

How Virtue Ethics Might Help Erase C-32's Conceptual Incoherence

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The proposed changes to the Canadian *Copyright Act*¹ set out in Bill C-32² illuminate the conceptual incoherence of what has come to be commonly known as “copyright plus” or “paracopyright.” In terms of copyright reform, the new provisions in C-32 seek to strike a balance between the interests of right-holders and the interests of users. A number of the proposed changes are welcome, and reflect the legitimate — or at least what ought to be the legitimate — expectations of copyright-holders and users. The non-copyright aspects of the Bill — the protection of digital locks, for example — have their grounding in other normative paradigms and are more problematic when juxtaposed against the traditional copyright provisions contained in the Bill and in the rest of the *Copyright Act*. They represent a serious conceptual flaw or incoherence in the Bill. This central conceptual flaw could overwhelm the copyright balances struck in the

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1 *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42> [*Copyright Act*].

2 Bill C-32, *An Act to amend the Copyright Act*, 3d Sess., 40th Parl., 2010, www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7026&Session=23&List=toc [C-32].

other parts of C-32, in Canadian jurisprudence, and in copyright theory and history generally.

Others have and will detail these problems more carefully in this collection and elsewhere; I need not do that in this essay. Rather, I will argue how the proposed changes might be able to function, notwithstanding the flagrant, fundamental flaw. This potential operability, or, more accurately, cohabitation, depends not on the following of the explicit text of a revised Act, but rather on the reasonableness and fairness on the part of copyright users and right-holders in the particular context of the protected work that they are dealing with (i.e., the nature of the rights and the nature of the object of copyright). This position might be labeled a “virtue thics” approach to C-32. I am not unrealistic, however. If right-holders in particular are not reasonable about the exercise of their rights under C-32, any promise that C-32 might have for achieving a sense of normative balance will be overwhelmed.³ The only hope for C-32 — short of legislative amendment — is that an informal normativity based on virtue might somehow emerge to harmonize the incoherence left in place by the formal normativity of C-32.

A. COPYRIGHT’S BALANCES VERSUS PARACOPYRIGHT’S FENCES

The quest to “modernize” copyright in the digital world seems to have been overtaken by lobbyists and power-brokers, especially for the side of large corporate copyright interests.⁴ This discussion has taken place in a context of Lockean rights discourse with the seemingly unobjectionable starting point that some act of “creation” automatically leads to full-blooded⁵

3 Note that I am not unrealistic about the ability of a formal legal system to function in harmony with open-ended, and often contextual, informal and specifically ethical normative concepts: the civil law tradition generally, and Quebec Civil Law in particular, has long functioned successfully with overarching ethical concepts such as *abus de droit*, good faith, *équité* and *ordre public*. See, e.g., *Civil Code of Quebec*, S.Q. 1991, c.64, arts. 6–7, www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html. Rather, I am troubled by some of the excessive rhetoric of the current debate, and especially that of many right-holders and their proxies.

4 See, e.g., Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001); William Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009). For the most complete account of lobbying efforts in Canada, see Michael Geist, www.michaelgeist.ca.

5 The term is from James W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 29–32.

and absolute ownership rights in the “intellectual” object that is created. Of course this Lockean picture—which isn’t really even consistent with Locke’s writing—is false. While I have no objection to calling copyright a species of property right,⁶ there is nothing in that act of creating that somehow implies that a property right is automatically granted⁷ or, indeed, that such a right is absolute, as Locke himself well understood.⁸ In practice, many property rights known to both the common and civil law traditions are less than the full package or bundle of rights, and, yet, are still held, “owned,” or are otherwise, in some sense, “property.”⁹ These rights are not absolute rights either, but rather are understood in the context—often physical—in which the ensuing rights, limits and obligations are exercised and understood. Moreover, as a number of writers have pointed out,¹⁰

6 See David Lametti, “The Concept and Conceptions of Intellectual Property as seen through the lens of Property” in Giovanni Comandé & Giulio Ponzanelli, eds., *Scienza e Diritto nel Prisma del Diritto Comparato* (Torino: Giappichelli, 2004) 269; David Lametti, “The (Virtue) Ethics of Private Property: A Framework and Implications” in Alastair Hudson, ed., *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish Press, 2004) 39.

7 Jim Harris has pointed this out rather convincingly in *Property and Justice*, above note 5.

8 While there is debate on the scope of the Lockean provisos, it is clear that Locke understood that all property rights were limited. The “labour” involved in intellectual property creation necessarily relies on the works of previous authors, and so an absolute and unfettered right to the whole cannot be justified. It is ironic that Lockean property theorists have long debated the limits of Locke, but some IP rhetoric—at the very least at the outset—de-emphasized the generally-accepted notion of limits. Thankfully, IP scholarship was quick to correct this idea of unlimited rights. See, e.g., Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993) Yale L.J. 1533; Seana Valentine Shiffrin, “Lockean Arguments for Private Intellectual Property” in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 138, www.law.ucla.edu/docs/lockean_arguments_for_private_intellectual_property.pdf; and Daniel Attas, “Lockean Justifications of Intellectual Property” in A. Gosseries et al., eds., *Intellectual Property and Theories of Justice* (London: Palgrave Macmillan, 2008) 29. The most notable Canadian exception is, of course, Carys Craig: see Carys J. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002) 28 Queen’s L.J. 1, www.forumonpublicdomain.ca/locke-labour-and-limiting-the-author’s-right-a-warning-against-a-lockean-approach-to-copyright-law. I have applied a balanced view of Locke; David Lametti, “Publish and Profit: Justifying the Ownership of Copyright in the Academic Setting” (2001) 26 Queen’s L.J. 497 at 520–60.

9 David Lametti, “The Concept of Property: Relations *through* Objects of Social Wealth” (2003) 53 U.T.L.J. 325 [“Concept of Property”].

10 See Jessica Litman, “The Public Domain” (1990) 39 Emory L.J. 965 at 969 (on adaptation as better metaphor), https://childedlaw.org/pd/papers/litman_background.pdf;

the metaphor of “creation” is too strong as it downplays the notion that all ideas evolve from the previous base of work in both the public and private domains. Perhaps “adaptation” or “evolution” is a more accurate description. According sweeping rights undermines the public domain and its ongoing role as a source for future creation.

It is rather ironic that at a time when leading Anglo-American property theorists are increasingly beginning to come to terms with “context” in their understanding of traditional property norms¹¹ and, thus, dealing with the ensuing notions of social obligations and stewardship, the quest to modernize copyright has taken such an outdated and erroneous concept such as “absolute rights” as its rallying cry.

Copyright, particularly in the Anglo-Canadian tradition, was never about absolute rights over every aspect of a work: not even in 1557 England, when literary works fell within the domain of the Stationers, was every aspect of the work under control. Rather, copyright’s focus is the power to make copies for the purposes of economic profit (or the prohibition against removing such profits from the copyright-holder). Copyright has never been, historically or conceptually, about total power over the object created. This point is articulated in the oft-cited maxim that copyright is a statutory right that confers only the rights granted in the *Copyright Act*.¹²

James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (London: Yale University Press, 2008) at 179, <http://thepublicdomain.org/thepublicdomain1.pdf> (on the intellectual commons as a source for creative work); and Abraham Drassinower, “Taking User Rights Seriously,” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462, http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID839988_code603.pdf?abstractid=839988&mirid=1 (on the inter-textuality of creation).

- 11 See, e.g., Gregory S. Alexander, *et al.* “A Statement of Progressive Property” (2009) 94 *Cornell L. Rev.* 743, www.lawschool.cornell.edu/research/cornell-law-review/upload/A-Statement-of-Progressive-Property.pdf; Gregory S. Alexander, “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell L. Rev.* 745, www.lawschool.cornell.edu/research/cornell-law-review/upload/94-4-Alexander-Article.pdf; Eduardo M. Peñalver, “Land Virtues” (2009) 94 *Cornell L. Rev.* 821, <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/94-4-Penalver-Article.pdf>; articles that follow at 889–1071; and Gregory S. Alexander & Eduardo. Peñalver, eds., *Property and Community* (New York: Oxford University Press, 2010). See also “Concept of Property,” above note 9.
- 12 *Compo Co. Ltd. v. Blue Crest Music*, [1980] 1 S.C.R. 357, <http://csc.lexum.umontreal.ca/en/1979/1980scr1-357/1980scr1-357.html>, 105 D.L.R. (3d) 249 [*Blue Crest Music*]; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, <http://csc.lexum.umontreal.ca/en/1990/1990scr2-467/1990scr2-467.html>, 72 D.L.R. (4th) 97; and more recently in *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, http://www.lexum.umontreal.ca/cscsc/ en/pub/2002/vol2/html/2002scr2_0336.html, [2002] 2 S.C.R. 336 [*Théberge* cited to

