

International Copyright Law: W[h]ither User Rights?

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The only persons who would be benefited by perpetuity of literary property, would be the great publishing houses and corporations, and the dominion of capital would be extended into the intellectual world by a species of literary syndicates.¹

... limits to absolute protection are rightly set by the public interest.²

A. INTRODUCTION

In May 2004, the Standing Committee on Canadian Heritage released its Interim Report on Copyright Reform³ in which it made a series of recommendations for revision of the *Copyright Act*.⁴ The Report was an attempt to “modernize” Canadian copyright law in light of new digital technologies

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- 1 Samuel Edward Dawson, *Copyright in Books: An Inquiry into its Origin, and an Account of the Present State of the Law in Canada* (Montreal: Dawson Brothers, 1882) at 35.
 - 2 From the closing speech of Numa Droz, President of the 1884 Diplomatic Conference that led to the Berne Convention, as cited in Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987).
 - 3 Canada, Standing Committee on Canadian Heritage, Interim Report on Copyright Reform (Ottawa: May 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/03-cov2-e.htm> [the Report].
 - 4 R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42>>.

and, both in tone and tenor, the Standing Committee adopted a vision of copyright reform very much steeped in a copyright industry perspective, thereby restricting to the point of nullifying permitted uses⁵ of copyright works in the digital environment.⁶

In one fell swoop, the Standing Committee would have Canadian copyright law transformed from remedial legislation designed to mediate between a number of legitimate and often overlapping interests, including the public interest in access to copyright works, to one in which the copyright holder's interests are paramount. This position seems to fly in the face of the recent pronouncements of the Supreme Court of Canada that remind policy-makers that:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.... 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.⁷

The Standing Committee also appeared to have disregarded the Supreme Court's ruling that, under Canadian law, user rights, manifesting themselves in a range of legislated permitted uses, are to be accorded equal treatment to those of copyright holders.

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver ... has explained ... : "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."⁸

5 The term "permitted use" will be used interchangeably with the term "limitations and exceptions" throughout this paper to encompass all restrictions on the copyright monopoly recognized under national and international law including "free uses" and compulsory licenses.

6 This is outlined in Recommendations 4–6 of the Report, above note 3.

7 *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 at paras. 30–31.

8 *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 cited to S.C.R.] at para. 48.

In their response to the Report, the Ministers of Canadian Heritage and Industry Canada offered a more balanced approach to the critical copyright issues of the day.⁹ In promising that any amending legislation would address "... the Internet in a manner that appropriately balances the rights of copyright owners to control and benefit from the use of their creative works with the needs of users to have reasonable access to those works,"¹⁰ the Ministers' position appeared more in keeping with the recent decisions of the Supreme Court of Canada.¹¹

On June 20, 2005, the Ministers unveiled Bill C-60, *An Act to Amend the Copyright Act*.¹² The proposed legislation has already garnered much commentary and will likely be the subject of vigorous and polarized debate before it is passed.¹³ Although Bill C-60 addresses some aspects of permitted uses of digital copyright works, the proposals appear to be very limited in scope and so narrowly circumscribed as to render them virtually ineffectual from a user's standpoint.¹⁴ More importantly however, the

9 Canada, Industry Canada and Department of Canadian Heritage, *Government Statement on Proposals for Copyright Reform* (Ottawa: Industry Canada and Department of Canadian Heritage), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html>>.

10 *Ibid.*

11 As expressed in the recent trilogy of cases starting with *Théberge v. Galerie d'Art du Petit Champlain*, above note 7; followed by *CCH Canadian Ltd. v. Law Society of Upper Canada*, above note 9, with *SOCAN v. Canadian Association of Internet Providers*, 2004 SCC 45, <www.canlii.org/ca/cas/scc/2004/2004scc45.html>, [2004] 2 S.C.R. 427 following closely thereafter. In each of these copyright decisions, the Supreme Court of Canada made it clear that Canadian copyright law was not designed solely to serve the interests of copyright holders, but rather must balance a number of different interests including those of users of copyright works. The most important of its decisions in this regard was *CCH* as it dealt specifically with the question of "fair dealing" as a user right within the copyright system.

12 *An Act to amend the Copyright Act*, R.S.C. 2005, c. C-60, amending R.S.C. 1985, c. C-42, <www.parl.gc.ca/38/1/parbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html> [Bill C-60].

13 See for example, "Education Ministers Disappointed with Federal Copyright Legislation," Press Release, 21 June 2005, <www.cmec.ca/releases/press.en.stm?id=30>; "CIPPIC Questions Unbalanced Copyright Bill," Press Release, 20 June 2005, <www.cippic.ca/en/news/documents/Media_Release_-_Copyright_Bill_-_20_June_05_Final.pdf>; "Writers Support Collective Licensing in Digital Environment," <www.writersunion.ca/press/digital.htm>; "Music industry says draft law takes key steps to bring Canada into the digital age," Press Release, 20 June 2005, <www.cria.ca/news/200605_n.php>.

