

**TOWARDS RECONSIDERATION OF THE INTERSECTION OF THE
CHARTER RIGHT TO FREEDOM OF EXPRESSION
AND COPYRIGHT IN CANADA**

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DISSERTATION

**SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW
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Abstract

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This thesis explores the intersection of freedom of expression (as protected in the *Canadian Charter of Rights and Freedoms (Charter)*) and copyright in Canada. In this thesis, I argue that both lower Canadian courts and the Supreme Court of Canada (SCC) should reconsider their approaches to this intersection. Lower Canadian courts have consistently rejected arguments that provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. The SCC, on the other hand, has consistently interpreted provisions of the *Copyright Act* in such a manner as to result in expanded protection for the expression interests of non-copyright owning parties. It has done so not by relying explicitly on the *Charter* right to freedom of expression, but through a process of statutory interpretation.

I argue that both approaches merit reconsideration. Specifically, I argue that the approaches adopted by lower Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright are based on now-invalidated approaches to both copyright and to freedom of expression, and are thus themselves invalid; that to the extent to which the SCC's approach to this intersection assumes that the *Charter* right to freedom of expression can be protected, in the context of copyright, through statutory interpretation alone, that it fails to adequately protect the *Charter* right to freedom of expression; that other leading national courts from which the SCC has previously sought assistance have explicitly engaged with this intersection, and that the SCC should follow suit; and that the SCC's own copyright and freedom of expression jurisprudence suggests that provisions of the *Copyright Act* may unjustifiably infringe the *Charter* right to freedom of expression. These four arguments, taken together, suggest that the time is ripe for reconsideration of this intersection.

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FCA = Federal Court of Appeal (Canada)
OCA = Court of Appeal for Ontario
SA = South Africa
SCC = Supreme Court of Canada
US = United States

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15 ... in the course of the appellant arguing the appeal with regard to the *Charter*, I took a strong and perhaps unfair position that the counsel for the appellant was demeaning the *Charter* by bringing the *Charter* argument that he did. On further review of the matter and referring to the cases argued on behalf of the appellant, I have concluded that there is a serious question to be considered.²

² *Moore v. Canadian Newspapers Co.* (1989), 60 OR (2d) 262 Ontario High Court of Justice, Divisional Court at paras. 15-16 (Rosenberg J.).

1. INTRODUCTION

Copyright can be defined as a bundle of rights in works of expression granted by states through legislation the structure of which is informed by international treaties and agreements.³ The rights granted under copyright legislation permit copyright owners, in certain circumstances, to restrict the expression of non-copyright owning parties.⁴

A number of justifications have been offered to account for the restrictions imposed by copyright on expression, or for the existence of copyright more generally: that copyright provides an economic incentive for individuals to create and disseminate works of expression, and as a result will lead to the flourishing of future expression;⁵ that copyright protects the natural rights of authors to the labour that they have invested in creating the work;⁶ that copyright protects the natural rights of authors to their personality, as expressed in the work;⁷ that copyright protects the human rights of authors (including authors' freedom of expression);⁸ that copyright,

³ The structure of Canada's *Copyright Act*, R.S.C. 1985, c. C-42, for instance, is informed by a number of treaties and agreements, including the WIPO Performances and Phonograms Treaty, Dec 20, 1996, 2186 UNTS 2013, S Treaty Doc No 105-17 (1997); 36 ILM 76 (1997) and the WIPO Copyright Treaty, Dec 20, 1996, 2186 UNTS 121, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997).

⁴ Persons held to have infringed others' copyrights may be barred from further unauthorized use of this copyrighted work, among other remedies.

⁵ See, for instance, *Harper & Row, Publishers, Inc., et al. v. Nation Enterprises et al.* 471 US 539; 105 S Ct 2218; 85 L Ed 2d 588; 1985 US LEXIS 17; 53 USLW 4562; 225 USPQ (BNA) 1073; 11 Media L Rep 1969 Supreme Court of the United States at 558, where copyright is referred to as 'the engine of free expression' which 'supplies the economic incentive to create and disseminate ideas.' See also Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press 2008).

⁶ See, for instance, Carys J. Craig, 'Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law' (2002) 28 Queen's Law Journal 1.

⁷ See, for instance, Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown Law Journal 287.

⁸ See, for instance, Graeme W. Austin and Amy G. Zavidow, 'Copyright Reform through a Human Rights Lens' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008).

by giving authors a degree of control over how their works are used, protects authors' 'expressive autonomy';⁹ and that copyright protects authors' dignity interests;¹⁰ among other theories and justifications.¹¹

However, regardless of the justification that is accepted, it cannot be denied that copyright laws restrict the expression of non-copyright owning parties.¹² Given that copyright restricts expression, it is appropriate to ask whether it does so unreasonably, and further, whether copyright is in conflict with freedom of expression. The answers to these questions may differ depending on the jurisdiction on which one chooses to focus.¹³ In this thesis, I will focus on the relationship between freedom of expression and copyright in Canada. I will do so for several reasons, explored in more depth in Chapter 2, including the fact that the Supreme Court of Canada (SCC) has yet to explicitly address the intersection of copyright and the right to freedom of expression as protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*.¹⁴

⁹ See, for instance, Timothy AO Endicott and Michael J Spence, 'Vagueness in the Scope of Copyright' (2005) 121 *Law Quarterly Review* 657 at 672-673.

¹⁰ See, for instance, Abraham Drassinower, 'Copyright Infringement as Compelled Speech' in Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (Page 203, Cambridge 2012), and Abraham Drassinower, 'Taking User Rights Seriously' in Michael Geist (ed), *In the Public Interest: (Irwin Law 2005)*.

¹¹ See, for instance, William W. Fisher, 'Theories of Intellectual Property' in *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001).

¹² Copyright may also be employed to restrict an author's use of works of expression that they themselves have created. If the author assigns their copyright in a work of expression, they are in the same position as a non-author in terms of their ability to engage in unauthorized use of this work. See, for instance, the litigation involving John Fogerty and Fantasy, Inc (*Fogerty v Fantasy, Inc* 510 US 517 SCOTUS).

¹³ Variables impacting upon the answers to these questions include the way in which a country's copyright legislation is structured, the manner through which freedom of expression is given constitutional protection (if at all), and the governing approaches to freedom of expression and to copyright adopted by courts.

¹⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

A number of lower Canadian courts have explicitly addressed the intersection of the *Charter* right to freedom of expression and copyright. These courts have consistently rejected arguments that provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. As I will outline in Chapter 3, under the governing approach to this intersection, as adopted by lower Canadian courts, it is accepted that due to the nature and scope of both the *Charter* right to freedom of expression and copyright, there is no conflict between these rights.¹⁵ One lower court has gone so far as to characterize arguments challenging the constitutionality of provisions of the *Copyright Act* on *Charter* right to freedom of expression grounds as 'bound to fail'.¹⁶

The SCC, on the other hand, although it has not explicitly engaged with the intersection of the *Charter* right to freedom of expression and copyright, has consistently interpreted provisions of the *Copyright Act* in such a manner as to result in expanded protection for the expression interests of non-copyright owning parties. It has done so not by weighing provisions of the *Copyright Act* against the *Charter* right to freedom of expression, or by interpreting provisions of the *Copyright Act* according to the *Charter* value of freedom of expression, but through a process of statutory interpretation.

In this thesis, I will argue, on the basis of doctrinal analysis, that the time is ripe for reconsideration of the approaches adopted by both lower Canadian courts and the SCC to the intersection of the *Charter* right to freedom of expression and copyright. Chapter 1 (this chapter) acts as the thesis introduction. In Chapter 2, I will

¹⁵ See, for instance, *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1996] FCJ No 1685 (QL); [1997] 2 FC 306 FCTD.

¹⁶ *Canwest Mediaworks Publications Inc. v. Horizon Publications Inc.* 2009 BCSC 391, [2009] BCWLD 6704 at para. 37.

discuss the research methodology that I am employing, the scope of the thesis, the research questions that I will address, the contributions made by the thesis, and my decision to focus on Canada as my jurisdiction of choice. I will also provide an introduction to freedom of expression, to the s. 1 analysis under the *Charter* (the primary mechanism, in Canada, through which any infringement of freedom of expression may be justified), and to copyright in Canada.

In Chapters 3 and 4, I will argue that the way in which lower Canadian courts have addressed the intersection of the *Charter* right to freedom of expression and copyright merits reconsideration. In Chapter 3, I will discuss all Canadian cases to have explicitly addressed the intersection of the *Charter* right to freedom of expression and copyright, identifying both the governing approach to this intersection as well as two alternative approaches adopted by Canadian courts.

In Chapter 4, I will critically examine these cases, arguing that the governing approach to the intersection of the *Charter* right to freedom of expression and copyright in Canada, as well as the two alternative approaches to this intersection, are based on approaches to copyright, and to the *Charter* right to freedom of expression, that are no longer valid. Given this, I argue that it is necessary for Canadian courts to reconsider the approaches adopted by lower Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright.

In Chapter 5, I will argue that the approach to the intersection of the *Charter* right to freedom of expression and copyright adopted by the SCC also merits reconsideration. Relying on the fair dealing provisions of the *Copyright Act* as my case study, I will argue that through the course of its post-2002 copyright jurisprudence, the SCC has consistently interpreted provisions of the *Copyright Act* in such a manner as to result in expanded protection for the expression interests of

non-copyright owning parties. As noted above, the SCC has done so, however, without explicitly engaging with the intersection of the *Charter* right to freedom of expression and copyright. Instead, the primary vehicle through which the SCC has balanced the expression interests of non-copyright owning parties with the rights of copyright owners has been the process of statutory interpretation.

I will argue that relying exclusively on statutory interpretation as the mechanism through which to protect the expression interests of non-copyright owning parties, in the context of copyright, fails to adequately protect the *Charter* right to freedom of expression; and that the beneficial impacts for the expression interests of non-copyright owning parties that have thus far flowed from the SCC's interpretations of provisions of the *Copyright Act* in its post-2002 copyright jurisprudence should not bar reconsideration of the approach adopted by the SCC to this intersection.

In Chapter 6, I will situate the approaches adopted by Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright in an international context. Specifically, I will contrast the approaches to the intersection of freedom of expression and copyright adopted by Canadian courts with approaches to this intersection adopted by courts in the United States of America (US), the United Kingdom (UK), and South Africa (SA), three jurisdictions the decisions of which have been cited by the SCC in the context of its copyright and/or freedom of expression jurisprudence. Courts in each of these jurisdictions have explicitly engaged with the intersection of freedom of expression and copyright. I argue that the SCC should follow suit. The comparative analysis set out in this chapter provides further support for the argument that Canadian courts should reconsider their

approaches to the intersection of the *Charter* right to freedom of expression and copyright.

In Chapter 7, I will examine – using contemporary copyright, freedom of expression, and s. 1 jurisprudence – how a *Charter* analysis might proceed in the context of copyright. I will do so in reliance on three case studies. These case studies are as follows: (1) an action is brought against A for copyright infringement for making available works the copyright in which would have expired were it not for a legislative amendment to the *Copyright Act* passed after the works had been created that extended the term of copyright for both future and existing works (a case analogous in some ways to *Eldred v. Ashcroft* (see Chapter 6));¹⁷ (2) an action is brought against B for copyright infringement for offering for sale printed copies of abridged versions of works protected under Crown copyright (a case analogous to *Queen v. James Lorimer & Co* (see Chapter 3));¹⁸ and (3) an action is brought against C for copyright infringement for creating and disseminating ‘transformative works’¹⁹ that infringe copyright. Through this analysis, I will argue that provisions of Canada’s *Copyright Act* may unjustifiably infringe the *Charter* right to freedom of expression, giving further weight to the argument that reconsideration of the relationship between freedom of expression and copyright, by Canadian courts, is necessary.

Chapter 8 concludes the thesis. On the basis of the analysis set out in Chapters 3 – 7, I will conclude both that there are serious questions to be considered

¹⁷ *Eldred v Ashcroft* 537 US 186.

¹⁸ *Queen v James Lorimer & Co* [1982] FCJ No 229 FCTD; *Queen v James Lorimer & Co* [1984] 1 FC 1065.

¹⁹ In *Campbell v Acuff-Rose Music* 510 US 569 (1994) SCOTUS at 579, Souter J. (who delivered the opinion of the Court) defined ‘transformative’ uses as those which ‘add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.

with respect to the relationship between the *Charter* right to freedom of expression and copyright in Canada as articulated both by lower Canadian courts and the SCC, and that the time is ripe for such reconsideration.²⁰

²⁰ This thesis is current as of 16 February 2015.

2. BACKGROUND

This chapter will provide the necessary background information for my thesis. In this chapter, I will discuss the research methodology that I am employing, the scope of my thesis, the research questions that I will address, the contributions made by this thesis, and my decision to focus on Canada as my jurisdiction of choice. I will also provide an introduction to the protection of freedom of expression in Canada, to the s. 1 analysis under the *Charter*, and to Canadian copyright law.

2.1 Research methodology and scope

This thesis is entirely doctrinal. Its purpose is to demonstrate that an issue treated by Canadian courts as settled – namely the relationship between the *Charter* right to freedom of expression and copyright – should not be seen as settled; that the approaches adopted by both Canadian lower courts and by the SCC to this relationship should be reconsidered; and that the time is ripe for such reconsideration.

This thesis does not address the normative question of how reconsideration of the approaches adopted by Canadian courts to the relationship between the *Charter* right to freedom of expression and copyright ought to take place. As initially conceived, this thesis had a significant normative component. However, over the course of developing this thesis (and particularly since March 2014), I came to believe that the most substantial contribution that I could make, at this time, to the study of the intersection of the *Charter* right to freedom of expression and copyright in Canada was to build the case for reconsideration of the ways in which Canadian courts have approached this intersection.²¹ The development of a normative analysis

²¹ For instance, in March 2014, I envisioned Chapters 6-8 of my thesis as follows: in Chapter 6, I would argue that core provisions of Canada's *Copyright Act* infringe the *Charter* right to freedom of expression and are not saved by a s. 1 analysis. In Chapter 7, I would suggest several ways through which Parliament could reform Canada's *Copyright Act* in order to make it *Charter*-compliant. In

of the relationship between the *Charter* right to freedom of expression and copyright is a project that I will undertake following submission of my doctoral thesis.

Consistent with the nature of this thesis as a doctrinal work, in the course of this thesis, I articulate the governing approaches to freedom of expression and to copyright in Canada without making a value judgment as to the desirability of each approach; and without endorsing either approach. In this project, I am neither advocating for the economic-functional approach to copyright nor for the author-centric approach. Similarly, I am neither advocating, in this project, for a broad rights approach to freedom of expression nor for a definitional conception.

While my thesis is not based on a specific theoretical framework, I will discuss several theories of freedom of expression and several theories of copyright in the context of developing my argument. As well, while my thesis is not a comparative thesis as such, Chapter 6 is devoted to comparative analysis. Engaging in this analysis provides additional support for my argument that the approaches adopted by both lower Canadian courts and the SCC to the intersection of the *Charter* right to freedom of expression and copyright merit reconsideration. This analysis also allows me to gauge the degree to which decisions of leading national courts on the intersection of freedom of expression and copyright might provide assistance to Canadian courts reconsidering this intersection. A full analysis of the

Chapter 8, I would explore the question of what types of actions individuals, corporations, or collectives could take in the absence of statutory reform should they wish to follow the approach outlined in Chapters 6 and 7. These chapters, as conceived, would have required me to develop a normative framework with respect to the intersection of the *Charter* right to freedom of expression and copyright. Since March 2014, I have restructured these chapters in line with the nature of this thesis as one that is entirely doctrinal. For instance, I have abandoned Chapters 7 and 8 as conceived in March 2014. I will address these topics in future works, building upon the doctrinal analysis set out in this thesis. As well, I have modified Chapter 6 (now Chapter 7). I am no longer arguing that certain core provisions infringe the *Charter* right to freedom of expression and either are not or should not be saved by a s. 1 analysis (an argument that relies upon the existence of a normative framework). Rather, I am arguing that Canadian courts could hold that certain core provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression (an argument that is consistent with the nature of this thesis as engaging in doctrinal analysis).

approaches to the intersection of freedom of expression and copyright adopted by courts in jurisdictions other than Canada, however, is beyond the scope of this thesis to address.

Other related topics that are beyond the scope of this thesis to address include the intersections of the *Charter* right to freedom of expression and intellectual property rights other than copyright, such as trademark rights, patent rights, passing off, moral rights, and the tort of appropriation of personality. While these topics are not addressed in this thesis, it may nevertheless be the case that conclusions reached in this thesis with respect to the intersection of the *Charter* right to freedom of expression and copyright might inform analyses in these areas. Also beyond the scope of this thesis to address are analyses of the intersection of copyright and other *Charter*-protected rights such as freedom of thought; the right to life, liberty, and security of the person; or equality rights;²² and analyses of the intersection of copyright and freedom of expression as instantiated in statutory bills of rights such as the Canadian *Bill of Rights* and the Quebec *Charter*.²³

2.2 Research questions

My thesis will address the following research questions:

- What is the governing approach to the intersection of the *Charter* right to freedom of expression and copyright as adopted by Canadian courts?
- Have any alternative approaches to this intersection been adopted by Canadian courts? If so, what are these alternative approaches?
- Upon which theory or approach to copyright are these approaches based?

²² Charter, arts. 2(b), 7, 15.

²³ Canadian Bill of Rights, SC 1960, c 44; Charter of Human Rights and Freedoms, RSQ c. C-12.

- Upon which theory or approach to the *Charter* right to freedom of expression are these approaches based?
- Is the approach to copyright upon which the governing and alternative approaches to the intersection of the *Charter* right to freedom of expression and copyright are based consistent with the governing approach to copyright in Canada?
- Is the approach to the *Charter* right to freedom of expression upon which the governing and alternative approaches to the intersection of the *Charter* right to freedom of expression and copyright are based consistent with the governing approach to freedom of expression in Canada?
- What has been the impact of the SCC's post-2002 copyright jurisprudence on expression interests?
- If the SCC can be said to have expanded protection for the expression interests of non-copyright owning parties through its post-2002 copyright jurisprudence, through what mechanism or mechanisms has it done so?
- What explains the absence of explicit discussion on the intersection of the *Charter* right to freedom of expression and copyright in the SCC's post-2002 copyright jurisprudence?
- Does the SCC have a history of reasoning comparatively so that an analysis of the approaches to the intersection of freedom of expression and copyright adopted by foreign courts might be relevant to the reconsideration, by Canadian courts, of the intersection of the *Charter* right to freedom of expression and copyright?
- What are the approaches to the intersection of freedom of expression and copyright adopted by leading foreign courts?

- Might the approaches to the intersection of freedom of expression and copyright adopted by foreign courts be relevant to the reconsideration, by Canadian courts, of this intersection? If so, how? If not, why not?
- Might certain core provisions of the *Copyright Act* prima facie infringe the *Charter* right to freedom of expression?
- How might a s. 1 analysis be applied in the context of certain impugned provisions of the *Copyright Act*?
- What are the possible remedies available to Canadian courts if it is held that certain provisions of the *Copyright Act* infringe s. 2(b) of the *Charter* and cannot be saved by a s. 1 analysis?

2.3 Contributions of thesis

2.3.1 Existing body of literature on the intersection of the *Charter* right to freedom of expression and copyright in Canada

My thesis builds upon the existing body of literature on the intersection of freedom of expression and copyright in Canada. The first work to address this intersection – Joe Conforti’s ‘Copyright and Freedom of Expression: A Privilege for New[s] Reports’ – was published in 1990, a full two decades after seminal works addressing this intersection had been published in the United States.²⁴ Since Conforti’s article was published in 1990, only a limited number of articles and book chapters have been published that explore, in depth, the intersection of freedom of

²⁴ Joe Conforti, ‘Copyright and Freedom of Expression: A Privilege for New[s] Reports’ (1990) 5 IPJ 130. Three of the earliest US works to focus on the topic of the intersection of freedom of expression and copyright are Melville B. Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L Rev 1180, Paul Goldstein, ‘Copyright and the First Amendment’ (1970) 70 Colum L Rev 983, and Lionel S Sobel, ‘Copyright and the First Amendment: A Gathering Storm’ (1969) 19 Copyright L Symp 43.

expression and copyright in Canada.²⁵ Some of these works focus broadly on the relationship between freedom of expression and copyright in Canada, while others examine this relationship in specific contexts.

²⁵ The limited number of articles published on the subject of the intersection of freedom of expression and copyright in Canada can be contrasted with the large body of research published on the topic of the intersection of freedom of expression and copyright in the US. See, for instance: Margot Kaminski, 'Copyright Crime and Punishment: The First Amendment's Proportionality Problem' (2014) 73 Maryland Law Review 587, Mark Bartholomew and John Tehranian, 'An Intersystemic View of Intellectual Property and Free Speech' (2013) 81 George Washington L Rev 1, Tun-Jen Chiang, 'Rehabilitating the Property Theory of Copyright's First Amendment Exemption' (2013) 89 Notre Dame L Rev 521, Neil Weinstock Netanel, 'First Amendment Constraints on Copyright after *Golan v Holder*' (2013) 60 UCLA L Rev 1082, David L Lange, Risa J Weaver and Shiveh Roxana Reed, '*Golan v Holder*: Copyright in the Image of the First Amendment' (2011) 11 J Marshall Rev Intell Prop L [i], Joseph P Bauer, 'Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies' (2010) 67 Wash & Lee L Rev 831, David S Olson, 'First Amendment Based Copyright Misuse' (2010) 52 Wm & Mary L Rev 537, Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 Harv J L & Tech 171, Alfred C Yen, 'A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement' (2010) 12 Vand J Ent & Tech L 947, David Lange and H Jefferson Powell, *No Law* (Stanford University Press 2009), David S Olson, 'First Amendment Interests and Copyright Accommodations' (2009) 50 BC L Rev 1393, Alfred C Yen, 'A First Amendment Perspective on the Construction of Third-Party Copyright Liability' (2009) 50 BC L Rev 1481, Adrian Liu, 'Copyright as Quasi-Public Property: Reinterpreting the Conflict between Copyright and the First Amendment' (2008) 18 Fordham Intell Prop Media & Ent LJ 383 Graeme Dinwoodie, 'Copyright and Freedom of Expression: Engine or Obstacle' in Raquel Xalbarder (ed), *Copyright and Freedom of Expression: Proceedings of the ALAI Study Days* (2008), Netanel, *Copyright's Paradox*, Paul Bender, 'Copyright and the First Amendment after *Eldred v Ashcroft*' (2007) 30 Colum JL & Arts 349, Alan E Garfield, 'The Case for First Amendment Limits on Copyright Law' (2007) 35 Hofstra L Rev 1169, Raymond Shih Ray, 'F(r)ee Expression – Reconciling Copyright and the First Amendment' (2007) 57 Case W Res L Rev 863, Shyamkrishna Balganes, 'Copyright and Free Expression: The Convergence of Conflicting Normative Frameworks' (2004) 4 Chi-Kent J of Intell Prop 45, David McGowan, 'Why the First Amendment Cannot Dictate Copyright Policy' (2004) 65 U Pitt L Rev 281, Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 Yale LJ 535, Diane L Zimmerman, 'Is There a Right to Have Something to Say – One View of the Public Domain' (2004) 73 Fordham L Rev 297, Michael Birnhack, 'Copyright Law and Free Speech After *Eldred v Ashcroft*' (2003) 76 S Cal L Rev 1275, William W Van Alstyne, 'Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review' [2003] Law & Contemp Probs 225, Christopher L Elsguber, 'Censorship, Copyright, and Free Speech: Some Tentative Skepticism about the Campaign to Impose First Amendment Restrictions on Copyright Law' (2003) 2 J on Telecomm & High Tech L 17, Eugene Volokh, 'Freedom of Speech and Intellectual Property: Some Thoughts After *Eldred*, 44 Liquormart, Saderup, and Bartnicki' (2003) 40 Hous L Rev 697 Alfred C Yen, 'Eldred, The First Amendment, and Aggressive Copyright Claims' (2003) 40 Hous L Rev 673, Jed Rubenfeld, 'The Freedom of Imagination: Copyright's Constitutionality' (2002) 112 Yale LJ 1, Alan E Garfield, 'The First Amendment as a Check on Copyright Rights' (2001) 23 Hastings Comm & Ent LJ 587, Lawrence Lessig, 'Copyright's First Amendment' (2001) 48 UCLA L Rev 1057, Neil Weinstock Netanel, 'Locating Copyright Within the First Amendment Skein' (2001) 54 Stan L Rev 1, Neil Weinstock Netanel, 'Market Hierarchy and Copyright in our System of Free Expression' (2000) 53 Vand L Rev 1879, Hannibal Travis, 'Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment' (2000) 15 Berk Tech LJ 777, Rebecca Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation' (2000) 42 BC L Rev 1, Alfred C Yen, 'Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment' (2000) 88 Geo LJ 1833, Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain' (1999) 74 NYU

David Fewer, Ysolde Gendreau, and Carys Craig are the three authors whose works have focused broadly on the relationship between freedom of expression and copyright in Canada. Fewer's article 'Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada', the second published article on this topic (after Conforti's article), constitutes a major contribution to the literature in this area.²⁶ Fewer was the first to point out the 'perplexing paradox' in Canadian law – that 'freedom of expression [is held out by the SCC] as the foundation upon which Western civilization is based' and yet 'courts have had no hesitation in trumping freedom of expression, the supreme law of the land, with intellectual property claims'.²⁷ In his article, Fewer develops a 'framework within which courts can reconcile the exclusive rights in expression of copyright law with the expressive values enshrined in s. 2(b) of the *Charter*'.²⁸ Arguing that '[t]he *Copyright Act*, properly construed, should be an engine of freedom of expression',²⁹ Fewer advocates for a 'harsher approach to economic piracy';³⁰ for broader, more rigorous interpretations of fair dealing and other defences to copyright infringement (such as

L Rev 354, Mark A. Lemley and Eugene Volokh, 'Freedom of Speech and Injunctions in Intellectual Property Cases' (1998) 48 Duke LJ 147, Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 Yale LJ 283, Diane L Zimmerman, 'Information as Speech, Information as Goods: Some Thoughts on Marketplace and the Bill of Rights' (1992) 33 Wm & Mary L Rev 665, Alfred C Yen, 'A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'' (1989) 38 Emory LJ 393, L. Ray Patterson, 'Free Speech, Copyright, and Fair Use' (1987) 40 Vand L Rev 1, David E Shipley, 'Conflicts between Copyright and the First Amendment after *Harper & Row, Publishers v Nation Enterprises*' (1986) 1986 BYU L Rev 983, Pamela Samuelson, 'Reviving Zacchini: Analyzing First Amendment Defences in Right of Publicity and Copyright Cases' (1983) 57 Tul L Rev 836, Robert C. Denicola, 'Copyright and Free Speech: Constitutional Limitations on the Protection of Expression' (1979) 67 Cal L Rev 283, Celia Goldwag, 'Copyright Infringement and the First Amendment' (1979) 79 Colum L Rev 320.

²⁶ David Fewer, 'Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada' (1997) 55 U Toronto Fac L Rev 175.

²⁷ *Ibid* at 176-177.

²⁸ *Ibid* at 184.

²⁹ *Ibid* at 239, citing to *Harper & Row*.

³⁰ Fewer at 239.

the public interest defence);³¹ and for the *Charter* to play a role ‘in selecting remedies under the Act’.³²

Ysolde Gendreau has published two papers on the topic of the intersection of freedom of expression and copyright in Canada.³³ In ‘Copyright and Freedom of Expression in Canada’, Gendreau offers an explanation for why the relationship between copyright law and freedom of expression has ‘attract[ed] much ... attention’ in the United States, but not in Canada.³⁴ Gendreau suggests several reasons for this lack of attention, including the nature of the *Charter* as ‘very much a public law instrument’ that has had less of an impact on ‘private law matters’ (such as copyright) than on areas of public law; and the view that ‘copyright law already incorporates freedom of expression values through its own mechanisms’.³⁵ In her work ‘Canadian Copyright Law and its Charters’, Gendreau continues her analysis of the intersection of freedom of expression and copyright in Canada, this time in the context of a broader discussion about the relationship between Canadian copyright law and both the federal *Charter* and Quebec’s *Charter of Human Rights and Freedoms*.³⁶ Gendreau remains the only scholar to have published articles on the intersection of freedom of expression and copyright in the context of both the federal and Quebec *Charters*.

³¹ Ibid at 239.

³² Ibid at 184.

³³ Ysolde Gendreau, ‘Canadian Copyright Law and its Charters’ in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press 2005), Ysolde Gendreau, ‘Copyright and Freedom of Expression in Canada’ in Paul Torremans (ed), *Copyright and Human Rights* (Kluwer Law International 2004).

³⁴ Gendreau, ‘Copyright and Freedom of Expression in Canada’ at 21.

³⁵ Ibid at 21-22.

³⁶ Gendreau, ‘Canadian Copyright Law and its Charters’.

Carys Craig’s article ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ constitutes the most significant contribution, from the perspective of copyright theory, to scholarly literature on the intersection of the *Charter* right to freedom of expression and copyright in Canada.³⁷ In this article, Craig argues that ‘[t]he key to understanding the relationship between freedom of expression and copyright is to see them both in light of their mutual goal: that of maximizing cultural flows and channels of communication between members of society’.³⁸ She states that ‘[t]o ensure the effectiveness and legitimacy of copyright, it must therefore embrace the values of freedom of expression, for these values are its own’,³⁹ and argues that in order to achieve this goal, the ‘characterization of copyright as private property’⁴⁰ should be abandoned in favour of a conception of copyright rooted in ‘communication and discursive interaction’.⁴¹ Craig incorporated this article into her book *Copyright, Communication, and Culture*, in which she develops a relational theory of copyright law.⁴²

³⁷ Carys J Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ (2006) 56 *Univ of Toronto LJ* 75. Abraham Drassinower’s ‘Copyright Infringement as Compelled Speech’ (Drassinower, ‘Copyright Infringement as Compelled Speech’) constitutes another major theoretical contribution to the intersection of freedom of expression and copyright by an author based at a Canadian institution (Drassinower is Associate Professor and Chair in the Legal, Ethical and Cultural Implications of Technological Innovation at the University of Toronto Faculty of Law). Unlike Craig’s work noted above, however, Drassinower’s work ‘Copyright Infringement as Compelled Speech’ does not root its theoretical analysis of the relationship between freedom of expression and copyright in a Canadian context.

³⁸ Craig at 76.

³⁹ *ibid* at 76.

⁴⁰ *ibid* at 114.

⁴¹ *ibid* at 113.

⁴² Carys J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar Publishing 2011).

While the works authored by Fewer, Gendreau, and Craig focus broadly on the relationship between freedom of expression and copyright in Canada, several works have been published that focus on this intersection in specific contexts. For instance, both Jane Bailey and I have published articles that examine the intersection of the *Charter* right to freedom of expression and copyright in Canada in the context of legislative protection for technological protection measures;⁴³ Alex Colangelo and Alana Maurushat engage with this intersection in the context of software and computer code;⁴⁴ Sarah Sklar-Heyn engages with this intersection in the context of non-fiction film;⁴⁵ and Bitá Amani uses expressive or digital play as the lens through which to engage with the intersection of freedom of expression and copyright.⁴⁶

In addition to the works just described, which have, as their focus, the intersection of the *Charter* right to freedom of expression and copyright in Canada (either generally or in specific contexts), this intersection has been referenced in a number of published articles the scope of which was framed more broadly or that focused on other topics;⁴⁷ and in several Canadian intellectual property law textbooks and casebooks.⁴⁸

⁴³ Jane Bailey, ‘Deflating the Michelin Man’ in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005), Graham Reynolds, ‘A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression’ (2006) 5 CJLT 179.

⁴⁴ Alex Colangelo and Alana Maurushat, ‘Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures’ (2006) 51 McGill LJ 47.

⁴⁵ Sarah Sklar-Heyn, ‘Battling Clearance Culture Shock: Comparing US Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film’ (2011) 20 Cardozo J Int'l and Comp L 233.

⁴⁶ Bitá Amani, ‘Copyright and Freedom of Expression: Fair Dealing Between Work and Play’ in Rosemary J Coombe, Darren Wershler and Martin Zellinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press 2013).

⁴⁷ See, for instance, Margaret Ann Wilkinson and Charles A. Painter, ‘Shifting the Balance of Copyright Control for Photographic Works in Canada’ (1998-1999) 13 Intellectual Property Journal 353, Teresa Scassa, ‘Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn v Office and Professional Employees' International Union, Local 378*’ (2002) 39

2.3.2 The contributions made by this thesis to the literature in this area

Despite the excellent work that has been done on the intersection of the *Charter* right to freedom of expression and copyright, significant gaps can be identified in the literature in this area. My thesis contributes to this literature by first identifying, and then filling, a number of these gaps. It does so in the following ways. First, none of the works noted above have engaged in a critical, in depth examination of the entire body of Canadian case law on the intersection of the *Charter* right to freedom of expression and copyright with the purpose of identifying the approach (or approaches) to this intersection adopted by Canadian courts. I engage in this exercise in Chapter 3 of my thesis, identifying one governing approach to this intersection and two alternative approaches.

Alta L Rev 934, Ian Kerr, Alana Maurushat and Christian Tacit, ‘Technical Protection Measures: *Tilting* at Copyright’s Windmill’ (2003) 34 Ottawa L Rev 6, Ian Kerr and Jane Bailey, ‘The Implications of Digital Rights Management for Privacy and Freedom of Expression’ (2004) 2 J of Info, Comm & Ethics in Soc 87, Abraham Drassinower, ‘A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law’ (2003) 16 Can JL & Juris 3, Myra J Tawfik, ‘International Copyright Law: W[h]ither User Rights?’ in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005), Gregory R Hagen and Nyall Engfield, ‘Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test’ (2006) 3 UOLTJ 477, EAC Mohammed, ‘Parody as Fair Dealing in Canada: A Guide for Lawyers and Judges’ (2009) 4 JIPLP 468, Graham Reynolds, ‘A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada’ (2009) 6 SCRIPTed 639, Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”* (Irwin Law 2010), Graham Reynolds, ‘All the Game’s a Stage: Machinima and Copyright in Canada’ (2010) 13 JWIP 729, Graham Reynolds, ‘Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada’ (2010) 33 Man LJ 241, Graham Reynolds, ‘The Impact of Canadian Copyright Laws on the Voices of Marginalised Groups: Towards a Right to Rewrite’ (2010) 48 Alta L Rev 35, Teresa Scassa, ‘Trademarks Worth a Thousand Words: Freedom of Expression and the Use of the Trademarks of Others’ (2012) 53 Les Cahiers de droit 887, Katie Sykes, ‘Towards a Public Justification of Copyright’ (2003) 61 UT Fac L Rev 1, Daniel Gervais, ‘Making Copyright Whole’ (2008) 5 UOLTJ 1, David Vaver, ‘Intellectual Property: The State of the Art’ (2000) 116 LQR 621, David Vaver, ‘Copyright Defences as User Rights’ (2013) 60 J Copyright Soc’y USA 661, Pascale Chapdelaine, ‘The Ambiguous Nature of Copyright Users’ Rights’ (2013) 26 IPJ 1 at 18.

⁴⁸ See, for instance, Sunny Handa, *Copyright Law in Canada* (Butterworths 2002) at 95, David Vaver, *Copyright Law* (Irwin Law 2000) at 22, David Vaver, *Intellectual Property Law* (2nd edn, Irwin Law 2011) at 46-50. I am one of the co-authors of an intellectual property casebook published by Emond Montgomery Limited in 2013 (Graham Reynolds and others, *Canadian Intellectual Property Law* (Toronto, Emond Montgomery 2013)). One section of this casebook addresses the intersection of freedom of expression and copyright (see pp 173-177). I contributed to the drafting of this section.

Second, while several works critique the approach to copyright adopted by Teitelbaum J. in *Michelin*,⁴⁹ I take a different approach in this thesis. Rather than arguing that Teitelbaum J. ‘mischaracterize[ed]...copyright’s nature and purpose’, as did Craig, I am instead arguing that Teitelbaum J. correctly applied an approach to copyright that, although at the time that *Michelin* was handed down was the governing approach to copyright in Canada, has since been abandoned by the SCC.⁵⁰

More broadly, my thesis is the first work to argue that the governing approach to the intersection of the *Charter* right to freedom of expression and copyright, as well as the two alternative approaches to this intersection, are based on approaches to copyright and freedom of expression that while once valid, are now invalid, and that, as a result, the intersection between these rights should be reconsidered. I engage in this argument in Chapter 4 of my thesis.

Third, none of the works noted above have attempted to explain, in depth, why, if the SCC has consistently interpreted provisions of the *Copyright Act* in such a manner as to result in expanded protection for the expression interests of non-copyright owning parties (as I argue, in Chapter 5, that it has), it has not explicitly discussed the *Charter* right to freedom of expression in the context of its copyright jurisprudence. I engage with this issue in Chapter 5 of my thesis.

Fourth, while several of the works described above contrast the approach adopted by Canadian courts to the intersection of freedom of expression and copyright with the approaches to this intersection adopted by courts in one or two

⁴⁹ See, for instance, Bailey, Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’, and Reynolds, ‘A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression’.

⁵⁰ Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 82.

other jurisdictions,⁵¹ none situate decisions of lower Canadian courts on the intersection of freedom of expression and copyright in the context of decisions of the Supreme Court of the United States (US Supreme Court), the Court of Appeal for England and Wales (EWCA), the European Court of Human Rights (ECtHR), and the Constitutional Court of South Africa (CCSA). I do so in Chapter 6 of my thesis. Broadening the scope of comparison to include additional jurisdictions provides further insight with respect to the intersection of the *Charter* right to freedom of expression and copyright in Canada (and may provide reciprocal insights for these other jurisdictions).

Fifth, my thesis engages with s. 2(b), s. 1, and copyright jurisprudence to a greater degree than does any work noted above. This is due in part to timing, and in part to the scope of this thesis. A number of significant decisions have been handed down by the SCC in the areas of copyright and the *Charter* right to freedom of expression in the years since many of the seminal pieces to have considered the intersection of the *Charter* right to freedom of expression and copyright were published. Much of my thesis, for instance, was written after 12 July 2012, the date when the SCC handed down five copyright decisions.⁵² These decisions, often colloquially referred to as the Canadian copyright pentalogy, have been referred to as having ‘sh[aken] the very foundations of copyright law in Canada’.⁵³ My thesis is the

⁵¹ See, for instance, Fewer, Gendreau, ‘Copyright and Freedom of Expression in Canada’, Bailey, and Reynolds, ‘A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression’.

⁵² *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36, *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35, [2012] SCR 283, *Re: Sound v Motion Picture Theatre Associations of Canada* 2012 SCC 38, [2012] 2 SCR 376, *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34, [2012] 2 SCR 231, *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37, [2012] 2 SCR 345.

⁵³ Michael Geist (ed) *The Copyright Pentalogy* (University of Ottawa Press 2013) at [iii].

first work to address the impact of the decisions in the pentalogy on the intersection of the *Charter* right to freedom of expression and copyright.

My thesis has also engaged, to a greater degree than any of the works noted above, with the body of decisions relating to the *Charter* right to freedom of expression, including recent decisions such as *R. v. Khawaja* (2012), *Saskatchewan (Human Rights Commission) v. Whatcott* (2013), and *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* (2013).⁵⁴ I engage with this jurisprudence primarily in Chapter 7 of my thesis.

Lastly, as the first book-length work to address the intersection of the *Charter* right to freedom of expression and copyright in Canada, my thesis constitutes the most comprehensive analysis, to date, of this intersection. The book-length nature of my thesis offers me the opportunity to explore doctrinal issues relating to the intersection of the *Charter* right to freedom of expression and copyright in Canada in greater depth than do any of the above-noted works (all of which are articles published in journals, chapters of edited collections, or, in one instance, a chapter in a monograph). The doctrinal analysis set out in this thesis provides a solid foundation upon which both I and other researchers working in this area can develop normative analyses of the intersection of the *Charter* right to freedom of expression and copyright.

2.4 Justifying Canada as my jurisdiction of choice

I have selected Canada as the jurisdiction on which I will focus my analysis of the intersection of freedom of expression and copyright for several reasons. First,

⁵⁴ *R v Khawaja* 2012 SCC 69, *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11 SCC, *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 SCR 733. Fewer focuses his *Charter* analysis on *Irwin Toy Ltd v. Quebec (Attorney General)* [1989] 1 SCR 927 and other freedom of expression cases handed down in the 1990s. Bailey centers her analysis on *Dunmore v Ontario (Attorney General)* 2001 SCC 94, among other decisions.

the intersection of freedom of expression and copyright is an underexplored area of research in Canada. As described above, particularly when compared to the significant body of literature published on this topic in the US context, relatively few works have been published on this topic through a Canadian lens.⁵⁵

Second, the SCC has yet to explicitly engage with the intersection of the *Charter* right to freedom of expression and copyright. This is the case despite Canada's constitutional framework, under which freedom of expression is guaranteed as part of the *Charter of Rights and Freedoms*, and under which neither copyright nor property is given explicit protection in the *Charter*; and despite the fact that the SCC has discussed the possible impact of the *Charter*-protected right to freedom of expression in a number of other contexts (as will be detailed below).

Given Canada's constitutional structure and the SCC's freedom of expression jurisprudence more broadly, one might have expected the SCC to have engaged in some discussion on the connection between the *Charter* right to freedom of expression and copyright. Examining why this has not occurred could provide

⁵⁵ Works on this topic have also focused on the UK (see, for instance, FM Patfield, 'Towards a Reconciliation of Free Speech and Copyright' in Eric Barendt et al (ed), *The Yearbook of Media and Entertainment Law* (Oxford University Press 1999), Jonathan Griffiths, 'Copyright Law and Censorship: The Impact of the Human Rights Act 1998' [1999] *Yearbook of Copyright and Media Law* 3 Michael Birnhack, 'Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the Human Rights Act' [2003] *Entertainment Law Review* 24, Eric Barendt, 'Copyright and Free Speech Theory' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press 2005), Gerald Dworkin, 'Copyright, the Public Interest and Freedom of Speech: A UK Copyright Lawyer's Perspective' in Jonathan Griffiths and Uma Suthersanen (ed), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press 2005), Kevin Garnett, 'The Impact of the Human Rights Act 1998 on UK Copyright Law' in Jonathan Griffiths and Uma Suthersanen (ed), *Copyright and Free Speech* (Oxford University Press 2005), Robert Danay, 'Copyright vs. Free Expression: The Case of Peer-to-Peer File Sharing of Music in the United Kingdom' (2006) 8 *Yale JL & Tech* 32), the EU and its member states (see, for instance, H Cohen Jehoram, 'Freedom of Expression in Copyright Law' [1984] *EIPR* 3, P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe' in Niva Elkin-Koren and Neil Weinstock Netanel (ed), *The Commodification of Information* (Kluwer 2002), Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 *IIC* 316, and Irini Stamatoudi and Paul L.C. Torremans, *EU Copyright Law* (Edward Elgar Publishing 2014) at pp. 452-454), and South Africa (see, for instance, AJ van der Walt and RM Shay, 'Constitutional Analysis of Intellectual Property' (2014) 17 *Potchefstroom Elec LJ* 51), among other jurisdictions.

insights both for Canadian courts and commentators as well as for courts and commentators in other jurisdictions in which leading courts have articulated a connection between freedom of expression and copyright.⁵⁶

2.5 The protection of freedom of expression in Canada: an introduction

In this section, I will set out the scope of and legal basis for freedom of expression in Canada. Beginning with an overview of Canada's constitutional structure, I will proceed by discussing the development of legal protection for freedom of expression through three periods of Canada's history: the common law era in which freedom of expression was generally conceived as a freedom upon which statutory rights could encroach; the Bill of Rights era in which freedom of expression received statutory protection as part of a Bill of Rights; and the *Charter* era in which freedom of expression was accorded constitutional protection. A central aim of this section is to define the scope of freedom of expression under the *Charter*. This definition will frame and inform the analysis in subsequent chapters of the intersection of the *Charter* right to freedom of expression and copyright in Canada.

2.5.1 Canada: a constitutional overview

A former colony of the United Kingdom (UK), Canada is a constitutional monarchy, a parliamentary democracy, and a federal state with authority divided between the federal and provincial governments.⁵⁷ The Dominion of Canada (as Canada was originally called) was created by an act of the UK Parliament called the

⁵⁶ *Harper & Row, Eldred, Golan v. Holder* 132 SCt 873, 33 ITRD 1769, 181 LEd2d 835, *Ashdown v. Telegraph Group* [2002] Ch 149, *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7, 2006 (1) SA 144, 2005 (8) BCLR 743 CCSA.

⁵⁷ Patrick Malcolmson and Richard Myers, *The Canadian Regime* (4th edn, University of Toronto Press 2009) at 98-100, The Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 at ss. 91-92.

British North America Act, 1867.⁵⁸ The Head of State in Canada is Queen Elizabeth II, represented in 2015 by Governor General David Johnston.⁵⁹

2.5.2 The protection of freedom of expression in Canada

Throughout its history, Canada has experienced three modes of protection for freedom of expression. The first (the common law era of protection) is characterized by the absence of both legislative and constitutional protection for freedom of expression. The second (the *Bill of Rights* era of protection) is characterized by the protection of freedom of expression through a statutory bill of rights. The third (the *Charter* era of protection) is characterized by the protection of freedom of expression through a constitutional bill of rights.

2.5.2.1 Common law era of protection

The scope of freedom of expression under the common law in Canada in 1867 (and prior to this date) was defined as the space, relating to expression, in which government had not legislated or into which the common law had not expanded.⁶⁰ Peter Hogg explains that this approach – under which ‘a person is free to do [or say] anything that is not positively prohibited’ – flows both from the manner in which civil liberties were protected under the English common law and from the doctrine of parliamentary sovereignty.⁶¹

Although in this era there was no positive protection for freedom of expression, this is not to say that courts did not take steps to protect freedom of

⁵⁸ Malcolmson and Myers at 23. The *British North America Act, 1867* is now called The Constitution Act, 1867.

⁵⁹ Malcolmson and Myers at 98-100.

⁶⁰ See, for instance, Honourable JC McRuer (Commissioner), *Royal Commission: Inquiry into Civil Rights* (Report No 2, Volume 4, 1969) at pp. 1493-96. Also see Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th edn, Carswell 2007) at 34-2.

⁶¹ Hogg at 34-2.

expression. As Hogg notes, they did so in several ways, including through the mechanism of federalism (through which laws that infringed freedom of expression were struck down by courts on the basis that the body that enacted them was not the body constitutionally authorized to enact them);⁶² and through the development of an implied bill of rights under which certain civil liberties, including freedom of expression, were protected.⁶³

In Canada, in the era of common law protection for civil liberties, the scope of freedom of expression was conceptualized as the freedom to engage in debate and discussion, to share ideas, to criticize, and to express opinion.⁶⁴ Freedom of expression cases decided by the SCC during this period focused on political expression.⁶⁵ However, statements made in these cases implied that the SCC was concerned with preserving an open space for discussion or debate more broadly.⁶⁶

During the common law era of protection for freedom of expression, it was accepted that freedom of expression could be limited. In *Re Alberta Statutes*, for instance, Duff C.J. stated that:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for

⁶² Ibid at 43-2 to 43-4. See, for instance, *Reference re: Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act* [1938] SCR 100 SCC, *Saumur v. City of Quebec* [1953] 2 SCR 299 SCC, and *Switzman v Elbing and AG of Quebec* [1957] SCR 285 SCC.

⁶³ Hogg at 34-10 to 34-13. See, for instance, *Reference re: Alberta Statutes* and *Switzman*.

⁶⁴ *Boucher v. the King* [1951] SCR 265 SCC at 277. See also Rand J.'s judgment in *Switzman*.

⁶⁵ In *Boucher*, for instance, the SCC held that the dissemination of pamphlets critiquing the way in which the Quebec government had dealt with Jehovah's Witnesses did not constitute seditious libel; in *Switzman v. Elbling*, [1957] S.C.R. 285 at 305 the SCC held that legislation 'to prevent the propagation of communism and bolshevism' was outside of the scope of the province to pass (and thus unconstitutional).

⁶⁶ As Rand J. noted in *Switzman* (at 304-5), '...public opinion ... demands the condition of a virtually unobstructed access to and diffusion of ideas'. See also Rand J. in *Boucher* at 288.

example, the laws of defamation and sedition are concerned.⁶⁷

2.5.2.2 The *Bill of Rights* era

In 1946, two years prior to the United Nations General Assembly's adoption of the Universal Declaration of Human Rights (UDHR), the province of Alberta enacted Canada's first statutory bill of rights.⁶⁸ This bill, which applied only to laws passed by the Government of Alberta (and which was later invalidated by the Privy Council on jurisdictional grounds), protected a range of fundamental freedoms, including freedom of expression.⁶⁹ Section 4 of the *Alberta Bill of Rights* stated that: '[i]t is hereby declared that every citizen of Alberta shall be entitled to enjoy freedom of expression provided that he does not violate the defamation laws in force in the Province or *The Criminal Code of Canada*'.⁷⁰ The following year, the province of Saskatchewan also enacted a statutory bill of rights.⁷¹ Like the *Alberta Bill of Rights*, the *Saskatchewan Bill of Rights* both provides protection for freedom of expression and applies only to laws passed by the Government of Saskatchewan.⁷²

Fourteen years after Alberta had enacted its bill of rights, the federal government followed suit. Freedom of speech was again one of the freedoms protected in the *Canadian Bill of Rights*, which applies only to laws passed by the federal government. Enacted as a statute as opposed to through a constitutional

⁶⁷ *Reference re: Alberta Statutes* at 133.

⁶⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Bill of Rights Act (Alberta), S.A. 1946, c. 11.

⁶⁹ *Attorney-General of Alberta v. Attorney-General of Canada and another v. Attorney-General of Canada v. Attorney-General of Alberta* [1947] UKPC 59.

⁷⁰ Alberta Bill of Rights.

⁷¹ Saskatchewan Bill of Rights Act, S.S. 1947, c. 35.

⁷² *Ibid* at s. 4.

amendment, the Canadian *Bill of Rights* can be amended or repealed by an Act of Parliament.⁷³

The Quebec *Charter of Human Rights and Freedoms* (Quebec Charter), which came into effect in 1976 – sixteen years after the Federal *Bill of Rights* and six years prior to the enactment of the Canadian *Charter of Rights and Freedoms* – applies only to laws passed by the National Assembly of Quebec (Quebec’s provincial legislature).⁷⁴ As described by David Schneiderman, Quebec’s statutory bill of rights ‘is an ordinary statute ... [with] a “quasi-constitutional” status, invalidating contradictory laws unless the override clause has been invoked’.⁷⁵ Like the bills of rights noted above, the Quebec Charter provides protection for freedom of expression, among other rights.

One question that courts in the *Bill of Rights* era were required to address was whether the scope of freedom of expression, under the *Bill of Rights*, was similar to or different from the scope of freedom of expression under the common law era described above. This question was addressed by the SCC in *Robertson and Rosetanni v. R.*, in which Ritchie J. of the SCC, who delivered the reasons for judgment of the majority, held that ‘the *Canadian Bill of Rights* is not concerned with “human rights and fundamental freedoms” in any abstract sense, but rather with such “rights and freedoms” as they existed in Canada immediately before the statute was enacted’.⁷⁶

⁷³ Hogg at 35-2.

⁷⁴ Québec Charter at s. 55. David Schneiderman, ‘Dual(ling) Charters: The Harmonics of Rights in Canada and Quebec’ (1992) 24 Ottawa L Rev 235 at 235.

⁷⁵ Schneiderman at 250.

⁷⁶ *Robertson and Rosetanni v R* [1963] SCR 651 SCC at 655.

2.5.2.3 The *Canadian Charter of Rights and Freedoms* era

In the late 1970s, Canada was engaged in a project of constitutional repatriation.⁷⁷ This project culminated with the enactment of the *Constitution Act, 1982*.⁷⁸ As part of the enactment of this *Act*, the Government of Canada adopted a constitutional bill of rights (*Charter*).⁷⁹ The *Charter* differs from the bills of rights discussed in the previous section in a number of ways.

First, while the bills of rights noted above (both provincial and federal) are statutes that can be amended or repealed by provincial legislatures or the federal Parliament, the *Charter* is part of the Constitution. As such, a constitutional amendment is required to modify it or to repeal it.⁸⁰ Second, while the bills of rights discussed in the previous section apply to either laws passed by a provincial government or laws passed by the federal government, the *Charter* applies to both provincial and federal laws.⁸¹

A third distinction between the *Charter* and at least some of the bills of rights introduced in the previous section is the presence, in the *Charter*, of a limiting clause. This clause, set out in s. 1 of the *Charter*, states that '[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free

⁷⁷ See, for instance, Barry L Strayer, *Canada's Constitutional Revolution* (The University of Alberta Press 2013) and Roy Romanow, John Whyte and Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982 (1982)* (25th anniv. ed, Carswell 2007).

⁷⁸ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁷⁹ Charter.

⁸⁰ See Constitution Act, 1982 at ss. 38-49.

⁸¹ Charter at s. 32(1).

and democratic society'.⁸² Hogg states that this limiting clause was added to the Charter as a recognition that:

...the civil liberties guaranteed by the Charter occasionally come into conflict with each other and frequently come into conflict with other values that are respected in Canadian society. A moment's reflection is enough to show that the Charter's values should not always take precedence over non-Charter values. ... What is called for, obviously, is a compromise between the conflicting values. Section 1 of the Charter ... implicitly authorizes the courts to balance the guaranteed rights against competing societal values.⁸³

A fourth major difference is the presence of a mechanism, existing within the *Charter* but not in most of the other bills of rights discussed in this section, that may permit the legislative body to enact the law (or to allow the law to continue to apply) 'notwithstanding' that it infringes a *Charter* right and that this infringement is not justified under s. 1.⁸⁴ This clause, referred to colloquially as the 'notwithstanding clause', is set out in s. 33(1), and provides that:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.⁸⁵

A fifth major difference between the *Charter* and the other bills of rights noted above relates to the question of whether, and the extent to which, property is

⁸² Ibid at s. 1. Such a clause is not present in the Canadian *Bill of Rights*. A comparable provision, however, is set out in s. 9.1 of the Québec Charter, which states that '[i]n exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law'.

⁸³ Hogg at 36-12 to 36-13. Despite the enactment of the *Charter*, however, the Bill of Rights was not repealed. Thus, the provisions of the Bill of Rights continue to apply.

⁸⁴ A comparable provision is found in s. 52 of the Québec Charter, which specifies that 'No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.'

⁸⁵ Charter at s. 33.

given protection. The *Charter* does not provide protection for property. In contrast, the *Alberta Bill of Rights*, *Saskatchewan Bill of Rights*, *Canadian Bill of Rights*, and the *Quebec Charter* all provide (or provided) protection, to some degree, for property (although the nature of protection varies depending on the bill of rights in question).⁸⁶

2.5.2.3.1 The scope of the *Charter* right to freedom of expression

In the years following the enactment of the *Canadian Charter of Rights and Freedoms*, courts struggled with a number of questions, one of which, as noted by Jamie Cameron, was ‘whether [*Charter*] rights could be restricted as a matter of definition, or whether limitations should be imposed exclusively under section 1’.⁸⁷ Cameron writes that ‘[a] definitional interpretation would limit the scope of the guarantee itself ... plac[ing] a burden on the individual to establish that the claim invokes values that are protected by the *Charter*’.⁸⁸ Cameron contrasts the definitional interpretation with a literal interpretation, which ‘would presume the breach whenever there is an interference with individual liberty and oblige the state to establish the permissibility of any limitation under section 1’.⁸⁹ Cameron also notes that because ‘[a] definitional conception focuses on “entitlements”, or the legitimacy of the individual’s right to claim the Constitution’s protection ... [it]

⁸⁶ The *Alberta Bill of Rights* provided that ‘every citizen of Alberta shall be free to acquire land and enjoy the use of his home and property without interference or molestation, so long as he conforms to the laws in force in the Province for safeguarding the lives, property, welfare and personal rights of other citizens’ (Alberta Bill of Rights, s. 7); the *Saskatchewan Bill of Rights* provides that every person has the right to own and occupy property without discrimination (Saskatchewan Bill of Rights, s. 10); the *Canadian Bill of Rights* protects ‘the right of the individual to ... enjoyment of property, and the right not to be deprived thereof except by due process of law’ (Canadian Bill of Rights, s. 1(a)); and the *Quebec Charter* provides that ‘[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law’ (Québec Charter, s. 6).

