

Interests in the Balance

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A. INTRODUCTION

The starting point for any exercise in legislative reform should be a consideration of the policy underlying the legislation. After all, the reforms should further the underlying public policy objectives. In Canadian copyright law, however, not only has the public policy underlying the legislation been unclear since the law's inception, it has become murkier still in recent years, with competing and often contradictory articulations from policy makers and the courts. As we stand once again on the eve of significant copyright reform in Canada, it is useful to step back and examine the policy underlying the legislation.

Most recently copyright law in Canada has been referred to as a balance between the interests of creators and users of works.¹ Other iterations of the balance have made reference to a broader societal interest as well.² Yet such statements are far from being an adequate articulation of the interests in the balance. Little attention has been given to defining who “creators” and “users” are, or to identifying the societal interests at play. Further, the expression of balance between users and creators overlooks another important — if not crucial — interest: that of owners. In

1 *SOCAN v. CAIP*, 2004 SCC 45, <www.canlii.org/ca/cas/scc/2004/2004scc45.html> [2004] 2 S.C.R. 427 [*SOCAN*] at para. 132.

2 *Théberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34 <www.canlii.org/ca/cas/scc/2002/2002scc34.html> [2002] 2 S.C.R. 336 [*Théberge*].

the commercial marketplace for copyright works, it is rare that the owner of copyright in a work is actually its creator. Many of the most significant groups pressuring the government for copyright reform represent copyright industries and thus the interests of copyright owners are central to public policy considerations. Although they are often conflated with the interests of creators, it should not be assumed that they are the same.

In this chapter, I will explore the underlying purpose of Canadian copyright as a balance between a series of competing interests. I will argue that there are many different types of “users” of copyright works, just as there are many different types of “creators.” I will explore the interests of “owners,” as well as the diversity of societal interests in copyright law, including interests that compete with the private property rights created and protected by copyright law. I will centre this analysis in the context of the massive technological changes brought about by digitization and the Internet. Ultimately, I argue for a more textured view of the competing interests at play in copyright policy.

B. THE PURPOSE OF COPYRIGHT LAW

Unlike that of the United States,³ Canada’s constitution⁴ does not contain any articulation of the purpose of copyright law.⁵ The *Copyright Act*⁶ also lacks an explicit statement of purpose. Until very recently, discussions of the purpose of copyright law have not featured prominently in judicial interpretations of the legislation. In *Compo Co. v. Blue Crest Music Inc.*,⁷ Estey J. referred to the *Copyright Act* as providing simply “rights and obligations upon terms set out in the statute.”⁸

3 **United States Constitution**, art. 1, §8, cl. 8., <www.usconstitution.net/const.html#Article1>. In the U.S. Constitution, the copyright balance is struck between the rights of authors to a revenue stream flowing from their work and the promotion of “the Progress of Science and useful Arts.” Of course, even in the U.S. there is controversy over the manner in which such balances are struck. See, for example: *Eldred v. Ashcroft*, 537 U.S. 186 <www.supremecourt.us.gov/opinions/02pdf/01-618.pdf>, 123 S.Ct. 769 (2003) [*Eldred*].

4 *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c. 3. <http://laws.justice.gc.ca/en/const/c1867_e.html#executive>.

5 **Section 91(23) of the Constitution Act, 1867**, *ibid.*, provides a one-word description of the legislative authority in this area: Copyrights.

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

7 *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at 373.

8 See also *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 477, where McLachlin J. (as she then was) stated that “copyright law is purely statutory law,” and took the view that resolving the issues in dispute was a matter of statutory interpretation.

Absent any express constitutional, statutory, or judicial statement of the purpose of copyright, copyright scholars in Canada have, for the most part, approached the issue from either a natural rights or a utilitarian perspective.⁹ The natural rights position, that copyright law is justified as a reward for authors for the labor they have invested to create their works, has fallen into disfavor among many academics.¹⁰ By contrast, the utilitarian perspective, that copyright law is a balance more directly aimed at promoting social utility by providing limited monopoly rights to creators, seems to dominate.¹¹ In spite of this, past exercises in legislative reform have often favored a natural rights view. In 1995, the Information Highway Advisory Council submitted a report on *Copyright and the Information Highway* in which it noted:

It must here be recalled that the U.S. law is founded on the principle that copyright is a tool 'to promote the progress of science and useful arts.' According to that principle, the goal of copyright in the U.S. is to be an incentive for the disclosure and publication of works.

The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors.¹²

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- 9 David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 U. T. Fac. L. Rev. 175 at para. 16.
- 10 *Ibid.*, paras. 17–19; see also 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 at 8. Craig is critical of the natural rights approach which she argues continues to influence Canadian copyright discourse. However, not all have abandoned the natural rights view. See, for example, Barry Sookman, "'TPMs' A Perfect Storm for Consumers: Replies to Professor Geist" (2005) 4 CJLT 23 at 24.
- 11 Howell suggests that the Supreme Court of Canada's decision in *Théberge* has moved Canadian law closer to a social contract theory of copyright. (See Robert G. Howell, "Recent Copyright Developments: Harmonization Opportunities for Canada" (2002–2003) 1 U.O.L.T.J. 149 at 152. Vaver states that "The strongest economic argument for intellectual property is utilitarian: without such rights, much research and creativity would not be carried on or would not be financed by capitalists." See David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) at 10. However, Vaver notes that the theory is nonetheless not entirely satisfactory.
- 12 Information Highway Advisory Council, *Copyright and the Information Highway: Final Report of the Copyright Sub Committee* (Ottawa: Information Highway Advisory Council, 1995) at 30. Ten years earlier, another policy report, by its very title, indicated the privileging of the relationship between creators and their works. See: Canada, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators* (Ottawa: Standing Committee on Communications and Culture, 1985). The Committee stated bluntly: "ownership is ownership is owner-

This view echoes earlier government articulations of copyright purpose.¹³

Many judges in Canada have been reluctant to expressly articulate an underlying purpose for copyright. It has been argued, though, that court decisions have leaned towards a utilitarian model,¹⁴ with some deviations towards a natural rights view.¹⁵ In an awkward amalgam of the two approaches, the Federal Court of Appeal in *CCH Canadian Ltd. v. Law Society of Upper Canada* stated: “The person who sows must be allowed to reap what is sown, but the harvest must ensure that society is not denied some benefit from the crops.”¹⁶ It is safe to say that, until very recently, there was no “official” version of the purpose underlying Canadian copyright, and that opinion was both divided and shifting over time.

In this context, it was quite a dramatic event when, in 2002, the Supreme Court of Canada handed down its decision in *Théberge v. Galerie d’Art du Petit Champlain*.¹⁷ Binnie J., for the majority of the Court, firmly articulated a view of the fundamental purpose of copyright law in Canada. He wrote:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the cre-

ship” (at 9), and embraced the metaphor of a creator as the landholding farmer of the mind.

