



**THEME TWO(A)**

*New Windows — New Insights*

A DIFFERENT DISCIPLINARY LENS



## *Historical Institutionalism and the Politics of Intellectual Property<sup>1</sup>*

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**ABSTRACT (EN):** All intellectual property law is political and cannot be understood outside of the political forces that shape it. Understanding the power relations of IP— who makes the rules, how they do so, and who wins and loses — is essential to our understanding of what IP is, how it is perpetuated, and even if it is necessary. Treating IP as politically and historically contingent also allows academics and policy-makers to avoid considering IP law only in terms of itself. This chapter outlines how a specific theoretical approach — historical institutionalism — can contribute to our understanding of IP’s development and potential future changes, both topics of interest to IP scholars across all disciplines. Historical institutionalism focuses on the changes over time in the relationship among the ideas underpinning IP, the actors involved in policy-making, and the institutions structuring their interactions. Its concept of path dependence suggests why a socially sub-optimal policy like IP has persisted in the face of criticisms regarding its utility. Applying it to the history of Canadian copyright policy, this chapter also demonstrates how historical institutionalism can allow researchers to analyze systematically IP policy outcomes, and to evaluate situations in which change is likely or possible.

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1 Thanks to all the participants at the IP Scholars Workshop and two anonymous reviewers for their helpful comments.

RÉSUMÉ (FR): Toute législation en propriété intellectuelle est politique et ne peut être comprise sans l'étude des forces politiques qui la forgent. Comprendre les relations de pouvoir de la propriété intellectuelle — qui établit les règles, comment les établit-il, qui gagne et qui perd — est essentiel afin de la connaître, de savoir comment elle se perpétue, et si elle est nécessaire. Analyser la propriété intellectuelle d'un angle historique et politique permet aussi aux universitaires et aux responsables politiques de ne pas seulement examiner le droit de la propriété intellectuelle en lui-même. Ce chapitre décrit comment une approche théorique spécifique — l'institutionnalisme historique — peut contribuer à notre compréhension du développement de la propriété intellectuelle et de ses changements potentiels futurs, tous deux sujets d'intérêt pour les spécialistes de la propriété intellectuelle de tous les domaines. L'institutionnalisme historique se concentre sur les changements qui s'opèrent au fil du temps, dans les rapports entre les idées à la base de la propriété intellectuelle, les acteurs impliqués dans les prises de décision, et les institutions structurant leur interaction. Le concept de « dépendance au chemin emprunté » « path dependence » peut expliquer pourquoi une politique sociale sub-optimale comme celle de la propriété intellectuelle s'est tout de même perpétuée malgré les critiques sur son utilité. L'appliquant à l'histoire de la politique canadienne sur le droit d'auteur, ce chapitre démontre aussi comment l'institutionnalisme historique peut aider les chercheurs à analyser de façon systématique les conséquences des politiques sur la propriété intellectuelle, et à évaluer les situations où le changement est souhaitable ou possible.

## A. INTRODUCTION

January and February 2012 offered indisputable proof that intellectual property is inherently political. On 11 February 2012, tens of thousands of Europeans took to the streets to protest the *Anti-Counterfeiting Trade Agreement*,<sup>2</sup> a US-led agreement designed to strengthen intellectual property rights that critics said would erode citizens' privacy rights and impede access to

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2 *Anti-Counterfeiting Trade Agreement*, 1 May 2011 (signed by Australia, Canada, the European Union, Japan, the Republic of Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and United States) [ACTA], online: Office of the United States Trade Representative [www.ustr.gov/acta](http://www.ustr.gov/acta); Wikipedia, "INT: Teilnehmerzahlen" (25 February 2012), online: Wikipedia <http://wiki.stoppacta-protest.info/INT:Teilnehmerzahlen> (concerning the number of protesters).

affordable medicines.<sup>3</sup> A month earlier and a continent away, on 18 January, millions of Americans signed petitions or contacted their elected representatives to protest against a far-reaching copyright bill, the *Stop Online Piracy Act*,<sup>4</sup> that experts warned would damage the underlying architecture of the Internet itself. So many people tried to contact their senators that it crashed the Senate's online contact page.<sup>5</sup>

These mobilizations are merely the latest evidence that intellectual property has become politicized in the public consciousness. The public involvement in an area traditionally considered to be a technocratic backwater dominated by large commercial interests has the potential to move intellectual property in new directions, but it also obscures the more basic point that intellectual property has *always* been political. This reality was strongly suggested by one of the main recommendations of the May 2011 report into intellectual property's role in enabling or constraining innovation prepared for the British government by Professor Ian Hargreaves.<sup>6</sup> Its first recommendation, that the United Kingdom adopt an evidence-based intellectual property regime,<sup>7</sup> was an implicit recognition that the UK's intellectual property policy is driven by politics, and not by empirical evidence.

Intellectual property law, in short, is the outcome of historically contingent processes and cannot be understood outside of the political forces that shape it. Although the importance of politics to intellectual property policy is becoming increasingly obvious, and despite intellectual property's increasingly central role in the global political economy as a means of appropriating value within global production chains, it remains a field understudied by political scientists, and political scientists remain underrepresented in the intellectual property field. As Sebastian Haunss and Kenneth C Shadlen remark, intellectual property studies are "insufficient-

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3 Amnesty International, "EU Urged to Reject International Anti-Counterfeiting Pact" (10 February 2012), online: Amnesty International [www.amnesty.org/en/news/eu-urged-reject-international-anti-counterfeiting-pact-2012-02-10](http://www.amnesty.org/en/news/eu-urged-reject-international-anti-counterfeiting-pact-2012-02-10).

4 US, Bill HR 3261, *Stop Online Piracy Act*, 112th Cong, 2012, online: The Library of Congress <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3261>.

