CHAPTER TWO

North American Digital Copyright, Regional Governance, and the Potential for Variation

Blayne Haggart

In 1994, Canada, the United States, and Mexico implemented the North American Free Trade Agreement (NAFTA), which was designed to provide a framework for the governance of a North American economy. One of the most significant parts of the agreement was Chapter 17, which dealt with intellectual property (IP) and was designed to bring Mexican IP law in line with that of the United States (Canadian IP law was already substantially similar to that of the US). Referring to the copyright sections of Chapter 17, Acheson and Maule describe the treaty as a step in the continuing harmonization of North American copyright law, itself embedded in a process of global harmonization spearheaded by the 1995 Agreement on the Trade-Related Aspects of Intellectual Property (TRIPs) at the World Trade Organization (WTO).[1]

Even given the NAFTA's effect on Mexico, and the tighter incorporation of Mexico and Canada into the economic orbit of the regional and global hegemon, the three countries continue to possess distinctive copyright regimes. This is all the stranger as the United States has placed IP and copyright policy at the heart of its international economic agenda since the mid-1980s.[2] Instead, somewhat ironically, the structure of the NAFTA has

1 Keith Acheson & Christopher J. Maule, "Copyright, Contract, the Cultural Industries, and NAFTA" in Emile G. McAnany & Kenton T. Wilkinson, eds. *Mass Media and Free Trade: NAFTA and the Cultural Industries* (Austin: University of Texas Press, 1996) 351.

2 See the 1995 *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPs), which paved the way for the creation of the World Trade Organization, Chapter 17

allowed Canada and Mexico some leeway to pursue independent copyright policies, within a global copyright regime shaped largely by the United States. Over fifteen years after the NAFTA was concluded, domestic factors continue to be at least as significant as US-based pressures for harmonization in the making of copyright policy.

The complex nature of the North American governance of copyright policy can be seen in the processes that have shaped the three countries' attempts to implement two 1996 US-backed treaties, the World Intellectual Property Organization (WIPO) *Copyright Treaty* (WCT) and *Performances and Phonograms Treaty* (WPPT), jointly known as the WIPO Internet treaties. The most controversial part of the treaties requires legal protection for technological protection measures (TPMs), or digital locks applied to digital products like MP3s, ebooks, and movies, and the devices that read them.

The three countries, however, have taken dramatically different paths in their attempts to implement this part of the Internet Treaties. The United States adopted a strong, "maximalist" approach to the legal protection of TPMs, outlawing the trade in devices that can circumvent TPMs, while Canada and Mexico have yet to implement their commitments, almost fouteen years after the treaties were concluded. In Canada's case, successive governments have proposed different approaches to TPMs; the current Conservative government appears set on following the US "maximalist" approach, while the previous Liberal government advocated a "minimalist" approach that would have made it a crime to break a digital lock only if it were done for purposes of infringing the underlying copyright. In Mexico, full implementation of the treaties is likely several years away, though its domestic situation seems to favour the adoption of a US-style approach.

While these events seem to indicate a convergence on a "North American" view of TPMs, from a governance perspective this headline view obscures a messier reality: that decisions regarding how to implement the WIPO Internet treaties continue to be made by domestic governments and are shaped by interests, foreign and domestic, working through domestic institutions. Consequently, whether the countries move toward increasing

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of the 1994 North American Free Trade Agreement, Chapter 17 of the 2005 United States–Australia Free Trade Agreement, Article 14 of the 1985 United States–Israel Free Trade Agreement, and Article 4 of the 2001 United States–Jordan Free Trade Agreement. Other examples are available at www.ustr.gov/trade-agreements/free-trade-agreements.

similarity or persistent differences is an open question, dependent on the dynamics in play within the three countries. Furthermore, the NAFTA, North America's "external constitution,"[3] which provides a baseline for copyright law in the three countries, contains both the potential to promote and hinder this harmonization.

Using an historical institutionalist approach, which emphasizes historical contingency and institutional persistence, this paper uses the implementation of the legal protection of TPMs to demonstrate the subtle regional dynamics and dominant domestic politics that have shaped the three countries' responses to these treaties. It argues that while the United States government and US copyright industries are influential in shaping the copyright policies of its neighbours, the triumph of US-style copyright law in Canada and Mexico depends more on the domestic configuration of institutions and interests than on regional dynamics. Most importantly from a democratic-governance perspective, US-style copyright law in Canada and Mexico is not a foregone conclusion. The particular nature of North American regional and copyright governance, described below, provides the three federal governments with a significant degree of leeway in setting autonomous copyright policies.

Understanding how North American copyright policymaking functions requires understanding the interplay of domestic and regional institutions. In Canada, this question has a particular urgency given the recent introduction of Bill C-32, *The Copyright Modernization Act*. In addition to the public-policy issues raised by the bill, ably discussed elsewhere in this volume, there lies the larger question of how much ability Canada has to chart its own path on copyright reform in a way that responds to Canadians' needs and desires.

This paper is divided into four sections. The first provides a brief overview of historical institutionalism, particularly as a way to think about regional governance, while the second provides a very brief overview of copyright, the requirements of the Internet treaties, and the specific way in which the three North American countries have (or have not) implemented the treaties. The third section analyzes the implementation process and policy dynamics in the three countries. The paper then offers some overall comments and conclusions in the context of Bill C-32.

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3 Stephen Clarkson, "Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?" (Ottawa: Canadian Centre for Policy Alternatives, 2002) (www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/clarkson_constitution.pdf).

A. HISTORICAL INSTITUTIONALISM

The shadow of Europe looms large over theories of how regions work. The two main "grand theories" of regional integration, neofunctionalism and intergovernmentalism, were developed to explain and legitimize Western Europe's postwar attempts at integration, including the European Union.[4] However, these theories do not translate well to North America, whose regional governance remains "undertheorized."[5] Their focus on strong supranational institutions as a driver of regional integration, for example, is not very helpful to understanding a continent characterized by a regional/global hegemon and weak supranational institutions.