13 *Charter of Rights of Creators, ibid.*

14 Fewer argues that Canadian courts have largely embraced a utilitarian model; above note 9 at para. 24; although Craig, above note 10 at para. 29, is less certain of this.

15 For example, Gonthier J. for the dissent in *Théberge*, above note 2 at para. 141, seems to embrace a natural rights view when he emphasizes the primacy of the author’s right to profit from their work. In *BMG Canada Ltd. v. John Doe*, 2005 FCA 193 <<http://decisions.fca-caf.gc.ca/fca/2005/05.shtml>>, [2005] F.C.J. No. 858 at paras. 40–41, the Federal Court of Appeal, in discussing the privacy rights at issue noted: “Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished. ... Modern technology such as the Internet has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.”

16 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, <<http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.shtml>>, [2002] 4 F.C. 213 at para. 23.

17 Above note 2.

ator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to under-compensate them.¹⁸

Although this vision has been described as embracing the utilitarian view of copyright,¹⁹ the statement also seems to give priority to the economic rights of authors. For example, in *Desputeaux v. Editions Chouette (1987) Inc.*,²⁰ LeBel J. for a unanimous Court cited *Théberge*, for the proposition that:

The *Copyright Act* deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it.²¹

Whatever its jurisprudential roots, the key passage from *Théberge* has been reiterated by the Supreme Court of Canada in several subsequent decisions.²² The message is clear that, in the Court's view at least,²³ the issue of the purpose of copyright law in Canada is now settled.

Unfortunately, things might not be as settled as one might wish. The fact that the Supreme Court has confirmed a particular purpose for copyright law does nothing to constrain Parliament from pursuing a different purpose or striking a different balance, absent any kind of constitutional constraint. Further, the Supreme Court's own articulation (and re-articu-

18 *Ibid.* at paras. 30–31.

19 Howell, above note 11 at 152.

20 *Desputeaux v. Editions Chouette (1987) Inc.*, 2003 SCC 17; <www.canlii.org/ca/cas/scc/2003/2003scc17.html> [2003] 1 S.C.R. 178 [*Desputeaux*].

21 *Ibid.* at para. 57.

22 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 <www.canlii.org/ca/cas/scc/2004/2004scc13.html> [2004] 1 S.C.R. 339 [*CCH Canadian Ltd. (SCC)*]; *SOCAN*, above note 1.

23 Because the statement of purpose is not expressed in the constitution, as it is in the U.S., it must be remembered that Parliament is free to amend the *Copyright Act*, above note 6, to include a statement of purpose that is at variance with that set out by the Supreme Court of Canada. It is also free to amend the legislation in such a way as to profoundly alter the balance between users and owners of copyright.

lation) of the *Théberge* purpose statement reveals a lack of certainty as to both the precise interests in the balance and the rationale for balancing them. Finally, the interests themselves remain unexplored, unarticulated, and undefined. Even if it is widely accepted that copyright law should balance the interests of creators and users (and perhaps society as well, depending on the articulation of the formula), there is no common consensus as to what constitutes those interests or who represents them.

1) A Departure Point for Balancing

One uncertainty lies in identifying the framework in which balancing is to take place. It is unclear whether the balance contemplated by the Court in *Théberge* is a more abstract “balancing approach” to be brought to bear in interpreting the legislation, or whether it is a matter of striving to give substance to the balance already identified by Parliament in the text of the legislation. The Federal Court of Appeal in *CCH Canadian Ltd.* would seem to have favored the latter approach. Linden J.A. for the majority noted: “Canadian courts must always be careful not to upset the balance of rights as it exists under the Canadian Act.”²⁴

By contrast, the Supreme Court of Canada in *Théberge* appears to suggest that the balance is one that is mandated by the inherent nature of copyright law.²⁵ In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Court does seem to go outside the boundaries of the legislation to strike its balance. In interpreting the scope of the fair dealing exceptions, the Court not only characterizes them as “users’ rights,”²⁶ but gives them a broad interpretation that is a significant departure from past Canadian approaches.²⁷ Relatively little attention is given to examining the overall content, structure,

24 *CCH Canadian Ltd.* (FCA), above note 16 at para. 22.

25 The impact of this approach is less clear in *Théberge*, above note 2, where the Court was interpreting the term “reproduction” used in the legislation. The balance in *Théberge* was ultimately between the moral and economic rights contained in the *Copyright Act*. In this respect, Margaret Ann Wilkinson suggests that the statement of purpose in *Théberge* was actually *obiter*. See Margaret Ann Wilkinson, “National Treatment, National Interest and the Public Domain” (2003–2004) 1 & 2 *Ottawa Law & Tech. J.* 23 at 37.

26 *Théberge*, above note 2 at para. 48.

27 Vaver is critical of approaches that have sought to construe the fair dealing provisions narrowly as an exception to owners’ rights (Vaver, *Copyright Law*, above note 11 at 171). Certainly the interpretation of the fair dealing provisions in cases such as *Cie Generale des Etablissements Michelin-Michelin & Cie v. C.A.W.-Canada et. al.* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.), have been very restrictive.

and framework of the legislation. Rather, the Court seems to use a broader concept of balance as a departure point for its analysis.²⁸

The difference between the two approaches is significant. In interpreting new provisions which clearly favour (for example) the rights of owners over those of users, a court striving to maintain the balance reflected in the legislation may interpret the fair dealing exceptions with a view to giving effect to this inclination in the legislation.²⁹ By contrast, a court with a view to a more abstract “balance” might give a generous interpretation to so-called “users’ rights”; notwithstanding the fact that other provisions of the legislation suggest that a restrictive approach would be more consistent overall. This is arguably what happened at the Supreme Court of Canada level in *CCH Canadian Ltd.*³⁰

2) Interests in the Balance

Once one gets past the issue of whether to balance interests in the abstract or in the context of the legislation as a whole, it is necessary to determine from the Court’s articulations (and re-articulations) of the purpose of copyright, what interests, even in general terms, are part of the balance, and what relative weight they should be given. Notes of disharmony in the Court’s approach are apparent in the *Théberge* decision itself. Gonthier J., who penned the dissenting opinion, does not expressly reject the statement of purpose of Binnie J. Nevertheless, he states that the primary purpose of the economic

28 *CCH Canadian Ltd.* (SCC), above note 22 at para. 26.