⁸⁷ Jamie Cameron, ‘The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*’ 35 McGill Law Journal 253 at 254.

⁸⁸ *Ibid* at 260.

⁸⁹ *Ibid* at 260.

assumes that the guarantees are themselves qualified by political, social and cultural values' (emphasis in original).⁹⁰

In a number of decisions in the 1980s, Canadian courts adopted an approach to freedom of expression that was consistent with the definitional conception.⁹¹ Initially, courts applying this approach viewed the scope of s. 2(b) as being no different than the scope of the right to freedom of speech under the *Canadian Bill of Rights* (which was itself interpreted to be no broader than the scope of freedom of speech or expression under the common law). That is to say, the s. 2(b) right to freedom of expression, under this approach, was interpreted as protecting the flow of ideas and opinions relating, in particular, to politics and democratic governance.⁹² Other courts, however, rejected the definitional conception, choosing instead to adopt an approach to s. 2(b) that more closely approximated the literal conception.⁹³

Over time, the definitional conception of the *Charter* right to freedom of expression was abandoned in favour of an approach that more closely approximated the literal conception. The latter approach – with several qualifications – was affirmed as the governing approach to the *Charter* right to freedom of expression by the Supreme Court of Canada (SCC) in *Irwin Toy Ltd. v. Quebec (Irwin Toy)*.⁹⁴ While *Irwin Toy* was not the first SCC case to address the s. 2(b) right of freedom of expression, it was the first case to set out, in detail, the framework that should be

⁹⁰ Ibid at 260.

⁹¹ Charter at s. 2(b).

⁹² See, for instance, *R. v. Squires* (1986), 25 CCC (3d) 44 Ontario Provincial Court (Criminal Division) and *Cromer v. British Columbia Teachers' Federation* (1986), 29 DLR (4th) 641 BCCA.

⁹³ See, for instance, *Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583 Ont HCJ, *Rocket et al and Rocket College of Dental Surgeons of Ontario et al* (1998) 64 OR (2d) 353 OCA.

⁹⁴ *Irwin Toy*.

applied by courts in evaluating potential infringements of s. 2(b). Over twenty-five years since it was handed down, the framework set out in *Irwin Toy* – albeit slightly modified in subsequent cases – continues to act as the foundation of the freedom of expression analysis under s. 2(b).

Cameron describes a number of ways in which the *Irwin Toy* test falls short of embracing, in its purest form, a literal conception of the *Charter* right to freedom of expression.⁹⁵ In light of this, I will refer to the conception of the *Charter* right to freedom of expression adopted in *Irwin Toy* and applied in future decisions not as the literal conception, but as the ‘broad rights’ approach.

A recent articulation of the s. 2(b) test was set out in *CBC 2011*.⁹⁶ In this decision, Deschamps J., writing for the Court, articulated the s. 2(b) analysis as follows:

to determine whether an expressive activity is protected by the Charter, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, prima facie, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?⁹⁷

2.5.2.3.1.1 ‘Does the activity in question have expressive content?’⁹⁸

Under the s. 2(b) test, as noted above, an activity has expressive content if it conveys or ‘attempts to convey meaning’.⁹⁹ Consistent with the idea under the broad rights approach that the *Charter* right to freedom of expression should be interpreted

⁹⁵ Cameron.

⁹⁶ *Canadian Broadcasting Corp v Canada (Attorney General)* 2011 SCC 2, [2011] 1 SCR 19.

⁹⁷ *Ibid* at para. 38.

⁹⁸ *Ibid* at para. 38.

⁹⁹ *Irwin Toy* at 968.

broadly, a wide range of activities have been found by courts to have expressive content. For instance, courts have stated that the following activities convey or attempt to convey meaning: displaying a business sign (Pinehouse Plaza Pharmacy);¹⁰⁰ displaying tobacco products for sale;¹⁰¹ distributing rebate coupons for prescriptions;¹⁰² postering;¹⁰³ using a loudspeaker at the entrance to a club;¹⁰⁴ begging or squeegeeing;¹⁰⁵ the act of growing a ‘naturalistic garden that included tall grass and weeds’;¹⁰⁶ silence;¹⁰⁷ the contribution of money to a fund;¹⁰⁸ defamatory libel;¹⁰⁹ deliberate lies;¹¹⁰ hate speech;¹¹¹ singing a rap song during recess at a school division official;¹¹² casting a ballot;¹¹³ showing a film in a class;¹¹⁴ painting a house haphazardly using a range of colours;¹¹⁵ performing a strip tease;¹¹⁶ communication

¹⁰⁰ *R v Pinehouse Plaza Pharmacy Ltd* (1991), 89 Sask R 47 Sask CA.

¹⁰¹ *R v Mader's Tobacco Store Ltd* 2010 NSPC 52 at para. 39.

¹⁰² *Nicholson v New Brunswick Pharmaceutical Society* (1994), 150 NBR (2d) 161 at para. 20.

¹⁰³ *Ramsden v Peterborough (City)* [1993] 2 SCR 1084.

¹⁰⁴ *Montréal (City) v 2952-1366 Québec Inc* [2005] 3 SCR 141, 2005 SCC 62.

¹⁰⁵ *R v Banks* [2007] OJ No 99 at para. 112.

¹⁰⁶ *Bell v Toronto (City)* (1996), 39 CRR (2d) 152 at para. 52.

¹⁰⁷ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 SCR 1123 at para. 82.

¹⁰⁸ *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211 at para. 276.

¹⁰⁹ *R v Lucas* [1998] 1 SCR 439 at para. 25.

¹¹⁰ *R v Zundel* [1992] 2 SCR 731 at para. 23.

¹¹¹ *R v Keegstra* [1990] 3 SCR 697 at para. 34.

¹¹² *Lutes (Litigation Guardian of) v Prairie View School Division No 74* (1992), 101 Sask R 232 Sask Court of QB. The song in question was ‘Let’s Talk About Sex’ by the group Salt ‘N’ Pepa.

¹¹³ *Haig v Canada* [1993] 2 SCR 995 at para. 68.

¹¹⁴ *Morin v Prince Edward Island Regional Administrative Unit No 3 School Board* 2002 PESCAD 9 PEI SC at para. 55. The film in question was entitled ‘Thy Kingdom Come, Thy Will Be Done’. It was shown to a grade nine class.

¹¹⁵ *R v AN Koskolos Realty Ltd* (1995), 141 NSR (2d) 309 NSPC at para. 25.

in public for the purposes of prostitution;¹¹⁷ professional advertising (specifically for dentists' services);¹¹⁸ and setting up a Peace Camp on Parliament Hill to protest cruise missile testing,¹¹⁹ among other examples. In Chapter 7, I will argue, on the basis of the SCC's freedom of expression jurisprudence, that the acts described in the three case studies outlined in the Introduction have expressive content.

2.5.2.3.1.2 'Is the activity excluded from that protection as a result of either the location or the method of expression?'¹²⁰

After having determined that the activity in question has expressive content, and is thus *prima facie* protected under s. 2(b), the next question that must be answered is whether the activity should be excluded from the scope of protectable expression under s. 2(b) on the basis of the method or location of expression.¹²¹ The exclusion of certain activities from the scope of protectable expression is considered necessary on the basis that, as noted by Deschamps J. in *CBC*, 'the protection of s. 2(b) of the *Charter* is not without limits and that governments should not be required to justify every exclusion or regulation of a form of expression ... under s. 1'.¹²²

With respect to exclusions based on the method of expression, activities have been excluded from s. 2(b) protection on the basis that the expression takes the form

¹¹⁶ *605715 Saskatchewan Ltd (c.o.b. 'Showgirls') v Saskatchewan Liquor and Gaming Licensing Commission* 2000 SKCA 97 at para. 20.

¹¹⁷ *Reference re: 193* at para. 89.

¹¹⁸ *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232 at para. 21.

¹¹⁹ *Weisfeld v Canada (CA)* (1994), [1995] 1 FC 68 FCA at para. 29.

¹²⁰ *CBC v. Canada* at para. 38.

¹²¹ *Ibid* at para. 38.

¹²² *Ibid* at para. 32.

of either violence or threats of violence.¹²³ Methods of expression that, in the view of the SCC, should not cause the expression to be excluded from protection under s. 2(b), have included the ‘use of equipment to film, take photographs and record voices’¹²⁴ and using a loudspeaker to broadcast noise from a club onto a street.¹²⁵

Expression may also be excluded from the scope of protectable expression on the basis of the location of the expression.¹²⁶ McLachlin C.J. and Deschamps J., in *Montréal (City) v. 2952-1366 Québec Inc*, noted that expression taking place on ‘[p]rivate property ... will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*’.¹²⁷ As well, in certain contexts, expression may be excluded from the scope of s. 2(b) if it takes place on public property.¹²⁸

In practice, this step has not been used to significantly narrow the scope of protectable expression. As an overarching principle, McLachlin C.J. and Deschamps J. noted, in their reasons for judgment in *Montréal (City) v. 2952-1366 Québec Inc* (*Montréal (City)*), that ‘[e]xpressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee’.¹²⁹ In Chapter 7, I will argue, on the basis of the SCC’s freedom of expression and copyright jurisprudence, that the acts described in the

¹²³ See, for instance *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component* 2009 SCC 31, [2009] 2 SCR 295 at para. 28; *Khawaja* at para. 70; and *Whatcott* at para. 112.

¹²⁴ *CBC v. Canada* at para. 44.

¹²⁵ *Montréal* at paras. 67-68.

¹²⁶ *Ibid* at para. 61.

¹²⁷ *Ibid* at para. 62.

¹²⁸ See, for instance, *Committee for the Commonwealth of Canada v. Canada* (1991), [1991] 1 SCR 139, 77 DLR (4th) 385.

¹²⁹ *Montréal* at para. 72.

three case studies should not be excluded from the scope of protectable expression under s. 2(b) on the basis of the method of expression, or on the basis of the formal characterization of copyright as property.

2.5.2.3.1.3 ‘If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?’¹³⁰

The guarantee of freedom of expression would be ‘necessarily limit[ed]’ if the purpose of the government action was to restrict meaning.¹³¹ Even in situations where the purpose of the government action is not to restrict meaning, however, parties may still establish an infringement of their *Charter* rights on the basis that ‘the effect of the government action was to restrict the plaintiff’s free expression’.¹³² As the majority noted in *Irwin Toy*, ‘[i]n order to so demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom’,¹³³ namely, as summarized by McLachlin C.J. in her majority reasons in *R. v. Sharpe*, ‘individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy’.¹³⁴ In Chapter 7, I will argue, on the basis of the SCC’s freedom of expression and copyright jurisprudence, that certain core provisions of the *Copyright Act* limit expression both in purpose and effect. In developing this argument, I will discuss how the principles and values underlying the *Charter* right to freedom of expression relate to the acts described in the case studies.

¹³⁰ *CBC v. Canada* at para. 38.

¹³¹ *Irwin Toy* at para 49.

¹³² *Ibid* at para 52.

¹³³ *Ibid* at para 52.

¹³⁴ *R v. Sharpe* [2001] 1 SCR 45, 2001 SCC 2 at para. 23.

2.5.2.3.2 The scope of the s. 1 analysis

A determination that legislative provisions infringe s. 2(b) of the *Charter* will not necessarily result in these provisions being struck down. Rather, the government has the opportunity to justify the infringement, under s. 1 of the *Charter*, as a ‘reasonable limit[] prescribed by law [that] ... can be demonstrably justified in a free and democratic society’.¹³⁵ The general approach to s. 1 was set out by the SCC in *R. v. Oakes*.¹³⁶ The *Oakes* framework, albeit modified, continues to undergird the approach to the s. 1 analysis adopted by the SCC.

The SCC recently described the nature of the s. 1 analysis in *Canada (Attorney General) v. Bedford*.¹³⁷ In *Bedford*, McLachlin C.J., who delivered the judgment of the Court, wrote that:

Under s. 1, the government bears the burden of showing that a law that breaches an individual’s rights can be justified having regard to the government’s goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law’s goal must be pressing and substantial. The ‘rational connection’ branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. ‘Minimal impairment’ asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature’s reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people’s rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law’s impact in terms of society as a whole.¹³⁸

¹³⁵ *Charter* at s. 1.

¹³⁶ *R v Oakes* [1986] 1 SCR 103 SCC.

¹³⁷ *Canada (Attorney General) v Bedford* 2013 SCC 72.

¹³⁸ *Ibid* at para 126.

The SCC has been criticized by some commenters as being overly deferential to governments in the context of the s. 1 analysis.¹³⁹ Particularly in recent years, however, the SCC has shown a greater willingness to hold that infringements of *Charter* rights cannot be justified under s. 1. For instance, in recent years, the SCC has held that the ‘prohibition on physician-assisted dying’ infringed the *Charter* and could not be justified under s. 1;¹⁴⁰ that several provisions of the Criminal Code that criminalized activities related to prostitution infringed the *Charter* and could not be justified under s. 1;¹⁴¹ that Alberta’s *Personal Information Protection Act (PIPA)* infringed the *Charter*-protected right to freedom of expression and could not be justified under s. 1;¹⁴² and that the refusal of the federal Minister of Health to extend a criminal law exemption to the Insite safe injection facility infringed the claimants’ rights to life, liberty, and security of the person (s. 7 under the *Charter*) and could not be justified under s. 1.¹⁴³

In Chapter 7, I will argue, on the basis of the SCC’s freedom of expression and copyright jurisprudence, that although the objective of the impugned provisions of the *Copyright Act* is pressing and substantial and that there is a rational connection between the impugned provisions and the objective, the impugned provisions, when analyzed in the context of the three case studies outlined in the Introduction, may fail both the minimal impairment and the proportionality branch of the s. 1 analysis, and may therefore not be justified.

¹³⁹ *Whatcott* at para. 130-132, citing to LW Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (University of Toronto Press 2004) at pp. 83 and 202-3 and Richard Moon, *The Constitutional Protection of Freedom of Expression* (University of Toronto Press 2000) at p. 37.

¹⁴⁰ *Carter v. Canada* 2015 SCC 5 at para. 3.

¹⁴¹ *Bedford*.

¹⁴² *Alberta (IPC)*.

¹⁴³ *Canada (Attorney General) v. PHS Community Services Society* 2011 SCC 44, [2011] 3 SCR 134.

2.5.2.3.3 Remedies

Section 52(1) of the *Constitution Act, 1982* states that ‘[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’.¹⁴⁴ As noted in *Schachter*, under s. 52, ‘[d]epending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in’.¹⁴⁵

In Chapter 7, I will argue, on the basis of the SCC’s freedom of expression and copyright jurisprudence, that in one of the case studies, the most appropriate remedy might be to sever the unconstitutional aspect of the provision. In the other two case studies, however, I will argue that a court could determine that the most appropriate remedy may be for the court to declare the *Copyright Act* to be of no force and effect, albeit with a temporary suspension of invalidity which would permit the Federal Government to remedy the constitutional deficiency. Although this may at first glance appear to be a radical remedy, it may be the remedy that is most consistent with the need, expressed by the SCC, for courts to ‘avoid[] undue intrusion into the legislative sphere’ by rewriting legislation found to be unconstitutional.¹⁴⁶

2.6 Copyright in Canada: an introduction

In this section, I will provide a brief overview of copyright in Canada. I will begin by describing the development of Canadian copyright legislation, noting the

¹⁴⁴ Charter at s. 52(1).

¹⁴⁵ *Schachter v Canada* (1992), [1992] 2 SCR 679, 93 DLR (4th) 1 SCC at para. 25.

¹⁴⁶ *Ibid* at para. 37.

impact on this legislation of international treaties relating to copyright to which Canada has committed. I will also set out, in general terms, the framework for copyright protection in Canada. I will then proceed by describing the absence of constitutional protection for copyright in Canada. In the final part of this section, I will describe the governing approach to copyright in Canada, as articulated by the SCC (an approach that can be described as economic-functional).¹⁴⁷

2.6.1 Canadian copyright legislation

Section 91(23) of the *Constitution Act* gives Canada's federal government exclusive authority to enact legislation in relation to copyright.¹⁴⁸ The current *Copyright Act* has its origins in the *Copyright Act* passed by Parliament in 1921, which came into force in 1924.¹⁴⁹ This *Act* has been said to have 'embodied the general principles and to have adopted many of the express provisions of the [UK] Imperial Act of 1911'.¹⁵⁰ Canada's copyright legislation has been periodically amended. Significant amendments occurred in 1988, 1997, 2012, and 2014.¹⁵¹

Some of these amendments were required in order for Canada to ratify international copyright treaties to which it had become a signatory, such as the Berne

¹⁴⁷ In Daniel J. Gervais, 'The Purpose of Copyright Law in Canada' (2005) 2 UOLTJ 315 at 317, Gervais describes the 'economic purpose of copyright law [as] instrumentalist in nature, namely, to ensure the orderly production and distribution of, and access to, works of arts and intellect'. For a similar articulation of the purpose of copyright, see Craig, 'Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright' at 109-110. Under this approach, 'copyright can be regarded as a policy tool whose purpose is to advance our common interest in the vibrant social exchange of meaning; rights for authors provide an incentive (economic, but perhaps also personal) for useful and necessary creation'.

¹⁴⁸ Constitution Act, 1867.

¹⁴⁹ *Copyright Act*, 1921, SC 1921, c. 24. See Meera Nair, 'The Copyright Act of 1889: A Canadian Declaration of Independence' (2009) 90 *The Canadian Historical Review* 1 for a work that explores Canada's copyright history.

¹⁵⁰ Canada, *Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs: Report on Copyright* (1957) at 8.

¹⁵¹ Canada-United States Free Trade Agreement Implementation Act, SC 1988, c. 65, An Act to amend the Copyright Act, SC 1997, c. 24, Copyright Modernization Act, SC 2012, c. 20, Combating Counterfeit Products Act, S.C. 2014, c. 32.

Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.¹⁵² Canada's 2012 copyright amendments, for instance, were passed in part to ratify the two WIPO Internet treaties.¹⁵³ Canada is currently one of the nations negotiating the Trans-Pacific Partnership (TPP).¹⁵⁴ Should Canada become a signatory to the TPP, additional amendments to the *Copyright Act* may be required in order for Canada to ratify this agreement.

Under the Canadian *Copyright Act*, copyright owners are granted a number of rights in copyrighted works, including the right to reproduce the work, the right to perform the work in public, and the right to communicate the work to the public by telecommunication.¹⁵⁵ One prima facie infringes copyright under the *Copyright Act* by doing anything that only the copyright owner has the exclusive right to do.¹⁵⁶ Generally speaking, under the *Copyright Act*, the duration of copyright (at least with respect to works created by authors) is for the life of the author plus 50 years.¹⁵⁷ A variety of defences and limitations to copyright infringement (described by the SCC

¹⁵² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), WCT, WPPT, 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, [1992] ATS 29, 496 UNTS 43. See Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1971* (UBC Press 2013) and Sara Bannerman, 'Canadian Copyright: History, Change, and Potential' (2011) 36 *Canadian Journal of Communication* 31 for two works that describe the role played by Canada in the international copyright system.

¹⁵³ Copyright Modernization Act, Summary and Preamble.

¹⁵⁴ Trade and Development Canada Foreign Affairs, 'Canada Formally Joins Trans-Pacific Partnership' (*Government of Canada*, October 10, 2012) <http://www.international.gc.ca/media_commerce/comm/news-communicues/2012/10/09a.aspx?lang=eng> accessed 16 February 2015.

¹⁵⁵ Copyright Act at s. 3.

¹⁵⁶ *Ibid* at s. 27.

¹⁵⁷ *Ibid* at ss. 6-12.

as ‘users’ rights’¹⁵⁸) are set out in the *Copyright Act*. The broadest defence is ‘fair dealing’, under which users have the right to use a substantial part of a copyrighted work without the permission of the copyright holder, provided the use is considered to fall within one of a number of fair dealing categories (namely research, private study, parody, satire, education, criticism, review, and news reporting) and that the use is considered to be fair.¹⁵⁹ Remedies available to copyright owners under the *Copyright Act* include injunctions and statutory damages.¹⁶⁰

2.6.2 Constitutional protection of copyright

For historical and other reasons – including the forces of international harmonization as described above – Canada’s copyright system shares many features with copyright systems of other jurisdictions. Some important differences, however, can be identified. One difference relates to the absence of constitutional protection of copyright in Canada. Neither copyright (specifically) nor property rights (more broadly) are given constitutional protection in the Canadian *Charter of Rights and Freedoms*.¹⁶¹ The lack of constitutional protection for copyright in Canada can be compared with both the US, in which Congress is empowered – through article 1, section 8, clause 8 of the US Constitution (the copyright clause) – to pass laws ‘[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries’;¹⁶² with the Council of Europe, where Article 1 of Protocol 1 of the

¹⁵⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 at para. 12.

¹⁵⁹ Copyright Act at ss. 29-29.2.

¹⁶⁰ *Ibid* at ss. 34-44.

¹⁶¹ The only reference to copyright contained in Canada’s constitution is found in s. 91(23) of the Constitution Act, 1867. This provision gives exclusive authority over copyright to the Parliament of Canada.

¹⁶² US Const, art 1, sec 8, cl 8.

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which protects the right to property, has been interpreted by the European Court of Human Rights (ECtHR) as providing protection for intellectual property;¹⁶³ and with the European Union, where Article 17(2) of the *Charter of Fundamental Rights of the European Union* states that ‘[i]ntellectual property shall be protected’.¹⁶⁴

2.6.3 The purpose of copyright in Canada

In Canada, neither the Constitution nor the *Copyright Act* sets out the purpose or objective of copyright.¹⁶⁵ Furthermore, as Daniel Gervais and Teresa Scassa note, neither legislative history¹⁶⁶ nor ‘the history of copyright reform in Canada’¹⁶⁷ provides a clear articulation of copyright’s purpose. It has thus fallen to the courts to articulate a purpose of copyright. For a period of time, the governing approach to copyright in Canada was an approach described by the SCC as ‘author-centric’.¹⁶⁸ Under this approach, the singular objective of copyright is to protect and reward authors and their assigns. Animated by natural rights theories and justifications of copyright, and connected to a specific conception of authorship (namely the author as originator), this approach ‘focuse[s] on the exclusive right of authors and copyright owners to control how their works were used in the marketplace’.¹⁶⁹ Firmly endorsed

¹⁶³ Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9; *Anheuser-Busch v Portugal* 73049/01, judgment of 11 January 2007 European Court of Human Rights.

¹⁶⁴ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

¹⁶⁵ Cf Copyright Clause, which sets out the objective of copyright in the United States.

¹⁶⁶ Gervais at 318.

¹⁶⁷ Teresa Scassa, ‘Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition’ 1 UOLTJ 51 at 58.

¹⁶⁸ *SOCAN v. Bell*.

¹⁶⁹ *Ibid* at para. 9.

by the SCC in *Bishop v. Stevens*, a 1990 decision of the SCC, this approach was the governing approach to copyright during the 1990s and the first few years of the 21st century.¹⁷⁰

Accepting that the sole purpose of copyright is to protect and reward authors, some courts applying an author-centric approach have described the unauthorized use of copyrighted works in terms that suggest that these uses constitute low value expression.¹⁷¹ Other courts applying an author-centric approach have emphasized the proprietary nature of copyright to support a view of it granting the right to exclude or eject all trespassers (individuals engaging in unauthorized use) from the copyrighted work. As well, courts applying this approach have interpreted both the uses restricted by copyright broadly and the defences to copyright infringement narrowly.

This approach to copyright, however, is now seen as the ‘former framework’ for copyright in Canada, abandoned by the SCC in favour of an approach to copyright that can be described as economic-functional.¹⁷² Copyright, under the economic-functional approach, is conceptualized both as an economic right and as a mechanism that incentivizes the creation of works of expression.¹⁷³ Under this approach, in order for copyright to be effective in encouraging the creation of certain types of works of the arts and intellect (ultimately leading to a vibrant public domain), copyright owners must be given a fair reward. However, care must be taken

¹⁷⁰ *Bishop v. Stevens* [1990] 2 SCR 467.

¹⁷¹ Paul Goldstein is critical of this approach as applied in the US context. He writes that ‘[t]he infringer is ... the sole proponent of the generalized interest in access; for courts to prejudice his position with assumptions of infringement’s intrinsic badness would significantly impede vindication of the public interest’: Goldstein at 1056.

¹⁷² *SOCAN v. Bell* at para. 9.

¹⁷³ *Cinar Corporation v. Robinson* 2013 SCC 73 SCC at para. 23.

to ensure that copyright owners are not overcompensated.¹⁷⁴ To provide an excessive reward to copyright owners would be to unnecessarily restrict the use of copyrighted works, which might ‘unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole’.¹⁷⁵

Gervais writes that the question that must be asked in seeking to strike this balance is:

at what point is an optimal level of creation, production and dissemination reached and, if one protects copyright beyond or in ways that differ from that optimal level, what are the risks of generating rentseeking behaviours, deadweight losses or other forms of unproductive and uncompensated social costs.¹⁷⁶

Under the economic-functional approach to copyright, fair dealing and other defences to copyright infringement are not interpreted restrictively as derogations from copyright owners’ rights. Rather, defences to copyright infringement, under the economic-functional approach, are seen as ‘users’ rights’,¹⁷⁷ and have been referred to by the SCC as ‘[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*’.¹⁷⁸ Said differently, defences to copyright infringement are the primary mechanisms through which the court ensures that copyright does not overcompensate copyright owners at the expense of the public interest.

As described above, under the author-centric approach to copyright, copyright is conceived as the exclusive property of the author, upon which any

¹⁷⁴ *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] 2 SCR 336, 2002 SCC 34 at para. 31.

¹⁷⁵ *Ibid* at para. 32.

¹⁷⁶ Gervais at 317.

¹⁷⁷ *CCH SCC* at para. 12.

¹⁷⁸ *SOCAN v. Bell* at para 11.

‘trespass’ (or unauthorized use) can be enjoined. Under the economic-functional approach, however, copyright – although acknowledged to be property – is conceived not as confirming pre-existing natural property rights, but as an important component of the regulatory framework for the expression environment.

The SCC’s shift to the economic-functional approach from the author-centric approach was foreshadowed in an address given by McLachlin J. (as she then was) to a National Judicial Institute course. In this address, given only two years after *Bishop* was handed down, McLachlin J. states:

We must stop thinking of intellectual property as an absolute and start thinking of it as a function – as a process which, if it is to be successful, must meet diverse aims: the assurance of a fair reward to creators and inventors and the encouragement of research and creativity, on the one hand; and on the other hand, the widest possible dissemination of the ideas and products of which the world, and all the individuals in it, have such great need.¹⁷⁹

It took another decade – until the SCC’s decision in *Théberge v. Galerie d’Art du Petit Champlain (Théberge)* – for the economic-functional approach to begin to emerge in SCC copyright jurisprudence.¹⁸⁰ *Théberge* was the first decision in which the SCC addressed the purpose of copyright since its 1990 decision in *Bishop v. Stephens*. Binnie J. wrote the reasons for judgment in a 4-3 decision (concurring in by McLachlin C.J., Iacobucci and Major J.J.).¹⁸¹ Rejecting the idea that copyright was animated by a single purpose – protecting and rewarding authors – Binnie J. instead stated that Canadian copyright law balances two objectives,

¹⁷⁹ Chief Justice Beverley McLachlin, ‘Intellectual Property - what is it all about? (Address to the National Judicial Institute course "Intellectual Property: Trademark Law," 19, 20 November 1992)’ in Gordon F Henderson (ed), *Trade-marks Law of Canada* (Carswell 1993) at 393-394.

¹⁸⁰ *Théberge*.

¹⁸¹ Gonthier J. wrote dissenting reasons (concurring in by L’Heureux-Dubé and LeBel J.J.). The two judges on the bench at the time who took no part in the decision were Arbour J. and Bastarache J.

rewarding authors and promoting the public interest in the encouragement and dissemination of expression.¹⁸² Binnie J.’s reasons – in which he articulates a public interest that can be invoked to limit the rights of copyright owners – have been said by the SCC to mark a break away from the author-centric approach.¹⁸³

When it broke away from the author-centric approach, the SCC moved towards the approach that I describe as economic-functional.¹⁸⁴ The SCC’s approach to copyright continued to evolve towards the approach outlined above through decisions such as *CCH, Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers (SOCAN v. CAIP)*, *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada (SOCAN v. Bell)*, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, and, most recently, *Cinar Corporation v. Robinson (Cinar Corp)*.¹⁸⁵

In *Cinar Corp*, McLachlin C.J., who delivered the reasons for judgment for the Court, clarified, for the first time by a Canadian court, the relationship between the two objectives of copyright identified by Binnie J. in *Théberge*.¹⁸⁶ Specifically, McLachlin C.J. noted that copyright ‘seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works’ (emphasis added).¹⁸⁷ In so doing, McLachlin C.J. again presents copyright as being animated by

¹⁸² *Théberge* at para. 30.

¹⁸³ *SOCAN v. Bell* at paras. 9-10.

¹⁸⁴ *Ibid* at paras. 9-10.

¹⁸⁵ *CCH SCC, Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* 2004 SCC 45, [2004] 2 SCR 427, *SOCAN v. Bell, Alberta (Education) , Cinar*.

¹⁸⁶ Such an eventuality was anticipated by Carys Craig, who writes in Carys J Craig, ‘The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest’ (2005) 2 UOLTJ 425 at para. 34, ‘[w]ith two goals to further in the pursuit of copyright’s purposes, one must wonder whether, at a certain point, a choice will have to be made ... which right will prevail when the balance (or the illusion thereof) can no longer be convincingly maintained?’

¹⁸⁷ *Cinar* at para. 23.

a single purpose. However, unlike under the author-centric approach, in which the purpose of copyright was to reward and protect authors, under the economic-functional approach, the purpose of copyright is to encourage the creation of works of the arts and intellect through the grant of limited economic rights. *Cinar Corp* is thus the decision that affirms – to a degree not present in previous decisions – the SCC’s shift from the author-centric to the economic-functional approach to copyright.

At the same time as McLachlin C.J.’s judgment in *Cinar Corp* affirms the economic-functional approach as the governing approach to copyright in Canada, however, aspects of this decision also suggest that the purpose of copyright in Canada could continue to evolve, potentially beyond the economic-functional approach. In *Cinar Corp*, McLachlin C.J., in discussing whether punitive damages could be awarded for infringement of copyright, noted that ‘[i]n Quebec, punitive damages can be awarded where they are provided for by a specific enabling enactment’;¹⁸⁸ that ‘[s]ection 49 of the *Charter [of human rights and freedoms, RSQ, c C-12 (Quebec Charter)]* provides that punitive damages may be awarded if there is an unlawful and intentional interference with any of the rights and freedoms that the *Charter* recognizes’;¹⁸⁹ and that ‘[t]he evidence establishes unlawful and intentional interference with several of Robinson’s *Charter* rights’.¹⁹⁰ Specifically, McLachlin C.J. held that copyright infringement violates s. 6 of the *Quebec Charter*, which provides protection for property, and that in this instance, the infringing acts

¹⁸⁸ Ibid at 113.

¹⁸⁹ Ibid at 114.

¹⁹⁰ Ibid at 114.

committed by Cinar Corp et al ‘interfered with Robinson’s personal rights to inviolability and to dignity recognized by ss. 1 and 4 of the [*Quebec*] *Charter*’.¹⁹¹

It remains to be seen how broadly or narrowly these determinations will be applied; whether they will impact upon the purpose of copyright, as articulated by the SCC; and, if so, how they might do so. A number of scholars have been critical of conceptions of copyright in which copyright is presented as focusing solely on economic incentives to create. They argue that copyright should also concern itself with values such as dignity, autonomy, justice, and equality.¹⁹² *Cinar Corp*, while affirming the governing approach to copyright in Canada as one which is economic-functional, leaves open the possibility that the purpose of copyright in Canada could continue to evolve to encompass these considerations, among others.

¹⁹¹ Ibid at 114.

¹⁹² See, for instance, Madhavi Sunder, ‘IP3’ (2006) 59 *Stan L Rev* 257, Madhavi Sunder, *From Goods to a Good Life* (Yale University Press 2012), Drassinower, ‘Copyright Infringement as Compelled Speech’, Lea Shaver, ‘Copyright and Inequality’ (2014) 92 *Washington University Law Review* 117, Alex Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan 2008), Drassinower, ‘Taking User Rights Seriously’, Brett Frischmann and Mark P McKenna, ‘Intergenerational Progress’ [2011] *Wis L Rev* 123.

3. THE APPROACHES ADOPTED BY LOWER CANADIAN COURTS TO THE INTERSECTION OF THE *CHARTER* RIGHT TO FREEDOM OF EXPRESSION AND COPYRIGHT

3.1 Introduction

While the SCC has yet to explicitly discuss the relationship between the *Charter* right to freedom of expression and copyright, this intersection has been addressed in a number of lower court decisions. Decisions by lower courts on the intersection of the *Charter* right to freedom of expression and copyright can be grouped into two categories. The first category is comprised of cases in which the idea that copyright might unjustifiably infringe the *Charter* right to freedom of expression is considered and, although viewed with scepticism, is not wholly rejected. The first three decisions by Canadian courts to consider this intersection fall within this category.¹⁹³ In each of these decisions, however, despite leaving open the possibility that in a future case the invocation of the *Charter* right to freedom of expression might result in the rights of copyright owners being limited in favour of the expression interests of non-copyright owning parties, the court ultimately rejects the argument that this should occur on the specific facts of the case before it.

The second category is comprised of cases in which courts have considered, and rejected, the possibility that copyright might unjustifiably infringe the *Charter* right to freedom of expression, both on the facts of the case before it and as a general principle. All cases to have addressed the intersection of the *Charter* right to freedom

¹⁹³ *Lorimer TD, Lorimer FCA, Canadian Tire Corp v Retail Clerks Union, Local 1518* (1985), 7 CPR (3d) 415; 36 ACWS (2d) 4; [1985] FCJ No 1005; [1985] ACF no 1005 Federal Court of Canada - Trial Division.

of expression and copyright in Canada, except for the three cases that comprise the first category, fall within this category.

Three approaches to the relationship between the *Charter* right to freedom of expression and copyright can be identified in the cases canvassed in this chapter.

Under the first, the possibility of conflict between copyright and the *Charter* right to freedom of expression is rejected due to the manner in which courts have articulated the nature and scope of each right. Under this approach, copyright and the *Charter* right to freedom of expression operate in separate spheres. This approach to the relationship between copyright and the *Charter* right to freedom of expression has been adopted in a number of Canadian court decisions, including the decision of Teitelbaum J. in *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)*.¹⁹⁴ A 1996 decision of the Federal Court (Trial Division), *Michelin* remains the most detailed articulation, by a Canadian court, of the intersection of the s. 2(b) right to freedom of expression and copyright. Due to the frequency with which this conception of the relationship between copyright and the *Charter* right to freedom of expression has been employed in Canadian jurisprudence both pre- and post-*Michelin*, and the primary role it plays in *Michelin*, this conception can be described as the governing approach to the intersection of copyright and the *Charter* right to freedom of expression in Canada.

In *Michelin*, Teitelbaum J. also articulated two additional approaches to the relationship between the *Charter* right to freedom of expression and copyright (both of which lead to the same outcome as does the first approach noted above, namely the rejection of the possibility that copyright might unjustifiably infringe the *Charter*

¹⁹⁴ *Michelin*.

right to freedom of expression). First, Teitelbaum J. wrote that even if copyright is found to have infringed the *Charter* right to freedom of expression (he takes the view that it does not), mechanisms internal to the *Copyright Act*, such as the idea/expression dichotomy, the ‘substantial part’ test of copyright infringement, and defences such as fair dealing, ensure that copyright accommodates the freedom of expression interests of non-copyright owners to a sufficient degree to satisfy a s. 1 analysis.¹⁹⁵

Second, Teitelbaum J. suggested that rather than being in conflict with the *Charter* right to freedom of expression, copyright supports and promotes freedom of expression.¹⁹⁶ Post-*Michelin*, these approaches are occasionally cited, along with the governing approach noted above, by Canadian courts considering the intersection of copyright and the *Charter* right to freedom of expression.¹⁹⁷

¹⁹⁵ Ibid at para. 111. In short, under this argument, it is accepted that although copyright imposes short-term costs on expression, these costs are justified at least in part by the long-term benefits provided by copyright. For a detailed articulation of this argument, see Netanel, *Copyright's Paradox*.

¹⁹⁶ *Michelin* at para. 104. A number of scholars agree. See, for instance, Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) at 354: ‘Copyright ... serves the public interest in freedom of expression. By enabling the creator to derive a financial reward from his work, his artistic independence and right to create and publish according to his own wish and conscience is assured’. See also Gendreau, ‘Copyright and Freedom of Expression in Canada’ at 21: ‘It is also widely agreed that copyright has a certain role to play in furthering free expression.’

¹⁹⁷ The dual conclusions reached in *Michelin* – that the *Charter* does not grant the right to use private property in the service of freedom of expression, and that in the alternative, any restrictions would satisfy a s. 1 analysis, are cited with authority in *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* (2008), 2008 BCSC 1609; 173 ACWS (3d) 431; [2008] BCJ No 2271. As well, the conclusions reached in *Michelin* that any restrictions on freedom of expression that the *Copyright Act* may include are reasonable limits in a free and democratic society and that the purpose or effect of the *Copyright Act* is not to infringe freedom of expression are cited with approval in *Drolet v Stiftung Gralsbotschaft (F.C.)* (2009), 2009 FC 17; [2010] 1 FCR 492; [2010] 1 RCF 492; [2009] FCJ No 38; [2009] ACF no 38 Federal Court. In these decisions, however, fair dealing or other ‘internal mechanisms’ are not mentioned.

3.2 Judicial interpretation of the intersection of the *Charter* right to freedom of expression and copyright in Canada

3.2.1 The first category: the possibility that copyright might unjustifiably infringe the *Charter* right to freedom of expression is not foreclosed

3.2.1.1. *Queen v. James Lorimer and Co.*

Prior to 17 April 1982, the date on which the *Charter* came into effect, no Canadian court had explicitly addressed the intersection of freedom of expression and copyright. It did not take long following the coming into force of the *Charter*, however, for this issue to be considered. On 28 April 1982 – a mere 11 days after the *Charter* had come into force – Noël A.C.J. of the Federal Court (Trial Division) began to hear arguments in *Canada v. James Lorimer and Co.*¹⁹⁸ The first Canadian judgment to explicitly address the relationship between freedom of expression and copyright, *Canada v. James Lorimer and Co.* dealt with a claim of copyright infringement brought by the Federal Crown against James Lorimer and Company Limited (Lorimer and Co.).¹⁹⁹ Lorimer and Co. was alleged to have infringed the Crown's copyright in a report published in March 1981 entitled 'The State of Competition in the Canadian Petroleum Industry,' prepared by Robert J. Bertrand, Q.C., Director of Investigation and Research, under the *Combines Investigation Act*.²⁰⁰ This report, which was 1748 pages long, was originally published in a set of seven volumes.²⁰¹ The set was offered for sale at a price of \$70.²⁰² Individual volumes were offered at a price of \$10.²⁰³

¹⁹⁸ *Lorimer TD*. Arguments were also heard on 29 April 1982.

¹⁹⁹ The judgment in *Lorimer TD* was delivered orally on 30 April 1982 and was not reported in any printed case law reporters. It is available on Quicklaw.

²⁰⁰ *Lorimer TD* at para. 1.

²⁰¹ *Lorimer FCA* at para. 2.

James Lorimer (Lorimer) had examined the report close to the date of its release, and ‘immediately formed the opinion that a condensed version of the report, which consisted of seven volumes, would enjoy good public distribution’.²⁰⁴ Lorimer sought permission to publish a condensed version of the report.²⁰⁵ Although permission was not granted, Lorimer moved ahead with his plans to publish a condensed version of the report.²⁰⁶ He did not do so covertly. Rather, Lorimer, ‘in his capacity as president of the Defendant company, wrote to the Minister of Supply and Services’ indicating that the Defendant company is ‘preparing ... a version of the report for publication’, and that it was prepared to ‘pay to the Receiver General a royalty of eight per cent of the retail price on all copies sold’.²⁰⁷

Lorimer’s abridged version was 626 pages long and was offered for sale at \$14.95.²⁰⁸ As noted in the publisher’s introduction, Lorimer’s condensed version included:

... the full text of Volume I – the findings and recommendations of the Director regarding the oil industry, together with much of the supporting discussion and information from Volumes II-VI. In the interests of keeping this volume to a reasonable length, some of the more technical sections have been omitted. But conclusions and summaries from all sections of the report have been reprinted.²⁰⁹

²⁰² *Lorimer TD* at para. 15; *Lorimer FCA* at para. 2.

²⁰³ *Lorimer FCA* at para. 2.

²⁰⁴ *Lorimer TD* at para. 5.

²⁰⁵ *Ibid* at para. 7.

²⁰⁶ *Ibid* at para. 10.

²⁰⁷ *Ibid* at para. 9.

²⁰⁸ *Lorimer FCA* at para. 3.

²⁰⁹ *Ibid* at para. 3.

Lorimer's abridged version was released 'almost exactly to the day four weeks from the first release of the seven-volume report'.²¹⁰ Sales were brisk.²¹¹

The Crown objected to the unauthorized publication of this work, and responded in early April 1982 by bringing an action against Lorimer and Co. for copyright infringement. Three defences were pleaded by Lorimer and Co. to the claim of copyright infringement: fair dealing (for the purposes of review), the public interest defence, and freedom of expression. Noël A.C.J. rejected all three defences, including the argument, raised by Lorimer and Co., that the *Charter* right to freedom of expression gave the defendant the right to continue to reproduce and distribute the report without compensating the plaintiff.

In rejecting this argument, Noël A.C.J. focused his discussion on the potential impact, on public discussion, commentary, and access to information, of granting the plaintiff the remedies that it sought. He concluded that:

In the Defendant's own opinion, the quality of the information released, the quality of the supporting documentation, was quite impressive. Certainly the distribution of the information was as brisk as the government could expect, that the agency could expect. There is nothing in the Defendant's work which constitutes an attack, criticism, discussion or a commentary on that report or on the inquiry and, therefore, nothing in the interpretation of the law sought by the Plaintiff in the remedies which it does seek in this litigation which could be construed as in any way contributing to a restriction of public commentary or public discussion. We are dealing here purely and simply with a condensed copy of the Plaintiff's report.²¹²

Despite holding that Lorimer and Co. had prima facie infringed copyright, and that the three defences noted above did not apply to render Lorimer and Co.'s

²¹⁰ *Lorimer TD* at para. 8.

²¹¹ *Ibid* at para. 12.

²¹² *Ibid* at para. 25.

actions non-infringing, Noël A.C.J. did not order a recall, an injunction, or damages. Stating that ‘the Crown is an unusual plaintiff’²¹³ on the basis both that it ‘really is not greatly interested in income or revenue from this work’²¹⁴ and that it has an ‘obligation to see that [the work] ... receives the widest possible dissemination’,²¹⁵ and noting that ‘the Defendant’s publication did not then and certainly now is not having any adverse effect on further distribution or sales of the Plaintiff’s original work’,²¹⁶ Noël A.C.J. chose instead to order ‘that the Defendant be required to pay to the Crown a royalty of eight per cent of retail sales on all volumes sold now or in the future’.²¹⁷

However, although Noël A.C.J. denied injunctive relief to the Crown on the basis that it had a responsibility to ensure that works in which it owns copyright ‘receive[] the widest possible dissemination’,²¹⁸ there is no indication in his decision that this aspect of his judgment was informed by the *Charter* right to freedom of expression. Noël A.C.J., in fact, emphasized that in his view, the relief sought by the Crown (which included an injunction) would not interfere or restrict freedom of expression in any way. Nevertheless, it is notable (particularly in light of future cases to address this intersection) that at no point in his decision did Noël A.C.J. express the view that the *Charter* right to freedom of expression could not be used to modify or limit the rights of copyright owners.

²¹³ Ibid at para. 38.

²¹⁴ Ibid at para. 38.

²¹⁵ Ibid at para. 44.

²¹⁶ Ibid at para. 38.

²¹⁷ Ibid at para. 42.

²¹⁸ Ibid at para. 44.

3.2.1.2 *Queen. v. James Lorimer & Co (FCA)*

Nöel A.C.J.'s judgment was appealed to the Federal Court of Appeal (FCA).

Mahoney J. delivered the judgment for the FCA, in which he:

varied [Nöel A.C.J.'s judgment] by striking out the part which ordered the respondent to pay a royalty to the appellant; by increasing the damages recoverable by the appellant by the amount of royalty paid or payable under that judgment up to the date of judgment ... and by granting [other] relief sought.²¹⁹

With respect to the defence of freedom of expression, Mahoney J. 'agree[d] with [Nöel A.C.J.] that there [was] no merit in this defence'.²²⁰ He continued by stating that:

If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them. So little of its own thought, belief, opinion and expression is contained in the respondent's infringing work that it is properly to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work.²²¹

Thus, although agreeing with Nöel A.C.J. that on the facts of this case, the defence of freedom of expression was not applicable, Mahoney J. did not foreclose the possibility that copyright might unjustifiably limit the *Charter* right to freedom of expression in certain circumstances. Rather, his judgment can be read as opening the door to the possibility that a future court might reach such a conclusion. Of note, however, is the scepticism with which Mahoney J. viewed this argument, and his reluctance to accept that in certain circumstances copyright might unjustifiably restrict the *Charter* right to freedom of expression.

²¹⁹ *Lorimer FCA*.

²²⁰ *Ibid* at para. 29.

²²¹ *Ibid* at para. 29.

The overarching message conveyed by Mahoney J. with respect to the intersection of freedom of expression and copyright is that although it might be possible in certain situations for copyright to unjustifiably limit the *Charter* right to freedom of expression, this will certainly not be the case when dealing with conduct that can be characterized as nothing more than an appropriation of the ‘thought, belief, opinion and expression of the author of the ... work’.²²²

3.2.1.3 *Canadian Tire Corp. Ltd. v. Retail Clerks Union, Local 1518*

Following *Queen v. James Lorimer and Co.*, the next Canadian case to explicitly address the intersection of the *Charter* right to freedom of expression and copyright was *Canadian Tire Corp. Ltd. v. Retail Clerks Union, Local 1518 (Canadian Tire)*.²²³ This case, heard in 1985, was the first in a series of Canadian cases that addressed the intersection of the *Charter* right to freedom of expression and copyright in the context of labour disputes.²²⁴ It is also the last Canadian case to leave open the possibility that copyright might, in certain circumstances, unjustifiably infringe the s. 2(b) rights of non-copyright owners.

The dispute in *Canadian Tire* originated in a labour dispute in Prince George, British Columbia. The Retail Clerks Union, Local 1518 of the United Food and Commercial Workers Union (Retail Clerks Union) had commenced, on December 5, 1983, a strike against T.A. Steadman Marketing Consultants Ltd. (Steadman). Steadman operated a Canadian Tire store in Prince George as a

²²² Ibid at para. 29.

²²³ *Canadian Tire*.

²²⁴ See also *Rôtisseries St.-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.)* [1986] 17 CPR (3d) 461, *Michelin, Fraser Health Authority v. Hospital Employees' Union* (2003), 2003 BCSC 807; 226 DLR (4th) 563; 25 CPR (4th) 172; 122 ACWS (3d) 544; [2003] BCJ No 1192 British Columbia Supreme Court, *Corporation Sun Média c. Syndicat canadien de la fonction publique* 2007 QCCS 2943, [2007] JQ no 6007 Cour supérieure du Québec.

franchisee. Canadian Tire, a department store, has a special place in Canada's retail landscape. As noted by one commentator, Canadian Tire both 'has a national presence as one of the country's leading retailers, [and] is part of [Canadian] culture'.²²⁵

In the context of their strike, the Retail Clerks Union used a modified version of Canadian Tire's logo on pamphlets distributed by union members in front of Canadian Tire stores. Designed in 1967,²²⁶ the Canadian Tire logo consists (as described by Strayer J.):

of an equal sided triangle slightly rounded at the corners, standing on one corner and its top plane horizontal, with a maple leaf superimposed on the triangle at the mid point of its top line and the words Canadian Tire printed across the triangle. The triangle is normally depicted in red, the maple leaf in green, and the printing in white. It is used extensively by the plaintiff on catalogues, flyers, and certain of its wares, and in its advertising; the emblem is also used extensively by associate stores to identify their premises, and in their displays and advertising.²²⁷

The Retail Clerks Union had modified the logo by superimposing a red line upon it. Strayer J. described this addition as:

a red diagonal line running across the white circle ascending from left to right in the manner of international traffic signs or signs commonly found in public streets and buildings designed to instruct the functionally illiterate. Hence the total effect is that of a sign which would warn or prohibit members of the public from entering, or buying from, a Canadian Tire store.²²⁸

²²⁵ Mark Kearney and Randy Ray, *The Big Book of Canadian Trivia* (Toronto, Dundurn Press 2009) at p. 265.

²²⁶ 1967 was the year of Canada's Centennial. Given the degree to which Canadian Tire is linked with Canadian culture (at least according to some individuals), this is a coincidence that is worthy of note.

²²⁷ *Canadian Tire* at para. 3.

²²⁸ *Ibid* at para. 5.

The Retail Clerks Union had also modified the logo by depicting the maple leaf in ‘simulated pink’, and not in green.²²⁹ Strikers used this modified logo on pamphlets as well as on lawn signs and placards ‘together with the words “Boycott Canadian Tire”’.²³⁰

Canadian Tire Ltd. applied for an interlocutory injunction to prevent the Retail Clerks Union from infringing its copyright in the ‘Canadian Tire Triangle’.²³¹ Strayer J. granted the injunction. Building on Mahoney J.’s statement in *Lorimer FCA* with respect to the intersection of the *Charter* right to freedom of expression and copyright, Strayer J. stated that ‘there may be situations where the guarantee of freedom of expression in paragraph 2(b) of the Canadian Charter of Rights and Freedoms may properly limit the protection otherwise given to the owners of copyright.’²³² However, Strayer J. said that ‘[he did] not believe this represents such a situation’.²³³

Above, I noted that in his judgment in *Lorimer FCA*, Mahoney J. implied that copyright would not be seen as an ‘unjustified limitation on an infringer’s freedom of expression’ in situations where the party seeking to make use of the defence of freedom of expression has merely ‘appropriat[ed] ... the thought, belief, opinion and expression’ of another’s work.²³⁴ In *Canadian Tire*, the defendants did more than merely appropriate the expression of another (the Canadian Tire logo). They

²²⁹ Ibid at para. 5.

²³⁰ Ibid at para. 6.

²³¹ Ibid at para. 7.

²³² Ibid at para. 13.

²³³ Ibid at para. 13.

²³⁴ *Lorimer FCA*.

superimposed a diagonal line over top of it – undeniably both an act of criticism and an expressive addition to that work.

However, Strayer J. – citing to *Lorimer FCA* - found that this addition did not warrant limiting the copyright owners' rights, stating that '[this] addition ... does not, it seems to me, amount to a sufficient expression of thought by the defendants as to override the plaintiff's copyright in its logo'.²³⁵ Thus, the overarching message conveyed by Strayer J. with respect to the intersection of the *Charter* right freedom of expression and copyright is that while it is possible that the *Charter* right to freedom of expression might limit the rights of copyright owners in certain circumstances, this will not be the case where only a minor modification has been made by the defendant to the work. Such an act is not sufficient, in Strayer J.'s view, to 'override the plaintiff's copyright in its logo'.²³⁶

3.2.2. The second category: the possibility that copyright might unjustifiably infringe the Charter right to freedom of expression is rejected

As described above, in the first three decisions to address the intersection of freedom of expression and copyright in Canada, the idea that copyright might unjustifiably infringe the *Charter* right to freedom of expression was considered and, although viewed with scepticism, was not wholly rejected. In all other cases to have examined the intersection of freedom of expression and copyright in Canada, however, the idea that copyright might unjustifiably infringe the *Charter* right to freedom of expression has been both considered and rejected.

In many of these cases, courts have articulated the nature and scope of both copyright and the *Charter* right to freedom of expression in such a manner as to lead

²³⁵ *Canadian Tire*.

²³⁶ *Ibid.*

to the conclusion that the two rights are not in conflict. I refer to this approach to the intersection of the *Charter* right to freedom of expression and copyright as the governing approach to this intersection.

Two alternative approaches to this intersection can also be identified in this set of cases. Under the first alternative approach, courts take the view that even if copyright limits the *Charter* right to freedom of expression, mechanisms internal to the *Copyright Act* ensure that copyright accommodates the freedom of expression interests of non-copyright owners, at least to a sufficient degree to satisfy a s. 1 analysis. Under the second alternative approach, copyright is presented as a type of right that promotes, rather than restricts, the *Charter* right to freedom of expression.

3.2.2.1 *Rôtisseries St.-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.)*

The first decision to address the intersection of the *Charter* right to freedom of expression and copyright following *Canadian Tire* was *Rôtisseries St.-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.) (St-Hubert)*.²³⁷ Similar to *Canadian Tire*, this decision also involved an iconic logo being reworked or modified by a union for use in a labour dispute. While *Canadian Tire* addressed a union's use of the Canadian Tire logo, *St.-Hubert* involved CSN's use of the Rôtisseries St-Hubert Ltd. (St-Hubert) logo. St-Hubert, 'Quebec's largest homegrown restaurant chain', has been described as 'as iconic within Quebec as Bonhomme Carnaval and the [Montreal] Canadiens [ice hockey club]'.²³⁸ St-Hubert's logo consists of a cartoon rooster head with a large shock of red hair, a yellow smiling beak, large eyes, and a black bow tie positioned beside a

²³⁷ *St-Hubert*.

²³⁸ Nicolas Van Praet, 'Growth plans for Quebec icon' *Financial Post* (24 October 2011) <<http://business.financialpost.com/2011/10/24/growth-plans-for-quebec-icon/>> .

white hand. The rooster head is positioned above red block lettering in cursive font spelling out the name St-Hubert.

In the context of negotiations for the renewal of a collective agreement, CSN had created a circular in which they criticized the working conditions and treatment of St-Hubert employees in the Drummondville Branch.²³⁹ This circular featured a modified version of the St-Hubert logo, with the main modifications being the addition of a knife in the roosters' hand and two long fangs.²⁴⁰ This design was also printed onto stickers and brochures, along with the titles 'The True Face of St-Hubert'²⁴¹ and 'St-Hubert Poison' (translated).²⁴² St-Hubert sought a permanent injunction to prevent CSN and the other defendant from using its logo in ways that would infringe both the *Copyright Act* and the *Trade-Marks Act*.

Freedom of expression was raised as a defence to copyright infringement both under s. 2(b) of the *Canadian Charter of Rights and Freedoms* and Article 3 of the *Quebec Charter of Rights and Freedoms*. This argument, however, was dismissed as being without merit. According to Lesyk J.C.S., an injunction wouldn't deprive the defendants of the ability to inform the public of their concerns.²⁴³ *St-Hubert* was the first Canadian decision to consider the intersection of the *Charter* right to freedom of expression and copyright in which the court did not leave open

²³⁹ *St-Hubert* at para 10.

