

Deflating the Michelin Man:

Protecting Users' Rights in the Canadian Copyright Reform Process

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One of the public policy principles underlying the Act is the need to maintain an appropriate balance between the rights of copyright owners and the needs of intermediaries and users.¹

A. INTRODUCTION

On 20 June 2005, the Canadian government introduced Bill C-60, *An Act to Amend the Copyright Act*.² Bill C-60 resembled in many ways the government's March 2005 announced intention to table legislation proposing

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1 [Emphasis added.] Canada, *Government of Canada Statement on Proposals for Copyright Reform* (24 March 2005), online: <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html>> [Statement].

2 Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2004-2005, <www.parl.gc.ca/common/Bills_House_Government.asp?Language=E&Parl=38&Ses=1#C-60>.

certain copyright reforms (the “Statement”).³ The Statement was issued contemporaneously with the government’s response to the Standing Committee on Canadian Heritage’s (“SCCH”) May 2004 *Interim Report on Copyright Reform* (the “Interim Report”).⁴ Despite the profound impact of copyright itself and the would-be protection of technological protection measures (“TPMs”) on freedom of expression, neither the Statement nor the Interim Report⁵ even adverted to this *Charter* protected right.⁶ Instead, the Statement mischaracterized the constitutional and statutory rights of users as “needs,” in notable contrast with the “rights” of copyright holders.⁷ Unfortunately, Bill C-60 appears equally inattentive to the rights of users.⁸

While the *Copyright Act* (the “Act”)⁹ confers certain rights on copyright holders, the Supreme Court of Canada (“SCC”) has also confirmed that the Act confers rights on users that are designed to serve the public interest in a healthy and innovative marketplace of ideas.¹⁰ Largely absent, both now and throughout the history of Canadian copyright law,¹¹ has been express recognition that since the entrenchment of the *Charter* in 1982,

3 Above note 1.

4 Canada, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage* (Canada: May 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirpo1-e.htm> [Interim Report].

5 The Interim Report referred to the *Charter* only once — and most likely in relation to the process protections guaranteed by s. 7 of the *Charter*, rather than to the s. 2(b) rights relating to freedom of expression. Specifically, it recommended that ISPs with actual or constructive knowledge of infringing content be “required to comply with a ‘notice and takedown’ scheme that is compliant with the Canadian Charter of Rights and Freedoms”: Interim Report, *ibid.* at 7.

6 Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 2(b), <www.canlii.org/ca/const_en/const1982.html> [*Charter*].

7 Interim Report, above note 4 at 16, 19; Statement, above note 1.

8 Jack Kapica “Copyright bill satisfies recording industry” *Globe and Mail* (20 June 2005), online: <www.globetechnology.com/servlet/story/RTGAM.20050620.gtbbillo620/BNStory/Technology/> [Kapica].

9 R.S.C. 1985, c. C-42, as am., <www.canlii.org/ca/sta/c-42/> [the Act].

10 *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 at paras. 11–12, 48; 2004 Can. Sup. Ct. LEXIS 15 [*CCH* cited to S.C.R.].

11 With respect to the largely unexplored connection between the *Charter* and copyright in Canada, see: David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 U.T. Fac. L. Rev. 175 [Fewer]. See also: Ysolde Gendreau, “Canadian Copyright Law and Its Charters” in Jonathan Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech* (Oxford: Oxford University Press, 2005) 245 [Gendreau].

whenever Parliament purports to exercise its section 91(23)¹² power in relation to copyright, its exercise of that power must conform with the *Charter*-protected right to freedom of expression.¹³ Protection of users' rights is essential to maintaining a balance within the Act consistent with that constitutional guarantee.¹⁴ In proceeding on any purported¹⁵ exercise of its copyright power, the federal government should take into consideration *Charter*-based concerns relating to the constitutional validity of the current Act, which stand only to be exacerbated by explicitly extending legislative protection to TPMs.¹⁶

Bill C-60 and the Statement, without explicitly recognizing the *Charter* protected rights of users, suggest a potentially more equitable compromise between users' rights and those of copyright holders than did the Interim Report.¹⁷ The Bill also appears to have been drafted with a view to better protecting freedom of expression than does the United States' legislative

12 Section 91(23) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, as am. [*Constitution Act 1867*] identifies "copyrights" as falling within the legislative jurisdiction of federal Parliament.

13 *Charter*, above note 6, s. 2(b).

14 The SCC has made clear that the exercise of s. 91 and 92 powers is subject to *Charter* review: *New Brunswick Broadcasting Co. v. Nova Scotia*, 1993 SCC 10, <www.canlii.org/ca/cas/scc/1993/1993scc10.html>, [1993] 1 S.C.R. 319 at 392; see also *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 SCC 53, <www.canlii.org/ca/cas/scc/1991/1991scc53.html>, [1991] 2 S.C.R. 158 at 192.

15 As others have pointed out, there is also a serious question as to whether extending protection to TPMs falls within the federal head of power under s. 91 of the *Constitution Act 1867*: Jeremy deBeer & Guy Régimbald, "Constitutional Authority Over Copyrights & Private Copying," <<http://ssrn.com/abstract=720223>>. Full text: <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID731943_code395605.pdf?abstractid=720223&mirid=1>.

16 As Kerr, Maurushat, & Tacit have noted, copyright holders and TPMs are arguably already protected by two layers of law in Canada — copyright law and contract law: Ian Kerr, Alana Maurushat, & Christian Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002–2003) 34 *Ottawa L. Rev.* 7 at 43–45, <www.commonlaw.uottawa.ca/faculty/prof/ikerr/CVArticles/TechnologicalProtectionMeasures-TiltingatCopyrightsWindmill.pdf> [Kerr *et al.*].

17 The Interim Report, for example, simply recommended ratification of the WIPO Treaties (*World Intellectual Property Organization Copyright Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [WCT] and *World Intellectual Property Organization Performances and Phonograms Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [WPPT]) without analysis of the impacts of extensive protection of TPMs on the common law balance between users' and copyright holders' rights. For a brief analysis see: Russel McOrmond, "CIPPIC/PIAC Responds to Bulte Report on Copyright Reform" *Digital Copyright Canada* (21 June 2004), online: <www.digital-copyright.ca/node/view/410>.

response to online copyright issues in the *Digital Millennium Copyright Act* (“DMCA”).¹⁸ Not only should the Canadian government stand firm against pressures from south of the border to exponentially expand legal protections for TPMs,¹⁹ it should further tailor the proposed legislation to better protect the constitutional rights of users.

The implications of Bill C-60’s TPM-related proposals for freedom of expression will be explored in three parts. Part I contrasts the TPM-related recommendations in the Interim Report with those contained in the Statement and Bill C-60, noting the Bill’s proposal to tie legislative protection for TPMs to acts of infringement as currently defined in the Act. Part II explores the relationship between freedom of expression and Canada’s existing copyright regime, suggesting its constitutional validity should not be presumed. Part III explores the ways in which legislated protection of TPMs would deepen the Act’s incursion on freedom of expression. It notes the ways in which Bill C-60 could minimize that incursion, but also suggests further constitutional contouring to ensure that any future legislation to protect TPMs more explicitly recognizes and protects users’ rights and the public interest.

18 *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as various amended sections of 17 U.S.C.), <<http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.ENR:>>. The focus of this article will be on comparing the Canadian and U.S. responses, although numerous other countries have also domestically implemented the WIPO Treaties. For a helpful summary, see: Kerr *et al.*, above note 16 at 58–64.

19 See U.S., The United States Trade Representative, *Special 2005 301 Report* (May 2005) at 37–38, <www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf>: “The U.S. copyright industry is concerned about proposed copyright legislation regarding technological protection measures and internet service provider (ISP) liability, which if passed, would appear to be a departure from the requirements of the WIPO Internet Treaties as well as the international standards adopted by most OECD countries in the world. 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. Specifically, 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.”

B. THE INTERIM REPORT, THE STATEMENT, AND BILL C-60

The Interim Report referred to TPMs on only four occasions, primarily to suggest that technological measures alone were insufficient to protect the interests of copyright holders.²⁰ Nonetheless, the Report explicitly recommended immediate ratification of the WIPO Treaties,²¹ noting the requirement for their signatories to 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.²²

The Interim Report also recommended development of licensing schemes for material that is not publicly available on the Internet, defining “publicly available” in part by reference to whether access to or use of that material is limited by a TPM.²³

In contrast with the Interim Report’s broad-brush endorsement of extending legal protection to TPMs, the Statement recommended what appeared to be more specific and discrete protections relating to TPMs, which the federal government claimed would provide:

- “rights holders with greater confidence to exploit the Internet as a medium of dissemination”;
- “consumers with a greater choice of legitimate material”; and
- “stronger remedies against the misuse of the Internet for disseminating material which infringes copyright.”²⁴

With respect to TPMs, the Statement specifically proposed:

[T]he circumvention, for infringing purposes, of technological protection measures (TPMs) applied to copyright material would itself constitute an act of infringement of copyright. Copyright would also be infringed by persons who, for infringing purposes, enable or facilitate circumvention or who, without authorization, distribute copy-

20 Interim Report, above note 4 at 15–16, 19, 23.

21 Above note 17.

22 Interim Report, above note 4 at 20.

23 *Ibid.* at 23 (Recommendations 4 and 5).

24 Statement, above note 1 at para. 7.

right material from which TPMs have been removed. It would not be legal to circumvent, without authorization, a TPM applied to a sound recording, notwithstanding the exception for private copying.²⁵

The Statement appeared to suggest two key features of the then-impending proposed amendments to the Act that would prohibit circumvention, enabling or facilitating circumvention and the distribution of material from which TPMs have been removed:

- i) the prohibitions would relate only to copyright material, such that there would be no legislative protection for TPMs that protect non-copyright material (e.g. works in the public domain); and
- ii) the Acts of circumvention, enabling or facilitating circumvention would only be prohibited where executed for purposes of infringement, such that none of these acts would amount to infringement, where done, for example, in order to exercise existing users' rights (e.g. the right to fair dealing).²⁶

However, as Michael Geist had predicted before the release of Bill C-60, the devil is, of course, in the details of the tabled legislation.²⁷ The Bill addresses TPM circumvention in two ways:

- i) expansion of the definition of copyright infringement to include circumvention of a TPM taken in conformity with new provisions relating to distance education;²⁸ and

25 *Ibid.* at para. 8.

26 As defined in ss. 29–29.2, 30–32 of the Act, above note 9.

27 Michael Geist “Government’s new copyright plan more balanced” *The Toronto Star* (28 March 2005), online: <www.michaelgeist.ca/resc/html_bkup/mar282005.html>.

28 The distance education provisions appear to be intended to facilitate telecommunication of lessons involving copyright material, but impose complicated requirements for educators to “take measures” designed to limit communication of the fixed material only to those enrolled in the particular course and only for the duration of the course: Michael Geist “Canadian copyright bill a missed opportunity” *The Toronto Star* (27 May 2005), online: <www.michaelgeist.ca/resc/html_bkup/june272005.html>.

Libraries, in order to avoid liability relating to providing copies, would also be required to “take measures that can reasonably be expected to prevent the making of any reproduction of” a digital or reproduced copy “other than a single printing, its communication, or its use for a period of more than seven days”: Bill C-60, above note 2 ss. 15, 18, 27.