14 See sections 18–19 of Bill C-60, above note 12, that permits certain educational uses of digital works but subjects them to a number of onerous conditions. For

more general and contentious question of the proper breadth and scope of permitted uses in the digital age, particularly in relation to educational uses, has been left off the table for the moment to allow for further public consultation.¹⁵

In anticipation of these consultations and in the hope that Canadian policy-makers will seize that opportunity to more comprehensively address the entire question of user rights, it is important to dispel some of the assumptions upon which the Standing Committee based its recommendations. I am especially concerned about the way in which the Standing Committee interpreted Canada's international treaty obligations, as it reflects some pervasive misconceptions about the nature of international copyright law — misconceptions that are likely to recur if left unchallenged.

B. THE STANDING COMMITTEE'S VIEW OF CANADA'S INTERNATIONAL COPYRIGHT OBLIGATIONS

In the closing paragraphs of the Report, under the recommendation that educational institutions and libraries license directly with individual copyright holders for digital copies of interlibrary loan material, the Standing Committee cautioned:

Another point raised was that Canada must respect its obligations under **international copyright and related rights treaties**, such as the Berne and Rome Conventions, and under international trade agreements, namely the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements establish minimum standards of protection for intellectual property that are bolstered by strong dispute resolution mechanisms.

In addition to these agreements, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), concluded in December 1996, contain special provisions specifically designed to address the challenges posed to copyright by new tech-

commentary see, Michael Geist "Bill C-60 Puts the Padlock on Teachers and Librarians," *Toronto Star*, 27 June 2005, <www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1119823809845&call_pageid=971794782442&col=971886476975>.

15 See "Government of Canada Introduces Bill to Amend the *Copyright Act*," <www.ic.gc.ca/cmb/welcomeic.nsf/o/85256a5d006b9720852570260064a852?OpenDocument>.

nologies in the digital environment. Both these treaties provide that exceptions to the rights set out in them be limited to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Moreover, both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty explicitly state that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WIPO treaties or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.¹⁶

These statements, left unexplained in the Report, appear almost as an afterthought, not clearly integrated into or, indeed, exclusive to the question of digital copyright in interlibrary loans. In fact, the exhortations regarding Canada's international obligations should not be so particularized. They are emblematic of the Standing Committee's overall attitude towards permitted uses of copyright works irrespective of the form these limitations ultimately take — either as “fair dealing” or as the series of specific exceptions contained in the *Copyright Act*.¹⁷

The combined effect of these assertions is to suggest that Canadian copyright law is deficient because it does not provide “minimum standards” of protection for copyright holders and is therefore vulnerable to sanctions under international trade rules. Further, the intimation is that certain types of limitations and exceptions, especially those that provide for “free uses”¹⁸ of digital versions of copyright works would not withstand

16 Above note 3 at 19–20.

17 See for example the comments of the Hon. John Harvard of the Standing Committee:

I think that we have been too quick in this country to say, oh, there's the library, there's the educational institution; they're good boys and girls, we have to give them some help. But sometimes we forget ... and it's the politician who very often is not prepared to go into the taxpayer's pocket for some extra stipend, saying instead, oh, in this case we'll pick on the producer, we'll pick on the creator. And I don't think that's very fair.

<www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81312>.

18 The term “free uses” refers to those that enable users to access works without prior permission and without the payment of a royalty — in other words, “free” in the sense of being unfettered. The “fair dealing” exception is a form of “free use.” The Standing Committee's recommendations to adopt a licensing model for

international scrutiny especially under the *WIPO Treaties*¹⁹ because these treaties require enhanced protections for copyright holders with commensurate restrictions on users' rights. The Standing Committee conjured up the so-called three-step test²⁰ to justify its belief that the international legal order obliges Canada to legislate in an ever-increasing protectionist manner.

Nowhere in its deliberations did the Standing Committee consider Canada's international treaty obligations in light of those provisions specifically directed at the rights of individuals, including creators themselves, to access information and knowledge or to those designed to curb potential abuses resulting from excess control in the hands of copyright holders. While it is true that Canadian copyright policy is increasingly tied to a larger international context that necessarily constrains the way in which we approach copyright issues domestically, it is not correct to assume that

educational institutions and libraries effectively abrogate such "free uses" in the digital environment. This is a clear departure from existing law. As the Supreme Court of Canada asserted in relation to the interplay between fair dealing and licensing systems in *CCH*, above note 8, at para. 70:

The availability of a license is not relevant to deciding whether a dealing has been fair ... If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a license as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly ... in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.