However, the central point is grounded much more deeply than the idea that copyright is simply a creature of statute.¹³ The concept of copyright in any tradition, including the Continental author's rights tradition where some would point to a more absolutist picture of ownership generally, is far from absolute. An author has a certain number of rights in her work — and these rights, within this institutional scope, might be quite powerful — but she nevertheless does not have a claim to critical parts of the whole work: there is no entitlement to the larger ideas expressed in her work, nor to any elements in her work that do not originate from her, but rather came from the public domain. Moreover, specific user rights in a work in any given jurisdiction, such as fair use or dealing, or the right to make personal copies, also limit the core of a copyright-holder's powers, especially when, like fair use, they are open-ended.¹⁴ Even when specific rights are absolute, as for example moral rights in the Continental tradition, the substantive scope of these rights is narrowly defined. And in all cases, the ultimate goal of promoting the progress of the art in question has always been the central organizing idea for the contours of protection.¹⁵

A key justification for these limitations is users' rights in the works of others. Perhaps, most importantly for the purposes of current Canadian discussions, an author does not have the right, once published, to control access to the work. All are entitled to read the book, listen to the song, look at the painting; what the author can prohibit is the making of unauthorized copies, as per section 3 of the *Copyright Act*. And even here, not all copying is prohibited. The Canadian *Copyright Act*, and the common law tradition, says a substantial amount must be taken to constitute infringement, and hence "insubstantial" takings in terms of quality and quantity have always been permitted. And then, there is the concept of fair dealing, which legitimates specific kinds of copying. In short, the doctrine of fair dealing or fair use has allowed users to deal with copyright-protected

S.C.R.]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>, [2004] 1 S.C.R. 339 [*CCH Canadian* cited to S.C.R.].

- 13 In *Estey J.*'s well-known terms: Copyright is a "creature of statute." See *Blue Crest Music*, *ibid.* at 373.
- 14 Samuel Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 *Can. J.L. & Jur.* 217 (where these limits are seen as "safety valves").
- 15 In the US framework, in fact, the power to grant copyright protection is embedded in the provision in the Constitution which grants Congress the power to enact legislations that "promotes the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8.

works in ways that do not go to the detriment, especially economic, of the right-holder and which allow significant scope for context in the determination of what is fair.

Copyright's evolving normative structure has tried, through specific norms, to account for both the rights of authors and the rights of users: this is the so-called copyright balance. The parameters of copyright protection have been modified over time by both statute and jurisprudence with the scope of protection (length of protection, types of works covered, scope of fair dealing, etc.) changing in order to address the balance sought at the time. While one can argue for or against some of these shifts,¹⁶ the general overall pattern remained true to the idea that copyright was a limited series of rights in a work, perhaps even a species of property right, with attention paid to both authors and users in the context of promoting future works, future creation, and future creativity. The structure of copyright has always loathed economic monopolies under the guise of copyright, limiting protection to the expression itself and resisting the idea of merger except under very limited circumstances. The balance of copyright has also been particularly vigilant in not allowing rights over ideas and facts. And, for the most part, the balance has maintained sensitivity to the intellectual objects created and the specific nature of the appropriate balance for those objects. If legislative normativity was lacking or lagging, courts stepped in to interpret, often adding to or softening the scope of legislative norms.¹⁷

Of equal importance is the informal; here I refer to the cultural practices that have existed at the fringes of formal normativity under the radar of copyright and often in contravention of some of the formal aspects of

16 As indeed I have done regarding duration of copyright protection: see David Lametti, "Coming to Terms with Copyright" in Michael Geist ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 480 www.irwinlaw.com/pages/content-commons/coming-to-terms-with-copyright---david-lametti.

17 Numerous cases could serve as examples across various jurisdictions: In Canada, the obvious example of gap-filling on fair dealing is the *CCH Canadian* decision, which elaborated a fair dealing test. In the US, a good example regarding reaction to a new technology is *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), www.law.cornell.edu/copyright/cases/464_US_417.htm [*Sony* cited to U.S.]; even the *Grokster* decision does not try to explicitly contradict *Sony*: *MGM Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005), <http://www.law.cornell.edu/supct/pdf/04-480P.ZS> [*Grokster* cited to U.S.]. Perhaps the best example is in the area of computer software, where courts softened the scope of copyright protection by limiting what was protected in the expression of computer software to only what was truly innovative: *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), www.bitlaw.com/source/cases/copyright/altai.html [*Altai* cited to F.2d].

copyright law that over time have been tolerated, ignored or have been deemed to be otherwise unenforceable. A certain “leakage” or “lag” in formal copyright norms has thus always been an important part of the picture leading to progress. The development of a number of different technologies — file-sharing software, and perhaps even the Internet — could have been stifled had copyright norms been applied too early or too rigorously.¹⁸ Parts of copyrighted works, even when these are the original, protectable parts of a work, have always inspired other works. Confusing Gandalf and Dumbledore, Harry Potter and Percy Jackson, Mozart and Haydn, or trying to write like Joyce, or Proust, or Faulkner, is nothing new or surprising; being inspired by the form or substance of another work, even to the extent of some artistic “borrowing,” has always existed and made the artistic whole all the better. With perhaps the exception of Shakespeare or Picasso, the product of creativity largely rests “on the shoulders of giants” who have come before.¹⁹ What is more, it can be argued that “piracy” — a term much bandied about these days — had always been part of the creative forces behind artistic and scientific progress.²⁰ Until very recently, digital fences did not exist; absolute control over a work was never possible simply because originals once published always existed in a material format that could always be reproduced (by hand or mechanically) and, hence, the imperfection of the system actually helped reinforce the creative cycle. I would go so far as to argue that leakage was a necessary part of the system, especially in terms of learning the arts in question.

The copyright-inspired portions of C-32, laudably in my view, *do* follow in this grand tradition of copyright balancing: personal use exemptions which mirror current use practices such as time and format shifting, allowing for mash-ups that represent one of the newest forms of intellectual creativity, adding education to the definition of “fair dealing,” and “no-

18 The argument has been advanced by Fred von Lohmann of the Electronic Frontier Foundation, using examples from various points in the history of copyright; see Fred von Lohmann, “Fair Use as Innovation Policy”, (2008) 23 Berkeley Tech. Law Journal 829, www.eff.org/files/Fair%20Use%20as%20Innov%20Policy%20Final%20Galley.pdf. See also Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill & Wang, 1996).

19 Lloyd Weinrib, “Copyright for Functional Expression” (1998) 111 Harv. L. Rev. 1150 at 1224.

20 Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2009). A similar argument has been made in the larger context of property reform: Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws: How Squatters, Pirates and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010).

tice-and-notice” as the standard for ISPs, as a way to protect the rights of copyright-holders on the internet while not trenching on the potentially legitimate rights of users. While these changes do not go as far as I would like as regards fair dealing (where an explicit, purposive and open-ended test as articulated in *CCH Canadian* or in the US *Copyright Act*²¹ would be preferable in light of the theoretical framework that I have elaborated), one must see the proposed changes as a positive step.

Other provisions in C-32 are not inspired at all by the copyright tradition, but rather by the provisions in the WIPO Treaties²² and the US *Digital Millennium Copyright Act*.²³ Unlike copyright, these paracopyright rules are grounded in a different normative paradigm and a different realm of emerging technical possibilities. By the latter I mean that absolute control over a work is now technologically possible; technological protection measures allow for certain types of works to be “fenced in,” accessible only upon permission, or traced. This in turn, changes the normative paradigm of such measures from copyright and its central metaphor of balance to something more akin to trade secret protected by a wall of contract. The dominant metaphors here are monopoly, fencing and walls; absolute protection is possible. Others have noted this phenomenon, and even questioned its constitutionality.²⁴

Obviously, paracopyright falls within another paradigm of the governance for intellectual goods or objects of social wealth, perhaps in the same manner that trade secret presents an option for the holder of the secret instead of patent protection. However, in conceptual terms, the co-existence between paracopyright and copyright is more problematic. First, unlike patent and trade secret, there is no “either-or” choice between regimes: you either apply for a patent and take the trade-off of a twenty-year monopoly in exchange for publishing the “recipe” or the “teaching,” obtaining

21 U.S. *Copyright Act*, 1976, 90 Stat. 2541; 17 U.S.C., s. 107.

22 WIPO-Administered Treaties, World Intellectual Property Organization www.wipo.int/treaties/en.

23 *Digital Millennium Copyright Act*, Pub. L. No. 105-304 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 1201 (1998)), www.copyright.gov/legislation/pl105-304.pdf [DMCA].