5 Nathan Ingraham, "On SOPA Blackout Day, Senate Web Sites Experience 'Technical Difficulties'" *Washington Post* (18 January 2012), online: Washington Post [www.washingtonpost.com/business/technology/on-sopa-blackout-day-senate-websites-experience-technical-difficulties/2012/01/18/gIQABWkh8P\\_story.html](http://www.washingtonpost.com/business/technology/on-sopa-blackout-day-senate-websites-experience-technical-difficulties/2012/01/18/gIQABWkh8P_story.html).

6 UK, *Digital Opportunity: A Review of Intellectual Property and Growth* (An Independent Report to the Department for Business, Innovation, and Skills) by Ian Hargreaves (May 2011), online: UK Intellectual Property Office [www.ipo.gov.uk/ipreview-finalreport.pdf](http://www.ipo.gov.uk/ipreview-finalreport.pdf).

7 *Ibid* at 8.

ly theorized in a political sense: not enough attention is given to how the politics of IP may be informed by distinct dynamics and logics.”<sup>8</sup> This lack of attention is regrettable, and not only because political scientists and political economists are ignoring an important and fascinating corner of the world. Political science, at its core, involves the study of power. To the extent that intellectual property is perpetuated by the exercise of power, understanding the power relations of intellectual property policy — who makes the rules, how they do so, and who wins and loses — is absolutely essential to our understanding of what intellectual property is, how it is perpetuated, and even if it is necessary. Focusing on intellectual property as something that is politically and historically contingent — and not necessarily sustained by logic or evidence — allows the researcher to avoid considering intellectual property law only in terms of itself, of “reifying” its subject: “abstracting . . . a particular set of relations into an ahistorical naturalised (and hence non-political) set of occurrences.”<sup>9</sup> Focusing too intently on the law in itself rather than situating the law in its larger political (and economic) context can lead the researcher to ask the wrong question, such as: “how can we reform copyright law to deal with our modern reality?” rather than asking, “given that copyright emerged out of a particular situation to deal with a particular problem, is it the best policy response to our current reality, and if not, what is?”

This paper outlines a specific theoretical approach — historical institutionalism — that can contribute to our understanding of intellectual property’s development and potential future changes. Historical institutionalism focuses on the changes over time in the relationship among the ideas underpinning intellectual property, the actors involved in policy-making, and the institutions structuring their interactions. Crucially for intellectual property studies, historical institutionalism’s concept of *path dependence* suggests why a socially suboptimal policy like intellectual property has persisted in the face of criticisms regarding its utility. The following sections outline the four elements — institutions, interests, ideas, and change over time — of a

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8 Sebastian Haunss & Kenneth C Shadlen, “Introduction: Rethinking the Politics of Intellectual Property” in Sebastian Haunss & Kenneth C Shadlen, eds, *Politics of Intellectual Property: Contestation Over the Ownership, Use, and Control of Knowledge and Information* (Cheltenham: Edward Elgar, 2009) at 2.

9 Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, 2d ed (New York: Routledge, 2009) at 149; see also A Claire Cutler, “Gramsci, Law, and the Culture of Global Capitalism” (2005) 8:4 *Critical Review of International Social & Political Philosophy* 527.

historical-institutionalist approach to intellectual property studies, illustrated through an examination of the protracted Canadian copyright debate from 2001 to 2012. The three main branches of intellectual property—patents, copyrights, and trademarks—each involve different constituencies and somewhat different logics. While this chapter focuses on copyright for clarity’s sake, historical institutionalism’s logic can also be used to analyze intellectual property policy development more generally.

Canada offers a fascinating illustration of how historical institutionalism can be applied to copyright policy-making. On 29 June 2012, the *Copyright Modernization Act*<sup>10</sup> received Royal Assent. A bill seven years in the making—successive governments had been trying to pass similar legislation since 2005—included both new user rights and strong legal protection for technological protection measures (TPMs), which are digital locks placed on works like MP3s and ebooks to control their use and access. Far from being a “natural” extension of Canadian copyright law, the bill was the outcome of political and institutional processes. While space precludes a full analysis of the issues raised by digital locks and user rights, and the complex nature of Canadian copyright policy-making, it is hoped that this brief discussion will demonstrate historical institutionalism’s general utility for students of intellectual property policy development.<sup>11</sup>

## **B. THEORIZING THE POLITICS OF INTELLECTUAL PROPERTY**

Politically, copyright (like intellectual property generally) is defined by three characteristics. First, it has persisted, in one form or another, over several hundred years. Copyright’s birth is usually dated to the United Kingdom’s 1709 *Statute of Anne*,<sup>12</sup> although it has earlier antecedents and regulation of the market in creative works—focusing on attribution—dates at least

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10 SC 2012, c 20.

11 For a more complete account through mid-2011, see Blayne Haggart, *North American Digital Copyright, Regional Governance, and the Potential for Variation* (PhD Thesis, Carleton University, 2011), online: <http://blaynehaggart.files.wordpress.com/2011/08/deposit-copy-north-american-digital-copyright-policy-governance-and-the-potential-for-variation.pdf> [Haggart, “North American”].

12 *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Time therein Mentioned, 1710 (UK)*, 8 Anne, c 19.

to Ancient Rome.<sup>13</sup> Second, copyright has changed in response to pressure from existing and new groups, often in parallel with technological changes. Third, and most striking to copyright neophytes, empirical evidence that it is either necessary to achieve its overt societal objectives — for copyright, the maximization of the production and dissemination of creative works<sup>14</sup> — or that it actually accomplishes these objectives, is shockingly thin on the ground for such a long-lived social policy.<sup>15</sup> Saying that copyright is the basis for the well-being of several industries and thousands of individual creators and (more often) intermediaries, and has led to certain forms of creative production, is not the same as saying that copyright is *necessary* for creative production, yet this is usually the extent of the “evidence” offered in copyright’s defence in policy discussions.