Unfortunately, the Standing Committee's apparent disregard for "fair dealing" even insinuated itself into the copyright permission notice at the front of the Report, above note 3, which reads: "The Speaker of the House hereby grants permission to reproduce this document, in whole or in part for use in schools and for other purposes such as private study, research, criticism, review or newspaper summary." Uses of a work for private study, research, criticism, etc. are "fair dealing" uses for which permission would not be required.

- 19 *WIPO Copyright Treaty*, 20 December 1996, 36 I.L.M 65 (entered into force 6 March 2002), <www.wipo.int/clea/docs/en/wo/wo033en.htm> [WCT] and *WIPO Performances and Phonograms Treaty*, December 20, 1996, 36 I.L.M 76 (entered into force 20 May, 2002), <www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> [WPPT]. Reference to the *WIPO Treaties* in this paper shall mean the two treaties.
- 20 **The Standing Committee refers to the obligation to ensure that exceptions to copyright rights be limited to "certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."** This three-part test is quickly becoming the international standard for measuring copyright limitations and exceptions as shall be discussed more fully below.

Canada's international obligations preclude the recognition of user rights in the form of legislated limitations and exceptions.

I would suggest that the Standing Committee invoked international copyright law as a convenient excuse to advance the result it ultimately sought to achieve, and the ease with which it used the threat of an intractable international context to justify the adoption of a particular domestic policy outcome is particularly troubling. Frankly, Canadians are entitled to expect more from their policy-makers. The simple truth is that international copyright law affords greater flexibility in the formulation of domestic copyright policy than the Standing Committee would allow.

Firstly, the international copyright law system does not mandate or compel specific outcomes for domestic legislation nor does it require the international harmonization of laws. National legislatures retain a great measure of discretion in the way in which they interpret and implement their international copyright obligations.²¹

Secondly, international copyright law is more forgiving to users of copyright works than the Standing Committee would suggest. The various treaties that form the international copyright system all recognize that certain public interest considerations can legitimately override copyright rights. One of the threads that runs through these international instruments is a concern that, without appropriate safeguards, freedom of expression, the dissemination of information, and the advancement of knowledge through education and research would be compromised. In effect, the need to balance a number of different policy interests inheres within the international copyright system itself.

C. CANADA'S EXISTING INTERNATIONAL COPYRIGHT OBLIGATIONS

Canada's existing international copyright obligations can be found in two sets of international treaties: copyright and related rights treaties such as

21 On the diversity of national copyright laws within the international copyright system see J.A.L Sterling, *World Copyright Law*, 2d ed. (London: Sweet & Maxwell, 2003). See as well, H. Patrick Glenn, "Harmony of Laws in the Americas" (2003) 34 *U Miami Inter-Am L Rev* 223 (diversity of laws within the international trade system is the optimal approach) and Myra J. Tawfik, "No Longer Living in Splendid Isolation: National Courts and the Internationalization of Intellectual Property" (publication forthcoming — draft manuscript at <<http://athena.uwindsor.ca/law/tawfik>>) (questioning the legitimacy of harmonization of judicial interpretation).

the *Berne Convention*²² and the *Rome Convention*²³ and international trade treaties such as *NAFTA*²⁴ and *WTO/TRIPS*.²⁵

The starting point for any discussion of international copyright law must begin with the *Berne Convention*, especially the last revision, the Paris text of 1971, to which Canada acceded in 1998. It is the *Berne Convention*, more than any other international treaty, that plays a crucial role in establishing the international copyright framework not only in its own right but also because its key substantive norms have been incorporated by reference into *NAFTA* and *WTO/TRIPS*.

The *Berne Convention* does not merely establish minimum standards for copyright protection; it also sets the parameters for permitted uses of copyright works. For example, the *Berne Convention* recognizes that certain types of works may be excluded from copyright protection entirely — such as legislative texts and other legal materials as well as news of the day.²⁶ The treaty also provides for a series of discretionary “free use” exceptions that allow for unfettered access to a copyright work. For example, Article 2*bis*(2) allows Member States to create an exception to the public communication right for the benefit of Press reporting, broadcasts, and other public communication of lectures, addresses, and similar works where the communication is for the purpose of providing information.

Similarly, Article 10(2) read with 10(3) allows for the use of literary or artistic works to the extent necessary for “illustration in publications, broadcasts or sound or visual recordings for the purposes of teaching” as

22 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised at Paris on 24 July 1971, 1161 U.N.T.S. 30, <www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [*Berne Convention* or *Berne*].

23 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 43, <www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html> [*Rome Convention* or *Rome*].

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. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), <www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78> [*NAFTA*].

25 *Agreement on Trade Related Aspects of Intellectual Property Rights*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), <www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm> [*WTO/TRIPS*].