In contrast, a mid-range approach like historical institutionalism (HI) offers a useful way to study North America because it does not privilege any particular configuration of institutions; nor does it assume that supranational institutions are necessarily positive forces for integration. In HI, institutions are seen as semi-persistent "constraints or rules that induce stability in human interaction"[6] and structure individuals' and groups' interactions with each other and with broader social forces. Actors pursue strategic self-interests, which are partly shaped by the institutional "rules of the game," and encounter institutions both as constraints on action and as rules that can be modified by the actors.[7] Change in HI is not driven wholly from on high (structuralism) or below (individualism/atomism), but emerges through the interaction of both within an institutional structure whose rules and procedures structure these changes.

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4 Thomas Diez & Antje Wiener, "Introducing the Mosaic of Integration Theory" in *European Integration Theory* (Oxford: Oxford University Press, 2004) 1 at 13–14. For an overview of the regionalism literature, including neofunctionalism and intergovernmentalism, see Young Jong Choi & James A. Caporaso, "Comparative Regional Integration" in Walter Carlsnaes, Thomas Risse, & Beth A, Simmons, eds., *Handbook of International Relations*. 3d ed. (London: Sage, 2005) 480.

5 Laura Spitz, "The Evolving Architecture of North American Integration, 80 University of Colorado Law Review (May, 15 2009) 735 at 735 (http://ssrn.com/abstract=1405397).

6 T.R. Voss, "Institutions" in N. J. Smelser and P. B. Baltes, eds., *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam and New York: Elsevier Science, 2001) 7561 at 7561.

7 One way to think of this is by introducing time into one's analysis, as in Archer's "morphogenic" analytic approach. In the initial time period, actors confront institutions as pre-existing rules. In the second period, however, actors can work to modify these rules, so that the rules have been changed in the third period. The choice of time periods is made for analytical purposes: in actuality, actors continually make and remake institutions (Margaret S. Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995)).

One test of a theory's usefulness is where it directs the researcher's eye. HI emphasizes institutional persistence, and particularly the concept of "path dependence," which refers to the claim that the initial establishment of an institution is highly sensitive to historical contingency, in which small, early events can have large future consequences.[8] Once established, institutions structure future actions, resulting not so much in institutional stasis, but, rather, "constrained innovation"[9] and institutional persistence: "preceding steps in a particular direction induce further movement in the same direction."[10] Understanding what leads to path dependence or divergence from a path requires paying attention to "who is invested in particular arrangements, exactly how that investment is sustained over time, and perhaps those who are not invested in the institutions are kept out," and what might impair this form of reproduction and lead to change.[11]

An HI approach starts with the relevant institutions and asks how they structure and constitute actors. It also requires identifying the underlying processes that support these institutions, including the various paradigms and public sentiments that support or undermine them, and the frames and programs that are deployed by interested actors in order to promote their perspective. Attention must be paid to the (potentially conflicting) logics of competing and complementary institutions, as well as to changes in these institutional supports over time, either as the result of exogenous or endogenous shocks. HI also requires the identification of the relevant actors, their interests, resources and strategies employed.

Such an approach is particularly useful when considering how policies develop in a region like North America, in which domestic institutions retain official decision-making power within a continental market governed by the NAFTA.

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8 Ira Katznelson, "Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science" in James Mahoney & Dietrich Rueschemeyer, eds., *Comparative Historical Analysis in the Social Sciences* (Cambridge: Cambridge University Press, 2003) 270 at 291; Paul Pierson & Theda Skocpol, "Historical Institutionalism in Contemporary Political Science" in Ira Katznelson & Helen Milner, eds., *Political Science: The State of the Discipline* (New York: Norton, 2002) 693 at 699 (http://gking.harvard.edu/ArticleS/PieSko02.pdf).

9 John L. Campbell, *Institutional Change and Globalization* (Princeton: Princeton University Press, 2004).

10 Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics" (2000) 94 The American Political Science Review 251 at 251–52.

11 Kathleen Thelen, "Historical Institutionalism in Comparative Politics" (1999) 2 Annual Review of Political Science 369 at 391.

B. NORTH AMERICAN REGIONAL INSTITUTIONS AND ACTORS

North America is characterized by a significant economic imbalance between the regional/global hegemon, the United States, and its neighbours, whose economic well-being depends to a large degree on access to the US market. In 2008, the United States was the destination for 78% of Canada's exports and the source of 52% of its imports. Similarly, Mexico sent 80% of its exports to the United States and received 49% of its imports there. In contrast, the United States sent only 20% of its exports to Canada and 12% to Mexico, and received only 16% and 10% of its imports from Canada and Mexico, respectively.[12] This imbalance and dependence has long caused policymakers in Canada and Mexico, at the very least, to pay attention to their neighbour's concerns.

As Sell, Drahos and Braithwaite and others have documented,[13] the United States has pursued strong international copyright reform that favours its copyright industries since the mid-1980s. Since that time, US governments have depended mainly on trade agreements to convince other countries to adopt US-style copyright and IP regimes, specifically, offering market access (or threatening economic sanctions) in exchange for stronger IP protection. The TRIPs Agreement, for example, was the price demanded by the United States for the World Trade Organization, and a deal on agriculture desired by developing countries.[14] What is true internationally is also true in North America. The United States, working for and with its content industries, has been the most insistent actor for copyright reform in Canada and Mexico. In the negotiations that led to the NAFTA, it was the party that was most interested in IP issues, and in the debate over the implementation of the WIPO Internet treaties, it has been the most insistent voice in favour of their (US-style) implementation.

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12 World Trade Organization Statistics Database, Trade Profiles, http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CA,MX,US.

13 Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003); Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan Publications Ltd., 2002).

14 Sell, above note 13 at 37; Drahos with Braithwaite, above note 13 at 11. Though, as Sell remarks, developing countries asked for, and received, the phase-out of the *Multi-fibre Agreement*, which protected US textile interests, in return. Thumm provides more background on the fears and desires of developing and developed countries with respect to the negotiation of the TRIPs (Nikolaus Thumm, *Intellectual Property Rights: National Systems and Harmonisation in Europe* (New York: Physica-Verlag, 2000) at 63–64).