²⁴⁰ *Ibid* at para. 11.

²⁴¹ *Ibid* at para. 14.

²⁴² *Ibid* at para. 24.

²⁴³ *Ibid* at para. 113. The allegations of trademark infringement (based on ss. 19, 20, and 22 of the Trade-marks Act, RSC, 1985, c T-13) were rejected on the basis that St-Hubert's marks (the Rooster head and the name St-Hubert itself) were not 'used' in connection with goods or services. An earlier decision (*Clairol Inc. of Canada v. Thomas Supply and Equipment Co. Ltd. et al* (1968), 55 CPR 176) had interpreted 'use' as requiring a situation of commercial competition. Lesyk J.C.S. held that the Union was not a for-profit organization and did not engage in commercial activity (*St-Hubert* at para. 52). As a result, it had not 'used' St-Hubert's marks.

the possibility that copyright, in some circumstances, might conflict with freedom of expression (or vice versa).

3.2.2.2 *R. v. Ghnaim*

On 4 November 1988, Ketchum Prov. Ct. J. (Alberta Provincial Court) delivered his judgment in *R. v. Ghnaim (Ghnaim)*.²⁴⁴ *Ghnaim* is the only Canadian decision to address the intersection of freedom of expression and copyright in the context of criminal charges. Andy Ghnaim and his company Midland Enterprises Ltd. had been charged under what was then s. 25 of the *Copyright Act* for ‘illegally copying and selling video cassettes...described as “adult” “XXX” or pornographic.’²⁴⁵ Ketchum Prov. Ct. J. found that Ghnaim had committed an offence under s. 25.

Based on Ketchum Prov. Ct. J.’s judgment, it appears as if Ghnaim may have raised, under the *Charter*, a freedom of expression defence (or perhaps had requested that the court take into account the *Charter* right to freedom of expression when interpreting the amount of the fine or penalty). Ketchum Prov. Ct. J.’s judgment rejected the idea that freedom of expression could be employed in this context:

The opening words of the *Canadian Charter of Rights and Freedoms* recognizes the supremacy of God and the rule of law. All of the world's great religious leaders have consistently taught that it is the divine spark in men and women that sets them apart from the animals. That view of humanity is the foundation of the Judeo-Christian tradition. It is also a foundation of our law and morality. It would be a tragic irony if the freedom of expression clause (Section 2(b) of the Charter) were interpreted so as to subvert the intent conveyed in the opening words of the Charter. I reject such an interpretation and have no hesitation in finding this material to be grossly immoral; subversive of good public morals; and contrary to the standards of tolerant

²⁴⁴ *R. v. Ghnaim* (1988), 92 AR 27.

²⁴⁵ *Ibid.*

Canadians.²⁴⁶

Ketchum Prov. Ct. J. imposed the maximum fine possible under the statute, in the amount of \$10.00 per infringing copy for a total of \$1,540.²⁴⁷

3.2.2.3 *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*

Eight years passed before a Canadian court again addressed the intersection of the *Charter* right to freedom of expression and copyright. The next decision to address this issue – *Michelin*, heard by Teitelbaum J. in the Federal Court (Trial Division)²⁴⁸ – is notable for several reasons. First, it is the first case to address the intersection of freedom of expression and copyright following the SCC’s articulation, in *Irwin Toy*,²⁴⁹ of the correct approach to be followed in addressing freedom of expression arguments under s. 2(b) of the *Charter*; second, it is the Canadian case that has dealt with the relationship between copyright and freedom of expression in the most depth; third, it represents the most detailed articulation of the governing approach to the intersection of the s. 2(b) right to freedom of expression and copyright in Canada; and fourth, it also features two alternative approaches to this intersection.

In a manner similar to *Canadian Tire* and *St-Hubert*, *Michelin* involved a union’s use of a modified version of a corporate logo in the context of a labour dispute. In *Michelin*, the Defendant National Automobile, Aerospace, Transportation

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ *Michelin*.

²⁴⁹ *Irwin Toy*.

and General Workers Union of Canada (CAW) had attempted to unionize employees of Michelin North America (Canada) at Michelin Canada's three tire plants in Granton, Waterville and Bridgewater, Nova Scotia.²⁵⁰ In the context of this organizing campaign, the CAW had prepared a leaflet featuring a modified version of Bibendum (aka the Michelin Tire Man or the Michelin Man), CGEM Michelin's corporate logo described by Teitelbaum J. as a 'beaming marshmallow-like rotund figure composed of tires'.²⁵¹ This leaflet was distributed to several thousand Michelin employees outside of the factory gates at the three plants noted above.²⁵² Teitelbaum J. described the leaflet as follows:

The top right hand corner of the leaflet displays the CAW logo ... The contentious portion of the leaflet depicts a broadly smiling 'Bibendum', arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker. In the same leaflet, another worker safely out of the reach of 'Bibendum's' looming foot has raised a finger of warning and informs his blithe colleague, 'Bob, you better move before he squashes you!' Bob, the worker in imminent danger of 'Bibendum's' boot has apparently resisted the blandishments of the union since a caption coming from his mouth reads, 'Naw, I'm going to wait and see what happens'. Below the roughly drawn figures of the workers is the following plea in bold letters, 'Don't wait until it's too late! Because the job you save may be your own. Sign today for a better tomorrow.'²⁵³

CGEM Michelin (the owner of Michelin North America (Canada)) objected to the use of Bibendum on these leaflets.²⁵⁴ Seeking both damages and a permanent

²⁵⁰ In *Michelin*, Teitelbaum J. described CGEM Michelin as 'a French corporation with worldwide interests in the manufacture, distribution and sale of tires and automotive accessories. CGEM Michelin also provides tourism services, including the production of tourist guides and maps' (ibid at para. 1).

²⁵¹ Ibid at para. 2.

²⁵² Ibid at para. 8.

²⁵³ Ibid at para. 8.

²⁵⁴ In addition to being distributed to employees, '[t]he leaflet was also reproduced as a poster and displayed on the windows of CAW offices' (ibid at para. 9). Michelin also objected to the use of the

injunction, CGEM Michelin brought an action against CAW (et al) for both copyright and trademark infringement. The defendants pleaded several defences. Among them was a defence based on the *Charter* right to freedom of expression. CAW et al argued that certain core sections of the *Copyright Act* (namely the rights-granting provision, when read together with the primary infringement provision) unjustifiably infringe their s. 2(b) right to freedom of expression.²⁵⁵

Ultimately, although finding that the union's use of Bibendum constituted expression,²⁵⁶ Teitelbaum J. reached what he referred to as the 'seemingly straightforward'²⁵⁷ conclusion that:

the defendants' right to freedom of expression was not restricted. The Charter does not confer the right to use private property--the plaintiff's copyright --in the service of freedom of expression. Since there has been no infringement of the defendants' freedom of expression, the plaintiff has no need to justify sections 3 and 27 of the Copyright Act under section 1 of the Charter.²⁵⁸ (emphasis added)

The order granted by Teitelbaum J. required CAW et al to deliver up 'all offending handouts, advertisements, wares or material' on which images of Bibendum were printed.²⁵⁹ It also indicated that CAW et al were required to refrain from unauthorized use of Bibendum in future.²⁶⁰

word 'Michelin' on an information bulletin entitled 'Sick and Accident vs. Compensation' (ibid at para. 10) and on '[a] second information brochure [that] contrasts the discretionary company policies of a non-unionized environment with the binding rights of an unionized labour force' (ibid at para 11).

²⁵⁵ Ibid at para. 3.

²⁵⁶ Ibid at para. 85.

²⁵⁷ Ibid at para. 80.

²⁵⁸ Ibid at para. 79.

²⁵⁹ Ibid at para. 117.

²⁶⁰ Ibid at para. 116.

Teitelbaum J.'s judgment in *Michelin* exemplifies the approach to the intersection of the *Charter* right to freedom of expression and copyright adopted by a number of cases in this category – an approach through which the possibility that copyright might unjustifiably infringe the *Charter* right to freedom of expression is rejected due to the scope or nature of the rights themselves. As stated earlier, this approach can be seen to be the governing approach to the intersection of freedom of expression and copyright in Canada.

Teitelbaum J., however, also offered two alternative conceptions of the relationship between freedom of expression and copyright. He noted first that:

Even if I am incorrect in stating that the defendants have not met their burden under paragraph 2(b) of the Charter by failing to prove infringement of their freedom of expression, I would have held, according to the wording of section 1, that sections 3 and 27 of the Copyright Act are ‘reasonable limits prescribed by law . . . demonstrably justified in a free and democratic society’.²⁶¹

He reached this conclusion primarily on the basis of his view that mechanisms internal to copyright (such as the idea/expression dichotomy, the ‘substantial part’ test of copyright infringement, and the ‘list of exceptions’ set out in the *Copyright Act*) provide sufficient protection for freedom of expression interests (at least to a degree that would be sufficient to satisfy a s. 1 analysis).²⁶² A third conception of the relationship between the s. 2(b) right to freedom of expression and copyright noted by Teitelbaum J. in *Michelin* is the idea that copyright promotes, rather than restricts, the s. 2(b) right to freedom of expression.²⁶³

Michelin remains the leading Canadian case with respect to the intersection of

²⁶¹ Ibid at para. 109.

²⁶² Ibid at para. 111.

²⁶³ Ibid at para. 104.

copyright and the s. 2(b) right to freedom of expression. No other Canadian case – either prior to or subsequent to *Michelin* – has examined this intersection in as much depth as does Teitelbaum J.’s judgment in *Michelin*. As well, the conclusion reached in *Michelin* that freedom of expression arguments cannot be used to modify the rights of copyright owners, or to act as a defence to a claim of copyright infringement, has been cited in numerous cases, as will be described below.²⁶⁴

3.2.2.4 *Productions Avandi Ciné Vidéo Inc c. Favreau*

While *Michelin* remains the case to have addressed the intersection of the *Charter* right to freedom of expression and copyright in Canada in the most depth, freedom of expression is occasionally mentioned, post-*Michelin*, in decisions by Canadian courts that address issues of copyright infringement. For instance, in 1999, in a case dealing with the creation of a pornographic version of a popular Quebec situation comedy – *Productions Avandi Ciné Vidéo Inc c. Favreau (Productions)* – freedom of expression, although not mentioned in the reasons for judgment for the majority, was mentioned in Rothman J.’s concurring reasons. Responding to the defendant’s argument that his work was a parody, Rothman J. wrote that:

Parody normally involves the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment. Appropriation of the work of another writer to exploit its popular success for commercial purposes is quite a different thing. It is no more than commercial opportunism. The line may sometimes be difficult to trace, but courts have a duty to make the proper distinctions in each case having regard to copyright

²⁶⁴ Ysolde Gendreau states that: ‘the conclusion [*Michelin*] ... draws with respect to the general appreciation of the *Copyright Act* in light of the *Charter* seems to put a break on any further analysis of the relationship between the two sets of rights. If copyright law as a whole can withstand the pressure of the freedom of expression value that is enshrined in the *Charter*, how can a single notion within copyright law itself, however fundamental it is, fare better’ (Gendreau, ‘Copyright and Freedom of Expression in Canada’ at p. 33). Gendreau also states that ‘[g]iven the kind of language that can be found in the latest decisions, one suspects that the high point in this debate has already been reached and that freedom of expression arguments will be relegated to last ditch marginal pleadings’ (ibid at p. 36).

protection as well as freedom of expression.²⁶⁵

3.2.2.5 *Fraser Health Authority v. Hospital Employees' Union*

In *Fraser Health Authority v. Hospital Employees' Union*, Ross J. of the British Columbia Supreme Court dealt with the intersection of the *Charter* right to freedom of expression and copyright in a case arising from a dispute between the Fraser Health Authority (FHA) (a regional health board) and the Hospital Employees' Union (HEU), which 'represent[ed] workers in health care facilities throughout British Columbia including the Fraser Health Region'.²⁶⁶ This dispute related to the FHA's decision to contract out security services (a decision to which HEU was 'strongly opposed').²⁶⁷ A request for proposal (RFP) for these services was prepared and bids were received.²⁶⁸ HEU had published, on its website, a hyperlink to a report that contained a 'draft confidential memorandum summarizing the results of the evaluation of the various bids submitted in response to the RFP'²⁶⁹ in addition to other documents that 'contained detailed financial and costing information from the bids'.²⁷⁰ FHA considered these documents to be confidential, and objected to their unauthorized distribution (both to the HEA and more broadly).²⁷¹ FHA brought an action 'alleging copyright infringement and breach of confidence'.²⁷² An

²⁶⁵ *Productions Avandi Ciné Vidéo Inc c. Favreau* (1999), 177 DLR (4th) 568; JE 99-1607; 1 CPR (4th) 129; 90 ACWS (3d) 623; [1999] JQ no 2725; [1999] RJQ 1939 Cour d'appel du Québec at para. 10

²⁶⁶ *Fraser Health Authority v. Hospital Employees' Union* at para. 4.

²⁶⁷ *Ibid* at para. 6-7.

²⁶⁸ *Ibid* at para. 8.

²⁶⁹ *Ibid* at para. 11.

²⁷⁰ *Ibid* at para. 13.

²⁷¹ *Ibid* at para. 15.

²⁷² *Ibid* at para. 17.

injunction (ex parte) was granted on March 27, 2003 by Bouck J.²⁷³

The dispute heard by Ross J. involved an application, sought by HEU, for an Order that would either set aside or vary the Order of Bouck J. HEU submitted that:

because the injunction constitutes a restriction on the freedom of expression of HEU on a matter of public interest, it should not be granted unless it is manifest that the defendant HEU has no defences to the claim of FHA.²⁷⁴

Ross J., relying in part on the judgment of Teitelbaum J. in *Michelin*, rejected this argument, stating that:

49 ... in [*Michelin*], Teitelbaum J. held, in a case involving an allegation that a union had breached the copyright of the employer with respect to documents used in an organizing campaign, at para. 79: ‘the defendants’ right to freedom of expression was not restricted. The Charter does not confer the right to use private property - the plaintiff’s copyright - in the service of freedom of expression.’

50 In the circumstances, I have concluded that the test proposed by the HEU is not appropriate to these circumstances.²⁷⁵

As a result, Ross J. concluded that ‘FHA [had] established its right to an interim injunction’.²⁷⁶

3.2.2.6 Corporation Sun Média c. Syndicat canadien de la fonction publique

In 2007, in *Corporation Sun Média c. Syndicat canadien de la fonction publique* - yet another case involving a union’s use of a corporate logo in the context of a labour dispute - Pronovost J.C.S. heard a motion for an interlocutory injunction applied for by Corporation Sun Média (Sun).²⁷⁷ The logo, in this instance, consisted of a red rectangle inside which the words ‘le journal de Quebec’ were written in

²⁷³ Ibid at para. 17.

²⁷⁴ Ibid at para. 46.

²⁷⁵ Ibid at para. 49-50.

²⁷⁶ Ibid at para. 51.

²⁷⁷ *Sun*.

white, the number ‘#1’ was written in yellow,²⁷⁸ and the word ‘No’ written in black preceding the number 1.²⁷⁹ Sun brought an action for copyright infringement, alleging that the union had infringed its copyright by reproducing this logo (with slight modifications) on a banner that was hung on the wall of a trailer in the parking lot of a building owned by the union, on the union’s website, and on two instances in the daily *Média-Matin-Québec*.

The union argued that its use of the work was protected by s. 2(b) of the *Charter* and Article 3 of the *Québec Charter*. This argument was rejected by Pronovost J.C.S., who granted the injunction in part on the basis that freedom of expression, under the *Charters*, neither permits individuals to violate civil laws (such as the *Copyright Act*) nor to use property belonging to third parties.²⁸⁰

3.2.2.7 *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*

The dispute in *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* arose from the creation and distribution of a parody or a ‘fake edition’ of the Vancouver Sun (one of Vancouver’s daily newspapers).²⁸¹ The parody was placed in Vancouver Sun vending machines, and is described as follows:

The mock paper duplicated the masthead of the Vancouver Sun. It contained articles which, by their sarcasm, criticised, amongst other things, Israel's policy with respect to the Palestinians. The articles also criticised the plaintiff's reporting of Middle East issues.²⁸²

Canwest Mediaworks Publications Inc (Canwest) (the owners of the Vancouver Sun) alleged that the creation and distribution of this ‘fake edition’

²⁷⁸ Ibid at para. 1.

²⁷⁹ Ibid at para. 3.

²⁸⁰ Ibid at paras. 30-33.

²⁸¹ *Canwest 2008* at para 1.

²⁸² *Canwest 2009* at para 2.

constituted passing off, injurious falsehood, copyright infringement, and trademark infringement.²⁸³ Gordon Murray, the defendant, claimed, among other defences, freedom of expression.²⁸⁴

In the context of an application brought by the plaintiff to strike portions of Murray's amended statement of defence, Master Donaldson discussed whether the *Charter* right to freedom of expression could act as a defence to copyright infringement. As Master Donaldson noted:

The defendant Mr. Murray contends that the defence of freedom of expression is appropriate and applicable to him in this matter. In [*Michelin, CAW*]... raised freedom of expression as a defence to both copyright and trademark infringement. Teitelbaum J. (as he then was) analyzed freedom of expression in relation to the *Copyright Act*, R.S. 1985, c. C-42, and held at Para. 76 that 'the principles and outcome' also applied to the *Trade-marks Act*, R.S. 1985, c. T-13.

Teitelbaum J. clearly found that freedom of expression is not a defence to copyright or trademark infringement. At Para. 79 he stated that:

... the defendants' right to freedom of expression was not restricted. The Charter does not confer the right to use private property - the plaintiff's copyright - in the service of freedom of expression ...

He further held at Para. 109 that, if he had found an infringement, he would have held that the relevant provisions of the *Copyright Act* were justified under s. 1 of the *Charter*.²⁸⁵

Concluding, based on *Michelin*, that a freedom of expression defence was not available to the defendant, Master Donaldson ordered the paragraph in which Murray argued that 'the purpose and effect of the lawsuit are inimical to the common law and to the *Charter of Rights and Freedoms*' to be struck (among other paragraphs).²⁸⁶

²⁸³ *Canwest 2008* at para. 4.

²⁸⁴ *Ibid* at para. 5.

²⁸⁵ *Ibid* at paras. 12-13.

²⁸⁶ *Ibid* at para. 26.

Murray appealed this decision to the British Columbia Supreme Court. This appeal case was heard by Myers J. in Chambers.²⁸⁷ After canvassing the arguments, Myers J. ordered that:

[a]part from the first sentence of paragraph 11 [which is unrelated to the *Charter* argument] ... any portions of paragraphs 2, 3, 4 and 11 which purport to raise a defence to the plaintiff's claim [such as the defence of freedom of expression] are bound to fail and therefore disclose no defence.²⁸⁸

As a result, Myers J. ordered these paragraphs to be struck.²⁸⁹

3.2.2.8 *Robinson c. Films Cinar*

In 2009, two cases were heard in which the intersection of freedom of expression and copyright was discussed. The first was *Robinson c. Films Cinar inc. (Robinson)*.²⁹⁰ In this case, Claude Robinson and Les Productions Nilem alleged that Films Cinar and the other defendants had infringed their copyright and moral rights in the work *Les Aventures de Robinson Curiosité* through the creation and dissemination of their series *Robinson Sucroë*.

While freedom of expression did not appear to have been raised as a defence to copyright infringement, several paragraphs from *Michelin* relating to freedom of expression were cited in *Robinson* in the context of a discussion on the purpose of copyright (which was said to be to protect authors, their creative energy, their reputation, and to ensure their income).²⁹¹ Specifically, the passages cited from *Michelin* are:

²⁸⁷ *Canwest 2009*.

²⁸⁸ *Ibid* at para. 37.

²⁸⁹ *Ibid* at para. 37.

²⁹⁰ *Robinson c. Films Cinar inc.* (2009), 2009 QCCS 3793, 83 CPR (4th 1), [2009] JQ no 8395 Cour supérieure du Québec.

²⁹¹ *Ibid* at para. 1098.

98 ... In other words, if copyright is not respected and protected, the creative energies of authors and artists in furthering the diversity of ideas will not be adequately compensated or recognized.

...

104 ... Copyright promotes the third value [of freedom of expression] by protecting and providing an incentive for authors to create works of expression because their works will be protected under the aegis of the Copyright Act from unauthorized reproduction.

...

106 ... if the plaintiff loses its right to control the use of its copyright, there is little left to the plaintiff's right of private property. ...²⁹²

Auclair J.C.S.'s judgment was appealed to the Court of Appeal, where it was heard as *France Animation, s.a. v. Robinson*.²⁹³ Freedom of expression was not mentioned in this decision.²⁹⁴ Four appeals from the judgment of the Court of Appeal were made to the SCC, which handed down its decision in *Cinar Corp. v. Robinson* on 23 December 2013.²⁹⁵ Neither *Michelin* nor freedom of expression were mentioned in the SCC's decision, in which it dismissed the appeals in three files and allowed the fourth appeal in part.

3.2.2.9 Drolet v. Stiftung Gralsbotschaft

The second decision to address the intersection of freedom of expression and copyright in 2009 was *Drolet Stiftung Gralsbotschaft (Drolet)*.²⁹⁶ This case dealt with the publication of what the plaintiff, Yvon Drolet, believed to be the original version of Oskar Ernst Bernhardt's work the Grail Message.²⁹⁷ As described by de

²⁹² *Michelin* at paras. 98-106, cited in *Robinson c. Films Cinar inc.* at para. 1098.

²⁹³ *France Animation, s.a. v. Robinson* 2011 QCCA 1361.

²⁹⁴ *Ibid* at paras 269, 272, 273, 274.

²⁹⁵ *Cinar*.

²⁹⁶ *Drolet v Stiftung Gralsbotschaft (F.C.)*.

²⁹⁷ *Ibid.* at para. 15.

Montigny J.:

Considered by followers to be a work of even greater importance than the Bible, the Grail Message claims to answer the existential questions with which all religions are concerned and places considerable importance on the teachings of Christ. In fact, the author considers himself a messenger from God, following Moses and Christ. Adherence to the principles of the Message can be formalized in an official ceremony called ‘sealing’.²⁹⁸

The Grail Message was originally written by Bernhardt in 1926. Drolet, after extensive research, came to believe that the definitive version of Bernhardt’s work was not the version previously considered to be the definitive version by the Foundation of the Grail Movement, but was instead a 1931 French translation that ‘had existed only in the form of photocopies’.²⁹⁹ Drolet re-constituted this work and sold a first edition of one hundred copies in May 2001.³⁰⁰ While preparing a second edition of the re-constituted 1931 French translation of the Grail Message, Drolet received a letter from the Foundation demanding that he cease using specific trademarks. Later, the defendant Stiftung Gralbotschaft also alleged that Drolet had infringed its copyright.

Drolet raised freedom of expression as a defence. This defence was rejected cursorily. As noted by de Montigny J., perhaps expressing a certain impatience with Drolet:

The plaintiff submitted at length that his right to freedom of expression, as protected by the Canadian and Quebec charters of rights and freedoms and by international conventions, supported his argument based on the expiry of the copyright. I do not think it is necessary to cite fundamental rights to resolve this dispute. The Court must avoid dealing with such a complex issue when it is not

²⁹⁸ Ibid at para. 5 (unofficial translation from Quicklaw).

²⁹⁹ Ibid at para. 13.

³⁰⁰ Ibid at para. 16.

absolutely necessary in order to make a determination in the case at bar, especially when the issue was not fully argued by the parties with supporting evidence. I would note also that this Court has already found that the purpose or effect of the *Copyright Act* is not to restrict freedom of expression and that any restrictions it may include are reasonable limits in a free and democratic society: see [*Michelin*].³⁰¹

The counterclaim based on copyright infringement was dismissed on the basis that the limitation period had expired.

3.2.2.10 *Dish Network LLC v. Rex*

In 2011, the issue of the intersection of freedom of expression and copyright was raised in *Dish Network LLC v. Rex*.³⁰² This case dealt with an application by Richard Rex for an order for advanced costs. Rex sought to ‘strike down certain provisions of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 which he says effectively prohibit Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters’ on the basis that they infringe s. 2(b) of the *Charter*.³⁰³ While this decision mostly addresses the *Radiocommunications Act*, Walker J., in providing an overview of freedom of expression, noted that:

Further, a *Charter* right to freedom of expression cannot be used to compel private property to be used as a forum for expression: *Compagnie General des Etablissements Michelin v. C.A.W.* (1996), 124 F.T.R. 192 (T.D.); *New Brunswick Broadcasting Co. v. CRTC*, [1984] 2 F.C. 410 (C.A.); *Committee for the Commonwealth of Canada*.³⁰⁴

Rex’s application for advanced costs was allowed by Walker J., although it was reversed on appeal.³⁰⁵

³⁰¹ Ibid at 187.

³⁰² *Dish Network L.L.C. v. Rex* (2011), 2011 BCSC 1105, [2011] BCJ No 1557 British Columbia Supreme Court.

³⁰³ Ibid at para. 1.

³⁰⁴ Ibid at para. 183.

³⁰⁵ *Dish Network LLC v Rex* 2012 BCCA 161.

3.2.2.11 *Waldman v. Thomson Reuters Corp*

In 2012, freedom of expression and copyright were both raised in the context of a certification motion for a proposed class action under the *Class Proceedings Act*.³⁰⁶ This motion was brought by Lorne Waldman against Thomson Reuters Canada Limited (Thomson) and Thomson Reuters Corporation.³⁰⁷ As described by Perell J.:

This action arises because Thomson, through its legal publishing branch known as Carswell, copies court documents that have been authored by lawyers and reproduces them on an electronic data base and search and retrieval service known as ‘Litigator.’ Documents authored by Mr. Waldman, who is a lawyer, were included in Litigator without his express permission. In his proposed class action, Mr. Waldman alleges that Thomson infringes the copyright of the class members by making available, without permission and for a fee, copies of court documents authored by the lawyers and the law firms.³⁰⁸

Among other arguments raised by Thomson, Perell J. noted that it ‘asserts...that...[it] has a right supported by s. 2(b) (freedom of expression) of the *Charter of Rights and Freedoms*, to copy and sell the works’.³⁰⁹ Thomson also submitted, as summarized by Perell J., that Litigator:

provides a useful service that facilitates ... freedom of expression ... and ... does not cause any damage to class members who lose nothing by having their court documents shared on Litigator. It submits that its behavior should be encouraged not condemned or enjoined.³¹⁰

³⁰⁶ Class Proceedings Act, 1992, SO 1992, c. C.6.

³⁰⁷ From 2008-2013, I was the Co-Editor-in-Chief of the Canadian Journal of Law and Technology, a journal currently being published by Thomson Reuters (Carswell).

³⁰⁸ *Waldman v. Thomson Reuters Corp.* 2012 ONSC 1138 at para. 2.

³⁰⁹ *Ibid* at para. 48.

³¹⁰ *Ibid* at para. 200.

Perell J., who noted that ‘[t]he purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff’s claim’,³¹¹ held that ‘all the certification criteria have been satisfied...[and] the action must be certified as a class action’.³¹²

3.3. Conclusion

In this chapter, I have described all Canadian cases to have addressed the intersection of the *Charter* right to freedom of expression and copyright. I have suggested that these cases can be grouped into two categories. In the first category of cases, the possibility that the invocation of the *Charter* right to freedom of expression could result in the rights of copyright owners being modified or limited is considered and not wholly rejected (although in each of the cases that can be considered to fall within this category – *Lorimer TD*, *Lorimer FCA*, and *Canadian Tire* – the Court rejected the argument that on the specific facts of the case, the *Charter* right to freedom of expression should be applied to limit the rights of copyright owners).

The second category is comprised of cases in which courts have considered and rejected the possibility that copyright might, in certain circumstances, unjustifiably infringe the *Charter* right to freedom of expression, both on the facts of the case and as a general principle. This category encompasses all cases to have addressed the intersection of freedom of expression and copyright since *Canadian Tire*.

Three approaches to the relationship between the *Charter* right to freedom of expression and copyright can be identified in the cases canvassed in this chapter.

³¹¹ Ibid at para. 109.

³¹² Ibid at para. 218.

Under the first approach to this intersection, the possibility of conflict between the *Charter* right to freedom of expression and copyright is rejected on the basis of the scope and nature of these rights. This approach can be seen as the current governing approach to this intersection in Canada. A second, or alternative approach to the intersection of freedom of expression and copyright in Canada, discussed briefly in *Michelin*, takes the view that even if it is found that copyright limits or restricts freedom of expression, mechanisms internal to the *Copyright Act* are sufficient to address any freedom of expression concerns (at least to the point where any restrictions would satisfy a s. 1 analysis). A third conception of the relationship between the s. 2(b) right to freedom of expression and copyright views copyright as a mechanism that promotes and supports, rather than conflicts with s. 2(b).

Three conclusions are thus offered. First, few Canadian court decisions have addressed the intersection of the *Charter* right to freedom of expression and copyright. Only one decision – *Michelin* – has addressed this intersection in any significant depth. Second, most Canadian courts that have addressed the intersection of the *Charter* right to freedom of expression and copyright have viewed as self-evident the idea that copyright does not unjustifiably infringe the *Charter* right to freedom of expression. Even the courts that have left open the possibility that the *Charter* right to freedom of expression might conflict with copyright appear to reach this conclusion reluctantly, and with scepticism. Third, over time, Canadian courts have become more confident in their view that copyright does not unjustifiably infringe the *Charter* right to freedom of expression. While early decisions left open the possibility that copyright might, in certain contexts, unjustifiably infringe the *Charter* right to freedom of expression, this possibility was rejected in *Michelin*. Most cases post-*Michelin* to address this intersection simply cite one or more of the

approaches adopted in *Michelin* as support for their cursory rejection of this argument. Canadian courts have become so convinced that copyright does not unjustifiably infringe the *Charter* right to freedom of expression that, in one decision, handed down in 2009 – twenty years after the SCC’s landmark freedom of expression decision in *Irwin Toy* – arguments raising a claim of a defence of freedom of expression were struck out of an appellant’s amended statement of defence on the basis that they were ‘bound to fail’.³¹³

Over the subsequent chapters, I will argue that the conclusion that copyright does not unjustifiably infringe the *Charter* right to freedom of expression is not self-evident, and that – furthermore – it may be incorrect. At the very least, there is a serious question to be considered. In the next chapter, I will continue my discussion of the way in which lower Canadian courts have approached the intersection of the *Charter* right to freedom of expression and copyright. Specifically, I will argue that both the governing approach to this intersection, as well as the alternative approaches to this intersection proposed by Teitelbaum J. in *Michelin*, are based on conceptions of both copyright and freedom of expression that are no longer valid; and that it is therefore necessary for Canadian courts to reconsider their approaches to the intersection of the *Charter* right to freedom of expression and copyright.

³¹³ *Canwest 2009* at para. 37.

**4. THE APPROACHES TO THE INTERSECTION OF THE CHARTER
RIGHT TO FREEDOM OF EXPRESSION AND COPYRIGHT IN CANADA
RELY ON APPROACHES TO COPYRIGHT, AND TO THE CHARTER
RIGHT TO FREEDOM OF EXPRESSION, THAT ARE NO LONGER VALID**

4.1 Introduction

In this chapter, I will argue that both the governing approach to the intersection of the *Charter* right to freedom of expression and copyright in Canada, and the alternative approaches to this intersection (as described in Chapter 3), rely on approaches to copyright and to freedom of expression that although once valid, are now invalid. The current governing approach to copyright, for instance, can be contrasted with an approach to copyright that, although now invalid, was widely accepted by Canadian courts (including by the SCC) during the period in which many of the cases involving the intersection of the *Charter* right to freedom of expression and copyright were decided (the ‘author-centric’ approach). Elements of this ‘former framework’³¹⁴ for copyright are evident in many of the cases to have engaged with the intersection of the *Charter* right to freedom of expression and copyright, including *Michelin*, the leading decision in this area.

Similarly, the current governing approach to the *Charter* right to freedom of expression can be contrasted with an approach to this right that, although now invalid, was widely accepted during the period in which many of the cases to have examined the intersection of the *Charter* right to freedom of expression and copyright were decided – a conception of freedom of expression referred to by Cameron as a definitional conception.³¹⁵ Many of the cases to have engaged with the

³¹⁴ *SOCAN v. Bell*.

³¹⁵ Cameron.

intersection of the *Charter* right to freedom of expression and copyright, including *Michelin*, can be seen as having adopted elements of this former approach to the *Charter* right to freedom of expression.

The application of the author-centric approach to copyright and the definitional conception of freedom of expression, in concert, shaped both the governing and alternative approaches to the intersection of the *Charter* right to freedom of expression and copyright in Canada. The result of the application of these approaches has been the conclusion that copyright does not unjustifiably infringe the *Charter* right to freedom of expression, a conclusion that – as demonstrated in Chapter 3 – Canadian courts have accepted as self-evident.

Given that the SCC has rejected both the author-centric approach to copyright and the definitional conception of freedom of expression in favour of other approaches to these rights, this conclusion is no longer self-evident (if it ever was). Ultimately, I will argue that the approaches adopted by lower Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright, to the extent to which they rely on now-invalid approaches to copyright and to the *Charter* right to freedom of expression, are themselves invalid, and must be reconsidered.³¹⁶

4.2 Elements of the author-centric approach to copyright are evident in decisions of Canadian courts considering the intersection of the *Charter* right to freedom of expression and copyright

As described in Chapter 2, the current governing approach to copyright in Canada can be described as economic-functional. Under this approach, as noted by McLachlin C.J., writing for the Court in *Cinar Corp*, authors (as the first owners of

³¹⁶ In arguing that these approaches are no longer valid, I am not claiming that these approaches are not legitimate. Rather, I am using the word valid in the sense of lawful, legal, binding or effective. Essentially, I am arguing that these approaches are no longer the approaches to copyright, and to the s. 2(b) right to freedom of expression, accepted by the SCC as the governing approaches to these areas.

copyright) are rewarded with the grant of rights under the *Copyright Act* ‘in order to incentivize the creation of new works’.³¹⁷ Rights granted to copyright owners, under the economic-functional approach, are and can be limited by public interest considerations.³¹⁸ The primary limiting mechanisms internal to the *Copyright Act* are defences to copyright infringement such as fair dealing. These defences are interpreted broadly, seen as an ‘integral part of the *Copyright Act*’, and described as ‘user’s rights’.³¹⁹

The shift to the current governing approach to copyright, in the context of the SCC’s copyright decisions, began with Binnie J.’s majority judgment in *Théberge v. Galerie d’Art du Petit Champlain*, a 2002 decision of the SCC.³²⁰ Prior to this decision, courts had accepted that Canadian copyright was animated by a different approach. Referred to as ‘author-centric’ by Abella J. in *SOCAN v. Bell*,³²¹ this approach was applied in a number of decisions during the early part of the era in which many of the cases to have addressed the intersection of freedom of expression and copyright were handed down (namely 1982-1989). Firmly endorsed by the SCC in 1990 in *Bishop v. Stevens*,³²² this approach served as the governing approach to copyright in Canada during the last decade of the 20th century and into the 21st century.

³¹⁷ *Cinar* at para. 23.

³¹⁸ As noted by Binnie J. in *Théberge*, ‘[t]he proper balance’ in copyright ‘lies not only in recognizing the creator’s rights but in giving due weight to their limited nature’ (ibid at para. 31).

³¹⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 at para. 48.

³²⁰ See *SOCAN v. Bell* at para. 9, citing to *Théberge*. Another early articulation of the current governing approach to copyright is evident in a speech given by McLachlin J. in 1992 as part of a course organized by the National Judicial Institute. This speech, delivered only two years after *Bishop* was handed down, foreshadows the SCC’s later abandonment of the author-centric approach in favour of the economic-functional approach. See McLachlin.

³²¹ *SOCAN v. Bell* at para. 9.

³²² *Bishop*.

The author-centric approach differs significantly from the current governing approach to copyright in Canada. Under the author-centric approach, the singular purpose of copyright is to protect and reward authors and their assigns (copyright owners, who may or may not have authored the copyrighted work in question). Animated by natural rights theories and justifications of copyright, and connected to a specific view of authorship, this approach ‘focuse[s] on the exclusive right of authors and copyright owners to control how their works were used in the marketplace’.³²³

Accepting that the sole purpose of copyright is to protect and reward authors, some courts applying an author-centric approach have described the unauthorized use of copyrighted works in terms that suggest that these uses constitute low value expression. Other courts applying an author-centric approach have emphasized the proprietary nature of copyright to support a view of it granting the right to exclude or eject all trespassers (individuals engaging in unauthorized use) from the copyrighted work. As well, based on the idea that the singular purpose of copyright, under the author-centric approach, is to protect and reward authors (or their assigns), and informed by the characterization of copyright as a property right under which rights-holders have the ability to exclude all ‘trespassers’, courts applying this approach have interpreted both the uses restricted by copyright broadly and the defences to copyright infringement narrowly. Elements of the author-centric approach to copyright are evident both in Canadian copyright jurisprudence (generally) and in cases in which the intersection of the *Charter* right to freedom of expression and copyright is addressed (specifically).

³²³ *SOCAN v. Bell* at para. 9.

4.2.1 Elements of the author-centric approach to copyright

4.2.1.1 Singular purpose: to protect and reward authors

In a number of Canadian copyright decisions pre-2002, including the 1990 SCC decision of *Bishop v. Stevens*, courts accepted that the singular purpose of copyright, under the *Copyright Act*, is to protect and reward authors.³²⁴ In *Bishop*, for instance, McLachlin J. (as she then was), who delivered the judgment for the court, stated that the ‘copyright holder’ is the party ‘whose interests the [*Copyright Act*] is designed to protect’.³²⁵ In *Bishop*, McLachlin J. rooted her view of the purpose of copyright in Canada’s copyright history. She stated that:

The [Copyright] Act was based on, and designed to implement, the Berne Convention of 1886 as revised in Berlin in 1908, which set forth an international code and created a union of states ‘for the protection of the rights of authors over their literary and artistic works’: Revised Berne Convention, Schedule II of the *Copyright Act*, Article 1.³²⁶

McLachlin J. also remarked that the Canadian *Copyright Act* was based on the Copyright Act, 1911 (UK), and noted that:

As noted by Maugham J., in *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121, at p. 127, ‘the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical’.³²⁷

Under the author-centric approach, although the public may derive benefits from copyright, the purpose of copyright is to benefit authors. This view is reflected

³²⁴ See, for instance, *Bishop*; See, for instance, *Nintendo of America Inc v. Camerica Corp.* [1991] FC.J. No 58 FCTD, in which Rouleau J. described the purpose of the *Copyright Act* as ‘to protect original artistic and literary expression’; see also *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* [1987] FC.J. No 1 FCTD in which Denault J. stated that ‘[t]he purpose of the *Copyright Act* is to ensure that the author of a work, his assignee or anyone holding a right relating thereto will have protection under the law against any infringement of his rights’.

³²⁵ *Ibid* at 483.

³²⁶ *Ibid* at 473.

³²⁷ *Ibid* at 478-479.

in Gibson J.’s judgment in the trial decision in *CCH Canadian et al. v. Law Society of Upper Canada*. As Gibson J. stated:

The object and purpose of the Copyright Act is to benefit authors, albeit that in benefiting authors, it is capable of having a substantially broader-based public benefit through the encouragement of disclosure of works for the advancement of learning or, as in this case, the wider dissemination of law.³²⁸

Under this approach to copyright, as noted by Abella J. in (*SOCAN v. Bell*), citing Carys Craig, ‘any benefit the public might derive from the copyright system was only “a fortunate by-product of private entitlement”’.³²⁹

The word ‘might’ used by Abella J. in the above paragraph carries significant weight in this context, as does the word ‘capable’ employed by Gibson J. The use of these terms assists in constructing an image of an approach to copyright focused squarely on the author, under which the public may benefit, although there is no guarantee that it will and no consequence or significance if it does not.

The idea that the singular purpose of copyright in Canada is to protect and reward authors is noted in *Michelin* (the leading Canadian case to address the intersection of freedom of expression and copyright). In his decision, Teitelbaum J. stated that the purpose of copyright is to ‘[protect] the interests of authors and copyright holders’.³³⁰ Teitelbaum J. also cited *Bishop* on multiple occasions (the SCC decision that exemplifies the author-centric approach to copyright). A similar articulation of the purpose of copyright is also present in Auclair J.C.S.’s judgment

³²⁸ *CCH Canadian et al v. Law Society of Upper Canada* (1999), 179 DLR (4th) 609 FCTD at para. 116.

³²⁹ *SOCAN v. Bell* at para. 9, citing to Craig at pp. 14-15.

³³⁰ *Michelin*.

in *Robinson c. Cinar*, where it is stated that the purpose of copyright is to protect authors, their creative energy, their reputation, and to ensure their income.³³¹

4.2.1.2 Rooted in natural rights theories

The author-centric approach to copyright is rooted in natural rights theories and justifications of copyright, namely labour theory and personality theory. These theories and justifications maintain that authors deserve reward, or merit protection, because of the labour that they have invested in the creation of works; or because the work is itself an extension of the author's personality.³³²

In Canadian copyright cases, this connection is occasionally made explicit.

For instance, in *Tele-Direct*, Décaré J.A. stated that:

One should always keep in mind that one of the purposes of the copyright legislation, historically, has been 'to protect and reward the intellectual effort of the author (for a limited period of time) in the work' (my emphasis). The use of the word 'copyright' in the English version of the Act has obscured the fact that what the Act fundamentally seeks to protect is 'le droit d'auteur'. While not defined in the Act, the word 'author' conveys a sense of creativity and ingenuity.³³³

The influence of natural rights theories and justifications can also be identified in *Michelin*, a decision characterized by Craig as being shaped by 'Lockean concepts of natural entitlement'.³³⁴ In the course of his decision,

³³¹ *Robinson c. Films Cinar inc.* at para. 1098.

³³² See, for instance, Craig, Fisher, Jeremy Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 Chi-Kent L Rev 841, Wendy J Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 Yale LJ 1533, Peter Drahos, *The Philosophy of Intellectual Property* (Dartmouth Publishing Company Ltd 1996), John Locke, *Second Treatise of Government (1690)* (CB Macpherson ed, Hackett Publishing Company 1980), Hughes, Alfred C Yen, 'Restoring the Natural Law: Copyright as Labour and Possession' (1990) 51 Ohio St LJ 517, John Tehranian, 'Et Tu, Fair Use? The Triumph of Natural Law Copyright' (2005) 38 UC Davis L Rev 465, Justin Hughes, 'The Personality Interest of Artists and Inventors in Intellectual Property' (1998) 16 Cardozo Arts & Ent LJ 81, Margaret Jane Radin, 'Property and Personhood' (1982) 34 Stan L Rev 957.

³³³ *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1997), 154 DLR (4th) 328, [1998] 2 FC 22 FCA at para. 29.

³³⁴ Craig at 22.

Teitelbaum J. asked whether ‘[the defendants can] lay claim to [Bibendum] as protected expression even though the “Bibendum” is not the fruits of the Defendants’ own labours?’³³⁵ The use of the phrase fruits of one’s labour is strongly suggestive of a natural rights view of copyright.

4.2.1.3 Connected to a specific view of authorship

In addition to being rooted in natural rights theories of copyright, the author-centric approach can also be seen as connected to a specific view of authorship, namely the Romantic vision of the author as original creator.³³⁶ Under this approach, the author is seen as someone who, through their labour and/or genius, creates something out of nothing. This view of creativity and authorship stands in contrast to the view of authorship accepted by the SCC as part of the governing approach to copyright, under which authors ‘produce new works by building on the ideas and information contained in the works of others’.³³⁷

Acceptance of the idea of the romantic author can be discerned in several Canadian copyright decisions, including *Desputeaux v. Éditions Chouette (1987) inc.*, a case that dealt with the authorship (or ‘maternity’, to use the language of LeBel J. of the SCC, who delivered the judgment of the Court) of Caillou, a fictional character.³³⁸ In the first paragraph of this decision, LeBel J. introduced Caillou,

³³⁵ *Michelin*.

³³⁶ See, for instance, Carla Hesse, ‘The Rise of Intellectual Property, 700 BC - AD 2000: An Idea in the Balance’ [2002] *Daedalus* 26, Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate Publishing Company 2007), Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1999), Peter Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of Authorship’ [1991] *Duke LJ* 455, Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1995), Mark Rose, ‘The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship’ (1988) 23 *Representations* 51.

³³⁷ *CCH SCC* at para. 23.

³³⁸ *Desputeaux v. Éditions Chouette (1987) inc.* 2003 SCC 17 at para. 1

describing him as a ‘creation that sprang from the imagination and from the art of form and colour’, and discussing how the issue before the court is that ‘the people who consider themselves to be his mothers are engaged in battle for him’.³³⁹

Several cases to have addressed the intersection of the *Charter* right to freedom of expression and copyright can be read as giving priority to the view of authorship as original creation over other views of authorship (for instance, the view that authorship is a process that encompasses the re-working or adaptation of existing works of expression). In *Michelin*, for instance, CAW’s reworking of the Bibendum figure was presented as an act of vandalism (analogized at one point to ‘drawing a moustache on [a] painting’).³⁴⁰ Along the same lines, in *Lorimer FCA*, Mahoney J. was critical of Lorimer’s abridgment in part on the basis that it contained so little of his own original thought, commentary, or expression.³⁴¹ This criticism – directed towards the Retail Workers Union, which had argued that the s. 2(b) right to freedom of expression should protect their addition of a diagonal line over the Canadian Tire logo – was echoed by Strayer J. in *Canadian Tire*.³⁴² The acts engaged in by the CAW, Lorimer, and the Retail Workers Union are thus presented not as acts of authorship, but as derogations from or distortions of the creative efforts of other parties.

³³⁹ Ibid at para. 1. *Desputeaux* was decided in 2003 (the year following *Théberge*). Another case in which the view of authorship as original creation was adopted is *Composers, Authors & Publishers Assn. of Canada Ltd. v. Kiwanis Club of Western Toronto* [1953] 2 SCR 111 at 116, in which Rand J. described copyright as ‘property which in the truest sense they have created’. The conception of authorship employed in these decisions can be contrasted with *Cinar* at para. 3, in which McLachlin C.J. presents Robinson as having ‘meticulously craft[ed]’ his copyrighted work.

³⁴⁰ *Michelin* at para. 103.

³⁴¹ *Lorimer FCA*.

³⁴² *Canadian Tire*.

4.2.2 The author-centric approach applied

4.2.2.1. Unauthorized use described in terms that suggest that it is low value expression

Building on the idea that the purpose of copyright, under the author-centric approach, is to protect or reward the author as originator, some courts, applying an author-centric approach, have described unauthorized uses of copyrighted works in terms that convey the impression that such uses constitute low value expression. In *Michelin*, for instance, Teitelbaum J., in seeking to determine the ‘nature’ of the copyright owner’s property right, constructed the following hypothetical situation:

No infringer could credibly allege that freedom of expression gives him or her the right to subvert the content or message of the painting by physically drawing a moustache on the painting. However, what if the infringer asserted the right to copy or substantially reproduce the painting with a moustache?³⁴³

In this example, the defendant CAW is portrayed as an immature vandal, an individual who defaces a work of art (a painting) through the addition of a crude moustache. The CAW’s actions are portrayed as disrespectful, as insulting and as having little expressive value.³⁴⁴

As well, in *Lorimer FCA*, Mahoney J. (writing for the Court) dismissed *Lorimer’s* abridgement as an act that has no independent expressive value, describing it as ‘entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work’.³⁴⁵ Mahoney J.’s decision implies that absent original

³⁴³ *Michelin* at para. 103.

³⁴⁴ The language used by Teitelbaum J. would not be out of place in an action for moral rights infringement (specifically of the right to integrity), where a question to be answered would be whether CAW distorted Bibendum in a manner prejudicial to the author’s honour or reputation (see *Copyright Act*, ss. 14.1 and 28.2).

³⁴⁵ *Lorimer FCA* at para. 29. Mahoney J.’s focus on appropriation suggests another breach of moral rights, this time of the right to attribution (or paternity) (see *Copyright Act*, s. 14.1).

thought, expression, or opinion (engagements with the work that represent a degree of original thought and that might imbue the work with some degree of expressive value), Lorimer’s use of the copyrighted work is nothing more than an unlawful taking (regardless of the public benefits that might flow from the abridgment itself).

A third example is found in *Saint-Hubert*, in which Lesyk J.C.S., in discussing the application of a specific provision of the *Copyright Act* to the case at bar, cited a passage from Fox in which it is stated that this specific provision ‘does not operate to bring an existing artistic copyright to an end, or to absolve pirates from the offence of piracy’.³⁴⁶ Lesyk J.C.S.’s decision to include this aspect of the quote in his decision can be seen as his implicit (or perhaps explicit) acceptance of the idea that the union members are pirates, or that, in this instance, they committed an offence of piracy (a term that again reflects the low expressive value associated by the court with the act of unauthorized use).³⁴⁷

³⁴⁶ *St-Hubert* at para. 81, citing Harold G. Fox, *The Canadian Law of Copyright and Industrial Designs* (Published in Toronto, 2d edn, Carswell Co. 1967) at 129.

³⁴⁷ A number of Canadian cases have referred to the unauthorized use of copyrighted expression as ‘piracy’, a term the use of which can be seen as signaling the court’s view that the act of unauthorized use constitutes low value expression (or otherwise lacks value). See, for instance, *Microsoft Corp. v. 1276916 Ontario Ltd.* (2009), [2009] FCJ No 1023, 2009 FC 849, 347 FTR 248 at para. 8 (in which software piracy is discussed); *Adobe Systems Inc v. KLJ Computer Systems Inc.* [1999] 3 FC 621 FCTD at para. 27 (in which infringement of copyright in software is referred to as piracy and softlifting); *Pro Arts, Inc v. Campus Crafts Holdings Ltd et al* (1980), 28 OR (2d) 422, 110 DLR (3d) 366 Ontario High Court of Justice at para. 27; *Disney Enterprises Inc v. 2631-5373 Quebec Inc. (c.o.b. Multividéo)* (2004), [2004] FCJ No 1652, 2004 FC 1360, 36 CPR 4th 34 at para. 2 (in which video piracy is mentioned); *Garland v. Gemmill* (1887), 14 SCR 321 (in which piracy is referenced repeatedly); *American Greetings Corporation et al v. Oshawa Group Ltd. et al* (1982), 69 CPR (2d) 238, 17 ACWS (2d) 4, [1982] FCJ No 1174 (in which Walsh J., in discussing the judgment of the House of Lords in *King Features Syndicate, Incorporated, and another v. O. and M. Kleeman, Limited* [1941] AC 417, notes that the House of Lords held that ‘s. 22 of the *Copyright Act, 1911*, did not operate to bring an existing copyright to an end or to absolve pirates from the offence of piracy’; *Smiles v. Belford* (1876), [1876] OJ No 285, 23 Gr 590 Ontario Court of Chancery (in which Proudfoot V.C. notes that ‘[t]he Imperial Act 5 & 6 Vic. ch. 45 ... Gives a remedy for piracy by special action on the case’; *Horn Abbot Ltd. v. W.B. Coulter Sales Ltd.* (1984), [1984] FCJ No 41, 1 CIPR 97, 77 CPR (2d) 145 Federal Court Trial Division (in which Cattnach J. contemplates whether ‘this may not be a case of piracy without colour of right’); *Cadieux v. Beauchemin* (1901), 31 SCR 370 (in which Sir Henry Strong C.J. notes that ‘It appears as if the book published by the appellants had not been made with the pen, but with scissors and paste pot... it was clearly upon the defendants to shew what he did and how it was done in order to rebut the prima facie case against them made out by the plaintiffs’ evidence of piracy’); *Ludlow Music Inc. v. Canint Music Corp. Ltd. et al* (1967), [1967] ExCJ No 5, 62 DLR (2d) 200 at para. 51 (in which Jackett P. noted that ‘it is a proper exercise of

4.2.2.2 Copyright characterized as a specific type of property right

A number of cases decided by Canadian courts during the era in which the author-centric approach was the governing approach to copyright have emphasized the proprietary nature of copyright to support a view of it granting the right to exclude or eject all trespassers (individuals engaging in unauthorized use) from the copyrighted work.³⁴⁸ Consistent both with the view that the purpose of copyright is to protect and reward authors, and that copyright owners have the ability to control a broad range of unauthorized uses of their copyrighted works, under this characterization of copyright, the owner has the right (and the moral justification) to exclude or eject all unauthorized users from their property (within the limits or constraints imposed by the *Copyright Act*). Craig writes that conceptualized in such a manner, copyright ‘is recast ... as a system for the protection of private individuals’ rights against the world’.³⁴⁹

The idea that copyright is a property right the essential aspect of which is the right to exclude is reflected in several cases to address the intersection of freedom of expression and copyright. Throughout the course of his decision in *Michelin*, for instance, Teitelbaum J. – in trying to determine the ‘nature of copyright as private property’³⁵⁰ – describes copyright in such a manner. Among other references to cases involving the intersection of the s. 2(b) right to freedom of expression and real

judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy’).

³⁴⁸ For instance, copyright is referred to as a ‘legal right in property’ in *Canadian Performing Right Society Ltd. v. Vigneux* [1942] ExCR 129, [1942] 3 DLR 449 at para. 11. As well, in *Composers, Authors & Publishers Assn. of Canada Ltd. v. Kiwanis Club of Western Toronto*, Rand J. of the SCC refers to copyright as ‘property which in the truest sense ... created’ (*CAPAC* at 116).

³⁴⁹ Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 94.

³⁵⁰ *Michelin* at para. 103.

property, for instance, Teitelbaum J. quotes from McLachlin C.J.’s judgment in *Committee for the Commonwealth of Canada v. Canada*, in which McLachlin C.J. wrote that ‘[a] proprietor has had the right to determine who uses his or her property and for what purposes’.³⁵¹ Expressing concern that the ‘intangible nature of the copyholder’s right’ might lead one to ‘undervalue the nature of the Plaintiff’s copyright’, Teitelbaum J., analogized copyright to tangible private property, noting that ‘it may be easier to focus on the nature of the plaintiff’s property right in the copyright if we imagine the case of an infringer dealing with a painting, a piece of tangible private property that like the copyright is already imbued with meaning’.³⁵² Bailey writes that Teitelbaum J.’s judgment in *Michelin* ‘presupposes an existing property right in copyright material against which incursions for purposes of exercising freedom of expression must be justified’.³⁵³

Lorimer FCA is another decision that can be interpreted as reflecting a similar view of the proprietary nature of copyright. As described in Chapter 3, Mahoney J., in *Lorimer FCA*, referred to Lorimer’s unauthorized use as an appropriation. Craig links the use of this term, by Mahoney J., to the idea that copyright is a mechanism through which courts can protect pre-existing property rights, writing that ‘[w]hen we talk of appropriating something that belongs to another person, this characterization is not value neutral; it is necessarily informed by the moral nuances of entitlement’.³⁵⁴ Craig argues that the use of this term suggests that Mahoney J. is

³⁵¹ *Commonwealth* at 228, cited in *Michelin* at para. 91.

³⁵² *Michelin* at para. 103.

³⁵³ Bailey at 141.

³⁵⁴ Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 83.

‘judg[ing] the defendant’s communicative act in light of its nature as an appropriative act, even if beyond the scope of the copyright system’.³⁵⁵

4.2.1.3 Rights interpreted broadly, defences interpreted narrowly

The role of the court, when considering a claim of copyright infringement, is to determine whether or not the act in question infringes copyright. In determining this question, the court engages in a process of statutory interpretation. The governing approach to statutory interpretation in Canada is the ‘modern approach of purposive interpretation’ (drawn from Professor Elmer Driedger’s text *Construction of Statutes*).³⁵⁶ A key component of this approach involves the court interpreting the relevant provision(s) through the lens of the object or purpose of copyright.