26 See Articles 2(4), 2(8), & 2*bis*(1). Sam Ricketson refers to these provisions as true limitations to copyright. See “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment,” Report for the Standing Committee on Copyright and Related Rights, 9th Session, SCCR/9/7 (2003), <www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf>.

long as such use is fair and the source is attributed. The *Berne Convention* also recognizes that, in certain situations, the right of an individual to use a work for private, non-commercial, purposes should be permissible.²⁷

Berne also provides for one non-discretionary measure; namely, the right to quote short passages of published copyright works with attribution "... provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose..."²⁸ The mandatory nature of this provision underscores the importance of this act of intellectual self-expression for "users" of copyright works.

Finally, *Berne* allows for compulsory licenses in certain specific cases permitting the work to be used without prior authorization but upon the payment of a royalty. These include exceptions to the exclusive rights of broadcast or public communication and in respect of the making of a new sound recording of a musical work.²⁹

The *Berne Convention* also contains one particular provision that has been the focus of much attention in recent international copyright developments. Article 9(2) provides an overarching formula for measuring the legitimacy of any restriction on the copyright holder's right of reproduction.

Article 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

This provision has provided the model for the now ubiquitous three-step test that has been incorporated into all subsequent trade and copyright treaties. Its incarnation in the *WTO/TRIPS* and under the *WIPO Treaties* will be discussed in more detail later in this paper.

Like *Berne*, the 1961 *Rome Convention*, to which Canada acceded in 1998, sets out not only the rights of performers, producers of phonograms, and

27 In respect of the right of reproduction, Article 9(2) of *Berne* is invoked. Further, *Berne* limits other copyright rights to those performed or communicated in public such that private communications would not infringe. See Articles 11(1), 11bis(1), 11ter(1), 14(1)(ii), & 14bis(1). See also Ricketson, above note 2, and Martin Senftleben, *Copyright Limitations and the Three-Step Test* (The Hague: Kluwer Law International, 2004).

28 Article 10(1) of *Berne*.

29 *Ibid.* For example, see article 11bis(2) read with (3) and article 13.

broadcasters but also provides for limitations and exceptions to those rights for the same public policy objectives that motivated their inclusion within the *Berne Convention*. Article 15(1) of the treaty allows Member States to provide for restrictions for private study, news reporting, teaching, and scientific research. More generally, Article 15(2) permits the same limitations and exceptions to neighbouring rights as are provided for copyright rights.³⁰ Further, there is no restriction on the form that these limitations and exceptions may take, except in the case of compulsory licenses, which are fixed under the terms of the treaty itself.³¹

In sum, contrary to the assertions of the Standing Committee, the *Berne* and *Rome Conventions* are not limited to establishing the normative standards for copyright rights. Rather, they recognize the need to provide for the rights of users to access copyright works in the form of allowable limitations and exceptions and they allow latitude on the part of domestic policy-makers to enact copyright laws to suit their particular national interests.

Does the international trade system especially under the pre-eminent multilateral WTO/TRIPS affect this international copyright context?³² It is true that, under WTO/TRIPS, the copyright standards established under

30 Above note 23 — Article 15:1:

Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

Article 15:2:

Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

31 Articles 7:2(2), 12, & 13(d) of the *Rome Convention*.

32 For the sake of brevity, I will limit my discussion of limitations and exceptions as they appear under the *WTO/TRIPS*. Given that the copyright provisions contained in Chapter 17 of the *NAFTA* mirror very closely the later *WTO/TRIPS* agreement, there is effectively no difference between the two at least insofar as they touch on the issues under discussion in this paper.

Berne and *Rome* have become fully enforceable³³ and there is no question that this enforceability has had a significant impact in shaping domestic copyright law. There is also no doubt that the international trade system, premised as it is upon a belief that the stronger the intellectual property rights, the greater the economic return, has sparked the trend towards a progressive strengthening and deepening of copyright rights. But, as Professor Pamela Samuelson reminds us:

The true mission of TRIPs is not to raise levels of intellectual property protection to ever higher and higher planes, as some rightholders might wish, but to encourage countries to adopt intellectual property policies that promote their national interests in a way that will promote free trade and sustainable innovation on an international scale.³⁴

In fact, *WTO/TRIPS* expressly recognizes the need to mitigate against the harms that a maximalist view of copyright rights can engender. Thus, the Preamble to *WTO/TRIPS* recognizes “the underlying public policy objectives of national systems ... including developmental and technical objectives.” Article 7 of *WTO/TRIPS* cautions that intellectual property rights should “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” Further, Article 8 stresses that “appropriate measures ... may be needed to prevent the abuse of intellectual property rights by right holders ...” These often-overlooked provisions make it clear that international copyright law does not merely serve the interests of copyright holders and that domestic policy-makers retain the ability to craft copyright legislation to take into account the need for balance.