Institutionally, the NAFTA has had two main effects on North American copyright policies. First, it reoriented Mexican copyright law. The United States used the promise of enhanced market access to exact concessions on copyright, primarily from Mexico. Prior to the NAFTA, and the subsequent 1997 overhaul of Mexico's *Ley Federal del Derecho de Autor*, Mexican copyright law (or *derechos de autor*, literally authors' rights) and the domestic institutions supporting it had been mainly concerned with protecting authors' moral rights in their works. As part of the overall NAFTA deal, itself rooted in the neoliberal model that replaced Mexico's discredited import-substitution-industrialization model,[15] Mexico agreed to US demands that it restructure its copyright regime to emphasize copyright as an economic right available to publishers, distributors and other middlemen — including foreign companies — rather than just a primarily moral right available to authors. It therefore expanded the number, type and focus of Mexican groups with a stake in the copyright debate. Post-NAFTA, Mexican copyright law is now more focused on the contractual aspects of copyright than it was before.[16]

Second, the NAFTA has, somewhat ironically, constrained the ability of the United States to influence economic and copyright policy in its neighbours. It cannot be modified easily: the NAFTA does not contain any mechanisms to allow for routine updating of or changes to the NAFTA. This lack is particularly important when dealing with an issue like copyright, where technological change often leads to pressure for change in copyright law. As a result, NAFTA's copyright provisions are quite brittle: they lock in a certain level copyright protection that will come under increasing pressure with the normal passage of time and technological change. Any change must therefore come via a channel other than the NAFTA itself.

As well, by ensuring Canada and Mexico of a certain level of guaranteed access to its market, the United States has effectively limited its ability to link copyright reform to market access. Far from being a force for convergence, the NAFTA is, at least potentially, a force for continued policy divergence.

The overall effect of the NAFTA is therefore indeterminate. Altering the focus of Mexican copyright does influence the future direction of Mexican

15 Stephanie R. Golob, "Beyond the Policy Frontier: Canada, Mexico and the Ideological Origins of NAFTA" (2003) 55 World Politics 361. For an overview of how the NAFTA changed Mexican IP and copyright law, see Maryse Robert, Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals (Toronto: University of Toronto Press, 2001).

16 Robert, above note 15 at 53.

copyright-policy debates. This change, however, came at the price of a reduced ability of the United States to influence directly Mexican (and Canadian) copyright policy: with the NAFTA and secure market access in place, the United States could no longer use the carrot of increased market access or the stick of reduced access to convince Mexico or Canada to change its laws. Instead, the US government (a regional actor in this sense) has had to resort to other means of influence, such as deploying (not inconsequential) diplomatic pressure via its embassies, its content industries (such as Hollywood and the music industry, themselves global players with interests in Canada and Mexico), and through the Special 301 process, an annual, though largely toothless, review of other countries' IP policies.

As for other actors, there is little or no evidence of regional civil-society groups and little cross-border cooperation beyond information-sharing. Indeed, Mexico's nascent copyright civil-society groups have stronger links to Spain and the rest of Latin and South America than they do with groups in the US or Canada.[17]

North American copyright governance, therefore, is characterized by a brittle regional framework that is not easily modified. While the regional hegemon, the United States, may be interested in copyright reform in Canada and Mexico, in the absence of strong regional institutions and with no mechanism to make regional law, pressure to reform copyright law must run through domestic institutions, which can be expected to have a determinative effect on the copyright debate in the three countries. This is, indeed, the case.

C. THE 1996 WIPO INTERNET TREATIES AND TECHNOLOGICAL PROTECTION MEASURES

On December 20, 1996, Canada, Mexico, and the United States joined over sixty other countries in adopting the Internet treaties. The treaties were a US-driven response[18] to the challenges posed to copyright policy in a

17 For example, the first academic book on copyright and "free culture" was a co-production involving the Spanish Embassy in Mexico's *Centro Cultural de España:* Alberto López Cuenca & Eduardo Ramírez Pedrajo, eds., *Propiedad Intelectual, Nuevas Tecnologías y Libre Acceso a La Cultura* (Puebla: Universidad de las Américas Puebla/Centro Cultural de España México, 2009) (www.ccemx.org/img_act_x_tipo/propiedadint.pdf).

18 Pamela Samuelson, "The US Digital Agenda at the World Intellectual Property Organization" (1997), http://people.ischool.berkeley.edu/~pam/courses/cyberlaw97/docs/wipo.pdf.

digital age: how to enforce copyright law given technology (personal computers and the Internet) that allowed individuals to reproduce and distribute, easily and inexpensively, anything that could be converted into zeroes and ones.

One of the responses, covered in the treaty, concerned extending legal protections to digital locks, or TPMs. TPMs control the access and use of the work that it has locked down. For example, someone can place a TPM on a .pdf file that requires the user to input a password before the work can be copied or altered. Or a TPM on a song or a movie can limit the number of times it is played, on what machines it can be played, or how many times (if at all) it can be copied.

As these examples show, while TPMs can limit copy making (which copyright also does), their uses can also extend toward attempts at market control (e.g., making some works useable only on some machines) and interfering with existing user rights under copyright (among other issues).[19] For example, every copyright law allows copying for academic purposes. However, a password-protected .pdf that prevents an academic from copying a paragraph from that document is a (small) restriction on her legal rights. These digital locks can have similar effects when placed on works already in the public domain, restricting the legal right of users to copy these works.[20]

From the copyright owner's perspective, TPMs have a significant drawback — they can be broken, often quite easily. TPMs on their own cannot fully lock down digital content. In response, copyright owners have sought to make it illegal to break TPMs. Such legal protection presents a difficult policy issue: how to ensure that such protection does not interfere

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19 See, e.g., Jeremy de Beer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright La*w (Toronto: Irwin Law, 2005) 89 (www.irwinlaw.com/content/assets/content-commons/120/Two_01_deBeer.pdf); Jeremy de Beer, "Copyright and Innovation in the Networked Information Economy" *Social Science Research Network* (May 26, 2009) (http://ssrn.com/abstract=1410158); Pamela Samuelson, "DRM {and, Or, Versus} the Law" (2003) 46 Communications of the ACM 41; Ian R. Kerr, Alana Maurushat, & Christian S. Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 Ottawa Law Review 6 (www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=232); Jessica Litman, *Digital Copyrigh*t (Amherst: Prometheus Books, 2006); and Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Cultur*e (Cambridge: MIT Press, 2007).