A political theory of copyright must therefore account for its constrained evolution over a long period of time, its persistence despite a lack of evidence that it achieves its societal objectives, and evidence that it may actually impair these goals.

Historical institutionalism allows us to address all three characteristics. Historical institutionalism emerged from the comparative politics subfield of political science as one of the (now-not-so-) “new institutionalisms” of the 1980s and 1990s.<sup>16</sup> The new institutionalisms offered a way to strike a middle ground between overly structuralist theories in which actors had no agency and overly atomistic behaviouralist theories that “often obscured the enduring socio-economic and political structures that mould behaviour

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13 Graham Dutfield & Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham, UK: Edward Elgar, 2008) at 64.

14 Copyright also has a unique “moral rights” dimension that justifies property rights in creative works in the language of human rights, protecting the integrity of the individual author. This chapter focuses on copyright’s economic dimension, as this is the focus of current copyright debates.

15 See, for example, Michele Boldrin & David K Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008); Robert M Hurt & Robert M Schuman, “The Economic Rationale of Copyright” (1966) 56:1 *The American Economic Review* 421; Raymond Shih Ray Ku, Jiayang Sun, & Yiyang Fan, “Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty” (2009) 63 *Vanderbilt LR* 1669; Arnold Plant, “The Economic Aspects of Copyright in Books” (1934) 1:2 *Economica, New Series* 167; Ruth Towse, Christian Handke, & Paul Stepan, “The Economics of Copyright Law: A Stocktake of the Literature” (2008) 5:1 *Review of Economic Research on Copyright Issues* 1.

16 See generally Peter A Hall & Rosemary CR Taylor, “Political Science and the Three New Institutionalisms” (1996) 44:5 *Political Studies* 936; James G March & Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989) [March & Olsen, *Rediscovering Institutions*].



in distinctive ways in different national contexts.”<sup>17</sup> Historical institutionalism focuses researchers’ attention on the interaction of three key variables — institutions, interests (or actors), and ideas — and how they change over time.<sup>18</sup>

## 1) Institutions

Humanity lives within a world of institutions, both formal and informal. Institutions can be thought of as semi-persistent “formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy. They can range from the rules of a constitutional order or the standard operating procedures of a bureaucracy to the conventions governing trade union behaviour or bank-firm relations.”<sup>19</sup> Copyright can thus be considered an institution, as it provides people with rules about how to conduct their affairs. Different institutional set-ups can lead to different outcomes, even when facing similar social situations.<sup>20</sup>

In a historical institutionalist approach, institutions and policies do not necessarily represent efficient, unique equilibria, or socially objective “best practices.” They are created, sustained, and changed by purposeful actors with varying degrees of material and ideational resources, and under conditions of imperfect information and something less than perfect foresight. They can also persist beyond their “best before” date. Institutions favour some groups and policies over others. Outcomes depend on actors’ skills, resources, and technical expertise deployed in public and private debates.<sup>21</sup>

Finally, institutions are not wholly self-contained, internally consistent entities. They exist within a universe of other institutions, some with

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17 Kathleen Thelen & Sven Steinmo, “Historical Institutionalism in Comparative Politics” in Sven Steinmo, Kathleen Thelen, & Frank Longstreth, eds, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992) at 1.

18 For an institutionalist, if not explicitly historical institutionalist, analysis of Canadian intellectual property policy making, see G Bruce Doern & Markus Sharaput, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press, 2000).

19 Hall & Taylor, above note 16 at 938.

20 Colin Hay, “Contemporary Capitalism, Globalization, Regionalization and the Persistence of National Variation” (2000) 26:4 *Review of International Studies* 509 at 512.

21 Frank R Baumgartner & Bryan D Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993) at 9.

overlapping jurisdictions that may complement or contradict the rules set forth in the particular institution being studied. Furthermore, the relevant institutions in a given policy area can be located on any “level,” from the subnational to the global. Just as, for example, US copyright policy-making institutions can have a disproportionate effect on international intellectual property treaties, so can international institutions influence domestic policy outcomes, and institutional creation, maintenance, and change in other countries.<sup>22</sup>

### a) Canadian Copyright Institutions

Canadian copyright policy is made within an overlapping framework of international, regional, and domestic institutions. International institutions, including the *Agreement on Trade-Related Aspects of Intellectual Property Rights*,<sup>23</sup> Chapter 17 (the IP chapter) of the *North American Free Trade Agreement*,<sup>24</sup> the various treaties administered by the World Intellectual Property Organization (WIPO),<sup>25</sup> as well as (given their influence on global copyright policy) US copyright and trade institutions,<sup>26</sup> set the overall parameters for Canadian copyright debates. In particular, Canadian (and global) conceptions that define digital copyright reform have been largely shaped by the two 1996 WIPO treaties, namely the *Copyright Treaty* and *Performances and Phonograms Treaty*, collectively known as the *Internet Treaties*. For example, both treaties require that signatories provide legal protection TPMs.<sup>27</sup> Jeremy F de Beer and others call such rules “paracopyright,” entirely new rights within copyright law.<sup>28</sup> There is nothing inherent in copyright

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22 Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

23 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197.

24 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

25 *Copyright Treaty*, 20 December 1996, 36 ILM 65 (entered into force 2 March 2002) [*Copyright Treaty*]; *Performances and Phonograms Treaty*, 20 December 1996, 36 ILM 76 (entered into force 20 March 2002) [*Performances and Phonograms Treaty*].