- ii) expansion of the civil remedies section of the current Act to provide copyright holders with the same civil remedies for certain circumvention-related acts as are currently available for infringement.²⁹

This paper will focus on the second aspect — civil remedies for certain circumvention-related acts. The Bill would amend the civil remedies section of the current section 34 to provide rights holders with the same civil remedies to which they are currently entitled for infringement, but in this case as against:

- a person who, without consent of the rights holder, “circumvents, removes or in any way renders ineffective” a TPM “for the purpose of an act that is an infringement of copyright or the moral rights” in respect of the protected work or for the purpose of making a personal copy pursuant to section 80(1) of the Act;³⁰
- a person who “offers or provides a service to circumvent, remove or render ineffective” a TPM “and knows or ought to know that providing the service will result in an infringement” of copyright or moral rights;³¹ and
- a person who, among other things, sells, distributes or imports into Canada for those purposes a work from which a TPM has been removed or rendered ineffective in circumstances not giving rise to a remedy under section 27, where that person “knows or ought to know that the” TPM has been “removed or rendered ineffective.”³²

Bill C-60 would expose to civil liability (including thousands of dollars in statutory damages³³) individuals falling into any of three categories: users who circumvent, circumvention “service” providers and subsequent distributors or sellers (as well as those importing for those purposes) of works where TPMs were previously lawfully circumvented. Users who circumvent would be liable where they circumvent for the purpose of infringement.³⁴ Users would be liable for offering or providing a circumvention “service” where they know or ought to know that infringement will result. Users of

29 *Ibid.* s. 27 (proposing the addition of a new s. 34.01 to the current Act).

30 *Ibid.* s. 27 (proposing addition of s. 34.02(1)).

31 *Ibid.* s. 27 (proposing addition of s. 34.02(2)).

32 *Ibid.* s. 27 (proposing addition of s. 34.02(3)).

33 The Act, above note 9, s. 38.1.

34 That users would also be legally prohibited from making personal copies of works is particularly troublesome, given that consumers pay a levy on blank recording media that is specifically designed to compensate copyright holders: Kapica, above note 8.

works where a TPM was previously lawfully circumvented would be liable for sale, distribution and certain other acts where they know or ought to know the TPM has been removed or rendered ineffective.

Overall, it would appear that Bill C-60's protections relating to circumvention of TPMs are not intended to expand the scope of material covered by copyright, or to expand the concept of infringement, except insofar as a TPM is circumvented in order to carry out what would currently constitute infringement. However, the government should not assume that freedom of expression concerns will be avoided simply because legal protection of TPMs is tied to infringement under the current Act. While in the past certain aspects of the Act have survived scrutiny under section 2(b) of the *Charter*, legitimate concerns remain as to its constitutionality. Bill C-60's proposals to expand the Act's expressive restrictions in order to protect TPMs only serve to intensify those concerns.

C. FREEDOM OF EXPRESSION AND COPYRIGHT

Historically, Canadian law, lawmakers and the general public have not focused on the connection between copyright and freedom of expression.³⁵ Prior to constitutional entrenchment of freedom of expression with the coming into force of the *Charter* in 1982, this was perhaps understandable.³⁶ However, since 1982 the lack of attention paid in Canada to this connection stands in sharp contrast with legal history in the United States, where the effect of copyright on the First Amendment³⁷ protected right to free speech has been extensively explored in jurisprudence, academic literature and in congressional and senate debates relating to copyright reform.³⁸ The effects of the *DMCA* have been relatively consistent with the

35 This was noted and commented upon in detail by Fewer and by Gendreau, above note 11. Kerr, Maurushat, & Tacit flagged the freedom of expression issues arising in the related context of TPMs: Kerr *et al.*, above note 16.

36 Although the Canadian Bill of Rights, the antecedent of the *Charter*, protected such fundamental freedoms as freedom of expression, it was not constitutionally entrenched and therefore did not override acts of government: *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. As Dickson C.J. noted in *Keegstra*, below note 41 at para. 26: "Without explicit protection under a written constitution ... the freedom of expression was not always accorded careful consideration in pre-*Charter* cases."

37 U.S. Const. amend. I, <www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html>.

38 Fewer, above note 11 at 178–79. However, even in the United States, the connection between copyright and freedom of expression was largely ignored until the

deference afforded to copyright in much First Amendment-related litigation, although are seemingly quite inconsistent with the United States' enduring reputation for vociferously protecting freedom of expression in other areas.³⁹ Canada has the opportunity to proceed in a way that takes better account of all of the expressive interests at stake. Any legislative protection of TPMs should be contoured to minimize constraints on access to and use of information, which form an integral part of Canada's international human rights obligations, as well as the *Charter*-protected right to freedom of expression.

1) Freedom of Expression

Section 2(b) of the *Charter* states that everyone has “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”⁴⁰

Canadian *Charter* decisions discussing the values underlying protection of freedom of expression frequently cite classic liberal theory focusing both on the social utility of promoting the search for truth and encouraging and enabling informed democratic participation, as well as the intrinsic value of individual self-fulfillment associated with free expression.⁴¹ Promotion and protection of freedom of expression are intended to

1970s: Eric Barendt, “Copyright and Free Speech Theory” in Jonathan Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech* (Oxford: Oxford University Press, 2005) 11 at 14 [Barendt].

39 See for example Pamela Samuelson, below note 162 at 543; Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain” (1999) 74 N.Y.U. L. Rev. 354 at 420–22, 427–29, <www.yale.edu/lawweb/jbalkin/telecom/benklerfreeastheairtocommonuse.pdf> [Benkler].

Barendt also suggests that the approach taken to the relationship between freedom of expression and copyright in the United States has been characterized by a deference to copyright uncharacteristic of approaches taken with respect to free expression and other forms of speech such as defamation: above note 38 at 14–16.

40 *Charter*, above note 6, s. 2(b).

41 See for example *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 SCC 37, <www.canlii.org/ca/cas/scc/1989/1989scc37.html>, [1989] 1 S.C.R. 927 at 976, [*Irwin Toy* cited to S.C.R.]; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 728–29, <www.canlii.org/ca/cas/scc/1990/1990scc128.html> [*Keegstra* cited to S.C.R.]; and *R. v. Zundel*, 1992 SCC 72, <www.canlii.org/ca/cas/scc/1992/1992scc72.html>, [1992] 2 S.C.R. 731 at 752.

foster a healthy and vibrant marketplace of ideas⁴² that serves the public as, among other things, an important source of future innovation.

The jurisprudence of the SCC sustains a robust vision of freedom of expression, notwithstanding the fact that the Court has accepted the legitimacy of numerous legislative restrictions on it.⁴³ In keeping with Canada's international human rights obligations,⁴⁴ the SCC has interpreted this freedom broadly to encompass not only the right to impart information, but also the right to receive it:

There is another aspect to freedom of expression which was recognized by this Court in *Ford v. Quebec* ... There ... it was observed that freedom of expression "protects listeners as well as speakers."⁴⁵

Both the right to speak and the right to listen are essential features of the cycle of innovation. In this cycle, today's listener can be thought of as a creator-in-waiting. Access to and use of information and ideas expressed by others act as building blocks for future expression and creation, converting today's creators-in-waiting into tomorrow's creators.⁴⁶ The signifi-

42 John Stuart Mill, *On Liberty*, ed. by Alburey Castell (Illinois: AHM, 1947), Plain text: <http://wikisource.org/wiki/On_Liberty>; A. Meiklejohn, *Political Freedom* (New York: Oxford University Press, 1965); Thomas Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale L.J. 877.

43 Such as hate speech, see *Keegstra*, above note 41; and *Canada (Human Rights Commission) v. Taylor*, 1990 SCC 130, <www.canlii.org/ca/cas/scc/1990/1990scc130.html>, [1990] 3 S.C.R. 892; child pornography, see *R. v. Sharpe*, 2001 SCC 2, <www.canlii.org/ca/cas/scc/2001/2001scc2.html>, [2001] 1 S.C.R. 45; obscenity, see *R. v. Butler*, 1992 SCC 15, <www.canlii.org/ca/cas/scc/1992/1992scc15.html>, [1992] 1 S.C.R. 452; and various forms of commercial speech, see *Irwin Toy*, above note 41; and *Ford v. Quebec (Attorney General)*, 1988 SCC 94, <www.canlii.org/ca/cas/scc/1988/1988scc94.html>, [1988] 2 S.C.R. 712 [*Ford* cited to S.C.R.].

44 Both the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9–14, Can. T.S. 1976 No. 47, Art. 19(2) (entered into force 23 March 1976, accession by Canada 19 May 1976), <www.pch.gc.ca/progs/pdp-hrp/docs/iccpr/cn1_e.cfm> and the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 19 speak of protecting the right to seek and to impart information, <www.un.org/Overview/rights.html>.

45 *Edmonton Journal v. Alberta (Attorney General)*, 1989 SCC 131, <www.canlii.org/ca/cas/scc/1989/1989scc131.html>, [1989] 2 S.C.R. 1326 at 1339.

46 As Richard Moon has noted, "[t]he creation of meaning is a shared process, something that takes place between speaker and listener. A speaker does not simply convey a meaning that is passively received by an audience. Understanding is an active, creative process in which listeners take hold of, and work over the

cant role of public institutions such as libraries and schools in facilitating this cycle and equitably distributing opportunities to access knowledge cannot be overstated.⁴⁷

The SCC has verified the importance of access to information in a well-functioning democracy, explicitly recognizing the ways in which it serves the fundamental values underlying freedom of expression. The Court has held that the right to advertise is constitutionally protected expression, in part because receiving **commercial advertising serves the purpose of better** insuring informed economic decisions,⁴⁸ that the right to receive information on public institutions and governance insures informed democratic participation,⁴⁹ and that the right to import erotic expressive materials relates to individual self-fulfillment.⁵⁰ The right to access information is, therefore, an enshrined constitutional right that forms part of Canada's supreme law, the violation of which is prohibited unless justifiable in a free and democratic society.⁵¹ If the government acts to restrict that right, it bears the burden of proving that restriction is justified.

Canadian jurisprudence on freedom of expression is not limited to the classic liberal interpretation of constitutional rights as rights *against* government action.⁵² The SCC's section 2(b) decisions explicitly recognize that

symbolic material they receive, locating and evaluating this material within their own knowledge or memory": Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 23–24 [Moon].

47 As Andrew Carnegie said, public institutions such as libraries "only help those who help themselves. They never pauperize. They reach the aspiring and open to these chief treasures of the world — those stored up in books": T. Rub, "The Day of Big Operations: Andrew Carnegie and His Libraries" (1985) 173:7 *Architectural Record* 81 at 81.

48 *Ford*, above note 43 at 766–67.

49 *Harper v. Canada (Attorney General)*, 2004 SCC 33, <www.canlii.org/ca/cas/scc/2004/2004scc33.html> at para. 8 (dissent), [2004] 1 S.C.R. 827. *Vancouver Sun (Re)*, 2004 SCC 43, <www.canlii.org/ca/cas/scc/2004/2004scc43.html>, [2004] 2 S.C.R. 332 at para. 26.

50 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, <www.canlii.org/ca/cas/scc/2000/2000scc69.html> at paras. 101, 123, [2000] 2 S.C.R. 1120.

51 *Charter*, above note 6, ss. 1 & 52.(1).