In terms of substantive copyright standards, the *WTO/TRIPS* agreement takes a “*Berne-plus*” approach to international copyright rights by incorporating by reference the norms contained in Articles 1–21 of the *Berne Convention*.³⁵ As has been seen, these norms are not limited to setting out

33 See *Understanding on Rules and Procedures Governing Settlement of Disputes*, 15 April 1994, *WTO Agreement*, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

34 Pamela Samuelson, “Challenges for the World Intellectual Property Organization and the Trade-Related Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age” [1999] 21(11) *EIPR* 578 at 591.

35 Article 9(1). However, moral rights under Article 6bis of *Berne* are excluded from *WTO/TRIPS*.

the rights of copyright holders but also include the various allowable limitations and exceptions to those rights that have been discussed above.

WTO/TRIPS has, however, expanded the three-step test first articulated in Article 9(2) of the *Berne Convention*:

Article 13: Limitations and Exceptions: Members shall confine limitations or exceptions to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Not limited to restrictions on the reproduction right, Article 13 of WTO/TRIPS has been interpreted as the overarching normative standard from which to evaluate all limitations and exceptions that curtail rights conferred under the *Berne Convention* and WTO/TRIPS.³⁶ Its scope has been the subject of much discussion and commentary, including having been at issue in a recent WTO Dispute Panel decision.³⁷ Although the test is emerging as the pre-eminent measure for assessing limitations and exceptions and has found its way from *Berne* to WTO/TRIPS as well as to the *WIPO Treaties*, its interpretation is still evolving.³⁸

While there remains uncertainty about the contours of this test, at least one aspect seems clear: the three-step test does not undermine the discretion enjoyed by national legislatures to enact limitations and exceptions so long as they remain consistent with the *Berne Convention* and conform to the objectives the test was formulated to achieve.³⁹ More specifically,

36 It has been suggested that Article 13 should be read as applying only to the right created under WTO/TRIPS itself; namely, the rental right for software and certain films. The prevailing view is that it should not be so restricted and that it is applicable to the substantive rights conferred under *Berne* as well. See, for example, WTO, *United States — s. 110(5) of the US Copyright Act: Report of the Panel*, 15 June 2000, WTO Doc. WT/DS160/R, <www.wto.org/english/tratop_e/dispu_e/1234da.pdf>, and Senftleben, above note 27.

37 See Panel decision, above note 36.

38 A full analysis of the three-step test is well beyond the scope of this paper. See Senftleben, above note 27, for a detailed exploration of this subject matter. See as well the studies conducted by Sam Ricketson, above note 26, and “The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions: Advice prepared for the Centre for Copyright Studies” (Australia: Centre for Copyright Studies Ltd., December 2002), <<http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf>>. More generally, see Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2^d ed. (London: Sweet & Maxwell, 2003).

39 See Panel decision, above note 36, and Tyler Newby, “What’s Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International

the test does not prevent countries from introducing “free use” limitations and exceptions, nor does it require further restrictions on existing permitted use formulations.⁴⁰

Therefore, Canada’s existing international copyright and international trade obligations do not require even greater restrictions on copyright limitations and exceptions than those already contained within the *Copyright Act*, which has already been amended to take these instruments into account. Truth be told, it was not really Canada’s existing obligations that were at issue in the Report. Rather, it was with a view to ensuring the ratification of the *WIPO Treaties* that the Standing Committee issued its not-so-subtle warning about the dire consequences to Canada should it fail to provide “adequate protection and effective legal remedies” in the digital environment.

D. CANADA’S OBLIGATIONS UNDER THE *WIPO TREATIES*

The *WIPO Treaties* — the so-called “Internet Treaties” — are special agreements under Article 20 of the *Berne Convention*⁴¹ designed to address the impact of digital technologies on copyright holders. Although Canada has signed the treaties, it has yet to ratify them and the first recommendation of the Standing Committee urged that Canada do so “immediately.” Its penultimate recommendation was emphatic about the need to correct the perceived deficiencies in the *Copyright Act*:

Copyright Law?” (1999) 51 *Stanford L. Rev.* 1633. See more generally, Senftleben, above note 27; Myra J. Tawfik, “Is *WTO/TRIPS* User Friendly? Report prepared for the International Trade Treaties Committee of the Canadian Library Association,” January 2005, <www.cla.ca/resources/tawfik_final_report.pdf>.