26 Sell, above note 22.

27 See *Copyright Treaty*, above note 25, art 11; *Performances and Phonograms Treaty*, above note 25, art 18.

28 Jeremy F de Beer, “Constitutional Jurisdiction Over Paracopyright Laws” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 89.

that requires regulating such locks within copyright law. Regardless, TPM protection was a central element in all of the proposed copyright bills.

Institutions are not monoliths. Inter- and intra-institutional rules often conflict, with significant effects on policy development. Domestically, the Canadian *Copyright Act*,<sup>29</sup> like copyright itself, embodies the central political intellectual property paradox: it seeks to encourage both the “protection” and the “dissemination” of creative works,<sup>30</sup> even though stronger protection by definition will inhibit innovation and the spread of creative works. Similarly, much of the difficulty in passing copyright law is attributable to the diametrically opposed mandates of the two departments responsible for developing copyright policy—the Department of Canadian Heritage (which generally favours protection-focused interests) and Industry Canada (which generally favours dissemination). The institutionalization of copyright’s fundamental tension makes it that much more difficult for any government to even reach a decision about what type of reforms to undertake. In the words of one government official who was involved in the law-making process, were copyright the responsibility of one department, “life would be a thousand times easier.”<sup>31</sup>

These domestic institutions had a significant effect on the Canadian copyright debate of the early 2000s. Between 2005 and 2012 successive governments attempted four times to pass a bill that would adapt Canadian copyright law for the digital age (finally succeeding in 2012).<sup>32</sup> Domestically, inter-departmental fighting between the Canadian Heritage and Industry Canada departments contributed to the slow process of crafting legislation, while the existence of minority governments between 2005 and 2011 made it difficult to pass what had become very contentious legislation. Because these minority Parliaments required the government to negotiate with opposition parties to pass legislation, they also opened the government to influence by individual voters, as will be discussed below. Only after the Conservative government won a majority government in May 2011 was it able to get its bill through Parliament.

Beyond the two main departments, the highly centralized nature of political power (in the hands of the Prime Minister) in the federal government allowed the Prime Minister’s Office (PMO) to decide, for political reasons,

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29 RSC 1985, c C-42.

30 Doern & Sharaput, above note 18 at 18–19.

31 Haggart, “North American,” above note 11 at 251, n 188.

32 See *Copyright Modernization Act*, above note 10.

that the government would follow the US lead on TPMs, rather than maintain the compromise position that the departments had previously reached. Where the departmental position would have effectively maintained the protection/dissemination status quo (by making it illegal to break a digital lock only if it were done for the purposes of violating an underlying copyright), the US (and PMO) position did not link TPM protection to actual infringement, and required that trafficking in lock-circumvention devices be prohibited.

## 2) Ideas

Although theorists have argued that the role of ideas in historical institutionalism has remained underdeveloped, historical institutionalism's incorporation of their constraining and enabling effects represents one of its primary contributions to policy studies.<sup>33</sup> Ideas play two important roles in the policy-making process, along the lines of what Campbell refers to as "background" and "foreground" ideas.<sup>34</sup> "Foreground" ideas are those that are linked to specific policy proposals. Lying behind these foregrounded ideas are what Campbell refers to as "background" ideas. Background ideas are the assumptions about how the world works that constrain the range of acceptable policy solutions available to policy-makers and, in a democracy, the public. Even more interestingly, actors often internalize background ideas; these ideas become the lens through which they view policy and politics, predisposing them toward some solutions over others, and shaping their policy preferences.

Background ideas represent the primary link between institutions and the deep structures that undergird the political and economic system. Ideas are embedded within institutions, which are maintained by "a powerful supporting idea . . . generally connected to core political values which can be communicated directly and simply through image and rhetoric."<sup>35</sup> While whatever are considered to be the "best" ideas will differ from society to society, investigating which are the fundamental ideas underpinning insti-

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33 Stephen Bell, "Do We Really Need a New 'Constructivist Institutionalism' to Explain Institutional Change?" (2011) 41:4 *British Journal of Political Science* 883.

34 John L. Campbell, *Institutional Change and Globalization* (Princeton: Princeton University Press, 2004) at 93–94.

35 Baumgartner & Jones, above note 21 at 7.

tutions and policies, both as they are and how they ebb and flow over time, provides a way to highlight dominant social structures.

The effective use of foregrounded ideas depends not only on the material resources deployed by actors to support them, but also on the fit between these foregrounded ideas and background ideas, which Campbell divides into policy paradigms (elite ideas) and public sentiments (public ideas). For example, foundational concepts like “freedom,” “individuality,” and “property” represent powerful concepts embedded within institutions and which policy-makers will seek to use to frame their proposals.

Just as institutions can embody sometimes-conflicting rules, various types of background ideas rarely exist uncontested. Institutions can embody conflicting paradigms. *Liberté, égalité, fraternité* may be foundational ideas in French society (and in Western society generally), but they exist in tension with each other. Often, a successful challenge to a dominant institution will involve reworking dominant paradigms, including a redefinition of an issue, expressed in a way that deploys powerful symbols. Policy proposals do best when they are linked to a “strong” paradigm<sup>36</sup> that makes institutions seem natural, rather than “socially contrived arrangements.”<sup>37</sup>

Building off this point, copyright as a form of regulation of the marketplace in creative works is anchored in core Enlightenment ideas of property and individuality: powerful ideas that are often deployed to defend a particular form of copyright. Proponents of stronger copyright, including collection societies like the Access Copyright collection society in Canada and motion picture and music producers worldwide, couch their arguments in favour of stronger copyright laws, written to maximize their material interests, in these terms. However, the positive idea of ownership is in tension with the negative idea of copyright as a “monopoly” (i.e., copyright prevents someone who has lawfully acquired a work to do whatever they wish with it). “Monopoly” implies not only that control is vested in only one person, but also that this control is unfair (a monopoly is typically regarded as societally destructive). Those who do not benefit from current copyright laws can use this argument to challenge them. Together these two ideas — property and monopoly — form the “protection-dissemination” paradox at the heart of

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36 *Ibid.*

37 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) at 296 [Katznelson, “Periodization”] [footnote omitted].

copyright policy. Proponents of “balanced” copyright (itself a loaded term), such as the telecommunications industry, researchers, consumers, and future creators, invoke notions of fairness and — yes — balance intended to emphasize the “dissemination” side inherent in all copyright laws to promote their own material interests.