24 The argument here is that while copyright falls explicitly under an enumerated federal head of power, as paracopyright is in its essence contractual, then it would fall under Property and Civil Rights and would thus be under provincial jurisdiction in Canada: see Jeremy F. deBeer, “Constitutional Jurisdiction over Paracopyright Laws” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 89, http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID814074_code395605.pdf?abstractid=814074&mirid=1.

the state's authority in protecting your monopoly or you keep the secret yourself, using contracts and licenses to protect your secret or confidential information and resort to private law doctrines as your basis for remedy. If your secret gets out, it is up to you to enforce it; you can, with some legal doing,²⁵ get the cat partly back in the bag. Finally, trade secret does not posit a monopoly: others can reverse engineer or use trial and error, to get to the same result. Hence, this kind of governance system can co-exist rather peacefully with the patent bargain and monopoly, as the parameters of each being different enough to offer a choice to inventors.

The problem with paracopyright is that copyright-holders want the added option to put up fences around their copyrighted work *in addition to* having base copyright protection; there is no “either-or.” A copyright-holder is afforded the automatic protection of copyright (with no registration requirements, unlike patent, and for a much longer period of time) without, in effect, having to “publish” the work in the sense of making the work available to be read or heard or seen. The digital fences can prevent this kind of access at the outset. Or, by restricting access at the outset, they can prevent certain other kinds of legitimate methods of fair dealing, as C-32 will now enable copyright-holders to do. And unlike the trade secret paradigm, if the fence is by-passed, then the right-holder gets to claim a *copyright* violation, even though the right-holder unilaterally altered the copyright bargain.²⁶ Finally, if the fence is transgressed, the original work is still protected by copyright as against copying, unlike a trade secret that is no longer a secret. This is, as my civil law colleagues would say, *cumul* and not *option*.

The reverse-engineering provisions in C-32 provide a neat example of conceptual confusion. Reverse-engineering can only really be convincingly criticized on some of the grounds that are analogous to copyright infringement; by reverse-engineering one is, in effect, copying the substance of the work (say, for example, a software program). Otherwise, if something is a secret — for instance, the recipe for Coke — then reverse-engineering

25 Using trade secret and confidential information as treated by the common law, there is some ability to flag information that is meant to be treated as confidential, thus putting the general reader on guard. The warnings that follow professional email are the best example. There is also, of course, the web of contracts that are often put into place to bind persons more specifically. The same kind of result could be had using the civil law.

26 Unless, as will be discussed, it is by-passed for those exceptions in c. 41.11, 41.12, 41.13, etc. — such as reverse-engineering for some cases; but this proves the confusion, as will be argued; C-32, above note 2 at c.41.11–41.18.

is allowed; if you can make your own version independently, that is fine.²⁷ A provision protecting against tampering of the digital locks protecting a secret should not be able to be used as an excuse to outlaw reverse-engineering, as this kind of power (i.e., a digital lock over a trade secret) is not within the copyright paradigm.²⁸ Bill C-32, in its digital locks provisions, is thus confused in conceptual terms from the outset.

Yet, as a part of the provisions on digital locks, there are exceptions permitting the picking of digital locks for the reverse-engineering of computer programs as it pertains to interoperability purposes, reverse-engineering for encryption research, and for network security vulnerability testing purposes. As regards the two latter examples, encryption research and vulnerability testing, one might say that such an exception is evidence of reasonableness on the part of the legislator in recognizing that reverse-engineering has a role to play in protecting certain kinds of software hacking. However, the justification for restricting reverse-engineering in the first place is grounded on the underlying copyright protection of the work and not on the mere power to place a digital lock. If the digital barrier was erected to prevent access to the work, then the justification for the digital lock is parasitic on the justification for copyright protection. Hence, the exceptions set out in C-32 show the opposite of what they were intended to show: instead of being reasonable limitations on digital locks, they help justify the placing of digital locks on confidential information and secrets, implicitly relying on the notion that these are also copyright-protected works, and thus remove the ability to reverse engineer except in exceptional cases.²⁹ Yet these works are inaccessible, and thus in some sense, contrary to the spirit of being “published.”

27 Of course, trademark law and passing off means you have to call it something else!

28 There is an argument to be made that a moral right (or even copyright) would protect the rights of an author as it allows her to prevent a work from being published, thus effectively keep it a secret. This means that some “secrets” fall within the domain of copyright. However, in my view, these unpublished works are not used as the basis for economic activity, or are not an economic resource, in the way that trade secrets are meant to be, thus putting them out of the realm of moral rights and copyright.

29 Copyright scholar, lecturer, lawyer and former computer programmer Sunny Handa had previously insisted that a reverse-engineering right *for any purpose* be added to copyright’s *limits*, as part of copyright’s balance: “Narrowing the exception creates conceptual difficulties in applying limits to reverse-engineering. Allowing a broad exception would avoid these difficulties while continuing to provide copyright-holders with protection if, after the reverse-engineering process is concluded, their protectable expression is used within another’s software product.” While Handa’s argument is in effect pre-paracopyright, the sentiment expressed is in many ways

It is for this reason—that paracopyright is not really copyright at all—that a number of copyright scholars have found these paracopyright provisions and, in particular, those provisions that protect and legitimate access-denying digital locks to be so problematic. The conceptual metaphor of copyright, entrenched over time, has been one of balance. We can quibble about the balance point, but authors and users co-exist with limited rights in the service of fostering creation and creating. The paracopyright paradigm is one of no-access or limited access, with no implicit or explicit counter-balance: the structure favours the right-holder to the exclusion of all other users, to the exclusion of any notion of enriching the public domain, and with a rather impoverished view of creation. It does not subject the right-holder to the usual responsibilities and limitations traditional to which copyright-holders are subject, while giving the traditional copyright rights and different, new rights of absolute control to the copyright holder. So, for example, fair dealing will become an utterly meaningless concept if one has to pay to get access for an otherwise legitimate use. Ditto for time- and format-shifting. The goals of paracopyright in such cases can only be to reward copyright-holders (financially) without the usual copyright *quid pro quo* of paying attention to the care of the public domain, to the legitimate rights of users or to the overall idea that even protected works have a role in fostering other works simply by being accessible.

Another way to frame the same point is to say that while copyright rights have always been much less than absolute (for good teleological reasons), we have enshrined a type of protection for the same works in the *Copyright Act* that is predicated on absoluteness. Such a paradigm actually guts the balance made by copyright doctrine, legislation and, I suppose, history³⁰ and ignores the justificatory discourse of copyright that in no way supports the according and protecting of such absolute rights.

similar: if we wish this activity to be covered by copyright, then we should discuss the copyright balance directly, as Handa had done. The paracopyright solution merely gives double protection. I thank Carrie Finlay for helping me to elaborate this specific point. See Sunny Handa, *Reverse Engineering Computer Programs Under Canadian Copyright Law* (LL.M. Thesis McGill University Institute of Comparative Law, 1994), (Ottawa: National Library of Canada, 1994), eScholarship@McGill, http://digitool.Library.McGill.CA:80/R/-?func=dbin-jump-full&object_id=22693¤t_base=GEN01. The exception for interoperability might be a different nature: here reverse-engineering is not an exercise with regard to the lock itself, but rather relates to the possible uses to be made of the copyrighted work: i.e., one tampers with the lock precisely to achieve interoperability. I thank the anonymous reviewer for pointing out this distinction.

30 See e.g., Daniel J. Gervais, "The Purpose of Copyright Law in Canada" 2 (2005) O.U.L.T.J. 315, www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Gervais.315-356.pdf.

Of course, the state can do whatever it wants in its formal copyright statute. If the duly-elected representatives of the people wish to create these “super-rights” that cumulate other rights on top of copyright rights then they may do so. But the fact that the two are conceptually different paradigms remains quite obvious and, as such, C-32 is mired in fundamental conceptual incoherence.

One solution might be to force holders to choose between copyright protection and paracopyright protection in the same way one chooses between trade secret and patent. Given the current state of domestic and international copyright law, this solution, as intellectually coherent as it might otherwise be and with an obvious intellectual property (IP) parallel to patent/trade secret trade-off, is a non-starter. One might subject the paracopyright to the copyright scheme: this would appear to be just and sound, but it would require attention at the level of architecture in order to (a) not be overly cumbersome and (b) be enforceable. Some have suggested this and it is an indeed valuable and potentially viable solution.³¹ Scrapping the digital locks protection would be better, in my view, but the current government is not there.

B. VIRTUE AND COPYRIGHT: SAVING C-32

Short of a legislative solution, how might we go about saving C-32 from this rather problematic juxtaposition of balances and fences? Can we?

One possibility lies in the realm of informal normativity inspired by the school of “virtue ethics.” Virtue ethics is the label given to what might be called a rediscovered emphasis on ethical action in particular situations. These situations challenge us to act and, in doing so, force us to effectively define ourselves and better ourselves.

Inspired by the writing of Aristotle (and to a lesser extent Aquinas) and re-formulated by a new generation of scholars,³² virtue ethics purports to provide the guidelines or the right questions to ask in a situation of

31 Michael Geist, “Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions” (15 June 2010), www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,33.