Thus, under the modern approach of statutory interpretation, courts applying an author-centric approach to copyright interpret the provisions of the *Copyright Act* through the lens of the purpose of copyright associated with this approach. As noted above, under the author-centric approach to copyright, the purpose of copyright is to protect the labour invested by the author in the creation of the work; to protect the personality of the author, as expressed in the work; and/or to reward authors for their labour or their genius.

One consequence that flows from interpreting the provisions of the *Copyright Act* through the lens of this purpose is that the rights of copyright owners are interpreted more broadly than they might have been should a different approach to copyright have been applied. For instance, in *Théberge*, Gonthier J. (who can be seen, in his dissenting reasons, as having adopted an author-centric approach to

³⁵⁵ Ibid at 83.

³⁵⁶ As summarized in Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th edn, LexisNexis 2008) at 1: ‘the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’.

copyright) would have interpreted the right of reproduction more broadly than did Binnie J. (who adopted an approach to copyright, in his majority judgment, that more closely approximates the current framework), and in such a manner that would encompass the actions of the defendant art galleries.³⁵⁷

A second consequence flowing from courts interpreting the provisions of the *Copyright Act* in light of the purpose of copyright is that Canadian courts applying an author-centric approach (under which the sole purpose of copyright is to protect and reward authors) have interpreted exceptions narrowly (or, said differently, have declined to adopt broad or even less restrictive interpretations of defences to copyright infringement). Craig writes, in the context of fair dealing, that:

The common claim that fair dealing should be subject to strict construction ... appears to flow from a conviction that fair dealing is exceptional because it is antithetical to the normative presupposition of the copyright system: namely, that the author should have exclusive control over the use of her work.³⁵⁸

Some courts have justified the adoption of narrow interpretations of defences and exceptions to copyright infringement on the basis that they are required to do so in order to protect and preserve the property rights of copyright owners. In *Canadian Performing Right Society*, for instance, Maclean P stated that ‘it is, I think, a well settled principle of law that a legal right in property, such as copyright in a musical work, can be taken away only by express language, which is not, I think, to be found in any provision of the statute here relevant’.³⁵⁹ As well, in *CAPAC*, Rand J. of the SCC stated, with respect to the proper method through which a defence to copyright

³⁵⁷ *Théberge* at paras. 147 and 42.

³⁵⁸ Carys J Craig, ‘The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform’ in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005) at 449.

³⁵⁹ *Vigneux* at para. 11.

infringement should be interpreted, ‘to extend the language of the proviso would unnecessarily run counter to those principles of justice which accord to owners, particularly of property in the truest sense they have created, the accepted privileges of ownership’.³⁶⁰ Furthermore, in *Ludlow Music Inc. v. Canint Music Corp Ltd. et al*, in granting an application for an interlocutory injunction restraining the defendant from distributing a Canadian parodic adaptation of the work ‘This Land is Your Land’, Jactett P. concluded that:

a person who has no fairly arguable right to use property should not be able to put himself in a position where the Court will aid him in using the property as against the person who is apparently the owner ... In effect, as it seems to me, it is a proper exercise of judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy.³⁶¹

The idea that under the author-centric approach, copyrights are interpreted broadly and exceptions narrowly is present in the leading Canadian case to have addressed the intersection of freedom of expression and copyright. In *Michelin*, Teitelbaum J. stated that ‘exceptions to copyright infringement should be strictly interpreted...as exceptions’ and summarized a view articulated by McLachlin J. in *Bishop v. Stevens* as ‘caution[ing] the Court against reading in exceptions to copyright infringement given the detailed and explicit exceptions’.³⁶² Applying this approach, itself informed by his view of copyright as a property right analogous to real or personal property, Teitelbaum J. held that parody is not included in the fair dealing category of criticism, and that the CAW’s use of the *Bibendum* (accepted to be a parody) is thus not protected by fair dealing.

³⁶⁰ *CAPAC*.

³⁶¹ *Ludlow Music Inc. v. Canint Music Corp. Ltd. et al* at para. 51.

³⁶² *Michelin* at paras. 63 and 65.

4.3 Elements of the definitional conception of the *Charter* right to freedom of expression are evident in decisions of Canadian courts considering the intersection of the *Charter* right to freedom of expression and copyright

As described in Chapter 2, subsequent to the enactment of the *Charter*, two distinct approaches emerged with respect to the scope of the *Charter* right to freedom of expression. Under one approach, referred to in Chapter 2 as the broad rights approach to freedom of expression, the scope of protectable expression is interpreted expansively. Although under this approach several methods of expression are not considered protectable (namely violence and threats of violence), and although not all attempts to express oneself on public or private property are considered protectable, the starting position is that all attempts to convey meaning are prima facie protectable. Thus, most of the balancing between freedom of expression and other interests, under the broad rights approach, is dealt with in the context of a s. 1 analysis. This approach (the broad rights approach) constitutes the current governing approach to the *Charter* right to freedom of expression in Canada.

The other approach to freedom of expression adopted by Canadian courts in the years immediately following the enactment of the *Charter* is an approach referred to by Cameron as the definitional conception of freedom of expression.³⁶³ As Cameron writes, this conception of the *Charter* right to freedom of expression ‘focuses on ... the legitimacy of the individual’s right to claim the Constitution’s protection ... [and] assumes that the guarantees are themselves qualified by political, social and cultural values’ (emphasis in original).³⁶⁴

³⁶³ Cameron at 260.

³⁶⁴ Ibid at 260.

Initially, as noted in Chapter 2, courts applying this approach (the definitional conception) took the view that the scope of the *Charter* right to freedom of expression was no different than the scope of the right to freedom of speech under the Canadian *Bill of Rights* (which was itself interpreted to be no broader than the scope of freedom of speech or expression under the common law). That is to say, the *Charter* right to freedom of expression was initially interpreted not as prima facie protecting all attempts to convey meaning (as is the case under the broad rights approach), but as protecting the flow of ideas and opinions relating, in particular, to politics and democratic governance. Over time, as a result of guidance from the SCC in *Irwin Toy* and other decisions, it was accepted that the *Charter* right to freedom of expression should not be interpreted in such a narrow manner. However, some courts continued to interpret the *Charter* right to freedom of expression more narrowly than did others.

One distinguishing factor between cases in which a broad rights approach was adopted and those in which a definitional conception was adopted involved the question of whether, and the extent to which, the value of the expression (social, political, moral, expressive, artistic, etc) should be considered in defining the scope of protectable expression under s. 2(b) of the *Charter*. Courts applying a definitional conception of freedom of expression accepted that the value of the expressive act should be considered in defining the scope of protectable expression, and, as a result, interpreted the scope of the *Charter* right to freedom of expression more narrowly than did courts that rejected this proposition.

Another distinguishing factor between cases in which a broad rights approach was adopted and those in which a definitional conception was adopted involved the extent to which the scope of protectable expression under the *Charter* right to

freedom of expression could be limited or constrained by private rights, property rights, or the expressive rights/interests of others. Courts applying a definitional conception held that the scope of protectable expression could be limited or constrained by these rights or interests. This can be contrasted with the broad rights approach, under which acts that involve a prima facie infringement of others' private rights, property rights or expressive rights might nonetheless constitute protectable expression to which a s. 1 balancing analysis therefore needs to be applied. Elements of the definitional conception of freedom of expression are evident both in Canadian freedom of expression jurisprudence (generally), and in cases in which the intersection of the s. 2(b) right to freedom of expression and copyright is addressed (specifically).

4.3.1 Elements of the definitional conception of the *Charter* right to freedom of expression

4.3.1.1 Scope of protection pre-*Irwin Toy*: the flow of ideas and opinions

In contrast to the current governing approach to freedom of expression, in which the scope of protectable expression is conceived of broadly (as prima facie encompassing all attempts to convey meaning), under the definitional conception, the scope of protectable expression is conceived of in a much more restricted fashion. Initially, under this approach, the scope of protectable expression under the *Charter*-protected right to freedom of expression was viewed as being no different than the scope of protected expression under the *Bill of Rights*: as encompassing the communication of ideas and opinions.³⁶⁵ As stated by Lambert J.A. in his reasons for judgment in *Cromer v. British Columbia Teachers' Federation*, '[t]he Charter does

³⁶⁵ That is to say, under this approach, the *Charter* was seen as having 'entrench[ed] as constitutional rights the right existing at common law associated with the words themselves' (*R. v. Squires* at para. 59).

not purport to confer new freedoms. ... [t]he freedom of expression itself remains the same freedom as existed before the adoption of the Charter'.³⁶⁶

The idea that freedom of expression protects ideas and not expression can be discerned in a number of cases to have addressed the intersection of freedom of expression and copyright in Canada. One prominent refrain in these cases is that the defendants' speech rights are neither significantly impacted by the exercise of the plaintiff's copyrights, nor by injunctions preventing further use by the defendants of the copyrighted work, because it is not necessary for the defendants to use the copyrighted works of the plaintiffs in order to convey their message. The parties can convey their message – the idea underlying their expression – in other ways that do not involve making unauthorized use of the copyright owner's copyrighted works.

For instance, in *Canadian Tire*, Strayer J. concluded that 'the prohibition by injunction of [the defendants'] use of the plaintiff's logo is surely not a critical impairment of their lawful right to convey information to the public. This they can do, and are obviously doing, in a variety of other ways'.³⁶⁷ Similarly, in *Michelin*, Telteibaum J. pointed to 'a wealth of union anti-Michelin pamphlets and brochures that did not use the Plaintiff's property in violation of the *Copyright Act*' in concluding that '[a] prohibition on using the Plaintiff's "Bibendum" copyright does

³⁶⁶ *Cromer* at para. 54. Lambert J.A. was sceptical of the view that all balancing should be done in s. 1: 'I do not think that the standards of s. 1 are sufficiently flexible to cope with the accumulated wisdom of the law of civil remedies for spoken or written expressions. What is required is a continuation of the careful weighing and balancing of competing interests that has gone in to the development of that law. That can be achieved through permitting the phrase "freedom of ... expression" in para. 2(b) to have its natural and flexible content, in the same way as the concept of freedom of speech co-existed with the law of civil remedies before the Charter, subject to those changes that wisdom may require as new circumstances arise' (ibid at para. 48). He also noted that '[t]o adopt Mr. Justice Rand's language, the question in this case becomes: Whether the phrase "freedom of expression" in s. 2 of the Charter is describing the whole original freedom or the residue within the periphery of countervailing rights. Does it describe an absolute freedom, to be restricted only under s. 1, or does it describe the bundle of civil rights that arise as protection against infringements of free speech?' (ibid at para. 21).

³⁶⁷ *Canadian Tire* at para. 13.

not therefore create undue hardship for the Defendants in conveying their message to the Michelin workers'.³⁶⁸ This conclusion was also echoed in *Corporation Sun Média*, in which the court concluded that the union could still convey its message without using the plaintiff's logo, and as a result, its freedom of expression was not infringed.³⁶⁹

4.3.1.2 The value of the expressive act needs to be considered in determining the scope of protectable expression

In a number of decisions pre-*Irwin Toy*, Canadian courts applying a definitional conception of freedom of expression held that the value of the expressive act must be considered in determining whether the expressive act falls within the scope of protectable expression under s. 2(b). For instance, courts applying this approach were critical of (and ultimately rejected) arguments that the scope of protectable expression under the *Charter*-protected right to freedom of expression should include nude burlesque dancing, spreading false news, and communication for the purposes of prostitution.³⁷⁰ They did so in part on the basis that, in their view, these types of expression did not possess sufficient value to warrant protection under s. 2(b).

In *R. v. Smith*, for instance, Watt J. concluded that para 195.1(1)(c) of the Criminal Code (relating to communication for the purposes of prostitution) was not protected by s. 2(b), in part on the basis that:

... the expression here at issue would appear to have no intrinsic social or moral value which would merit

³⁶⁸ *Michelin* at para. 111.

³⁶⁹ *Sun* at para. 39.

³⁷⁰ See, for instance, *Re Koumoudorous and Metro Toronto* 1984 CanLII 1858 (ON SC), [1984] 6 DLR (4th) 523, *R. v. Zundel* (1987), 58 OR (2d) 129 OCA, *R. v. Smith* (1988), 44 CCC (3d) 385 Supreme Court of Ontario.

constitutional protection. ... It is very difficult to apprehend in words such as ‘it’s 40 for a blow or 50 for a lay’ any social or moral value, however ephemeral. ... The absence of [some enduring social, moral or artistic value] ... value is ... a factor to consider in determining whether such expression falls within or without the area of permissible state regulation.³⁷¹

This idea can also be discerned in the Court of Appeal for Ontario decision in *R. v. Zundel*, a case that dealt with the offence of spreading false news (s. 177 of the *Criminal Code*).³⁷² In this decision, the Court rejected the argument that spreading false news is protected by s. 2(b) of the *Charter*, in part on the basis that ‘[s]preading falsehoods knowingly ... would appear to have no social or moral value which would merit constitutional protection’.³⁷³

In dismissing arguments that expression such as communication for the purposes of prostitution, burlesque dancing, or commercial expression should be considered to be protectable expression under the *Charter*-protected right to freedom of expression, courts have referred to the risk that interpreting freedom of expression in such a manner would trivialize or demean the right itself, or the *Charter* more broadly. For instance, in *R. v. Bailey*, Bordeleau Prov. Ct. J. stated that ‘it would demean the concept of opinion and expression to relate it to the bargaining between a prostitute and a customer as to what sexual services are available and at what price’.³⁷⁴

³⁷¹ *R. v. Smith*.

³⁷² *Zundel*.

³⁷³ *Ibid* at para. 57.

³⁷⁴ *R. v. Bailey* [1986] OJ No 2795 Ontario Provincial Court. Also see *Reference re: Criminal Code, ss. 193, 195.1(1)(c) (Man. C.A.)* (1987), 49 Man R (2d) 1, [1987] 6 WWR 289 and *R v McLean; R v Tremayne* (1986) 2 BCLR (2d) 232. This argument was raised in *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 SCR 573 at para. 19, but was not accepted by the SCC: ‘The respondent contends for a narrower approach to the concept of freedom of expression. The position is summarized in the respondent’s factum: 4. We submit that constitutional protection under section 2(b) should only be

In many instances, this argument – that to interpret freedom of expression in such a broad manner would demean the right – was raised by counsel. At least in one instance, however, this argument appears to have been initiated by the judge himself, rather than by counsel. Specifically, in *Moore v. Canadian Newspapers Co.*, Rosenberg J. stated that:

in the course of the appellant arguing the appeal with regard to the Charter, I took a strong and perhaps unfair position that the counsel for the appellant was demeaning the Charter by bringing the Charter argument that he did. On further review of the matter and referring to the cases argued on behalf of the appellant, I have concluded that there is a serious question to be considered.³⁷⁵

Courts applying a definitional conception of freedom of expression were not prepared to adopt an interpretation of the scope of protectable expression that would provide cover to types of expression that the court deemed to lack value. As discussed above, in a number of cases to have addressed the intersection of the *Charter* right to freedom of expression and copyright – including *Michelin* – courts used language suggesting that they view expression that makes unauthorized use of copyrighted works as low value expression.

4.3.1.3 Private rights, property rights, or steps taken to enhance the expression of another or to protect against abridgements of the *Charter* rights of others can act as valid internal limits to freedom of expression

4.3.1.3.1 Private rights as valid internal limits to freedom of expression

Courts applying a definitional conception of freedom of expression have held that the scope of protectable expression can itself be limited by other private rights or

given to those forms of expression that warrant such protection. To do otherwise would trivialize freedom of expression generally and lead to a downgrading or dilution of this freedom.’

³⁷⁵ *Moore v. Canadian Newspapers Co.* at paras. 15-16.

laws, without needing to subject these limits to s. 1 analysis. In *Cromer*, for instance, Lambert J.A. stated that:

The tests of s. 1 are not designed for the refinements of the private law of civil liability. These and other private law limits on the spoken word must form a part of the content and substance of ‘freedom of expression’ under s. 2(b) of the Charter.³⁷⁶

This approach can be contrasted with the governing approach to freedom of expression, under which acts that involve a prima facie infringement of others’ private rights or of other laws (both civil and criminal) might nonetheless constitute protectable expression to which a s. 1 balancing analysis therefore needs to be applied.³⁷⁷

The idea that private rights can act as valid internal limits to freedom of expression is evident in at least one of the Canadian cases to explore the intersection of freedom of expression and copyright: *Corporation Sun Média*.³⁷⁸ In this decision, Pronovost J.C.S states that the *Charter* right to freedom of expression does not permit anyone to commit torts, infringe civil laws, or commit criminal acts under the guise of freedom of expression.³⁷⁹

³⁷⁶ *Cromer* at para. 39. Also see *Fraser v. Nova Scotia (AG)* (1986), 30 DLR (4th) 340 NSSC in which Grant J. stated that: ‘[f]reedom of expression does not mean that all speech is permissible. It must be limited by the laws relating to defamation, slander, sedition and other limits;’ and *Imperial Oil v. Wright* [1982] SJ No 523 Saskatchewan Court of Queen's Bench at para. 19 in which Batten J. stated that ‘[t]he defendants are of necessity restricted in their exercise of [freedom of expression and communication] where the primary purpose of such exercise is the committal of a tortious act’.

³⁷⁷ See, for instance, *Reference re: 193* at paras. 79-80.

³⁷⁸ *Sun*.

³⁷⁹ *Ibid* at paras. 30 and 33.

4.3.1.3.2 Freedom of expression can't be used to derogate from private property rights

A number of courts applying a definitional conception of freedom of expression accepted that freedom of expression could not be used to derogate from property rights. Scott Prov. Ct J. in *R. v. Layton* summarized this argument as follows:

26 ... the 'freedom of expression' guaranteed by s. 2(b) is in itself limited so as to fully protect both private and public property from the impact of its operation.

27 ... This argument, in turn, is founded on the contention that the Charter does not diminish or modify any common law rights concerning the enjoyment of property. (emphasis in original).³⁸⁰

Applying this approach in *New Brunswick Broadcasting Co., Limited v.*

Canadian Radio-television and Telecommunications Commission, Thurlow C.J. held that:

The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. ... the freedom guaranteed by paragraph 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute.³⁸¹

This approach can be contrasted with the governing approach to freedom of expression, which contemplates, as described in Chapter 2, that acts that involve a

³⁸⁰ *R. v. Layton* (1986), [1986] OJ No 3069, 38 CCC (3d) 550, 3 WCB (2d) 22 Provincial Court (Criminal Division), Judicial District of York, Ontario. This argument was not accepted by Scott Prov. Ct. J.

³⁸¹ *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission* [1984] 2 FC 410 FCA. This line of reasoning is consistent with the majority decision in *Harrison v. Carswell* [1976] 2 SCR 200.

prima facie infringement of others' property rights might nonetheless constitute protectable expression to which a s. 1 balancing analysis therefore needs to be applied.

Not every Canadian case to have adopted elements of the author-centric and definitional conceptions of copyright and freedom of expression can be seen as having accepted that copyright is a property right that exists outside of the reach of the *Charter*. In the first category of cases described in Chapter 2, for instance, the possibility that in certain circumstances copyright might be held to conflict with freedom of expression is left open. For instance, in *Lorimer FCA*, Mahoney J. stated that '[i]f, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them'.³⁸² This statement takes as its starting point the *Charter*-guaranteed right to freedom of expression, and contemplates whether copyright can, in some circumstances, be seen as an 'unjustified limitation' on freedom of expression (it may even imply that copyright is a limitation, just not an unjustified one). This structure is consistent with the broad rights approach that was ultimately adopted in *Irwin Toy*, and with s. 52 of the *Constitution Act, 1982*, which notes that '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect'.³⁸³

However, this statement can be contrasted with that of Strayer J. in *Canadian Tire* (the next Canadian decision to have addressed the intersection of freedom of expression and copyright). As Strayer J. stated:

³⁸² *Lorimer FCA* at para. 29.

³⁸³ *Constitution Act, 1982* at s. 52.

While there may be situations where the guarantee of freedom of expression in paragraph 2(b) of the Canadian Charter of Rights and Freedoms may properly limit the protection otherwise given to the owners of copyright, I do not believe this represents such a situation.³⁸⁴

In this statement, Strayer J. takes as his starting point the protection given to copyright owners, and asks whether there are situations in which freedom of expression could limit these protections. This subtle shift is significant. Although Strayer J. accepted that freedom of expression might, in some circumstances, limit the rights of copyright owners, the way in which this relationship is framed (as freedom of expression limiting copyright as opposed to copyright limiting freedom of expression) is consistent with the case law discussed above in which expressive acts that take place on private property are viewed as being outside the scope of protectable expression.

The strongest statement in support of the idea that the nature of copyright as private property justifies excluding it from the scope of protectable expression under s. 2(b) of the *Charter* is set out in *Michelin*. In this decision, Teitelbaum J. concluded that ‘[t]he Charter does not confer the right to use private property – the Plaintiff’s copyright – in the service of freedom of expression’.³⁸⁵

4.3.1.3.3 Limitations justified provided the result is to enhance the expression of another or protect against abridgements of the *Charter* rights of others

Consistent with the idea that freedom of expression is or can be subject to internal limits is the idea, under the definitional conception, that one party’s expression can be limited without resulting in the *Charter* right to freedom of expression being infringed (or without requiring recourse to a s. 1 analysis) provided

³⁸⁴ *Canadian Tire* at para. 13.

³⁸⁵ *Michelin* at para. 79.

the result is to either enhance the expression of another or to protect against abridgements of the *Charter* rights of others.³⁸⁶

One consequence of the adoption of this conception of freedom of expression is that, in certain contexts, the expression interests of defendants are minimized in favour of the expression interests of the plaintiffs. This approach can be contrasted with the governing approach to freedom of expression, under which expressive acts that abridge the *Charter* rights of another or that might be enjoined in order to enhance the expression of another might nonetheless constitute protectable expression to which a s. 1 balancing analysis therefore needs to be applied.³⁸⁷

The idea that restrictions on freedom of expression can be justified without recourse to s. 1 on the basis that other expression is being furthered is reflected in several decisions to address the intersection of freedom of expression and copyright.

For instance, in Teitelbaum J.'s judgment in *Michelin*, he stated that:

The defendants had no need to adopt a form of expression, the use of copyrighted material, that ... actually subverted the third value of promoting the diversity of ideas. In other words, if copyright is not respected and protected, the creative energies of authors and artists in furthering the diversity of ideas will not be adequately compensated or recognized.³⁸⁸

This quote from *Michelin* was later incorporated into the judgment of the QCCS in *Robinson c. Films Cinar Inc.*³⁸⁹ In this decision, copyright is portrayed not as conflicting with freedom of expression, but as supporting it.

³⁸⁶ See, for instance McIntyre J.'s judgment (dissenting in part) in *British Columbia Government Employees' Union v British Columbia (Attorney General)* [1988] 2 SCR 214 (BCGEU).

³⁸⁷ See, for instance, *Keegstra* at 702.

³⁸⁸ *Michelin* at para. 98.

³⁸⁹ *Robinson c. Films Cinar inc.* at para. 1098.

4.4 The approaches to the intersection of the *Charter* right to freedom of expression and copyright adopted by Canadian courts have been shaped by courts' adoption of elements of the author-centric approach to copyright and of the definitional conception of freedom of expression

4.4.1 The governing approach to the intersection of the *Charter* right to freedom of expression and copyright has been shaped by courts' adoption of elements of the author-centric approach to copyright, in concert with elements of the definitional conception of freedom of expression

The adoption, by courts considering the intersection of the s. 2(b) right to freedom of expression and copyright in Canada, of elements of the definitional conception of freedom of expression, in concert with elements of the author-centric approach to copyright, played a significant role in shaping the governing approach to this intersection. As described in Chapter 3 and noted above, under the governing approach to the intersection of the *Charter* right to freedom of expression and copyright, the possibility of conflict between these rights is rejected due to the nature and scope of each right.

4.4.1.1 Freedom of expression protects ideas, and not expression

The adoption, by courts considering the intersection of freedom of expression and copyright, of a conception of the *Charter* right to freedom of expression under which freedom of expression is conceptualized as protecting the ability of individuals to disseminate ideas and opinions, as opposed to expression, has had a significant impact on the governing approach to this intersection. Under this conception of freedom of expression, the fact that a particular expression may be enjoined through legislation or a common law rule would not infringe the right to freedom of

expression, so long as the idea underlying that expression is able to be expressed or communicated.

Under this conception of freedom of expression, freedom of expression and copyright exist in separate spheres. They are not in conflict. The application of this conception of freedom of expression in the context of copyright thus accounts for what Fewer referred to as the ‘perplexing paradox’ in Canadian law: that ‘freedom of expression [is held out by the Supreme Court of Canada] as the foundation upon which Western civilization is based’ and yet ‘lower courts [have] casually brush[ed] aside freedom of expression claims in the face of assertions of ... copyright’.³⁹⁰

Lower courts applying this approach to the intersection of the *Charter* right to freedom of expression and copyright have been able to brush aside any idea of conflict between these two rights due in large part to the idea/expression dichotomy – one of the foundational pillars of Canadian copyright law. In Canada, ideas are not, and cannot be the subject of exclusive protection in Canada through the grant of copyright.³⁹¹ Rather, copyright in Canada is seen as attaching to expression. If freedom of expression only protects ideas, then copyright, which makes no claim to the protection of ideas, would not be in tension with freedom of expression.³⁹²

In the view of courts applying this approach, the party that engaged in the unauthorized use of copyrighted works would not be prevented from exercising their right to freedom of expression should a copyright infringement suit succeed – they could simply express their idea using different means (namely ones that did not

³⁹⁰ Fewer.

³⁹¹ *CCH SCC* at para. 8.

³⁹² Of course, there may be situations where there are only one or two ways through which to present a specific idea. In these situations, the merger doctrine would apply to prevent a copyright owner from asserting copyright in the particular expression.

involve the unauthorized use of copyrighted works). As discussed in the previous section, this idea is evident in a number of decisions to have addressed the intersection of the *Charter* right to freedom of expression and copyright, including *Canadian Tire, Michelin*, and *Corporation Sun Média*.

4.4.1.2 The value of expression should be considered in articulating the scope of protectable expression under s. 2(b); unauthorized uses of copyrighted works have low expressive value

The idea, under the definitional conception of freedom of expression, that the value of expression is a factor to be considered in determining whether the expression falls within the scope of s. 2(b) of the *Charter*, when applied in conjunction with the idea, associated with the author-centric approach to copyright, that acts that involve the unauthorized use of copyrighted works constitute low value expression, has provided further justification for the exclusion of expression that has incorporated or made use of copyrighted works (without authorization) from the scope of protectable expression under s. 2(b) of the *Charter*.

Courts applying an author-centric approach to copyright in concert with a definitional conception of freedom of expression have concluded both that expression that makes unauthorized use of copyrighted works lacks sufficient value to be considered protectable expression; and that it would demean the right of freedom of expression to permit individuals who engage in unauthorized use of expression to escape civil liability for so doing. In either instance, the outcome is the exclusion of expression that has incorporated or made use of copyrighted works from the scope of protectable expression under s. 2(b).

In *Lorimer FCA*, for instance, Mahoney J. concluded that having ‘appropriated’ the Crown’s report (prepared by Robert J. Bertrand, QC) (an act that

has low expressive value, according to Mahoney J.), Lorimer is not entitled to make use of the defence of freedom of expression.³⁹³ Similarly, in *Canadian Tire*, Strayer J., citing to the part of *Lorimer FCA* from which the above excerpt is drawn, concluded that ‘[t]he addition by the defendants of a diagonal line across the plaintiff’s logo does not, it seems to me, amount to a sufficient expression of thought by the defendants as to override the plaintiff’s copyright in its logo.’³⁹⁴ Without ‘sufficient expression of thought’, or without an element of originality, creation, or independent effort which might imbue the work with value, Strayer J. was not able to justify taking action to limit Canadian Tire’s copyright.

This interpretation of *Lorimer FCA* and *Canadian Tire* is echoed by Teitelbaum J. in *Michelin*. Teitelbaum J. noted that:

From the brief discussion in both cases [*Lorimer FCA* and *Canadian Tire*], it appears that the Court found that the infringers’ use of the copyrighted material demonstrated insufficient original thought to be labelled protected expression under Section 2(b).³⁹⁵

Teitelbaum J. also stated, in relation to *Canadian Tire*, that ‘[i]n effect, Justice Mahoney appears to be stating that one cannot appropriate or use another’s property and assert that it is your own expression for the purposes of the *Charter*’.³⁹⁶

Teitelbaum J. himself presented the CAW – which had engaged in unauthorized use of copyrighted content – as a vandal that defaces or disfigures a work of art; as an individual that – through their re-use of a work – demonstrates disrespect for that work (and through the work, the artist), holding it up to

³⁹³ *Lorimer FCA* at para. 29.

³⁹⁴ *Canadian Tire* at para. 14. See also the use of the phrase ‘offending symbol’ and ‘spurious logo’ in *Canadian Tire* (ibid at para. 14).

³⁹⁵ *Michelin* at para. 78.

³⁹⁶ Ibid at para. 83.

‘ridicule’.³⁹⁷ CAW’s act of unauthorized use – characterized by Teitelbaum J. as childish, immature, and destructive – is presented by Teitelbaum J. as not possessing any expressive value, and, as such, as not being deserving of the protection of the right to freedom of expression.

4.4.1.3 Freedom of expression cannot be used to derogate from private rights and property rights; copyright is both a private right and a property right

In *Irwin Toy*, the SCC formally abandoned the idea that the scope of protection, under freedom of expression, is restricted to ideas and opinions, in favour of a broad rights approach under which all attempts to convey meaning are prima facie protected under the *Charter* right to freedom of expression.³⁹⁸ Under this approach, it would not be sufficient, for freedom of expression purposes, to argue that a party has no need to make use of specific copyrighted works in order to convey their message, or that the party could simply express their message (or the idea behind their message) in a different manner (namely one that does not use copyrighted works).

Rather, under the broad rights approach, the scope of protectable expression is characterized as encompassing most attempts to convey meaning, which would include both an idea itself but also the manner in which the idea is communicated. One would expect, under such an approach, that the rights granted to copyright owners under the *Copyright Act*, which authorize the copyright owner to limit or to restrict the expression of non-copyright owning parties, would be considered to conflict with the *Charter* right to freedom of expression and would need to be justified under a s. 1 analysis.

³⁹⁷ Ibid at paras. 62, 70, and 105.

³⁹⁸ *Irwin Toy*.

However, the ultimate impact of *Irwin Toy* on the intersection of the *Charter* right to freedom of expression and copyright has been negligible.³⁹⁹ *Michelin* – the first Canadian case to engage with the intersection of the *Charter* right to freedom of expression and copyright post-*Irwin Toy* – does not chart a new course for the intersection of freedom of expression and copyright in Canada. Rather, it is an extension of *Lorimer FCA*, *Canadian Tire*, and *St-Hubert* (decisions handed down pre-*Irwin Toy*). It affirms the governing approach to the intersection of the *Charter* right to freedom of expression and copyright, under which these rights are not in conflict. What can explain the minimal impact of *Irwin Toy* on the intersection of the *Charter* right to freedom of expression and copyright?

In large part, the minimal impact of *Irwin Toy* on the intersection of the *Charter* right to freedom of expression and copyright can be explained by Teitelbaum J.'s adoption of elements of the author-centric approach to copyright (specifically the characterization of copyright as a property right the essential element of which is the right to exclude), in concert with elements of the definitional conception of freedom of expression (specifically the idea that the scope of protectable expression can be limited or constrained by private rights and property rights). As I will argue, by characterizing copyright as a piece of legislation the primary function of which is to protect pre-existing property rights, and by concluding that freedom of expression does not protect the right to use the property rights of others, Teitelbaum J. is able to both formally apply the *Irwin Toy* framework while reaching the conclusion that copyright and the *Charter* right to freedom of expression are not in conflict.

³⁹⁹ Fewer, in *Fewer* at 210, writing before *Michelin* had been handed down, had expressed optimism that *Irwin Toy* might impact upon the way in which Canadian courts addressed the intersection of freedom of expression and copyright.

Teitelbaum J. acknowledged that based on the ‘very broad and inclusive definition of expression’ adopted by the SCC since 1984, that the ‘modifications’ made by CAW to Bibendum ‘warrant the label “expression” under Section 2(b) of the Charter’.⁴⁰⁰ This acknowledgement can be seen as being required by *Irwin Toy*, in which all attempts to convey meaning are characterized as expression.⁴⁰¹ As noted by Teitelbaum J., the CAW’s use of Bibendum is clearly an attempt to convey meaning.⁴⁰²

However, Teitelbaum J. stated that this is not the end of the analysis. At this point, under the *Irwin Toy* framework, it is necessary to determine whether there are any reasons to exclude expression that would otherwise be protectable from the scope of protection under s. 2(b) of the *Charter*. As noted in Chapter 2, both the method and location of expression can result in the expression being excluded from the scope of protection under s. 2(b). Noting that in a number of Canadian cases (including *Harrison v. Carswell*, *New Brunswick*, and *Commonwealth*), expression has been excluded from the scope of protection under s. 2(b) of the *Charter* on the basis that it took place on private or public land, Teitelbaum J. proceeded to analogize copyright both to property in land, and to personal property.⁴⁰³

Harrison v. Carswell figures prominently in Teitalbum J.’s analysis. This decision, handed down pre-*Charter*, has been described as representing the view that ‘[p]roperty rights are a powerful trope, and invariably win the day over other societal

⁴⁰⁰ *Michelin* at para. 86.

⁴⁰¹ *Irwin Toy*.

⁴⁰² *Michelin* at para. 85.

⁴⁰³ *Harrison*; *NB Broadcasting*; *Commonwealth*.

values, even though property remains formally outside the *Charter*'.⁴⁰⁴ In *Harrison* (in a passage cited by Teitelbaum J. in *Michelin*), it is stated that 'Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law'.⁴⁰⁵ Focusing on the broad rights of the property owner to exclude, *Harrison* adopts what can be referred to as a Blackstonian conception of property, under which property is conceived as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of any other individual in the universe'.⁴⁰⁶

Ultimately, Teitelbaum J. 'hold[s] that it is reasonable to equate doing something on private property as a forum for expression with using the property – the copyright – to convey expression'.⁴⁰⁷ Thus, despite the fact that Teitelbaum J. acknowledged, as noted above, that the Union's use of *Bibendum* constitutes expression under the *Irwin Toy* test and is thus prima facie protected by s. 2(b), his determination that the exception to the scope of protectable expression that relates to the location of expression encompasses the unauthorized use of copyrighted works results in his conclusion that 'the Defendants' expression is a prohibited form or is ... a "special limitation" and is not protected under the umbrella of Section 2(b)'.⁴⁰⁸

⁴⁰⁴ Philip Girard and Jim Phillips, 'A Certain Malaise: *Harrison v Carswell*, Shopping Centre Picketing, and the Limits of the Postwar Settlement' in J Fudge and E Tucker (ed), *Canadian Labour Law Stories* (Irwin Law and Osgoode Society for Canadian Legal History 2010).

⁴⁰⁵ *Michelin* at para. 89, citing *Harrison* at 219.

⁴⁰⁶ William Blackstone, *Commentaries on the Laws of England*, Book II, ch. 1: Of Property in General.

⁴⁰⁷ *Michelin* at para. 101.

⁴⁰⁸ *Ibid* at para. 87. Bailey writes that in so doing, '[t]he FCTD's analysis in *Michelin* subverts the principle of constitutional supremacy articulated in section 52 of the *Constitution Act, 1982*': Bailey at 141.

In reaching this conclusion, Teitelbaum J. both formally applied the framework required under *Irwin Toy* (under which works that incorporate copyrighted works would be seen as prima facie protectable expression if they convey or attempt to convey meaning) while continuing to apply the definitional conception of freedom of expression formally abandoned in *Irwin Toy* (under which the scope of s. 2(b) is subject to a number of internal limitations).

Craig writes that:

[Teitelbaum J.'s] position is that copyright is property, and, by definition, property is not speech regulation. Copyright remains in its logic-tight compartment. With this partition erected between copyright and speech, the appeal to constitutional speech values from within copyright's compartment appears as no more than the unjustifiable encroachment of one area of law into the exclusive domain of another.⁴⁰⁹ [citations removed]

Thus, despite the change in the method of reasoning brought about by the SCC's decision in *Irwin Toy*, the result reached in *Michelin* is the same as that reached in *Canadian Tire* and *St-Hubert*, and contemplated in other decisions: the *Charter* right to freedom of expression does not protect the unauthorized use, by non-copyright owners, of copyrighted works; and, as a result, limitations on the unauthorized use of copyrighted works do not prima facie infringe s. 2(b).

4.4.2 The first alternative approach to the intersection of the *Charter* right to freedom of expression and copyright has been shaped by courts' adoption of elements of the author-centric approach to copyright, in concert with elements of the definitional conception of freedom of expression

In *Michelin*, in addition to applying the governing approach to the intersection of the *Charter* right to freedom of expression and copyright, Teitelbaum

⁴⁰⁹ Craig, 'Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright' at 96.

J. also articulated two alternative approaches to this intersection. Under the first alternative approach, it is accepted that copyright might conflict with the *Charter* right to freedom of expression. However, any tension that may exist is defused by mechanisms internal to copyright, at least to the point of satisfying a s. 1 analysis. In this section, I will argue that as is the case with the governing approach to the intersection of the *Charter* right to freedom of expression and copyright, as described above, the manner in which Teitelbaum J. articulated this approach can be seen as having been shaped by his adoption of elements of the author-centric approach to copyright, in concert with elements of the definitional conception of freedom of expression.

Teitelbaum J. devoted only a single paragraph of his decision to the portion of the s. 1 analysis that addresses the question of proportionality. In this paragraph, he first accepted that ‘the objectives of the *Copyright Act* are rationally connected to an action for copyright infringement’ on the basis that a link exists ‘between the goal of protecting the interests of authors and copyright holders’ (a statement that evokes the purpose of copyright associated with the author-centric approach to copyright) and the means of achieving this goal, namely ‘by granting [authors and copyright holders] a monopoly on the right to use and reproduce their works and the ability to enforce these interests in an action for copyright infringement’.⁴¹⁰

Second, Teitelbaum J. held that the impugned provisions of the *Copyright Act* minimally impair the defendants’ right to freedom of expression. He reached this conclusion on the basis that the *Copyright Act* permits ‘attacks on the authors of works or their ideas’, that ‘infringers’ may reproduce parts of works that are not substantial without attracting liability, and that the *Copyright Act* contains exceptions

⁴¹⁰ *Michelin* at para. 111.

to copyright infringement set out in ss. 27(2) and (3).⁴¹¹ Teitelbaum J., however, did not discuss how these exceptions or limitations contribute to or support the expression interests of non-copyright owning parties, or which aspects of these exceptions are particularly important (or essential) in this regard. Instead, he noted that in *Irwin Toy*, it is stated that ‘the Court should give Parliament a “margin of appreciation” in evaluating whether the impugned act minimally impairs the Charter right in question’, and that ‘[he] cannot lightly substitute what might be [his] evaluation of the least drastic means for the choice of the Legislature’.⁴¹² Thus, based on Teitelbaum J.’s comments, it appears as if it is the mere presence of exceptions to copyright infringement, rather than any particular aspect of them (or any particular exception) – alongside a need to give deference to Parliament – that is sufficient to persuade Teitelbaum J. that this aspect of the proportionality test is satisfied.

Furthermore, Teitelbaum J. supported his conclusion that the impugned provisions of the *Copyright Act* are minimally impairing of the defendant’s expression interests on the basis that the defendants could have used means other than through the use of copyrighted works to communicate its message.⁴¹³ This statement evokes an approach to freedom of expression that emphasizes ideas and opinions, rather than the expression of those ideas and opinions through any specific word choice or image – an approach consistent with the definitional conception of freedom of expression rather than a broad rights approach.

Lastly, Teitelbaum J. held that the benefits of the impugned provisions of the *Copyright Act* outweigh their deleterious effects on the basis that the defendants

⁴¹¹ Ibid at para. 111.

⁴¹² Ibid at para. 111.

⁴¹³ Ibid at para. 111.

could have conveyed their message in ways other than through the use of copyrighted works. This conclusion is again shaped by an approach to freedom of expression that emphasizes the centrality of ideas and opinions, rather than the expression of those ideas and opinions. Formulated in this manner, the only type of provision related to copyright that could conceivably fail to satisfy the proportionality aspect of the s. 1 analysis is one that prevents parties from expressing ideas and opinions.

4.4.3 The second alternative approach to the intersection of the *Charter* right to freedom of expression and copyright has been shaped by courts' adoption of elements of the author-centric approach to copyright, in concert with elements of the definitional conception of freedom of expression

Under the second alternative approach articulated by Teitelbaum J. to the intersection of the *Charter* right to freedom of expression and copyright, copyright is understood to promote, and not to restrict, the *Charter* right to freedom of expression. This approach, like the two described above, can also be seen as having been shaped by courts' adoption of elements of the author-centric approach to copyright, in concert with elements of the definitional conception of freedom of expression.

Specifically, this approach is shaped by the adoption, by courts, of the element of the definitional conception under which freedom of expression is understood to protect ideas and opinions, as opposed to expression; by the element of the definitional conception under which courts have accepted that one party's expression can be limited without resulting in the s. 2(b) right being infringed (or without requiring recourse to a s. 1 analysis), provided the result is to either enhance the expression of another or to protect against abridgements of the *Charter* rights of

others;⁴¹⁴ and by the element of the author-centric approach to copyright under which expression that makes use of existing copyrighted works is seen as possessing lower value than expression that is characterized as originating solely from one author.

As described above, this approach is addressed in greatest detail in *Michelin*, in which Teitelbaum J., adopting a scolding tone, notes that:

The defendants had no need to adopt a form of expression, the use of copyrighted material, that ... actually subverted the third value of promoting the diversity of ideas. In other words, if copyright is not respected and protected, the creative energies of authors and artists in furthering the diversity of ideas will not be adequately compensated or recognized.⁴¹⁵

Teitelbaum J.'s articulation of this approach to the intersection of the *Charter* right to freedom of expression and copyright is rooted in his view of the centrality of ideas to both freedom of expression and to copyright. To Teitelbaum J., the defendants' use of the copyrighted work was unnecessary, as they could simply have expressed their idea or their message in another way.

Furthermore, under this approach to the intersection of the *Charter* right to freedom of expression and copyright, the defendants' use of the copyrighted work may also have a broader negative impact on freedom of expression (at least freedom of expression as articulated under the definitional conception), in that without the protection guaranteed by copyright, authors and artists (the parties whose interests copyright is designed to protect, under the author-centric approach) will not create or develop additional ideas.⁴¹⁶

⁴¹⁴ See, for instance McIntyre J.'s judgment (dissenting in part) in *BCGEU*.

⁴¹⁵ *Michelin* at para. 98.

⁴¹⁶ As noted above, under the definitional conception of freedom of expression, the expression of one party may be limited in order to enhance the expression of another.

Lastly, given the way in which, under the author-centric approach to copyright, the re-use of existing expression is characterized as low value expression, the removal of this type of expression from the scope of protectable expression under s. 2(b) through the application of this approach to the intersection of the *Charter* right to freedom of expression – on the basis that in so doing the expression interests of authors will be furthered – is not viewed as problematic.

4.5 Conclusion

In this chapter, I have argued that the governing approach to the intersection of the *Charter* right to freedom of expression and copyright in Canada, as well as both alternative approaches to this intersection, have been shaped by an approach to copyright that, while at one time the governing approach to copyright, is no longer valid (namely the author-centric approach); as well as an approach to the *Charter* right to freedom of expression that, while widely accepted during the period in which many of the cases to consider this intersection were decided, is also no longer valid (namely the definitional conception).

Therefore, the approaches to the intersection of the *Charter* right to freedom of expression and copyright themselves – under which copyright is not seen as conflicting with the *Charter* right to freedom of expression (the governing approach); under which any conflict that might exist between the *Charter* right to freedom of expression and copyright is defused to a sufficient degree to satisfy a s. 1 analysis (the first alternative approach); and under which copyright is seen as ultimately promoting, and not restricting, the *Charter* right to freedom of expression (the second alternative approach) – are, at least to the extent to which these approaches are shaped by the former approaches of both copyright and freedom of expression, also invalid. Given this, it is necessary for lower Canadian courts to reconsider, using

contemporary copyright and freedom of expression jurisprudence, the relationship between the s. 2(b) right to freedom of expression and copyright.

5. THE SCC'S PROTECTION OF FREEDOM OF EXPRESSION INTERESTS THROUGH THE VEHICLE OF STATUTORY INTERPRETATION (AND THE LIMITATIONS OF SUCH AN APPROACH)

5.1 Introduction

In this chapter, I will discuss the approach adopted by the SCC to the intersection of the *Charter* right to freedom of expression and copyright, arguing that – like the approaches to this intersection adopted by lower Canadian courts – it too merits reconsideration. The SCC has yet to explicitly engage with the *Charter* right to freedom of expression in the context of copyright.⁴¹⁷ Despite this, however, one result of the SCC's post-2002 copyright jurisprudence has been a significant expansion in protection for the expression interests of non-copyright owning parties, at the expense of copyright owners' rights.

This result has been achieved neither by the SCC explicitly interpreting provisions of the *Copyright Act* according to *Charter* values (such as freedom of expression) nor by the SCC considering whether provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. Rather, as I will argue, through the course of its post-2002 copyright jurisprudence, the SCC has provided additional protection for the expression interests of non-copyright owning parties, at the expense of copyright owners' rights, through the vehicle of statutory interpretation (specifically by interpreting provisions of the *Copyright Act* in light of the purpose of copyright, as re-articulated by the SCC). I will describe in detail the

⁴¹⁷ The only SCC decision that addresses copyright issues in which the words copyright and 'freedom of expression' appear together is *Rogers v. SOCAN*. In this decision, Abella J. (dissenting), in discussing the correct standard of review to be taken to decisions of the Copyright Board, stated that: '[i]f concurrent jurisdiction with the courts in interpreting and applying something as legally transcendent as the Charter does not affect the deference to which tribunals are entitled in interpreting their own mandate, surely it is hard to justify carving out copyright law for unique judicial "protection"' (ibid, 73).

way in which the SCC has done so, using the fair dealing provisions of the *Copyright Act* as my case study.⁴¹⁸

I will begin by describing how the SCC, through the course of its post-2002 copyright jurisprudence, has re-articulated the purpose of copyright from an author-centric approach under which the sole objective of copyright is to protect and reward copyright owners to an economic-functional approach, under which the rewards granted to copyright owners (which the SCC has clarified are intended to incentivize the creation of expression⁴¹⁹) can and ought to be limited by public interest considerations (including the public's interest in accessing, disseminating, and using expression). I will then demonstrate both how the SCC has interpreted the fair dealing provisions of the *Copyright Act* in light of this purpose of copyright, and how these interpretations have resulted in a significant expansion in the degree of protection for the expression interests of non-copyright owning parties.

I will then proceed by exploring the question of why, if the SCC's post-2002 copyright jurisprudence has resulted in expanded protection for the expression interests of non-copyright owning parties, the SCC has as of yet not explicitly engaged with the relationship between freedom of expression (a *Charter*-protected

⁴¹⁸ In contrast with the intersection of the *Charter* right to freedom of expression and copyright, fair dealing is a topic that has received a significant amount of scrutiny from scholars. See, for instance, Daniel Gervais, 'Canadian Copyright Law Post-CCH' (2004/2005) 18 IPJ 131, Ariel Katz, 'Fair Use 2.0: The Rebirth of Fair Dealing in Canada' in Michael Geist (ed), *The Copyright Pentalogy* (University of Ottawa Press 2013), Tawfik, Myra J Tawfik, 'The Supreme Court of Canada and the "Fair Dealing Trilogy": Elaborating a Doctrine of User Rights Under Canadian Copyright Law' (2013) 51 Alta L Rev 191, Giuseppina D'Agostino, 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use' (2009) 53 McGill Law Journal 309, Craig, 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform', Drassinower, 'Taking User Rights Seriously', Meera Nair, 'Fair Dealing at a Crossroads' in Michael Geist (ed), *From "Radical Extremism" to "Balanced Copyright"* (Irwin Law 2010), Samuel E. Trosow, 'Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy' in Michael Geist (ed), *The Copyright Pentalogy* (University of Ottawa Press 2013), Rosemary J Coombe, Darren Wershler and Martin Zeilinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press 2014).

⁴¹⁹ *Cinar* at para. 23.

right and a *Charter* value) and copyright. I will offer three explanations. First, I will argue that in a manner consistent with the economic-functional approach to copyright, a primary focus of the SCC's post-2002 copyright jurisprudence has been on ensuring that copyright owners are not overcompensated at the expense of the public interest (one element of which is the public interest in accessing, disseminating, and using works of expression). Interpreted through the lens of this approach, fair dealing and other users' rights have been conceptualized as mechanisms that limit copyright owners' rights, or as tools that mediate between 'protection and access', as opposed to defences the purpose of which is to protect or promote freedom of expression.⁴²⁰

Second, I will argue that the absence of explicit engagement in the SCC's post-2002 copyright jurisprudence with the relationship between the *Charter* right to freedom of expression and copyright can also be attributed, at least in part, to the SCC's conclusion that statutory provisions may only be interpreted in accordance with *Charter* values (such as freedom of expression) in limited circumstances.⁴²¹ This conclusion restricts the extent to which courts (including the SCC) can interpret provisions of the *Copyright Act* according to *Charter* values (such as freedom of expression).

Third, I will suggest that the SCC's lack of explicit engagement with the *Charter* right to freedom of expression in the context of copyright could be also interpreted as the SCC having accepted that, provided the provisions of the *Copyright Act* are correctly interpreted, freedom of expression is either fully or adequately protected by mechanisms internal to the *Copyright Act*, and that it is

⁴²⁰ *SOCAN v. Bell* at para 11.

⁴²¹ *Bell ExpressVu Limited Partnership v Rex* [2002] 2 SCR 559, 2002 SCC 42 at paras. 28-30.

therefore unnecessary to provide additional protection for freedom of expression interests by explicitly engaging with the *Charter* right to freedom of expression.

I will conclude by arguing that relying exclusively on statutory interpretation as the mechanism through which to protect freedom of expression – particularly in light of the SCC’s conclusion that statutory provisions can be interpreted in light of *Charter* values only in limited circumstances – fails to adequately protect this right. Thus, despite the positive benefits for the expression interests of non-copyright owning parties that have thus far resulted from the SCC’s post-2002 copyright jurisprudence, I argue that the SCC should reconsider its approach to this intersection and explicitly engage with the *Charter* right to freedom of expression, in the context of copyright.

5.2 The SCC’s re-articulation of the purpose of copyright in its post-2002 copyright jurisprudence

In 2002, in his reasons for judgment in *Théberge v. Galerie d’art du Petit Champlain* (McLachlin C.J., Iacobucci J., and Major J. concurring), Binnie J. distanced himself from the view – accepted by the SCC in *Bishop v. Stevens*⁴²² – that copyright is singularly directed towards benefiting or rewarding authors. Instead, Binnie J. stated that:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).⁴²³

⁴²² *Bishop*.

⁴²³ *Théberge* at para 30-31. Binnie J. acknowledged that his articulation of the purpose or objective of copyright ‘is not new’ (ibid at para. 30). Similar articulations of the purpose of copyright can be found in *Robertson v Thomson Corp* (2001), 15 CPR (4th) 147 Ont Sup Ct J at para. 23, and in *Apple Computer Inc. v. Mackintosh Computers Ltd.* [1987] 1 FC 173 FCTD at para 95.

Binnie J.’s re-articulation of the purpose of copyright, in which he invoked a public interest that can limit or act in opposition to the rights of the copyright owner, can be attributed to his concern that a copyright system that focuses exclusively on protecting the rights of copyright owners might overcompensate copyright owners at the expense of the public interest.⁴²⁴ Binnie J.’s description of the *Copyright Act* as balancing between rewarding creators and the public interest, and his statement that ‘due weight’ must be given to the ‘limited nature’ of creator’s rights, reinforces this view.⁴²⁵

In *Théberge*, Binnie J.’s concern with ensuring that copyright owners are not ‘overcompensate[d]’⁴²⁶ at the expense of the public interest is rooted in part in his concern about the impact of a successful copyright infringement lawsuit on the defendants’ ability to use their personal property (their lawfully purchased *Théberge* prints).⁴²⁷ However, although Binnie J.’s reasons for judgment focused on the proper balance between the copyright holder’s rights and the ‘proprietary interest of the purchasing public’,⁴²⁸ the manner in which Binnie J. articulated the public interest engaged by copyright – as the ‘public interest in the encouragement and dissemination of works of the arts and intellect’ (emphasis added)⁴²⁹ – suggests concern not just for the impact of copyright on a third party’s personal property, but also for the impact of copyright on expression interests.

⁴²⁴ *Théberge* at para. 31.

⁴²⁵ *Ibid* at para. 31.

⁴²⁶ *Ibid* at para. 31.

⁴²⁷ *Ibid* at paras. 1-2.

⁴²⁸ *Ibid* at para. 29.

⁴²⁹ *Ibid* at para. 30.

The argument that Binnie J.’s re-articulation of the purpose of copyright suggests concern for the impact of the enforcement of copyright on the expression interests of non-copyright owning parties is reinforced by the way in which he connected ‘[e]xcessive control’ by copyright holders to possible negative consequences for the public domain.⁴³⁰ As Binnie J. noted:

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.⁴³¹

Thus, while Binnie J. noted that *Théberge* ‘demonstrates the basic economic conflict between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expression’, his re-articulation of the purpose of copyright can also be seen as acknowledging the ‘basic ... conflict between the holder of the intellectual property in a work’ and those who wish to engage in expression in ways that ‘[embody] the copyrighted expression’.⁴³²

Additionally, while Binnie J. emphasized the need to ensure that copyright owners are not given ‘[e]xcessive control’ over tangible embodiments of their works, or are not ‘overcompensate[d]’ at the expense of a third party’s property rights, the way in which the balance is framed in *Théberge* also leads to the conclusion that copyright owners should not be given ‘[e]xcessive control’ over expression embodying their copyrighted works, or ‘overcompensate[d]’ at the expense of the public’s expression interests.⁴³³ Though it would be ‘self-defeating to

⁴³⁰ Ibid at para. 32.

⁴³¹ Ibid at para. 32.

⁴³² Ibid at para. 33.

⁴³³ Ibid at paras. 31-32.

undercompensate' copyright owners, their rights are limited, and (as per *Théberge*) can be limited, in order to preserve the balance between guaranteeing a just or fair reward to copyright owners and promoting the public interest in the creation and dissemination of expression.⁴³⁴

Subsequent to *Théberge*, a number of copyright cases decided by the SCC framed the 'public interest' which, as per Binnie J.'s majority judgment in *Théberge* should be balanced against the copyright owner's rights, as the public's interest in accessing expression.⁴³⁵ For instance, in *CCH*, the public interest is framed as the ability of non-copyright owning parties to access, use, and disseminate specific types of works of expression (namely legal resources).⁴³⁶ As noted by Linden J.A. in his reasons for judgment in the FCA decision in *CCH* (in a quote later cited by McLachlin C.J. in her reasons for judgment for the Court in *CCH*), '[i]t is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained'.⁴³⁷

In a similar manner to *CCH*, the public interest referred to by Abella J. in her dissenting judgment in *Robertson v. Thomson* (McLachlin C.J. and Charron J. concurring) is the public interest in ensuring continued access to a specific type of work of expression, namely archived newspapers, described by Abella J. as 'a primary resource for teachers, students, writers, reporters, and researchers'.⁴³⁸

⁴³⁴ Ibid at para. 31.