- 40 See Senftleben above note 27 at 237: “The three-step test ... has always been understood to offer the possibility of setting limits to exclusive rights without remunerating the authors.”
- 41 The *WIPO Treaties* are expressly deemed to be connected to the *Berne Convention* and are expressly not “connected to” any other treaty including *WTO/TRIPS* (see for example, Article 1(1) of the *WCT*). What this means in effect is that the *WIPO Treaty* obligations are not subject to the binding dispute resolution process found under *WTO/TRIPS* and so, contrary to what the Report implies, the threat of a *WTO* challenge for non-compliance would not exist at present. That said, it is likely that these treaties will eventually be incorporated into a next round of *WTO/TRIPS* negotiations, whenever that might take place. See in this regard M. Ficsor, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002) and Gervais, above note 38.

The Committee urges the Government of Canada to take immediate and decisive action on the issues raised in this report. The Committee is convinced that the modernization of Canadian copyright law is of the utmost importance; consequently, it sees it as essential that the federal government work in partnership with Parliament to ensure that all necessary legislative changes to the *Copyright Act* are made immediately.⁴²

Indeed, considerable pressure has been brought to bear on Canada not only to ratify the *WIPO Treaties* quickly but also to implement them in a particular way. This pressure has been greatest from certain sectors of the copyright industry, both domestic⁴³ and foreign.⁴⁴ Not surprisingly, Canada has been placed on the United States Trade Representative's Special 301 Watch List for its failure to bring its copyright law into conformity with the *WIPO Treaties*. Speaking on behalf of the US copyright industry, the USTR also magnanimously offered the desirable model for the implementation of these treaties:

We urge Canada to ratify and implement the WIPO Internet Treaties as soon as possible, and to reform its copyright law so that it provides adequate and effective protection of copyrighted works in the digital environment The United States urges Canada to adopt legislation that is consistent with the WIPO Internet Treaties and is in line with the international standards of most developed countries. Specifi-

42 The Report, above note 3.

43 Among the most vocal has been the Canadian Recording Industry Association, concerned about online music file sharing. See <www.cria.ca/wipo.php>.

44 Regrettably, Canada's entire copyright history is characterized by pressure from the outside, most notably from its more powerful neighbour to the South. Very early on in, in 1895, the Copyright Association of Canada understood that the US would exert a profound influence on the way in which Canadian copyright law would be shaped: "... the geographical position of Canada, side by side with the United States ought not to be overlooked. This fact makes Canada's position very different indeed from that of any other British colony." The Copyright Association of Canada, "Statement issued on the Canadian *Copyright Act 1889*" (Toronto: Copyright Association of Canada, 1895). Nearly 100 years later, a similar sentiment was expressed by A. A. Keyes "What is Canada's International Copyright Policy" (1993) 7 IPJ 299 at 306:

While it is manifest that the interests of Canada lie in minimizing the outflow of copyright royalties and maximizing inflow, the lack of an expressed policy could mean that copyright legislation is being used to pursue other equally undisclosed policy goals. It is significant that in all this the United States plays a dominant, if not always visible, role.

cally, we encourage Canada to join the strong international consensus by adopting copyright legislation that provides comprehensive protection to copyrighted works in the digital environment, by outlawing trafficking in devices to circumvent technological protection measures, and by establishing a “notice-and-takedown” system to encourage cooperation by ISPs in combating online infringements.⁴⁵

To hear it stated by the USTR, the copyright industries and by the Standing Committee itself one would assume that the *WIPO Treaties* focus exclusively on strengthening copyright holders’ rights. Do the *WIPO Treaties* really relegate user rights to oblivion? Of course not. These international conventions contain similar safeguards for users of copyright works as the other treaties outlined above.⁴⁶

In fact, the Preambles to the *WIPO Treaties* go farther than *WTO/TRIPS* in emphasizing the need for balance within the copyright system:

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*.⁴⁷

Further, in the preparatory statements to the 1996 WIPO Diplomatic Conference that led to the *WIPO Treaties*, it was stated:

When a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.⁴⁸

45 United States, Office of the United States Trade Representative, 2005 *Special 301 Report*, <www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html> at 37.

46 For discussion of the negotiations regarding limitations and exceptions under the *WIPO Treaties* see Senftleben, above note 27, and on the influence of the United States in shaping the treaties see Pamela Samuelson, “The US Digital Agenda at WIPO” (1996) 37 *Va. J. Intl. L.* 369, <www.sims.berkeley.edu/~pam/courses/cyberlaw97/docs/wipo.pdf>.

47 Preamble of the *WCT*, above note 19. The Preamble to the *WPPT*, above note 19, is framed in a similar manner: “Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.”