32 The best introductory work is Stan van Hooft, *Understanding Virtue Ethics* (Acumen: Stocksfield, UK, 2006). See also Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999); Daniel Statman, ed., *Virtue Ethics: A Critical Reader* (Edinburgh: Edinburgh University Press, 1997); and Roger Crisp & Michael Slote, eds., *Virtue Ethics* (Oxford: Oxford University Press, 1997). See also Onora O’Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996) and Charles Taylor, *The Sources of the Self* (Cambridge: Harvard University Press, 1989).

ethical decision-making. Such decisions, following Aristotle's concept of practical reasonableness and attention to context, makes the "positionality" of the ethical decision-maker central to deciding how to act in any given circumstance.³³ That is to say, all norms are culture-relative and supported by intuitions that are grounded by community traditions; these norms are understood and inculcated in the members of a community over time. The hermeneutic tradition that supports this understanding of normativity and the transmission of norms will not necessarily tell agents — us — what the right answer is in all cases, but rather will help us to find the right answer for ourselves. Although set rules form part of the basis for what it means to act virtuously, rules are often less-than-clear, limited, contradictory, and opaque; hence, rule-following is incomplete as an ethical stance, outlook, or way of life. Put simply, we need to do more than follow rules in order to do what is right. Indeed, there is a sense in which one can even disregard, in principle, certain rules while remaining faithful to law.

The beauty of virtue ethics is that it helps individuals circumnavigate the seas of ethical grey in which we sail, whether in life or in copyright. What is required is individual judgment or self-reflection in service of the balanced decision-making that Aristotelians and neo-Aristotelians have favoured in their ethics. The fact that these virtues and values are widely shared in a society, deeply understood, and intrinsically appreciated means that such an ethic is not merely a breed of moral relativism, and positionality, while situated, is not simply a species of situation ethics.³⁴

In other terms that might be familiar along Lon Fuller's lines, I am arguing for an "ethics of aspiration"³⁵ in which we aim (as individuals, or

33 The best discussion of "positionality", in my view, is contained in Katherine Bartlett, "Feminist Legal Methods" (1990) 103 Harv. L. Rev. 829, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1119&context=faculty_scholarship. While that article predates the use of the term "virtue ethics" the Aristotelian and neo-Aristotelian sources and substance indicate that Bartlett's positionality narrative fits well within the description of virtue ethics.

34 This suffices for now, though I appreciate that these claims will always be contested. A good analysis, containing a defense of virtue ethics against the charge of moral relativism and differentiating virtue ethics from a duty-based ethics is contained in van Hooff, above note 31 at 7.

35 Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), www.ebook3000.com/Lon-L--Fuller---The-Morality-of-Law--Revised-Edition_81102.html. Happily, I have been "accused" of falling into this camp already: see David Lametti, "The Morality of James Harris's Theory of Property" in T. Endicott, J. Getzler & E. Peel, eds., *The Properties of Law: Essays in Honour of James Harris* (Oxford: Oxford University Press, 2006) 138 at 164, n. 44.

with the law) to aspire to the best sorts of actions or norms. This kind of ethics goes beyond formal norms: it is not mere rule-following. This ethic might serve as the basis for a specific duty, such as a duty to aspire to a certain standard of behavior,³⁶ but it does not always conform to rules and it goes beyond an ethic of duty to strictly follow rules. Rules are, however, a part of the ethical mix and ought to be followed generally as exclusionary reasons for action.³⁷ Good ethical reasons, based on positionality, might allow us to look beyond exclusionary reasons in some circumstances in service of some value or virtue. Moreover, the fact that such informal, ethical standards are so widely understood helps to lower the potential so-called information costs of relying on contextual standards as opposed to fixed rules.

I argue elsewhere that virtue ethics is useful in intellectual property and especially in copyright circles, because it helps to identify the boundaries and substance of terms like “fair,” “just,” and “balanced,” which are critical for understanding concepts like fair dealing.³⁸ (Likewise, the same is true for traditional property.³⁹) It also, in the case of C-32, helps the individual actors in the copyright context to resolve the conceptual incoherence of the copyright and paracopyright elements that are forced to co-habit in the *Act*.

As I have argued above, the copyright tradition — comprised of statutes, norms and doctrine — is best characterized by the notion of balance. While the *Copyright Act* remains the ultimate basis for action, decided cases such as *CCH Canadian, Théberge, Nichols*,⁴⁰ and the fundamental underlying principles enunciated therein, also form part of the underlying

36 To adopt the language of clear “rules” and open-ended “standards”: for a recent discussion in a property context, see Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards* [unpublished, on file with author].

37 A concept elaborated by Joseph Raz; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed. (Oxford: Oxford University Press, 2009) at 22ff. An exclusionary reason, such as a law, gives a person a reason for acting without forcing or requiring the person to provide any other reason or seek any other justification for acting. A stop sign gives a person an exclusionary reason for stopping; it does not mean, however, that in an emergency a person would not be ethically prohibited from safely running that same stop sign (my example).

38 David Lametti, “The Virtuous P(eer)” in Annabelle Lever, ed., *New Frontiers in the Philosophy of Intellectual Property* (forthcoming) (Cambridge: Cambridge University Press, 2011).

39 See David Lametti, “The Objects of Virtue” in Gregory S. Alexander & Eduardo Peñalver, eds., *Property and Community* (New York: Oxford University Press, 2010) 1.

40 *Nichols v. Universal Pictures Corporation et al.*, 45 F.2d 119 (2d Cir. 1930), www.coolco-pyright.com/cases/fulltext/nicholsuniversaltext.htm [*Nichols*].

normativity of copyright. It is also true that ideas such as the goals that copyright is meant to serve, like the promotion of the arts, learning, and literature and creativity generally enshrined in seminal copyright documents like the *Statute of Anne* and the US Constitution and often applied directly and indirectly forming part of the hermeneutics of copyright, also play a large role in our understanding of copyright's normativity. Equally true and emanating from all of the above is that ideas of fairness — to authors and users — also form part of copyright's context. Transcendent values such as the promotion of knowledge are part of copyright's core. Sharing and friendship, longstanding virtues in ethics, are increasingly seen to be important from current internet practices, as is evident in social networking and the wiki as cultural phenomena. The Aristotelean concept of practical reasonableness, as both a value itself as well as a method of determining other values, is also part of the normative structure and is linked to the idea of positionality. While much of this normativity is informal — i.e., not legislative — it simply cannot be ignored as it informs much of our understanding of what we must do as individual agents seeking to come to terms with the formal normativity of the *Copyright Act* with the addition of C-32.

How much might a virtue ethics stance help to illuminate what users and rights-holders ought to do in the face of C-32? We can begin with users. Even the most ardent defenders of the internet and the free-flow of information thereupon must admit that the behaviour of some internet users has been less than virtuous with regards to the works of others. Indiscriminate downloading has negatively affected the income stream of numerous artists and specific industries. Indeed, the so-called piracy of music and films and gaming software has been decried by these various entertainment sectors. However, even these groups would admit that, as noted above, some amount of unauthorized copying has always existed for certain kinds of works and, indeed, that such copying was either unenforced and tolerated, unenforceable, or even encouraged. The question then becomes when is uploading, downloading, or otherwise sharing by “making available” ethical or unethical, “piracy,” or something less? The law here is, has been, and will always be incomplete or underdetermined; the resort to informal normativity will be as necessary under the newly revised *Act* as it was under its predecessor.

In all cases, a virtue ethics approach would eschew unequivocal answers and would focus on context. Where the copying forms part of the educational process, one could usually classify it as fair dealing. Certainly the primary norms of the *Copyright Act*, the *CCH Canadian* decision and

the C-32 proposals reinforce this idea of educational fair dealing. But even this is not conclusive: as an educator, I might photocopy a handout to distribute to my students⁴¹ or upload a scholarly article to a closed, password-protected class website. There is, I am certain, no serious question of this not being fair dealing. But I might not be acting ethically or dealing fairly — even if the C-32 additions are taken into account — if I were to photocopy, in whole or in large part, a text on copyright that was designed precisely for the educational market and that was readily available at a student price. In that case, I would not be acting ethically or dealing fairly, even if C-32 affords me a stronger case for grounding my activity in the *Act*. The context here is that the author prepared the book for an educational audience and pedagogy and I and my students are part of that target market audience in a way that even ordinary scholarly articles might not be.⁴² Here, a number of contextual factors have guided the ethical deliberations by individuals: the copyright statute, a copyright licensing scheme, university practice, respect for the writing of scholars in those sorts of texts, old and new copyright doctrine,⁴³ the nature of the work in question, the price of the original, etc.