⁴³⁵ For an article that discusses the various conceptions of the public interest at play in Canadian copyright jurisprudence, see Teresa Scassa, 'Interests in the Balance' in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005).

⁴³⁶ *CCH SCC*.

⁴³⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada* 2002 FCA 187, [2002] 4 FC 213 at para. 159, cited in *CCH SCC* at para. 71.

⁴³⁸ *Robertson v Thomson Corp* [2006] 2 SCR 363, 2006 SCC 43 at para 70.

In *SOCAN v. CAIP*, a decision that addresses the question of whether and to what extent tariffs could be imposed on Canadian internet service providers, Binnie J. placed emphasis on the ‘vital’ importance of the ‘continued expansion and development [of Internet intermediaries] ... to national economic growth’.⁴³⁹ However, Binnie J.’s articulation of the public interest in *SOCAN v. CAIP*, and of the balance between the public interest and the rights of the copyright owner, can also be read in context with his statement, earlier in his reasons, that ‘[t]he capacity of the Internet to disseminate ‘works of the arts and intellect’ is one of the great innovations of the information age’.⁴⁴⁰ Thus, at least one element of the public interest referred to in *SOCAN v. CAIP* can be seen as the public interest in facilitating the fair dissemination of expression on the internet.⁴⁴¹

The idea that the public interest against which the reward to copyright owners must be balanced encompasses the encouragement and dissemination of expression is reinforced in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada (SOCAN v. Bell)*.⁴⁴² In this decision, SOCAN had submitted to the SCC that ‘only uses that contribute to the creative process are in the public interest’.⁴⁴³ Abella J., who wrote the reasons for judgment for the Court in *SOCAN v. Bell*, rejected this argument, stating that ‘the dissemination of works is also one of the *Act*’s purposes, which means that dissemination too, with or without creativity, is in the public interest’.⁴⁴⁴ Given that the purpose of copyright involves balancing the

⁴³⁹ *SOCAN v CAIP* at para. 131.

⁴⁴⁰ *Ibid* at para. 40.

⁴⁴¹ *Ibid* at para. 40.

⁴⁴² *SOCAN v. Bell*.

⁴⁴³ *Ibid* at para. 20.

⁴⁴⁴ *Ibid* at para. 21.

rights of copyright owners with the public interest, under this view of the public interest, although copyright owners must not be ‘undercompensate[d]’, the scope of their ‘just reward[s]’ can be determined in such a manner as to facilitate the dissemination, as well as the creation, of expression.⁴⁴⁵

In *Cinar Corp*, the SCC further refines the purpose of copyright in Canada. Specifically, McLachlin C.J., in her reasons for judgment for the Court in *Cinar Corp*, clarified, for the first time in a Canadian copyright decision, the relationship between copyright’s two objectives (rewarding authors and incentivizing the creation of new expression). Writing for the Court, McLachlin C.J. stated that copyright ‘seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works’ (emphasis added).⁴⁴⁶ The exclusive, limited economic rights provided by copyright are thus presented by the SCC as mechanisms through which the singular purpose of copyright – namely to encourage the production and dissemination of works of the arts and intellect – is achieved.

As demonstrated above, through the course of its post-2002 copyright jurisprudence, the SCC has re-articulated the purpose of copyright. Rejecting the former approach to copyright, under which the sole objective of copyright is to protect and reward copyright owners, the SCC has instead articulated a conception of copyright as a mechanism through which to encourage the creation and dissemination of expression. In order for copyright to fulfill this purpose, the rewards granted to copyright owners must be sufficient to incentivize the creation and dissemination of expression. McLachlin C.J.’s judgment in *Cinar Corp* thus provides additional clarity on what Binnie J. meant, in *Théberge*, when he indicated

⁴⁴⁵ *Théberge* at paras. 30-31.

⁴⁴⁶ *Cinar* at para. 23.

that it would be ‘self-defeating to undercompensate’ authors.⁴⁴⁷ Based on *Cinar Corp* and the above analysis, one undercompensates authors by failing to provide adequate incentives for the creation of expression.

However, although the promise of limited economic rights can incentivize the creation and dissemination of expression, the exercise of those same rights can limit both the creation of new expression and the dissemination of existing expression. Given the potential impact of the enforcement of copyright on expression, in order for copyright to fulfill its purpose, as re-articulated by the SCC, care must also be taken to ensure that the rewards provided by copyright for the creation of expression do not ‘overcompensate’ copyright owners by unnecessarily impeding the further creation, or the dissemination, of expression.⁴⁴⁸

5.3 The purpose of copyright plays a central role in the prevailing approach to statutory interpretation in Canada

The SCC’s re-articulation of the purpose of copyright is a critically important piece of its post-2002 copyright jurisprudence. This is due to the important role played by the purpose of legislation in the context of the prevailing approach to statutory interpretation in Canada, namely the ‘modern approach of purposive interpretation’ (modern approach). Introduced in Chapter 4, under the modern approach (drawn from Professor Elmer Driedger’s text *Construction of Statutes*):

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act, and the intention of Parliament.⁴⁴⁹

⁴⁴⁷ *Théberge* at para. 31.

⁴⁴⁸ *Ibid* at para. 31. As Gervais writes in Gervais at 324, ‘[c]opyright is not there to “protect” authors (or other owners of copyright), but rather to maximize the creation, production and dissemination of knowledge and access thereto. In other words, protection is not an end but a means to achieving that purpose, which implies that the level of protection must be properly calibrated’.

⁴⁴⁹ Elmer Driedger, *Construction of Statutes* (2nd edn, Butterworths 1983) at p. 87.

Stéphane Beaulac and Pierre-André Côté write that ‘Driedger's words [have been described by Canadian courts as] a ‘definitive formulation’ which ‘best captures or encapsulates’ the approach, even the ‘starting point’ for statutory interpretation in Canada’ (footnotes removed).⁴⁵⁰

In *CCH*, McLachlin C.J., who delivered the reasons for judgment of the Court, clarified that the modern approach should be applied by courts tasked with ‘interpreting the scope of the *Copyright Act*’s rights and remedies’.⁴⁵¹ Including McLachlin C.J.’s reasons for judgment in *CCH*, Driedger’s modern approach to statutory interpretation has been cited in 6 of the 14 copyright decisions handed down by the SCC between 2002 and 2015.⁴⁵²

5.4 Interpreting the *Copyright Act* in light of the purpose outlined above: the user right of fair dealing

The SCC’s decision to refer to defences and exceptions to copyright infringement as user rights, and its application of the concept of user rights in the context of fair dealing, exemplifies the way in which the SCC has used statutory interpretation as a mechanism through which to ensure that copyright owners are not overcompensated at the expense of the public interest, in a manner consistent with the purpose of copyright under the economic-functional approach.

⁴⁵⁰ Stéphane Beaulac and Pierre-André Côté, ‘Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization’ (2006) 40 RJT 131 at para 4.

⁴⁵¹ *CCH SCC* at para. 9.

⁴⁵² Driedger’s modern approach to statutory interpretation is cited in *ibid* (*CCH Canadian*) at para. 21; *Euro-Excellence Inc. v. Kraft Canada Inc.* 2007 SCC 37 at paras. 2 and 74; *ESA* at para. 71; *Re:Sound* at para. 32; and *Reference re: Broadcasting Act* [2012] 1 SCR 142, 2012 SCC 4 at paras. 11-12. It is also indirectly referenced in *Théberge* at para. 113 (Gonthier J.’s dissenting judgment). In this paragraph, Gonthier J. both referenced the substance of Driedger’s test as well as a paragraph in the SCC judgment of *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 (para. 21) in which Driedger’s modern approach is directly cited.

As I will describe, one consequence of the SCC’s interpretations of the fair dealing provisions of the *Copyright Act* in light of this purpose of copyright has been the creation of significant additional space within which the expression interests of non-copyright owning parties can be exercised.⁴⁵³

5.4.1 Guarding against overcompensating copyright owners through the characterization of defences and limitations to copyright infringement as user rights

The first reference to user rights in Canadian copyright jurisprudence is found in Linden J.A.’s reasons for judgment in the 2002 FCA decision in *CCH*.⁴⁵⁴ Linden J.A. used this term in the context of discussing Gibson J.’s determination, in *CCH (TD)*, that exceptions to copyright infringement should be ‘strictly construed’.⁴⁵⁵ Linden J.A. responded to this statement by indicating that:

There is no basis in law or in policy for such an approach. An overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners’ rights with legitimate public interests. Instead, courts should employ the usual modern rules of purposive construction in the context. As Professor Vaver has pointed out, ‘User rights are not just loopholes. Both owner rights and user rights should

⁴⁵³ Craig writes that ‘[t]he changing face of fair dealing is the result of a larger theoretical shift in the rationalization of copyright as a whole: a shift away from the author’s rights and towards the public interest’ (Craig, ‘The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform’ at 449). In focusing on fair dealing, I do not mean to suggest that this is the only instance in which the SCC has interpreted aspects of the *Copyright Act* through the lens of the purpose of copyright in a manner that has ultimately resulted in greater protection for the expression interests of non-copyright owning parties. Other examples could have been cited, including the SCC’s interpretation of the ‘originality’ doctrine and its interpretation of the defence set out in s. 2.4(1)(b) of the *Copyright Act*. Nor am I suggesting that in every instance in which it is tasked with interpreting a provision of the *Copyright Act*, that the SCC adopts an interpretation that results in greater protection for the expression interests of non-copyright owning parties (see, for instance, the SCC’s judgment in *Cinar*). As well, for an article that advocates for interpreting both the substantial part doctrine and the idea/expression dichotomy through the lens of the purpose of copyright, see Spence and Endicott, *Vagueness in the Scope of Copyright*.

⁴⁵⁴ *CCH FCA*.

⁴⁵⁵ *CCH Canadian et al v. Law Society of Upper Canada* (1999), 179 DLR (4th) 609 FCTD at para. 61.

therefore be given [a] fair and balanced reading'.⁴⁵⁶
[citations removed]

The characterization of defences as user rights is thus presented by Linden J.A. as being linked to the re-articulation, by Binnie J. in *Théberge*, of the purpose of copyright. If the purpose of copyright is both to ensure that copyright owners are justly or fairly rewarded, and to encourage the public interest in the creation and dissemination of expression – and if these purposes can at times exist in tension with one another – then, in order to give effect to the purpose of copyright and to guard against overcompensating copyright owners, defences to copyright infringement must not be given an ‘overly restrictive interpretation’.⁴⁵⁷ The parallel structure of the terms ‘users’ rights’ and ‘owners’ rights’ reflects the balancing process that – post-*Théberge* – must be applied by courts in evaluating copyright infringement claims.

The first SCC decision in which the term ‘user right’ was used in reference to defences and exceptions to copyright was *CCH*.⁴⁵⁸ In her judgment for the Court, McLachlin C.J.’s description of user rights evokes Binnie J.’s re-articulation of copyright as a system of laws that attempts to balance between copyright owners’ rights and the public interest. McLachlin C.J. described ‘fair dealing ..., like other exceptions in the *Copyright Act*, [as] ... a user’s right’, and wrote that ‘[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, fair dealing must not be interpreted restrictively.’⁴⁵⁹ In *SOCAN v. Bell*,

⁴⁵⁶ *CCH FCA* at para 126.

⁴⁵⁷ *Ibid* at para 126.

⁴⁵⁸ *CCH SCC*. Tawfik, ‘The Supreme Court of Canada and the “Fair Dealing Trilogy”’: Elaborating a Doctrine of User Rights Under Canadian Copyright Law’ at 195, describes *CCH* as ‘a watershed moment in Canadian copyright law’.

⁴⁵⁹ *CCH SCC* at para. 48.

Abella J., writing for the Court, also links user rights to the purpose of copyright as articulated in *Théberge*, indicating that they ‘are an essential part of furthering the public interest objectives of the *Copyright Act*’.⁴⁶⁰

One common element of both Linden J.A.’s reasons for judgment in *CCH (FCA)* and McLachlin C.J.’s reasons for judgment in *CCH* is that both judgments cite to the work of David Vaver in the area of user rights.⁴⁶¹ Vaver has engaged with the topic of user rights both in his intellectual property textbook (first published in 1997), and in his copyright law text (published in 2000), as well as in other works. In *Copyright Law*, Vaver devotes an entire chapter to the topic of user rights (a chapter that might otherwise have been referred to as defences against copyright infringement, or exceptions and limitations to copyright infringement).⁴⁶² Vaver uses the term ‘user rights’ in place of these other terms, stating that ‘[a]ny use that falls under a statutory exception does not infringe copyright, and so may fairly be called a “user right”’.⁴⁶³

In a manner similar to American scholars L. Ray Patterson and Stanley Lindberg’s use of the term user rights, Vaver’s use of this term is connected to his rejection of an approach to copyright through which owners’ rights are interpreted broadly and exceptions to copyright infringement are interpreted narrowly.⁴⁶⁴

Exemplified in *Michelin*, Vaver describes this approach as:

⁴⁶⁰ *SOCAN v. Bell* at para. 11.

⁴⁶¹ *CCH FCA* at para. 59, citing to Vaver, *Copyright Law* at p. 169-71; *CCH SCC* at para. 48, citing to Vaver, *Copyright Law* at p. 171.

⁴⁶² Vaver, *Copyright Law* at 169.

⁴⁶³ *Ibid* at 170.

⁴⁶⁴ In *Copyright Law*, Vaver includes the Patterson and Lindberg book *In the Public Interest* in the ‘further readings’ section of his ‘Users’ rights’ chapter (*ibid* at 227). As well, in a 2013 paper entitled ‘Copyright Defences as User Rights’, Vaver explicitly references the Patterson and Lindberg text, noting that this work ‘conceptualize[s] American copyright law and its interrelation with First

bad law and bad policy. It runs counter to decisions such as the Supreme Court's reversal of a trial judgment that equated a user benefit with the 'taking' of copyright property. Moreover, the policy of copyright law has always been to balance competing owner and user interests according to both contemporary exigencies and transcendental imperatives such as free speech and free trade.⁴⁶⁵

Vaver's use of the term user rights can thus be seen as a conscious push-back against the *Michelin* approach, which was, at the time he published the two textbooks noted above, the dominant approach in Canadian copyright law. Instead, Vaver advocates an approach to copyright in which owner rights are limited, and are balanced with public interest considerations such as freedom of expression.⁴⁶⁶ Such an approach, as described in the previous section, was adopted by Binnie J. in *Théberge*.⁴⁶⁷

Amendment principles as a balance between authors, publishers, and users' (Vaver, 'Copyright Defences as User Rights' at 667).

⁴⁶⁵ Vaver, *Copyright Law* at 171.

⁴⁶⁶ Teresa Scassa writes that in 'characteriz[ing] statutory exceptions to infringement as 'users' rights', [the SCC] plac[es] them on a par with the rights of copyright owners, in terms of achieving the purposes of the legislation' (Teresa Scassa, 'Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law' in Michael Geist (ed), *The Copyright Pentology* (University of Ottawa Press 2013) at 435).

⁴⁶⁷ A comparison between Professor Vaver's articulation of the policy of copyright and Binnie J.'s articulation of the purpose of copyright in *Théberge* is informative. Both articulations focus on a 'balance' between owner interests and other interests (Professor Vaver focuses on 'user' interests while Binnie J. focused on the 'public interest'; Professor Vaver focuses on 'owner' interests while Binnie J. focused on 'the creator'); and both articulations accept that these two interests can be in competition. One difference is that while Professor Vaver cites 'free speech' as an element of the balancing process, Binnie J. directly balanced a just reward to the creator with 'the public interest in the encouragement and dissemination of works of the arts and intellect' (*Théberge* at para. 30).

5.4.2 Guarding against overcompensating copyright owners through the SCC’s articulation of fair dealing

5.4.2.1 The scope of fair dealing is informed by the purpose of copyright, as articulated by Binnie J. in *Théberge*

Fair dealing is the broadest defence to copyright infringement in Canada. Set out in ss. 29-29.2 of the *Copyright Act*, under fair dealing persons may use a substantial part of copyrighted works for the purposes of research, private study, education, parody, satire, criticism, review, or news reporting provided the dealing is fair and, in the case of criticism, review, and news reporting, certain attribution requirements are satisfied.⁴⁶⁸ As articulated in *CCH*, the fair dealing analysis proceeds in two steps. First, defendants must establish that their dealing was for one of the purposes set out in the *Copyright Act*.⁴⁶⁹ Second, the defendant must establish that their dealing is fair.⁴⁷⁰ As noted by Abella J. in *Alberta (Education)*, ‘[t]he onus is on the person invoking “fair dealing” to satisfy all aspects of the test’.⁴⁷¹ Any act that is considered fair dealing is non-infringing.

As noted in Chapter 3, during the period in which the author-centric approach was the governing approach to copyright in Canada, defences to copyright infringement such as fair dealing were interpreted in a narrow, restrictive manner. In its post-2002 copyright jurisprudence, however, the SCC has rejected this interpretation of the scope of fair dealing. As noted above, both Linden J.A. in *CCH (FCA)* and McLachlin C.J. in the SCC’s decision in *CCH* characterized fair dealing

⁴⁶⁸ *Copyright Act* at ss. 29-29.2.

⁴⁶⁹ *CCH SCC* at para. 50.

⁴⁷⁰ *Ibid* at para. 50.

⁴⁷¹ *Alberta (Education)* at para. 12.

as a user's right which is not to be interpreted restrictively.⁴⁷² As well, in *CCH*, McLachlin C.J. stated that fair dealing is 'an integral part of the scheme of copyright'.⁴⁷³

In *CCH*, McLachlin C.J. clarified that 'the purpose of the fair dealing exception ... is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works'.⁴⁷⁴ In *SOCAN v. Bell*, Abella J. built on this characterization of fair dealing by describing it as '[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*'.⁴⁷⁵ Fair dealing is thus portrayed – both by McLachlin C.J. in *CCH* and, eight years later, by Abella J. in *SOCAN*, as a mechanism mediating between the reward granted to copyright owners and the public interest in the encouragement and dissemination of expression; as a tool that limits the rights of copyright owners and, in so doing, facilitates access to works of expression. The application of fair dealing by the SCC ensures – in a manner consistent with the purpose of copyright under the economic-functional approach – that the incentive provided by copyright for the creation of expression does not 'overcompensate' copyright owners by unnecessarily impeding the further creation, or the dissemination, of expression.

⁴⁷² *CCH FCA* at para. 129; *CCH SCC* at para. 48.

⁴⁷³ *CCH SCC* at paras. 48-49. In describing fair dealing as an integral part of copyright, McLachlin C.J.'s reasons for judgment echo comments made by Justice Pierre Leval in his work 'Toward A Fair Use Standard'. Describing the American analogous defence of fair use, Justice Leval writes that: '[f]air use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law' (Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 Harv L Rev 1105 at 1107).

⁴⁷⁴ *CCH SCC* at para. 63.

⁴⁷⁵ *SOCAN v. Bell* at para 11.

5.4.2.2 Fair dealing has been interpreted in a manner that guards against overprotecting copyright owners

Through the course of its post-2002 copyright jurisprudence, the SCC's interpretations of the fair dealing provisions of the *Copyright Act*, informed by the purpose of copyright as outlined above, have limited the scope of protection granted to copyright owners, resulting in expansions in the space available for non-copyright owning parties to exercise their expression interests. In this section, I will discuss several ways through which the SCC has interpreted the fair dealing provisions in such a manner, namely: by determining that parties may rely on their general practices to establish fair dealing; by interpreting fair dealing categories broadly; by determining that dealings should be analyzed from the perspective of the ultimate user; and by its articulation of the fairness analysis.

5.4.2.2.1 Parties may rely on their general practices to establish fair dealing

One way in which the SCC has interpreted fair dealing in a manner that limits the scope of protection granted to copyright owners (resulting in expanded space for the expression interests of non-copyright owning parties) is by indicating that the party seeking to establish fair dealing need not demonstrate that all individual dealings with copyrighted works satisfy the fair dealing test.⁴⁷⁶ Instead, parties seeking to establish fair dealing may 'rely on their general practice[s]' to do so.⁴⁷⁷

Requiring parties to demonstrate that individual dealings are fair, as opposed to permitting those parties to rely on general practices, imposes an additional administrative burden on defendants in copyright infringement lawsuits. Some defendants whose general practices might be sufficient to establish fair dealing may

⁴⁷⁶ *CCH SCC* at para. 63.

⁴⁷⁷ *Ibid* at para. 63.

not have the ability to demonstrate – on a balance of probabilities – that each dealing with a work was fair. In particular, defendants who are involved in a large number of dealings (for instance any online intermediary or library) would find such a requirement to be particularly onerous.

The question of whether a party could rely on its general practices in order to establish fair dealing or whether it would be required to demonstrate that each dealing was fair was at issue in *CCH*. The FCA, in its decision (as summarized by the SCC), had ‘concluded ... that there was not sufficient evidence to determine whether or not the dealings were fair, and, consequently, that the fair dealing exception had not been proven’.⁴⁷⁸ McLachlin C.J., however, held that the Great Library could rely on its general practices in establishing fair dealing, ensuring that dealings that would otherwise have been found to be fair would not be found to be unfair on the basis of insufficient evidence relating to the specific dealing in question. In so doing, the conclusion reached by McLachlin C.J. both guards against overcompensating copyright owners and creates additional space for the expression interests of non-copyright owning parties, in a manner consistent with the purpose of copyright under the economic-functional approach.

5.4.2.2.2 Fair dealing categories interpreted broadly

In addition to expanding the space available for the expression interests of non-copyright owning parties by clarifying that parties may rely on their general practices to establish fair dealing, the SCC has also interpreted both steps of the fair dealing analysis in ways that achieve a similar result. First, in *CCH*, McLachlin C.J. indicated that ‘in order to ensure that users’ rights are not unduly constrained’, the categories of fair dealing (such as research, the category in question in *CCH (SCC)*)

⁴⁷⁸ Ibid at para. 62.

‘must be given a large and liberal interpretation’ (emphasis added).⁴⁷⁹ McLachlin C.J.’s judgment in *CCH* was the first Canadian copyright decision to use the phrase ‘large and liberal’.⁴⁸⁰

Abella J. confirmed that as a result of the ‘large and liberal’ interpretation to be given to categories of fair dealing post-*CCH*, the first step of the fair dealing analysis has a ‘relatively low threshold’.⁴⁸¹ According to Abella J., the fairness analysis is where ‘the analytical heavy-hitting is done in determining whether the dealing is fair’.⁴⁸² The low threshold for fair dealing categories means that many uses of works will pass the first stage of the fair dealing analysis.⁴⁸³ Geist argues that following the copyright pentalogy, ‘[t]he core of fair dealing is fairness – fairness to the copyright owner in setting limits on the use of their work without permission and fairness to users to ensure that fair dealing rights can be exercised without unnecessarily restrictive limitations’.⁴⁸⁴ Maintaining a low threshold for fair dealing categories avoids overprotecting copyright owners at the expense of the public

⁴⁷⁹ Ibid at para. 51.

⁴⁸⁰ Ibid at para. 51. Neither the phrase ‘large and liberal’ nor the use of the word ‘integral’ in reference to the importance of fair dealing to the *Copyright Act* as a whole were used by Linden J.A. in his reasons for judgment in *CCH (FCA)*.

⁴⁸¹ *SOCAN v. Bell* at para. 27.

⁴⁸² Ibid at para. 27. This conceptualization of fair dealing evokes the governing approach to the *Charter* right to freedom of expression adopted by the SCC: where the s. 2(b) analysis can be seen as having a ‘relatively low threshold’, and with the ‘analytical heavy-hitting’ being done in the context of the s. 1 analysis.

⁴⁸³ The 2012 amendments to the *Copyright Act*, in which three additional fair dealing categories were added to s. 29, further expand the range of works that will pass the first stage of the fairness analysis. Michael Geist argues that ‘the breadth of the fair dealing purposes is now so wide – eight purposes covering most imaginable uses – that future Canadian fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes test together with a far more rigorous analysis ... in the second-stage, six-factor assessment’ (Michael Geist, ‘Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use’ in Michael Geist (ed), *The Copyright Pentalogy* (University of Ottawa Press 2013) at 159).

⁴⁸⁴ Ibid at 181.

interest, in that it reduces the potential for uses that would otherwise be found to be fair to fail the fair dealing analysis on the basis of the first fair dealing step.

The SCC has interpreted two fair dealing categories in its post-2002 copyright jurisprudence: research and private study. The SCC has commented on the scope of the ‘research’ category in three decisions: *CCH*, *SOCAN v. Bell*, and *Alberta (Education)*.⁴⁸⁵ One question raised in *CCH* was whether the fair dealing category of research should be restricted to non-commercial contexts.⁴⁸⁶ In some jurisdictions, the commercial nature of a dealing results in its exclusion from fair dealing protection.⁴⁸⁷ As Barton Beebe writes, however, ‘many ... have been highly critical, even dismissive, of the commerciality inquiry, primarily on the ground that nearly all expression in our culture is produced for profit or is otherwise income-producing in some sense’.⁴⁸⁸ Excluding commercial uses from of works from fair dealing would thus be inconsistent with the purpose of fair dealing, as articulated by the SCC, namely ‘to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works’.⁴⁸⁹ It would also overcompensate copyright owners in a manner inconsistent with the purpose of copyright under the economic-functional approach by excluding uses from fair dealing consideration that might not impact upon the incentive function of copyright.

⁴⁸⁵ *CCH SCC*, *SOCAN v. Bell*, *Alberta (Education)* .

⁴⁸⁶ *CCH SCC* at para. 51.

⁴⁸⁷ For instance, see s. 29(1) of the CDPA 1988 (UK), which provides that ‘[f]air dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement’ (Copyright, Designs and Patents Act 1988, c. 48 at s. 29(1)).

⁴⁸⁸ Barton Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978-2005’ (2008) 156 U Pa L Rev 549 at 598, cited in Bartholomew and Tehranian at 23.

⁴⁸⁹ *CCH SCC* at para. 63.

In *CCH*, McLachlin C.J. rejected the argument that the fair dealing category of research should be restricted to non-commercial contexts.⁴⁹⁰ In concluding that ‘lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*’, and, more generally, that commercial uses of works are not excluded from fair dealing protection, the SCC has interpreted the scope of fair dealing in such a manner as to limit the rights of copyright owners, resulting in additional space for the expression interests of non-copyright owning parties.⁴⁹¹

The SCC, in *CCH*, also considered, and rejected, the argument that the fair dealing category of research should be limited to private contexts. Like its determination that fair dealing should not be limited to non-commercial contexts, the SCC’s determination that fair dealing should not be limited to private contexts is significant from the perspective of the scope of the rights of copyright owners (and, as a result, the expression interests of non-copyright owning parties). Determining that non-private dealings may still be fair dealings expands the scope of uses of works potentially protectable under fair dealing to those involving multiple researchers or a research community (among other uses).

The scope of the category of research was further clarified in *SOCAN v. Bell*. SOCAN had argued that the category of research should be limited to creative purposes. Abella J. rejected this argument, stating that research ‘can be piecemeal, informal, exploratory, or confirmatory’; and that ‘[i]t can ... be undertaken for no

⁴⁹⁰ Ibid at para. 51.

⁴⁹¹ Ibid at para. 51.

purpose except personal interest’.⁴⁹² This determination again rejects a narrow interpretation of a fair dealing category for one that is more expansive.

As noted above, the second fair dealing category interpreted by the SCC in its post-2002 copyright jurisprudence is private study. In a manner similar to its interpretation of the research category, the SCC has interpreted the ‘private study’ category in a large and liberal manner. In *Alberta (Education)*, Abella J., who delivered the reasons for judgment of the majority, wrote that ‘the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude’.⁴⁹³ By adopting an interpretation of ‘private study’ that accepts that individuals may engage in private study with others, the SCC ensures that uses that might otherwise be fair are not excluded from the ambit of fair dealing on the basis of a more restrictive interpretation of the first step of the fair dealing inquiry.

5.4.2.2.3 Dealings should be analyzed from the perspective of the ultimate user

Another way in which the SCC has interpreted the first step of the fair dealing analysis in a way that guards against overcompensating copyright owners (and is thus protective of the expression interests of non-copyright owning parties) is through the SCC’s determination that the dealing ‘should be analyzed from the perspective of the ultimate user, not the [intermediary]’.⁴⁹⁴ Analyzing dealings from the perspective of the intermediary might overcompensate the copyright owner in a manner inconsistent with the purpose of copyright under the economic-functional

⁴⁹² *SOCAN v. Bell* at para. 22.

⁴⁹³ *Alberta (Education)* at para. 27.

⁴⁹⁴ *SOCAN v. Bell* at paras. 28-30.

approach, in that focusing on the actions of the intermediary and not the ultimate user might result in dealings being found by courts to be unfair not on the basis that they impact upon the incentive function of copyright, but on the basis of the intermediary's actions (and how those actions might be characterized).

This question is particularly relevant in contexts in which an intermediary engages in a dealing for or on behalf of a user, or facilitates a user's dealing. Considering the purpose of the dealing from the perspective of the intermediary, as opposed to the ultimate user, could lead to fewer dealings being considered to be fair, in that intermediaries might have a more difficult time establishing that their dealing satisfies the fair dealing categories. For instance, is an intermediary engaging in criticism when they disseminate expression to a user who then uses that content for the purposes of criticism? If not, the intermediary would not be able to rely on fair dealing (at least the fair dealing category of criticism) as a defence to a copyright infringement action brought by the copyright owner. This would impact the flow of expression by restricting the ability of intermediaries to provide copyrighted content to users while relying on the defence of fair dealing. It would also overcompensate the copyright owner by allowing them to impede the dissemination of expression in circumstances that do not impact upon the incentive function of copyright. Allowing intermediaries to use the purpose of the ultimate user in establishing a fair dealing defence guards against overcompensating copyright owners in such a manner.⁴⁹⁵

One example of a decision in which the dealing was analyzed from the perspective of the intermediary, and not the ultimate user, was the Federal Court (Trial Division) decision in *CCH*. In this decision, Gibson J. rejected the application of the fair dealing defence in part because:

⁴⁹⁵ It is also consistent with an approach to fair dealing where the first step is treated as having a low threshold.

[t]he copying by the defendant in the course of its custom photocopy service was not for a purpose within the ambit of fair dealing notwithstanding that the ultimate use by the requester of the photocopying might itself be within the ambit of fair dealing.⁴⁹⁶

The SCC rejected this approach. However, it did so not on the basis that the dealing should be analyzed from the perspective of the ultimate user, but on the basis that the intermediary themselves could be seen as engaging in the research process. As noted by McLachlin C.J. for the Court in *CCH*, ‘[a]lthough the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process’.⁴⁹⁷

In *SOCAN v. Bell*, SOCAN argued that the dealing should be assessed from the perspective of the service provider, and that from this perspective, the dealing would be ‘to sell permanent downloads of the musical works’.⁴⁹⁸ Abella J. rejected this argument. However, in a manner different from *CCH*, she justified her rejection of this argument on the basis that the purpose which must be considered is that of the ‘user or consumer’.⁴⁹⁹ Writing that ‘consumers used the previews for the purpose of conducting research to identify which music to purchase’, Abella J. thus held that the dealing satisfies the first step of the fair dealing analysis.⁵⁰⁰ In *Alberta (Education)*, Abella J., writing for the majority, affirms that ‘the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user’.⁵⁰¹

⁴⁹⁶ *CCH TD* at para. 61.

⁴⁹⁷ *CCH SCC* at para. 64.

⁴⁹⁸ *SOCAN v. Bell* at para. 19.

⁴⁹⁹ *Ibid* at para. 30.

⁵⁰⁰ *Ibid* at para. 30.

⁵⁰¹ *Alberta (Education)* at para. 22.

5.4.2.2.4 Fairness analysis interpreted in ways that have ensured that copyright owners are not overcompensated

Lastly, the SCC has interpreted the fairness analysis in a manner consistent with the purpose of copyright under the economic-functional approach. The correct approach to be taken to the fairness analysis was affirmed by McLachlin C.J. in *CCH*.⁵⁰² In her reasons for judgment, McLachlin C.J. outlined a list of factors that ‘provide[] a useful analytical framework to govern determinations of fairness in future cases’.⁵⁰³ These factors had originally been articulated by Linden J.A. in *CCH FCA*, who arrived at this list after considering Lord Denning’s decision in *Hubbard v. Vosper (Hubbard)* (as well as other UK decisions citing *Hubbard*), the section of the US Copyright Code that sets out the doctrine of fair use, and David Vaver’s discussion of fair dealing in *Copyright Law*.⁵⁰⁴ These factors are: ‘(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work’.⁵⁰⁵

Consistent with the purpose of fair dealing as articulated by McLachlin C.J. in *CCH* (and with the purpose of copyright more broadly), these factors have been applied in such a manner as ‘to ensure that users are not unduly restricted in their

⁵⁰² For clarification, I am neither endorsing the SCC’s fairness analysis as a mechanism through which to protect expression interests nor the fair dealing factors as set out by the SCC. I am merely demonstrating how the SCC has interpreted the fairness factors in such a manner as to guard against overprotecting copyright owners at the expense of the public interest, one consequence of which has been an expansion in the protection for the expression interests of non-copyright owning parties. In a separate paper, I discuss the fairness factors in depth, arguing that if fair dealing is to be a mechanism that protects freedom of expression in the context of copyright, that these factors need revisiting.

⁵⁰³ *CCH SCC* at para. 53.

⁵⁰⁴ *CCH FCA* at paras. 146-150, citing to *Hubbard v. Vosper* [1972] 2 QB 84 (CA) at p. 94.

⁵⁰⁵ *CCH SCC* at para. 53.

ability to express themselves using copyrighted works’.⁵⁰⁶ More specifically, as I will demonstrate, the SCC has applied these factors in such a manner as to ensure that copyright owners cannot enjoin uses of works that pass the first stage of the fair dealing analysis and do not undermine the incentive function of copyright, resulting in a significant expansion in the degree of protection for the expression interests of non-copyright owning parties.

The first factor set out by the SCC in *CCH* is the purpose of the dealing. One way in which the SCC has applied this factor in a manner that guards against overcompensating the copyright owner at the expense of the public interest is by clarifying that commercial dealings can still satisfy the fairness analysis. Clarifying that commercial dealings can still be considered to be fair dealings ensures that dealings that have an element of commerciality but that do not undermine the incentive function of copyright can still be considered to be ‘fair’ (thus expanding the range of expressive uses that are protectable under fair dealing).

A second way in which the SCC has applied this factor in a manner that guards against overcompensating copyright owners (and is thus protective of the expression interests of non-copyright owning parties) is by noting that commercial dealings ‘may ... be fair if there are “reasonable safeguards” in place to ensure the works are actually being used for research’.⁵⁰⁷ The SCC’s determination that the presence of safeguards is a factor to be considered in determining whether the dealing was fair pre-empts the argument that could be made by copyright owners that, although the defendant claims that the dealing is being done for a specific purpose, there is no guarantee that the dealing is being engaged in for this purpose. In

⁵⁰⁶ Ibid at para. 63.

⁵⁰⁷ *SOCAN v. Bell* at para. 36, referencing *CCH SCC* at paras. 54 and 66.

both *CCH* and *SOCAN*, the SCC found that safeguards were in place that ‘prevented the preview from replacing the work while still fulfilling a research function’.⁵⁰⁸ In *CCH*, the safeguards took the form of the Access Policy, which ‘places appropriate limits on the type of copying that the Law Society will do’.⁵⁰⁹ In *SOCAN*, the safeguards were said to be that ‘the previews were streamed, short, and often of lesser quality from the musical work itself’.⁵¹⁰ The key question asked by the SCC in this context is whether the safeguard limits the dealing to the fair dealing purpose argued for by the defendant.⁵¹¹

Second, in applying the ‘character of the dealing’ factor, Abella J., in *SOCAN*, rejected the argument raised by *SOCAN* that this factor should tend to unfairness on the basis that ‘consumers accessed, on average, 10 times the number of previews as full-length musical works’.⁵¹² Instead, Abella J. focused on the fact that ‘the previews were streamed ... [u]sers did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the user's computer, [meaning that] ... copies could not be duplicated or further disseminated by users’.⁵¹³

In a similar manner, in *CCH*, McLachlin C.J. noted that the character of the dealing factor supported a finding of fairness in part on the basis that ‘[t]here is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession’.⁵¹⁴ In focusing this factor on the extent to

⁵⁰⁸ *SOCAN v. Bell* at para. 35.

⁵⁰⁹ *CCH SCC* at para. 73.

⁵¹⁰ *SOCAN v. Bell* at para. 35.

⁵¹¹ *Ibid* at para. 35.

⁵¹² *Ibid* at para. 38.

⁵¹³ *Ibid* at para. 38.

⁵¹⁴ *CCH SCC* at para. 67.

which the dealing could act as a substitute for the work and on the safeguards in place to prevent this from occurring, rather than on the sheer quantity of content accessed, the SCC has interpreted this factor in a manner consistent with the purpose of copyright under the economic-functional approach, in which the primary question to be asked is whether the dealing in question undermines the economic incentive to create and disseminate the work.

Third, by assessing the fairness of the dealing based on individual use, as opposed to use in the aggregate, the SCC has interpreted the amount of the dealing factor in a manner that limits the rights of the copyright owner in a manner consistent with the purpose of copyright more generally. Both SOCAN, in *SOCAN*, and Access Copyright, in *Alberta Education*, had argued that the ‘amount of the dealing in the aggregate’ should be considered in evaluating this factor.⁵¹⁵ Adopting the approach advocated for by SOCAN would mean that even minor dealings, if done by many different persons, could be seen as ‘unfair.’ Abella J. rejected this approach. As she noted:

given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the ‘aggregate’ amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works.⁵¹⁶

The SCC’s decision to assess fairness based on individual use as oppose to use in the aggregate ensures that this factor focuses on the extent to which the individual dealing impacts upon the copyright owner’s incentive to create and disseminate the work. It also has the effect of limiting the extent to which copyright

⁵¹⁵ *SOCAN v. Bell* at para. 40; *Alberta (Education)* at para. 29.

⁵¹⁶ *SOCAN v. Bell* at para 43.

can impede the dissemination of expression in a digital environment.⁵¹⁷ Hutchison writes that to evaluate this factor based on aggregate as opposed to individual use ‘would have effectively tilted the balance toward an unfair dealing thus threatening the use of the internet for the benefit of all concerned’.⁵¹⁸

The next factor listed by McLachlin C.J. addresses ‘alternatives to the dealing.’ By articulating a test in which it is asked if the use is ‘reasonably necessary to achieve the ultimate purpose’;⁵¹⁹ by focusing on ‘realistic alternatives’;⁵²⁰ by suggesting that the existence of an alternative dealing would tend to unfairness only if it was ‘equally effective’;⁵²¹ and by rejecting the argument that the availability of a licence is relevant to the determination of fairness, the SCC has interpreted this factor in ways that limit the scope of the copyright owner’s rights in a manner consistent with the economic-functional approach to copyright.

The SCC could have interpreted the ‘alternatives to the dealing’ factor in a number of ways. For instance, it could have determined that so long as any alternatives exist to a dealing, that there was no need to make use of the work and that, as a result, that the dealing was unfair. Such a test, which would approximate a strict necessity test in the context of copyright, was rejected in *CCH* by both Linden J.A. (in the FCA) and McLachlin C.J. (in the SCC).⁵²² In its place, Linden J.A.

⁵¹⁷ As well, examining the amount of the dealing in the aggregate as opposed to assessing the amount used by the individual defendant could lead to defendants being held liable in part on the basis of the acts of other users.

⁵¹⁸ Cameron J Hutchison, ‘The 2012 Supreme Court Copyright Decisions and Technological Neutrality’ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157646 at 15.

⁵¹⁹ *CCH SCC* at para. 57.

⁵²⁰ *Alberta (Education)* at para. 32.

⁵²¹ *CCH SCC* at para. 57.

⁵²² *CCH FCA* at para. 158; *CCH SCC* at para. 57. Bartholomew and Tehranian argue that US courts have ‘reduce[d] fair use to a test about necessity’ and, in so doing, have ‘transformed copyright into a more Blackstonian, absolute form of property’ (Bartholomew and Tehranian at 14).

suggested that one question that could be asked is ‘whether the dealing was reasonably necessary to achieve the ultimate purpose’.⁵²³ McLachlin C.J., in her reason for judgment, agreed that this is a useful question for courts to consider. She then suggested that one instance where a dealing would not be seen as reasonably necessary would be ‘if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing’.⁵²⁴

This choice of example suggests that ‘reasonably necessary’ will be a high bar to reach. It suggests, for instance, that it would be reasonably necessary to use a copyrighted work in the context of criticism if the criticism – although effective – would not be equally effective without the reproduction of the work. This is not to say that the dealing will be fair. This determination can only be made after a consideration of all relevant factors. However, under the approach adopted by the SCC, the dealing would not support a finding of unfairness on the basis that there were alternatives, albeit not equally effective, that could have been used.

In applying this factor in *SOCAN v. Bell*, the SCC rejected the arguments, made by SOCAN, that other methods, such as advertising (including ‘album artwork, textual descriptions, and user-generated album reviews’) and return policies could adequately assist consumers in purchasing musical works. With respect to return policies, Abella J. described this as ‘an expensive, technologically complicated, and market-inhibiting alternative for helping consumers identify the right music’.⁵²⁵

Noting that ‘none of [these] other suggested alternatives can demonstrate to a consumer ... what a musical work sounds like’ (emphasis in original), the SCC

⁵²³ *CCH FCA* at para. 158.

⁵²⁴ *CCH SCC* at para. 57. The words equally effective were not used in *SOCAN v. Bell* and *Alberta (Education)*.

⁵²⁵ *SOCAN v. Bell* at para. 46.

found ‘short, low-quality streamed previews’ to be reasonably necessary to the dealing.⁵²⁶ None of these suggested alternatives was equally effective.

In *Alberta (Education)*, in applying this factor, the SCC focused on whether there were ‘realistic alternative[s]’ to the dealing. Access Copyright had argued that instead of photocopying the textbooks, the schools could have either bought books for each student or bought books to place in the library.⁵²⁷ A similar argument was made by CCH et al in *CCH*.⁵²⁸ Abella J., writing for the majority of the Court in *Alberta (Education)*, rejected this approach. She noted both that ‘the schools have already purchased originals that are kept in the class or library’, and that ‘buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks’.⁵²⁹

A final way in which the SCC has interpreted this factor in a manner protective of the expression interests of non-copyright owning parties is by rejecting the argument that the availability of a licence should be considered in determining whether there is an alternative to the dealing. This issue was noted, and not explicitly rejected, by Linden J.A. in the FCA.⁵³⁰ McLachlin C.J., on the other hand, rejected this argument in strong terms. As she noted, ‘[t]he availability of a licence is not relevant to deciding whether a dealing has been fair’.⁵³¹ McLachlin C.J. tied her

⁵²⁶ Ibid at para. 46.

⁵²⁷ Ibid at para. 31.

⁵²⁸ *CCH FCA* at para. 156.

⁵²⁹ *SOCAN v. Bell* at para. 32.

⁵³⁰ *CCH FCA* at para. 156. US courts consider the loss of licensing revenue to be a relevant factor in the context of the fair use analysis: *Bartholomew and Tehranian* at 21.

⁵³¹ *CCH SCC* at 70.

conclusion with respect to this issue to the copyright balance struck in *Théberge*. As she noted:

If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.⁵³²

McLachlin C.J. thus linked her rejection of this argument to the need to ensure – consistent with the purpose of copyright, as articulated by the SCC – that copyright owners are not overprotected at the expense of the public interest. D'Agostino writes that this analysis is consistent with 'several stakeholder positions within the educational community that there exists a "clear-for-fear" culture to obtain often unnecessary licences out of excessive caution'.⁵³³

The SCC's interpretation of the factor that considers the 'nature of the work' has also been interpreted in a manner protective of the public's interest in expression. In *CCH*, McLachlin C.J. wrote that 'if a work has not been published [and was not confidential], the dealing may be more fair in that its reproduction with acknowledgment could lead to a wider public dissemination of the work – one of the goals of copyright law'.⁵³⁴ In *SOCAN v. Bell*, this factor is described in a slightly different manner, as 'examin[ing] whether the work is one which should be widely disseminated' (emphasis added).⁵³⁵ This re-framing – which focuses on the value that

⁵³² Ibid at 70.

⁵³³ D'Agostino at 323, citing to Margaret Ann Wilkinson, 'Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries' in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005) and Jennifer M Urban and Laura Quilter, 'Efficient Process or Chilling Effects - Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer and High Technology Journal 621 (among others).

⁵³⁴ *CCH SCC* at para. 58.

⁵³⁵ *SOCAN v. Bell* at para. 47.

the public would gain from the dissemination of the work – is consistent with the way in which this factor was applied in *CCH*, in which McLachlin C.J., citing to Linden J.A.’s FCA judgment, noted that ‘[i]t is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained’.⁵³⁶

In *CCH*, Linden J.A. continued from this statement by noting that:

the fact that access to legal publications is in the public interest does not imply that copying such publications is always fair dealing. On the contrary, these legal works must be protected to ensure that their authors are not deprived of financial incentives to continue producing original works.⁵³⁷

It is significant that in her judgment for the Court in *CCH*, McLachlin C.J. cited the first part of the quote from Linden J.A.’s judgment noted above, and not the second. Instead, McLachlin C.J. indicated that ‘the Access Policy puts reasonable limits on the Great Library’s photocopy service’, and that ‘[t]his further supports a finding that the dealings were fair’.⁵³⁸

Abella J., in applying this factor in *SOCAN*, drew a distinction between whether a work is widely available, and whether it is widely disseminated. She wrote that ‘the fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated’.⁵³⁹ Abella J.’s articulation of this factor suggests that it is possible that this factor could offset other factors that support a finding of unfairness (for instance the effect of the

⁵³⁶ *CCH SCC* at para. 71.

⁵³⁷ *CCH FCA* at para. 159.

⁵³⁸ *CCH SCC* at para. 71.

⁵³⁹ *SOCAN v. Bell* at para. 47.

dealing on the work) on the basis of the value of the work's dissemination; that the dissemination of a work that is widely available but not widely disseminated (for instance due to the cost of accessing the work or the availability of work in other formats) could be fair.

The SCC has also adopted an approach to the final fair dealing factor, the 'effect of the dealing on the work', that guards against overcompensating the copyright owner at the expense of the public interest. The SCC has done so in three main ways: first, by adopting an approach to this factor that focuses on economic as opposed to non-economic factors; second, by adopting a more narrow scope of economic factors than has been the case in other jurisdictions; and third, by requiring the party arguing that the dealing is not fair due in part to the effect of the dealing on the work to demonstrate both negative economic impacts, and a link between the dealing in question and the negative economic impacts.

One way a court could interpret this factor would be to focus on the effects – framed broadly – of the dealing on the work. Such an interpretation could encompass both economic and non-economic consequences. One example of how this might be applied is found in *ATV Music Publishing of Canada Ltd v. Rogers Radio Broadcasting Ltd et al*, a case involving a parodic version of the song 'Revolution', authored by John Lennon and Paul McCartney.⁵⁴⁰ Van Camp J. granted ATV Music's application for an interlocutory injunction. In the course of her decision granting the injunction, Van Camp J. noted that '[i]t would be difficult ever again to listen to the original song without the words of the new song intruding'.⁵⁴¹ Applying this reasoning broadly could result in this factor supporting findings of unfairness in

⁵⁴⁰ *ATV Music Publishing of Canada Ltd v. Rogers Radio Broadcasting Ltd. et al* (1982), 35 OR (2d) 417 Ontario High Court of Justice.

⁵⁴¹ *Ibid* at para. 16.

situations where dealings cause parties to look at works in different ways; or in situations where dealings result in impacts to the work’s integrity or to its message. This approach, should it be adopted, could thus result in far fewer findings of fair dealing in cases where the original work has been transformed, modified, or combined with other existing or new content. While providing additional protection for copyright owners, this approach could result in significant restrictions to the expression interests of non-copyright owning parties.

A similar argument was addressed in the US decision of *Campbell v. Acuff-Rose*.⁵⁴² This case dealt with a parodic version of the Roy Orbison song ‘Pretty Woman’, created by 2 Live Crew. As noted by Souter J., who delivered the opinion of the US Supreme Court, ‘2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility’.⁵⁴³ In discussing whether market harms caused by parodies should impact the fair use analysis, Souter J., citing to *Fisher v. Dees*, wrote that ‘the role of the courts is to distinguish between “[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.”’⁵⁴⁴ The US Supreme Court considered that only the latter is relevant in the context of the effect of the dealing factor in fair use.⁵⁴⁵

⁵⁴² *Campbell*.

⁵⁴³ *Ibid* at p. 582.

⁵⁴⁴ *Ibid* at p. 592, citing to *Fisher v. Dees* 794 F 2d at 438.

⁵⁴⁵ More generally, however, Bartholomew and Tehranian argue that US courts have both defined market harm broadly (including ‘encompass[ing] theoretical markets that a copyright holder is unlikely to enter’) and given it a prominent role to play in the fair use analysis, making it less likely that a defendant will be able to make out a fair use defence and resulting in ‘less deference being given to free speech interests than other intellectual property regimes’ (Bartholomew and Tehranian at 24).

Like the US Supreme Court in *Campbell*, the SCC has also interpreted this factor as focusing on whether the dealing usurps demand for the work (or said differently, whether it acts as a substitute for the work). In *SOCAN v. Bell*, for instance, Abella J., in applying this factor, wrote that ‘[b]ecause of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself’.⁵⁴⁶ As well, Abella J. noted that ‘since the effect of previews is to increase the sale and therefore the dissemination of copyrighted musical works thereby generating remuneration to their creators, it cannot be said that they have a negative impact on the work’.⁵⁴⁷ To echo Binnie J.’s judgment in *Théberge*, interpreting this factor (and the fairness analysis more broadly) in such a manner as to find that the previews in question in *SOCAN v. Bell* are unfair would be to unduly burden the public’s interest in expression and thus to overcompensate copyright owners at the expense of the public interest.

Third, the SCC, in applying this factor, has required, in several decisions post-*CCH*, the party arguing that the dealing was not fair to bring evidence demonstrating both negative economic impacts, and a link between the dealing in question and any negative economic impacts. For instance, in *Alberta (Education)*, Abella J. (writing for the majority) noted that:

In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales.⁵⁴⁸

⁵⁴⁶ *SOCAN v. Bell* at para. 48.

⁵⁴⁷ *Ibid* at para. 48.

⁵⁴⁸ *Alberta (Education)* at para. 35.

In making this point, Abella J. also noted that ‘there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning’.⁵⁴⁹

D’Agostino frames the SCC’s interpretation of this factor in *CCH* as an onus shift.⁵⁵⁰ However, this is perhaps most accurately described as a shift of the strategic burden, as opposed to a true onus shift.⁵⁵¹ The onus remains on the defendant to establish that the dealing is fair. McLachlin C.J. in *CCH* acknowledged that:

[a]lthough the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers’ markets. If there had been evidence that the publishers’ markets had been negatively affected by the Law Society’s custom photocopying service, it would have been in the publishers’ interest to tender it at trial. They did not do so.⁵⁵²

In situations in which the plaintiffs may be best positioned to offer information, if it exists, relating to the economic impact of the dealing on the work, requiring the defendant to bring evidence that the dealing has had no economic impact would result in the imposition of a significant burden on defendants.⁵⁵³ Such a requirement would narrow the ambit of the defence significantly, expanding the

⁵⁴⁹ Ibid at para. 33.

⁵⁵⁰ D’Agostino at p. 325.

⁵⁵¹ As described by La Forest J. in his dissenting reasons in *R v. Noble*, ‘[i]f a case against the accused has been adduced that is capable of supporting an inference of guilt, it may be a wise strategy for the accused to testify in order to refute the case to meet; this does not involve a shift in the legal burden of proof to the accused, but rather involves a shift of a strategic burden’ (*R v Noble* [1997] 1 SCR 874 SCC at para. 92).

⁵⁵² *CCH SCC* at para. 72.

⁵⁵³ D’Agostino writes that ‘publishers are often the more sophisticated parties in a better position to access such records’ (D’Agostino at p. 324).

rights of the copyright owner in a manner inconsistent with the purpose of fair dealing, described by the SCC as ‘ensur[ing] that users are not unduly restricted in their ability to use and disseminate copyrighted works’.⁵⁵⁴

Even if the plaintiff is able to establish negative economic impacts (a drop in sales, for instance), the SCC’s fairness jurisprudence suggests that unless this evidence can be linked to or attributed to the dealing itself, this factor will not support a finding of unfairness. The SCC’s interpretation of this factor is thus consistent with the purpose of copyright, as articulated by the SCC, under which rewards are granted to copyright owners in order to incentivize the creation of expression, and under which uses of copyrighted expression that do not impact upon this purpose should not be enjoined.

5.5 Accounting for the absence of explicit discussion of freedom of expression in the context of the SCC’s copyright jurisprudence

In the previous section, I described the way in which the SCC, through a process of statutory interpretation, has interpreted the fair dealing provisions of the *Copyright Act* in such a manner as to result in additional protection for the expression interests of non-copyright owning parties. In this section, I will explore the question of why, if the SCC’s post-2002 copyright jurisprudence has resulted in expanded protection for the expression interests of non-copyright owning parties, the SCC has as of yet not explicitly engaged with the relationship between the *Charter* right to freedom of expression and copyright.

⁵⁵⁴ *CCH SCC* at para 63.

5.5.1 A primary focus of the SCC’s post-2002 copyright jurisprudence has been to guard against overcompensating copyright owners

The absence of explicit discussion of the *Charter* right to freedom of expression in the context of the SCC’s copyright jurisprudence can be explained, at least in part, on the basis that a primary focus of the SCC’s post-2002 copyright jurisprudence has been to ensure that – in a manner consistent with the purpose of copyright under the economic-functional approach – copyright owners are not overcompensated at the expense of the public interest (an important aspect of which is the public interest in accessing, disseminating, and using expression). Consistent with this focus, user rights (generally) and fair dealing (specifically) have been portrayed as mechanisms limiting the exclusive rights of copyright owners, as opposed to stand-alone defences through which freedom of expression is protected and promoted.

As noted above, the SCC’s concern with ensuring that copyright does not overcompensate copyright owners at the expense of the public interest can be traced to Binnie J.’s judgment in *Théberge*, in which he emphasized that ‘[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them’.⁵⁵⁵ The question of whether a copyright owner is overcompensated, adequately compensated, or undercompensated can be answered by reference to the purpose of copyright as articulated by the SCC (most recently in *Cinar Corp*).

In *Cinar Corp*, McLachlin C.J., writing for the Court, stated that the rewards granted by the *Copyright Act* are meant to incentivize the creation of expression.⁵⁵⁶

⁵⁵⁵ *Théberge* at para. 31.

⁵⁵⁶ *Cinar* at para. 23.

Based on this articulation of copyright's purpose, one undercompensates copyright owners by permitting unauthorized uses of works that undermine an author's incentive to create. Similarly, one overcompensates copyright owners by permitting them to enjoin unauthorized uses of works that do not impact upon this incentive function.