20 Copyright is a right limited in time: after a certain amount of time (generally speaking, life of the author plus 50 years in Canada; life plus 70 years in the United States and life plus 100 years in Mexico), a work is said to enter into the "public domain" and be freely copiable by anyone without permission or payment.

with users' right to break locks when the locks have nothing to do with copyright or to exercise their rights under copyright law.

During the negotiations that led to the Internet treaties, the United States, backed by its content industries, pushed for a ban on the sale of all devices that could circumvent digital locks, a maximalist position that would have provided strong protection to copyright owners' works, but with the major negative effect of making it impossible for non-hackers to access the tools needed to exercise their legal and legitimate rights.[21] This position has the potential to render impotent the user-creator-owner balances that have been negotiated into copyright law over centuries. TPMs protected too strongly allow those who control the locks to set the conditions of use, potentially far and beyond those allowed by copyright law. At its worst, legal protection of TPMs has the potential to effectively privatize copyright law by placing it in the hands of those who control the digital locks.

However, as the result of objections by developing countries and US consumer-electronics industries (who make their living by providing access to copyrighted works), the final wording required only that signatories

> provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[22]

A minimalist interpretation of these provisions would make it a crime to break a digital lock only if it is done for the purpose, or with the effect of, violating an underlying copyright. While there is some controversy over this language, particularly the meaning of "adequate" and "effective,"[23] the treaties provide countries with significant leeway in interpreting how

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21 Samuelson, above note 18.

22 WIPO *Copyright Treaty*, Art. 11. The WIPO *Performances and Phonograms Treaty* (Art. 18) uses the same language with respect to performers and phonograms producers.

23 See, e.g., Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed., vol. 2 (Oxford: Oxford University Press, 2006); and Myra Tawfik, "International Copyright Law: W[h]ither User Rights?" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 66 at 80 (www.irwinlaw.com/content/assets/content-commons/120/One_03_Tawfik.pdf).

strong protection should be, and seems to limit it only to copyright, and is not meant to be an expansive right.[24]

1) Country Choices

a) The United States

The three North American countries have implemented the treaties in different ways. In 1998, the United States passed the *Digital Millennium Copyright Act* (DMCA), a maximalist interpretation of the treaties. Section 1201 of the DMCA, subject to certain limitations, protects a TPM that restricts access and use in the service of a copyright owners' rights. What makes the DMCA a maximalist interpretation of the WIPO Internet treaties is that it forbids people to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof," that would allow individuals to circumvent TPMs designed to control access or limits copying of a work, if the following criteria are met:

- The device is primarily designed for this purpose,
- It has only limited commercially significant otherwise, or
- It is marketed as such a circumvention device.[25]

Despite provisions to allow for circumvention in limited cases, including the exercise of fair-use rights and non-copyright-related matters, this ban, and a triennial "rule-making" process that allows for the expansion of this list, prohibiting trade in the tools needed for most people to exercise these rights makes it difficult for users to exercise their rights under the law. Since the passage of the DMCA, the US government and US content industries have aggressively sought the implementation of DMCA-type rules by other countries, including Canada and Mexico.

b) Canada

In Canada and Mexico, the situation is more complicated. Canada, following public hearings and studies in 2001 and 2002, has attempted to implement the treaties three times. In 2005, a minority Liberal government

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24 That said, proponents of US-style TPM protection argue that strong protection is needed in order for the law to "adequately" and "effectively" protect copyright owners' rights.

25 *Digital Millennium Copyright Act*, 17 USC. §§ 1201(a)(2) and 1201(a)(3)(B) (2000) (www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00001201----000-.html).

proposed a "minimalist" bill, C-60,[26] that would have made it illegal to break a TPM only for the purposes of infringing the underlying copyright; trade in circumvention devices was ignored.[27] The bill died on the order paper when the January 2006 election was called. In December 2007, the current minority Conservative government attempted to introduce a bill that would have largely copied the TPM provisions of the US DMCA. However, its introduction to Parliament was delayed for six months by an unexpected public-grassroots outcry during a particularly sensitive period in which the minority Conservative government could not be sure that it could control the House of Commons;[28] the delay was enough to make the eventual bill, C-61, *An Act to Amend the Copyright Act* (which kept the controversial US-style TPM protections), a second victim of an election call, in September 2008. In the summer of 2009, the government held public hearings into copyright reform, in which most Canadians voiced strong opposition to DMCA-style TPM protection. In June 2010, the government introduced Bill C-32, *The Copyright Modernization Act*, which included several new consumer-friendly amendments, but with TPM provisions that essentially duplicated Bill C-61 and the DMCA.[29] As of July 2010, it had passed First Reading, with committee hearings planned for fall 2010.

c) Mexico

Mexico, as part of a comprehensive reform of its copyright law instigated by its NAFTA obligations, provided limited legal protection for TPMs in 1997, but only for those protecting computer software. In language similar to that which would be drafted into the 1998 US DMCA, Article 112 of the *Ley Federal del Derecho de Autor* (LFDA) prohibits "the importation, manufacture, distribution and use of equipment or the services intended to eliminate the technical protection of computer programs, of transmissions across the spectrum of electromagnetic and telecommunications networks and programs' electronic elements," while Article 231(V) imposes criminal sanctions on the importation, sale, lease of any program

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26 Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005 (as read at first reading by the House of Commons 20 June 2005).

27 Sam N.K. Banks and Andrew Kitching, "Bill C-60: *An Act to Amend the Copyright Act*" (Legislative Summary, 20 September 2005), (www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=e&source=library_prb&Parl=38&Ses=1&ls=C60).

28 Blayne Haggart, *North American Digital Copyright, Regional Governance and the Potential for Variation* (PhD dissertation, Carleton University) [forthcoming].