29 Several groups responding to the federal government’s call for comments on their *Consultation Paper on Digital Copyright Issues* (Industry Canada and Heritage Canada, *Consultation Paper on Digital Copyright Issues*, (Ottawa, June 22, 2001); <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rpo1102e.html> [*Consultation Paper*]) expressed concern that the first proposed phase of reforms would deal primarily with strengthening creators’ rights, leaving the legislation unduly weighted towards the interests of creators. See, for example, Canadian Association of Research Libraries (CARL), Submission, September 10, 2001, <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00319e.html>>: “The issues the two departments have selected for inclusion in the two consultation papers are not balanced. Should these issues alone constitute the first legislative reform package, the result would clearly tip the legislative balance in favour of creators and rights owners.” See also: Canada School Boards Association (CSBA), Submission, September 14, 2001, <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00260e.html>>: “Parliament cannot create a balanced law when it does not have all of the issues to be balanced before it.”

30 In discussing the fair dealing exceptions, the Court adopted a set of open-ended factors that could be used to guide a more flexible and contextual fair dealing analysis. *CCH Canadian Ltd.* (SCC), above note 22 at para. 53.

rights in the *Copyright Act* “is to enable the author to profit from his work.”³¹ This suggests a natural rights view, or at least a balancing approach that gives additional weight to authors’ interests.³² Although the unanimous court later takes up Binnie J.’s statement of purpose in *CCH Canadian Ltd.*, it is not entirely certain if there is a consensus (or what such a consensus might be) with respect to the relative weight of the interests in the balance.

The Court in *Théberge* refers to a balance between the public interest and the rights of the creator. This balance is referenced again in *CCH Canadian Ltd.* as reflecting the dual goals of copyright law.³³ However, in *CCH Canadian Ltd.*, the Court discusses the balance between the rights of owners and users, thus seeming to conflate the interests of users with the “public interest.” While this is an interesting perspective, it is not universally accepted that the interests of the public and those of users always coincide. Some have argued, for example, that robust protection for the economic rights of owners best serves the public interest by establishing strong incentives to create new works.³⁴ In current discourse, representatives of the music industry argue that only a high level of protection of owners’ rights will ensure the viability of the music industry.³⁵ In the same vein, some commentators balk at the notion that users have “rights” (as opposed to, for example, limited exceptions).³⁶

31 *Théberge*, above note 2 at para. 141. This tension over the relative weight of the interests in the balance is present in U.S. case law as well. For example, in *Eldred*, above note 3, Ginsburg J. for the majority of the Court expressly rejected the view of Stevens J., in dissent, that the reward to the author is a “secondary consideration” in achieving the constitutional objective of promoting the progress of science and the useful arts. Instead, emphasizing the profit motive, Ginsburg J. stated: “Copyright law serves public ends by providing individuals with an incentive to pursue private ones.” (*Eldred*, above note 3 at 212).

32 Howell also notes the inconsistency between the majority and dissent on this point: above note 11 at 154.

33 *CCH Canadian Ltd.* (SCC), above note 22 at para. 10.

34 See, for example, the submissions of the Canadian Recording Industry Association (CRIA) to the federal government as part of the Copyright Reform Process, September 14, 2001 [*CRIA Submissions*] <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00249e.html>>. Sookman has also argued that “protecting rights holders from having others unfairly appropriate their works is in the public interest.” See Sookman, above note 10 at 25.

35 *CRIA Submissions*, *ibid.*

36 Sookman, above note 10 at 34. Note that in the *CRIA Submissions*, above note 34, the question posed in the Consultation Paper: “How would a ‘making available’ right affect the balances among the various copyright interests” was treated by CRIA as a question exclusively about the interests of various holders of rights (be they copyright or neighbouring rights) in musical works.

In *SOCAN v. CAIP*,³⁷ Binnie J. augments the confusion over the rights or interests in the balance when he states that “This appeal is only tangentially related to holding ‘the balance’ between creators and users.”³⁸ This rephrasing of his statement in *Théberge* would seem to narrow the concept of “public interest” to the interests of users. However he also states that “Section 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright scheme.”³⁹ The message is mixed. Binnie J. opines that the use of the Internet “should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.”⁴⁰ What seems to occur in *SOCAN* is a further subdivision of interests in the balance. The place of creators’ rights is clear, and the Court also acknowledges the category of users’ rights. In addition, Binnie J. seems to separately recognize “tangential” public interests: ones that relate to the growth of the Internet and the digital economy.

Although it may make sense to consider different kinds of interests separately to achieve a more textured approach, there are problems with placing interests in “boxes.” While fostering the growth of the Internet and the digital economy is an important public policy goal in Canada, it is also crucial to the creation, use, and dissemination of a variety of works. It is for this reason that the impact of copyright policy in relation to digitization and the Internet is at the very heart of current debates around copyright law reform.

It is also not necessarily appropriate to conclude that the public interest in a robust Internet is tangential to (or to be given less weight in) any copyright balance. The apparent exclusion of the broader public interest from the balancing approach in *SOCAN* also does not appear to be in step with federal policy more generally. On a number of recent occasions, federal government policy papers have emphasized the importance of copyright law to the development of Canada’s digital economy.⁴¹ For example, a recent report to Parliament noted that alongside the cultural policy objectives of the *Act* are objectives related to using the legislation “as a powerful lever to promote innovation, entrepreneurship, and success in the new

37 Above note 1.

38 *Ibid.* at para. 132.

39 *Ibid.* at para. 89.

40 *Ibid.* at paras. 40 & 131.

41 Departments of Industry and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada, 2001) <<http://strategis.ic.gc.ca/epic/internet/inrcp-prda.nsf/en/rp01101e.html>>.

economy.”⁴² Further, policy documents have also recognized a wide range of interests addressed by copyright legislation, which include those of intermediaries.⁴³

That the “balancing approach” embraced by the Supreme Court of Canada is not a particularly clear-cut formula is evident in subsequent court decisions which have relied upon a balancing of interests to arrive at particular results. The Federal Court of Appeal in *CCH Canadian Ltd.* gave a fairly complex description of the range of public interests served by copyright law:

Copyright law should recognize the value of disseminating works, in terms of advancing science and learning, enhancing commercial utility, stimulating entertainment and the arts and promoting other socially desirable ends. In order to realize these benefits, however, creators must be protected from the unauthorized exploitation of their works to guarantee sufficient incentives to produce new and original works.⁴⁴

Linden J.A. would balance a broad range of public interests with the interests of creators. Although “users’ rights” might be a shorthand for many of these interests, it is a shorthand which underplays the range and depth of interests. The balance to be struck is framed more narrowly in *Robertson v. Thomson Corp.*,⁴⁵ where the majority of the Ontario Court of Appeal paraphrases Binnie J.’s statement in *Théberge* as follows: “The Act thus has two objectives, the provision of access to works and the recognition of the right of the person creating the work to control its use and receive payment. In interpreting the Act, courts must strive to maintain an appropriate balance between the two objectives.”⁴⁶ The weighting of the balance seems even more one-sided in the recent Federal Court of Appeal decision in *BMG Canada Inc. v. John Doe*, where the Court expressed the view that:

42 **Minister of Industry**, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa, October 2002) <<http://strategis.ic.gc.ca/pics/rp/Section92eng.pdf>>, Preface at i.