As described above, the SCC's characterization of defences to copyright infringement as user rights (generally) and its interpretation of fair dealing (specifically) can be viewed through this lens. As interpreted by the SCC, fair dealing is a mechanism that guards against overcompensating copyright owners, in that it that helps ensure that copyright users are not 'unduly restricted' in their ability to use works in ways that do not disrupt the incentive function of copyright.⁵⁵⁷ Fair dealing, according to the SCC, is a tool that mediates between 'protection and access'.⁵⁵⁸

Interpreted in this way, fair dealing reflects and is embedded within the economic-functional approach to copyright. In that sense, it is perhaps not surprising that although one result of the SCC's interpretation of the fair dealing provisions of the *Copyright Act*, as detailed above, has been an expansion in protection for the expression interests of non-copyright owning parties, the SCC has not explicitly linked fair dealing to freedom of expression – a right that transcends the economic-functional approach and that embodies a broader range of values (including self-fulfillment, democratic discourse, and truth-finding).⁵⁵⁹

⁵⁵⁷ *CCH SCC* at para. 63.

⁵⁵⁸ *SOCAN v. Bell* at para 11.

⁵⁵⁹ *Montréal* at para. 72.

5.5.2 *Charter* values may only be used to interpret statutory provisions in limited circumstances

Second, the absence of explicit discussion of freedom of expression in the context of the SCC's post-2002 copyright jurisprudence can be explained, at least in part, by the SCC's conclusion, in *Bell ExpressVu Limited Partnership v. Rex*, that courts should only use *Charter* values as tools through which to interpret statutory provisions in limited circumstances.⁵⁶⁰ While it is a legitimate exercise of judicial authority for Canadian courts to shape or re-shape the common law according to *Charter* values,⁵⁶¹ Canadian courts are more limited in their ability to interpret statutory provisions – like those of the *Copyright Act* – in light of *Charter* values. As Iacobucci J. stated in *Bell ExpressVu*:

when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that 'it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not' (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a 'Charter values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.⁵⁶²

The SCC has stated that to interpret all statutory provisions in light of *Charter* values would:

wrongly upset the dialogic balance. Every time the principle

⁵⁶⁰ *Bell ExpressVu* at paras. 28-30.

⁵⁶¹ *Ibid* at para. 61.

⁵⁶² *Ibid* at para 62. This approach to statutory interpretation can be contrasted with that adopted by L'Heureux-Dubé J. in her dissenting reasons in *Symes v Canada* [1993] 4 SCR 695, in which she noted that 'the respect of *Charter* values must be at the forefront of statutory interpretation' (para. 190).

were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on Charter rights and freedoms, which would in turn be inflated to near absolute status.⁵⁶³

In at least one judgment, the SCC had the opportunity to reference *Charter* values in the context of its decision. In *CCH (FCA)*, which was heard by the FCA prior to *Bell ExpressVu* being heard by the SCC, and was handed down approximately three weeks after *Bell ExpressVu* was handed down, Linden J.A. noted that:

the Law Society's factum strongly encouraged this Court to take account of Constitutional and Charter ... values, such as the rule of law, equality, and access to justice, to defend its photocopying service ... [m]oreover, broadly speaking, I have implicitly considered the values advocated by the Law Society in balancing of the Publishers' rights with the public interest. To me, the Publishers' rights must also be fairly recognized in order to guarantee incentives to continue to provide original legal publications.⁵⁶⁴

In her reasons for judgment in *CCH*, McLachlin C.J., although she cited *Bell ExpressVu*, did not make any reference to *Charter* values (or to 'values' at all). Rather, McLachlin C.J. cited *Bell ExpressVu* for the proposition that '[i]n interpreting the scope of the Copyright Act's rights and remedies, courts should apply the modern approach to statutory interpretation' under which the purpose or objective of copyright assumes a central role.⁵⁶⁵

Some commentators and foreign courts have adopted an approach to the intersection of freedom of expression and copyright through which tension between

⁵⁶³ *SOCAN v. Bell* at paras. 66-67.

⁵⁶⁴ *CCH FCA* at paras. 170-171. *CCH (FCA)* was heard on October 23-25, 2001, and the decision in this case was handed down May 14, 2002. *Bell ExpressVu*, on the other hand, was heard on December 4, 2001 with the decision being handed down on April 26, 2002.

⁵⁶⁵ *CCH SCC* at para. 9.

freedom of expression and copyright is resolved not by relying on external constitutional analyses, but by interpreting copyright's internal mechanisms (including fair dealing or its equivalent) according to freedom of expression values.⁵⁶⁶ As detailed above, however, this option – due to the conclusion reached in *Bell ExpressVu* that it is only appropriate to interpret statutory provisions in accordance with *Charter* values in limited circumstances – is not broadly available to Canadian courts.

5.5.3 The *Copyright Act* fully or adequately protects freedom of expression interests

A third explanation for the absence of explicit engagement by the SCC with the *Charter* right to freedom of expression is that in a manner consistent with lower Canadian courts, the SCC has accepted that once the provisions of the *Copyright Act* are properly (and purposively) interpreted, the *Copyright Act* adequately protects the *Charter* right to freedom of expression, and that it is therefore not necessary to provide additional protection for freedom of expression interests by explicitly engaging with the *Charter* right to freedom of expression.

Gendreau, for instance, suggests that the lack of engagement by Canadian courts (including the SCC) with the *Charter* right to freedom of expression 'could ... be explained by the hypothesis that copyright law already incorporates freedom of

⁵⁶⁶ See, for instance, *Ashdown* and Patrick Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law 2008). Some scholars, however, have argued that internal mechanisms alone are not sufficient to address constitutional or human rights concerns. See, for instance, Barendt at 15, who argues that '[i]t is wrong for the courts to hold that the copyright statute necessarily safeguards freedom of speech, so no further consideration of the relationship of expression and copyright is required. That would be an abdication of their responsibility to determine the scope of constitutional rights, in this context the right to freedom of expression, and how far it is necessary to restrict its exercise to protect the right to copyright' (emphasis in original). See also Laurence R Helfer and Graeme W. Austin, *Human Rights and Intellectual Property* (Cambridge University Press 2011) at 508, Birnhack, 'Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the Human Rights Act', Geiger and Izyumenko, and Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation'.

expression values through its own mechanisms’.⁵⁶⁷ Craig, as well, refers to the ‘largely unchallenged assumption ... that the copyright system sufficiently respects freedom-of-expression values by virtue of internal mechanisms’ as a ‘contributing factor’ in the ‘paucity of constitutional scrutiny of the Copyright Act’.⁵⁶⁸

Consistent with this argument, it could also be argued that the process of statutory interpretation engaged in by the SCC through the course of its post-2002 copyright jurisprudence, which has resulted in an expanded scope of protection for the expression interests of non-copyright owning parties (as demonstrated above), has had the effect of weakening any need for additional consideration of the constitutional validity of provisions of the *Copyright Act*. If statutory interpretation has resulted in adequate protection of freedom of expression interests, then why should further steps be taken to consider the constitutionality of copyright?

5.6 Challenging the absence of explicit discussion of freedom of expression in the context of the SCC’s copyright jurisprudence

The explanations offered above may account – at least in part – for the absence of explicit engagement, by the SCC, with the *Charter* right to freedom of expression in the context of its post-2002 copyright jurisprudence. However, they do not justify continued non-engagement with the *Charter* right to freedom of expression by the SCC in all contexts relating to copyright.

Courts, in Canada, are ‘guardians of the Constitution’,⁵⁶⁹ one aspect of which

⁵⁶⁷ Gendreau, ‘Copyright and Freedom of Expression in Canada’ at 21. Another argument that could be made is that – in light of *Michelin* or for other reasons – parties are not bringing, before the court, arguments that require the court to consider the relationship between the *Charter* right to freedom of expression and copyright. In a separate project, I am looking at the extent to which interveners make submissions, to Canadian courts, on *Charter* issues (or human rights issues more broadly) in the context of intellectual property law disputes.

⁵⁶⁸ Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 78.

⁵⁶⁹ *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 2 CNLR 281 at para. 135.

is the *Charter* right to freedom of expression. In order to uphold their role as guardians of the Constitution, the SCC may be required to explicitly engage with the *Charter* right to freedom of expression in the context of copyright. This is not to say, however, that the SCC must abandon its purposive approach to provisions of the *Copyright Act*. Rather, both approaches can be applied in concert. The SCC can continue to interpret statutory provisions purposively, according to the modern approach, while also taking steps – where appropriate – to explicitly engage with the *Charter* right to freedom of expression in the context of copyright.

Explicit consideration of the *Charter* right to freedom of expression could supplement the SCC's existing purposive interpretations of provisions of the *Copyright Act* in a number of ways, as will be discussed below. First, the SCC could re-conceptualize fair dealing (or other user rights) not as a limit on copyright owners' rights, but as a defence the purpose of which is to promote or protect freedom of expression. Second, the SCC could – in limited circumstances – interpret provisions of the *Copyright Act* in light of *Charter* values (or, more broadly, consider the extent to which *Charter* values may be relevant in the copyright context).⁵⁷⁰ Third, the SCC could explicitly weigh provisions of the *Copyright Act* against the *Charter* right to freedom of expression.

5.6.1 Fair dealing as a freedom of expression defence

As described above, the SCC has thus far interpreted fair dealing – in a manner consistent with the purpose of copyright under the economic-functional approach – as a mechanism to help ensure that copyright owners are not

⁵⁷⁰ See Fewer at 184 for a work, published prior to *Bell ExpressVu* being handed down, that 'proposes a ... purposive approach to copyright defences ... explicitly balancing the plaintiff's proprietary interests with the defendant's *Charter* considerations'.

overcompensated at the expense of the public interest (including the public's interest in accessing, disseminating, and using expression).

However, should it wish to explicitly engage with the *Charter* right to freedom of expression in the context of copyright, one way in which the SCC could do so is by exploring the extent to which fair dealing (or user rights more generally) could be re-conceptualized not as a limit on copyright owners' rights, but as a stand-alone defence the purpose of which is to promote or protect freedom of expression.⁵⁷¹ As will be discussed in the following chapter, several jurisdictions – including the US and the UK – have already referred to fair dealing in such a manner.⁵⁷² As well, despite the SCC not having done so, a number of scholars have linked the SCC's fair dealing jurisprudence to freedom of expression, or to human rights more broadly.⁵⁷³

Furthermore, the SCC's fair dealing jurisprudence already has, embedded within it, a connection to Canadian constitutional law. The phrase 'large and liberal', used by McLachlin C.J. in *CCH* to describe the interpretation to be given to fair dealing categories, has also been employed by Canadian courts discussing how provisions of the Constitution Act, 1867, the Constitution Act, 1982 and the *Charter*

⁵⁷¹ Although the question of how fair dealing might need to be re-conceptualized in order to act as a 'freedom of expression' defence is a topic that is outside of the scope of this thesis to address, I mention it as one possible option as to how the SCC might explicitly engage with the *Charter* right to freedom of expression in the context of copyright.

⁵⁷² See, for instance, *Eldred* at 219, *Golan* at 890, *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) at para. 325.

⁵⁷³ See, for instance, Vaver, 'Copyright Defences as User Rights' at 670-671, Marcelo Thompson, 'Property Enforcement or Retrogressive Measure? Copyright Reform in Canada and the Human Right of Access to Knowledge' (2007) 4 UOLTJ 163, Richard Peltz, 'Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law' (2009) 17 Tex Intell Prop LJ 267 at 281.

ought to be interpreted.⁵⁷⁴ For instance, in *Edwards et al v. A-G Can.*, Lord Sankey LC notes that ‘[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits’, and that it is the duty of courts to give this Act ‘a large and liberal interpretation’.⁵⁷⁵ Given this connection, it is perhaps not out of the question that the SCC might one day re-conceptualize fair dealing as a defence the purpose of which is to promote or protect freedom of expression.

5.6.2 Application of *Charter* values in limited circumstances

In *Bell ExpressVu*, the SCC concluded that statutory provisions may only be interpreted in light of *Charter* values in limited circumstances. However, the fact that Canadian courts are limited in the extent to which they may interpret statutory provisions in light of *Charter* values does not mean that Canadian courts may not interpret any statutory provisions in light of *Charter* values. Drawing from Iacobucci J.’s judgment in *Bell ExpressVu*, the question to be raised, in each instance in which it is argued that statutory provisions should be interpreted according to *Charter* values, is whether the circumstances in question constitute those of ‘genuine ambiguity’.⁵⁷⁶

In *Bell ExpressVu*, Iacobucci J., in describing ‘[w]hat ... in law is an ambiguity’, cited Major J.’s judgment in *CanadianOxy Chemicals Ltd v. Canada (Attorney General)*, in which Major J. noted that ‘[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance

⁵⁷⁴ *CCH SCC* at para. 51. See, for instance, *Reference re: Same-Sex Marriage* 2004 SCC 79, *Application under s. 83.28 of the Criminal Code (Re)* 2004 SCC 42, *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62, *R v 974649 Ontario Inc* 2001 SCC 81.

⁵⁷⁵ *Edwards et al v A-G Can.* [1930] AC 124 at 136.

⁵⁷⁶ *Bell ExpressVu* at para. 62.

with the intentions of the statute, that the courts need to resort to external interpretive aids’ (emphasis in *Bell ExpressVu*).⁵⁷⁷ Thus, in order to determine whether circumstances of genuine ambiguity exist, it is necessary first to determine the intention of the statute, and second, to apply the modern approach to statutory interpretation. It is only when the application of this approach results in ‘differing, but equally plausible, interpretations’ (*Bell ExpressVu*) that *Charter* values may be used as an interpretive mechanism.⁵⁷⁸ Abella J. has suggested that ‘where more than one interpretation of a provision is equally plausible, *Charter* values should be used to determine which interpretation is constitutionally compliant’ (emphasis added).⁵⁷⁹

In the event that a court determines that it is appropriate to apply *Charter* values as an interpretive tool with respect to certain provisions of the *Copyright Act*, what substantive impact, if any, might this have on Canadian copyright law? In this chapter, I have described the impact of interpreting fair dealing through the lens of the purpose of copyright associated with the economic-functional approach (the current governing approach to copyright in Canada). Interpreting fair dealing in accordance with the *Charter* right to freedom of expression (should it be determined that it is appropriate to apply *Charter* values as an interpretive tool with respect to fair dealing) could lead to different outcomes (for instance a different set of fairness factors).

A second area in which explicitly referencing *Charter* values could have a substantive impact on Canadian copyright law is in the administrative law context. Both the manner in which an administrative body exercises its statutory discretion,

⁵⁷⁷ *Ibid* *CanadianOxy Chemicals Ltd v. Canada (Attorney General)* [1999] 1 SCR 743 SCC at para. 14.

⁵⁷⁸ *Bell ExpressVu* at para 62.

⁵⁷⁹ *R v Clarke* 2014 SCC 28 at para. 15.

and the standard of review applied to the decisions of administrative bodies, differ when an administrative decision-maker applies *Charter* values in the exercise of its statutory discretion than when an administrative decision-maker renders a decision in which it does not apply *Charter* values.

The leading SCC decision to address the correct approach to be taken to judicial review of decisions of administrative tribunals where *Charter* values are not at stake is *Dunsmuir v. New Brunswick*.⁵⁸⁰ As noted by Bastarache and LeBel J.J., who delivered the reasons for judgment for the majority, ‘[w]here the question is one of fact, discretion, or policy, deference will usually apply automatically’.⁵⁸¹ The question is one of reasonableness.⁵⁸² Bastarache and LeBel J.J. stated that when conducting judicial review, reviewing courts should look to whether there is ‘the existence of justification, transparency and intelligibility within the decision-making process’ as well as to ‘whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’.⁵⁸³

The SCC first addressed the related questions of the impact of the application of *Charter* values on the decision-making processes of administrative tribunals and the standard of review of those decisions in the 2012 decision of *Doré v. Barreau du Québec*.⁵⁸⁴ In this decision, Abella J. (who delivered the reasons for judgment for the Court) wrote that:

[a]n administrative decision-maker appl[ies] *Charter* values in the exercise of statutory discretion ... [by] balanc[ing] the *Charter* values with the statutory

⁵⁸⁰ *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 2008 SCC 9.

⁵⁸¹ *Ibid* at para. 53.

⁵⁸² *Ibid* at para. 46.

⁵⁸³ *Ibid* at para. 47.

⁵⁸⁴ *Doré v. Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives ... [t]hen the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives.⁵⁸⁵

Similarly, the process of judicial review differs from the approach outlined above in *Dunsmuir* when the decision-maker has applied *Charter* values. As noted by Abella J. in *Doré*:

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. ... If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.⁵⁸⁶

The Copyright Board is the primary administrative tribunal in the context of copyright. The standard of review that should be applied to decisions of the Copyright Board was most recently addressed in *Rogers Communications Inc v. Society of Composers, Authors and Music Publishers of Canada*.⁵⁸⁷ In this decision, Rothstein J., writing for the majority, affirmed that ‘correctness should be the appropriate standard of review on questions of law arising from judicial review from the Copyright Board’.⁵⁸⁸ Rothstein J. also held that ‘the Board’s application of the correct legal principles to the facts of a particular matter should be treated with deference’.⁵⁸⁹

⁵⁸⁵ Ibid at para. 56.

⁵⁸⁶ Ibid at para. 58.

⁵⁸⁷ *Rogers v. SOCAN*.

⁵⁸⁸ Ibid at para. 15.

⁵⁸⁹ Ibid at para. 20.

If it is accepted that copyright engages *Charter* values such as freedom of expression, however, the question on judicial review would not simply be whether there is ‘existence of justification, transparency and intelligibility within the decision-making process’ or ‘whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’.⁵⁹⁰ Instead, the reviewing court would need to ask whether the Copyright Board has ‘properly balanced the relevant *Charter* value’ (for instance freedom of expression) with the objectives of the *Copyright Act*.⁵⁹¹ It is possible that asking this question could lead to different outcomes.

Thus, although courts are constrained in their ability to apply *Charter* values in the context of copyright due to *Bell ExpressVu*, they are not precluded from applying *Charter* values in all contexts. As discussed above, it is possible that the application of such an approach might have a substantive impact upon Canadian copyright jurisprudence. Such a possibility should not be discounted by Canadian courts seeking to reconsider the relationship between the *Charter* right to freedom of expression and copyright.

5.6.3 Explicit challenges to the constitutionality of copyright

The third explanation given above to account for the absence of explicit engagement, by the SCC, with the *Charter* right to freedom of expression in the context of copyright, is that the SCC may have accepted that properly interpreted, the *Copyright Act* fully or adequately accommodates expression interests, and that it is

⁵⁹⁰ *Dunsmuir* at para. 47.

⁵⁹¹ *Doré* at para. 58. See Graham Reynolds, ‘Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada’s Copyright Pentalogy’ in Michael Geist (ed), *The Copyright Pentalogy* (University of Ottawa Press 2013) for a paper in which I argue that the Copyright Board, in its decision in *Alberta (Education)*, interpreted fair dealing through the lens of an author-centric approach to copyright.

therefore unnecessary to explicitly engage with the *Charter* right to freedom of expression in the context of copyright.

This explanation is based on the assumption that the *Charter* right to freedom of expression can be adequately protected through statutory interpretation alone. For several reasons, I argue that this assumption is flawed. First, the ability of Canadian courts to protect expression interests through statutory interpretation – whether informed by *Charter* values or not – is limited. Under the modern approach to statutory interpretation, for instance, courts’ interpretations of statutory provisions are constrained by the structure and wording of the legislation, as well as by the purpose of the legislation.⁵⁹² Amendments to the *Copyright Act* might modify the range of interpretive possibilities open to courts, which could in turn impact upon the degree of protection for expression interests.⁵⁹³ Furthermore, as noted above, as a result of the SCC’s decision in *Bell ExpressVu*, the ability of Canadian courts to interpret provisions of the *Copyright Act* according to *Charter* values is also limited.⁵⁹⁴

Second, in light of the SCC’s conclusion that courts may interpret provisions according to *Charter* rights only in limited circumstances, relying exclusively on statutory interpretation as the sole mechanism through which to protect expression interests, in the context of copyright, inappropriately insulates provisions of the *Copyright Act* from *Charter* scrutiny. The reason cited by the SCC for limiting the

⁵⁹² Under the prevailing approach to statutory interpretation in Canada (the modern approach to statutory interpretation) ‘the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act, and the intention of Parliament’: Driedger at p. 87.

⁵⁹³ For instance, the federal government could amend the *Copyright Act* to include a provision articulating a purpose of copyright. It could also substantively amend certain provisions of the *Copyright Act*, add additional provisions, or remove provisions currently part of the *Copyright Act*.

⁵⁹⁴ *Bell ExpressVu* at paras. 28-30.

extent to which statutory provisions can be interpreted according to *Charter* values (such as the *Charter* value of freedom of expression) is that broad application of such a principle would, as noted by Charron J. in her reasons for judgment in *R. v. Rodgers*, ‘deprive the Charter of its more powerful purpose – the determination of the constitutional validity of the legislation’.⁵⁹⁵ According to Iacobucci J. in *Bell ExpressVu*, ‘interpret[ing] all statutes such that they conformed to the *Charter*’ would strip legislatures ‘of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status’.⁵⁹⁶

The corollary of this statement is that litigants must be able to challenge statutory provisions as unreasonable limits on their *Charter* rights. If it is neither possible to ‘interpret ... statutes such that they conform[] to the *Charter*’ nor to challenge the constitutional validity of statutory provisions, then the provisions limiting *Charter* rights might themselves be ‘inflated to near absolute status’.⁵⁹⁷ As described in this thesis, however, under the governing approach to the intersection of the *Charter* right to freedom of expression and copyright as adopted by lower courts in Canada, the ability to challenge the constitutionality of provisions of the *Copyright Act* (at least on the basis that these provisions unjustifiably infringe the *Charter* right to freedom of expression) is foreclosed.

The SCC has yet to opine upon the approaches to the intersection of the *Charter* right to freedom of expression and copyright adopted by lower Canadian courts, or to comment on whether the decisions from which these approaches are

⁵⁹⁵ *R v Rodgers* [2006] 1 SCR 554, 2006 SCC 15 at para. 19.

⁵⁹⁶ *Bell ExpressVu* at para. 66.

⁵⁹⁷ *Ibid* at para. 66.

drawn are still good law. It has, however, cited *Michelin* for a different point of law, demonstrating that it is aware of this decision.⁵⁹⁸ The SCC's silence with respect to the intersection of the *Charter* right to freedom of expression and copyright could be due to a lack of opportunity to address these questions. However, among other reasons, it could also be attributed to the SCC's acceptance of the idea that statutory interpretation, in the context of copyright, adequately or fully protects the *Charter* right to freedom of expression. To the extent that this idea underlies the SCC's approach to the intersection of the *Charter* right to freedom of expression and copyright, I argue that it merits reconsideration.

5.7 Conclusion

In this chapter, I have explored the approach adopted by the SCC to the intersection of the *Charter* right to freedom of expression and copyright, arguing that this approach is ripe for reconsideration. In reliance on the fair dealing provisions of the *Copyright Act* as my case study, I argued first that one result of the SCC's post-2002 copyright jurisprudence has been to significantly expand protection for the expression interests of non-copyright owning parties, at the expense of copyright owners' rights.

Despite this result, however, the SCC has yet to explicitly engage with the *Charter* right to freedom of expression and copyright. I provided several explanations for the absence of explicit discussion of the *Charter* right to freedom of expression in the context of the SCC's copyright decisions. First, I argued that this absence of explicit discussion could be explained, in part, on the basis that fair dealing, as interpreted by the SCC, reflects and is embedded within the economic-functional approach to copyright, as opposed to existing as a stand-alone 'freedom of

⁵⁹⁸ See *Théberge* at paras. 46 and 73.

expression’ defence. Second, I noted that the ability of courts to interpret provisions of the *Copyright Act* in light of *Charter* values is limited by the SCC’s determination in *Bell ExpressVu* that statutory provisions should only be interpreted in accordance with *Charter* values in circumstances of ‘genuine ambiguity’.⁵⁹⁹ Third, I suggested that the absence of explicit discussion of freedom of expression in the context of the SCC’s post-2002 copyright jurisprudence could be interpreted as the SCC having accepted that, interpreted correctly (through the lens of the purpose of copyright, as re-articulated by the SCC), the *Copyright Act* either fully or adequately protects the *Charter* right to freedom of expression.

However, although these explanations may account – at least in part – for the absence of explicit engagement, by the SCC, with the *Charter* right to freedom of expression in the context of its post-2002 copyright jurisprudence, they do not justify continued non-engagement by the SCC with the *Charter* right to freedom of expression in all contexts relating to copyright. As I have demonstrated, relying exclusively on statutory interpretation as the mechanism through which to protect the *Charter* right to freedom of expression in the context of copyright – particularly in light of the SCC’s determination that statutory provisions may be interpreted according to *Charter* rights only in limited circumstances – fails to adequately protect this right. To the extent to which the SCC’s approach to the intersection of the *Charter* right to freedom of expression and copyright is based on the assumption that the *Charter* right to freedom of expression can be adequately protected, in the context of copyright, through statutory interpretation alone, this approach must be reconsidered.

⁵⁹⁹ *Bell ExpressVu* at paras. 28-30.

6. THE INTERSECTION OF FREEDOM OF EXPRESSION AND COPYRIGHT: THE CANADIAN APPROACH IN ITS INTERNATIONAL CONTEXT

6.1 Introduction

In *Grant v. Torstar Corp (Grant)*, the SCC expanded the scope of protection for freedom of expression interests in the context of the law of defamation by ‘recogniz[ing] a defence of responsible communication on matters of public interest’.⁶⁰⁰ One of the two arguments that had been presented in support of the adoption of this defence was grounded in an analysis of case law from other common law jurisdictions. As McLachlin C.J. summarized in her reasons for judgment for an 8-1 majority in *Grant*, ‘[t]his argument points out that many foreign common law jurisdictions have modified the law of defamation to give more protection to the press’ and that ‘[w]hile different countries have taken different approaches, the trend is clear. The time has arrived, it is argued, for this Court to follow suit’.⁶⁰¹

In this chapter, I make a similar argument. Courts in three countries previously cited by the SCC in the context of its freedom of expression and/or its copyright jurisprudence – the United States of America (US), the United Kingdom (UK), and South Africa (SA) – have explicitly considered the intersection of freedom of expression and copyright. This represents a clear trend towards engagement, by leading national courts, with this intersection. I argue that the time has arrived for the SCC to follow suit and to itself explicitly engage with the intersection of the *Charter* right to freedom of expression and copyright.

⁶⁰⁰ *Grant v. Torstar Corp.* 2009 SCC 61 at para. 7.

⁶⁰¹ *Ibid* at para. 40.

I will begin by discussing the SCC's history of reasoning comparatively in the context of both its freedom of expression and its copyright jurisprudence. Given this history, it is likely that when the SCC considers the intersection of the *Charter* right to freedom of expression and copyright, it will look for assistance to the decisions of other leading courts in this area. I will then proceed by outlining the approaches adopted by US, UK, and SA courts to the intersection of freedom of expression and copyright. In the final substantive section of this chapter, I will examine, in detail, the extent to which the approaches to the intersection of freedom of expression and copyright adopted by US, UK, and SA courts might be of assistance to Canadian courts in reconsidering this intersection.

I will argue that although elements of the approach of at least one of these jurisdictions to the intersection of freedom of expression and copyright (SA) may prove useful for Canadian courts re-examining this intersection, due to significant differences between Canada and the jurisdictions noted above, Canadian courts must not uncritically accept the specific approaches to this intersection adopted by US, UK, or SA courts. Rather, what is required is for the SCC to develop an approach to the intersection of the *Charter* right to freedom of expression and copyright that although informed by decisions from comparator jurisdictions, is rooted in the Canadian constitutional, jurisprudential, and legislative context.

6.2 The SCC's propensity to reason comparatively in the contexts of copyright and freedom of expression

The SCC, particularly in its post-2002 copyright jurisprudence, has consistently referenced the copyright legislation and jurisprudence of other countries in determining how the provisions of the *Copyright Act* should be interpreted and

applied.⁶⁰² Decisions of foreign courts and/or foreign copyright legislation have been referenced in 11 of the 14 copyright cases decided by the SCC between 2002 and 2015 (79%).⁶⁰³ The country the legislation and jurisprudence of which has been referenced most often by the SCC in its post-2002 copyright jurisprudence is the US. US jurisprudence or legislation has been referenced in 10 of the 14 copyright cases decided by the SCC between 2002 and 2015 (inclusive) (71%).⁶⁰⁴ While in several cases the SCC found US jurisprudence helpful in articulating its approach to a specific provision of the *Copyright Act*,⁶⁰⁵ in other decisions, the SCC found US jurisprudence to be irrelevant to the issue before it (primarily on the basis of differences between US and Canadian copyright legislation).⁶⁰⁶

⁶⁰² For general discussion about the extent to which Canadian courts rely upon foreign decisions, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) and Sir Basil Markesinis and Dr. Jörg Fedtke, *Judicial Recourse to Foreign Law* (Routledge 2006).

⁶⁰³ The 11 copyright cases decided between 2002 and 2015 in which decisions of foreign courts and/or foreign legislation were cited are: *Théberge*, *SOCAN v CAIP*, *CCH SCC*, *Robertson*, *Euro-Excellence*, *ESA*, *Rogers v. SOCAN*, *SOCAN v. Bell*, *Re:Sound*, *Alberta (Education)*. The three SCC copyright decisions handed down between 2002 and 2015 in which decisions and/or legislation of foreign courts was not cited are: *Desputeaux*, *Reference re: Broadcasting Act*, and *Canadian Artists' Representation v. National Gallery of Canada* 2014 SCC 42.

⁶⁰⁴ The ten copyright decisions handed down by the SCC between 2002 and 2015 in which US jurisprudence and/or legislation was referenced are: *Théberge* at paras. 66, 67, and 70-72, *SOCAN v CAIP* at paras. 43 and 69-71, *CCH SCC*, *Robertson* at paras. 22-23, 53, *Euro-Excellence ESA* at paras. 42-44, *Rogers v. SOCAN* at paras. 50-51, *SOCAN v. Bell* at para 23, and *Re:Sound* at para. 17.

⁶⁰⁵ See, for instance, *Euro-Excellence* at para. 42, in which Rothstein J. noted that 'the US and the UK copyright regimes are helpful in elucidating the Canadian approach'.

⁶⁰⁶ See, for instance, *Compo Co. Ltd. v. Blue Crest Music et al.* [1980] 1 SCR 357 SCC at p. 367, in which Estey J. wrote that 'United States court decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country.' In Tawfik, 'The Supreme Court of Canada and the "Fair Dealing Trilogy": Elaborating a Doctrine of User Rights Under Canadian Copyright Law', Tawfik contrasts the SCC's reasoning in *Harvard College v. Canada (Commissioner of Patents)* 2002 SCC 76, [2002] 4 SCR 45 and *Théberge* with its reasoning in *SOCAN v. Bell* and *Alberta (Education)*. She writes that while in the former cases the SCC espoused an 'expansive transjudicial method', in the latter decisions, '[t]here was no discussion at all about harmonizing interpretations of fair dealing with other like-minded jurisdictions. In fact, the court specifically rejected the persuasiveness of foreign decisions in its assessment of the fair dealing provisions under the Act' (Tawfik, 'The Supreme Court of Canada and the "Fair Dealing Trilogy": Elaborating a Doctrine of User Rights Under Canadian Copyright Law' at 192-193).

The US is not the only foreign jurisdiction the jurisprudence or legislation of which has been cited by the SCC in its copyright decisions. Other countries' jurisprudence or legislation referenced in Canada's post-2002 copyright jurisprudence include that of the UK (5 out of 14 decisions, or 36%),⁶⁰⁷ Australia (4 out of 14 decisions, or 29%),⁶⁰⁸ France (3 out of 14 decisions, or 21%),⁶⁰⁹ New Zealand (2 out of 14 decisions, or 14%),⁶¹⁰ and the Netherlands (1 out of 14 decisions, or 7%).⁶¹¹

The SCC's tendency to reason comparatively is not limited to its copyright jurisprudence. Among other areas, the SCC has also consistently referenced the jurisprudence of foreign courts, as well as the constitutional provisions of foreign countries, in determining how the *Charter* right to freedom of expression should be interpreted and applied. Like in the context of copyright, the country the legislation and jurisprudence of which has been cited most often by the SCC in its freedom of expression jurisprudence is the US. Beginning with the first SCC decision to address the scope of the s. 2(b) right to freedom of expression – *Retail, Wholesale and Department Store Union, Local 580 (RWDSU) v. Dolphin Delivery Ltd*, in which McIntyre J., writing for the majority of the SCC, cited Holmes J.'s dissent in *Abrams v. United States*⁶¹² – the SCC has consistently referenced US jurisprudence and the

⁶⁰⁷ See *Re:Sound* at para. 17, *Euro-Excellence* at paras. 42 and 45-48, *Théberge* at para. 12, *CCH SCC* at para. 53, and *Alberta (Education)* at para. 19.

⁶⁰⁸ See *Théberge* at paras. 69 and 71, *SOCAN v CAIP* at paras. 41, 43-44, and 73-74, *Euro-Excellence* at paras. 5 and 66, and *Re:Sound* at paras. 17, 21, 43, and 45.

⁶⁰⁹ See *SOCAN v CAIP* at para.75, *CCH SCC* at para. 20, and *Théberge* at para. 63.

⁶¹⁰ See *Théberge* at para. 71 and *Alberta (Education)* at para. 18.

⁶¹¹ See *Théberge* at para. 64.

⁶¹² *Dolphin Delivery* at para. 14, citing to *Abrams v United States* 250 US 616 (1919) SCOTUS at p. 630.

US Constitution in discussing the scope of s. 2(b) of the *Charter*.⁶¹³ The SCC has also cited, on numerous occasions in the context of its jurisprudence on the s. 2(b) right to freedom of expression, to either the European Court of Human Rights (ECtHR) or the European Convention on Human Rights and Fundamental Freedoms (ECHR);⁶¹⁴ to decisions from the UK;⁶¹⁵ and to decisions and legislation from SA;⁶¹⁶ among other jurisdictions.

Given the SCC's history of looking for assistance to the legislation and jurisprudence of other countries in interpreting both the provisions of the *Copyright Act* and the scope of the *Charter* right to freedom of expression, and its expressed concern – at least in the context of defamation – with keeping pace with international trends in the area of constitutional law, it is important, in the context of a project that explores the intersection of freedom of expression and copyright in Canada, to consider the approaches adopted by comparator jurisdictions to this intersection. In

⁶¹³ See, for instance, *Dolphin Delivery* at para. 14, *Ford v. Quebec* [1988] 2 SCR 712 at paras. 46-47 and 50, *Irwin Toy* at para. 41, *Moysa v Alberta (Labour Relations Board)* [1989] 1 SCR 1572 at para. 7, *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 SCR 1326 at paras. 7 and 56-57, *Reference re: 193* at paras. 34-37 and 51-54, *Rocket* at paras. 16, 18, 31, 37, and 45, *Keegstra* at paras. s. 47-57, *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 SCC at paras. 117 and 177, *Commonwealth* at paras. 3-10, 62, 70-72 et al, *Vickery v. Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671 at paras. 27-28, 48-76 et al, *Osborne v. Canada (Treasury Board)* [1991] 2 SCR 69 at paras. 87-89, *Lavigne* at 80-82, 90-92, et al, *Canadian Broadcasting Corp. v. Lessard* [1991] 3 SCR 421 at paras. 4, 23, and 72, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1991] 3 SCR 459 at paras. 41-43, *Zundel* at paras. 22 et al, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at paras. 193-198, *Ramsden* at paras. 41-42, *Bou Malhab v. Diffusion Métromédia CMR inc.* 2011 SCC 9 at para. 20, 63-64, and 72, *Crookes v. Newton* [2011] 3 SCR 269 at paras. 28 and 84, *Whatcott* at para. 103, among a number of other decisions.

⁶¹⁴ See *BCGEU* at paras. 24 and 39, *Ford* at paras. 41 and 44, *Edmonton Journal* at paras. 34, 85, 91, and 93, *Keegstra* at paras. 71-73, *Commonwealth* at para. 167, *R v Butler* [1992] 1 SCR 452 at para. 154, *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835 at para. 177, *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877 SCC at para. 83, *Canada (Attorney General) v. JTI-Macdonald Corp.* 2007 SCC 30 at para. 36, *WIC Radio Ltd. v. Simpson* 2008 SCC 40 at para. 20, *R v. National Post* 2010 SCC 16, [2010] 1 SCR 477 at paras. 66-68, *Bou Malhab v. Diffusion Métromédia CMR inc.* at para. 20.

⁶¹⁵ See *Dagenais* at paras 168 and 177, *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130 at para. 134, *WIC Radio* at para. 49, *Grant* at paras. 69-76, *R v. National Post* at paras. 47-48 et al, and *Crookes* at para. 115.

⁶¹⁶ See *Grant* at paras. 82-84, and *R v. National Post* at para. 114.

the following section, I will introduce the approaches adopted by US, UK, and SA courts to the intersection of freedom of expression and copyright.

6.3 The intersection of freedom of expression and copyright: the experience of US, UK, and SA courts

6.3.1 United States

In the US, freedom of speech is protected under the First Amendment to the US Constitution. This Amendment, ratified in 1791 (four years after the US Constitution was written), states that ‘[c]ongress shall make no law ... abridging the freedom of speech’.⁶¹⁷ In addition to providing protection for freedom of speech, the US Constitution also empowers Congress to pass copyright laws. This authority is provided for in Article 1, Section 8 of the US Constitution (frequently referred to as the Copyright Clause or as the Patent Copyright Clause), in which it is stated that ‘[t]he Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.⁶¹⁸ Despite the apparent tension between the First Amendment and the Copyright Clause, however, the relationship between these clauses received limited attention from US courts and commentators during the 18th, 19th, and much of the 20th centuries.

The first US Supreme Court decision to address the intersection of the First Amendment and copyright, *Harper & Row v. Nation Enterprises*, was handed down in 1985.⁶¹⁹ This decision dealt with a ‘purloined manuscript’ of former President Gerald R. Ford’s autobiography that had been provided to the Nation Magazine (the

⁶¹⁷ US Const, amend I.

⁶¹⁸ Copyright Clause.

⁶¹⁹ *Harper & Row*.

Nation) by an ‘undisclosed source’.⁶²⁰ Approximately 300 words from the Ford autobiography were incorporated by the Nation into an article entitled ‘The Ford Memoirs – Behind the Nixon Pardon’.⁶²¹ The Nation timed the publication of this piece ‘to “scoop” an article scheduled shortly to appear in Time Magazine’.⁶²² As a result of the publication of the Nation’s article, Time Magazine canceled their agreement to ‘purchase the exclusive right to print prepublication excerpts from ... Harper & Row’.⁶²³ Time Magazine sued the Nation for copyright infringement, among other causes of action. In their defence relating to the copyright infringement action, the Nation argued that consideration of First Amendment values should lead their unauthorized use to be considered a fair use.

O’Connor J. (who delivered the majority opinion) rejected this argument. In so doing, she also spoke more generally about the intersection of the First Amendment and the *Copyright Act*, noting that ‘copyright’s idea/expression dichotomy “strike[s] a definitional balance between the First Amendment and the *Copyright Act* by permitting free communication of facts while still protecting an author’s expression”’.⁶²⁴ Most prominently associated with Melville Nimmer’s seminal article ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’, published in 1970, the principle of definitional balancing forms the core of the US Supreme Court approach to the intersection of freedom of expression and copyright.⁶²⁵

⁶²⁰ Ibid at 542.

⁶²¹ Ibid at 542.

⁶²² Ibid at 543.

⁶²³ Ibid at 542.

⁶²⁴ Ibid at 556.

⁶²⁵ Nimmer. See also Sobel.

Nimmer proposed the technique of definitional balancing as a solution to the challenge posed by the language of the First Amendment (which states that ‘Congress shall make no law abridging freedom of speech or of the press’) to the existence of copyright legislation (which restricts the ability of individuals to express themselves using copyrighted works). Under this approach, as noted by Nimmer, the First Amendment and copyright are largely seen as ‘mutually supportive’ as opposed to ‘contradictory’.⁶²⁶

Consistent with Nimmer’s view that copyright supports and does not conflict with freedom of expression, O’Connor J. wrote that by providing an ‘economic incentive to create and disseminate ideas’, and by creating a ‘marketable right to the use of one’s expression’, copyright ‘is the engine of free expression’.⁶²⁷ O’Connor J. also noted that copyright also supports the First Amendment in that it protects the ‘right’ of individuals ‘not to speak’.⁶²⁸

The next US Supreme Court decision in which the intersection of the First Amendment and copyright was addressed was *Eldred v. Ashcroft*, a 2003 decision that considered the constitutionality of aspects of the *Sonny Bono Copyright Term Extension Act* (CTEA).⁶²⁹ The CTEA extended the period of copyright protection for ‘most copyrights’ (including in existing and future works) from the life of the author plus 50 years to the life of the author plus 70 years.⁶³⁰ Among other arguments, the Petitioners (led by Lawrence Lessig) argued that ‘in enlarging the term for published

⁶²⁶ Nimmer at 1180-1181.

⁶²⁷ *Harper & Row* at 558.

⁶²⁸ *Ibid* at 560-561.

⁶²⁹ *Eldred*; Sonny Bono Copyright Term Extension Act, Tit. I, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998), codified at 17 U.S.C. §§302-04.

⁶³⁰ *Eldred* at 193.

works with existing copyrights’, ‘the CTEA fails constitutional review under ... the First Amendment’s free speech guarantee’.⁶³¹

Ginsburg J. rejected this argument. First, she noted that the fact that the ‘Copyright Clause and First Amendment were adopted close in time ... indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles’;⁶³² second, citing to the passage of *Harper & Row* that described copyright as the ‘engine of free expression’, Ginsburg J. noted that the purpose of copyright ‘is to promote the creation and publication of free expression’;⁶³³ third, Ginsburg J. accepted that a ‘definitional balance’ exists ‘between the First Amendment and the Copyright Act’, noting that ‘copyright law contains built-in First Amendment accommodations’ (or ‘safeguards’) such as the idea/expression dichotomy and fair use, and holding that the CTEA ‘itself supplements these traditional First Amendment safeguards’ through the inclusion of additional exceptions to copyright infringement;⁶³⁴ fourth, Ginsburg J. stated that ‘[t]he First Amendment securely protects the freedom to make – or to decline to make – one’s own speech’ and that ‘it bears less heavily when speakers assert the right to make other people’s speeches’;⁶³⁵ and finally, Ginsburg J. held that it is incorrect to state that ‘copyrights [are] “categorically immune from challenges under the First Amendment”’ (as a court of appeal had held) but that ‘when...Congress has not

⁶³¹ Ibid at 193.

⁶³² Ibid at 219.

⁶³³ Ibid at 219.

⁶³⁴ Ibid at 220.

⁶³⁵ Ibid at 221.

altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary’.⁶³⁶

The most recent US Supreme Court decision to address the intersection of copyright and the First Amendment is *Golan v. Holder*, a 2012 decision that addressed the question of whether ‘§ 514 of the Uruguay Round Agreements Act (URAA), which granted copyright protection to preexisting works of Berne member countries that were protected in their country of origin, but that lacked protection in the United States’ violated the First Amendment.⁶³⁷ Ginsburg J., who delivered the opinion of the Court, found that it did not. In her decision, Ginsburg J. re-stated many of the points noted above in *Eldred* (referring to it as a ‘pathmarking decision’).⁶³⁸ As well, noting that ‘some restriction on expression is the inherent and intended effect of every grant of copyright’, Ginsburg J. built on her opinion in *Eldred* by describing fair use as the second ‘traditional contour’ in copyright.⁶³⁹

6.3.2 United Kingdom

Prior to the coming into force of the Human Rights Act 1998 (HRA 1998) in 2000, as noted by Eric Barendt, fundamental rights like freedom of expression ‘used to be of only uncertain common law status’ in the UK.⁶⁴⁰ Following the coming into force of the HRA 1998, however, as Barendt writes, ‘the right to freedom of expression guaranteed by Article 10 of the [ECHR] ... is protected by law in the

⁶³⁶ Ibid at 221.

⁶³⁷ *Golan* at 878.

⁶³⁸ Ibid at 889.

⁶³⁹ Ibid at 890.

⁶⁴⁰ Eric Barendt, ‘Freedom of Expression in the United Kingdom Under the Human Rights Act 1998’ (2008) 2008 NZ L Rev 243 at 243; Human Rights Act 1998.

United Kingdom’, and ‘[c]ourts must, if possible, interpret legislation compatibly with that right’.⁶⁴¹

Article 10 of the ECHR provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁶⁴²

Section 12 of the HRA 1998 requires UK courts to ‘have particular regard to the importance of the Convention right to freedom of expression’.⁶⁴³

In addition to providing protection for freedom of expression, the ECHR also provides protection – through Article 1 of Protocol 1 to the ECHR – for property rights. This Article states that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems

⁶⁴¹ Barendt, ‘Freedom of Expression in the United Kingdom Under the Human Rights Act 1998’ at 243-244; see, for instance, HRA 1998 at s. 3(1), in which it is stated that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’

⁶⁴² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) at art. 10.

⁶⁴³ HRA 1998 at s. 12.

necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁶⁴⁴

In *Anheuser-Busch Inc v. Portugal*, the ECtHR confirmed that Article 1, Protocol 1 applies to intellectual property.⁶⁴⁵

The first decision to address the issue of whether provisions of the UK's copyright legislation (the Copyright, Designs and Patents Act 1998 (CDPA)) comply with the ECHR following the coming in force of the HRA 1998 was *Ashdown v. Telegraph Group Ltd.*⁶⁴⁶ Paddy Ashdown was 'a member of Parliament and the former leader of the Liberal Democrats'.⁶⁴⁷ On 21 October 1997 Ashdown attended a meeting with Prime Minister Blair at which a high level discussion was held 'concerning a coalition cabinet comprising members of the Labour Party and of the Liberal Democrats'.⁶⁴⁸ An avid diarist, Ashdown 'dictated a minute of that meeting ('the Minute') [which was] ... typed by his secretary and checked by [Ashdown]'.⁶⁴⁹ A copy of this minute was added to Ashdown's diary. Following a BBC interview at which Ashdown both disclosed that the high level discussion noted above had occurred and 'referred to his diaries and the possibility of publishing them', a copy of the Minute was provided, without Ashdown's knowledge, to the political editor of the Sunday Telegraph.⁶⁵⁰ The Sunday Telegraph then published articles that

⁶⁴⁴ Protocol 1 at art 1.

⁶⁴⁵ *Anheuser-Busch*.

⁶⁴⁶ *Ashdown*; CDPA 1988.

⁶⁴⁷ *Ashdown v. Telegraph Group* [2001] EWHC Ch 28 at para. 1.

⁶⁴⁸ *Ibid* at para. 2.

⁶⁴⁹ *Ibid* at para. 1.

⁶⁵⁰ *Ibid* at para. 2.

‘incorporated substantial sections of the Minute both in direct quotation and paraphrase’.⁶⁵¹

Ashdown sued the Sunday Telegraph for copyright infringement. As part of its defence, the Sunday Telegraph argued that the CDPA’s provisions should be interpreted and applied so as to give effect to Article 10 of the ECHR.⁶⁵² In the England and Wales High Court (Chancery Division), the Vice-Chancellor held that ‘there is no defence to the copyright claim with any reasonable prospect of success’.⁶⁵³ The Vice-Chancellor’s order was appealed to the England and Wales Court of Appeal (EWCA).

Lord Phillips, who delivered the reasons for judgment for the EWCA in this decision, stated that ‘in most circumstances’, the CDPA ‘sufficiently protect[s]’ freedom of expression.⁶⁵⁴ However, he noted that:

rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the *Copyright Act* [CDPA], notwithstanding the express exceptions to be found in the *Act*. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the *Act* in a manner that accommodates the right of freedom of expression.⁶⁵⁵

Lord Phillips suggested that one way through which UK courts could apply the CDPA in a manner that accommodates the right to freedom of expression is by ‘declining the discretionary relief of an injunction’.⁶⁵⁶ Should courts choose to grant

⁶⁵¹ Ibid at para. 3.

⁶⁵² Ibid at para. 5.

⁶⁵³ Ibid at para. 38.

⁶⁵⁴ *Ashdown* at para 39.

⁶⁵⁵ Ibid at para 39. See also *Twentieth Century Fox Film Corporation and others v British Telecommunications plc* [2011] EWHC 1981 (Ch).

⁶⁵⁶ *Ashdown* at para. 46.

this remedy, defendants could still be required to pay damages, although they would not be barred from future use of the copyrighted work. Echoing Nimmer's discussion, in 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?', of a limited exception to copyright infringement relating to news photographs,⁶⁵⁷ Lord Phillips stated that '[f]reedom of expression should not normally carry with it the right to make free use of another's work', and that where one party 'considers it necessary to copy the exact words created by another', that they should either account for profits made through unauthorized use of the work, or indemnify the copyright owner of any losses.⁶⁵⁸

In addition to declining to grant an injunction, Lord Phillips suggested that a second way through which courts could apply the CDPA in a manner that accommodates the right to freedom of expression is through the application of the public interest defence codified under s. 171(3) of the CDPA, stating that 'in those rare cases where [freedom of expression]... trumps the rights conferred by the *Copyright Act* ... s. 171(3) of the *Act* permits the defence of public interest to be raised'.⁶⁵⁹

A third way through which UK courts have applied the CDPA in a manner that accommodates freedom of expression is by indicating that fair dealing categories are to be given a liberal interpretation. In *SAS Institute v. World Programming Limited*, for instance (decided post-*Ashdown*), Arnold J. noted the need to interpret fair dealing categories liberally, indicating that the judicially-imposed requirement to give fair dealing categories a liberal interpretation 'was reinforced by the

⁶⁵⁷ Nimmer at 1197-1200.

⁶⁵⁸ *Ashdown* at para. 46.

⁶⁵⁹ *Ibid* at para. 59.

requirement in s. 3 of the Human Rights Act 1998 to construe legislation compatibly with the right of freedom of speech under art 10 of the European Convention on Human Rights'.⁶⁶⁰

Applicants found to have committed copyright infringement by UK courts, once they have exhausted all domestic remedies, may apply to the ECtHR. The ECtHR (a specialist human rights tribunal), should it determine that the application is admissible, will determine whether the impugned provisions of the UK's copyright legislation unjustifiably infringe the right to freedom of expression guaranteed under Article 10 of the ECHR. The first two cases to address the intersection of freedom of expression and copyright decided by the ECtHR were handed down in 2013: *Ashby Donald and others v. France*, and *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*.⁶⁶¹ In both cases, it was held that the impugned provisions of the copyright acts in question infringed Article 10(1), but that the infringements were justified under Article 10(2). Based on s. 2(1)(a) of the HRA 1998, UK courts will be required to take account of these decisions in any future cases involving the intersection of freedom of speech under Article 10 of the ECHR and copyright.⁶⁶²

6.3.3 South Africa

Both freedom of expression and property are protected in Chapter 2 of the Constitution of the Republic of South Africa (South Africa's Bill of Rights) (SA Bill

⁶⁶⁰ *SAS* at para. 325. See also *Pro Sieben Media AG v Carlton UK Television Ltd and another* [1998] All ER (D) 751.

⁶⁶¹ *Ashby Donald et autres c. France* no 36769/08 ECHR, *Neij and Sunde Kolmisoppi v Sweden* (dec), no 40397/12 ECHR.

⁶⁶² HRA 1998 at s. 2(1)(a).

of Rights).⁶⁶³ Freedom of expression is protected under Article 16, which provides that:

- 16(1) Everyone has the freedom of expression, which includes:
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research
- (2) The right in subsection (1) does not extend to:
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁶⁶⁴

The protection of property is addressed in Article 25 of the SA Bill of Rights. Article 25(1) notes that ‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.⁶⁶⁵

Article 36 of the SA Bill of Rights sets out the contexts in which rights protected in the Bill of Rights can be limited. This Article indicates that:

- 36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.⁶⁶⁶

⁶⁶³ The Bill of Rights of the Constitution of the Republic of South Africa (1996) Government Gazette (No 17678).

⁶⁶⁴ Ibid at art. 16.

⁶⁶⁵ Ibid at art. 15(1).

⁶⁶⁶ Ibid at art. 36.

The Constitutional Court of South Africa (CCSA) has discussed the intersection of freedom of expression and copyright in one decision, *Laugh it Off Promotions CC v. South African Breweries International (Laugh it Off)*.⁶⁶⁷ This decision dealt with the relationship between freedom of expression and trademarks law (specifically the provision in SA's *Trade Marks Act* that addresses trademark dilution through tarnishment (s. 34(1)(c))).⁶⁶⁸ In the context of this decision, however, the intersection of freedom of expression and copyright (or freedom of expression and intellectual property rights) was referenced on multiple occasions.

South African Breweries International (SABI) is 'a trader largely of alcoholic and also of non-alcoholic beverages' that 'holds, manages, maintains, and controls the use of a range of trade marks throughout the world', including the CARLING BACK LABEL trade marks.⁶⁶⁹ *Laugh it Off Promotions CC (Laugh it Off)*, as noted by Moseneke J. of the CCSA (who delivered the reasons for judgment for the majority) is:

a close corporation that occupies itself with the appropriation of brands which inhere in well-known trade marks. This it does by altering the images and words on trade marks and printing them onto T-shirts. The applicant sells the T-shirts for profit in order to make social comment.⁶⁷⁰

As noted by Moseneke J., *Laugh it Off* produced and offered for sale T-shirts:

which bore a print that was markedly similar, in lettering, colour scheme and background, to that of the respondent's CARLING BLACK LABEL trade marks. The only real difference was in the wording. The words 'Black Label' on the respondent's registered trade marks were replaced, on

⁶⁶⁷ *Laugh it Off CCSA*.

⁶⁶⁸ Trade Marks Act 1993 (Act No. 194 of 1993) at s. 34(1)(c).

⁶⁶⁹ *Laugh it Off CCSA* at para. 7.

⁶⁷⁰ *Ibid* at para. 4.

the T-shirt, with ‘Black Labour’; the respondent’s ‘Carling Beer’ was substituted with ‘White Guilt’; and where written ‘America’s lusty lively beer’ and ‘enjoyed by men around the world’, the applicant had printed ‘Africa’s lusty lively exploitation since 1652’ and ‘No regard given worldwide’, respectively.⁶⁷¹

SABI brought an action alleging that Laugh it Off’s use of its marks constituted trademark infringement. Laugh it Off raised, as a defence to the use of the trademarks, that ‘it was exercising freedom of expression entrenched in section 16(1) of the Constitution’.⁶⁷² It did not challenge the constitutional validity of the relevant provision of the *Trade Marks Act* (s. 34(1)(c)). The High Court found that Laugh it Off had infringed SABI’s trademarks.⁶⁷³ The SCA granted leave to appeal, and subsequently dismissed Laugh it Off’s appeal.⁶⁷⁴ The CCSA (with Moseneke J. delivering the reasons for judgment for the majority) allowed the appeal.

Moseneke J. wrote that ‘[i]t is trite that under our constitutional democracy, the requirements of [statutory provisions]... ought to be understood through the prism of the Constitution and specifically that of the free expression guarantee’.⁶⁷⁵ Moseneke J. also noted that ‘[t]he injunction to construe statutes consistent with the Constitution means that, where reasonably possible, the court is obliged to promote the rights entrenched by it’; and that ‘[w]e are obliged to delineate the bounds of the constitutional guarantee generously’.⁶⁷⁶

On the basis of these interpretive principles, Moseneke J. held that:

⁶⁷¹ Ibid at para. 8.

⁶⁷² Ibid at para. 12.

⁶⁷³ *SAB International t/a Sabmark International v Laugh It Off Promotions* [2003] 2 All SA 454.

⁶⁷⁴ *Laugh it Off Promotions CC v. South African Breweries International* [2004] ZASCA 76, [2004] 4 All SA 151 SCA.