29 See Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in this volume.

or performance of any act that would have as its purpose the deactivation of the protective electronic controls of computer software. Violation of these articles is punishable by imprisonment of three to ten years and a fine of 2,000 to 20,000 times the minimum daily wage. Furthermore, while the LFDA does not define circumvention, a non-paper presented at WIPO by the *Instituto Nacional del Derecho De Autor* (INDAUTOR), Mexico's copyright authority, suggests that currently circumvention would only become a legal issue if an underlying copyright or author's rights had been infringed.[30] A 2003 copyright-reform bill was silent on TPMs and WIPO treaty implementation generally.

D. EXPLAINING IMPLEMENTATION

1) United States

US implementation of the Internet treaties can be explained almost completely without reference to international or regional factors. US copyright policymaking is a pragmatist's game, involving tradeoffs among various interest groups that have a seat at the table. As Litman documents extensively, copyright-law reform has since the early 1900s involved inter-industry negotiations overseen by a state that acts an arbiter, ratifying the consensus reached by the players at the table.[31] As a result, copyright law reflects the interests and relative strength (economic and political) of those who have been invited to the table, although legislation is crafted in such a way as to offer narrow exceptions to win the support of the various groups involved. Generally speaking, this process is friendly to the status quo: already-established groups have the advantage over upstarts, and specific interests (i.e., industries) generally outclass the overall "public interest," and every invited guest does better than the wallflowers.

In US copyright policy, the content industries — particularly the motion picture and music industries — currently deploy the most politically influential lobbyists, a fact reflected in the general bias of US copyright industry and in the DMCA itself. As two economists critical of copyright argue, Congress has been "bought and paid for" by a content industry,[32]

30 Mexico, Instituto Nacional del Derecho De Autor, *Internet & Technology Provisions: Questions for Discussion,* (Mexico City: Instituto Nacional del Derecho De Autor, 2008) (On file with the author).

31 Litman, above note 19.

32 Michele Boldrin and David K. Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008) (http://levine.sscnet.ucla.edu/general/intellectual/against.htm).

that has, for example, received (in a separate 1998 bill[33]) retroactive term-of-protection extensions. Article 1, Section 8, Clause 8 of the US Constitution requires that copyright (and IP generally) "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." A retroactive extension of rights to cover already-created works cannot possibly induce future innovation, meaning that this bill cannot be characterized as anything but pure rent-seeking by the content industries, which own the vast majority of copyrights.

The process that led to the DMCA conformed to this historical pattern of inter-industry bargaining overseen by a generally copyright-friendly congress. In Litman's definitive account of the political process that led to the DMCA, she describes what ended up being a "hodgepodge,"[34] reflecting competing views expressed by the various Congressional committees (which often hold divergent views on what the law should do) and the stakeholders these committee represented.

Generally speaking, however, the TPM provisions were of the maximalist kind desired by the content industries. Groups critical of legal protection of TPMs — research libraries, the consumer-electronics industry and a group of academics and lawyers concerned with "fair use" issues[35] — each received limited exceptions, including a "Rule-making process" that would require the Librarian of Congress to review the legislation every three years in order to determine whether further exemptions should be added to this list.[36] However, the blanket ban on the manufacture and traffic in circumvention devices has been criticized for effectively making it impossible for those lacking the technological savvy to build programs to break digital locks (i.e., most people) to exercise their rights under the *Copyright Act*.[37]

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33 *Sonny Bono Copyright Term Extension Act of 1998*, Pub.L. 105-298 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ298.105.pdf).

34 Litman, above note 19 at 143.

35 Fair use refers to the user rights in copyright law that allow for the making of copies for an open-ended list of activities deemed to be in the public interest.

36 The DMCA overall represented a compromise between the content industries, which wanted legal protection for TPMs and the powerful telecommunications lobby, which wanted (and received) protection from liability for the infringing acts of its customers (above note 33).

37 For an overview of the effects of this section of the DMCA, see Electronic Frontier Foundation (EFF), *Unintended Consequences: Twelve Years Under the DMCA* (March 2010) (www.eff.org/wp/unintended-consequences-under-dmca).

In the end, the TPM language of the DMCA was almost exclusively a function of the domestic US political process. Specifically, the open language of the Internet treaties, while much more permissive than that originally sought by the United States (that language was eventually incorporated into the DMCA), both avoided constraining the US policymaking process in any way while allowing the United States to continue, in good faith, to promote its maximalist approach to copyright (i.e., the DMCA) to other countries as *the* legitimate way that the Internet treaties should be implemented.

2) Canada

Of the three countries, Canadian copyright policies are the most complex, involving a somewhat unique bureaucratic setup, a weak "domestic" lobby for copyright reform, anti-American sentiments and, since the early 2000s, the politicization of what traditionally been seen as a technical, commercial (and politically neutral) law. Taken together, these factors explain both why after 10 years the treaties have still not been implemented and why two maximalist copyrights bills and one minimalist bill have been tabled, but not passed, to date.

Canada's domestic copyright-policymaking institutions[38] are biased toward compromise. Unusually, copyright is the joint responsibility of two departments, the Department of Industry and the Department of Canadian Heritage, each with conflicting, and sometimes diametrically opposed mandates.[39] Generally speaking, performers, writers and other creators — and, most importantly, industry groups like the Canadian Recording Industry Association (CRIA) — see Heritage Canada as their voice,[40] while Industry Canada tends to represent technology industries, consumers, business and investors, from the point of view of wishing to increase Canadian productivity and innovation. On the issue of TPMs,

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38 This chapter's focus on lawmaking by necessity puts to one side the other ministries and quasi-governmental agencies, which also affect actual policy.

39 Doern & Sharaput remark that the linkage between trade and IP has given the Canadian Department of Foreign Affairs and International Trade an important — they say central — role in the making of IP policy, including copyright (G. Bruce Doern & Markus Sharaput, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press, 2000). Outside of a trade-negotiation context, however, Foreign Affairs' role is limited and Canadian Heritage and Industry continue to have the official lead on the file.