52 See *Haig v. Canada*, 1993 SCC 84, <www.canlii.org/ca/cas/scc/1993/1993scc84.html>, [1993] 2 S.C.R. 995 at 1039; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 361, in which Dickson C.J. (dissenting) stated: "Section 2 of the *Charter* protects fundamental 'freedoms' as opposed to 'rights.'" Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. 'Rights' are said to impose a corresponding duty or obligation on another party to ensure the protection of the

freedom of expression may require not just a *constraint* on government action, but may impose a *positive obligation* on government to create an environment in which the freedom can flourish.⁵³ As L'Heureux-Dubé J., writing for the Court, noted in *Haig*:

... a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.⁵⁴

The rights to speak and listen, and the prospect of positive obligations on government to promote access to information are highly relevant in the context of copyright and the proposed protection of TPMs. Unfortunately, however, the contours of their relationship have been only cursorily explored in Canadian case law,⁵⁵ sometimes without direct reference to the *Charter* itself. For example, one might read the SCC's recognition of users' rights in *Théberge* as reflective of the centrality of access to and use of the expression of others in a healthy marketplace of ideas:

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

...

right in question whereas 'freedoms' are said to involve simply an absence of interference or constraint. This conceptual approach to the nature of 'freedoms' may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms ..."

53 *Haig, ibid.* at 1039; *Native Women's Assn. of Canada v. Canada*, 1994 SCC 90, <www.canlii.org/ca/cas/scc/1994/1994scc90.html>, [1994] 3 S.C.R. 627 at paras. 84–89, L'Heureux-Dubé J., dissenting.

54 *Haig, ibid.* at 1039.

55 *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306, <www.canlii.org/ca/cas/fct/1996/1996fct10133.html> [*Michelin*], currently the leading Canadian decision directly on point is discussed in detail below.

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.⁵⁶

The Court's observations regarding the connection between a healthy public domain and society's long-term interests in innovation and creativity are both theoretically and scientifically supported. As Litman notes:

All authorship is fertilized by the work of prior authors, and the echoes of old work in new work extend beyond ideas and concepts to a wealth of expressive details. Indeed, authorship is the transformation and recombination of expression into new molds, the recasting and revision of details into different shapes. What others have expressed, and the ways they have expressed it, are the essential building blocks of any creative medium. ... The use of the work of other authors in one's own work inheres in the authorship process.⁵⁷

The centrality of access to and use of the work of others to the authorship process appears to prevail across creative disciplines from literature to art to music. While cognitive scientists are by no means in agreement as to the “ingredients” that contribute to creativity and the creative process,⁵⁸ an important body of psychological theory focuses on whether knowledge (and its precursor — access to information) are essential to creativity and innovation. Numerous case studies (from Mozart to Charlie Parker to The Beatles) demonstrate that an intense period of immersion characterized by practice and rehearsal based on imitating and copying the work of others is a necessary condition for creativity and innovation.⁵⁹ Moreover,

56 *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, <www.canlii.org/ca/cas/scc/2002/2002scc34.html>, [2002] 2 S.C.R. 336 at paras. 30–32 [*Théberge* cited to S.C.R.]. As Gendreau has noted, however, it may be telling that in its recent decisions relating to users rights the SCC has chosen not to specifically tie its interpretation of the Act to the *Charter* right to free expression: above note 11 at 252.

57 Jessica Litman, “Copyright as Myth” (1991) 53 U. Pitt. L. Rev. 235 at 243–44.

58 For an overview of some of the methodologies followed in studying the creative process, see: Mark A. Runco, “Creativity” (2004) 55 *Annu. Rev. Psych.* 657.

59 Robert Weisberg notes that none of Mozart's first seven piano concertos contained original music written by him, that much of Charlie Parker's work was premised upon “formulas” traceable to specific artists in the previous swing generation, and that the Beatles' innovative works came only after years of covering versions of others' works and producing their own works within existing

expression such as parody, satire and appropriation art depends upon “reproduction or adaptation of a significant part of earlier work.”⁶⁰

My focus on the centrality of access to, and use of, the expression of those who have gone before and the prospect of obligating government to take proactive steps to defend these essential ingredients of freedom of expression is not meant to suggest that *Charter*-consistent copyright protection is impossible. It can be argued that affording copyright holders rights of exclusivity in relation to certain expression fosters a healthy marketplace of ideas by providing holders with economic incentives to produce and disseminate musical, literary, artistic, scientific and other important works.⁶¹ However, in enacting copyright legislation, the government should “strive to afford the degree of private exclusivity necessary to incent creation, without unduly trenching on public access and use,”⁶² which are also critical to the innovation cycle.

Parliament, in the Act, has imposed its vision of acceptable and unacceptable uses of the work of others, presumably in an attempt to balance these competing objectives. Whether Parliament’s vision (or the way in which the government now proposes to recast it) is constitutionally justifiable is another question entirely. It is essential to explore the relationship between free expression and copyright as the Canadian government embarks upon expanding copyright holders’ rights and concomitantly limiting those of users. The current Act’s constitutionality is subject to legitimate question. If expanded protections for copyright holders relating to TPMs are not offset with protections for users, the current, and arguably tenuous, balance could be tipped in favour of invalidity.

styles: Robert Weisberg, “Creativity and Knowledge: A Challenge to Theories” in R. J. Steinberg ed., *The Handbook of Creativity* (Cambridge: University of Cambridge Press, 1999) at 235–37, 241.

60 Barendt, above note 38 at 18.

61 This analysis of copyright’s relationship to free expression was recently endorsed by the Federal Court of Appeal in *BMG Canada Inc. v. John Doe*, [2005] FCA 193 at para. 40. See also: *Eldred v. Ashcroft* 537 U.S. 186 (2003), <<http://straylight.law.cornell.edu/supct/html/01-618.ZS.html>> at 219.

62 In addition to the impact of digital rights management on “fair use” or “fair dealing,” other “safety valves” are also slowly being eroded over time by measures such as copyright term extensions, and protections for databases and compilations of fact: Samuel Trosow, “The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital” (2003) 16 Can. J.L. & Juris. 217 at 220–21.

2) The Act's Violation of Freedom of Expression

A statute whose purpose or effect is to interfere with the conveyance or attempted conveyance of meaning, except by violence, violates section 2(b) of the *Charter*.⁶³ The Act explicitly interferes with the conveyance of meaning by exposing individuals to civil and criminal liability for (among other things and subject to certain exceptions) publicly expressing “X,” where “X” represents another’s copyright material.⁶⁴ In virtually any other instance, a classic content-based restriction⁶⁵ such as this would almost instantaneously lead a Canadian court to conclude that section 2(b) has been violated, requiring the government to provide a section 1 justification for that infringement.⁶⁶ Curiously, this has not been the case with respect to copyright. The Federal Court (Trial Division) (“FCTD”) in *Mi-*

63 *Irwin Toy*, above note 41 at paras. 41–42. Notably, however, the SCC concluded in an earlier decision that restrictions on the *place* where expression can occur do not necessarily violate s. 2(b): *Committee for the Commonwealth of Canada v. Canada*, 1991 SCC 13, <www.canlii.org/ca/cas/scc/1991/1991scc13.html>, [1991] 1 S.C.R. 139 at 157–59, [*Commonwealth* cited to S.C.R.].

64 See the Act, above note 9, ss. 27–28, 35.(1) for the civil liability provisions; and ss. 42–43 for the criminal liability provisions.

65 For a detailed discussion of the content-based nature of copyright legislation, see: C. Edwin Baker, “First Amendment Limits on Copyright” (2002) 55 Vand. L. Rev. 891. Certain uses of the expression of others will be more difficult to accept as expression that ought to fall within the scope of expression protected by the *Charter*. We may be more convinced that copying another’s work for the purpose of parody or satire is the kind of expression that ought to be constitutionally protected, rather than “straightforward commercial piracy, when the copier aims solely to exploit the artistic skills of others for his or her own financial advantage”: Barendt, above note 38 at 19. In the latter case, the expression in issue appears less related to a communicative act. However, the SCC has made clear that scope of expression protected by s. 2(b) is very broad and includes financially motivated expression, such as advertising (*Irwin Toy*, above note 41), expression by speakers, whose motives and expressive content are morally repugnant (*Zundel*, above note 41 at para. 23), as well as possession of morally repugnant and harmful content such as child pornography since possession of it “allows us to understand the thought of others or to consolidate our own thought” (*Sharpe*, above note 43 at para. 25).

66 Richard Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights” (2002) 40 Osgoode Hall L.J. 337 at 339 [Moon, “Justified Limits”]. Shifting the analysis of the justifiability of the breadth of the restriction on expression to the s. 1 phase of the constitutional inquiry has significant consequences. Once a violation of s. 2(b) has been established, the onus shifts away from the party claiming infringement to the government, requiring it to justify the limitation.

*chelin*⁶⁷ (currently the leading decision on point) held that the Act did not violate section 2(b) on the basis that:

[t]he *Charter* does not confer the right to use private property — [someone else’s] copyright — in the service of freedom of expression. ... [A] person using the private property of another like a copyright, must demonstrate that his or her use of the property is compatible with the function of the property before the Court can deem the use a protected form of expression under the *Charter*.⁶⁸

In the alternative, the Court held that if the Act violated section 2(b), that violation was justified in a free and democratic society. In enacting legislation relating to TPMs, however, the government must approach this decision with caution for at least two reasons. First, there are solid reasons to question the precedential value of the *Michelin* decision, particularly in the digitally networked context.⁶⁹ Second, even if the current Act generally strikes a constitutional balance, the TPM protection proposed in Bill C-60 would expand the Act’s incursion on expression.

a) Questioning the precedential value of *Michelin*

In 1994 the Canadian Auto Workers (“CAW”) attempted to organize three of Michelin Canada’s tire manufacturing plants in Nova Scotia. The CAW parodied Bibendum (aka “the Michelin Man”) in 2500 leaflets that it distributed to Michelin workers. Bibendum was placed in various positions obviously intended to critique Michelin’s approach to human resource management. One leaflet depicted “Bibendum, arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker.”⁷⁰

Although the CAW was unsuccessful in its organizing efforts, Michelin sued the CAW for using both Bibendum and the word “Michelin” in its organizing material. Michelin was unsuccessful in its trademark infringement

67 *Michelin*, above note 55, since followed without analysis in *British Columbia Automobile Association v. OPEIU* (2001), 2001 BCSC 156, <www.canlii.org/bc/cas/bcsc/2001/2001bcsc156.html>, 10 C.P.R. (4th) 423 [BCAA cited to C.P.R.]; see also: *Fraser Health Authority v. Hospital Employees’ Union*, 2003 BCSC 807, <www.canlii.org/bc/cas/bcsc/2003/2003bcsc807.html>, [2003] 25 C.P.R. (4th) 172 (BCSC), [*Fraser Health* cited to C.P.R.].

68 *Michelin*, *ibid* at paras. 79, 105.

69 There are also reasons to question the FCTD’s analysis based on the particular facts in *Michelin*. Given the more general focus of this article, however, they will not be addressed in detail here.

70 *Michelin*, above note 55 at para. 8.

claim.⁷¹ However, it succeeded in its copyright infringement claim.⁷² The CAW argued that it had not violated Michelin's copyright in that the union's parodic use of Bibendum fell within the fair dealing provisions under the Act. The union further posited that if its use did not fall within those provisions, the Act restricted constitutionally protected expression and therefore violated section 2(b) of the *Charter*. As noted above, the FCTD rejected this constitutional argument based primarily on its analysis of Michelin's "property" rights — an analysis that merits further interrogation.