The ethical actor has to do some weighing of these factors and decide how to act. Admittedly, an actor might make a mistake in judgment, but over time — as in all other types of ethical situations — such errors can be corrected. Colleagues, friends, or parents might weigh in to say one should not do that, copyright-holders might weigh in to say how their rights are being affected, etc., and, yes, formal legal claims might be brought to bear

41 I appreciate that making photocopies is currently part of a licensed regime that universities have entered into by contract with Access Copyright, www.accesscopyright.ca, or Copibec, www1.copibec.qc.ca/?action=pr_accueil, and have thus bound their professors. One might argue that the new C-32 provision for fair dealing in education could effectively be used to question aspects of the current licensing regime, in the same way that *CCH Canadian* might have. At the very least, it should alter the bargaining process, augmenting the bargaining power that universities and other educational institutions possess.

42 I doubt that most authors of scholarly articles expect that they will be remunerated for their publications; rather, they are contributing to a scholarly discourse. On the other hand, text-book writers do write for the student market, while other book authors might expect some remuneration from sales.

43 *CCH Canadian* (on what is a contextual approach to fair dealing), *Jennings v. Stephens*, [1936] 1 All E.R. 409 (C.A.) at 418ff per Greene LJ (a contextual approach to determining “in public” is centred around the inquiry of who is the author’s “public”, thus in effect involving the determination of who is the author’s market for the economic value of the work).

in some cases. As I am learning with my children, one should never underestimate the power of informal normativity, especially peer pressure.

The same kinds of consideration might be brought to music: the copying and the downloading of recorded music files. Certain types of copying of recorded music have always existed. Most people have always format-shifted their own purchased music and thankfully C-32 will enshrine the practice and protect it. The recording industry effectively accepted the practice of taping and recording when levies were introduced on blank media in Canada: first cassette tapes⁴⁴ and later CDs. Technological protection measures, especially the technological incompatibility of certain types of formats, have impeded this practice and were met with resistance by consumers.⁴⁵

Can one say that all other forms of copying of recorded music are either absolute piracy or absolute justifiable? Again the answer is probably not in either case. Working from a law and economics perspective, as well as justice-based reasoning, Geert Demuijnck has questioned whether the sharing of MP3 files is an objectional form of free riding. His conclusion is negative.⁴⁶ One of the central points of his argument is contextual. Demuijnck argues that many of the adolescents who share such music files were never in the market anyway, and never have been. While to some extent children and adolescents have bought some music, few have ever paid for all of it. Indeed, this seems to be another variant of the target market audience argument that copyright is quite familiar with: does the copying by adolescents affect the market for the original? At the very least we can admit that while copying necessarily must reduce the potential market for the original, by how much it reduces is unclear as is the question of whether that potential market (from the point of view of the copyright-holder) is so large to include every piece of music ever obtained by an adolescent. I would argue that this latter market has always been purely hypothetical,

44 Ironically, perhaps, this too was a Bill C-32, and its amendments came into force in 1998.

45 These include technological locks on CDs: see Jeremy F. deBeer, "How Restrictive Terms and Technologies Backfired on Sony BMG" (2005–2006) 6 I.E.C.L.C. 93, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901305. Even Steve Jobs, whose iTunes model was constructed on technological incompatibility with other MP3 players, is moving iTunes away from this restrictive strategy.

46 Geert Demuijnck, "Is P2P Sharing of MP3 Files an Objectionable Form of Free-riding?" in A. Gosseries *et al.*, eds., *Intellectual Property and Theories of Justice* (London: Palgrave Macmillan, 2008) 141.

though some artists have managed to tap into it better than others, as is currently being done by Lady Gaga and Justin Bieber.⁴⁷

Indeed, the recorded music market was dependent on a less-than-perfect anti-copying and performance regime for free publicity. I doubt the DJs at my college pubs and dances in the 80s and 90s paid for all their recorded music or paid any sort of licensing fee for what they played, but I heard and bought a whole lot of (sometimes life-changing) recorded music based on what they played. Ditto for recorded tapes and burned CDs from friends, later from nieces and nephews, and finally from students. Back then there was still conventional radio for new music, where a tariff is indeed paid, but these forms of dissemination have been overtaken by sharing on the web, through MySpace and other social networking sites, YouTube, etc. Without some forms of sharing and “leakage,” everyone loses out financially. This has simply always been the case.

Other arguments can be brought to bear in the service of other virtues: for example, one might point to the transmission of knowledge and culture through music, the social function of music,⁴⁸ or even its social-neurological dimension.⁴⁹ One might point to the kinds of virtues that human action attempts to foster through sharing: friendship, sociality, and socialization. But perhaps the strongest ethical arguments in favour of some forms of sharing music are those that point to the way in which listening to music helps to inspire new forms of music. In some cases, blatant copying is part of the picture: think of the digital sampling and re-mixing that leads to new musical creations. New works are made, with or without audible recognition of the sampled original. At bottom, this process is really no different than the way in which music was borrowed, was copied, or provided inspiration in the past, except that one can now take exact samples and need not replay the music on new instruments; in effect, the computer is the instrument.⁵⁰ Any changes can be brought to the sample at any point. The fact of the matter is that much new music is created here, and ethic-

47 I thank Magda Woszczyk for challenging me on this point.

48 See generally Alan P. Merriam, *The Anthropology of Music* (Evanston, IL: Northwestern University Press, 1964), partially available online, <http://books.google.ca/books?id=4bUAFf8CWosC&pg=PP1&dq=alan%20merriam&pg=PP1#v=onepage&q&f=false>.

49 Daniel J. Levitin has written that our brains are hard-wired for music, and part of its impact is social, on its link to dancing, for example; Daniel J. Levitin, *This is Your Brain on Music: The Science of a Human Obsession* (New York, New York: Dutton, 2006).

50 For example, Girtalk; Brett Gaylor, *RiP! A Remix Manifesto* (Canada: National Film Board, 2008), www.nfb.ca/film/rip_a_remix_manifesto/.

ally, one can argue that one has not really done anything different than in the past when one borrowed a riff or a chord structure — often note for note — from another group. Indeed, the reality of what has changed is not the borrowing, but rather the ability of the original group to trace its music and demand a fee with a greater chance of success. How much poorer we would be had this been the case when classical composers borrowed from each other, or much later when rock and roll borrowed from gospel, hill-billy, and blues music. The copyright standard tests — quality of what was taken, and to some extent quantity — are perfectly serviceable standards in this regard, as they go to the ethics of what was done. The mere fact that digital copying makes exact copying possible should not lead to an absolute result of infringement or violation.

Of course, none of the above means that all kinds of copying should be allowed. Obviously, if one takes a substantial part of a song or most of it, especially when taken for economic purposes — whether using analogue or digital technology, or simply re-playing the music — one should have to pay a licensing fee to the copyright-holder. And we should consider downloading for non-creative purposes: the adolescent who is a serial uploader and downloader, but never pays a cent for music and merely uploads to make it available to strangers and downloads at will. To some extent, some of the virtue arguments apply (sharing knowledge, friendship, creating, inspiring, etc.), as do the (no-)market arguments (would not have bought anyway). But it is equally true that some of this music was also bought and paid for in the past, so the free downloading is by some measure unfair. Aristotelian ethics allows one to criticize or condemn this person and offer up a better contextual understanding of the ethics of the act of copying. These correctives will be offered to change behaviour. (As a parent, this is what I try to do all the time.) It may even be so over-the-top that legal action is warranted, although my experience is that the informal pressure and normativity will work a whole lot more effectively and efficiently.

It is important to note the role that the normativity of copyright — formal and informal — plays in allowing us the ethical stance from which to judge fairness or condemn the unethical. In the Aristotelian structure, some will be less than ethical and will never “get it.” Education, the example of the virtuous, legal norms and rules, standards, and possibly even threat of legal action all continue to play a role in helping individuals understand their ethical choices.⁵¹

51 I thank Madga Woszczyk for pressing me on this point.

Moreover, in light of the changing remuneration model in the music industry, I believe that there is an ethical duty (based on the aspiration to be fair) to explore, consider, and support other models for artists. The old industry business model for recorded music — a small group of record labels with artists signed to them, giving exclusive rights to the label, and allowing the label to market for them — is drawing to an end. It has lasted around fifty years⁵² with its banner years from the sixties to the nineties and especially this last decade when many customers re-purchased works in digital form on CD at a price point much higher than production cost. As with other industrial revolutions, a series of technologies brought the old model to its knees. Artists are already beginning to use social networking and other distribution models for the dissemination of and remuneration for their works.⁵³ This decline is as much a cause for celebration — many artists were not, to put it euphemistically, well dealt-with under the old model — as it is a cause for mourning. Yet, there is no doubt that some artists and people previously employed in the industry are suffering. Virtue ethics address this situation as well. In my view, it is simply unethical for consumers to not seriously consider and perhaps even actively support some form of remuneration model, such as a tax or tariff on Internet Service Providers (ISPs) or hardware, that puts money back into the hands of artists and value-adding persons in the recorded music industry. (Indeed, here is one case where technological measures that allow tracing of downloads might be positively put to use in determining proportional remuneration via a tariff scheme.)