43 In the recent *Consultation Paper*, above note 29 at 6, there is reference to the fact that “The *Copyright Act* has evolved over time to reflect a balance between the various categories of rights holders, intermediaries and users.”

44 *CCH Canadian Ltd.* (FCA), above note 16 at para. 23.

45 *Robertson v. Thomson Corp.*, 2004 CanLII 32254 (ON C.A.), (2004), <www.ontario.courts.on.ca/decisions/2004/october/C38148.htm>, 243 D.L.R. (4th) 257.

46 *Ibid.* at para. 31.

Intellectual property laws originated in order to protect the promulgation of ideas. Copyright law provides incentives for innovators — artists, musicians, inventors, writers, performers and marketers — to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.⁴⁷

The reference to “fruits of their efforts” harkens back to a natural rights view of copyright. Moreover, the “balance” described here seems to lean predominantly towards protecting the interests of creators through providing adequate incentives. Copyright law is described as “protecting” the promulgation of ideas, rather than “promoting” it.

Up to this point my description has sought to establish that while the Supreme Court of Canada has mandated a “balancing approach” to copyright law, the relevance of the existing compromises reflected in the legislation, the nature of the interests in the balance, and the weight they are to be given remain contentious. In the section that follows I will explore the complexity of some of the interests that feature in this copyright balance.

C. COPYRIGHT INTERESTS

Thus far we have seen several specific interests identified in both judicial and academic statements about copyright purpose. “Creators” are one interest group that features prominently. Creators are hard to ignore, as the legislation specifically links the monopoly rights granted to their original efforts.⁴⁸ The public interest in the encouragement and dissemination of works of the intellect is also identified. This is sometimes translated into “users” rights, suggesting that the end users’ access to works represents the ultimate dissemination of the works. Judicial pronouncements on the copyright balance do not reference “owners” of copyright, but this is a very significant interest.

It is possible to divide these interests into two general categories: owners and creators, and users and society. Within these groups there is such a diversity of constituents that it is safe to say that their interests are not always equally served, or served at all by the same copyright provisions.

47 *BMG Canada Inc.*, above note 15 at para. 40.

48 *Copyright Act*, above note 6, s. 5 states that copyright subsists “... in every original literary, dramatic, musical and artistic work.”

1) Owners and Creators

In *Théberge*, Binnie J., like so many others who have written about the copyright “balance,” refers to the interests of “creators” of works. This plays on the traditional copyright mythology of the centrality of the struggling artist as creator, and links the copyright monopoly to the expenditure of their creative and intellectual efforts. Yet as many have observed, this romantic notion of the author is largely a fiction.⁴⁹ Further, within the spectrum of works created by copyright, the link between the author and her reward is less obvious. Finally, many works are commercially exploited, not by the creator of the work, but by the owner of the copyright. In such a context, the interests of the two may well diverge in terms of the nature of copyright protection afforded. I will deal with each of these points in turn.

First, the romantic notion of the creator is problematic generally, as individuals create within a broader cultural context, and draw upon the works of others who have gone before them in creating their own works. In many ways, then, the creator is a user of works, and the interests of creators and users intersect. In contemporary times, the line between the creation of a new work and the use of the work of another has blurred significantly. *Rogers v. Koons*⁵⁰ and *Campbell v. Acuff-Rose*⁵¹ are two classic examples of an increasingly common phenomenon, where the creator’s borrowing from a previous work raises questions about the boundaries of copyright in the first. Fan fiction,⁵² a phenomenon that predates the Internet, but that has flourished in recent years, also raises similar questions on a more amateur

49 Randall notes that the concept of authors as owners of copyright was an eighteenth century invention. See Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit, and Power* (Toronto: University of Toronto Press, 2001) at 268. See also Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) Duke L.J. 455 at 466–71.

50 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) <www.ncac.org/artlaw/op-rog.html>. In *Rogers*, an infringement suit was brought by a photographer who objected to a sculpture made by the defendant that copied his photograph in three-dimensional form as a kind of social commentary. The photographer was ultimately successful in the suit.

51 *Campbell v. Acuff-Rose*, 510 U.S. 569, <www.law.uconn.edu/homes/swilf/ip/cases/campbell.htm> 114 S.Ct. 1164 (1994). In this case, the plaintiff copyright holder sued the defendant over the defendant’s parody of the plaintiff’s song. The defendant was able to successfully argue that the parody amounted to “fair use.”

52 Traditionally, fan fiction has involved fans of television series’ or movies writing scripts that feature the central characters and general themes of the target series/movie. The Internet has given new life to fan fiction, permitting fan web sites to spring up and host large quantities of stories written by fans that are easily accessible to aficionados the world over.

level.⁵³ In fact, digitization has given rise to a much greater facility for users to create works that are based upon the works of others. On one end of the spectrum, this may involve the creation of their own compilations of works (play-lists, for example).⁵⁴ On the other end, it may involve the substantial modification or alteration of digital content such as movies,⁵⁵ or sampling from music.⁵⁶ A substantial body of work — academic and scientific publication, for example — is also the result of creators building on the works of others. Strong copyright protection for “creators” in these contexts might privilege the first sort of creation by outlawing the second.⁵⁷

The second point is that a very significant number of copyright protected works are not created in a context where there is a clear link between the creation of the work and the incentive provided by the copyright monopoly. The example of academics, who are salaried and write for tenure or promotion rather than for royalties, is an example that has been given before.⁵⁸ However there are many other instances where the link between incentive and creation is indirect. Copyright in works created in the course of employment is owned by the employer;⁵⁹ and a significant volume of copyright protected materials is produced in such contexts. The software industry is but one example — the production of value-added compilations is another. In such contexts, salary and benefits are both the incentive and reward for creation. Although it can be argued that copyright protection

53 See, for example: Meredith McCardle, “Note: Fan Fiction, Fandom, and Fanfare. What’s All the Fuss?” (2003) 9 B.U.J. Sci & Tech L. 433.

54 Copyright can exist in an original selection or arrangement of material, even if the underlying material is in the public domain (as is the case, for example with facts) or the intellectual property of another person (as is sometimes the case with journals or anthologies). *Copyright Act*, above note 6, s. 2 “compilation.”

55 See, for example: René Pepin, “Les consommateurs et les clubs video ont-ils le droit de modifier les films à leur guise?” (2004) 3 C.J.L.T. 57.

56 For a discussion of the creative dimensions of sampling, see Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (New York: Doubleday, 2005) at 61–113 <<http://kembrew.com/documents/mcleod-freedomofexpression3.pdf>>.