40 *Ibid*.

then, Heritage Canada's stakeholders favour a maximalist implementation of Canada's WIPO obligations, while Industry Canada's favour a minimalist approach.[41] The vigour with which each bureaucracy defends its mandate often interferes with the timely pursuit of reform, even when their respective ministers are ostensibly in agreement about what should be done.[42]

This tendency to balance largely explains the 2005 bill. As Doyle documents thoroughly, the bill reflected the strenuous lobbying by CRIA of the Department of Canadian Heritage and its then-Minister, Sheila Copps.[43] However, despite Copps' clout in the Liberal party as a senior minister, the strength of the eventual bill's TPM regulations were mitigated by concerns from the civil servants in both the departments of Heritage and Industry about the soundness of the US DMCA approach.[44]

The other truth that must be considered is that, when faced with departments with opposing mandates, political power must be used to break the deadlock. This became clear in the run-up to the eventual introduction, in June 2008, of the minority Conservative government's Bill C-61. Specifically, it demonstrated the often-ignored, but central role of the Prime Minister's Office and the Privy Council Office as the final arbiter of what proposals get introduced to Parliament.

The Conservative government's decision to follow the US DMCA model on TPM protection was political. The PMO's insistence on passing a law the US government would like came over the objections of then-Industry Minister Maxime Bernier, and went against the bureaucratic consensus, circa 2005, described by Doyle (2006). As Michele Austin, then-Industry Minister Maxime Bernier's (2006–2007) chief of staff, recounted in an interview with the author:

> The Prime Minister's Office's position was, move quickly, satisfy the United States and both of our positions were, politically speaking, "Listen, there have been mistakes made in the DMCA, there are a list of exceptions that have been created by court, can we not have DMCA

41 There are exceptions to this rule. In the recent debate, the Entertainment Software Association of Canada, representing video-game manufacturers, has justified its support for DMCA-style legal protection for TPMs in terms of promoting innovation and employment in the Canadian video-game industry.

42 Haggart, above note 28.

43 Copps was Heritage Minister from 1997 to 2003; her Liberal successors continued to support her position.

44 Simon Doyle, *Prey to Thievery* (Ottawa: Simon Doyle, 2006) at 81–82 (www.lulu.com/product/file-download/prey-to-thievery/566014).

> lite?" And they said: 'We don't care what you do, as long as the US is satisfied.'[45]

US pressure on Canada to implement the WIPO Internet treaties predates the Conservative government. For several years, Canada has faced "considerable" American pressure to ratify the treaties quickly with legislation modeled on the US DMCA.[46] It has been mentioned by successive US Ambassadors to Canada and Canada continues to be mentioned on the US Special 301 Watch List (and the higher-level "Priority Watch List" in 2009) of countries with IP laws it deems inadequate. While these actions amount to no more (or no less) than attempts at moral suasion, possible reasons for the PMO's position include a desire to demonstrate that the new Conservative government was more US-friendly than its Liberal predecessor and, more proximately, US insistence in August 2007, within the context of the Security and Prosperity Partnership of North America (SPP), that it would not discuss border-related impediments to Canadian access to the US market if Canada did not move on the copyright file.[47]

In August 2007, Bernier was shuffled to Foreign Affairs and replaced by Jim Prentice, who began to make plans to introduce a copyright bill that would include DMCA-style TPM provisions. While the government had planned to introduce the bill in December 2007, its eventual introduction was delayed until June 2008 for several reasons, including an unexpected burst of grassroots opposition to the bill, instigated by a Facebook group, Fair Copyright for Canada,[48] started by University of Ottawa law professor Michael Geist, combined with Cabinet-level concerns with the bill. Appealing both to policy arguments and emotion, opponents denounced this (as-yet unseen) "born in the USA" copyright bill (thus appealing to a current of anti-Americanism that is rarely hard to find in Canadian political discourse) and calling for public hearings to determine what a balanced "made in Canada" bill should look like. Blindsided by this opposition, and unsure at the time of the strength of the government in the House of Commons, the government decided to postpone the bill for six months. While the resulting bill largely reflected the DMCA position on TPMs, public op-

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45 Haggart, above note 28.

46 Myra J. Tawfik, "International Copyright Law: W[h]ither User Rights?" above note 23 at 79.

47 Michael Geist, "How the US Got its Canadian Copyright Bill" *Toronto Star* (June 16, 2008) (www.thestar.com/sciencetech/article/443867).

48 www.facebook.com/group.php?gid=6315846683.

position had been sufficient to delay the bill long enough to make it a victim of the government's September 2008 election call.

The public opposition, however, has had a lasting effect, turning what had previously been an arcane, technical issue into a topic for popular political debate. More concretely, in the summer of 2009, the Conservative government reversed its opposition to public consultations and held a series of cross-country consultations on copyright reform, at which public opposition to DMCA-style TPM protection ran strong. However, it was not enough to override the continued Conservative government's insistence on a maximalist approach to TPM protection. In June 2010, the Conservative government introduced Bill C-32, *The Copyright Modernization Act*. While it contained several new and novel user rights — rights that quite possibly would not have been included had it not been for the protests of the previous two years — it followed Bill C-61's lead on TPM protection. This suggests the effectiveness of "Facebook activism" is dependent on the context in which it occurs. In December 2007 it was unclear how strong the opposition parties, particularly the Liberals, were. Facing a particularly contentious vote on whether to continue Canada's military involvement in the Afghan war in the winter 2008 session, the Conservative government, facing unexpected public opposition, decided that discretion was the better part of valour and delayed the introduction of the bill.

This delay, however, was purely tactical, a matter of working on the bill's communications strategy rather than reconsidering the substance of bill itself. That Bill C-32 contains the same TPM provisions, as well as user rights that would be overridden by digital locks,[49] suggests very strongly that the Conservative government is fully committed to DMCA-like TPM provisions, seeing the issue largely in the context of Canada-US relations, and that it takes public opposition to these provisions as a communications problem to be managed rather than as a policy issue to be reconsidered.

While this current government has decided to follow the US lead on TPM protection, the larger point concerns Canadian political autonomy. That successive Liberal and Conservative governments adopted diametrically opposed approaches to TPMs demonstrates that US-style protection of TPMs in Canada is not a foregone conclusion. The decision to "make the Americans happy" was but one of several possible policy choices and is based on a specific perception of the issue, with which reasonable people

49 See, for example, Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in this volume.

can take issue. Canadian governments retain the ability to implement a "made-in-Canada" copyright policy, should they so desire.