So, in the end, the ethic of virtue means that, as a user, you ought to deal with all musical works “fairly” using the various copyright norms as your guide — not only the works in which you are claiming a fair dealing right, but in all works. As a result, if you are in the habit of sampling music in order

52 See Jonathan Sterne, “Is Music a Thing?” in *MP3: The Meaning of a Format* (Durham: Duke University Press, 2012) (forthcoming).

53 Of course, the now standard example is Radiohead’s initial sale of *In Rainbows* directly over the internet — if memory serves, I paid £7 — but there are numerous other examples from a variety of sources: see, e.g., Sasha Frere-Jones, “The Dotted Line: What do record labels do now?” *The New Yorker* (16 & 23 August 2010) at 92 (discussing bands Arcade Fire and Vampire Weekend and their respective independent labels Merge Records and XL Recordings that have used alternative business models from the outset, including social networking and grass-roots marketing). At McGill, the Faculties of Law, Management and Music have, over the past three years, mounted a course focused precisely on developing new business models for remunerating artists, many of which have been focused on educating consumers and social networking.

to decide what music you will later purchase, that practice is ethically justifiable, as one might have done with a cassette in the past; but, in my view, you have to purchase enough music to justify your sampling. In the same vein, if you are sampling to create then you have to create and, in turn, be willing to share what you have created to some extent.⁵⁴ If you do purchase you should be able to expect, whatever the license agreement⁵⁵, that you can make a copy for your kids, your brother, and your best friend in a format that is compatible to your hardware.⁵⁶ This, in my view, is the way that it has always been. Digital locks should not be able to prevent that. Clearly, there are no bright-line answers to questions such as what constitutes “enough music,” how you “create,” or who is a “best friend,” but context should help determine appropriate answers in any given circumstance.

One could extend this type of analysis to other works and media such as film, video games, and books. Each brings different contextual considerations to the table pertaining to both the exercise of rights and the objects or works upon which they are exercised. Software is an area where paradigms of protection — copyright and increasingly patent — compete with paradigms of non-protection and sharing. Here, there is a strong argument that certain forms of software — operating systems, browsers, and search engines — are the motors of knowledge generation. I mean by this that these vehicles help to generate (i.e., disseminate, create and organize) learning and knowledge (in the most ample meaning of *connaissances*), either by organizing, disseminating, or making accessible the information of others (in the case of browsers and search engines) or by making computers themselves functional or organizing one's own information (in the case of operating systems).⁵⁷ As such, at least some aspects of even pro-

54 C-32 incorporates a non-commercial, user-generated content exception, reinforcing formally what informally is virtuous or ethical.

55 In my view, in ethical terms, purchasing a copy of a work and thus remunerating the creator/right-holder, might give the owner of the purchased copy additional moral weight in making ethical decisions to make copies, or do other acts with the copied work: lend it to a friend, make a back-up, alter the material support, etc. This is evidenced by the first-sale doctrine in Canadian copyright, and is perhaps yet another reason to support the majority in *Théberge*. A license, on the other hand, being more limited, might ground less extensive rights, although making a back-up copy of software purchased by license seems to me to be completely ethical. Again, I suppose context is determinative: is the work normally purchased or licensed?

56 Indeed, another set of practices that C-32 will attempt on copyright's virtuous balancing, to formalize. Whether the digital locks provisions will undermine this, may depend on the ethical behavior of copyright-holders: see below.

57 I thank Allen Mendelsohn for helping me to formulate this point.

tected software must be either in the public domain or not absolutely protectable. In this domain user expectations coupled with a doctrine such as *Altai* will effectively make certain features of any software an “unoriginal,” common, or *expected* feature akin to a *scène-à-faire* in a relatively short period of time. An ethics approach might hold that users — or competing programmers — would have to respect the original feature of a protected program until such time as the feature loses its artistic or creative nature and becomes rudimentary, unless perhaps the feature was truly fundamental to advancing the field of knowledge, in which case it might not really be protectable at all.

Gaming software presents an interesting case example. At first glance, this kind of software ought to be highly protectable, at least for the period when it is marketable and being marketed. Unlike an operating system, gaming software does not have as direct a vocation in generating knowledge. As a specific type of digital work it does not have the same kind of vocation as art, literature or music, although I am sensitive to the argument that video games are in themselves an art form,⁵⁸ as well as to the social function of gaming (both in-person socializing and online socializing). In such situations, the kinds of public domain/*scène-à-faire* arguments will be less convincing in my view, as we are talking about software products whose vocation is more purely a rather precise form of entertainment and whose paradigm is quite market-oriented. It is harder to find a public justification for users to justify sharing. At the very least, the pace at which unique features become user expectations might be slower than for operating systems and such. It may also be possible to say that, in context, gaming has not evolved in the same way as music, as people expect to pay higher sums for the hardware and software and, therefore, it is no problem ethically to maintain those expectations with digital fences. Even still, people are playing more and more online, where they pay access fees. In sum, the gaming world has developed completely behind a cost wall and there seems intrinsically no need to share freely.⁵⁹ Hence, some fences seem to be consistent with this kind of work and are thus ethical. User

58 For a humorous fictional account of gamers and their creative spark, see Douglas Coupland, *JPod* (Toronto: Random House Canada, 2006), partially available online <http://books.google.ca/books?id=v17Xuw4gjGoC&lpq=PP1&dq=JPod&pg=PP1#v=onepage&q&f=false>. What tips the balance in this case is that the art form is highly commercialized, the games are generally used to make profit in a market setting, and the highly temporary nature of the “art” form: the technology is outmoded rather quickly as technology and the games evolve.

59 I thank Magda Woszczuk for suggesting these two arguments.

copying seems, to me at least, much more unethical. That being said, the industry argument that digital locks are needed to protect people from cheating in the games seems to me to be spurious: if I buy a book, the author has been remunerated and I can skip a few pages, not read it, or even use it as a doorstop; if I buy a videogame, the creators have been remunerated — why should they care if I download a few cheats? Even with regard to multi-user online games, where cheating goes to ruining the enjoyment of the game for non-cheaters, using digital locks to guard against cheating seems to be using a sledge hammer when a screwdriver would do (and indeed where ethical behavior is already part of the answer).⁶⁰

Film shares some of the public and vocational aspects of music while also sharing aspects of more private, fenced-in ordering models. There has always been a “fence” around traditional movie distribution in the sense that one had to pay to see the movie in the cinema. Once seen, one could borrow ideas, even scenes — the brilliant baby carriage scene in *The Untouchables* taken from Sergei Eisenstein’s “Odessa Steps” scene in *The Battleship Potemkin* — but one did not have a copy of the film. With the advent of videocassettes and later DVDs, other monies could be made from sales and rental regimes. Now one had a physical copy of the film. Coupled with the rise of the internet and digital technologies, the possibilities for copying — straight up counterfeiting to personal copying, time and format-shifting — all became increasingly easier. So, here the question of copyright and paracopyright is trickier. Given that the context of the original business model had begun with an effective fence — the ticket booth — there might be a particular sympathy here for allowing more fences. Unlike with music, a person who “samples” a whole movie⁶¹ intuitively seems less likely to buy it afterwards or to legally download a second copy. Given the duration and cost of producing a film or television episode as compared to a single song, it becomes increasingly clear that a person who knowingly takes once will take, with respect to that work, the “virtueless” path for eternity (or until they are stopped by the authorities). Still, the additional income gained from the rental and sales of DVDs must have certainly helped the industry, as have sales to television stations for redistribution and as has internet distribution of certain films. Similarly,

60 As an adolescent, I went through a long phase where I played a lot of cards with the same three friends; euchre, to be precise. We all got pretty good, and we all became excellent at stacking a deck. At a certain point, the games became so unmanageable because of the cheating that we all simply agreed to stop. It was much more fun after that.

61 This applies at least in the case where the copy is of a high quality, I suppose.

taking or sampling analog or digital film — through home taping and now burning — has become easier and sampling pieces for the creation of new works (mash-ups) is a now recognized, legitimate art-form, even in C-32.