### a) Canadian Copyright Ideas

The Canadian copyright debate continues to take place within this familiar protection/dissemination frame. During the debate over the WIPO implementation bills, content owners emphasized the need to crack down on “pirates,” while advocates for greater user rights called on the government to undertake a “balanced” approach.<sup>38</sup> Furthermore, despite the lack of strong empirical evidence, referred to above, that copyright actually maximizes the production and dissemination of creative works, and despite the way digital technologies have upended existing copyright-based business models, the basic question of whether copyright is necessary was never seriously raised. If one pole of the debate was defined by the copyright industries’ arguments for stronger copyright protection, the other was defined by the argument — associated with Michael Geist, Professor at the University of Ottawa, Faculty of Law — that user rights should be taken into consideration when crafting copyright law. While he has been vilified in some circles for his views — one Canadian artist refers to him as “he who shall not be named”<sup>39</sup> — Geist’s overriding argument, that copyright should balance both protection and dissemination, is hardly radical. That Geist and those who hold similar views can pass for “radical extremists,” in the words of Conservative Heritage Minister James Moore,<sup>40</sup> suggests the power and strength of the ideas in which copyright is grounded in Canada.

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38 As can be seen in the title of the edited volume in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010).

39 Jeff Gray, “Changing Canada’s Tune on Copyright Law” *Globe and Mail* (20 April 2010), online: The Globe and Mail [www.theglobeandmail.com/report-on-business/industry-news/the-law-page/changing-canadas-tune-on-copyright-law/article1211543/](http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/changing-canadas-tune-on-copyright-law/article1211543/).

40 The quote is taken from a comment about critics of the government’s copyright bill made by Heritage Minister James Moore to industry executives: Peter Nowak, “Copyright Debate Turns Ugly” *CBC* (24 June 2010), online: *CBC* [www.cbc.ca/news/technology/story/2010/06/23/copyright-heritage-minister-moore.html](http://www.cbc.ca/news/technology/story/2010/06/23/copyright-heritage-minister-moore.html).

### 3) Actors/Interests

Historical institutionalism holds that actors are purposeful agents acting under conditions of constrained agency. Actors act strategically, seeking to realize complex, contingent, and often changing goals, in a context that favours certain strategies over others, and must rely upon incomplete (possibly inaccurate) perceptions of context, seen primarily in institutional terms. In other words, actors' strategic actions are limited cognitively by the ideas and identities promoted by their institutional context.<sup>41</sup> Actors exhibit a "situated . . . rationality,"<sup>42</sup> "operating within relational structural fields that distinguish the possible from the impossible and the likely from the less likely."<sup>43</sup>

Actors both shape and are shaped by the institutions within which they operate, as well as the institutions that they either sustain or change (often in unforeseen ways) through their actions. Institutions can affect actors in two ways. They provide the rules governing their interactions, based on the "background" ideas discussed above. Through their rules and propagated norms, institutions shape their strategies by privileging some strategies and actors over others. Institutions also provide actors with "rules of appropriateness,"<sup>44</sup> partially constituting actors' identities. Institutions "create categories and 'realities' that seem natural,"<sup>45</sup> comprising of "actors with particular identities, values, interests, and strategies — that is, preferences — who seek to manage and solve problems."<sup>46</sup>

Actors vary not only in their objectives, but also in their access to material and ideational resources: better-resourced actors, all else being equal, will have a greater effect on institutional and policy outcomes than those lacking resources, as will those privileged by an institution's rules. As a consequence

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41 Colin Hay & Daniel Wincott, "Structure, Agency and Historical Institutionalism" (1998) 46:5 *Political Studies* 951.

42 Ira Katznelson, "Review: The Doleful Dance of Politics and Policy: Can Historical Institutionalism Make a Difference?" (1998) 92:1 *The American Political Science Review* 191 at 196.

43 Ira Katznelson, "Structure and Configuration in Comparative Politics" in Mark Irving Lichbach & Alan S Zuckerman, eds, *Comparative Politics: Rationality, Culture, and Structure* (Cambridge: Cambridge University Press, 1997) at 83.

44 James G March & Johan P Olsen, "The New Institutionalism: Organizational Factors in Political Life" (1984) 78:3 *The American Political Science Review* 734 at 741; Hall & Taylor, above note 16.

45 Katznelson, "Periodization," above note 37 at 294.

46 *Ibid.*

of this state of affairs, institutions, themselves shaped by actors with different resource levels, will favour some actors and policies over others; as noted above, institutions do not represent socially optimal equilibria.