57 It would be possible to characterize the result of this process either as a new “work” or as an active and engaged form of consumption of the first work, depending on the nature and circumstances of the work and its creation. See the discussion of transformation in Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004) at 100–7 <www.free-culture.cc/freeculture.pdf>.

58 See, for example, Stephen G. Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” (1970) 84 Harv. L.Rev. 281.

59 *Copyright Act*, above note 6, s. 13(3).

provides the basis for the company's ability to continue to pay its employees, and thus encourages the creation and dissemination of work, this link is far from direct. In many cases, uncertainty about copyright protection has not stopped the production of such works. For example, the uncertain scope of protection for compilations of fact has not brought the production of fact-based compilations to a halt.⁶⁰ In fast-moving industries, particularly in the software and information sectors, being first to market may be more significant to a company's success than robust copyright protection. In more mundane contexts, wedding and event photographers, for example, will be hired to take photographs regardless of the strength or weakness of copyright protection.⁶¹ While I do not mean to minimize the importance of copyright protection to the production of many kinds of works, my point is that the link between the copyright incentive to create and the creation of works that are protected by copyright is not always a direct one. The level of robustness actually required to produce the desired balance may vary from sector to sector.⁶²

The fact that copyrights are often commercially exploited by owners who are not creators is also significant in considering a balance between "creators" and society more generally.⁶³ While in many cases there will be

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- 60 The issue of whether there was copyright in in-column phone book listings was litigated over a number of years in *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1996), 74 C.P.R. (3d) 72 (F.C.T.D.) <<http://reports.fja.gc.ca/fc/1998/pub/v2/1998fc21425.html>>, aff'd [1998] 2 F.C. 22; (1997), 76 C.P.R. (3d) 296 (F.C.A.), leave to appeal to S.C.C. denied, [1998] 1 S.C.R. xv, before being resolved in the negative. The Federal Court of Appeal decision in that case did not, however, clearly resolve the issue of the standard for originality in Canada. Although *CCH Canadian Ltd.* (SCC), above note 22, has ostensibly settled this issue, the issue of originality of any compilation of factious will ultimately be determined on a case by case basis. Canada has no *sui generis* protection for compilations of fact.
- 61 Currently, absent any agreement to the contrary, a person who commissions a portrait holds copyright in any event. This is slated to change in the current round of reforms.
- 62 With Crown copyright the incentive to create is generally entirely absent. In some cases, such as the legislative or judicial context, the creation of works is actually mandated by law. For a discussion of some of the issues relating to Crown copyright see: W.T. Stanbury, "Aspects of Public Policy Regarding Crown Copyright in the Digital Age" (1996) 10 I.P.J. 131, Jacques Frémont, "Normative State Information, Democracy and Crown Copyright" (1996) 11 I.P.J. 19; Teresa Scassa, "The Best Things in Law are Free: Towards Quality Free Public Access to Primary Legal Materials in Canada" (2000) 23 Dalhousie Law Journal 301.
- 63 Randall, among others, notes that copyright law has its genesis in measures designed expressly to support the print industry (Randall, above note 49 at 81).

a concrete link between the ability of an owner to exploit a copyright and the reward for the creator, this is not always the case, or it does not always trickle down in the manner one might expect. For example, an author of a book will likely not be able to get her book published and properly marketed without the involvement of a publishing company. That company will not publish the book unless they are reasonably confident they will get a satisfactory return on their investment in the publication and marketing of the work. The level of copyright protection available has a real impact on their decision to publish the book, and thus on the author's ability to gain a revenue stream from their work. Typically, a publishing company will only publish the book if the author assigns copyright to them; the author's reward comes in the form of royalties paid on the basis of sales. Again, the amount of money received by the author will be affected by the robustness of copyright protection, as the author will receive nothing if readers are acquiring unauthorized copies of the book. Thus, the robustness of the copyright scheme has an impact on the incentive the author has to continue to write and publish.

However, relationships between owners and creators vary. In its submissions on the current Canadian copyright reform process, the Canadian Association of University Teachers noted that: "While the interests of creators and owners can sometimes coincide, in other instances they do not."⁶⁴ Fisher argues that in the music industry the traditional relationships between creators of musical works and recording companies do not necessarily translate high profits for copyright owners into stable revenue streams for artists.⁶⁵ Further, his argument suggests that the music industry's business model may actually limit the creation and dissemination of works, and the range and diversity of works created.⁶⁶ In such a context,

See also Goldstein's discussion of the emerging importance of rights *owners* in the wake of the development of print technology: Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, Revised Edition, (Stanford: Stanford University Press, 2003) at 31–33. Although the rhetoric used invoked the right of an author to the fruits of his labour, the economic reality was that of an industry struggling to enforce monopolies with a view to the economic bottom line.

64 Submissions of the Canadian Association of University Teachers (CAUT) on the Copyright Reform Process, September 14, 2001 <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00333e.html>> [CAUT Submissions].

65 William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004) at 54–59.

66 Fisher makes this argument with respect to both the music and film industries in the United States. He notes that the drive in both industries to maximize

strong copyright protection may bolster the bottom line of certain industries, but may not serve the purpose of encouraging a broad and diverse musical culture.

Thus the interests of owners (in many cases, corporate or industry owners) are focused on a bottom line that is dependent both on strong copyright protection and on creators of content. However, the bottom line may depend more upon the ability to fully exploit a limited range of works than on the proliferation of a diverse body of works by a multiplicity of creators. While the interests of corporate owners are substantial, they are not necessarily aligned with the interests of a broader cross-section of creators.⁶⁷

This discussion is not intended to be comprehensive. The main point is that the interests of “creators” are not uniform, and that “creators” are not synonymous with “owners.” Not all creators are copyright owners, and those that are may remain owners only for a short period of time. Creators are also users of works. The ability to actually access and use other works may be central to their creative activity.

2) Users and Society

The public interest in the encouragement of creation and the wide dissemination of works presumably serves the interests of further creation and the growth of knowledge and culture. It thus assumes that *uses* of works will be in some way productive. As a result, the analytical focus is turned on “users” of works. Yet it is unfortunate that the word has become shorthand for the interests to be balanced against those of “creators.” This is a loaded term; the word “user” is often applied in a pejorative manner

returns by focusing attention on a limited range of high volume products has led to homogeneity in mainstream cultural products. See Fisher, *ibid.* at 80–81. A recent major OECD study notes that studies have shown “most musicians embrace the Internet as a creative workspace where they can collaborate and promote their works.” The report also notes that “artists are divided about the impact of unauthorized file-sharing on the music business.” Organization for Economic Co-operation and Development (OECD), Working Party on the Information Economy, Digital Broadband Content: Music, (OECD, June 8, 2005) at 11 <http://cyber.law.harvard.edu/digitalmedia/music_dsti_iccp_ie_2004_12_final_eng.pdf> [OECD Report].