The FCTD's analysis in *Michelin* subverts the principal of constitutional supremacy articulated in section 52 of the *Constitution Act, 1982*.⁷³ The decision presupposes an existing property right in copyright material against which incursions for purposes of exercising freedom of expression must be justified. The logic underlying this conclusion is problematic for at least three reasons. First, since copyright exists in Canada only as a result of its statutory creation in the Act,⁷⁴ the existence of any such property right is dependent upon the constitutional validity of the legislation purporting to grant it. Notwithstanding Parliament's section 91(23) jurisdiction in respect of copyright, its exercise of that jurisdiction must conform to the *Charter*.⁷⁵ Simply put, the *Charter* prohibits Parliament from creating a property right so broad as to unjustifiably infringe freedom of expression. Thus, the *Michelin* conclusion that users must justify their expression vis-à-vis the copyright owner's intended use of the "property" mistakenly

71 Michelin was unable to establish to the FCTD's satisfaction that the CAW had "used" Michelin's registered trademarks within the meaning of then ss. 20 & 22 of the *Trademarks Act*, S.C. 1952-53, c. 49: *Michelin*, *ibid.* at para. 47.

72 Only the copyright infringement aspect of the decision will be considered here. For an analysis of the intersecting trademark and copyright issues in a subsequent labour-related case see: Teresa Scassa, "Intellectual Property on the Cyber-Picket Line: A Comment on British Columbia Automobile Assn. and Professional Employees' International Union, Local 378" (2002) 39 *Alta. L. Rev.* 934.

73 *Charter*, above note 6, s. 52.

74 As Binnie J. noted in *Théberge* "[c]opyright in this country is a creature of statute and the rights and remedies it provides are exhaustive": *Théberge*, above note 56 at para. 5.

75 With respect to the *Charter's* application to the exercise of jurisdiction identified in the division of powers clause, McLachlin J. (as she then was) stated "although legislative jurisdiction to amend the provincial constitution cannot be removed from the province without a constitutional amendment and is in this sense above Charter scrutiny, the provincial exercise of its legislative authority is subject to the Charter...": *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 SCC 53, <www.canlii.org/ca/cas/scc/1991/1991scc53.html>, [1991] 2 S.C.R. 158 at 192.

places the statutory property cart before the constitutional expression horse.

Second, foreclosing the protection of certain expression under section 2(b) on the basis that it conflicts with unentrenched property rights directly contradicts the concept of constitutional paramountcy — with the unenshrined property right seemingly taking precedence over the enshrined right to free expression. The SCC has explicitly rejected the notion that corporate-commercial economic rights enjoy *Charter* protection.⁷⁶ Since the property created and protected by the Act relates largely to economic rights⁷⁷ it should not generally merit⁷⁸ *Charter* protection.⁷⁹ In any event, there is no principled basis to suggest that economic rights should foreclose inclusion of expression within the scope of section 2(b), even though those economic rights may later form a partial basis for justification of the restriction pursuant to section 1.

76 *Ibid.*

77 As Binnie J. noted in *Théberge*, “[g]enerally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights. ... The economic rights are based on a conception of artistic and literary works essentially as articles of commerce”: *Théberge*, above note 56 at paras. 12, 15.

78 The SCC has left open the possibility that in some circumstances property rights may be protected where they are intimately connected to physical survival and well-being, thus reflecting *Charter* rights and commitments to protection of security of the person and privacy: *Reference re Public Service Employee Relations Act (Alta.)*, 1987 SCC 15, <www.canlii.org/ca/cas/scc/1987/1987scc15.html>, [1987] 1 S.C.R. 313 at 412; *Irwin Toy*, above note 41 at 1003; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 SCC 50, <www.canlii.org/ca/cas/scc/1990/1990scc50.html>, [1990] 1 S.C.R. 1123 at 1171; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, <www.canlii.org/ca/cas/scc/2002/2002scc84.html>, [2002] 4 S.C.R. 429 at paras. 80-81. As such, it may be plausible to argue that moral rights as protected in the Act do enjoy a kind of quasi-constitutional status. (To the extent, for example, that an author’s creations are considered extensions of his or her personality, such that their unauthorized use could negatively impact the individual’s reputation: see *Théberge*, above note 56 stating “[an] artist’s oeuvre [is treated] as an extension of his or her personality, possessing a dignity which is deserving of protection” at para. 15; *Snow v. The Eaton Centre Ltd. et al.*, [1982] 70 C.P.R. (2d) 105. For further analysis, see: Gendreau, above note 11 at 254-55.

79 The reality of copyright ownership further undermines any argument in favour of its *Charter* protection. As the authors whose personalities could arguably be encompassed within the work are separated from their copyright and moral rights through assignment to corporate publishers, distributors, etc. any connection between the property in the work and rights relating to privacy, security of the person, and personality quickly evaporates.

Third, even accepting for argument's sake that certain property rights can trump the entrenched right to freedom of expression at the section 2(b) stage, so that the expressive use of the property must be justified rather than requiring justification of the breadth of the property right itself, the analysis should distinguish between intellectual and real property rights. In concluding that in order to fall within the expression protected by section 2(b) the use of copyright material must be justified in light of the copyright owner's property in the material, the FCTD applied a conclusion reached by the SCC in the distinguishable context of government-owned real property.⁸⁰ Like real property, copyright can be synonymous with its owner's ability to express him or herself.⁸¹ Unlike real property, however, copyright material is non-rivalrous — your use of my copyright material does not preclude me from expressing myself through it.⁸² Thus, while there may be a principled basis to justify limiting your use of my real property since this rivalrous use physically precludes me from expressing myself,⁸³ no such justification arises in relation to copyright material.

These are solid reasons to be cautious about *Michelin's* conclusion that the Act is consistent with section 2(b). A strong argument can be made that the Act's prohibition against expressing certain content constitutes a

80 The FCTD applied the reasons of Lamer J. in *Commonwealth*, above note 63 at para. 156, in which he concluded that freedom of expression extended only so far as to allow an individual to express him or herself on government-owned real property where the expression itself was compatible with the function of the property. L'Heureux-Dubé and McLachlin JJ. each advocated quite different constitutional analyses than that of Lamer J. None of the sets of reasons garnered a majority of the court and the SCC has since declined to identify any one analysis as governing: *Ramsden v. Peterborough (City)*, 1993 SCC 86 <www.canlii.org/ca/cas/scc/1993/1993scc86.html>, [1993] 2 S.C.R. 1084 at 1096–97, 1103 [*Ramsden* cited to S.C.R.].

81 Consider the obvious example of a printing press. Use of the press may be essential to its owner's ability to express him or herself in a meaningful, distributed way.

82 Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright" (2002) 28 *Queen's L.J.* 1 at 23 [Craig].

83 See Moon, above note 46. Moreover, where the creator-in-waiting has purchased a physical object, such as a CD, one might question the degree to which a copyright owner's rights in the material contained in that physical entity can be expanded to trump the property rights paid for by the CD's owner: Jeremy DeBeer & Guy Régimbald, "Constitutional Authority Over Copyrights and Private Copying," <<http://ssrn.com/abstract=720223>>. Full text: <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID731943_code395605.pdf?abstractid=720223&mirid=1>.

prima facie section 2(b) violation.⁸⁴ If that is the case, its constitutionality depends upon the government's ability to justify the infringement under section 1. The FCTD in *Michelin* concluded that any infringement was justified, although subsequent legal and technological developments raise new questions about any continuing precedential value in the Court's section 1 analysis as well.

Michelin's alternative conclusion was that, if the Act did violate section 2(b), the infringement would be justified under section 1. In terms of the facial validity of the legislation,⁸⁵ this conclusion is strengthened by the SCC's decisions in *Théberge*⁸⁶ and *CCH*.⁸⁷ Coupling the interpretive principle that laws should be construed insofar as possible to accord with the *Charter*⁸⁸ and the SCC's mandate in *Théberge* and *CCH* that the provisions in the Act must be interpreted in a way that balances users' and rights holders' rights,⁸⁹ there are respectable arguments in favour of constitutional justification.⁹⁰

84 This conclusion is also in keeping with more current s. 2(b) jurisprudence in which the violation of freedom of expression is regularly conceded and the focus of the inquiry relates to the justifiability of the violation pursuant to s. 1. See Moon, "Justified Limits," above note 66 at 339.

85 I refer to "facial validity" here since the Act on its face may be interpreted overall as striking an appropriate compromise between copyright holders, users, and the public interest. In any event, there will be individual cases in which the violation of expression should not be considered justifiable — such as where copyright material is used for purposes of socially, politically, or artistically significant expression, such as parody, whistle-blowing, or sampling. As Barendt notes "it is wrong for the courts to hold that the copyright statute necessarily safeguards freedom of speech.... That would be an abdication of their responsibility to determine the scope of constitutional rights ... and how far it is necessary to restrict its exercise to protect the right to copyright": above note 38 at 15.

86 Above note 56.

87 Above note 10.

88 In *Slaight Communications Inc. v. Davidson*, 1989 SCC 42, <www.canlii.org/ca/cas/scc/1989/1989scc42.html>, [1989] 1 S.C.R. 1038 at 1078, the SCC held that where legislation is susceptible to more than one interpretation, a court ought to choose the one that best accords with the *Charter*, although a court is not to read in or delete anything in order to reach the conclusion that the legislation comports with the *Charter*.

89 See *Théberge*, above note 56 and accompanying text; see also *CCH*, above note 10 at para. 10.

90 For example, the interpretive approach outlined in *Théberge* and *CCH* might well suggest that important forms of expression such as whistle-blowing and parody should today be considered to fall within the fair dealing provisions, thus narrowing the scope of the Act's incursions on expression. Nonetheless, there may well remain significant examples of artistic and other important forms of expression that continue to be precluded by the Act. For examples, see: Fewer, above

Nevertheless, developments in technology and constitutional reasoning since *Michelin* suggest that different considerations may arise in the section 1 analysis — considerations that, in turn, signal the need for constitutional contouring of any legal protections extended to TPMs.

In order to justify a section 2(b) violation the government must show that:

- i) the Act aims at a pressing and substantial objective;
- ii) the means chosen to pursue that objective are rationally connected to it;
- iii) the means chosen impair the right to free expression as little as possible; and
- iv) the positive benefits derived from the Act outweigh its negative impacts on free expression.⁹¹

i) Pressing and substantial objectives

Michelin concluded that the following pressing and substantial objective underlies the Act:

The protection of authors and ensuring that they are recompensed for their creative energies and works is an important value in a democratic society in and of itself. As well, the pressing and substantial nature of the *Copyright Act's* objective is buttressed by Canada's international obligations in treaties like the *Berne Convention* of 1886.⁹²

While this is certainly consistent with Parliamentary commentary and submissions made throughout periods of copyright legislative formation and reformation in Canada,⁹³ there are sound conceptual reasons to question whether the Act actually overcompensates authors for their “energies” and “works” with unnecessarily broad rights of exclusion. As Craig has noted:

note 11 at 201. Moreover, the Canadian government's decision not to specifically address these areas in Bill C-60 may well send the message that the legislation is not intended to protect these socially and culturally valuable forms of expression.

91 *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees*, 2004 SCC 66, <www.canlii.org/ca/cas/scc/2004/2004scc66.html>, [2004] 3 S.C.R. 381 at para. 53 [NAPE cited to S.C.R.].

92 *Michelin*, above note 55 at para. 109.

93 See for example Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (Section 92 Report)* (Ottawa: Industry Canada, 2002) online: <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00866e.html>>; and Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada and Canadian Heritage, 2001) online: <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01101e.html>>.