A historical institutionalist analysis requires identifying the relevant actors and their underlying interests. The actors involved in the Canadian copyright debate can be divided in several, somewhat artificial, ways. Most crudely, they can be sorted into users (such as consumers, researchers, or even future creators, who draw on existing works for inspiration), creators (such as musicians and writers), and intermediaries (such as the various industry lobby groups), each of which interacts with copyright law in different ways. These distinctions, however, ignore the reality that any one actor can be a creator, user, and/or distributor of creative works, and that different types of actors within these categories can have different material interest in copyright law.<sup>47</sup> Politically, though, actors tend to pursue reforms that emphasize copyright's "protection" or "dissemination" roles.<sup>48</sup>

Copyright offers a perfect example of how institutions shape "not just actors' strategies . . . but their goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes."<sup>49</sup> The legal creation of scarcity in creative works — copyright — is but one possible way to regulate the market in creative works. Yet, debates focus on *copyright* reform, not on the underlying market. From the establishment side, at a time in which technology makes maintaining this legal scarcity increasingly difficult, the music and motion picture industries, for example, have continued to concentrate their efforts almost exclusively on strengthening domestic copyright laws and promoting ever-stronger copyright provisions in treaties such as the aforementioned ACTA, rather than modify their business models to minimize their dependence on the artificial/legal maintenance of scarcity in digital products. The goal for these firms has become not the maximization of profits, but the preservation of their right to copy. This focus on means, rather than ends, is the result of an inability to think past the institutionalized model of copyright. These ideational barriers also impose a significant

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47 Yochai Benkler, "A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman, & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001).

48 Doern & Sharaput, above note 18 at 18–19.

49 Thelen & Steinmo, above note 17 at 9 [footnote omitted].



social cost: discussing only copyright reform precludes the issue of whether copyright is actually necessary to accomplish objectives like maximizing the production and dissemination of creative works. This second, more important, conversation is cut off before it even gets started.

### **a) Canadian Copyright Interests**

On the “protection” side of the Canadian copyright debate we tend to find copyright-based industries (most of which are foreign-based) such as the motion-picture industry, the United States government, and several traditional creator groups, notably collection societies such as Access Copyright. On the “dissemination” side, we find groups such as the telecoms industry (companies such as Rogers and Bell), consumers, researchers, up-and-coming artists, and public-interest organizations. “The public” is also important, both as individual voters and as a group that various smaller interest groups claim to represent.<sup>50</sup> Lobbyists and advocates within academia also work to promote specific views of copyright.

During the 2000s, the Canadian copyright debate was particularly notable because it saw the emergence of individuals as an important force on the dissemination side of copyright policy. Influential copyright-based interest groups and research institutions such as universities previously dominated the Canadian copyright agenda. Social-networking technology, notably Facebook, allowed individuals across the country to network and lobby the government for greater user rights. Its greatest accomplishment occurred in December 2007, when Michael Geist created the “Fair Copyright for Canada” Facebook page.<sup>51</sup> Tens of thousands of Canadians joined the page, and thousands used it to organize local chapters to lobby their Members of Parliament.<sup>52</sup> This lobbying led directly to the inclusion of new user rights in the Conservative government’s eventual 2012 legislation.<sup>53</sup>

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50 Sara Bannerman, “Canadian Copyright Reform: Consulting with Copyright’s Changing Public” (2006) 19:2 IPJ 271.

51 Michael Geist, “The Fair Copyright for Canada Facebook Group” (2 December 2007), online: Michael Geist [www.michaelgeist.ca/content/view/2428/125](http://www.michaelgeist.ca/content/view/2428/125).

52 Michael Geist, “Canadians for Fair Copyright” *Facebook* (2 December 2007), online: Facebook [www.facebook.com/groups/6315846683](http://www.facebook.com/groups/6315846683); Michael Geist, “Fair Copyright for Canada” *Facebook* (25 April 2010), online: Facebook [www.facebook.com/FairCopyright-Canada/info](http://www.facebook.com/FairCopyright-Canada/info).

53 Haggart, “North American,” above note 11 at ch 4; see Michael Geist, “The Battle Over C-11 Concludes: How Thousands of Canadians Changed the Copyright Debate” (18 June 2012), online: Michael Geist [www.michaelgeist.ca/content/view/6544/99999](http://www.michaelgeist.ca/content/view/6544/99999), on the provenance of these new user rights.

#### 4) Consistency and Change in Historical Institutionalism

##### a) “Constrained Innovation”

Historical institutionalism scholars continue to debate the conditions under which change happens in historical institutionalism, and the mechanisms that drive it. In most accounts, existing institutions structure and shape the direction of reform along a certain *path*. Change in historical institutionalism is thus the consequence (whether intended or unintended) of strategic action (whether intuitive or instrumental), filtered through perceptions (however informed or misinformed) of an institutional context that favours certain strategies, actors, and perceptions over others. Actors then appropriate a structured institutional context which favours certain strategies over others and they do so by way of the strategies they formulate or intuitively adopt.<sup>54</sup>

Because actors, pursuing their own partial interests, lack perfect information, resulting institutions do not represent societally optimal results. These postulates lead to historical institutionalism’s famous notion of *path dependence*, which is based on the observation that institutions, once established, are difficult to change, and can outlive their objective utility. Institutions structure future actions, resulting in “constrained innovation”<sup>55</sup> and institutional persistence: “preceding steps in a particular direction induce further movement in the same direction . . . .”<sup>56</sup>

One of the main points of contention among historical institutionalism scholars is how to account for periods of radical change. One influential school of thought<sup>57</sup> holds that institutional histories can be divided into periods of stability and change, divided by “critical junctures” when, for various reasons (such as an external economic shock), institutions and policies can be knocked onto a new “path.” This view has been criticized for being logically inconsistent, that “institutions explain everything until they explain nothing.”<sup>58</sup> In contrast to the “critical junctures” approach, what we can call an *unstable institutions* view, sees institutions as constantly being made and remade by actors when they follow or deviate from in-

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54 Hay & Wincott, above note 41 at 955.

55 Campbell, above note 34 at 8.

56 Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics” (2000) 94:2 *The American Political Science Review* 251 at 252.