My intuition here is that certain fences are acceptable in the distribution of films to cinema, sales, and rental, as they are with CDs and MP3s, but some scope needs to be maintained to allow the arts to progress in the same way that homage could be paid to Eisenstein. Film studies schools need to be able to operate without bumping into digital locks. A virtue ethics approach does not yield a hard-and-fast result, but rather says users should expect to pay to see films and that certain liberties would be allowed to a user after purchasing a legitimate copy and even after simply paying to see the film, especially for private re-copying or re-creating, or sharing with family and best friends, and certainly sampling for the purposes of creating other, derivative works.⁶²

And, of course, there are books which are at least part of, if not totally, the lynch pin of knowledge acquisition and transmission, as well as a central point for the progress of the arts. Books need to be read and users need to be able to read them. They are passed on over generations, to friends, and made available in libraries. From an ethical viewpoint, sharing is good and encouraged. Free access to books, if no copying is to be done, is to be protected at all costs — a point that seems to have been lost on certain copyright collectives. And copies made through fair dealing, especially for students and educational institutions — another point lost to copyright collectives — must be protected. Users have a great deal of rights here, and the diminishing of users' rights in this context has a serious potential impact on the transmission of knowledge and access to education in our society.

As book reproduction technology moves from the printed word to iPads and Kindles, we must ascertain that, in some way shape or form, the ability to access and read books (conveniently and for free, by borrowing, shar-

62 One must also note there is something to be said about the social aspect of film-viewing. People do still go to movie theatres, and it is still in some sense special. Going to a movie theater and watching a film with many others is a powerful, shared experience: people are there at the same time, laughing at the same jokes, sighing at the same scenes, and screaming at the same horrifying moments. This is a much different experience than the solipsistic experience of downloading a movie for free and watching it alone on a laptop. The social nature of movie-going acts as an additional, informal protection measure for the film industry — something that doesn't seem to be disappearing anytime soon — and should be considered by the industry before turning to digital locks. I thank Carrie Finlay for reminding me of this point.

ing and library lending) must be maintained. This does not mean that, at present, anyone who currently buys into Kindle and its digital locks is morally inferior. Rather, it means that we all have an ongoing duty to ensure that books continue to be “readable” in accessible forms, whether traditional or electronic. Thus, the producers and consumers of this hardware have an ethical responsibility to work with copyright-holders to ensure that all printed works remain accessible and any printed works that have a digital form have some manner of being read without being copied or being able to be copied and without the reading being restricted by the locked hardware.⁶³ Users are entitled to a high expectation of access with regard to books.⁶⁴

Finally, regarding books, Cory Doctorow notes a certain reticence with respect to reading on screens.⁶⁵ Notwithstanding free ebooks and such online, most people still prefer the traditional format and, at this stage, a major role of online works according to Doctorow is to entice the reader to purchase the hard copy version. While this preference may change over time, especially with technologies such as iPad and Kindle, for the foreseeable future the love of the traditional book format affords a certain protection for authors and publishers.

At bottom, in order for users to make ethical claims on right-holders that are in some sense informal and supererogatory on the part of copyright-holders, users too will have to act ethically. Not every act of copying is fair, just, or justified. Sticking to those acts that are just will help create a context in which one can ask for similar virtuous behaviour from copyright-holders.

Next, we should turn to copyright-holders. Indeed, given the fundamental incoherence identified above in the C-32, copyright-holders will hold the key to determining whether such an Act, unmodified, can actually continue the copyright tradition of balance or succumb to the fence paradigm of digital locks.

63 Of course, one might try to distinguish books used directly in the educational process from books with a mass market audience and value. I suppose there is a stronger claim to be able to fair deal with respect to educational books than mass market books. This argument cuts both ways however, and for historical and practical reasons it is easier to keep books together and treat them all alike.

64 This is why the Google books project (<http://books.google.com/books>) has angered many: not because of the copying of out-of-print books, but rather the access fee.

65 Cory Doctorow, “You DO like reading off a computer screen” in Cory Doctorow, ed., *Content: Selected Essays on Technology, Creativity, Copyright and the Future of the Future* (San Francisco: Tachyon, 2008) 51, <http://craphound.com/content/download>. That I bought the book, all of which is available free online, proves his point.

The first point, as regards right-holders, is that it is in some sense fair that copyright-holders must choose, where appropriate to the context, the benefits of copyright protection (and accepting its limits) *or* the benefits of digital fences/confidential information (and accepting its limits). Fences should only be able to be chosen where impeding access to a work will not have a significant impact on the development of the area chosen or on social virtue; certain objects should be the subject of digital locks that bar access. Similarly, one should never choose a digital lock where fair dealing needs to be considered, without at least allowing for fair dealing to take place. If copyright protection is sufficient, why ever use a digital lock? As we have seen above, putting digital locks around books must be avoided as a matter of ethical duty by copyright-holders and hardware providers.

In both cases, admitting that the certain applications of the digital locks paradigm—those which bar access to content—are really part of the confidential information governance paradigm is instructive. If one has confidential information (such as the recipe for Coke or a client list or other database) and one creates a network of contracts and licensing around the secret in order to protect it, then one cannot protect competitors from doing likewise (developing another cola, assembling a competing client list, or a competing database). Their efficacy is lessened even if there is some inspiration, or reverse-engineering, to the extent that one duplicates the former and to the extent that trade secrets and confidential information will entail some leakage, even some copying. If there has been no leak in this paradigm, you cannot sue a competitor for having “copied.” So, if one chooses this paradigm, one should in principle have to forego the benefits of copyright protection. Of course, this is unrealistic as copyright protection is now automatic. Rather, we should take care when we allow the non-copyright protection to cumulate. As C-32 has failed to fully account for this tension between paradigms, then copyright-holders who choose paracopyright digital locks have more control over access than traditional copyright protection would ever afford for similar information. Thus, they should *ethically* forego suing in copyright (the traditional flexible text of substantive copying) where their own chosen method of protection—fences—has fallen short. If you choose an absolute fence and cannot keep out similar works, then you should not ethically be able to fall back on balance. Certainly, a copyright act cannot justify giving a form of super-protection to digital locks; violations should be in contract and not copyright. This is perhaps the most bizarre element of the new paracopyright norms: making the circumvention of digital locks a copyright infringement, when what is being protected is a secret or informa-

tion that is not even protected by copyright. In sum, paracopyright could work, but not in the copyright regime and certainly not under C-32 if every right is taken to its textual limit.

Put another way, if passed, C-32 becomes part of the normative order and becomes a set of exclusionary reasons or reason for action in and of itself without further need of ethical justification. But given that C-32 contains fundamental internal contradictions, as well as contradictions with the current and historical concept of copyright, following some of its principal rules to the limit will cause inevitable conflicts with other central provisions in the same bill, as well as other entrenched principles of copyright. Put simply, the *only* way paracopyright can co-exist with copyright is if everyone acts with restraint, *i.e.*, ethically.

Of course, not all forms of technological protection measures bar access to content. Rather, they restrict specific uses of content which are accessible in principle. That is, some types of digital locks lock functions or impede functionality without directly obstructing access to content. Ethically, these locks are less problematic, though perhaps bothersome, provided the function is not central to accessing the work or exercising fair dealing rights. A virtue ethics approach is neutral in this regard.

Given the effectively temporary nature of digital fences (all locks can be picked, all fences can be breached) and the persistence of hacking,⁶⁶ one wonders if this inevitability would cause anyone to ever opt for a fence, incurring development costs and occasionally the scorn of its customer base. Certain elements of the music industry have begun to understand this⁶⁷ and have tried to work around the digital age by developing new business models. A number of these models are based on sharing, user interaction, or both. Some artists simply want their music to be heard, tolerating and even encouraging sharing. Profit can be found in other aspects of the business, even including some sale of recorded music. This seems to me to be a virtuous approach. It may also end up being profitable, especially for artists.

Trade secrets also illuminate where digital fences are appropriate or inappropriate as a governance paradigm in the larger context. Trade secrets and confidential information are used in heavily marketized contexts

66 See Cory Doctorow, "Microsoft Research DRM Talk" in Cory Doctorow, *ibid.* at 3.

67 Such is the case especially after the Sony "Rootkit fiasco," where many consumers and artists reacted quite strongly against such measures: see "Sony's Rootkit Fiasco" *CNET News* (November 2005), http://news.cnet.com/Sonys-rootkit-fiasco/2009-1029_3-5961248.html; and Jeremy F. deBeer, "How Restrictive Terms and Technologies Backfired on Sony BMG", above note 45.

where society does not have a real stake in knowing the recipe for Coke or a client list, provided that competition laws are not impeded. These kinds of objects do not, *en soi*, help to enrich the public domain in the same way as a book, a painting, a song, or a movie. So, ethically, a copyright holder ought to consider the object of protection: is it helping to directly advance science or the state of learning or the arts and does it enrich the public domain and inspire others to create in turn? Is it the foundation for a kind of learning or knowledge, etc.? Does it serve to develop some other social virtue? Can others be reasonably expected to want to deal fairly in order to study, learn, re-create (and not simply to get the market secret?). Does the development of the object owe its origins to adaptation from the public domain or the pool of creative knowledge? If so, then others should be able to be inspired in turn as a matter of ethical duty to the creative process (or, for Litman, the “adaptive process”⁶⁸). If the answer to the question of whether the work is important to the knowledge or creative base is affirmative, then my strong ethical intuition is that one should *never* put up a digital fence, whatever the law might allow, but rather trust the traditional balances of copyright to balance the interest of the right-holder and users or society.