48 WIPO, *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Basic Proposal for the Substantive Provisions of the Treaty on Certain Ques-*

Finally, the *WIPO Treaties* each contain their own iterations of the three-step test, found in Article 10 of the *WCT* and Article 14 of the *WPPT*. According to the agreed statement on Article 10 of the *WCT*:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the *Berne Convention*. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the *Berne Convention*.⁴⁹

This statement makes it clear that existing limitations and exceptions can be extended into the digital world and that Member States can fashion new limitations and exceptions for the networked environment as long as they remain consistent with the *Berne Convention*. In effect, the *WIPO Treaties* form part of and are informed by the entire network of treaties that have set the international framework for both copyright rights *and* their limitations and exceptions.⁵⁰ Nowhere within this broad international legal order is it suggested that Canada adopt a particular international model for permitted uses in the digital environment or that it curtail them altogether. In other words, there exists a range of possibilities available to Canadian policy-makers in enacting copyright limitations

tions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference (held 2–20 December 1996), WIPO Doc. CRNR/DC/4 (1996) <www.wipo.int/documents/en/diplconf/pdf/4dc_e.pdf>, at para. 12.09.

49 *Agreed Statements concerning the WIPO Copyright Treaty*, 20 December 1996, 36 I.L.M. 65 <www.wipo.int/treaties/en/ip/wct/statements.html>.

50 *United States — s. 110(5) of the US Copyright Act: Report of the Panel*, above note 36 at para. 6.70, referred to the *WIPO Treaties* as part of the “overall framework for multilateral copyright protection” and stated that “[t]he *WCT* is designed to be compatible with this framework, incorporating or using much of the language of the *Berne Convention* and the *TRIPS* agreement [I]t is relevant to seek contextual guidance also in the *WCT* when developing interpretations that avoid conflicts with this overall framework, except where these treaties explicitly contain different obligations.”

and exceptions under the *WIPO Treaties* consistent with the overall public interest purposes these restrictions are designed to serve.⁵¹

One recent example of the interpretation of the contours of the three-step test is instructive, emanating as it does from a jurisdiction generally regarded as more “creator-centric” in its copyright tradition than Canada. It serves to dispel any assumption that, as a matter of principles, the *WIPO Treaties* oblige Member States to restrict the scope of copyright limitations and exceptions.

In the decision of the French Court of Appeal in *Stéphane F et L'Union Fédérale des Consommateurs-Que Choisir v. Société Universal Pictures Vidéo France*,⁵² the court held that the reproduction of a recorded work for per-

51 A recent WIPO survey in relation to the *WIPO Treaties* is interesting in this regard as it demonstrates the diversity in the way in which Member States have implemented their treaty obligations, especially in relation to permitted uses. In canvassing the laws of those countries that had ratified the treaties by 2003, it was reported that:

The section on *exceptions and limitations* is the largest single section in the survey; every law surveyed contains provisions on exceptions and limitations. The following exceptions and limitations appear: personal or private use; educational use; use by libraries and archives; making of ephemeral copies by broadcasters; making of anthologies and certain databases; use of a computer program as an adjunct to another legitimate activity; government use; use in court and parliamentary proceedings; use for scientific research; use in conjunction with reporting public affairs and current events; decompilation of computer programs; temporary reproduction; secondary transmissions, such as by cable systems or hotels; reproductions for testing equipment; reproduction for purposes of time shifting; fair use and fair dealing; public display; reproductions in the form of depicting completed buildings and structures; uses for religious and spiritual purposes; uses by handicapped persons; and reproductions and non-voluntary licenses for recording of musical compositions. One law reviewed contains provisions which specify that exceptions and limitations should have no effect on moral rights, while two laws reviewed contain provisions that exceptions and limitations shall have no effect on technological measures of protection.

WIPO, *World Intellectual Property Organization Standing Committee on Copyright and Related Rights: Survey on Implementation of Provisions of WCT and WPPT*, SCCR/9/6 (2003), 9th Sess., <www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_6.pdf> at 3-4.

52 Cour d'appel, Paris, 22 Avril 2005, 4ème Chambre 04/14933, <www.juriscom.net/documents/caparis20050422.pdf>. As a result of this decision, a class action suit against major DVD distributors has been launched by a group of French lawyers claiming that technological protection measures infringe the rights of consumers to make a private copy of their DVDs. See <www.classaction.fr/actions/action1/assignation-cp.pdf>.

sonal use within a family circle was not an infringement of copyright. The right to make a private copy was construed to capture the making of a VHS copy of a lawfully purchased film on DVD for viewing with the purchaser's mother who did not reside with him.

In applying the relevant provision of French copyright law,⁵³ the Court assessed the use in question in light of France's international obligations under the three-step test as enunciated in Article 9(2) of *Berne*:

... il n'est pas expliqué en quoi l'existence d'une copie privée, qui, en son principe et en l'absence de dévoiement répréhensible, ne fait pas échec à une exploitation commerciale normale, caractérise l'atteinte illégitime... l'impossibilité de réaliser une copie n'impliquant pas nécessairement pour le consommateur une nouvelle acquisition du même produit ...