57 Stephen D Krasner, “Sovereignty: An Institutional Perspective” (1988) 21:2 *Comparative Political Studies* 66.

58 Thelen & Steinmo, above note 17 at 15.

stitutional rules.<sup>59</sup> The unstable institutions approach argues that there is almost always a degree of continuity between periods.<sup>60</sup> Such continuity, even between two seemingly disparate institutional periods, becomes more obvious if one sees institutions as historically contingent and as temporary responses to “enduring problems.”<sup>61</sup>

The invention and evolution of copyright offers a perfect example of path dependence within an unstable institutions framework. The formal history of copyright may begin in 1709, but it emerged from, and was shaped by, the monopoly granted by the British Crown to the Stationers’ Guild. Canadian copyright law is directly influenced by this British tradition. Before Confederation, Canada was ruled by a succession of British copyright laws, and its first *Copyright Act* (passed in 1924) was essentially a replica of the UK *Imperial Copyright Act* of 1911.<sup>62</sup> Subsequent laws have been based in the Anglo-American tradition, although in some areas it follows the Continental moral rights tradition, reflecting the French influence (via Quebec) on Canadian law.

Since then, we have seen constrained innovation at work in wave after wave of copyright reform. Challenges to copyright law, in Canada as elsewhere, which emerged as a response to technological change — from the phonogram to the Internet — have all been subsumed within copyright law as a result of actors’ decisions to do so. Even technologies that have little in common with physical book publishing have been treated as if copyright, a

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59 This is a variation on the famous agent-structure debate. For a useful elaboration, see Margaret S Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995).

60 Campbell, above note 34, notes that change “rarely starts from scratch. Typically, institutional change involves the recombination of old institutional elements and sometimes the introduction of new ones as well” at 28.

61 Jeffrey Haydu, “Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving” (1998) 104:2 *American Journal of Sociology* 339 at 354 and 358; see Paul Pierson, “Not Just What, but *When*: Timing and Sequence in Political Processes” (2000) 14:1 *Studies in American Political Development* 72, for a description and defence of dividing “path dependence” into “open” and “closed” stages; on the uneasy fit between path dependence and critical junctures, see also Chris Howell & Rebecca Kolins Givan, “Rethinking Institutions and Institutional Change in European Industrial Relations” (2011) 49:2 *British Journal of Industrial Relations* 231; James Mahoney, “Path Dependence in Historical Sociology” (2000) 29:4 *Theory and Society* 507.

62 1911 (UK), 1 & 2 Geo V, c 46; Sara Bannerman, *Canada and the Berne Convention, 1886–1971* (PhD Thesis, Carleton University, 2009); Canada, Royal Commission on Patents, Copyright, Trade Marks, and Industrial Designs, *Report on Copyright* (Ottawa: Queen’s Printer and Controller of Stationary, 1957) at 8–10 (Chair: James Lorimer Ilsley), online: Privy Council Office <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/ilsley1957a-eng/ilsley1957a-eng.htm>.

regulatory regime developed for physical books, is appropriate to their regulation. A historical institutionalist analysis reminds us that these developments are the result of historical accidents and the exercise of political will by interested actors.

In historical institutionalism, actors can exploit ideational and material resources, as well as potentially conflicting institutional rules in order either to maintain or change — incrementally or radically — an institution or a policy. Some resources and institutions are more potent than others. For example, in Canada’s highly centralized federal government, the PMO has much more discretion in setting copyright policy than does the US President; in the United States, power is split between the Executive and Congress. Prime ministerial approval is thus a powerful resource for those who receive it. Some ideational resources, similarly, carry particular weight. Policies that can be framed as supporting Canadian artists will tend to resonate more than those that are framed as primarily benefiting foreign multinational record companies.

Actors also differ in their access to these resources, with those that benefit from the status quo often using their resources and influence to perpetuate the institution; that is, to promote path dependence. As a result, institutions and policies can persist even in the face of a changing external environment. Change-seeking actors, for their part, can use their resources and exploit rules that favour them in order to pursue their preferred policies.

### **b) How Change Can Happen: Bricolage**

Change, ultimately, depends on the actions of actors. Scholars have elaborated numerous strategies for effecting change, such as “layering” (“grafting of new institutions onto old ones”), “conversion” (“changes in function” of the institution), and “drift” (change through a “loss of relevance” of the current institution).<sup>63</sup> Change also depends on the relative strength of institutional rules (including the extent to which actors follow these rules and what outcomes result from following the rules).<sup>64</sup> This chapter focuses on one strategy in particular, *bricolage*, which involves the active combination

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63 Steven Levitsky & María Victoria Murillo, “Variation in Institutional Strength” (2009) 12 *Annual Review of Political Science* 115 at 127; Wolfgang Streeck & Kathleen Thelen, “Introduction” in Wolfgang Streeck & Kathleen Ann Thelen, eds, *Beyond Continuity: Institutional Change in Advanced Political Economies* (New York: Oxford University Press, 2005).

64 Levitsky & Murillo, above note 63.

of various sources of material, ideational, and regulatory power. Bricolage is the act of recombining “locally available institutional principles and practices in ways that yield change . . . .”<sup>65</sup> Bricolage can be either *substantive*, where “the recombination of already existing institutional principles and practices to address these sorts of [substantive] problems and thus follows a logic of instrumentality” or “symbolic,” which “involves the recombination of symbolic principles and practices . . . ,” or a combination of both. Both types of bricolage refer to the recombination of already-existing elements, not the introduction of new elements.<sup>66</sup> When actors emphasize a particular combination of copyright’s protection and dissemination roles, they are engaging in a form of bricolage.