The natural rights thesis, which awards a property right to the labourer in his intellectual product, ignores the contributions that have been made by those who preceded him. Thoughts and ideas are not freestanding, but are inherently linked to the thoughts and ideas that went before. Simply because authorship or another form of expression is necessary to give rise to an idea and to allow it to be communicated and developed, it does not follow that its entire value is attributable to that labour. If a labourer has a right to the fruits of her labour, this right can only entitle her to the *value added* through her own labour. The myths of romantic authorship and the assertion of private property entitlement as a reward for intellectual labour are closely tied.⁹⁴

If we accept that authors add value to thoughts and ideas that have gone before, we may well question whether the Act, in awarding authors rights of exclusivity in relation to an entire work (rather than simply their valued added), is accurately characterized as being about rewarding authors for their labour at all.⁹⁵

Further, and in any event, the SCC's decisions in *Théberge* and *CCH* demonstrate that the Act's purposes relate to more than just compensating authors. The SCC's findings in *Théberge* and *CCH* underscore the Act's public interest objectives in dissemination, access and use. The Court in *Théberge* characterized the Act as "promoting the public interest in the encouragement and dissemination of works of the arts and intellect,"⁹⁶ ensuring against undue limits interfering with society's long-term interests in a healthy public domain, proper use of which will allow innovation to thrive.⁹⁷ It embellished on this public objective in *CCH*, holding that provisions previously characterized as "defences" were better characterized as "user's rights."⁹⁸

The SCC's characterization of the Act as driving toward both just compensation of authors and the public interest in dissemination of, access to and use of expressive works arguably reinforces the *Michelin* conclusion as to the pressing and substantial nature of the purposes underlying the Act.

94 Craig, above note 82 at 34–35.

95 The SCC's refusal to adopt the "sweat of the brow" standard for originality in *CCH* arguably also suggests that the Act's underlying purposes are not wholly related to compensating authors for their labour: *CCH*, above note 10 at para. 24.

96 *Théberge*, above note 56 at para. 30.

97 *Ibid.* at para. 32.

98 *CCH*, above note 10 at paras. 11–12, 48.

The reasons in *Théberge* and *CCH* add to the less convincing argument of “just desserts” the more compelling public interest in the dissemination of expressive works. Indeed, one might argue that these private and public objectives are intricately connected, such that the private interests of copyright holders should be protected only insofar as those protections are necessary to serve the public interest in dissemination. When we turn to consider the rational connection element of the section 1 test, we must consider the consistency of the means chosen not solely in relation to the private interest of copyright holders in just compensation, but also the public interest in fair access to and use of expression that has gone before.

ii) Rational connection

Michelin concluded that the means chosen to protect rights holders in the Act was rationally connected to the objective of justly compensating creators, reasoning that:

There is a definite and efficient link between the goal of protecting the interests of authors and copyright holders by granting them a monopoly on the right to use and reproduce their works and the ability to enforce those interests in an action for copyright infringement.⁹⁹

These reasons adopt an often-unquestioned conclusion — the copyright power to exclude serves the interest of the rights holder by allowing value to be extracted from a work through mechanisms such as licensing.¹⁰⁰ However, technological developments (particularly in the form of digital networks) increasingly call into question to what degree (if any), exclusivity is actually necessary in order to incent creation. And, even if one accepted that the current degree of exclusivity is rationally connected to the self-interested purpose of the legislation, this does not resolve the constitutional question. There must also exist a rational connection between the public interest purpose of the legislation and the restriction in issue.

Whether there is a “definite and efficient link” between protecting authors’ and rights holders’ interests and granting them a monopoly right over use and reproduction of their works is a matter of considerable debate in the copyright community. Economic models attempting to prove the link and its efficiency have regularly been criticized, particularly for failing to

⁹⁹ *Michelin*, above note 55 at para. 111.

¹⁰⁰ See for example William M. Landes & Richard A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 *J. Legal Stud.* 325 at 333–44, <<http://cyber.law.harvard.edu/IPCoop/89land1.html>>.

identify precisely what degree of exclusivity is necessary in order to incent creation, without unduly compromising the public domain so essential to future innovation.¹⁰¹ Further, in a world where authors and rights holders are often two or more different people in relation to a single work, a monopoly right exercised in a copyright owner's interest may not work in favour of an author's interests. If a scholarly publication takes copyright in my work and then chooses to refuse me the right of subsequent republication, their right of exclusivity may work in favour of their commercial interest in maintaining a "unique" product, but it does not necessarily enhance my self-interest in the broad dissemination of my work.¹⁰²

Digital networks present further challenges to any presumed rational and efficient link between the current level of monopoly rights over works and the interests of rights holders. Take, for example, the music industry. Peer-to-peer ("P2P") technology makes mass, high fidelity copying and sharing of digital files relatively simple and inexpensive. While many would argue that the music industry has sustained losses (in terms of CD sales) as a result of P2P filesharing (in which users arguably infringe monopoly rights),¹⁰³ a compelling case can be made *against* the rational connection between those rights and the industry's self-interest. Many artists argue that "sharing," rather than holding to any form of a strict right of exclusion, works in their self-interest by broadening access to and

101 On the reasons for the limited role that economics has played in justifying copyright thus far, see: Pamela Samuelson, "Should Economics Play a Role in Copyright Law and Policy?" (2004) 1 U.O.T.L.J. 1 at 8, <[http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%201\(Samuelson\).pdf](http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%201(Samuelson).pdf)>, [Samuelson, "Economics"]. As Barendt argues, however, "[i]t is in fact much clearer that copyright laws violate the free speech rights of infringers (albeit that this can often be justified) than it is that the laws themselves promote the values which justify recognition of speech rights": above note 38 at 24.

102 One could argue that refusal to republish may also work against the interests of the copyright holder, who might derive higher name recognition and returns if a right of republication subject to notice of first publication were granted.

103 For example, Raymond Nimmer argues that "[d]igital systems altered the balance in copyright law in a manner adverse to the author by allowing no cost, widespread, immediate and perfect copying. Protecting access technology may reset the balance": "First Amendment Speech and the DMCA" in Jonathan Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech* (Oxford: Oxford University Press, 2005) 359 at 364 [Nimmer]. Whether filesharing copyright material in Canada violates the Act, particularly in light of the private copying levy, remains an open question: see *BMG Canada Inc. v. John Doe*, 2004 FC 488, <www.canlii.org/ca/cas/fct/2004/2004fc488.html>, [2005] F.C.J. No. 858 at paras. 46–54.

knowledge of their works.¹⁰⁴ Still others argue that if, instead of using legal (primarily property-based) weapons and rhetoric, the music industry had adopted a licensing model embracing the technology, “[i]n any reasonable scenario, those revenues would have more than made up for the decline in CD sales, even if one accepts that such decline was entirely caused by online music sharing.”¹⁰⁵

Nonetheless, the government need not establish any *necessary* connection between the means employed and the objectives in issue, it need only establish a *rational* connection. Even if one were to assume that the lower threshold is satisfied with respect to the private or self-interested objective underlying the Act, it remains necessary to demonstrate consistency between the means chosen and the *other* and arguably overriding objective of the Act — the public interest. Is there a rational connection between the current level of exclusivity inherent in copyright and the public interest in the dissemination of works?

As in relation to the self-interested objective, authority with respect to the public interest is also split. On one hand, economic theorists suggest that the public stands to benefit through broader dissemination if creators are granted a strong and expansive property interest in their expression, which acts as an incentive to invest in research, development and dissemination.¹⁰⁶ On the other, many argue that the public interest is best served through narrow circumscription of rights of exclusivity so

104 Examples include Beastie Boys, Chuck D, David Bowie, Michael Franti, and Moby. Further support for greater sharing of work can be found in the popularity of the Creative Commons Licence system, an alternative to copyright that permits the sharing of works by reserving only some rights. In its first six months over one million creative licences were created: 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 291. For a general description see Lessig, at 288–92, <www.free-culture.cc/freeculture.pdf>.

105 Daniel Gervais, “The Price of Social Norms: Towards a Liability Regime for File-sharing” (2004) 12 J. Intell. Prop. L. 40 at 46, <www.crimsonfeet.org/IMG/pdf/p2p.pdf>.

106 William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press, 2003) at 13. This analysis is also reflected in the United States Supreme Court’s conclusion that “copyright itself [is] the engine of free expression”: *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 at 558 (1985), <<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=471&invol=539>>, O’Connor J.; see also *Eldred*, above note 61 at 219. For a discussion of other supporting perspectives see: Daniel Farber, “Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the ‘Digital Millennium’” (2005) 89 Minn. L. Rev. 1318.

that “follow-on creators and innovators remain as free as possible from the control of the past.”¹⁰⁷

Thus, analysing whether the creation of a monopoly right in expression is rationally connected to the dual objectives of the Act is conceptually more difficult than the analysis undertaken in *Michelin*. Even if a rational connection can be established, the minimal impairment stage of the section 1 test may present a justificatory challenge.

iii) *Minimal impairment & deference standard*

Michelin concluded with respect to minimal impairment:

Copyright also minimally impairs the defendants’ right of free expression by the very well-tailored structure of the Copyright Act with its list of exceptions in subsections 27(2) and (3). In *Irwin Toy*, ... Chief Justice Dickson stated ... that the Court should give Parliament a “margin of appreciation” in evaluating whether the impugned act minimally impairs the Charter right in question.¹⁰⁸

Application of subsequent decisions of the SCC suggests that future analysis of this element of the section 1 test will not necessarily yield results so favourable to Parliament.¹⁰⁹

The simple assertion that the limitations on copyright included in the Act necessarily demonstrate minimal impairment would, since *Théberge*,

107 Lessig, above note 104 at xiv. The cultural impact of broad protection of intellectual property has been the subject of extensive academic and popular commentary: Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Toronto: Knopf, 2000); Kembrew McLeod, *Freedom of Expression®: Overzealous Copyright Bozos and Other Enemies of Creativity* (New York: Doubleday, 2005); Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press, 1998).

108 *Michelin*, above note 55 at para. 111.

109 Further, there is good reason to doubt the specific conclusions in *Michelin* with respect to whether fair dealing encompasses parody and to the extent that it does not, whether one can reasonably conclude the Act is sufficiently tailored to minimally impair the right to freedom of expression. Moreover, it is plausible that no infringement would be found, given the SCC’s decision on originality in *CCH*, above note 10. The FCTD’s rejection of the CAW’s *Bibendum* as an original work and its concomitant finding of copying of a “substantial part” of *Michelin*’s *Bibendum*, was premised on what is arguably a higher standard than the “skill and judgment” test for originality adopted by the SCC. A solid case can be made that *Michelin* would be decided differently today, if the *CCH* test were applied. Moreover, the SCC’s admonitions of the need to broadly construe “fair dealing” to protect user rights, might well have led to the conclusion that the “parody” in issue fell within “criticism.”

arguably demand greater scrutiny. The emphasis in *Théberge* on users' rights and the related importance of access to and use of others' expression in the innovation process, could well be used to suggest the user rights articulated in the Act are under-inclusive. To the extent, for example, that fair dealing¹¹⁰ does not include copying for expression that is as socially and politically important as whistle blowing and parody, the Act may well restrict more expression than is reasonably necessary.¹¹¹

Further, the SCC's subsequent decision in *Dunmore*¹¹² casts doubt on *Michelin's* conclusion that courts should defer to Parliament in analysing the constitutionality of the Act. In *Dunmore*, the SCC did not defer to the Ontario legislature in its repeal of a legislation that had permitted agricultural workers to organize collectively. Bastarache J. stated:

Given the delicate balance between interests that is required here, as well as the added complexity of protecting the character of the family farm, one might be tempted to conclude that a wide margin of deference is owed to the enacting legislature when applying the minimum impairment test However, as outlined in *Thomson Newspapers*, political complexity is not the deciding factor in establishing a margin of deference under s. 1. Rather, the margin will vary according to whether legislature has (1) sought a balance between the interests of competing groups, (2) defended a vulnerable group with a subjective apprehension of harm, (3) chosen a remedy whose effectiveness cannot be measured scientifically, and (4) suppressed an activity whose social or moral value is relatively low.¹¹³

Contrary to the FCTD's conclusions in *Michelin*, it is by no means obvious that a Canadian court should defer to Parliament, either in relation to the current Act or to the proposed TPM-related amendments.