3) Mexico

On the surface, the explanation for why Mexico has yet to extend TPM protection in any form to non-software digital works is quite straightforward, involving a relative lack of interest in the issue from the main groups involved in the making of Mexican copyright policy. Creators (represented in Mexico by *sociedades de gestión colectivas* (collection management societies)), the copyright industries, the US government (whose interests are aligned with the US-based copyright industries), and Mexican copyright authorities have been, until recently, much more concerned with traditional large-scale, commercial unauthorized copying of CDs, DVDs and books, which remains endemic in Mexico. Broadband Internet penetration rates in Mexico remain low compared with its northern neighbours, meaning that unauthorized online digital copying has been treated as a secondary issue.

For Mexico, the most significant recent development in copyright policy was the 1997 modernization of its copyright law. As already mentioned, these changes to the *Ley Federal del Derecho de Autor* moved Mexican copyright policy away from being primarily a moral right exercised by authors to being a commercial right exercised by copyright owners. Directly related to TPMs, the 1997 changes included a limited form of legal protection for TPMs, but only for those protecting computer software. This was done in the context of the NAFTA negotiations and was the result of US pressure concerning the software industry, which the US saw as a pressing issue.[50] This finding is unsurprising, given traditional US policy to link market access with IP reform.

Domestic ideas, institutions and actors remain central to understanding the development of Mexican copyright law. Although the next major changes to the law occurred in 2003, despite continuous demands from the US government and industries,[51] new rules for TPMs were not a part of these reforms. The 2003 reforms were undertaken to address the concerns of domestic groups (i.e., the *sociedades de gestión colectivas*). This indicates that, despite the 1997 reforms, which effectively gave greater standing

50 Luis Schmidt, "The New Digital Agenda" *Copyright World* (February 23, 2009) 17.

51 US, United States Trade Representative, *Special 301 Report*, www.keionline.org/ustr/special301; International Intellectual Property Alliance, "Country Report: Mexico," www.iipa.com/countryreports.html.

to foreign copyright owners, traditional domestic interests continued to shape Mexican copyright policy. More generally, it also reflects both the extent to which the treaties were seen by US-based industries and the US government as a secondary issue to physical piracy and the reality that the United States lacked the ability to dictate the pace of reforms, absent a compelling carrot and stick.

There are indications that within the next five years (i.e., by 2015), as Mexican broadband penetration increases and as digital-copyright issues become more important to Mexican copyright interests, Mexico will implement the treaties. The institutional, political and ideational factors — domestic and international — influencing the development of Mexican copyright, make conditions favourable for the adoption of US-style rules regarding TPMs.

The 1997 NAFTA-mandated changes have in practice been reinforced by traditional Mexican views of copyright as an author's right that should be maximized and that downplays users' rights. This traditional approach has, in effect, merged with the economic view of copyright, specifically one that advocates maximizing the economic rights of copyright and neighbouring rights[52] owners. In this sense, it is debatable the extent to which the 1997 changes were imposed on Mexican authorities, as opposed to being welcomed. For example, INDAUTOR sees its role primarily as protecting and maximizing authors' and owners' rights, which fits well with drives to implement the WIPO Internet treaties along US-desired lines. In 2007, for example, the type of people working at INDAUTOR began to change, following the hiring of a lawyer comfortable with the industry side of copyright as the head of INDAUTOR, and the subsequent hiring of staff with a similar background. This suggests a new comfort level with US views on TPMs and copyright generally; INDAUTOR has also indicated a desire to implement the Internet treaties.[53]

Both domestic and "foreign" copyright actors have also been active. With the blessing of INDAUTOR and the *Instituto Mexicano de la Propiedad Industrial* (IMPI) (which enforces the commercial aspects of Mexico's copyright law), the main stakeholders in Mexican copyright policymaking, the *sociedades de gestión colectivas* and the copyright industries in late 2009 have joined forces in the *Coalición por el Acceso Legal a la Cultura* (Coali-

52 Neighbouring rights are those rights given for those activities indirectly related to the creative process, such as to producers of phonograms.

53 Haggart, above note 28.

tion for the Legal Access to Culture),[54] with the goal of reaching common positions on issues of mutual concern. This alliance is significant given that historically Mexican copyright law has been treated, as in the United States, as a technical, apolitical matter best left to negotiations among the various parties, overseen by the government. Such a coalition indicates a high degree of consensus on copyright reform going forward. While the groups involved see TPM implementation as a secondary issue (more important for them is implementing rules governing the liability of Internet Service Providers for copyright violations carried out by their customers[55]), the fact that these groups have called for the Internet treaties' full implementation, combined with their pursuit of maximalist copyright policies, further suggests a sympathy with US-style TPM rules.

With no other major groups opposed to strong TPM protection in Mexico, potential public interest represents a wild card. Presently, copyright is not a pressing public issue, since inexpensive bootlegged works are freely available everywhere, and only about 9.8% of Mexican households had broadband Internet access in 2008.[56] However, if awareness grows, digital copyright in general could easily become politicized, as it has in Canada. Already, some Mexican academics are trying to draw attention to the perils of maximalist copyright for access to information and culture. For example, in June 2009, the first Mexican academic book dealing with these issues was published;[57] and in March 2010, the *Centro Cultureal de España México* hosted a three-day workshop, "*Comunidades, cultural libre y propiedad intellectual*" (communities, free culture and intellectual property) as part of the 2010 *Festival de México*, an annual arts and culture festival held in Mexico City.

Some Mexican politicians also seem increasingly to be paying greater attention to copyright as an innovation and economic, rather than purely cultural, issue. In October 2008, the president of the Senate *Comisión de Ciencia y Tecnología*, Francisco Castellón Fonsecal (from the left-leaning

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54 "Reconocen a Coalición por el Acceso Legal a la Cultura," Publimetro (4 May 2010), www.publimetro.com.mx/entretener/reconocen-a-coalicion-por-el-acceso-legal-a-la-cultura/njed!03v9wEhzv5jB9sEASORj3A.

55 In fact, one of the main reasons for the coalition seems to be to form a counterweight to the economically and politically powerful telecommunications industry in the upcoming battle over ISP liability.