⁶⁷⁵ *Laugh it Off CCSA* at para. 44.

⁶⁷⁶ Ibid at para. 47.

in a claim under section 34(1)(c), a party that seeks to oust an expressive conduct protected under the Constitution must, on the facts, establish a likelihood of substantial economic detriment to the claimant's mark. ... In an open democracy valuable expressive acts in public ought not to be lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the mark itself.⁶⁷⁷

Moseneke J. then held, on the basis that 'no likelihood of economic prejudice has been established', that the production and commercial distribution, by Laugh it Off, of the 'black labour' t-shirts described above, did not constitute trademark dilution through tarnishment.⁶⁷⁸

6.4 To what extent might the approaches to the intersection of freedom of expression and copyright adopted by US, UK, and SA courts be of assistance to Canadian courts reconsidering the intersection of the *Charter* right to freedom of expression and copyright?

As described in Chapter 4, the intersection of freedom of expression and copyright in each jurisdiction is shaped in large part by the approaches to freedom of expression, and to copyright, adopted by courts in that jurisdiction. Thus, in examining the question of the extent to which the approaches adopted by US, UK, and SA courts to the intersection of freedom of expression and copyright might be of assistance to Canadian courts reconsidering this intersection, it is necessary to explore whether and the extent to which these approaches rely upon conceptions of freedom of expression, and of copyright, that are consistent with the governing approaches to these rights in Canada.

In addition to exploring this issue, I will also discuss several other factors that impact upon the approach to the intersection of freedom of expression and copyright

⁶⁷⁷ Ibid at para. 56.

⁶⁷⁸ Ibid at para. 65. Sachs J., who delivered a concurring judgment, critiqued the judgment of the Supreme Court of Appeal (SCA) for 'over-emphasiz[ing] the fact that the T-shirts were sold at a profit' and for 'g[iving] far too little regard to the uniquely expressive weight of the parodic form used' (ibid at para. 75). Sachs J. stated that the result of so doing was to 'inappropriately ... allow what were tenuous property interests to outweigh substantial expression rights' (ibid at para. 75).

adopted in any jurisdiction, namely the questions of whether and the extent to which property is granted constitutional protection, as well as applicable principles of constitutional interpretation.

6.4.1 US jurisprudence

As I will demonstrate, the approach adopted by the US Supreme Court to the intersection of freedom of expression and copyright evokes approaches to freedom of expression, and to copyright, that although once valid in Canada have since been abandoned by the SCC (namely the definitional conception of freedom of expression and the author-centric approach to copyright).⁶⁷⁹ Thus, the adoption, by a Canadian court, of the approach to the intersection of freedom of expression and copyright as articulated by the US Supreme Court would inappropriately re-incorporate, into Canadian jurisprudence, these now-abandoned approaches to freedom of expression to and copyright. As a result, despite the frequency with which the SCC has looked to decisions of US courts in the context of both its copyright and its freedom of expression jurisprudence, the approach to the intersection of freedom of expression and copyright adopted by the US Supreme Court is of minimal assistance to Canadian courts reconsidering this intersection.

In a number of ways, the US Supreme Court's decisions addressing the intersection of the First Amendment and copyright evoke aspects of the definitional conception of freedom of expression, an approach that – as detailed in Chapter 4 – has been rejected by the SCC in favour of a broad rights approach. First, in a manner similar to a number of Canadian decisions described in greater depth in Chapters 3 and 4 such as *Canadian Tire, Michelin, and Corporation Sun Média*, the US Supreme Court portrays freedom of expression (or speech), in the context of

⁶⁷⁹ See Chapters 2 and 4 for detailed discussions of these approaches to freedom of expression and to copyright.

copyright, as protecting the ability of individuals to disseminate ideas and information.⁶⁸⁰

In *Harper & Row*, for instance, O'Connor J. cited with authority to Nimmer's treatise on copyright for the proposition that '[c]opyright laws are not restrictions on freedom of speech, as copyright protects only form of expression, and not the ideas expressed'.⁶⁸¹ As noted above, in the US, this view of the relationship between freedom of expression and copyright is rooted in the technique of definitional balancing proposed by Nimmer in his 1970 article 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?'.⁶⁸²

Adopted by the US Supreme Court in *Harper & Row*, this view of the scope of freedom of speech (as protecting ideas, and not expression), in the context of copyright, was affirmed by the US Supreme Court in both *Eldred* and *Golan*.⁶⁸³ Under this approach to freedom of expression, given that copyright disclaims the protection of ideas, copyright and freedom of expression are not in tension. Thus, there is no justification (at least from a freedom of expression perspective) for the use of another's copyrighted works. The party making unauthorized use of copyrighted works could (and should) simply express their idea in a different manner (one that does not make unauthorized use of copyrighted works).⁶⁸⁴

⁶⁸⁰ See, for instance: *Canadian Tire; Michelin; Sun*. In Canada, as described in Chapter 4, this approach approximates the degree of protection of freedom of expression under the common law and the Canadian Bill of Rights. It is inconsistent with the governing approach to freedom of expression in Canada, under which any attempt to convey meaning constitutes expression and is prima facie protectable.

⁶⁸¹ *Harper & Row* at 470.

⁶⁸² Nimmer.

⁶⁸³ *Harper & Row, Eldred, Golan*.

⁶⁸⁴ Eric Barendt, in Barendt, 'Copyright and Free Speech Theory' at 28, argues that '[t]he approach of the Supreme Court in *Eldred*, as in *Harper & Row*, can only be explained in terms of its unwillingness to accept that copiers' free speech rights are engaged'.

In *Harper & Row*, the possible tension between freedom of expression and copyright is eliminated entirely through the application of the idea/expression dichotomy, the principle through which copyright protects only the expression of ideas (or information), and not ideas (or information) themselves. Support for this statement can be found in the part of the majority opinion in *Harper & Row* in which O'Connor J. declined to expand fair use on the basis of 'the First Amendment protections already embodied in the *Copyright Act's* distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded to fair use'.⁶⁸⁵

While it is possible to interpret this statement as indicating that fair use is a 'First Amendment protection[]', it is also possible to interpret the US Supreme Court, in *Harper & Row*, as indicating that the idea/expression and the fact/expression dichotomies constitute 'First Amendment protections', and that fair use supplements these protections without itself being required by the First Amendment. Consistent with the latter interpretation is a statement by Nimmer from his 1970 article 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?', in which he:

suggest[s] that a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment. The scope and extent of fair use falls within the discretion of Congress. The limitations of the first amendment are imposed upon Congress itself.⁶⁸⁶

⁶⁸⁵ *Harper & Row* at 560.

⁶⁸⁶ Nimmer at 1200.

In later decisions, however, the US Supreme Court describes fair use as a ‘First Amendment accommodation[]’ (*Eldred*, later cited in *Golan*),⁶⁸⁷ a ‘traditional First Amendment safeguard[]’ (*Eldred*),⁶⁸⁸ and part of the ““traditional contours” of copyright protection’ (*Golan*) (along with the idea/expression dichotomy).⁶⁸⁹ The US Supreme Court in *Golan* cites to both *Eldred* and *Harper & Row* as authorities for the proposition that fair use is a First Amendment accommodation.⁶⁹⁰

Rejecting the US District Court of Appeals for the District of Columbia’s conclusion *Eldred v. Reno* (citing to its judgment in *United Video*) that ‘copyrights are categorically immune from challenges under the First Amendment’ on the basis that the idea/expression dichotomy ‘give[s] adequate protection to free expression’ (a statement consistent with early articulations of the governing approach to the intersection of the *Charter* right to freedom of expression and copyright in Canada, and with my reading of *Harper & Row* above), the US Supreme Court, in *Eldred*, stated that so long as ‘Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary’.⁶⁹¹

This approach to the intersection of freedom of expression and copyright evokes the first alternative approach adopted by Teitelbaum J. in *Michelin*, under which any tension between the *Charter* right to freedom of expression and copyright is resolved by mechanisms internal to the *Copyright Act*, at least to the point that would satisfy a s. 1 analysis.

⁶⁸⁷ *Eldred* at 219, *Golan* at 890.

⁶⁸⁸ *Eldred* at 220.

⁶⁸⁹ *Golan* at 890.

⁶⁹⁰ *Ibid* at 890.

⁶⁹¹ *Eldred* at 221.

Notably, however, neither the US Supreme Court’s decisions in *Harper & Row*, *Eldred*, and *Golan*, nor Teitelbaum J.’s decision in *Michelin*, discuss why the defences set out in the US and Canadian copyright legislation are sufficient to remedy any potential conflict between these rights. The mere presence of these defences, along with the stated need to show deference to the relevant legislative body, is sufficient – in both cases – to defuse any tension between freedom of expression and copyright.

Second, in addition to largely denying the existence of conflict between copyright and freedom of expression, both US Supreme Court decisions and decisions of lower Canadian courts emphasize that not only does copyright not infringe freedom of expression, it enhances and advances it (the second alternative approach to the intersection of the *Charter* right to freedom of expression and copyright, as adopted by Canadian courts, and a key component of Nimmer’s theory of definitional balance). Referring to copyright as ‘the engine of free expression’, for instance, the US Supreme Court in *Harper & Row* wrote that ‘[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas’.⁶⁹²

Similarly, in *Michelin*, Teitelbaum J. wrote that copyright promotes freedom of expression by ‘protecting and providing an incentive for authors to create works of expression because their works will be protected under the aegis of the Copyright Act from unauthorized reproduction’.⁶⁹³ Thus, to both the US Supreme Court and

⁶⁹² *Harper & Row* at 579. The language used by McLachlin C.J. in *Cinar* at para. 23, in which she noted that the *Copyright Act* ‘seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works’ (emphasis added), evokes this statement.

⁶⁹³ *Michelin* at para. 104.

Teitelbaum J. in *Michelin*, any short term restriction on expression imposed by copyright is more than justified by its long-term benefit.

These statements are consistent with the element of the definitional conception of freedom of expression that holds that the scope of protectable expression can be defined in such a manner as to exclude certain types of expression, provided that the result is to enhance other expression. Under this approach, it is acceptable to define the scope of protectable expression in such a manner as to exclude expression, provided the result is to enhance or to provide the conditions for the flourishing of future expression. As described in Chapter 4, this aspect of the definitional conception of freedom of expression has been rejected in favour of the view through which balancing between rights mostly occurs in the context of a s. 1 analysis.

Third, in both the US Supreme Court's decisions to have addressed the intersection of freedom of expression and copyright, and lower Canadian court decisions in this area, non-copyright owning parties that express themselves using copyrighted works are presented as having engaged in low value expression. In *Eldred*, for instance, the US Supreme Court noted that '[t]he First Amendment securely protects the freedom to make--or decline to make--one's own speech; it bears less heavily when speakers assert the right to make other people's speeches'.⁶⁹⁴

The distinction highlighted by the US Supreme Court between 'one's own speech' and 'other people's speeches' is worthy of note. It evokes the statement made by Nimmer in his seminal work in this area (upon which the US Supreme Court approach to the relationship between freedom of expression and copyright was based), that '[o]ne who pirates the expression of another is not engaging in self-

⁶⁹⁴ *Eldred* at 221.

expression in any meaningful sense’ (emphasis in original).⁶⁹⁵ This quote is also consistent with the approach adopted in *Michelin*, in which Teitelbaum J. in *Michelin* portrayed the Union as a vandal (a party engaging in low value expression), rather than a party asserting a valuable expression interest.⁶⁹⁶

This is not to say that the US Supreme Court, in all instances, presents parties that use works of expression created by someone else as low value expression. The US Supreme Court’s jurisprudence on parody, for instance, is an example of one situation in which the US Supreme Court has affirmed the value of such types of expression.⁶⁹⁷ I am merely making the narrow point that in deciding how to structure the relationship between the First Amendment and copyright, the US Supreme Court (in a manner similar to the decisions of lower Canadian courts in cases such as *Michelin* and *Lorimer FCA*, as described in Chapter 4) has presented parties who express themselves using existing expression as having engaged in lower value speech – speech that does not merit freedom of expression protection to the same degree as ‘original’ speech – a characterization that supports the US Supreme Court’s view that copyright and freedom of expression are mutually supportive, and that copyright does not conflict with the First Amendment.

Above, I have described how parallels can be identified between the approach to freedom of expression adopted by the US Supreme Court in its First Amendment and copyright jurisprudence, and the approach to freedom of expression adopted by lower Canadian courts in its decisions in this area. Parallels can also be identified between the approaches to copyright adopted by both the US Supreme Court and

⁶⁹⁵ Nimmer at 1192.

⁶⁹⁶ *Michelin* at para. 103.

⁶⁹⁷ See, for instance, *Campbell*.

lower Canadian courts, in the context of decisions involving the intersection of freedom of expression and copyright. As I will demonstrate, courts in both sets of decisions can be seen as having adopted approaches to copyright that evoke the author-centric approach to copyright.

First, parallels can be identified between the purpose of copyright as articulated by the US Supreme Court in its First Amendment and copyright jurisprudence, and the purpose of copyright as reflected in the decisions of lower Canadian courts to have engaged with this intersection. This claim is perhaps surprising, given that the purpose of copyright in the US, and the purpose of copyright accepted by Canadian courts during the period in which these lower court decisions were decided, appear, at least on their faces, to be starkly different.

As described in Chapter 4, under the author-centric approach – the governing approach to copyright in Canada during the period when many of the lower court decisions to have addressed the intersection of freedom of expression and copyright were decided – the singular purpose of copyright is to protect and reward authors. In the US, on the other hand, the purpose of copyright – as set out in the patent and copyright clause of the US Constitution – is ‘to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.⁶⁹⁸ The provision of rewards to authors, under the US copyright clause, is the means through which the end of ‘[p]romot[ing] the [p]rogress of [s]cience and useful [a]rts’ is achieved, and is not an end in itself.⁶⁹⁹

⁶⁹⁸ Copyright Clause.

⁶⁹⁹ Ibid.

Despite the apparent dissimilarity between the US and Canadian approaches to copyright, however, the manner in which the purpose of copyright is achieved in the US draws the two approaches closer together. While under the governing approach to copyright in Canada it has been accepted by the SCC both that the rewards granted to copyright owners through legislation are limited, and that courts can themselves intervene to limit the rights of copyright owners in a number of ways (including through statutory interpretation, as discussed in Chapter 5), the majority of the US Supreme Court, in the context of its First Amendment and copyright jurisprudence, has expressed reluctance at intervening in such a manner. In *Eldred*, for instance, the majority accepted that ‘it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives’; and that if Congress decides that the best way to ‘promote the Progress of Science’ is to grant broad property rights to copyright owners (an approach through which, as noted in a footnote in *Eldred* by Ginsburg J., citing to James Madison, ‘[t]he public good fully coincides ... with the claims of individuals’), the US Supreme Court should not interfere in this decision.⁷⁰⁰

A second similarity between the approaches to copyright adopted in US Supreme Court decisions to have addressed the intersection of freedom of expression and copyright, and decisions of lower Canadian courts to have addressed this intersection, is that both sets of cases evoke, to differing degrees, natural rights justifications of copyright. This approach, associated with the author-centric approach to copyright, is inconsistent with the governing approach to copyright in Canada, under which copyright is justified on utilitarian or functional grounds.

⁷⁰⁰ *Eldred* at fn 18. Breyer J., in his dissenting judgment in *Eldred*, would have ‘look[ed] harder ... at the statute’s rationality’ than did the majority (ibid at 245).

While many assert that copyright, in the US, is informed by utilitarian justifications⁷⁰¹ (a conclusion supported by the text of the patent and copyright clause, noted above, in which the public interest is foregrounded), language used in several of the US Supreme Court decisions to have addressed the intersection of the First Amendment and copyright suggests – at the very least – a linkage or connection to natural rights theories (specifically labour theories).⁷⁰² In *Harper & Row*, for instance, the US Supreme Court noted that ‘[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors’.⁷⁰³ In his dissent in *Harper & Row*, Brennan J. was critical of the approach adopted by the majority, writing that:

The urge to compensate for subsequent use of information and ideas is perhaps understandable. An inequity seems to lurk in the idea that much of the fruit of the historian's labor may be used without compensation. This, however, is not some unforeseen byproduct of a statutory scheme intended primarily to ensure a return for works of the imagination. Congress made the affirmative choice that the copyright laws should apply in this way.⁷⁰⁴

In *Golan*, as well, Ginsburg J., in describing the impact of the impugned legislative framework through which works formerly in the public domain are granted copyright protection, noted that ‘[a]uthors once deprived of protection are spared the continuing effects of that initial deprivation; §514 gives them nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires’.⁷⁰⁵

⁷⁰¹ See, for instance, Leval at 1107 and Frischmann and McKenna at 123.

⁷⁰² See John Tehranian, ‘Et Tu, Fair Use? The Triumph of Natural-Law Copyright’ (2005) 38 UC Davis L Rev 465.

⁷⁰³ *Harper & Row* at 546.

⁷⁰⁴ *Ibid* at 589.

⁷⁰⁵ *Golan* at 893.

The connection between copyright and labour is also made in Nimmer's article 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?', in which Nimmer suggests that a person who uses expression the copyright in which is held by another party is engaging in 'labor-saving utility', implying a short-cut taken (which should not be rewarded) or effort unfairly avoided.⁷⁰⁶ He also describes individuals engaging in unauthorized use of expression as 'pirat[ing] the expression of another'.⁷⁰⁷

As described in Chapter 4, the use of language that evokes natural rights justifications of copyright is present in a number of decisions of lower Canadian courts to have addressed the intersection of freedom of expression and copyright, including *Michelin* and *Lorimer FCA*.⁷⁰⁸

A third similarity between US Supreme Court decisions to have addressed the intersection of freedom of expression and copyright and decisions of lower Canadian courts to have addressed this intersection is that both sets of decisions emphasize, as a central or defining element of copyright, the ability of the copyright owner to broadly control uses of their copyrighted works. In *Harper & Row*, for instance, the US Supreme Court cited to its judgment in *Sony Corp of America v. Universal City Studios, Inc* in which it noted that copyright 'is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired'.⁷⁰⁹ This quote is also cited in *Eldred*.⁷¹⁰ The word control is also

⁷⁰⁶ Nimmer at 1202.

⁷⁰⁷ Ibid at 1192.

⁷⁰⁸ *Michelin, Lorimer FCA*.

⁷⁰⁹ *Harper & Row* at 546, citing *Sony Corp of America v Universal City Studios, Inc*. 464 US 417 (1984) SCOTUS at 429.

used later in *Harper & Row*, where the US Supreme Court notes that ‘[t]he Copyright Act ... echoes the common law’s concern that the author or copyright owner retain control through this critical stage’ (namely pre-publication).⁷¹¹ As described in Chapter 4, a focus on broad rights to control is also present in decisions of lower Canadian courts to have addressed the intersection of freedom of expression and copyright.⁷¹²

Brennan J. was critical of this approach to copyright. He wrote, in his dissenting judgment in *Harper & Row*, that ‘Congress ... seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product’.⁷¹³ Brennan J.’s description of copyright evokes the governing approach to copyright in Canada, under which the SCC has interpreted provisions of the *Copyright Act* in such a manner as to limit the sphere of control of copyright owners in order to ensure that copyright owners are not overprotected at the expense of the public interest (see Chapter 5).

As noted in the first section of this chapter, the foreign jurisdiction cited most frequently by the SCC, in both the contexts of copyright and freedom of expression, is the US. However, the remark by Dickson C.J. in *R. v. Keegstra* that ‘we must examine American constitutional law with a critical eye’ before applying it in a Canadian context is particularly relevant in the context of US Supreme Court judgments on the intersection of freedom of expression and copyright.⁷¹⁴

⁷¹⁰ *Eldred* at 227.

⁷¹¹ *Harper & Row* at 555.

⁷¹² See, for instance, *Michelin* at para. 103, 106, and 108, and *SOCAN v. Bell* at para. 9.

⁷¹³ *Harper & Row* at 580.

⁷¹⁴ *Keegstra* at para. 51.

As demonstrated in this section, significant conceptual differences can be identified between the governing approaches to copyright, and to freedom of expression, in Canada, and to the approaches to copyright, and to freedom of expression, present in US Supreme Court decisions to have addressed the intersection of freedom of expression and copyright (differences which can in part be attributed to differences in constitutional protection for freedom of expression). Due to these differences, Canadian courts reconsidering the relationship between the *Charter* right to freedom of expression and copyright should not rely on the US Supreme Court's decisions in this area in order to build a Canadian approach to this intersection.

6.4.2 UK jurisprudence

UK decisions to have addressed the intersection of freedom of expression and copyright evoke both the governing approaches to freedom of expression and to copyright in Canada, as well as the approaches to each right that have since been abandoned by the SCC (namely the definitional conception of freedom of expression and the author-centric approach to copyright). Thus, like in the context of the US judgments discussed above, reliance on the approach to the intersection of freedom of expression and copyright adopted by UK courts would have the effect of re-importing, into Canadian jurisprudence, conceptions of freedom of expression and of copyright abandoned by the SCC. As well, differences can be identified between Canada and the UK both with respect to the scope of constitutional protection for property and applicable principles of constitutional interpretation. These differences, taken together, limit the extent to which Canadian courts should rely on the UK approach to the intersection of freedom of expression and copyright as a model that might inform reconsideration of this intersection in a Canadian context.

At one point in *Ashdown*, Lord Phillips, writing for the EWCA, appears to adopt an approach to freedom of expression that, at least in part, evokes the broad rights approach discussed in Chapter 2.⁷¹⁵ Under this approach, freedom of expression is conceptualized as prima facie encompassing all attempts to communicate meaning. Conflicts between freedom of expression and other values, under this approach, are addressed not by narrowing the scope of expression but through an external justification analysis. Consistent with this approach, Lord Phillips wrote that ‘circumstances can arise in which freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another’.⁷¹⁶ Acceptance of the idea that the right to freedom of expression encompasses expression that incorporates copyrighted works (and thus that copyright conflicts with or is in tension with freedom of expression) is consistent with a broad rights approach to freedom of expression.

At other parts of his decision, however, the approach to freedom of expression adopted by Lord Phillips evokes the definitional conception. For instance, using language later echoed in *Eldred*, Lord Phillips noted that ‘[i]t is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words devised by someone else’.⁷¹⁷ Lord Phillips also wrote that one should not be permitted to ‘copy[] the very words which that person has employed to convey the information or express the ideas’.⁷¹⁸ These statements suggest an approach to freedom of expression that evokes the

⁷¹⁵ *Ashdown*.

⁷¹⁶ *Ibid* at para. 39.

⁷¹⁷ *Ibid* at para. 31.

⁷¹⁸ *Ibid* at para. 39.

aspect of the definitional conception under which low value expression can be excluded from the scope of protectable expression.⁷¹⁹

Another way through which the EWCA, in *Ashdown*, adopts an approach to freedom of expression that evokes the definitional conception is by focusing not on the impact of the exercise of copyright on the public's expression interests but instead in focusing in a more narrow manner on the Telegraph Group's actions and the impact of these actions on Mr. Ashdown's commercial interests. For instance, in determining whether 'the importance of freedom of expression outweighs considerations set out above so as to afford the Telegraph Group a defence of fair dealing', Lord Phillips stated that:

It appears to us that the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper. Mr Ashdown's work product was deployed in the way that it was for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group.⁷²⁰

As Eric Barendt writes, Lord Phillip's 'judgment ignored the argument that social critics, satirists, and political commentators have legitimate free speech interests of their own'.⁷²¹

By focusing on the commercial interests of both parties as opposed to the public's interest in expression, this aspect of the EWCA's decision evokes the approach adopted in *Harper & Row* in which the commercial interests of Time Magazine are foregrounded and the public's interest in information is minimized. It

⁷¹⁹ They also suggest an approach to copyright under which the use of someone's copyrighted expression is seen as low value expression (an approach to copyright consistent with the author-centric approach).

⁷²⁰ *Ashdown* at para. 82. This paragraph is later cited in *HRH the Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) (17 March 2006) at para. 174.

⁷²¹ Barendt, 'Copyright and Free Speech Theory' at 22. See also Goldstein at 1056.

also evokes the approach adopted by a number of decisions of Canadian lower courts that have addressed the intersection of freedom of expression and copyright, in which the expression interests of the defendant and of the public more generally are downplayed or absent from discussion.⁷²²

As discussed above, however, post-HRA 1998, UK courts are required to interpret legislation, to the extent possible, ‘in a way which is compatible with the Convention rights’.⁷²³ UK courts are also required, under the HRA 1998, to take into account judgments of the ECtHR.⁷²⁴ Particularly in light of the recent ECtHR decisions in *Ashby Donald* and *Neij and Kolmisoppi*, both of which adopt broad conceptions of the scope of Article 10(1) of the right to freedom of expression, UK courts may, in future, adopt an approach to freedom of expression that more closely approximates the ‘broad rights approach’, a shift that may impact the way in which the relationship between freedom of expression and copyright is conceptualized.⁷²⁵

Like in the context of freedom of expression discussed above, UK decisions to have considered the intersection of freedom of expression and copyright have adopted an approach to copyright that – at least in part – echoes both elements of the author-centric approach to copyright and elements of the economic-functional approach.

⁷²² *Harper & Row*. See, for instance, *Canadian Tire, St-Hubert, Michelin, and Sun*.

⁷²³ HRA 1998 at s. 3(1).

⁷²⁴ *Ibid* at s. 2(1)(a).

⁷²⁵ In *Ashby Donald et autres c. France*, for instance, the ECtHR indicated that beyond information and ideas, Article 10 protects internet communications; communications for the purpose of profit; publication of photographs; and, in the facts of this specific case, publishing and offering for sale fashion photos on a website. In *Neij*, the ECtHR noted that ‘Article 10 guarantees the right to impart information and the right of the public to receive it’; applies ‘to the means of transmission or reception’ of information and ‘not only to the content of the information’; ‘guarantees freedom of expression to “everyone”’, including those who ‘pursue[] ... profit-making’ aims; and, under the facts of this decision, encompasses involvement in the operation of a website the purpose of which is the transmission of digital content.

In at least one way, for instance, decisions from UK courts to have addressed the intersection of freedom of expression and copyright evoke aspects of the governing approach to copyright in Canada. As noted above, under the governing approach to copyright in Canada, exceptions are interpreted in a ‘large and liberal’ manner.⁷²⁶ Similarly, in *Ashdown*, Lord Phillips accepted the Vice-Chancellor’s conclusion that ‘the expression of “criticism and review” is of wide import’.⁷²⁷ As well, in *SAS*, as noted above, Arnold J. re-affirmed the need to interpret fair dealing categories liberally, grounding this judicially-imposed requirement in the HRA 1998, and through it, art. 10 of the ECHR.⁷²⁸

However, a number of statements by UK courts considering the intersection of freedom of expression and copyright also evoke an author-centric approach to copyright. In *Ashdown*, for instance, Lord Phillips wrote that ‘in most circumstances ... it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected’, a statement that suggests that the primary purpose of copyright, in the UK, is to protect and reward authors (the purpose of copyright associated with the author-centric approach) rather than to balance between authors’ interests and the public interest (the purpose of copyright associated with the economic-functional approach).⁷²⁹

⁷²⁶ *CCH SCC* at para. 51.

⁷²⁷ *Ashdown* at para. 61, citing to *Ashdown HCJ* at p. 976.

⁷²⁸ *SAS* at para. 325. Despite the language used in *Ashdown* and *SAS*, however, questions can be asked as to how broadly UK courts have interpreted fair dealing, both in *Ashdown* itself and more generally. In *Ashdown*, for instance, although accepting that the category of criticism and review is of wide import, the Vice-Chancellor went on to hold that the copying in question did not constitute criticism or review on the basis that the criticism was of ‘the actions of the Prime Minister and the claimant’ and not of the work itself (the minute). Thus, according to the Vice-Chancellor (in a statement endorsed by Lord Phillips), ‘[i]t was not necessary for that purpose to copy the minute at all’ (*Ashdown* at para. 61, citing to *Ashdown HCJ* at p. 976). With respect to the question of how narrowly or broadly UK courts have interpreted fair dealing, see, for instance, D’Agostino at 314, *Alberta (Education)* at para. 19.

⁷²⁹ *Ashdown* at para. 39.

In *Rocknroll v. News Group Newspapers Ltd*, a decision that suggests the adoption, by UK courts, of a broad rights approach to freedom of expression, Briggs J. referenced – in contemplating how to balance between freedom of expression and copyright – a decision in which the Article 10 right to freedom of expression is balanced with real property rights.⁷³⁰ As described in Chapter 4, a number of cases decided by Canadian courts during the era in which the author-centric approach was the governing approach to copyright have characterized copyright as a property right analogous to property rights in land or personal property, the essential element of which is the property owner’s right to exclude.⁷³¹ Characterizing copyright in such a manner provides an additional moral justification that supports the copyright owner’s ability to eject the trespasser (unauthorized user) from their property (copyrighted work). Adopting this characterization of the proprietary nature of copyright thus impacts upon the balance struck by courts between copyright and freedom of expression.

Another complicating factor in considering the extent to which decisions by UK courts to have addressed the intersection of freedom of expression and copyright are applicable to Canadian courts’ consideration of this intersection is the fact that under the HRA 1998, UK courts are required to interpret legislation ‘in a way which is compatible with ... Convention rights’.⁷³² As noted by Lord Phillips in *Ashdown*, in the:

⁷³⁰ *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at para. 42.

⁷³¹ For instance, copyright is referred to as a ‘legal right in property’ in *Vigneux* at para. 11. In this paragraph, Maclean P. stated that ‘it is, I think, a well settled principle of law that a legal right in property, such as copyright in a musical work, can be taken away only by express language, which is not, I think, to be found in any provision of the statute here relevant, and if the defendants can do what they are doing with impunity it means they are able to divert the plaintiff’s property to their own use and profit’.

⁷³² HRA 1998 at s. 3(1).

rare circumstances ... where the right of freedom of expression will come into conflict with the protection afforded by the *Copyright Act* ... we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression.⁷³³

In Canada, however, as discussed in Chapter 5, courts are limited in their ability to interpret statutory provisions in light of *Charter* values (such as freedom of expression).⁷³⁴ Thus, this aspect of the UK courts' articulation of the relationship between freedom of expression and copyright is of limited utility for Canadian courts.

As well, Canadian courts' reliance on UK decisions in building a Canadian approach to the intersection of freedom of expression and copyright is also complicated by the fact that under Article 1 of Protocol 1 to the ECHR, property is given constitutional protection.⁷³⁵ The balance struck between copyright and freedom of expression in the UK may therefore be different than that struck in Canada, under which neither property nor copyright is constitutionally protected under the *Charter*.

Elements of the approaches to both freedom of expression and copyright adopted by UK courts in the context of its freedom of expression and copyright jurisprudence evoke the governing approach to these rights in Canada. Furthermore, the requirement for UK courts to interpret legislation in a manner consistent with case law from the ECtHR, when read alongside ECtHR jurisprudence that echoes governing approaches to freedom of expression and to copyright in Canada, suggests that UK decisions may – in future – prove to be fertile ground for Canadian courts

⁷³³ *Ashdown* at para. 45.

⁷³⁴ *Bell ExpressVu* at paras. 28-30.

⁷³⁵ Protocol 1 at article 1.

seeking assistance in re-articulating the relationship between freedom of expression and copyright.⁷³⁶

However, strong echoes of both the definitional conception of freedom of expression and the author-centric approach to copyright, present in UK decisions to have addressed the intersection of freedom of expression and copyright, as well as differences with respect to the scope of constitutional protection for property and relevant principles of constitutional interpretation, limit the extent to which Canadian courts seeking to reconsider the intersection of the *Charter* right to freedom of expression and copyright can rely on the UK approach to this intersection as a possible model.

6.4.3 SA jurisprudence

Out of the three jurisdictions canvassed in this chapter, the approaches to freedom of expression and to copyright adopted by the CCSA in *Laugh it Off* most closely approximate the governing approaches to these areas in Canada.⁷³⁷ As I will argue, Canadian courts reconsidering the intersection of freedom of expression and copyright could thus usefully draw from certain aspects of this decision. However, as with the UK decisions discussed above, differences both in the scope of constitutional protection for property and with respect to principles of constitutional interpretation complicate any attempt by Canadian courts to use the SA approach to the intersection of freedom of expression and copyright as a model for Canadian courts to use in reconsidering the intersection of the *Charter* right to freedom of expression and copyright.

⁷³⁶ As noted by LeBel J. in his dissenting judgment in *Alberta v. Hutterian Brethren of Wilson Colony* 2009 SCC 37 at paras. 184-185, the s. 1 analysis developed in *Oakes* ‘belongs to [the same] legal and philosophical tradition’ as the ECHR. Both are rooted in questions of ‘the legitimacy of the purpose and proportionality of the means’ (185).

⁷³⁷ *Laugh it Off* CCSA.

The approach to freedom of expression adopted by the CCSA in *Laugh it Off* approximates the broad rights approach to freedom of expression, as adopted by Canadian courts.⁷³⁸ In a statement that echoes the governing approach to freedom of expression in Canada, Moseneke J., writing for the majority of the CCSA, in describing the scope of Section 16 of the Constitution of South Africa [SA Constitution] (the provision that protects freedom of expression), noted that ‘[it is] obliged to delineate the bounds of the constitutional guarantee of free expression generously’.⁷³⁹ Moseneke J. further stated that this section ‘has an expansive reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research’.⁷⁴⁰ As is the case in Canada and in the UK post-HRA 1998, the adoption of a broad approach to the scope of protectable expression by the CCSA can be argued to be consistent with the way in which this right is structured in the *Charter*, the ECHR, and the SA Constitution: as a free-standing right with a separate limitation or justificatory mechanism.

Second, under the governing approach to freedom of expression in Canada, although not all expression constitutes protectable expression (and not all communications constitute expression), exclusions from the scope of protectable expression have been interpreted narrowly. Most balancing between freedom of expression and other rights or values is done in the context of the s. 1 analysis.

⁷³⁸ In contrast, the approach adopted by the SCA more closely approximates the definitional conception of freedom of expression. To this end, it is notable that Harms J.A., who delivered the judgment of the SCA in *Laugh it Off*, cited *Michelin*, noting that ‘[t]he appellant may declaim the message about black labour and white guilt from rooftops, pulpits and political platforms ... In other words, its freedom of expression is hardly affected. A Canadian court [*Michelin*] has held that freedom of expression is not at all affected if the appellant is able to say what it wants in a another manner’ (*Laugh it Off SCA* at para. 30).

⁷³⁹ *Laugh it Off CCSA* at para. 47.

⁷⁴⁰ *Ibid* at para. 47.

Similarities can be identified between this element of the governing approach to freedom of expression in Canada and the approach to freedom of expression adopted by the CCSA. For instance, in *Laugh it Off*, Moseneke J. neither made mention of the possibility of excluding expression that makes use of copyrighted content from the scope of protectable expression, nor did he exclude *Laugh it Off*'s expression (which was commercial expression) from the scope of the right to freedom of expression.⁷⁴¹

Third, while *Harper & Row*, *Ashdown*, and a number of decisions of lower Canadian courts can be seen as having minimized the impact of a determination of copyright infringement on the expression interests of the public, the public's expression interests are foregrounded in *Laugh it Off*. Moseneke J., for instance, described the case at issue in *Laugh it Off* as involving 'constitutional issues of considerable private and public moment' (emphasis added).⁷⁴² He also noted that 'the constitutional issue, which falls to be decided, has a bearing well beyond the litigants before us. The interplay between free expression and intellectual property... is of concern to the broader public'.⁷⁴³ Sachs J., as well, noted the impact that this decision (and the threat of litigation more generally) might have on public debate.⁷⁴⁴

Similarities can also be drawn between the approaches to copyright adopted by the CCSA and the governing approach to copyright in Canada. First, Moseneke J. wrote that '[t]he purpose of copyright ... laws in an open and democratic society is not to shut out critical expression or to throttle artistic and other expressive acts in a

⁷⁴¹ Ibid.

⁷⁴² Ibid at para. 27.

⁷⁴³ Ibid at para. 30.

⁷⁴⁴ Ibid at para. 87.

manner that gives way to inordinate brand sway'.⁷⁴⁵ This articulation of the purpose of copyright is more similar to the governing approach to copyright in Canada, under which the rights of copyright owners can be limited by public interest considerations, than the author-centric approach, under which the purpose of copyright is to protect and reward authors.

Second, Moseneke J. noted – citing to David Vaver's *Intellectual Property Law* – that the SCA, in its judgment in *Laugh it Off*, 'acknowledged that ... the right to intellectual property is not absolute but rather a value which must be weighed against other values of arguably equal importance, such as the right to work, create, compete, talk, write and imitate freely'.⁷⁴⁶ This conception of intellectual property again evokes the governing approach to copyright in Canada, through which the rights granted to copyright owners are and can be limited by public interest considerations, including, as detailed in Chapter 5, the public's interest in expression.

Third, the CCSA's decision in *Laugh it Off* did not describe the unauthorized use of copyrighted material in terms that suggest that the expression is of low value. This can be contrasted with the decisions of lower Canadian courts to have addressed the intersection of freedom of expression and copyright, as well as the decisions of the EWCA and the US Supreme Court, as mentioned above.

Despite these similarities, however, two significant differences between Canadian and South African constitutional law can be identified that complicate reliance, by Canadian courts reconsidering the intersection of freedom of expression and copyright, on the approach to this intersection articulated by the CCSA in *Laugh it Off*. First, under s. 25 of the South African Bill of Rights (Chapter 2 of the

⁷⁴⁵ Ibid at para. 13.

⁷⁴⁶ Ibid at para. 17, citing to David Vaver, *Intellectual Property Law* (Irwin Law 1997) at 19.

Constitution of the Republic of South Africa), property is given constitutional protection.⁷⁴⁷ One of the sub-clauses in this section sets out that ‘[n]o one may be deprived of property except in terms of law of general application’.⁷⁴⁸ Another sub-clause sets out the circumstances through which property may be expropriated.⁷⁴⁹ Neither property nor copyright is protected under the *Charter*. The fact that property is given constitutional protection in South Africa could impact upon the balance struck by the CCSA between copyright and freedom of expression.

Despite this possibility, however, the fact that property is given constitutional protection in South Africa did not seem to have impacted upon the balance between copyright and freedom of expression struck by the CCSA in *Laugh it Off*. Moseneke J., in his majority judgment, did not connect the protection of intellectual property rights with the property clause in the Bill of Rights. Rather, he began his judgment by noting that ‘[t]his case brings to the fore the novel, and rather vexed, matter of the proper interface between the guarantee of free expression enshrined in s. 16(1) of the Constitution and the protection of intellectual property rights’.⁷⁵⁰ Furthermore, Moseneke J., in describing the SCA’s judgment, noted that ‘the court rightly observed [that] ... like other property intellectual property does not enjoy special status under the Constitution’.⁷⁵¹ As well, in his concurring judgment, Sachs J. criticized the SCA for ‘inappropriately ... allow[ing] what were tenuous property interests to outweigh substantial expression rights’.⁷⁵²

⁷⁴⁷ SA Bill of Rights at art. 25.

⁷⁴⁸ Ibid at art. 25(1).

⁷⁴⁹ Ibid at art. 25(2).

⁷⁵⁰ *Laugh it Off CCSA* at para. 1.

⁷⁵¹ Ibid at para. 17.

⁷⁵² Ibid at para. 75. See Bailey at 142 for a similar criticism of Teitelbaum J.’s reasons in *Michelin*.

Second, under the SA Constitution, courts are required to interpret statutory provisions in light of the rights set out in the Constitution.⁷⁵³ This interpretive principle, as noted above, permitted Moseneke J. to interpret s. 34(1)(c) of the *Trade Marks Act* as requiring ‘[parties] ... seek[ing] to oust an expressive conduct protected under the Constitution ... [to] ... establish a likelihood of substantial economic detriment to the claimant’s mark’.⁷⁵⁴ In Canada, however, courts are much more limited in their ability to interpret statutory provisions in light of *Charter* values. As held in *Bell ExpressVu*, and as discussed in depth in Chapter 5, courts may interpret statutory provisions in light of *Charter* values only in limited circumstances (namely those of ‘genuine ambiguity’).⁷⁵⁵

The jurisprudence of the CCSA with respect to the intersection of freedom of expression and copyright, out of the three jurisdictions canvassed in this chapter, most closely approximates the governing approaches to freedom of expression and to copyright in Canada. Aspects of the CCSA’s jurisprudence in this area may thus be of assistance to Canadian courts reconsidering this intersection. For instance, the CCSA’s determination that ‘tenuous property interests’ should not be permitted ‘to outweigh substantial expression rights’, a conclusion consistent with the broad rights approach to freedom of expression, could be applied by a Canadian court reconsidering the intersection of the *Charter* right to freedom of expression and copyright.⁷⁵⁶ As well, Canadian courts could also take note of the way in which the CCSA focused its decision on the impact a determination of trademark infringement

⁷⁵³ Article 39(2) of the SA Bill of Rights states that ‘[w]hen interpreting any legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights’.

⁷⁵⁴ *Laugh it Off CCSA* at para. 56.

⁷⁵⁵ *Bell ExpressVu* at paras. 28-30.

⁷⁵⁶ *Laugh it Off CCSA* at para. 75.

would have on the expression interests of the public, an aspect of its decision which is again consistent with the broad rights approach to freedom of expression. Thirdly, the CCSA's acceptance that the unauthorized use of trademarks is encompassed within the scope of protectable expression under the constitutionally guaranteed right to freedom of expression could be applied by Canadian courts reconsidering the governing approach to the intersection of the *Charter* right to freedom of expression and copyright.

As is the case with UK jurisprudence in this area, however, differences both with respect to the scope of constitutional protection and applicable principles of constitutional interpretation – specifically with respect to the question of whether legislation can be interpreted in light of constitutional rights – limits the extent to which the jurisprudence of the CCSA can act as a model upon which Canadian courts can base their reconsideration of the intersection of the *Charter* right to freedom of expression and copyright.

6.5 Conclusion

In this chapter, I have offered a third argument in support of reconsideration of the approaches adopted by Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright, one grounded in a comparative analysis of approaches to this intersection adopted by leading courts in three countries previously cited by the SCC in the context of its freedom of expression and/or its copyright jurisprudence: the US, the UK, and SA.

Several conclusions can be offered. First, at least with respect to the three jurisdictions canvassed in this chapter, the SCC is an outlier in that it has not yet explicitly engaged with the intersection of freedom of expression and copyright. This

intersection was first addressed by the US Supreme Court in 1985, by the EWCA in 2001, and by the CCSA in 2005.

Second, the questions of whether and the extent to which approaches to the intersection of freedom of expression and copyright adopted by foreign courts might assist Canadian courts in reconsidering the intersection of freedom of expression and copyright are dependent on a variety of factors, including the approaches to freedom of expression and to copyright adopted by these courts, whether property is constitutionally protected, whether any constitutional protection for property encompasses protection for intellectual property, and whether and the extent to which courts are permitted (or required) to interpret statutory provisions in light of constitutional rights.⁷⁵⁷ Depending on the extent to which these factors, as applied in each jurisdiction, are consistent with or conflict with these factors as applied in Canada, the specific articulation by foreign courts of the intersection of freedom of expression and copyright may be more or less helpful to Canadian courts reconsidering this intersection.

Third, the US Supreme Court's decisions in the area of freedom of expression and copyright evoke approaches to freedom of expression, and to copyright, that although once valid, have been abandoned by the SCC. As a result, the approach adopted by the US Supreme Court to the intersection of freedom of expression and

⁷⁵⁷ It is important to note that there is no necessary correlation between the approach to copyright adopted by courts, and the approach to freedom of expression adopted by those same courts. For instance, it is not necessarily the case that a court that adopts an author-centric approach to copyright will inevitably adopt a definitional conception of freedom of expression. In each instance, the question of the approach adopted to copyright, and the approach adopted to freedom of expression, will depend on a range of factors, including the way in which the right to freedom of expression is framed; whether the purpose of copyright is articulated in copyright legislation or in constitutional documents; and which authors (ie Nimmer or Goldstein in the US context) are more influential during the period in which the governing approach to the intersection of these two rights takes shape, among a number of other factors. As well, as demonstrated above, the approaches adopted by courts to copyright, and to freedom of expression, may shift over time. If this occurs, the relationship between these two rights should shift accordingly.

copyright is of minimal assistance to Canadian courts reconsidering this intersection.⁷⁵⁸ To adopt the US approach to this intersection would be to re-incorporate, into Canadian jurisprudence, approaches to copyright and to freedom of expression that the SCC has rejected.

Fourth, the articulation of the intersection of freedom of expression and copyright in the UK has also been shaped, in part, by approaches to copyright and to freedom of expression that evoke those abandoned in Canada. As a result, the approach adopted by UK courts – like that of the US Supreme Court – is also of limited assistance to Canadian courts reconsidering this intersection. However, further consideration, by UK courts, of ECtHR decisions to address the intersection of freedom of expression and copyright – to the extent that consideration of these decisions requires UK courts to modify their approaches to copyright and to freedom of expression – may modify this conclusion.

Fifth, while none of the jurisdictions canvassed in this chapter are perfect analogues to Canada with respect to the factors noted above, the jurisprudence of the CCSA with respect to the intersection of freedom of expression and copyright tracks most closely to the governing approaches to copyright, and to freedom of expression, in Canada. Certain elements of this jurisprudence may be of assistance to Canadian courts considering this intersection. For instance, Canadian courts considering the intersection of freedom of expression and copyright could take note of the way in which the CCSA adopted a conception of copyright in which copyright is explicitly balanced with expression interests; the CCSA's decision not to portray Laugh it

⁷⁵⁸ Margot Kaminski, in Kaminski at 590, is critical of the way in which the US Supreme Court has adopted a 'presumptively categorical approach to reconciling copyright and speech'. Instead, she advocates for courts to 'reintegrate elements of proportionality analysis into First Amendment jurisprudence'. While Kaminski references ECtHR decisions in support of her argument, judgments of the SCC might also serve as useful points of contrast.

Off's unauthorized use of trademarked expression as low value expression; the CCSA's determination that 'tenuous property interests' should not be permitted 'to outweigh substantial expression rights';⁷⁵⁹ the way in which the CCSA focused its decision on the impact a determination of trademark infringement would have on the expression interests of the public; and the way in which the CCSA accepted that the unauthorized use of trademarks is encompassed within the scope of protectable expression. These elements of the CCSA's decision in *Laugh it Off* are consistent with the governing approaches to copyright, and to freedom of expression, in Canada, and could thus be usefully applied in a Canadian context.

Sixth, as was the case with defamation in Canada in 2009, as mentioned in *Grant*, 'while different countries have taken different approaches' with respect to the intersection of the *Charter* right to freedom of expression and copyright, 'the trend is clear'.⁷⁶⁰ This trend is towards engagement, by leading national courts, with the intersection of freedom of expression and copyright. Leading courts previously cited by the SCC in the context of its freedom of expression and/or copyright jurisprudence have explicitly engaged with the intersection of the *Charter* right to freedom of expression and copyright. The SCC has yet to do so.

I argue that as it did in the context of defamation, the SCC should follow this international trend and explicitly consider the relationship between the *Charter* right to freedom of expression and copyright. In so doing, given the significant differences between Canada and the other jurisdictions outlined in this chapter, it will not be sufficient for Canadian courts to merely adopt one of the approaches to this intersection as articulated by US, UK, or SA courts. Rather, Canadian courts must

⁷⁵⁹ *Laugh it Off CCSA* at para. 75.

⁷⁶⁰ *Grant* at para. 40.

develop a Canadian approach to this intersection: one that is informed by approaches adopted in other jurisdictions, but that is ultimately rooted in Canada's constitutional, legislative, and jurisprudential context.

7. WHAT DOES THE *CHARTER* REQUIRE? APPLYING S. 2(B) AND S. 1 IN THE CONTEXT OF COPYRIGHT

7.1 Introduction

In this chapter, I will subject certain core provisions of the *Copyright Act* to *Charter* scrutiny.⁷⁶¹ I will do so in reliance on three case studies, which are as follows: (1) an action is brought against A for copyright infringement for making available works the copyright in which would have expired were it not for a legislative amendment to the *Copyright Act*, passed after the works had been created, that extended the term of copyright for both future and existing works (an *Eldred*-type situation (see Chapter 6)); (2) an action is brought against B for copyright infringement for offering for sale printed copies of abridged versions of works protected under Crown copyright (a *Lorimer*-type situation (see Chapter 3)); and (3) an action is brought against C for copyright infringement for creating and disseminating, for commercial purposes, ‘transformative works’.⁷⁶²

Two of the three case studies involve existing provisions of the *Copyright Act* ((2) and (3)). The first case study, on the other hand, is hypothetical; it assumes the existence of such a provision.⁷⁶³ In all three of these case studies, it is assumed that

⁷⁶¹ Other scholars that have engaged in this analysis include Fewer, in Fewer (published in 1997), and Bailey, in Bailey (published in 2005). See, as well, Tushnet, ‘Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation’ for a similar analysis in the US context.

⁷⁶² As noted above, in *Campbell*, Souter J. (who delivered the opinion of the Court) defined ‘transformative’ uses as those which ‘add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message’. Fewer also identifies transformative works as works that ‘further the purposes of freedom of expression’ but might ‘run afoul of the [Copyright] Act’ (Fewer at pp. 202 and 212).

⁷⁶³ This case study was selected due to the possibility that Canada’s *Copyright Act* could be amended to include such a provision, a possibility suggested by some scholars in light of Canada’s participation in negotiations to join the Trans-Pacific Partnership. See, for instance, Michael Geist, ‘Why the secrecy on Canadian trade talks? Because there’s something to hide.’ *Toronto Star* (Toronto, July 4, 2014).

the acts complained of prima facie infringe copyright, and are not saved by any defence to copyright infringement (including fair dealing). The defendants (A, B, and C) are thus arguing that specific provisions of the *Copyright Act* unjustifiably infringe their *Charter* right to freedom of expression.⁷⁶⁴

In selecting these three case studies – each of which is narrowly focused – I do not mean to imply that these are the only potential issues with respect to the question of whether provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. Rather, I am arguing that these case studies demonstrate that provisions of Canada’s *Copyright Act* may unjustifiably infringe the *Charter* right to freedom of expression, and that – given that under the governing approach to the intersection of the *Charter* right to freedom of expression and copyright arguments, any possibility of challenging these provisions under the *Charter* is foreclosed – reconsideration of the relationship between these two rights is thus necessary.

I will proceed by discussing the scope of the s. 2(b) right to freedom of expression in the context of copyright. I will argue that the SCC’s freedom of expression jurisprudence suggests that the uses of copyrighted works described in the three case studies convey or attempt to convey meaning and thus constitute protectable expression under s. 2(b); that they should not be excluded from the scope of the *Charter* right to freedom of expression due to the method or location of expression; and that key provisions of the *Copyright Act* – namely the general infringement provision (s. 27(1)) read in context with the provisions granting rights

⁷⁶⁴ As a preliminary issue, it should be noted that the SCC has held, in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 SCR 110 at para. 15, that statutory provisions are not presumed to be consistent with the *Charter*. As noted by Beetz J., who delivered the judgment of the Court, ‘the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter’.

in works (ss. 3 and 5), the primary remedy provisions (ss. 34, 38.1 and 42), the provisions detailing defences and limitations to copyright infringement (ss. 29-30.9), and, in the case of the first case study, the provision setting out the term of copyright in works (as amended) (s. 6) – limit or restrict these expressions in purpose and effect, thus infringing the *Charter* guarantee of freedom of expression.⁷⁶⁵

I will then draw upon SCC jurisprudence and related commentary to discuss how the s. 1 analysis might be applied in the three case studies described above. I will argue that the SCC's s. 1 jurisprudence suggests that the objective of the impugned provisions of the *Copyright Act* is pressing and substantial and that there is a rational connection between this objective and the impugned provisions. However, I will argue that the impugned provisions may be considered to be overbroad, and as a result may fail the minimal impairment branch of the proportionality test. As well, a court could find, in the context of the specific case studies described above, that the deleterious impact of the provisions may not be outweighed by their benefits. As a result, these provisions may not be justified under a s. 1 analysis.

In the event that the impugned provisions noted above are found to infringe the s. 2(b) right to freedom of expression and are not saved by s. 1, what might be the appropriate remedy? Perhaps surprisingly, at least with respect to two of the case studies, a court could find that the most appropriate remedy would be for the Court to declare the *Copyright Act*, in its entirety, to be of no force or effect (albeit with a temporary suspension of invalidity). Although appearing at first glance to be a radical outcome, such an action would be consistent with both past *Charter* jurisprudence and, more generally, with the division of authority between courts and Parliament. While Canadian courts have the authority, in certain contexts, to 'extend

⁷⁶⁵ *Copyright Act*.

legislation ... by ... read[ing] in' or to narrow legislation by reading down, this authority is limited.⁷⁶⁶ As Dickson J. wrote (for the Court) in *Hunter v. Southam Inc.*:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.⁷⁶⁷

7.2 Copyright and freedom of expression (s. 2(b))

7.2.1 Do the activities in question have expressive content?

As described in Chapter 2, the SCC, in *CBC 2011*, articulated the s. 2(b) analysis as follows:

[T]o determine whether an expressive activity is protected by the Charter, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, prima facie, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?⁷⁶⁸

As noted in Chapter 2, the SCC has interpreted the *Charter* right to freedom of expression broadly, in order to 'extend the guarantee under the Canadian *Charter* to as many expressive activities as possible.'⁷⁶⁹ Aside from certain circumstances in which the method or location of an expression will result in the expression not being protected under the *Charter* right to freedom of expression (an issue that will be addressed in the next section), as noted by Cory J. in *Libman*, 'any activity or

⁷⁶⁶ See *Schachter* at para. 100.

⁷⁶⁷ *Hunter v Southam Inc* [1984] 2 SCR 145 SCC at 169.

⁷⁶⁸ *CBC v. Canada* at para. 38.

⁷⁶⁹ *Libman v Quebec (Attorney General)* [1997] 3 SCR 569 at 591-592.

communication that conveys or attempts to convey meaning is covered by the guarantee of section 2(b) of the Canadian Charter'.⁷⁷⁰

Do the acts described in case studies one, two, and three convey or attempt to convey meaning? One question that must be addressed in considering this question is whether s. 2(b), despite protecting an 'infinite variety of forms of expression', only protects expression that originates from the individual claiming the benefit of the s. 2(b) right?⁷⁷¹ That is to say, is it possible for one party to convey meaning in a manner recognized by s. 2(b) of the *Charter* using expression authored by someone else? Craig notes that Mahoney J., in *Lorimer FCA*, 'attribut[ed] legal significance to the fact that the defendant's communicative act involved someone else's expression'.⁷⁷² Is this approach to the scope of freedom of expression consistent with the governing approach to this right?

This issue was dealt with most directly in *Coles Book Stores Ltd v. Ontario (Attorney General) (Coles)*, a decision that addressed, among other issues, whether 'the operation of a book store ... [was] a protected form of expression'.⁷⁷³ Henry J., in *Coles*, found the operation of a book store to 'clearly' be a protected form of expression.⁷⁷⁴ This determination was based on several lines of reasoning, including Henry J.'s view that 'in selling a copy ... of a book, the book store is conveying to others the ideas, meaning and message of the author whether or not the bookseller is actively promoting the content, is neutral towards it, or is opposed to it' and that:

⁷⁷⁰ Ibid at para. 31.

⁷⁷¹ *Weisfeld* at para. 26.

⁷⁷² Craig, 'Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright' at 83.

⁷⁷³ *Coles Book Stores Ltd v. Ontario (Attorney General)* (1991), 6 OR (3d) 673 at para. 80.

⁷⁷⁴ Ibid at para. 80.