The common conception of intellectual property (including copyright) as a trade issue emerged from a process of bricolage. There is nothing inherent in intellectual property that requires it to be defined as a trade issue rather than, for example, a purely domestic regulatory policy. As Drahos and Braithwaite document, the link between trade and intellectual property was the result of lobbying by US intellectual property firms in the 1970s and 1980s, who argued that maximizing international intellectual property protection would maintain US global economic dominance at a time when this hegemony was being threatened by the rising star of Japan, among others.<sup>67</sup> There was nothing “natural” or inevitable about this linkage, but once made, it exerted, and continues to exert, a powerful hold on our conceptions of how to address copyright and intellectual property issues.

As with all types of institutionally-based change, the form that bricolage takes, and whether it is successful, will depend on the material, ideational, and institutional resources available to actors, both domestic and international, and the constraints under which they operate. Even this type of change, however, is dependent on the willingness and ability of actors to work to effect change.

### **c) Change in the Canadian Copyright Debate**

As this chapter suggests, a historical institutionalist analysis can help account for the development of Canadian copyright law in the 2000s. Institu-

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65 Campbell, above note 34 at 69 [endnote omitted].

66 *Ibid* at 69–73, citing March & Olsen, *Rediscovering Institutions*, above note 16.

67 Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan Publications Ltd, 2002). All intellectual property owners, including patent and copyright holders, have exploited this trade-IP nexus.

tionally, the articles of the 1996 WIPO Internet treaties also largely defined the terms of the digital-copyright debate. Domestically, as the author has set out elsewhere,<sup>68</sup> the *Copyright Modernization Act* reflected the particular nature of the Canadian copyright-policy-making regime, including the divided responsibility for copyright policy and the highly centralized nature of power in the Canadian federal system. Ideationally, the debate itself took place within the well-defined boundaries of copyright law, even though the digital technologies' near-zero marginal cost of reproduction fundamentally challenges the logic of using a regime that regulates copy-making designed for a world in which copying was difficult. Within these parameters, interest groups engaged in bricolage.

Canadian user-rights activists, for example, displayed both the willingness and the ability to influence government copyright policy, engaging in substantive bricolage to advance the objective of greater user rights. Specifically, they reinterpreted the tension between dissemination and protection inherent in the *institution* of copyright to emphasize the need for greater attention to user (i.e., dissemination) rights, arguing that the changes demanded by the United States and copyright-based industries would be harmful to this fundamental part of copyright policy. Claiming that the bill was made in the United States, as some critics did, also played to anti-American sentiments that are rarely far below the surface in Canadian political life.<sup>69</sup> While the TPM provisions were the result of American lobbying, other parts of the bill, such as its more-balanced approach to the issue of ISP liability (relative to US policies), departed from the US position to stake out a “made in Canada” approach to copyright reform.

With respect to interests, despite the tendency in the 1980s and 1990s for Canadian policy-makers to emphasize copyright's protection function, and despite the material and institutional advantages of traditional copyright interests, new interest groups — including public-interest groups and individual voters — were able to advance “user interests” by exploiting new social-media technologies that made it easier to organize, emphasizing copyrights in pursuit of new user rights and against strong protection for

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68 Blayne Haggart, “International Copyright Treaties and Digital Works: Implementation Issues in Canada and Mexico” (2011) 38:3 *Australian Journal of Communication* 33.

69 In actuality, many parts of the bills reflected a “made in Canada” consensus. New rules on ISP liability, for example, codified an already-established informal institution between important segments of copyright-based industries and the politically and economically important telecoms industry. In contrast, there were no existing rules for TPMs: it is always easier to create a new rule or institution than change one.

digital locks. While they were unsuccessful in preventing the inclusion of strong, US-demanded rules for digital locks, the final bill included several new user rights that represent a change from the previous status quo, within copyright's well-established protection/dissemination dichotomy and the ideational parameters set in 1996 by WIPO.

While this short overview of a decade's worth of highly contentious copyright politics cannot do justice to the debate, it does highlight several points. First, the outcome was a highly political contest among Canadian and foreign (notably the US government) interests, with the outcome determined by the institutional structure of the Canadian policy-making regime (particularly the central role of the PMO), and the amount and effectiveness with which actors deployed material and ideational resources (arguments in favour of protection/dissemination; the highly effective use of social media by individuals and user-interest groups). The victory, in other words, went to the best political argument in the context of existing institutions, not necessarily the best argument.

### **C. CONCLUSION**

Historical institutionalism provides researchers with a useful way to think about the politics of intellectual property and to understand how it has changed and adapted as it has for over 300 years. Rather than focusing on the law itself, historical institutionalism involves identifying relevant institutions, interests, and ideas—be they domestic, regional, or international—and how they interact. Understanding if change is likely, or where change might emerge, is a matter of considering their relative strength and whether anything has happened that might upset the status quo, such as the introduction of a means to simplify the organization of disparate individuals around a specific policy demand. Historical institutionalism analyses, done well, can provide us with a better and more nuanced understanding of how institutions and public policies emerge and develop. It can provide us with a framework for thinking about where, when, and how policies can be shaped and who is shaping the laws under which we live. For those interested in copyright and intellectual property reform, such an analysis offers a guide about how best to think about successfully influencing policy-making.

Historical institutionalism analyses also serve as a reminder of the historically and politically contingent nature of intellectual property. This

focus on the politics of intellectual property and its contingent nature, somewhat ironically, has the potential to expand the debate from a focus on reforming intellectual property laws as an end in itself toward considering intellectual property as part of a larger puzzle, seeing intellectual property as a contestable form of regulation that can be changed or discarded if conditions warrant. Intellectual property, like all institutions, is maintained by the actions of purposeful actors. Being conscious of the political forces that support intellectual property is a necessary step toward having a complete debate, not just on the limited question of how to reform intellectual property law, but also on the more interesting and fundamental question of how society should best regulate the market in intellectual products, concepts, and ideas.