67 The potential divergence of interests between creators and owners is also noted by Kerr *et al.*: Ian R. Kerr, Alana Maurushat, & Christian S. Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002–2003) 34 Ottawa L.R. 73 <www.commonlaw.uottawa.ca/faculty/prof/ikerr/CVArticles/Technological%20Protection%20Measures%20-%20Tilting%20at%20Copyrights%20Windmill.pdf> at para. 116.

in other contexts,⁶⁸ and suggests a one-sided, non-productive drain on resources. A great deal of media attention has lately been given to accusations by copyright owners (typically in the film and music industries) that those who copy or download their works from the Internet are pirates or thieves. In fact, much of the public discourse about copyright characterizes users of works as parasites, thieves, or pirates.⁶⁹ Although this is, in part, a rhetorical device used by industries to frame their case for robust copyright protection as strongly as possible, the rhetoric has had some persuasive effect.⁷⁰

Yet this is an impoverished and superficial view of both “users” and the uses they make of works. Current uses of digital works are not always parasitic — the line between users and creators can be blurred, where users are actually engaged in transformative behaviour. **A user who creates their own playlist has created a compilation that in and of itself is a “work.”** While their creative input is relatively minor compared to that of the artists whose works are featured in the list, and while copyright law does not excuse compilers from getting authorization for the works they include in their compilations,⁷¹ the point is that something original may have been added. The degree of creative input may vary depending on the type of use. Clearly, some uses of digital content do reflect original creative input, and where the boundaries between the rights of the competing “authors” may

68 The *Oxford English Dictionary* definition of “user” includes: “1.b. A person who takes narcotic, etc., drugs” and “3. A userer.” *Oxford English Dictionary*, 2nd Ed., Vol. XIX, (Oxford: Clarendon Press, 1989) at 357.

69 A quick glance at the website and press releases of the Recording Industry Association of America shows frequent references to file-sharing using the following terms: “piracy,” “illegal,” “abusers,” “quality of life crimes,” “music theft,” and so on. See online: Recording Industry Association of America: <www.riaa.com/default.asp>. The Canadian Recording Industry Association is more subdued in its rhetoric, but nonetheless refers to music downloading as “piracy,” notwithstanding the unresolved legal issues relating to music downloading in Canada. See, for example: Canadian Recording Industry Association, “News Release: Canadian recording industry welcomes music piracy decision,” online: <www.cria.ca/news/190505_n.php>.

70 Binnie J. in *SOCAN*, above note 1, at para. 131, stated, in referring to the s. 2.4(1) (b) exception for ISPs: “Parliament made a policy distinction between those who abuse the Internet to obtain “cheap music” and those who are part of the infrastructure of the Internet itself.” The comment seems to take as a given that file-sharers are engaged in abusive or unjust activity.

71 In *Robertson*, above note 45, part of the dispute centered around whether the defendant publisher had obtained sufficient permission from freelance authors to include their writings in an electronic database compilation.

be a matter of dispute, as they are in other media,⁷² it is not appropriate to dismiss all such efforts as parasitic.

It would also be a mistake to assume that all users share the same interests or even engage in the same kinds of activities. Certainly copyright legislation already draws distinctions between categories of users and kinds of uses. Specific exemptions are aimed at schools,⁷³ libraries,⁷⁴ and archives,⁷⁵ and the fair dealing provisions protect dealings with works only for specific purposes.⁷⁶ Similarly, in *CCH Canadian Ltd.*, the Supreme Court of Canada struggles to articulate a basis for distinguishing between different types of uses.⁷⁷ In the discussion which follows, I will divide uses of copyright protected works into four general categories, and discuss the characteristics of “users” with respect to each. The categories are consumption, transformation, access, and distribution.

a) Consumption

If stealing is one popular way of characterizing certain uses of copyright protected works, consumption is its flip-side. Many industry advocates view those who use the works they produce as consumers of those works. Consumers who do not pay for what they consume are thieves. On this

72 For example, in *Rogers v. Koons*, above note 50, the dispute was over the boundaries of authorship and fair use as between a photograph and a sculpture. In a recent article, Ann Bartow argues that the risk of litigation faced by creators who build on the works of others can be chilling of expression, and she argues that courts should be careful in how they determine whether “substantial taking” has occurred. See Ann Bartow, “Copyrights and Creative Copying,” (2003–2004) 1&2 *Ottawa J. Law & Tech.* 77.

73 *Copyright Act*, above note 6, ss. 29.4–30.

74 *Ibid.*, ss. 30.1–30.4.

75 *Ibid.*

76 *Ibid.*, ss. 29, 29.1 & 29.2.

77 McLachlin C.J., in setting out the test for fair dealing, suggests that some uses are likely to be more fair than others, depending on their purposes. For example, she states: “some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.” (*CCH Canadian Ltd.* (SCC), above note 22 at para. 54). I am critical of this elsewhere because, in a statute where the allowable fair dealing purposes have already been set out in a very limited fashion, it seems inappropriate to further limit them by making distinctions on the basis of altruistic or non-altruistic purposes. (See Teresa Scassa, “Recalibrating Copyright Law? A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*,” (2004) 3 *Canadian Journal of Law and Technology* 89).

model, one either pays for one's ability to consume a work, or one steals it. In either event, the user's role is to passively consume works.

If users of copyright works are simply consumers of those works, then it is relatively easy to justify copyright reforms that strengthen the ability of copyright owners to prevent unauthorized uses. The argument is that the public interest is served by allowing consumers to consume cultural products, or by providing them with entertainment products which enhance their enjoyment of life. In this model, the user's desire to consume can generally be met by the market. This attitude or approach is reflected in certain exceptions already in the *Copyright Act*. For example, the need of disabled "consumers" of copyright works to have access to works in alternate formats can be met without copyright infringement so long as the market has not provided an alternate format version.⁷⁸ Once such a version is made commercially available, there is no longer any justification for an unauthorized reproduction to enhance access. The focus in such situations is on whether the market — whether the owners of copyright — can meet the need for consumption. If they can, there is no need to provide users with any exceptions from the basic rules of copyright. Provisions which enable collective management of copyright, as well as systems such as the private copying regime, all have as their basis this conception of the user as consumer, with the challenge of copyright law being how to ensure that the consumer has access to the work and that the "creator" is compensated for the consumer's uses of works.

b) Transformation

It is clear, however, that simple consumption is not an adequate description of the uses made of copyright works. The bitterness in academic circles over this pay-as-you-go mentality imposed upon the educational system⁷⁹ is an illustration of the discontent with a model that views uses of works as simple consumption as opposed to serving some other social benefit such as education, the advancement of knowledge, or the fostering of the creation of new forms of work. Pay-as-you-go consumption models with unduly limited access (and cost is a limitation) can ultimately hamper social progress and development. Further, the user as consumer model ignores the fact that many uses of copyright protected works are transformative, resulting in new works. Thus uses may be production and not simply consumption.