110 See the Act, above note 9.

111 Fewer, above note 11. As Sachs J. wrote in dismissing an infringement claim relating to the parodic use of a trademark: “[h]umour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. ... it is an elixir of constitutional health”: *Laugh It Off Promotions CC v. South African Breweries International (Finance) BV* (27 May 2005) Constitutional Court of South Africa, <www.constitutional.court.org.za/ohtbin/hyperion_image/J-CCT42-04> at 64 [*Laugh It Off*].

112 *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, <www.canlii.org/ca/cas/scc/2001/2001scc94.html>, [2001] 3 S.C.R. 1016.

113 *Ibid.* at 1071–72.

Balancing competing interests

As noted in *Michelin*, the Act seeks to balance the interests of competing groups. The idea/expression dichotomy, the time limited nature of the right and the fair dealing “exceptions” within the Act all reflect an attempt to balance the private and public interests in compensating copyright holders,¹¹⁴ with the public interest in preserving fair access to and use of expression. While the legislation may have been treated in the past in a way that tips the balance in favour of protecting holders, the SCC’s decisions in *Théberge* and *CCH* clearly convey the significance of user’s rights and the importance of the public domain under the Act. Of all factors, this is the one weighing most obviously in favour of deference.

Protecting vulnerable groups

Can it be said that in enacting the Act and any subsequent amendments thereto, Parliament seeks to protect a vulnerable group with a subjective apprehension of harm? As in *Dunmore*, it is by no means clear that in the current Act or in the proposed amendments Parliament is acting to protect a “vulnerable” group. At the time the Act came into force (and in the context of subsequent amendments), the Parliamentary record is replete with examples of the vulnerability of Canadian authors and the threat to Canadian culture in the absence of specific legislative protection.¹¹⁵ However, the “vulnerability” of any particular copyright owner at any particular time in history remains very much a live issue.¹¹⁶ Further,

114 This would include either the expression that they “created” (in the case of authors) or the expression for which they contracted to hold the rights (in the case of publishers, distributors, etc.).

115 Predominating much of this debate, however, is not the vulnerability of authors *vis-à-vis* those who would use the public domain as the basis for further creation, but *vis-à-vis* distributors and publishers. As noted in the DeMontigny Report of 1930, “... Canadian authors are far from being encouraged to create, to produce, to contribute to our national Arts and Letters when the existing legislation deprives them of all expectation of securing due compensation for their labour, and permits distributors to take freely for their use and profit, and with impunity, works which they ought to buy, as they must buy any other commodity of life”: Copyright in Canada in 1930: Report of the Copyright Committee of the Canadian Author’s Association, Supplemented with Practical Observations by Louvigny De Montigny, Ex-F.R.S.C. and Member of the Copyright Committee of the C.A.A., RU-MI-LOU Books, Ottawa Canada, August 1930. (Catalogued as *Canadian Authors’ Association*. Call No. Z 565 M65 1930 NL Stacks, Amicus # 6167220) at 14.

116 With respect to the specific facts of *Michelin*, it was certainly difficult, at best, to describe the copyright owner — Michelin — as falling within any vulnerable group the legislation seeks to protect.

with respect to the purported current “threat” of digitized networks that is driving the proposed TPM-related changes, any vulnerability of copyright holders may be as much the result of their own choice of business model as it is the conduct of others.¹¹⁷ In any event, even if one did accept a continuing vulnerability for authors or other copyright holders meriting legislative protection,¹¹⁸ balanced against this vulnerable group is another at least equally vulnerable group — creators-in-waiting.

As discussed previously, the absence of a rich public domain and often over-reaching claims of infringement¹¹⁹ threaten to circumscribe the raw material available to often less advantaged artists, authors and other would-be creators, as well as that available for important purposes such as public education¹²⁰ and political and social satire (such as in the *Michelin* case). It is perhaps telling that the handful of constitutional challenges in this area have arisen in the context of labour disputes, where copyright claims were used to stifle union communications.¹²¹ Viewed in this light, there is little reason to assume that the Act addresses a single vulnerable group. One might question copyright holders’ claims to vulnerability, and even if those were accepted, other vulnerable groups and the public interest generally may well be equally, if not more seriously, affected by the legislation. Application of this factor evokes no clear reason for legislative deference.

Remedy incapable of scientific verification

Whether the protections and limitations extended in the Act actually achieve the objectives of incenting creation, while at the same time preserving healthy public access to and use of expressive works is one that is, at the very least, not obviously susceptible to scientific verification.¹²² Fur-

117 With respect to the industry’s chosen business model and the impacts of file-sharing, see: Gervais, above note 105 at 55–63; Michael Geist “The real threat to the music download market” *The Toronto Star* (18 April 2005), online: The Toronto Star <www.michaelgeist.ca/resc/html_bkup/april182005.html>.

118 As is argued, for example, by Jane Ginsburg, “Copyright Use and Excuse on the Internet” (2000) 24 *Colum-VLA J.L. & Arts* 1 at 8–9.

119 Lessig, above note 104 at 8–10, 119, 195–98.

120 Michael Geist “Will copyright reform chill use of Web? Copyright proposal upsets the balance” *The Toronto Star* (31 May 2004), online: <www.michaelgeist.ca/resc/html_bkup/may312004.html>.

121 *Fraser Health*, above note 67; *BCAA*, above note 67. It is notable, however, that in *BCAA* although the freedom of expression argument failed in relating to fair dealing under the Act, it succeeded in relation to the common law passing off claim: Gendreau, above note 11 at 252.

122 Samuelson, “Economics,” above note 101 at 8–9.

ther, there is no sound empirical evidence supporting the need for or efficacy of legal protections for TPMs.¹²³ Since the incentive structure under the Act operates within the complex context of other incentives (e.g. government subsidization for the arts and education) and varying technological and economic conditions, it is very difficult to establish with any precision whether in fact the Act does incent the creation and dissemination of expression. Even if it does, questions remain as to whether the protections it offers copyright holders undermine creation and dissemination by creators-in-waiting, as well as unduly limiting public institutions' facilitation of access to knowledge.¹²⁴ While the difficulty of verifying how and whether the Act achieves its objectives may suggest deference is in order, it is equally plausible to argue that deference should not be shown in the case of legal protections for TPMs, given the dearth of empirical evidence to verify the need for such protection.

Suppressing low value expression

Application of this criterion is heavily fact dependent, but it does suggest that where socially, politically and artistically important forms of expression are limited, courts should not defer to Parliament.¹²⁵ Digital technologies offer unprecedented opportunities for making creative use of the expression of others.¹²⁶ In the music context, for example, sampling and rifting from the works of others are emerging as significant cultural art forms.¹²⁷ Copyright restrictions that stifle these forms of expression and undermine the innovation and knowledge-building power of digital technologies merit no judicial deference.

123 Kamil J. Koelman & Natali Helberger, "Protection of Technological Measures" in P. Bernt Hugenholtz, ed., *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (The Hague: Kluwer Law International, 2000) at 165 [Hugenholtz, "Copyright Management"]. See also Jeffrey P. Cunard, "Technological Protection of Copyrighted Works and Copyright Management Systems: A Brief Survey of the Landscape" (Paper presented to the ALAI Congress, June 2001) [unpublished], online: ALAI 2001 Congress Program and Presentation <www.law.columbia.edu/conferences/2001/program_en.htm>.

124 Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002).

125 "News reporting, parody, and other transformative uses, whistle-blowing activities and non-commercial educational uses are all socially valued activities that further the purposes of freedom of expression": Fewer, above note 11 at 202. See also: *Laugh It Off*, above note 111 at 64–65.

126 Scassa has noted the importance of allowing sufficient space online for critical commentary and parody: above note 72 at 947–48.

127 See Lessig, above note 104.

This exploration of the deference-related factors identified in *Dunmore* suggests that, at minimum, there is no obvious reason for the judiciary to defer to Parliament in analysing the justifiability of the Act's current or proposed restrictions on freedom of expression. The analysis highlights that, despite the likelihood of conflicting social science evidence on the degree of exclusivity necessary (if any) to incent expression, there is no reason to presume copyright holders a group any more vulnerable than creators-in-waiting. These are sound reasons to question whether the Act more than minimally impairs freedom of expression, and to suggest that courts need not defer to Parliament in relation to further future incursions on that right.

iv) Benefits outweigh detriment to free expression

With respect to this fourth aspect of the section 1 test, the Court in *Michelin* concluded:

Finally, I find that considering the deleterious effects of the *Copyright Act*, the third element of the Oakes three-pronged proportionality test, confirms its status as a reasonable limit prescribed by law in a free and democratic society. The plaintiff offered into evidence a wealth of union anti-Michelin pamphlets and brochures that did not use the plaintiff's property in violation of the Copyright Act.... A prohibition on using the plaintiff's "Bibendum" copyright does not therefore create undue hardship for the defendants in conveying their message to the Michelin workers.¹²⁸

The proportionality element of the section 1 test involves a weighing of legislative efficacy in achieving the legislation's pressing and substantial objective(s) against its deleterious impacts on the right to free expression.¹²⁹ The *Michelin* analysis may both underestimate the deleterious impacts of the Act on free expression and overestimate its efficacy in achieving its objectives (particularly in light of the dual legislative objectives articulated by the SCC in *Théberge* and in the context of digital networks).

To the extent that important social and cultural expression such as parody, whistle blowing, and sampling are not protected users' rights, the Act arguably trenches on high value expression, with little substantive evidence of its efficacy in delivering both just compensation to creators

128 *Michelin*, above note 55 at para. 111.

129 *R. v. Oakes*, 1986 SCC 7, <www.canlii.org/ca/cas/scc/1986/1986scc7.html>, [1986] 1 S.C.R. 103 at 71.

and protecting the public interest in access to and use of the expression of others.¹³⁰ Moreover, the federal government should not be misled by the suggestion in *Michelin* that incursions on free expression are less pronounced simply because alternate venues for expression are available. The SCC has noted the significance of access to *effective* means of expression.¹³¹ The Court has also highlighted the instrumental role that digital networks are playing in terms of broadening access to information and enhancing opportunities for distribution to those without the significantly greater resources previously required to do so.¹³² Parliament should be cautious in acting to legislatively reinforce technological restrictions that limit this vital role of digital networks, particularly where the primary motivating force is founded on protecting private financial interests.