Considérant qu'il n'est pas davantage démontré que l'exception de copie privée aurait été, en l'espèce, à l'origine d'un préjudice injustifié causé aux intérêts légitimes des titulaires de droit; qu'en effect, d'une part, M. F n'a pas outrepassé l'exception de copie privée, le projet de copie étant effectué par lui-même, pour être utilisé, certes à l'extérieur de son domicile, mais dans un cercle familial restreint, d'autre part, en acquérant ce DVD M. F a, au mois pour partie, payé la rémunération destinée aux auteurs en contrepartie de l'éventuelle reproduction. ...⁵⁴

In the Court's view, such a private copy did not impede the normal commercial exploitation of the work and did not unreasonably prejudice the interests of the copyright holder. As such, the technological anti-circumvention measures that prevented the individual from exercising his right to make a private copy were unlawful.

Although France has not yet implemented the EU Directive on *Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*,⁵⁵ designed to permit EU Member States to accede to the *WIPO*

53 The relevant provision of France's *Code de la propriété intellectuelle*, Art. 123(8) C.P.I., <www.celog.fr/cpi>, is Article L122-5 (2):

Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire:

2. *Les copies ou reproductions strictement réservées à l'usage privé du copiste et non destinées à une utilisation collective*

54 Above note 52 at 14.

55 Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (2001), L 167/10, <http://europa.eu.int/information_society/europe/2005/all_about/digital_rights_man/doc/directive_copyright_en.pdf>.

Treaties, the French Court of Appeal did consider the extent to which France's private copying provisions were compatible with the "Internet Treaties." In this regard, the Court held that the domestic legislation was consistent with the Directive in that the latter expressly permitted private copying so long as the copyright holders received equitable compensation, which, under French law, took the form of a levy on black audio-visual recording media.

Considérant que la loi interne n'est pas en contradiction avec la directive 2001/29/CE ... qui dans son considérant 31, met l'accent sur la nécessité de maintenir un juste équilibre en matière de droits et d'intérêts entre les différentes catégories de titulaires de droits ainsi qu'entre celles-ci et les utilisateurs d'objets protégés et qui, par l'article 5-2b) laisse aux Etats membres le soin de prévoir une exception au droit de reproduction "lorsqu'il s'agit de reproductions effectuées sur tout support par une personne physique, pour un usage privé et à des fins non directement ou indirectement commerciales, à condition que les titulaires de droits perçoivent une compensation équitable; qu'ainsi, l'exception de copie privée est toujours possible en droit interne."⁵⁶

The French Court of Appeal stressed not only the need to ensure a "just equilibrium" between copyright holders and users in a digital environment but also emphasized the discretion that continues to exist for national legislatures to fashion copyright exceptions that suit their own individualized copyright contexts. Canadian policy-makers would do well to take note.

E. CONCLUSION

It is likely that the debate over copyright limitations and exceptions will continue to be contentious both at the national and international levels. To date, copyright holders have been very successful in pressing for a view of copyright that advances their own specific interests and undermines the legitimacy of any limitations on their rights. It is imperative that Canadian policy-makers not automatically conflate these right-holder interests with the public interest. They must also not make quick and superficial assumptions about Canada's international copyright obligations for, in so doing, they risk defining national policy in a manner that may not only be contrary to domestic interests but which is not at all necessitated by the

⁵⁶ Above note 52 at 13.

international copyright system itself. It was in this respect that the Standing Committee failed so grievously in its mandate.

As has been seen, nothing in the texts of any of the international treaties or in their interpretation ought to lead Canadian policy-makers to the conclusion that their international obligations, including those under the Internet Treaties, require them to eviscerate user rights. What possible justification could there be for advancing a domestic copyright policy that is more restrictive than what the international copyright system would permit? If policy-makers place further restrictions on user rights than those already imposed under the *Copyright Act*, it is much less about Canada's international obligations than it is about placating special interests.

It is true that Canadian domestic law is increasingly informed by international considerations and, in truth, by international constraints. However, raising the spectre of a violation of Canada's international obligations in order to adopt a position that favours one set of copyright interests over other equally compelling ones is both spurious and duplicitous. There is greater scope to manoeuvre under the international system than the Standing Committee would have us believe.

It is incumbent upon Canadian policy-makers to fashion legislation that genuinely reflects the society in which Canadians want to live — one that not only respects the rights of creators to benefit from their works but also allows individuals their right to freedom of expression, to pursue their educational and research aspirations, and to contribute to the advancement of knowledge free from unreasonable fetters: in other words, the very aims that international copyright law, through its system of limitations and exceptions, seeks to uphold. To do otherwise — to shrug one's shoulders as if to say “we are powerless in the face of our international obligations” — is disingenuous and does all Canadians, including “creators” and “users,” a great disservice.