78 See *Copyright Act*, above note 6, s. 32(3).

79 See, for example, *CAUT Submissions*, above note 64.

The existing fair dealing provisions of the *Copyright Act* arguably recognize transformative or value-added uses that go beyond mere consumption. However, these have long been criticized for the narrow way in which they are framed.⁸⁰ The law recognizes dealings with copyright works that are fair, and that are for one of a limited and specific set of purposes: criticism or commentary, news reporting, research, or private study.⁸¹ They do not address the difficult issues raised in the fields of both art and literature over the boundaries between a new work which references a previous work, and the previous work itself.⁸² They arguably also unduly limit or exclude more creative forms of criticism, such as parody.⁸³ In a context where copyright law has expanded to cover, for example, works such as fictional characters, they also do not address the relationship of iconic characters to the culture which has produced them.⁸⁴ That the law makes space for some transformative uses of copyright works is clear. A lively issue for debate, however, is whether these uses are sufficiently recognized, or whether the public interest in such uses has adequately been explored.⁸⁵

80 In *CCH Canadian Ltd.*, McLachlin C.J., for the unanimous Court, stated: "...these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights." (*CCH Canadian Ltd.* (SCC), above note 22 at para. 54.)

81 *Copyright Act*, above note 6, ss. 29, 29.1, & 29.2.

82 *Rogers v. Koons*, above note 50; *Acuff-Rose*, above note 51.

83 **Parody can be present across various media and forms of creative expression.** For Canadian cases on parody, see: *Michelin*, above note 27; *British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378* 2001 BCSC 156 (CanLII), <www.canlii.org/bc/cas/bcsc/2001/2001bcsc156.html>, (2001), 10 C.P.R. (4th) 423 (F.C.T.D.); *Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs(euses) de la Rotisserie St-Hubert De Drummondville (C.S.N.)* (1986), 17 C.P.R. (3d) 461 (Q.S.C.).

84 For example, I have argued elsewhere that the iconic power of corporate logos should be taken into account in considering the legitimacy of parodies of those logos. To limit the ability of critics to reference this power may be to unduly limit critical expression. See Teresa Scassa, "Intellectual Property on the Cyber-Picketline: A Comment on *British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378*," (2002) 39 *Alberta Law Review* 934 at 957.

85 **Fewer**, above note 9 at para. 46, argues that in the case of many transformative uses of works, the copyright owners may be unwilling to licence the use. In such contexts, he argues "the infringing author's interests in the copyright work encompass values at the core of freedom of expression. The copyright owner, conversely, is usually motivated by the impulse of the censor." Fewer argues that the constitutional value of freedom of expression (and the public interest associated with this value) are thus engaged. Randall notes, with respect to this form of creative activity: "'Appropriation' appears to be neither theft,

c) Access

Another form of “use” that is becoming increasingly an issue in the digital environment is what I would call access. By access I mean something different from the ability to access a work so as to consume it. In using the term “access” what I refer to is the ability to have access to copyright works in the place, time, and modality of one’s choosing. In the classic *Sony Corporation of America v. Universal City Studios Inc.*,⁸⁶ this form of access, through the video-taping of television programming, was referred to as time-shifting. In *A & M Records, Inc. v. Napster, Inc.*,⁸⁷ it was argued that Internet file-sharing could be used so as to facilitate “space-shifting” by users. Consumers have long sought to make tape copies of music recordings which they own so that they can listen to those recordings on a Walkman or in their car. Currently, MP3 players and digital music files serve these so-called space-shifting needs. These uses could be characterized as another version of consumption, raising the same issues, and requiring the same solutions. However, they do raise questions about distinct public interests or benefits. The desire for increased flexibility in how to consume copyright works has been a boon for certain electronics industries, and it is arguable that this desire has fueled technological and economic development in the public interest. Beyond that, it has been argued that flexible modes of consumption have increased the variety and volume of consumption of works.⁸⁸ This may ultimately serve the interests of copyright owners; it most likely also serves the public interest. If consumption of cultural works is seen as producing social benefits, greater consumption should arguably produce greater benefits — especially when the technology also facilitates more selective consumption.⁸⁹

opportunism nor plagiarism; it is simply the inevitable consequence of the convergence of technology and ideology. As such it is seen by some to be a natural evolution only threatening those species already on the road to extinction.” (Randall, above note 49 at 262).

86 *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417, <www.law.cornell.edu/copyright/cases/464_US_417.htm> 104 S.Ct. 774 (1984).

87 *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000); <www.law.uh.edu/faculty/cjoyce/copyright/release10/AMRecords.html> 239 F.3d. 1004 (9th Cir. 2001).

88 *OECD Report*, above note 66 at 11.

89 Fisher explores how digital technologies and the Internet have given rise to an unprecedented ability for consumers to choose what cultural products they will consume, and where and how they will consume them. See Fisher, above note 65. See also *OECD Report*, *ibid.* at 85.

d) Distribution

The fourth category of use is distribution. The distribution of works, particularly over the Internet, has been a source of great concern to many copyright industries and creators. The Internet allows those who are in possession of digital copies of works to distribute them widely, inexpensively, and rapidly. This is seen as a significant threat to the economic viability of industries, and the ability of creators to obtain a reasonable revenue stream from their works.

These concerns are real and significant. There is much evidence that Internet distribution can significantly undercut the market for copyright works.⁹⁰ However, Internet distribution is not a simple negative to be limited or controlled. In some cases, the ability to distribute works over the Internet is actually seen as an opportunity for many different creators to achieve audiences for their works in contexts where there would have been no commercial market open to them through the traditional industry models.⁹¹ In such cases, it is not distribution over the Internet that is a problem, the problems lie with the level of control a creator (or owner) can have over such distribution.⁹²

Distribution over the Internet has been argued to be equivalent to sharing. The sharing of copyright protected works has always been largely legal. For example, a book purchased at a bookstore could legitimately be

90 For example, CRIA has argued that file-sharing has contributed to Canadian music industry losses of \$465 million over five years: (CRIA, "Facts about file-sharing" <www.cria.ca/filesharing.php> 2005). While there is debate about the actual number of lost sales that can be attributed to file-sharing, as opposed to other phenomena, it seems widely accepted that file-sharing has had some impact on music sales. See Fisher, above note 65 at 5–6. A recent comprehensive OECD study concludes that while there is "currently a considerable volume of copyright infringement that is taking place among users of peer-to-peer networking software," it is still difficult to determine whether there is a causal relationship between documented drops in music sales and file-sharing. *OECD Report*, above note 66 at 11.