The foregoing analysis suggests that the Act as currently structured cannot be assumed to be consistent with freedom of expression, and that the justifiability of the violation is by no means a foregone conclusion — particularly in the digital networked context. The strength of and considerations central to the justification argument in *Michelin* are changing with time and technology, and the SCC has made clear the importance of protecting users' rights. Bill C-60's proposed protections of TPMs will broaden and exaggerate the violation of freedom of expression — cloaking with the public force of law privately-imposed and non-transparent prior restrictions not simply on use, but also on accessing digital content. Concomitant expansion of users' rights will be necessary if constitutional justification is to be achieved and unintended consequences like those of the *DMCA* are to be avoided.

130 See Samuelson, "Economics," above note 101; Barendt, above note 38 at 24.

131 For example, the SCC in *Ramsden* noted the importance of access to public spaces in enhancing the power of dissemination for those with few resources: above note 80 at para. 22.

132 In *R. v. Guignard*, 2002 SCC 14, <www.canlii.org/ca/cas/scc/2002/2002scc14.html>, [2002] 1 S.C.R. 472, LeBel J. noted at para. 25 that signs or posting on the Internet are an important "public, accessible and effective form of expressive activity for anyone who cannot undertake" a media campaign.

D. FREEDOM OF EXPRESSION AND TPMS

1) Protection of TPMs Exacerbates the Act's Charter Violations

Legislative protection of TPMs exacerbates the Act's inconsistencies with section 2(b). Even if one were to accept that current restrictions are justified pursuant to section 1, Bill C-60's deepened incursions on expression could tilt the section 1 balance against justification, particularly when high value scientific, literary, cultural and artistic expression is suppressed or chilled. With no necessary reason for any court to defer to the legislative choices Parliament may make, weak social science evidence supporting any reasoned basis for the prohibitions proposed,¹³³ and the economic nature of the private interests being protected, the government should anticipate a weighty justificatory task in the event of a future constitutional challenge.

Bill C-60's proposed protection of TPMs would trench more deeply on freedom of expression than does the current Act in at least four related ways. First, since TPMs often control both access to and use of digital materials,¹³⁴ individuals would be exposed to civil liability not only for infringing *uses* of copyright material, but for simply *accessing* copyright material by circumventing a TPM that controls access to digital content. In this way, the Act's current restrictions on the *use* of information would expand to restrict *access* to information as well, thereby directly implicating not only the right to impart information, but also the right to receive it. Given the availability of alternative sources of many forms of digital information (e.g. hard copies of books), the incursion on access to information and freedom of expression itself may not currently appear alarming. However,

¹³³ Hugenholtz, "Copyright Management," above note 123.

¹³⁴ *Kerr et al.*, above note 16 at 14, 18. Nimmer argues that circumvention of TPMs does not constitute protected expression in that "there is typically no communicative intent in the conduct": above note 103 at 368. However, general acceptance of such an argument could severely disable the constitutional right to freedom of expression to the extent that gaining access to expression is an essential component in fulfilling the objectives underlying the protection of freedom of expression, as accepted by the SCC in numerous contexts: above notes 48, 49, & 50. Moreover, it is wholly inconsistent with the Court's assertion that s. 2(b) may compel government action to insure access to certain kinds of information: *Haig*, above note 54.

if the digital economy develops as the government hopes it will,¹³⁵ the public will become increasingly dependent on digital information. Legal protections for TPMs could result in government-endorsed digital lock-up, the parameters of which are encoded into content by copyright holders in accordance with their own private financial interests.¹³⁶

Second, copyright holders can encode TPMs and integrate them into digital rights management systems (“DRMs”)¹³⁷ to impose a historically unprecedented degree of control over access to and use of digital content, as well as to surveil previously private activities.¹³⁸ TPM-enabled DRMs permit privately-determined meting out of access to and use of digital

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- 135 For example, Industry Canada has set a goal of making Canada “a world leader in the development and use of e-commerce,” see: Industry Canada, The Electronic Commerce Branch, The Canadian Electronic Commerce Strategy <[http://e-com.ic.gc.ca/epic/internet/inecicceac.nsf/vwapj/ecom_eng.pdf/\\$file/ecom_eng.pdf](http://e-com.ic.gc.ca/epic/internet/inecicceac.nsf/vwapj/ecom_eng.pdf/$file/ecom_eng.pdf)>. The Canadian government is also well on its way to realizing its broader objective of taking government online and ensuring that “Canadians [are] able to access all government information and services online at the time and place of their choosing”: Accenture, “eGovernment Leadership: High Performance, Maximum Value” (2004), online: Accenture, <www.accenture.com/xdoc/en/industries/government/gove_egov_value.pdf>.
- 136 Ian R. Kerr & Jane Bailey, “The Implications of Digital Rights Management for Privacy and Freedom of Expression” (2004) 2 J. Info, Comm & Ethics in Society 87 at 92–93, <[www.anonequity.org/files/ICES%20Chief%20Treasures%20\(kerr%20bailey\)%20FINAL%20\(june%202004\).pdf](http://www.anonequity.org/files/ICES%20Chief%20Treasures%20(kerr%20bailey)%20FINAL%20(june%202004).pdf)> [Kerr & Bailey]; Graham Dutfield & Uma Suthersanen, “DNA Music: IP and the Law of Unintended Consequences” (2005) 18 Science Studies 5 at 24–25, <www.ccls.edu/documents/dutfield_suthersanen_ss_2005_01.pdf>.
- 137 DRMs typically consist of: (i) “a database containing information which identifies the content and rights holders of a work”; and (ii) “a licensing arrangement which establishes terms of use for the underlying work”: Kerr *et al.*, above note 16 at 25. While some would argue that individual users are already “assenting” in these licenses to incursions on their expressive and privacy rights, there are sound reasons to question the degree to which that assent is valid and informed: Vincent Gautrais, “The Colour of E-Consent” (2003–2004) 1 UOLTJ 191 at 191–95, <www.uoltj.ca/articles/vol1.1-2/2003-2004.1.1-2.uoltj.Gautrais.189-212.pdf>. If the government chooses to become implicated in these incursions through extending legal protections to TPMs, Haig, above note 52 suggests a positive obligation to take steps to minimize their impacts on the rights to free expression and privacy.
- 138 Julie E. Cohen, “A Right to Read Anonymously: A Closer Look at “Copyright Management” In Cyberspace” (1996) 28 Conn. L. Rev 981 at 983–86 <<http://papers.ssrn.com/Delivery.cfm/9708091.pdf?abstractid=17990&mirid=1>> [Cohen]; Kerr & Bailey, above note 136 at 89.

content “by the sip”¹³⁹ — presenting the possibility of imposing limitations on expressive freedoms now taken for granted, such as the right to re-read a single page in a book as many times as one wishes, or to loan a book to a friend.¹⁴⁰ While a privately designed, metered and non-transparent approach may best suit the private financial interests of copyright holders, it could also significantly undermine the public interest in access to and use of expressive works.

TPM-enabled DRMs can also be used to monitor and track access to and uses of digital content, creating a digital database of information that may well reveal highly personal and confidential patterns regarding individuals’ lives.¹⁴¹ The limitations associated with metering, monitoring and tracking may well impact on whether and how we interact with information, curtailing or inhibiting expressive rights relating both to receiving and imparting information.¹⁴² Extending legislative protection to TPMs inevitably implicates government in these expression and privacy invasive measures. As Ian Kerr and I have argued elsewhere:

Widespread adoption of digital rights management systems could lock up digital content according to the private economic interests of rights holders, with little regard for the fundamental public interest in facilitating a healthy marketplace of ideas through access to and use of the expression of others. In addition to erecting cost barriers to accessing and using content (which need not reflect public efforts to balance interests), digital rights management systems could stifle innovation if used to protect outdated modes of content delivery, and discourage participation in the marketplace by those who wish, as Greenleaf put it, “to experience intellectual works ... free from surveillance.”¹⁴³

Third, given the current state of the art in TPMs,¹⁴⁴ the technology simply cannot honour existing users’ rights under the Act, such as fair

139 John Perry Barlow, “Life, Liberty and the Pursuit of Copyright?” in *The Atlantic* (17 September 1998) online: The Atlantic Online <www.theatlantic.com/unbound/forum/copyright/intro.htm>.

140 Lessig, above note 104 at 158–59, 163–65.

141 Cohen, above note 138 at 983, 986–87; Kerr & Bailey, above note 136 at 91.

142 Cohen, *ibid.* at 1012–15.

143 Graham W. Greenleaf, “IP, Phone Home: Privacy as Part of Copyright’s Digital Commons in Hong Kong and Australian Law” in Lawrence Lessig, ed., *Hoche-laga Lectures 2002: The Innovation Commons* (Hong Kong: Sweet & Maxwell Asia, 2003), Draft version online: <http://austlii.edu.au/~graham/publications/2003/IP_phone_home/IP_phone_home.html>.

144 Kerr *et al.*, above note 16 at 48–49, 51, 55.

dealing. As such, TPMs do not balance the rights of copyright holders, users and the public, even as much as the current Act does. While the government may choose to amend the statute to avoid the SCC's conclusion that such balancing is necessary under the Act,¹⁴⁵ maintaining a balance is likely to be an essential component in satisfying the minimal impairment element of the section 1 analysis.¹⁴⁶ Bill C-60 appears to address this problem by indicating that individuals will only be prohibited from circumvention where they do so for infringing purposes (which presumably would exclude circumvention for purposes of fair dealing or in pursuit of any other user's right articulated under the Act).¹⁴⁷ While less draconian than the comparable provisions of the *DMCA*, the proposed protection would still impair freedom of expression more significantly than does the current Act.¹⁴⁸

Even if it were to be perfectly lawful under any amendment to circumvent or facilitate circumvention for purposes of carrying out existing users' right, the proposed protections of TPMs would endorse technology that imposes a new hurdle to legitimate access to and use of copyright material. If exercising users' rights means, for example, developing or implementing decryption programs to circumvent over-broad TPMs, those without superior computer knowledge and programming skills (i.e. most citizens) will be "locked out." Most of us will be particularly dependent on those with superior skills to develop and distribute the technology necessary to exercise our rights. In this way, the proposed protection of

145 See above notes 10 & 56.

146 The uses provided for in what are now ss. 29 and 30 of the Act were central to the *Michelin* alternative conclusion of the Act's justifiability under s. 1: see above note 108 and accompanying text. *Cf.* In the United States context, Nimmer, above note 103 at 377, who argues that even if fair use were a constitutional right, the *DMCA*'s anti-circumvention provisions are not inconsistent with the First Amendment in that "[f]air use is not a right to take material in digital form merely because it is convenient."

147 Statement, above note 1 at para. 8.

148 For example, the language of the proposed provision 34.02(1) does not clearly indicate that an infringement must occur — the simple circumvention for an infringing purpose would appear to result in exposure to liability. In such instances, any rational connection between the restriction on access and even the private financial interests of copyright holders is tenuous at best. Further, the provision exposes members of security firms that "address security weaknesses by circumventing technological protection measures" to "a new layer of risk and liability": Digital Security Coalition, Press Release, "Digital Security Coalition Concerned over Copyright Bill" (20 June 2005), online: <www.digital-copyright.ca/node/view/940>.

TPMs would statutorily endorse additional time and expense barriers to accessing information and exercising users' rights, which are essential to the constitutional justifiability of the Act. These barriers would increase the costs to creators-in-waiting of borrowing from those who have gone before, thereby imposing further barriers to innovation.¹⁴⁹ Further, they would render even more important a thriving, innovative and accessible computer programming community to provide the tools and services necessary to maintain a constitutional balance. Unfortunately, the proposed provisions relating to "service" providers could have the opposite effect.