56 Organization for Economic Cooperation and Development, "2a. Households with broadband access (2004–2008)," *OECD Broadband Portal* (10 June 2010) (www.oecd.org/dataoecd/20/59/39574039.xls).

57 López Cuenca & Ramírez Pedrajo, above note 17.

Partido de la Revolución Democrática, or PRD), argued to consider regulating copyright for its cultural and economic effects, since it has the potential to generate as much or more revenues than industrial property (i.e., patents),[58] and in March 2010, he criticized negotiations over the Anti-Counterfeiting Trade Agreement (ACTA), which was (at the time of writing of this chapter) being negotiated in secret among a host of developed countries, for its potential effects on individual freedoms.[59] However, whether copyright will become sufficiently politicized to affect traditional inter-industry negotiation processes remain unclear.

E. ANALYSIS AND CONCLUSION

One of historical institutionalism's strengths is that it reminds one to focus on how all interested actors interact within all relevant institutions, be they international, regional or domestic. In a subject area like copyright, where analyses usually focus on domestic laws or international treaties, its sensitivity to how these "levels" interact with the added "level" of the region, is particularly helpful.

An examination of these three mini-case studies through this lens of historical institutionalism demonstrates the extent to which the Canadian, US and Mexican decisions to implement (or not) the Internet treaties, and the manner of implementation, have been shaped primarily by domestic, not regional, politics. It has failed to observe any strong regional institutional or regional-actor influences. To the extent that any clearly North American dynamic is at work, it involves

a) the NAFTA as a restraint on the US ability to refuse its neighbours access to its markets if its policy proposals are not adopted;
b) the US and its industries as significant actors in the making of Canadian and Mexican public policy; and
c) the degree to which the NAFTA reshaped the Mexican copyright landscape, giving voice to actors that otherwise would not have been as important, and potentially affecting the course of future legislative reform.

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58 Senado de la República, *B-0564 Seminario: "Derecho De Autor En El Entorno Digital"* (1 November 2008), (http://comunicacion.senado.gob.mx/index.php?option=com_content&task=view&id=7856&Itemid=163).

59 Francisco J. Castellón Fonseca, News Release, "Piden Comparecencia De Titulares De Economía, PGR e IMPI Para Que Expliquen Contenido De ACTA" (4 March 2010), http://www.prd.senado.gob.mx/cs/informacion.php?id_sistema_informacion=4713.

In short, North American copyright regimes continue to be shaped significantly by domestic politics. Domestically, each country is characterized by a unique constellation of interest groups, as well as the institutional frameworks in which they operate.

One interesting point that emerges from this analysis is the extent to which the copyright debate in the United States is relatively self-contained, while the debates in Mexico and Canada are affected by US-based actors promoting US-derived solutions. Not only are the two countries responding to initiatives from a US-influenced treaty, but actors in both countries also couch their arguments for and against TPM protection in terms of the US DMCA. This state of affairs reinforces the extent to which copyright policy in Mexico and Canada is driven — though not dictated by — the United States.

Despite this lack of regional governance, both the Canadian and Mexican governments have shown signs of adopting US-style TPM protections. The pressure for this adoption, however, can only be understood in terms of their respective domestic debates, and masks the potential in all three countries to adopt autonomous copyright policies. In Mexico, meanwhile, the bias in favour of TPMs is the result not just of a NAFTA-instigated rewriting of Mexican copyright law, but of the long-held view of copyright (or *derechos de autor*) as something to be maximized, not balanced. The concept of user rights is underdeveloped in Mexico, and the Mexican-based groups interested in copyright are strongly in favour of maximizing protection in general; there is no reason why this support would not extend to TPMs. And while civil-society involvement in the Canadian debate complicates (although likely not fatally) the government's ability to implement DMCA-style TPM protection, this opposition is almost completely absent in Mexico.

In Canada, the different approaches seen in the Liberal and Conservative bills suggests strongly that the importance of US influence — the United States and its industries being the main advocates for DMCA-type law — is in the eye of the beholder. Put another way, the identity of the Prime Minister, and their perception of the various political imperatives of the copyright debate, matter.

With respect to Bill C-32, the relative autonomy of domestic institutional copyright frameworks suggests that, despite the NAFTA and despite the economic asymmetry between the United States and Canada, there is nothing stopping the Canadian government from implementing a copyright regime that satisfies its WIPO obligations (should it choose to do so — signing a treaty does not oblige a country to implement it) with-

out signing off on DMCA-type rules for TPMs. In fact, successive Liberal and Conservative governments have consistently defied US wishes in their proposals addressing ISP liability: the Liberals' Bill C-60,[60] and both the Conservatives' Bill C-61[61] and C-32[62] advocated a "notice-and-notice" system, in contrast to the DMCA's "notice-and-takedown" regime.[63] While the reasons for this difference are beyond the scope of this paper,[64] the fact of this difference between Canadian proposed policy and US policy suggests, taken together with the differences between the Liberal and Conservative approaches to TPM protection, strongly suggests that the Canadian government largely controls its own copyright future.

The emergence of a North American copyright regime is highly dependent on domestic factors, and that, to a significant extent, each North American government remains master of its own copyright policy. The governments of Canada and Mexico may choose to follow the US lead, and they may do so in response to US pressure (as in the Canadian Conservative case) or in response to a mix of US influence and domestic interest-group preference (as in the case of Mexico). Neither case, however, takes away from the crucial point, from the perspective of those who value democratic decision-making: Convergence is a choice; it is not preordained.

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60 Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005 (as read at first reading by the House of Commons 20 June 2005), proposed sections 40.1–40.3.

61 Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2008 (as read at first reading by the House of Commons 20 June 2008), proposed sections 41.25–41.27.

62 Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess., 40th Parl., 2010 (as read at first reading by the House of Commons 20 June 2005), proposed sections 41–25-41.27.

63 *Digital Millennium Copyright Act*, above note 25. In the former, Internet service providers are exempted from liability if, upon receiving a notice of infringement from a copyright owner, they pass the notice on to the accused client in a prescribed way. In the latter, upon reception of a notice of infringement, ISPs must remove the content from their network or face potential liability.

64 They are discussed at length in the author's forthcoming dissertation.