91 Fisher, *ibid.* at 26.

92 Proponents of the addition of a "making available right" to the *Copyright Act* argue that this right, which would expressly give owners of copyright the right to make the work available in the digital environment. CRIA argues that such a right is fundamental to "the dissemination of music over digital networks and therefore for promoting the development of electronic commerce and of new business models by the recording industry." (*CRIA Submissions*, above note 34.) Others argue that the making available right is relatively trivial, as such rights are largely already protected by the current legislation. (See, for example, *CAUT Submissions*, above note 64).

shared with any number of friends without falling foul of copyright law. In fact, sharing in such contexts can serve the public interest by exposing more people to cultural works even where cost might otherwise be a barrier to access. It also fosters shared explorations of works, as where friends discuss a book that has been shared between them. Advocates of file-sharing have argued that the Internet has simply facilitated a more widespread form of sharing that serves similar public purposes,⁹³ although this view has also been strongly criticized.⁹⁴ Yet some argue that file-sharing can assist consumers of copyright works in making informed choices about consumption;⁹⁵ can foster criticism, debate, and discussion; and can enhance an individual's overall exposure to works of culture and knowledge.⁹⁶ While this should not all be done at the expense of creators of works, there is a strong argument that there is something here to put in the balance for the interests of society.

Prior to the advent of modern technologies of reproduction and distribution — particularly digitization and the Internet — “users” had implicit rights to share works protected by copyright. The concept that a copy of a work such as a book, once sold, could be shared by as many people as the purchaser chose, or, if placed in a library, could be read by a number of people limited only by the durability of the physical book was generally accepted. Further, the borrower or purchaser of a copy of a book could read all or parts of the book as many times as they chose; could underline or excise passages, and could write comments throughout if they chose. In this sense, it was accepted that consumers of works would have an unsupervised and unlimited form of access to the works. Digitization has given owners of copyright the power to develop models of production and distribution of works that can significantly limit the ways in which consumers interact with works. Where these models are supported by new copyright provisions (such as those relating to TPMs, for example) some would argue that the shift in the copyright balance is a quantum one.⁹⁷

93 For example, Lessig argues that one dimension of file-sharing is the age-old tradition of sharing works in one's possession. Lessig, above note 57 at 179.

94 Lessig goes on to note that when the sharing extends across the Internet, the analogy is defeated. *Ibid.*

95 For example, someone might download a musical work to see if it suits their tastes before committing to purchasing the work. Fisher, above note 65 at 25.

96 Lessig, above note 57 at 8. Fisher argues that online music distribution can also enhance cultural diversity. See Fisher, *ibid.* at 27–28. This point is also noted in the *OECD Report*, above note 66 at 12.

97 This concern is illustrated in the countless critiques that have been made of the TPM provisions of the *Digital Millennium Copyright Act*, Pub.L. No. 105-304,

As Van Houweling points out, more important than an explicit balancing mechanism or users' rights in copyright legislation has been "the simple fact of copyright's practical irrelevance to poorly financed creators."⁹⁸ Her point is that so long as it remained impractical to pursue creators without deep enough pockets to make an infringement suit worthwhile, creative uses of works could still be made around the margins of copyright legislation. In an era, however, where it is possible to encrypt and meter uses, and then to legislate to make it an offence to circumvent the encryption, these creative uses at the margins would be significantly curtailed.

e) The Public Interest

As noted earlier, beyond the interests of "users" of works lies the broader public interest. The public interest is a very difficult concept to pin down. It can be argued (and has been argued) that the more robust the copyright protection, the more likely it is that owners will widely distribute their works.⁹⁹ In this sense, strong copyright protection measures could be argued to best serve the public interest. However, this interest has also been linked to questions of access and use of works. The limited term of copyright protection and the idea/expression dichotomy are cited as examples of ways in which copyright law fosters a public domain. This concept of a public domain — of a robust public domain — is recognized and endorsed by the Supreme Court of Canada in *CCH Canadian Ltd.*¹⁰⁰ Thus it can be argued that the existence of a public domain is considered as an important part of the public interest served by copyright law, even though the size and shape of the public domain may vary from jurisdiction to jurisdiction, and from one legislative reform process to another.¹⁰¹ The concept of the public domain suggests a pool of concepts, themes, and works that can be

112 Stat. 2860 (codified, in relevant part at 17 U.S.C. §1201) (Supp. IV 1999) <www.copyright.gov/legislation/dmca.pdf>. See, for example, McLeod, above note 56 at 259–63; Fisher, above note 65 at 96–98; Lessig, *ibid.* at 160. Kerr *et al.* argue that it would be premature to legislate to offer further protection to TPMs at this point. They take the position that "until the market for digital content and the norms surrounding the use and circumvention of TPMs and their implications for that market become better known, it is simply premature to try to ascertain the appropriate practical legal response" (Kerr *et al.*, above note 67 at para. 254).

98 Molly Shaffer Van Houweling, "Distributive Values in Copyright" (2005) 83 Tex. L.Rev. 1535 at 1545.

99 CRIA, for example, argues that the making available right is crucial to the development of new industry business models. *CRIA Submissions*, above note 34.

100 Above note 22 at para. 23.

101 Wilkinson, above note 25 at 46.

freely drawn upon by those seeking to express their own ideas. The interests of copyright owners (not necessarily those of the creators of copyright works) are best served by a narrow public domain. The rights of creators, users, and society arguably lie with a more robust public domain.

D. CONCLUSIONS

In any process of copyright law reform, a major issue will be the extent to which proposed reforms affect existing balances with the legislation. The Supreme Court of Canada in *CCH Canadian Ltd.* makes it clear that in interpreting the *Copyright Act* it will adopt an approach to individual provisions that considers a more general balance to be struck between competing interests. Thus while the legislative reforms are important in expanding or contracting the economic rights of creators set out in the Act, there is some broader perspective from which courts have now been instructed to consider the interpretation of the law.

The challenge is, of course, in being able to identify and give due weight to the various interests, be they public or private. Past exercises in legislative drafting have left us with legislation that offers, at least in traditional media, robust protection to owners, and fairly narrowly constrained exceptions for free uses of copyright protected works. The challenge for the current copyright reform process is to address the perceived deficiencies in copyright protection in an Internet era, yet to also carve out adequate space for access to and use of copyright protected works.

At a time in history when the technologies by which works are created, reproduced, disseminated and accessed have so rapidly transformed the relationship of people to copyright works (whether as creators, users or both) it is crucially important that our understanding of concepts such as “creators,” “owners,” and “users” do not unduly limit the ways in which we conceive of the copyright balance in our society. Any exercise in balancing interests, whether through law reform or judicial interpretation, should be attentive to the substance, and not just the rhetoric, of the interests involved.