The fourth area of expanded incursion on free expression occasioned by the proposed protection of TPMs relates to its potential to chill dissemination of the scientific inquiry and related services so necessary to protect users' rights. What is now generally an *ex post* restriction relating to improper use could effectively become a prior restriction on expression. The current Act generally imposes civil and criminal liability *after* a prohibited use occurs, or at least after a preliminary judicial determination.¹⁵⁰ In contrast, the language of Bill C-60 relating to "service" providers suggests that civil remedies could flow *before* and even *regardless of* whether any unauthorized use actually occurs.

Bill C-60's proposed section 34.02(2) applies to those offering or providing a circumvention service, but does not define "service." Although use of the term "service" may be intended to isolate acts of infringement, rather than manufacture of devices (in contrast with the *DMCA*),¹⁵¹ such an interpretation does not easily flow from the language of the Bill. The difference between a "good" and a "service" is by no means a simple legal determination¹⁵² — so much so that it may well be difficult to tell where supplying a circumvention tool or device ends and "offering" or "provid-

149 As Drahos has noted, "The creator of innovation is also always the borrower of ideas and information from others. Intellectual property rights put a price on information, thereby raising the cost of borrowing. Raising the costs of borrowing through the imposition of very high standards of intellectual property will progressively choke innovation, not increase it. Most businesses, we argue, will be losers, not winners": above note 124 at 2.

150 Subject, of course, to the power of a court to issue an injunction following a hearing based on evidence: the Act, above note 9, ss. 34.(1)(2), 38(2)(3)(4), 39.1(2)(2).

151 The chilling implications of the much broader anti-circumvention provisions of the *DMCA* are discussed in more detail below.

152 For a discussion of the confusion in the law on the issue of distinguishing between goods and services, see: *Pittman Estate v. Bain*, [1994] O.J. No. 463 at paras. 375-455.

ing” a circumvention “service” begins. When faced with this lack of clarity as to whether, and if so, when providing a circumvention tool will amount to an infringing “service,” technical experts may well be deterred from disseminating the very devices and services that will be essential to preserving users’ rights.

The breadth of the chilling effect of anti-circumvention provisions¹⁵³ on those involved in researching and disseminating circumvention technologies is well-documented in the United States where, under the *DMCA*:

- a Russian programmer was arrested at a conference in the United States, and he and his employer criminally charged for distributing over the Internet software that converts Adobe eBooks into Adobe PDFs;¹⁵⁴
- injunctive and declaratory relief was issued against a magazine seeking to publish the code underlying a software program designed to decrypt the CSS code that prevents copying DVDs;¹⁵⁵
- computer scientists have refused to speak at encryption conferences out of fear of prosecution arising from, among other things, the Recording Industry of America Association’s legal threats against Princeton University professor Ed Felten in relation to publishing his research on digital music security weaknesses;¹⁵⁶ and
- civil suits relying on the anti-device provisions of the *DMCA* have been used to restrict competitors from circumventing access con-

153 It is notable that the anti-circumvention provisions in the *DMCA*, above note 18, s. 1201(a)(2) refer specifically not only to services, but to devices and components as well and thus are far more broad-ranging on their face than the provisions proposed in Bill C-60. Nonetheless, it is essential that the term “service” be clearly defined in a way that precludes the imposition of limitations on research and development of devices.

154 *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002), <<http://digital-law-online.info/cases/62PQ2D1736.htm>>.

155 *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d. 294 (S.D.N.Y. 2000) <<http://cyber.law.harvard.edu/openlaw/DVD/NY/trial/op.html>>, aff’d 273 F. 3d 429 (2d Cir. 2001).

156 Professor Felten challenged the constitutionality of the *DMCA*’s restrictions relating to circumvention devices, but the matter settled out of court. See: *Felten v. Recording Industry Association of America*, Case No. CV-01-2669 (GEB) (Dist. Ct. N.J.), description online: Electronic Frontier Foundation <www.eff.org/IP/DMCA/Felten_v_RIAA/>.

trols in order to create compatible, lower-cost printer cartridges¹⁵⁷ and garage door openers.¹⁵⁸

The language of Bill C-60, particularly in relation to “service” providers should be clearly drafted to ensure that these expression- and innovation-chilling results are avoided in Canada.

For these reasons, Bill C-60’s proposed protections of TPMs (even where tied to a purpose currently defined as infringing) would deepen the Act’s incursion on free expression by:

- broadening the Act’s prohibitions to include, not just use of, but access to information and knowledge;
- protecting non-transparent privately encoded mechanisms imposing unprecedented control over and surveillance of access to and use of information, and which are currently incapable of honouring many facets of users’ rights currently defined in the Act;
- imposing new barriers on access to and use of information that will make most users dependent upon experts to obtain the technological means to exercise their existing rights under the Act; and, at the same time,
- imposing prior restrictions with no necessary connection to the Actual commission of an unauthorized use that are likely to chill development and dissemination of the very scientific knowledge and expertise essential to maintaining the balance between the rights of copyright holders, users and the public.

These incursions on free expression will be particularly difficult to justify in relation to high value expression that is essential to the key values underlying the protection of the freedom itself, including political and social commentary, and literary and artistic works.¹⁵⁹ For example, prohibiting circumvention of TPMs regulating access to and use of material such

157 *Lexmark Int’l. Inc. v. Static Control Components, Inc.*, 387 F. 3d 522 (6th Cir. 2004), <<http://caselaw.findlaw.com/data2/michiganstatecases/appeals/102604/24923.pdf>>.

158 *Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) <[http://homepages.law.asu.edu/~dkarjala/cyberlaw/ChamberlainVskylink\(FedCir2004\).htm](http://homepages.law.asu.edu/~dkarjala/cyberlaw/ChamberlainVskylink(FedCir2004).htm)>.

159 It is likely to be more difficult to justify restrictions on high value expression, such as art, literature and political speech, since these forms of expression are more closely associated with the values underlying freedom of expression: see *Thomson Newspapers Co. v. Canada*, 1998 SCC 43, <www.canlii.org/ca/cas/scc/1998/1998scc43.html>, [1998] 1 S.C.R. 877 at paras. 90–92.

as legislation and policy papers that are subject to government copyright arguably strikes at the heart of freedom of expression's objective of facilitating democratic participation.¹⁶⁰

2) The Need for Constitutional Contouring

Given the concerns relating to expressive freedoms discussed above, the constitutionally prudent course of action may be for the federal government to avoid imposition of further expressive restrictions by extending legislative protection to TPMs. If, despite these concerns, Parliament chooses to do so, constitutional contouring will be essential in charting a distinctively Canadian course. The government should stand firm against any suggestion that *DMCA* style legislation is necessary in order to satisfy the international obligations¹⁶¹ owed by signatories upon ratification of the WIPO Treaties.¹⁶²

Any further legislative protection for TPMs in Canada should be specifically and narrowly crafted, building in broad and express protection for users' rights. Specific elements of constitutional contouring that might assist Canada in avoiding the detrimental and unintended consequences of *DMCA* style legislation on freedom of expression and innovation could include:

- no protection for TPMs on non-copyright material;¹⁶³
- no protection for TPMs on material subject to crown copyright;

160 With respect to facilitation of democratic participation, see: *Harper*, above note 49, McLachlin C.J. (dissenting, although not on this particular point) at paras. 11–17. An initial attempt to address the expressive restrictions of Crown copyright, however, met with no success, although the result may have related more to the context in which the argument was raised than to the strength of the argument generally: Gendreau, above note 11 at 247–48, referring to *Wilson & Lafleur Ltée v. SOQUIJ*, [1998] RJQ 2489 (Sup. Ct.).

161 While courts are likely to strive to conclude that domestic implementation of international obligations is constitutional, Canada's implementation of the WIPO Treaties can and will be subject to *Charter* scrutiny: *United States v. Burns*, 2001 SCC 7, <www.canlii.org/ca/cas/scc/2001/2001scc7.html>, [2001] 1 S.C.R. 283 [*Burns* cited to S.C.R.].

162 Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised" (1999) 14 *Berkeley Tech. L.J.* 519 at 535–38, <www.sims.berkeley.edu/~pam/papers/dmcapaper.pdf> [Samuelson, "Intellectual Property"].

163 *Kerr et al.*, above note 16 at 48–50. This element of constitutional contouring already appears evident in Bill C-60 by virtue of tying civil remedies to circumvention for infringing purposes.

- no liability for circumvention for purposes of exercising users' rights currently provided for under the Act (e.g. fair dealing) by explicitly recognizing an affirmative user right to circumvent TPMs in order to exercise those rights;¹⁶⁴
- clarifying and narrowing the restrictions on offering and providing a circumvention service¹⁶⁵ to expressly exclude limitations on devices by confining "service" to the Act of circumventing a TPM on behalf of another who has no legitimate purpose¹⁶⁶ other than infringing copyright,¹⁶⁷ and explicitly stating liability can only be imposed where that other does in fact infringe copyright in that work; and
- a sunset clause that requires a three-year review of the legislation in order to consider its continuing constitutionality in light of the impact of the protection of TPMs on the public domain, freedom of expression and innovation.¹⁶⁸

E. CONCLUSION

By signing the WIPO Treaties, Canada has expressed a commitment to, among other things, address the effects of our digitally networked society on copyright holders. Domestic implementation of that commitment must, however, accord with constitutional constraints relating to freedom of expression.¹⁶⁹ Legitimate questions already exist in relation to the

164 Cohen, above note 138 at 1023–24, 1029–30.

165 Yochai Benkler raised the concern that "Even if a few savvy users can circumvent without relying on the products or services of others, the vast majority of users will have to rely on such products or services. Prohibition on the means to circumvent effectively excludes most users from most uses of technically-protected information. Prohibiting manufacture, importation, or sale of devices without prohibiting copying would by and large negate the possibility of circumvention": Benkler, above note 39 at 416.

166 Samuelson, "Intellectual Property," above note 162 at 543–46.

167 *Ibid.* at 557: "The anti-device provisions of s. 1201 are not predictable, minimalist, consistent, or simple, as the Framework principles suggest that they should be. Due to inconsistencies in the statute, it is unclear whether s. 1201's anti-device provisions would be interpreted to allow the development and distribution of technologies to enable legitimate uses. Boiled down to its essence, this presents the question of whether Congress should be understood to have made an empty promise of fair use and other privileged circumvention. Unless the anti-device provisions of the DMCA are modified, either by narrow judicial interpretation or by legislative amendments, they are likely to have harmful effects on competition and innovation in the high technology sector."

168 *Ibid.* at 557–62.

169 Burns, above note 161.

constitutionality of the current Act. Deepening the Act's restrictions on freedom of expression through anti-circumvention provisions can only serve to heighten constitutional concerns. Any legislative prohibition on circumvention of TPMs must take into account not only copyright holders' rights, but users' rights and the public interest in access to and use of information and knowledge.

Legislation that does not clearly reflect lessons learned in the United States under the *DMCA* may prove difficult to justify under the *Charter*. The current legislative reform process presents an opportune moment in Canadian policy-making history to explicitly recognize the connections between copyright and freedom of expression. Parliament has the opportunity, and the obligation, to chart a course that compromises the entrenched expressive rights of users in favour of the economic interests of copyright holders only insofar as is necessary to serve the public interest in a robust marketplace of ideas.