would be brought before these tribunals. Due to these costs, graduated response should be reserved as a response of last resort; it should not be implemented unless other reforms prove ineffective. Graduated response was rightly rejected for inclusion in Bill C-32.

VI. CONCLUSION

As this paper has demonstrated, legislating within the area of copyright law remains a complex issue in regards to the law and rapidly changing technology. What remains (and what has been argued within this paper) is that the law as it stands now is in need of transformation to reflect today's digital world and reclaim legitimacy in the eyes of the public. This paper has urged the adoption of a balanced approach to copyright reform through the assessment of a number of popular and contentious reform proposals. In the current session of Parliament, the Government has committed itself to copyright reform and introduced amending legislation in the form of Bill c-32. As this paper has shown, Bill c-32 contains many provisions which modernize the law of copyright in a manner that is respectful of the requisite balancing of interests; however, Bill c-32 also contains provisions which undermine gains achieved elsewhere in the Bill. Accordingly, in the event that the Bill progresses through the House, amendments will be required to ensure a

¹²⁹ Sookman & Glover, "Graduated Response", *supra* note 122.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

proper balancing of interests. That being said, Bill c-32 presents a golden opportunity for stakeholders to come together and work with their elected representatives to ensure that the law of copyright adequately safeguards the interests it was designed to protect once again.