Here the analogy to concepts such as the American doctrine of copyright misuse⁶⁹ or the concept of *abus de droit* in Quebec Civil law⁷⁰ is appropriately drawn. One’s right does not allow a person to exercise that right in any conceivable fashion. In all such cases the exercise of the right must be undertaken to foster the overall purposes or teleology of the statute, in the case of copyright misuse, or of both a civil law norm and the larger normative order, in the case of civil law. Misuse or abuse undermines the very principles upon which the right-holder’s rights are grounded. Hence, all are to exercise their rights in good faith. Moreover, these doctrines focus on action, target standards of behaviour, and are contextual in terms of their specific substantive understanding and application within a given set of circumstances. And, in a very real sense, none of these doctrines or the principles underlying them is foreign to Canadian copyright law: the civil

68 Jessica Litman, “The Public Domain”, above note 10.

69 See generally Kathryn Judge, “Rethinking Copyright Misuse”, (2004) 57 *Stan. L. Rev.* 901: in her view any attempt by a copyright holder to effectively expand the purview of copyright protection to gain control over an idea or deter fair use constitutes misuse. See also Dan L. Burk, “Anti-Circumvention Misuse” (2003) 50 *UCLA L. Rev.* 1095, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=320961. I thank Michael Geist for reminding me of this doctrine.

70 *Civil Code of Quebec*, S.Q. 1991, c.64, art. 6.

law is part of our *copyright* tradition and we are closely linked to our American cousins in terms of Anglo-American copyright doctrine and practice (as proponents of incorporating digital lock protections and other DMCA-like revisions in Canadian copyright law like to remind us). In short, there is no good reason to hermetically seal Canadian copyright from principles that are already familiar and that focus on virtuous behavior.

The beauty of an object-focused, contextualized virtue ethics approach to such questions, as opposed to a formal statute, is that it allows us to draw meaningful distinctions from the question of appropriate governance tools and their parameters in a way that a formal statute cannot. There is a much weaker case for a digital lock on basic operating software or an internet browser, as these are necessary for learning and functioning in our digital world, than there is on a highly market driven, digital FPS video game, where the different features are more about marketing the game against competitors than about the state of knowledge. My own view is that the holder of the operating system is obligated to forego the digital lock, allow interoperability for similar kinds of “knowledge” applications, and maybe even support non-proprietary software, while the game-developer can generally choose a digital lock.

The same advantage holds for understanding databases and information. If the information is wholly market-oriented — client lists, customer databases, etc. — a digital lock is perfectly fine on a virtue-based approach, as the context is competition and the trade secret model is appropriate. But databases that are fundamental to advancing knowledge — space data for example⁷¹ — are subject to an ethical duty not to attach a digital lock at the very least, if not eschew copyright protection altogether. What of the non-original database?⁷² The state of copyright law is that some exercise of skill or judgment is required to attract the protection of traditional copyright in terms of originality.⁷³ This would, as a relatively attainable standard, cover most cases.⁷⁴

71 C. Doldirina, *The Challenge of Making Remote Sensing Data More Accessible: The Common Good as a Remedy* (D.C.L. Thesis, McGill University, 2011) (forthcoming; text on file with the author) [unpublished]. This is especially true where public bodies have assisted in gathering, organizing or maintaining the data.

72 Thanks to the anonymous reviewer for asking this question.

73 As set out in *CCH Canadian*, above note 12.

74 However, there could be certain databases that would not meet even this standard, and would thus not be protectable using copyright. While few in number, they present an interesting case: a generic white pages phone book is an obvious example. In effect, the data is known, or is public, available from other sources (though additional sweat is required), and is not organized in any protectable manner, such

Ethical rules of thumb regarding certain objects are also instructive for copyright-holders: don't exercise the locks to impede access, fair dealing, etc. Do nothing to impede the progress of the art (developing computer software, or impeding appropriation art or musical forms). Do not use a digital lock to hinder education or learning. Or, rather, use digital locks to protect works *and values* protected by the copyright tradition. Experience with the DMCA and rumours about the Anti-Counterfeiting Trade Agreement⁷⁵ teach us that, thus far, copyright-holders aren't yet thinking in this ethical mode.

C. CONCLUSION

As it tries to straddle two different governance paradigms, C-32 is seriously flawed. At present, should rights-holders in particular opt for the fence paradigm of digital locks, the goals of traditional copyright will be overwhelmed and possibly undermined, particularly where the pegs of digital locks rest on top of a base level of copyright protection.

Bill C-32 might be "saved"⁷⁶ in some sense in practice if copyright-holders are reasonable or, as I have argued, ethical in their use of digital locks. As suggested, this could be done by voluntarily opting not to use digital locks with respect to objects or in areas that undermine the traditional values of copyright: promotion of the art in question, development of knowledge, development of the public domain, and users' rights related to all of these. Digital locks should be restricted to areas where the protected resource is more akin to a simple trade secret, is a marketing advantage, and is not a building block to other kinds of development of the art, or state of knowledge.

that it cannot be owned. In principle, one might argue that the *Copyright Act*, and hence C-32, would not apply at all; neither its protections nor its restrictions would apply. Nevertheless, the data is possessed in a sense, and thus it remains open as to whether a digital lock might be legally applied to the database. It is also open as to whether a user might be able to challenge or circumvent that lock, and finally whether an "owner" successfully sue for anti-circumvention relief.

75 The official public working version was recently released after a series of high-profile leaks: http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf. The leaks, as well as the reactions, are too numerous to cite. Wikipedia remains a useful point of entry to this history and this debate: http://en.wikipedia.org/wiki/Anti-Counterfeiting_Trade_Agreement.

76 Or, at least, we might be saved from the eternal reform processes, legislative debates and lobbying that would come as a result of the failure of this project.

If the copyright industry claims it is being reasonable, this might be an opportunity to prove it. Indeed, given the current configuration of C-32, in my view, copyright-holders have much more to lose in not being virtuous. Users, consumers, and governments have, to some extent, heard their pleas and allowed some scope for the use of digital locks. But if digital locks crop up everywhere, even in music where they have been eschewed more recently, then the sympathy may well dry up. At that point, as a society, we may find that it will then be appropriate to remove protection for digital locks from the statute or seek to limit or ban them altogether. Virtue has its burdens.

In turn, users should exercise some restraint in their sharing of protected works where they do not have a good (here, ethical) reason to not pay for their copies. Traditional doctrines of creation and fair dealing already serve as guides. It is only by acting ethically, in good faith, and trying to be fair that users can expect copyright-holders to do likewise.

Of course, one can criticize the aspirational nature of these reflections. One may easily accuse me of being unrealistic. Both sides in the debate can point to abuses by the other side: the serial downloading by many in the world of file sharing versus the fanatical attempts to control access by many large, corporate copyright-holders. But virtuous behaviour and analysis have always been a part of our copyright traditions — witness the substance of doctrines such as fair dealing, of promoting the arts and literature, of judgmental and contextual doctrines for determining infringement, copyright misuse, etc. — not to mention *abus de droit* and good faith in one of our major Canadian private law systems. One will realize that in some quarters this kind of ethical behaviour has been elaborated, valued, understood, and even occasionally required all along. It may not be so idealistic after all: Bill C-32, flawed as it is, can serve as the reminder that a good normative order requires good actors.

Perhaps our expectations of the formal legal copyright order, at each successive attempt at copyright reform, are simply too high. The DMCA created more problems than it solved and its author Bruce Lehman exhorted Canada to do differently.⁷⁷ It may simply be that, given the complexity of the technology, the change of pace, and the spirit and rapid pace of human inventiveness, formal normativity in such an area will always

77 Bruce Lehman, "Digital Rights Management Dilemma" (Speaker at Musical Myopia, Digital Dystopia: New Media and Copyright Reform Conference, McGill University, March 2007), <http://video.google.com/videoplay?docid=4162208056624446466&hl=en# at 12:58>. The webcast of the conference is also available at <http://www.cipp.mcgill.ca/en/events/past/>.

fall short or will always be a step behind. The copyright tradition has *always* relied on informal norms and notions of fairness and ethics to settle claims about the scope of protection and competing claims as between holders and copiers. Our sense of ethics evolves much more slowly than technology⁷⁸ and somewhat more slowly than formal normativity. It thus makes good sense to focus first on the virtues and our ethics, as this in and of itself will help us cope with rapid changes. Both the ability to copy and the power to protect more absolutely have been made easier by rapid changes in digital technology. The fundamental idea of resorting to fairness and ethics in the interpretation of acts related to copyright ought to remain the same and, indeed, continue to guide us forward.

78 Though, of course, technological changes will help to shape ethical possibilities and then standards.