Coles as a bookseller in common with the seller of videotapes, the art gallery which displays an artist's painting or photograph, a cinema theatre which displays a moving picture created by others, a television broadcaster who creates the program material, is exercising its own freedom of expression, the content of which is in part at least the message created by someone else.⁷⁷⁵

Henry J. rejected the submission of the Attorney General that ‘Coles is improperly riding on the coat-tails of the authors and publishers of the books it sells who are not parties to this application’.⁷⁷⁶ Rather than portraying Coles as a free-rider, Henry J. instead characterized it as an integral part of a vibrant system of freedom of expression. In order for the public to be able to experience expression, this expression must be made available. Coles, by selling books, is fulfilling this role in this specific example, a role that is also played by sellers of videotapes, art galleries, cinema theatres, and television broadcasters (among other parties) more generally.

The question of whether a party can convey meaning, for s. 2(b) purposes, using the copyright-protected expression of another was answered, in the affirmative, in *Michelin*. In his reasons for judgment, Teitelbaum J. concluded that despite the fact that “‘Bibendum” is not the fruits of the defendants’ own labours,’ CAW is conveying meaning (and thus engaging in expression) through the use of the modified Bibendum on its pamphlets and leaflets.⁷⁷⁷ As he noted, ‘[a]t its minimum, the meaning in this instance is that Michelin workers should band together in the union before they are stomped into submission by the corporate powers symbolized

⁷⁷⁵ Ibid at para. 80.

⁷⁷⁶ Ibid at para. 82.

⁷⁷⁷ *Michelin* at para 83.

by the “Bibendum””.⁷⁷⁸ Craig echoes Teitelbaum J.’s conclusion that CAW’s use of Bibendum conveys meaning, writing that ‘the defendants’ depiction of Bibendum contributed something to the public understanding, generating new meaning by recontextualizing a powerful communicative symbol, expressing it anew and with a radically different message’.⁷⁷⁹

Given that Canadian courts have concluded that one can convey meaning using the expression of another (including expression contained in copyrighted works), are A, B, and C, in the contexts of their engagements with copyrighted works in the case studies described above, conveying or attempting to convey meaning? In the first case study, A makes available copyrighted works to individuals. In so doing, is A conveying or attempting to convey meaning? Some might argue that rather than conveying or attempting to convey meaning, all that A is doing is engaging in a purely physical act, unconnected to expression.

Some courts have interpreted acts that might otherwise be seen as expressive as purely physical.⁷⁸⁰ The result of this interpretation is that the act is not considered to be protectable expression under the *Charter* right to freedom of expression. One instance in which this occurred was in *R v. Ludacka (Ludacka)*, a case heard by the Court of Appeal for Ontario (OCA), the judgment of which was delivered by Dubin C.J.O.⁷⁸¹ *Ludacka* dealt with the question of whether a series of explicit sex acts, performed on stage, constituted expression and, thus, was prima facie protected by

⁷⁷⁸ Ibid at para 85.

⁷⁷⁹ Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 112.

⁷⁸⁰ See, for instance, *Irwin Toy* at para. 41, where Dickson C.J. and Lamer and Wilson JJ write that ‘[i]t might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content’.

⁷⁸¹ *R v Ludacka* (1996), 105 CCC (3d) 565, 28 OR (2d) 19 OCA.

the *Charter*.⁷⁸² Dubin C.J.O. held that the explicit sexual acts complained of were ‘purely physical activity which does not convey or attempt to convey meaning’.⁷⁸³ Applying this decision in the context of the first case study, it could be argued that the act of disseminating copyrighted works is ‘purely physical activity’ that does not convey or attempt to convey meaning.

The approach adopted in *Ludacka*, however, can be critiqued on several grounds. First, it is inconsistent with the expansive conception of s. 2(b) repeatedly affirmed by the SCC. In *Ontario Adult Entertainment Bar Assn v. Metropolitan Toronto (Municipality) (Ontario Adult Entertainment)*, a case decided by the OCA post-*Ludacka* in which it was held that explicit lap dancing is expression, it was noted that ‘courts have taken an expansive view in approaching the characterization of conduct as expression’ and that ‘competing values and interests that arise when viewing certain impugned conduct’ which might otherwise lead a court to determine that conduct does not constitute expression, are more properly assessed under a s. 1 analysis.⁷⁸⁴

Second, the decision of the OCA in *Ludacka* can also be critiqued on the basis that it is inconsistent with prior SCC jurisprudence. In *Butler* (which was decided by the SCC four years before the OCA’s decision was handed down in *Ludacka*), Sopinka J. stated that ‘I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression’.⁷⁸⁵ Sopinka J. distinguished ‘purely physical activity’ (that is to say physical activity in which one is not

⁷⁸² Ibid.

⁷⁸³ Ibid at paras. 24-25.

⁷⁸⁴ *Ontario Adult Entertainment Bar Assn v Metropolitan Toronto (Municipality)* (1995), 35 OR (3d) 161 OCA at para. 50.

⁷⁸⁵ *Butler* at para. 72. As Dickson C.J. and Lamer and Wilson J.J. held in *Irwin Toy*, even the act of parking a car can have expressive content (*Irwin Toy* at para. 41).

intending to convey a meaning, and does not convey a meaning) from the sale and rental of ““hard core” videotapes and magazines as well as sexual paraphernalia’.⁷⁸⁶ He held that ‘while indeed “physical”’, the sale and rental of these items ‘conveys ideas, opinions, or feelings’.⁷⁸⁷ Despite involving an element of physicality, in that individuals must engage in some physical act or process in order to make a work available for others to access, *Butler* and *Ontario Adult Entertainment* suggest that the act of so doing is a physical act through which information, expression, ideas, and opinions are conveyed, and thus should be seen as an expressive act.

The second case study involves the sale, by B, of abridged copies of government documents. As discussed above, Canadian courts have found, in a variety of contexts, that the acts of disseminating and making available works conveys or attempts to convey meaning. These decisions suggest that a Canadian court would conclude that the act of disseminating or making available an abridged version of a government document conveys or attempts to convey meaning. The meaning being conveyed, in this instance, would be the meaning of the original author (or government department) read together with any meaning conveyed by the person disseminating or making the work available (for instance through the addition of commentary, context, or title, or through the manner in which the work is abridged (for instance what was cut, and what was not cut)).

In the third case study, C uses existing works to create new, transformative works. As noted above, it is assumed that in so doing, C’s actions do not fall within any fair dealing category, and are not protected by any other defence to copyright infringement (such as the ‘YouTube’ exception set out in s. 29.21 of the *Copyright*

⁷⁸⁶ *Butler* at para. 2.

⁷⁸⁷ *Ibid* at para. 64.

Act, implemented in the 2012 reforms to the *Copyright Act*⁷⁸⁸). Although the creation and dissemination of many transformative works might be protected by defences to copyright infringement (for instance parodies or satire), it is possible that the creation and dissemination of some transformative works would be found by a court to constitute copyright infringement.

In ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’, a chapter published in an edited text in 2010, I suggested that several types of dealings could be seen as falling outside of the fair dealing categories, including ‘transformative works ... created or distributed as homages, expressions of appreciation, and tributes’; and ‘transformative works which use copyright-protected expression as the building blocks, or raw material, for new expression, without commenting on or critiquing the expression itself’.⁷⁸⁹ Should these uses be found to fall outside of the fair dealing categories, they would not constitute fair dealing (regardless of whether they might be seen as fair under the second part of the fair dealing analysis).

In using existing works to create new works such as those described above, do C’s acts convey or attempt to convey meaning? In *Butler*, Sopinka J. discussed whether the act of creating a film constitutes expression for the purposes of s. 2(b).

⁷⁸⁸ *Copyright Act* at s. 29.21.

⁷⁸⁹ Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ at 406-407. Geist, in Geist, ‘Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use’ at 159, argues that ‘the breadth of the fair dealing purposes is now so wide – eight purposes covering most imaginable uses – that future Canadian fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes together with a far more rigorous analysis’. However, as Tawfik points out in Tawfik, ‘The Supreme Court of Canada and the “Fair Dealing Trilogy”: Elaborating a Doctrine of User Rights Under Canadian Copyright Law’ at 197, ‘no matter how broadly one sets the boundaries of each category, they are nevertheless exhaustive. There will always be factual situations that will fall outside even the most generous interpretation of any given category, in which case the matter will end there’. Katz argues that ‘the question of whether fair dealing in Canada can apply to purposes that are not explicitly mentioned in the *Copyright Act* is an open one, and ... can and should be answered affirmatively’, thus throwing into question the claim that there are uses that might be considered fair that would not satisfy the first part of the fair dealing test (95).

He noted that ‘in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film’ and that ‘[i]n choosing his or her images, the creator of the film is attempting to convey some meaning’.⁷⁹⁰ Thus, according to Sopinka J. in *Butler*, the choices made by the creator in selecting the source materials from which a work is constructed, along with the act of creating the work, are sufficient to constitute the work as expression.

Analogizing from *Butler*, works that incorporate copyrighted content – including documentary films that include existing copyrighted works, mashups, machinima, home-made videos set to music, academic papers that quote directly from other works, as well as transformative works that do not satisfy any defence to copyright infringement – convey meaning (both the meaning articulated by the original author and the meaning articulated by the individual who placed the original work in context with other works) and are thus protectable expression under s. 2(b). This would be the case both if the work, when created, is distributed to others, or if it remains ‘on file’ with the author. That is to say, the protectability of the work – under *Butler* – would not depend on the work being disseminated to a broader audience. Either way, the work conveys or attempts to convey meaning, and constitutes expression.

7.2.2 Is the activity excluded from that protection as a result of either the location or the method of expression?

As noted in Chapter 2, despite the characterization of the *Charter* right to freedom of expression as a broad and expansive right, some acts that convey or attempt to convey meaning are excluded from the scope of protectable expression on the basis of either the method or the location of the expression. In their majority

⁷⁹⁰ *Butler* at para. 72.

reasons in *Montréal (City)*, McLachlin C.J. and Deschamps J., wrote that these exclusions should not be interpreted broadly. Instead, as they note, ‘expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee’, namely self-fulfillment, democratic discourse, and truth-finding.⁷⁹¹

The sole method of expression to have been excluded from protection by the SCC under s. 2(b), subsequent to *Irwin Toy*, is violent expression (or expression that takes the form of violence). In *Montréal (City)*, McLachlin C.J. and Deschamps J. noted that although it ‘may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator’, violent expression is excluded from protection under s. 2(b) on the basis that it ‘prevents dialogue rather than fostering it[; ...] prevents the self-fulfillment of the victim rather than enhancing it[; ...] [a]nd ... stands in the way of finding the truth rather than furthering it’.⁷⁹²

7.2.2.1 Method of expression

Do any of the acts in the three case studies described above ‘undermine[] the values underlying s. 2(b)’ on the basis of the method of expression?⁷⁹³ Prior to examining this question, it is perhaps useful to consider whether the acts described in the case studies could be considered violent expression (the sole method of expression that has been excluded from protection by the SCC under s. 2(b)). Some might describe the unauthorized use of copyrighted works as a violent act, as an act that harms the author of the work, or as an act that is equivalent to a violent act.⁷⁹⁴

⁷⁹¹ *Montréal* at para. 72.

⁷⁹² *Ibid* at para. 72.

⁷⁹³ *Ibid* at para. 72.

⁷⁹⁴ For instance, in an article published in the Guardian Newspaper, Alexis Petridis describes how the singer Madonna characterized the unauthorized leak of music from her album *Rebel Heart* as ‘a form

The scope of the ‘violence’ exclusion from s. 2(b), however, has been confined by Canadian courts to acts of violence committed by one individual against another, or to threats of violence. In *Irwin Toy*, for instance, murder and rape are mentioned as violent acts that would not receive protection under the s. 2(b) right to freedom of expression, regardless of whether the perpetrator conveyed or attempted to convey meaning.⁷⁹⁵ Hitting someone with a pie was also found to be a violent form of expression that was not protected under s. 2(b).⁷⁹⁶ It is possible that in certain instances, individuals could engage in the unauthorized use of copyright-protected expression in a manner that threatens violence against an individual – for instance combining clips of movies and sending them to an individual as part of a threat of violence against that individual or against a group with which the individual identifies. In this context, it is possible that this use of copyrighted works could be removed from the scope of protectable expression under s. 2(b). More broadly, however, excluding uses of copyrighted works from the protection of s. 2(b) of the *Charter* on the basis that unauthorized use of copyrighted works harms the author of the work (or is equivalent to a violent act or a threat of violence) would be to adopt an interpretation of violence inconsistent with the way in which violence has been interpreted by Canadian courts in the context of this step of the s. 2(b) analysis.

Violence aside, are there any other ways in which the acts described in the three case studies could be considered to ‘undermine[] the values underlying s. 2(b)’ on the basis of the method of expression, and be excluded from the scope of

of terrorism’ and ‘artistic rape’ (Alexis Petridis, ‘Madonna: I did not say, ‘Hey, here’s my music, and it’s finished.’ It was theft’ *The Guardian* (December 21, 2014) <<http://www.theguardian.com/music/2014/dec/21/madonna-album-hack-living-state-terror>>).

⁷⁹⁵ *Irwin Toy*.

⁷⁹⁶ *R. v. Geoghegan* 2004 ABPC 127.

protectable expression on this basis?⁷⁹⁷ A's making available of works the copyright in which would have expired were it not for a retroactively-applied legislative amendment to the *Copyright Act* extending the term of copyright in works, B's publication and sale of abridged versions of government documents, and C's creation and dissemination of transformative works, could prevent dialogue. For instance, the actions of A and C could lead to authors choosing not to write additional works out of concern that their works will be disseminated without their authorization (either in their entirety or as part of another work). As well, the actions of B might lead governments to make fewer documents available due to concerns that these documents might be re-packaged and sold by third parties. More broadly, large-scale unauthorized dissemination of an author's works by A may result in the author being unable to earn an income from the creation of their works, ultimately resulting in the author being compelled to earn income from other sources (which might restrict their ability to create).

Unauthorized use of copyrighted works may also limit the self-fulfillment of the authors of the original works in case studies one and three at the same time as it enhances the self-fulfillment of others (those able to access the work made available without the author's authorization, or those individuals making the work available (including C, whose self-fulfillment may be enhanced through both the creation and dissemination of the transformative work)). To the extent to which the self-fulfillment (or 'self-actualization'⁷⁹⁸) of the original authors in case studies one and three is linked to their ability to control or manage the dissemination of their copyrighted

⁷⁹⁷ *Montréal* at para. 72.

⁷⁹⁸ *Sharpe* at para. 76.

works, their self-fulfilment may be limited by the widespread dissemination of their copyrighted works (either in whole or as part of a new work) by A and C.

Finally, the unauthorized use of copyrighted works by A and C may ‘stand[] in the way of finding the truth’ if it results in authors who might otherwise contribute to the truth-finding process choosing not to write, or publishers who might disseminate works that would otherwise contribute to the truth-finding process choosing not to disseminate works.⁷⁹⁹ It is possible that B’s publication of abridged versions of government documents protected by Crown copyright could also have a negative impact upon the search for truth or on political participation depending on how the document is abridged or presented. Thus, as demonstrated above, it is conceivable that the acts in the three case studies described above could ‘undermine[] the values underlying s. 2(b)’ on the basis of the method of expression.⁸⁰⁰

However, Canadian courts have held that in situations where the method of expression cannot be separated from its content, the expression is entitled to protection under s. 2(b) regardless of whether the method of expression might ‘undermine[] the values underlying s. 2(b)’.⁸⁰¹ In *CBC 2011*, for instance, the SCC was required to determine whether ‘film[ing], tak[ing] photographs and conduct[ing] interviews in the public areas of courthouses, and broadcast[ing] the official audio recordings of court proceedings’, should be excluded from protection under s. 2(b) of the *Charter* on the basis of the method or location of expression.⁸⁰² Although

⁷⁹⁹ *Montréal* at para. 72.

⁸⁰⁰ *Ibid* at para. 72.

⁸⁰¹ *Ibid* at para. 72.

⁸⁰² *CBC v. Canada* at para. 3.

rejecting the idea that ‘the choice of a method of expression always conveys a message’, Deschamps J., who delivered the reasons for judgment of the Court, stated that ‘on the facts of this case, the method of expression cannot be considered separately from the content and cannot serve as a basis for excluding the expressive activity from the protection of s. 2(b) of the Charter’.⁸⁰³

In all of the case studies considered in this chapter, the method through which the message is conveyed – when the content of the expression is stripped from the equation – does not conflict with the values underlying freedom of expression. The making available of copyrighted works, the sale of abridged versions of works of expression, and the creation and distribution of creative works that combine one or more existing works, in and of themselves, do not undermine or conflict with the values that have been said to underpin freedom of expression. Rather, the argument that these methods of expression undermine the values that underpin freedom of expression ‘rests on [their] content’ (namely the fact that the works made available, sold, or created and distributed are copyrighted and were used without authorization).⁸⁰⁴ As a result, this argument, as was held by McLachlin C.J. and Deschamps J. in *Montréal (City)*, ‘cannot be considered in addressing the issue of whether the method ... of the expression itself is inimical to s. 2(b)’.⁸⁰⁵

The argument that in case studies one, two, and three, the method of expression cannot be separated from its content, and thus should not be excluded from the scope of protectable expression, is supported by SCC jurisprudence relating to choice of language and artistic expression. Both of these types of expression have

⁸⁰³ Ibid at paras. 52-53.

⁸⁰⁴ *Montréal* at para. 68.

⁸⁰⁵ Ibid at para. 68.

been said by the SCC to be instances in which the method or form of expression is inseparable from its content. In *Reference re: s. 193 and 195.1(1)(C) of the Criminal Code* (*Reference re: s. 193*), for instance, Lamer J. wrote that:

In my view the choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth. Language is, shortly put, both content and form.⁸⁰⁶

Art is another type of expression in which form and content is linked. Lamer J., in *Reference re: s. 193*, wrote that:

just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression. As with language, art is in many ways an expression of cultural identity, and in many cases is an expression of one's identity with a particular set of thoughts, beliefs, opinions and emotions.⁸⁰⁷

Lamer J. went on to state that:

Without settling the matter conclusively, I am of the view that at the very least a law that makes it an offence to convey a meaning or message, however distasteful or unpopular, through a traditional form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression, and must be justified, if possible, by s. 1 of the Charter.⁸⁰⁸

Like language and art, the choice to express oneself using copyrighted content can be seen, in many instances, as ‘an expression of cultural identity, and in many cases is an expression of one’s identity’.⁸⁰⁹ For instance, the use of a

⁸⁰⁶ *Reference re: 193* at para. 77. See also *Ford* at para. 40, in which the Court wrote that: ‘[l]anguage is so intimately related to the form and content of expression that there cannot be true freedom ... of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression’.

⁸⁰⁷ *Reference re: 193* at para. 78.

⁸⁰⁸ *Ibid* at para 81.

⁸⁰⁹ *Ibid* at para. 78.

copyrighted image as part of a person’s personal web page; wearing a t-shirt with a logo of a product or company a person identifies with or supports; creating a mix tape or CD or playlist; combining two existing works into one new work; sending a link to a song to a friend; and myriad other acts can all be seen as individuals expressing their identity. As well, again like language and art, the use of copyrighted content ‘colours the content and meaning of expression’.⁸¹⁰ A different message is conveyed by the use of Bibendum in the pamphlets prepared by the CAW than by a description of the business practices engaged in by Michelin that the CAW finds objectionable. The use of copyrighted content, therefore, is ‘both content and form’.⁸¹¹ As such, as was held in *CBC 2011*, the method of expression – namely the use of copyrighted content – ‘cannot be considered separately from the content and cannot serve as a basis for excluding the expressive activity from the protection of s. 2(b) of the Charter’.⁸¹²

Furthermore, although different from the laws at issue in *Reference re: s. 193*, which examined provisions relating to prostitution (including the section of the Criminal Code that prohibited communications in public for the purpose of prostitution), copyright can be conceptualized as ‘a law that makes it an offence to convey a meaning or message ... through a traditional form of expression like the written or spoken word or art’.⁸¹³ Instead of prohibiting specific messages, or types of communications, the provisions of the *Copyright Act* prohibit the manner in which those messages are expressed (namely through the use of copyrighted content).

⁸¹⁰ *Ford v Quebec (Attorney General)* [1988] 2 SCR 712 at para. 40.

⁸¹¹ *Reference re: 193* at para. 77.

⁸¹² *CBC v. Canada* at para. 53.

⁸¹³ *Reference re: 193* at para. 81.

Reference re: s. 193 and CBC 2011, taken together, suggest that the acts described in case studies one through three should not be excluded from the scope of protectable expression on the basis of the method of expression, and that – instead – the provisions of the *Copyright Act* restraining this type of use should be seen as a restriction on freedom of expression that requires justification through a s. 1 analysis.

7.2.2.2 Location of expression

In recent years, the SCC has clarified the test for excluding messages conveyed on either private or public property from the scope of protectable expression under s. 2(b). As noted by Deschamps J. in *CBC 2011*, citing to *Montréal (City)*, ‘for ... the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding’.⁸¹⁴ Should the acts engaged in by A, B, and C in the three case studies described above be excluded from the scope of protectable expression under s. 2(b) on the basis that they involve the use of property (copyrighted works)?

Teitelbaum J., in *Michelin*, took the view that expression that makes use of copyrighted works should be excluded from protection under s. 2(b) on the basis that copyright-protected expression, a species of private property, could not be used in the service of freedom of expression.⁸¹⁵ In reaching this conclusion, as described in Chapter 4, Teitelbaum J. drew parallels between the use of copyright-protected expression (private property) in the service of expression; and expressing oneself on private property.⁸¹⁶ Teitelbaum J. also cited from a pre-*Charter* decision – *Harrison*

⁸¹⁴ *CBC v. Canada* at para. 37.

⁸¹⁵ *Michelin* at paras. 86-108.

⁸¹⁶ Bailey at 143, Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at 92.

v. Carswell – that privileges property rights over other interests such as freedom of expression.⁸¹⁷ I have explained, in Chapter 4, how Teitelbaum J.’s discussion in this regard represents a view of freedom of expression that has been abandoned by the SCC.

In *Montréal (City)*, McLachlin C.J. and Deschamps J. affirmed that expression taking place on private property is generally not protected by s. 2(b). However, their judgment implies that the reason why private property falls outside of the protected sphere of s. 2(b) is not because property rights exist outside of the scope of the *Charter*. Rather, it is because of the way in which the *Charter* has been interpreted as applying to government action.⁸¹⁸ As McLachlin C.J. and Deschamps J. noted, ‘[p]rivate property ... will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*’.⁸¹⁹ In instances in which private property rights do not involve state-imposed limits on expression, the *Charter* would not apply. However, in situations where private property is intertwined with state-imposed limits on expression (for instance legislation that restricts expression in certain contexts), these state-imposed limits may be challenged using the *Charter* right to freedom of expression.⁸²⁰

The SCC has referred to copyright as a species of property. In *Cinar Corporation v. Robinson*, McLachlin C.J., writing for the Court, characterized the

⁸¹⁷ *Michelin* at para. 89.

⁸¹⁸ See *Dolphin Delivery*.

⁸¹⁹ *Montréal* at para. 62.

⁸²⁰ See, for instance, *R. v. Layton*. Jack Layton had been convicted under s. 2(1)(b) of the *Trespass to Property Act*, R.S.O. 1980, c. 511 for refusing to leave the Eaton Centre (a shopping mall) after having been directed to leave by the persons in charge of the private property. Layton had been handing out leaflets relating to a unionization campaign. Scott Prov. Ct. J. found that Layton’s s. 2(b) rights had been unjustifiably infringed.

infringement of copyright as ‘a breach of ... property rights’.⁸²¹ She also stated that ‘[c]opyright infringement is a violation of s. 6 of the [Quebec] *Charter*, which provides that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”’.⁸²² As well, in *Canadian Artists’ Representation v. National Gallery of Canada*, copyright is referred to, in a number of instances, as property.⁸²³

Created by government legislation (the *Copyright Act*), copyright limits the expression of some in order to advance the interests (both expression and otherwise) of others (for instance authors, publishers, and the public more generally). As such, based on the passage quoted above from *Montréal (City)*, the private property rights granted under the *Copyright Act* involve ‘state-imposed limits on expression’.⁸²⁴ They are thus subject to the *Charter*, and a *Charter* analysis must be conducted in the same manner in the context of copyright as with other legislation.⁸²⁵ Thus, contrary to the conclusion reached by Teitelbaum J. in *Michelin*, the formal conception of copyright as a private property right should not result in the exclusion of expression that makes use of the copyrighted works of others (for instance in the three case studies) from the scope of s. 2(b) of the *Charter* on the basis of the location of expression.

⁸²¹ *Cinar* at para. 102.

⁸²² *Ibid* at para. 114.

⁸²³ *Canadian Artists’ Representation* at paras. 16 and 22.

⁸²⁴ *Montréal* at para. 62.

⁸²⁵ The question of the extent to which all property rights could be considered as involving state-imposed limits on expression is outside the scope of this chapter to address.

7.2.3 ‘If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action’?⁸²⁶

In the previous sections, I argued that the acts engaged in as part of the three case studies both constitute expression and should not be removed from the scope of protectable expression under s. 2(b) of the *Charter* due to the method or location of the expression. In this section, I will consider whether certain core provisions of the *Copyright Act* – namely s. 27(1) of the *Copyright Act* (the general infringement provision), when read in context with the provisions granting rights in works (ss. 3 and 5), the primary remedy provisions (ss. 34 and 42), and the provisions setting out defences (ss. 29-30.9) and other limitations to copyright (for instance term limits, as amended (ss. 6-12)) – infringe s. 2(b) in purpose or effect.

Section 27(1) is the general infringement section. It provides that ‘[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do’.⁸²⁷ The rights of copyright owners are set out in s. 3 of the *Copyright Act*. These rights include the right to reproduce a work, to perform a work in public, and to communicate the work to the public by telecommunication, in whole or in substantial part.⁸²⁸

Section 5 of the *Copyright Act* sets out the conditions for subsistence of copyright. Section 5(1) notes that provided certain citizenship/residence requirements are met, ‘copyright shall subsist in Canada, for the term hereinafter mentioned, in

⁸²⁶ *CBC v. Canada* at para. 38.

⁸²⁷ *Copyright Act* at s. 27(1).

⁸²⁸ *Ibid* at s. 3.

every original literary, dramatic, musical and artistic work'.⁸²⁹ The term of copyright is addressed in ss. 6-12 of the *Copyright Act*. The general term of copyright in Canada is the life of the author plus fifty years from the end of the calendar year in which the author dies.⁸³⁰ The hypothetical provision noted above in the first case study extends the term of copyright protection in works from (generally speaking) the life of the author plus 50 years to the life of the author plus 70 years. This extension, in the context of the hypothetical provision, is applied both to existing and future works.

Section 34(1) of the *Copyright Act* details the remedies that are available to copyright owners. It states that '[w]here copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right'.⁸³¹ Statutory damages are provided for in s. 38.1 of the *Copyright Act*, and criminal remedies are addressed in s. 42.⁸³² As noted in previous chapters, the main defence to copyright infringement in Canada is fair dealing. This defence is set out in ss. 29-29.2 of the *Copyright Act*. Other defences are provided for in ss. 29.21-30.9 (inclusive).⁸³³

Do these provisions, in purpose or effect, infringe s. 2(b)? Or, as said in *Irwin Toy*, is 'the purpose or effect' of these provisions 'to control attempts to convey meaning through that activity'?⁸³⁴ First, what is the purpose of the provisions in

⁸²⁹ Ibid at s 5.

⁸³⁰ Ibid at s. 6.

⁸³¹ Ibid at s. 34(1).

⁸³² Ibid at ss. 38.1, 42.

⁸³³ Ibid at ss. 29-29.2, 29.21-30.9, 38.1, and 42.

⁸³⁴ *Irwin Toy* at para. 47.

question? In Chapter 2, I described the way in which the objective of copyright in Canada has been re-defined from an author-centric approach in which the sole objective of copyright is to reward and protect authors; to an economic-functional approach in which the objective of copyright is to promote the public interest in the encouragement and dissemination of works of the arts and intellect through the grant of limited, transferable, economic rights to authors.⁸³⁵ Thus, the purpose of the provisions of the *Copyright Act* described above is to incentivize the creation of expression by granting copyright owners rights in works of expression, as well as the ability, through the state, to enforce infringements of those rights.

In seeking to determine whether these provisions infringe s. 2(b) in purpose or effect, the example used in *Irwin Toy* of a rule against handing out pamphlets is informative. As noted by Dickson C.J., Lamer J. and Wilson J. (who wrote the reasons for judgment for the majority), this rule – despite ‘purport[ing] to control litter’ – ‘is “tied to content”’.⁸³⁶ Dickson C.J., Lamer J. and Wilson J. wrote that ‘[t]he rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning’.⁸³⁷ Like this provision, the provisions of the *Copyright Act* noted above are also ‘tied to content’. They ‘control access by others to a meaning being conveyed’, namely the meaning of the copyrighted work, and any meanings that are added to that work by parties that re-work it; they also ‘control the ability of [the unauthorized user of copyrighted

⁸³⁵ *Cinar* at para. 23.

⁸³⁶ *Irwin Toy* at para. 49.

⁸³⁷ *Ibid* at para. 49.

content] to convey a meaning'.⁸³⁸ In so doing, the impugned provisions of the *Copyright Act* limit, deny, and abridge expression.

In addition to arguing that the purpose of the provisions of the *Copyright Act*, as noted above, is to limit or abridge expression, it can also be argued that the effect of the impugned provisions of the *Copyright Act* is to deny or abridge freedom of expression. As noted in *Irwin Toy* by the majority, in order to demonstrate that the effect of government action is to deny or abridge freedom of expression, 'a plaintiff must state her claim with reference to the principles and values underlying the freedom', namely truth-seeking, participation in decision-making, and self-fulfillment and human flourishing. In the context of the three case studies that are the focus of this chapter, the effects of the impugned provisions are to deny or abridge freedom of expression. For persons A, B, and C, the application of the *Copyright Act* restricts or limits their ability to disseminate expression. It also restricts the ability of the public to receive expression from these individuals. As a result, these individuals, as well as the public more generally, are prevented from using this expression to the degree that they otherwise might, in the furtherance of truth-seeking, social and political decision-making, and self-fulfillment.

Thus far in this chapter, I have argued that the acts described in case studies one, two, and three constitute expression, should not be removed from the scope of protectable expression due to the method or location of expression, and that certain provisions of the *Copyright Act* – namely the general infringement provision, read in context with the provisions providing for the existence of rights, the conditions for the subsistence of copyright in works, the possible remedies, and defences and limitations to copyright – infringe the s. 2(b) guarantee of freedom of expression

⁸³⁸ Ibid at para. 4.

both in purpose and effect. Unless they can be justified under s. 1 of the *Charter*, these provisions will be declared of no force or effect.

7.3 Section 1 of the *Charter*, applied in the context of copyright

As described by Dickson C.J. in *Canada (Human Rights Commission) v. Taylor*, s. 1 both ‘guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society’.⁸³⁹ As summarized in *Bedford*, the s. 1 analysis proceeds as follows. First, the measures must be prescribed by law; second, the objective of the law must be pressing and substantial; third, the ‘law [must be] ... a rational means for the legislature to pursue its objective’; fourth, ‘the legislature’s reasonable alternatives’ are considered in the context of asking ‘whether the legislature could have designed a law that infringes rights to a lesser extent’; and lastly, ‘the court is required to weigh the negative impact of the law on people’s rights against the beneficial impact of the law in terms of achieving its goal for the greater public good’.⁸⁴⁰ The last three steps constitute the ‘proportionality branch’ of the s. 1 analysis.

The approach to be taken to a s. 1 analysis has been said to be ‘contextual and purposive’.⁸⁴¹ As The Constitutional Law Group notes, ‘[t]his approach requires that courts assess the value or significance of the right and its restriction in their context rather than the abstract’.⁸⁴² With respect to the value of expression, the SCC has stated that expression that is ‘far removed from the core values of freedom of expression’ can be characterized as ‘low value’, and that this expression ‘merits an

⁸³⁹ *Taylor* at p. 916.

⁸⁴⁰ *Bedford*.

⁸⁴¹ *Whatcott* at para. 65.

⁸⁴² The Constitutional Law Group, *Canadian Constitutional Law* (4th edn, Emond Montgomery Publications Limited 2010) at 780.

attenuated level of constitutional protection’.⁸⁴³ In *JTI-Macdonald*, the Court held that the value of the expression should be balanced against the objective of the impugned provision in the context of the final step of the proportionality analysis.⁸⁴⁴

7.3.1 Are the measures prescribed by law?

As noted above, the first question to be addressed under a s. 1 analysis is whether the impugned provisions are ‘limits prescribed by law’ within the meaning of s. 1.⁸⁴⁵ In *R. v. Therens*, Le Dain J. (dissenting on other grounds) stated that ‘[t]he limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements’.⁸⁴⁶ The impugned measures that are the focus of this chapter are expressly provided for in the *Copyright Act*. As a result, the provisions of the *Copyright Act* can be seen as limits prescribed by law for the purposes of the s. 1 analysis.

7.3.2 Pressing and substantial objective?

The next part of the s. 1 analysis asks whether the objective of the impugned provisions is ‘sufficiently important to justify overriding a *Charter* freedom’.⁸⁴⁷ The SCC has noted the ‘great importance’,⁸⁴⁸ to the s. 1 analysis, of properly characterizing the objective of the impugned provisions. Deschamps J. has written that ‘all steps of the Oakes test are premised on a proper identification of the

⁸⁴³ *Sharpe* at para. 181.

⁸⁴⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 68.

⁸⁴⁵ *Charter* at s. 1.

⁸⁴⁶ *R. v. Therens* [1985] 1 SCR 613 SCC at para. 56.

⁸⁴⁷ *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989 SCC at para. 112.

⁸⁴⁸ *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21 at para. 20.

objective of the impugned measure’.⁸⁴⁹ Of particular concern is the need to ensure that the objective is not articulated in an overbroad manner. McLachlin J., in *RJR-MacDonald Inc v. Canada (Attorney General)*, stated that:

[c]are must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.⁸⁵⁰

One possible negative consequence of overstating the legislative objective is that it may be difficult to establish that the provision (the ‘means adopted to promote’ the objective) is minimally impairing.⁸⁵¹

What are the objectives of the impugned provisions of the *Copyright Act*? As noted in Chapter 4, Teitelbaum J. defined the objective of the *Copyright Act* as ‘[t]he protection of authors and ensuring that they are recompensed for their creative energies and works’.⁸⁵² As described in Chapter 4, however, this view of the purpose of copyright – the author-centric view – represents the ‘former framework’ for copyright.⁸⁵³ In its place, the SCC stated in *Théberge* that there are two purposes to copyright (namely to ensure that copyright owners receive a just or fair reward, and to advance the public interest in the encouragement and dissemination of works of

⁸⁴⁹ *Ibid* at para. 20.

⁸⁵⁰ *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 SCC at para. 144.

⁸⁵¹ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 38.

⁸⁵² *Michelin* at para. 98. Similarly, in *Canadian Private Copying Collective v. Canadian Storage Media Alliance* 2004 FCA 424 at para. 33, Noël JA, who delivered the reasons for judgment of the FCA, wrote that ‘[t]he essential element of the federal legislative competence over copyright ... involves the establishment of a legal framework allowing rightsholders to be rewarded for the reproduction of recorded music by third parties’.

⁸⁵³ *SOCAN v. Bell* at para. 9.

the arts and intellect⁸⁵⁴). This view of the purpose of copyright was refined in *Cinar Corp*, in which McLachlin C.J. stated that the objective of the *Copyright Act* is to guarantee a just reward to the copyright owner in order to incentivize the creation of works of the arts and intellect.⁸⁵⁵

The objective of the impugned provisions is consistent with this broad objective. That is to say, in order to incentivize the creation and dissemination of works of the arts and intellect, the *Copyright Act* grants, to authors of works (s. 5), a set of time-limited (ss. 6-12) rights (s. 3) with respect to these works; permits authors to assign those rights to others (s. 13(4)); makes it an infringement of copyright to engage in any of the acts that the copyright owner has the exclusive right to do without the authorization of the copyright owner, provided no defences or limitations exist to render the act non-infringing (ss. 27, and 29-30.9); and makes available, to copyright owners, a number of remedies in the event that their rights have been infringed (ss. 34, 38.1 and 42).⁸⁵⁶

Is the objective of the impugned provisions of the *Copyright Act* pressing and substantial? As noted in Chapter 2, in *JTI*, McLachlin C.J. (who delivered the judgment for the Court), citing to Peter Hogg's *Constitutional Law of Canada*, noted that '[a]n objective will be deemed proper if it is for the realization of collective

⁸⁵⁴ *Théberge*.

⁸⁵⁵ *Cinar*.

⁸⁵⁶ *Copyright Act*. Other parts or provisions of the *Copyright Act* may be held to have different objectives. For instance, Part VIII of the *Copyright Act* (ss. 79-88), which legalises the private copying of recorded music in certain circumstances in exchange for the imposition of a levy on certain types of audio recording music, may be held to have a different objective than the provisions noted above. In *CPCC* at para. 32, the objective of this part was said to be to 'legalize[] private copying by a class of users while providing that rightsholders are compensated for the expropriation of their exclusive rights'. Another part of the *Copyright Act* that might have a different objective than that of the provisions noted above is the part that provides legislative protection for technological protection mechanisms (see, for instance, s. 41).

goals of fundamental importance'.⁸⁵⁷ A wide range of objectives have been considered by the SCC to be pressing and substantial.⁸⁵⁸ Although the list of objectives held to be pressing and substantial is lengthy, however, not every objective suggested by the government has been found to be pressing and substantial. Three objectives rejected by the SCC on the basis that they are not pressing and substantial are budgetary considerations,⁸⁵⁹ 'maintaining conventional standards of propriety, independently of any harm in society',⁸⁶⁰ and 'the promotion of marriage'.⁸⁶¹ Objectives that the SCC has indicated may not be seen as pressing and substantial include: 'to cut costs',⁸⁶² to 'increas[e] management power',⁸⁶³ 'ensuring that the electoral process results in a particular outcome',⁸⁶⁴ and 'utilitarian consideration[s]'.⁸⁶⁵

In *Michelin*, Teitelbaum J. stated that he 'would have had no difficulty in determining that the objective of the *Copyright Act*' [which he defines as the protection of authors and ensuring that they are recompensed for their creative

⁸⁵⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 37, citing to Hogg at p. 132.

⁸⁵⁸ These objectives range from 'to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable' (*Alberta (IPC)* at para. 19), to 'reduc[e] the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity' (*Whatcott* at para. 71), to 'providing 'a safe, welcoming public transit system' (*GVTA* at para. 76).

⁸⁵⁹ *Schachter* at p. 709.

⁸⁶⁰ *Butler* at para. 92.

⁸⁶¹ *Nova Scotia v Walsh* 2002 SCC 83 at para. 184.

⁸⁶² *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia* 2007 SCC 27 at para. 147.

⁸⁶³ *Ibid* at para. 147.

⁸⁶⁴ *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, 2003 SCC 37 at para. 80.

⁸⁶⁵ *Singh v. Minister of Employment and Immigration* [1985] 1 SCR 177 at p. 218.

energies and works] was “pressing and substantial”⁸⁶⁶. He also noted that ‘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 as revised in Berlin in 1908 and in Rome in 1928’⁸⁶⁷.

As noted above, the objective of the impugned provisions of the *Copyright Act* is conceptualized differently today than it was in 1996. However, for several reasons, I suggest that a Canadian court would consider the objective of the impugned provisions of the *Copyright Act*, as conceptualized today, to be pressing and substantial. First, as noted above, the SCC has considered a wide range of objectives to be pressing and substantial, demonstrating that the threshold for such a determination is one that is not overly onerous for governments to meet. As The Constitutional Law Group notes, ‘[t]he courts seem prepared to regard almost any purpose ... as “pressing and substantial”’⁸⁶⁸. Second, the granting of a just reward in order to incentivize the creation and dissemination of expression is connected to ‘the realization of collective goals of fundamental importance’⁸⁶⁹. One goal could be seen as the encouragement and dissemination of works of arts and the intellect. A wide range of benefits flow to the public from the existence of these works, including benefits tied to truth-seeking, democratic discourse, and self-fulfillment. A second goal could be to contribute, through the provision of incentives to authors and copyright owners, to the development of a robust and intellectual public domain. Third, this objective is neither ‘trivial’ nor ‘discordant with the principles integral to

⁸⁶⁶ *Michelin* at para. 109.

⁸⁶⁷ *Ibid* at para. 109.

⁸⁶⁸ *Group* at 777.

⁸⁶⁹ *Canada (AG) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 37, citing to *Hogg* at p. 132.

a free and democratic society’.⁸⁷⁰ Rather, the objective of the impugned provisions advances principles integral to a free and democratic society such as the freedom of expression interests of authors and the public. Fourth, as noted by Teitelbaum J., the pressing and substantial nature of the objective is supported by international treaties, ratified by Canada, that protect copyright.⁸⁷¹ Fifth, the pressing and substantial nature of the objective can also be seen to be supported by international human rights conventions ratified by Canada, including the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights.⁸⁷² Vaver writes that ‘[w]hen the Supreme Court speaks of copyright law’s need to achieve a “proper balance between protection and access”, the language echoes the customary international law of human rights treaties such as the Universal Declaration of Human Rights of 1948’.⁸⁷³

The arguments above strongly suggest that should this issue come before a Canadian court, the objective of the impugned provisions noted above would be seen as being of pressing and substantial importance ‘sufficient to justify some limitation on freedom of expression’.⁸⁷⁴ The question to be addressed is whether the specific limitations set out in the *Copyright Act* can be justified.

⁸⁷⁰ *Oakes* at para. 69.

⁸⁷¹ *Michelin* at para. 111. See also *Lucas* at para. 50.

⁸⁷² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

⁸⁷³ Vaver, ‘Copyright Defences as User Rights’ at 671.

⁸⁷⁴ *Whatcott* at para. 23.

7.3.2 Do the impugned measures satisfy the proportionality branch of the s. 1 analysis?

As described in Chapter 2, there are three parts to the proportionality branch of the s. 1 analysis. First, it must be asked whether the limit is rationally connected to the objective; second, whether the limit minimally impairs the right in question; and third, whether the benefits outweigh the deleterious effects. In applying this test, it is important to recall the statements in *Whatcott* that ‘perfection is not required. Rather the legislature's chosen approach must be accorded considerable deference. ... [w]e must ask whether Parliament has chosen one of several reasonable alternatives’.⁸⁷⁵

7.3.3 Is the limit rationally connected to the objective?

It is not necessary for the government to conclusively establish that there is a rational connection between the objective and the means used to promote the objective (the limitation). Rather, as noted by McLachlin C.J., writing for the majority of the SCC in *Alberta v. Hutterian Brethren of Wilson Colony*, ‘[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so’.⁸⁷⁶

In *JTI* (handed down in 2007), McLachlin C.J., writing for the Court, noted that although this step is not ‘unimportant’, ‘[f]ew cases have foundered on the requirement of rational connection’.⁸⁷⁷ Some cases, however, have foundered on the requirement of rational connection. For instance, in *RJR Macdonald*, McLachlin C.J. held that one provision of the *Tobacco Products Control Act* failed the rational connection test on the basis that ‘there is no causal connection based on direct

⁸⁷⁵ *Ibid* at para. 78.

⁸⁷⁶ *Hutterian Brethren* at para. 48.

⁸⁷⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 40.

evidence, nor is there, in my view, a causal connection based in logic or reason’ between ‘the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products’.⁸⁷⁸ Other cases in which the SCC found that the requirement of rational connection was not satisfied include: *R v. DB*, in which a reverse onus on young persons to ‘demonstrate that a youth sentence has “sufficient length” to hold him or her accountable’ was held to fail the rational connection part of the s. 1 analysis;⁸⁷⁹ *Canada (Attorney General) v. Hislop*, in which the SCC held that a provision restricting survivorship pensions to survivors of same-sex conjugal relationships only if they ‘became survivors on or after January 1, 1998’,⁸⁸⁰ failed the rational connection test on the basis of an ‘absence of evidence’ justifying this limitation;⁸⁸¹ and *M v. H*, in which the SCC determined that the definition of ‘spouse’ in Ontario’s *Family Law Act* failed the rational connection part of the s. 1 analysis on the basis that ‘there is no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective’.⁸⁸²

How might the rational connection test be applied in the context of the impugned provisions of the *Copyright Act*? In evaluating whether a rational connection exists between the objective and means chosen to implement the objective it should first be asked whether there is ‘conclusive evidence or empirical evidence of a rational connection’.⁸⁸³ In *JTI*, McLachlin C.J. noted that:

⁸⁷⁸ *RJR-MacDonald* at para. 159.

⁸⁷⁹ *R. v. D.B.* [2008] 2 SCR 3, 2008 SCC 25 at para. 3.

⁸⁸⁰ *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, 2007 SCC 10 at para. 13.

⁸⁸¹ *Ibid* at para. 54.

⁸⁸² *M v H* [1999] 2 SCR 3 at para. 4.

⁸⁸³ *Toronto Star* at para. 25.

Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.⁸⁸⁴

In the absence of conclusive evidence, a rational connection can also be found through the application of ‘reason and logic’.⁸⁸⁵ As well, in *Lavoie*, the majority wrote that ‘widespread international practice [is a]...relevant indicator[] of a rational connection’.⁸⁸⁶

In *Michelin*, Teitelbaum J. held that ‘the objectives of the Copyright Act are rationally connected to an action for copyright infringement’, concluding 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.⁸⁸⁷

As noted above, as a result of the SCC’s re-articulation of the purpose of copyright – beginning in *Théberge* and refined most recently in *Cinar Corporation* – the rational connection analysis must now be framed differently. The question that should be asked, in determining whether this part of the proportionality analysis is met, is whether there is a rational connection between the objective of granting a just reward to copyright owners in order to incentivize the creation and distribution of expression, and the means of doing so, namely through the grant of limited,

⁸⁸⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 41.

⁸⁸⁵ *Toronto Star* at para. 25.

⁸⁸⁶ *Lavoie v Canada* 2002 SCC 23 at para. 59.

⁸⁸⁷ *Michelin* at para. 111.

assignable, exclusive statutory rights (including the ‘ability to enforce those [rights] in an action for copyright infringement’).⁸⁸⁸

Is there ‘conclusive evidence or empirical evidence of a rational connection’ between this objective and the means chosen to achieve this objective?⁸⁸⁹ A number of commentators have challenged the idea that copyright incentivizes the creation of expression.⁸⁹⁰ Julie Cohen, for instance, writes that ‘the incentives-for-authors story is wrong as a descriptive matter’.⁸⁹¹ Raustiala and Sprigman also question whether the incentives provided for by copyright are necessary to incentivize creativity or innovation in all contexts.⁸⁹²

However, the question of how to incentivize the creation and dissemination of expression can be considered to be a ‘complex social problem[.]’, which would mean – following *JTI* – that Parliament’s decision on how to address this problem ‘should be accorded considerable deference’.⁸⁹³ Furthermore, it can be argued that through the application of ‘reason and logic’, a rational connection can be established.⁸⁹⁴ It is perhaps logical to accept that the provision of financial incentives for the creation of works of expression may encourage at least certain individuals to create works of expression. As well, as noted above, ‘widespread international

⁸⁸⁸ *Ibid* at para. 111.

⁸⁸⁹ *Toronto Star* at para. 25.

⁸⁹⁰ Julie Cohen, ‘Copyright as Property in the Post-Industrial Economy’ (2011) 2011 *Wis L Rev* 141, Jessica Sibley, ‘Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators’ (2011) 86 *Notre Dame L Rev* 2091.

⁸⁹¹ Cohen at 143.

⁸⁹² Kal Raustiala and Christopher Sprigman, *The Knockoff Economy* (Oxford University Press 2012).

⁸⁹³ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 41.

⁸⁹⁴ *Toronto Star* at para. 25.

practice’ can be cited as a ‘relevant indicator’ of a rational connection.⁸⁹⁵ Granting limited rights to authors in order – at least in part – to incentivize the creation and dissemination of works of expression can be said to be a widespread international practice.⁸⁹⁶ The idea that the grant of exclusive rights in works of expression will encourage individuals to create additional works of expression is one that has been accepted by many. Cohen writes that:

[t]he statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation. Court opinions and legislative histories are peppered with references to the incentives for authors rationale. Judges recite it as a matter of course when deciding cases, and legislators, lobbyists, and other interested parties invoke it in debates about proposed amendments to the copyright laws. Copyright scholars frame policy problems in terms of an ‘incentives-access’ tradeoff, and that framing in turn affects our analysis of what judges and legislators do.⁸⁹⁷

Given the above discussion, it is suggested that a Canadian court would find the impugned provisions of the *Copyright Act* are rationally connected to the objective.⁸⁹⁸

7.3.4 Minimal impairment

In *R. v. Oakes*, the SCC required courts to demonstrate, in order to satisfy this branch of the proportionality analysis, that ‘the means ... should impair “as little as possible” the right or freedom in question’.⁸⁹⁹ Jamie Cameron notes that ‘[n]ot

⁸⁹⁵ *Lavoie* at para. 59.

⁸⁹⁶ Many countries around the world have adopted copyright legislation similar in form to Canada’s legislation as a mechanism through which to encourage the creation and dissemination of works. See, for instance, *U.S. Copyright Act*, 17 U.S.C. §§ 101 - 810 and CDPA 1988.

⁸⁹⁷ Cohen at 142.

⁸⁹⁸ Bailey expresses doubts that certain provisions of the *Copyright Act* would satisfy the rational connection requirement (Bailey at 147).

⁸⁹⁹ *Oakes* at para. 70, citing to *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 SCC at para. 139.

surprisingly, a consensus ... emerged that *Oakes* propounded a strict standard of justification which the Court subsequently found impossible to implement'.⁹⁰⁰

In *RJR*, McLachlin J. reframed this step as requiring 'the law [to] ... be carefully tailored so that rights are impaired no more than necessary'.⁹⁰¹

Furthermore, in *R v. St-Onge Lamoureux*, Deschamps J., writing for the majority, stated that:

In the minimal impairment inquiry, the court must not second-guess Parliament and try to identify the least intrusive solution. In *Downey*, this Court stated that '... the issue is "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively"'.⁹⁰²

In *Whatcott*, the range of alternatives from which Parliament could safely choose is referred to as the 'range of reasonably supportable alternatives'.⁹⁰³

How, then, might the minimal impairment analysis be applied in the context of the impugned provisions of the *Copyright Act*? In *Michelin*, Teitelbaum J. found the impugned provisions of the *Copyright Act* to be minimally impairing of the *Charter* right to freedom of expression on the basis that:

The Copyright Act does not prohibit attacks on the authors of works or their ideas. Infringers are only liable for reproducing the work or a substantial part of the same. 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 Sections 27(2) and (3).⁹⁰⁴

⁹⁰⁰ Cameron at 264. See also Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian *Charter's* Section 1' (2006) 34 Sup Ct L Rev 501 at 502.

⁹⁰¹ *RJR-MacDonald* at para. 160.

⁹⁰² *R. v. St-Onge Lamoureux* 2012 SCC 57 at para. 39.

⁹⁰³ *Whatcott* at para. 101.

⁹⁰⁴ *Michelin* at para. 111.

For several reasons, as will be discussed below, this conclusion might not be reached by a Canadian court considering this issue today. At the very least, the analysis should proceed differently. As described in Chapter 4, Teitelbaum J. adopted an approach to freedom of expression that approximates – in many ways – the now-rejected definitional conception. Under this approach, as discussed in Chapter 4, freedom of expression protects the ability of individuals to disseminate and receive ideas and opinions. If freedom of expression protects only the ability to disseminate ideas, and not expression, then the *Copyright Act* itself (which only protects expression, and not ideas), does not limit freedom of expression. Free to disseminate ideas and opinions relating to copyrighted works, non-copyright owning parties would be restrained only in their ability to express themselves using copyrighted works that they do not own or are not authorized to use. Beginning from this starting point, Teitelbaum J.'s conclusion that the *Copyright Act* is minimally impairing is not surprising. Not only does the *Copyright Act* disclaim any protection of ideas, but it also gives non-copyright owning parties the ability – in certain instances – to utilize expression without first receiving the authorization of the copyright owner. Thus, under the former approach to freedom of expression, the *Copyright Act* goes beyond what the s. 2(b) right to freedom of expression requires in permitting unauthorized use of expression in certain specific contexts.

As I have detailed in Chapter 4, however, the approach to freedom of expression employed by Teitelbaum J. is no longer the governing approach to freedom of expression in Canada. The s. 2(b) right to freedom of expression does not merely protect the ability to disseminate ideas or opinions; rather, it encompasses the ability of individuals to convey (or to attempt to convey) expression (meaning).

Based on this shift, as discussed earlier, it is appropriate to re-examine the question of whether the impugned provisions of the *Copyright Act* are minimally impairing.

According to the SCC in *Cinar Corp*, the objective of the *Copyright Act* is to provide a fair reward for creators and copyright owners in order to incentivize the creation of works of the arts and intellect.⁹⁰⁵ As described above, the objective of the impugned provisions can be seen as consistent with this overall objective. Parliament has chosen to attempt to achieve this objective through the means of limited exclusive rights granted initially to authors, which can be then transferred from authors to other parties. This was not the only means through which Parliament could have met the objective identified above. This objective could also have been met, for instance, through government grants, tax incentives, certificates, medals, or prizes.⁹⁰⁶

However, it has been accepted, in many jurisdictions around the world, that the creation of limited property rights in intangible expression through the vehicle of copyright legislation is an effective way to reward authors; and, in doing so, to incentivize the creation and distribution of works of the arts and intellect. Given this, the decision to enact a *Copyright Act* through which exclusive time-limited rights are granted in expression, with access to specific remedies, and subject to certain defences, could be seen as falling squarely within the range of ‘reasonably supportable alternatives’ from which Parliament could choose in order to fulfill its objective.⁹⁰⁷

⁹⁰⁵ *Cinar*.

⁹⁰⁶ Bruno S Frey and Susanne Neckermann, ‘Prizes and Awards’ in Luigino Bruni and Stefano Zamagni (eds), *Handbook on the Economics of Reciprocity and Social Enterprise* (Edward Elgar 2013). See also Lior Zemer, ‘Rethinking Copyright Alternatives’ (2005) 14 Int’l J of L and Info Tech 137 at 138-140 and Tushnet, ‘Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation’ at 27-30.

⁹⁰⁷ *Whatcott* at para. 101.

Despite being a reasonable alternative, however the impugned provisions (or portions of them) could still be found to be not minimally impairing on the basis that they are overbroad. Two types of overbreadth have been discussed by the SCC. As described in *JTI*:

Overbreadth is concerned with whether the provision on its face catches more expression than necessary to meet the legislator's objective. The criticism is not that the words are unclear, but that while clear, they go too far. Vagueness, by contrast, focuses on the generality and imprecision of the language used. The argument is that because the language is vague and unclear, it may be applied in a way that in fact goes beyond the legislator's stated goals. A citizen, corporate or otherwise, who wishes to stay within the law may have no choice but to err on the side of caution. The result may be that the citizen says less than is required in fact to accomplish the state's object. Indeed, confronted by vague bans on speech, the prudent citizen may be reduced to saying nothing at all. Like clear language that casts the statutory net too broadly, overbreadth by reason of vagueness goes to the heart of the requirement of minimal impairment.⁹⁰⁸

In *Whatcott*, the SCC listed a number of criticisms relating to overbreadth.⁹⁰⁹

Rothstein J., writing for the Court, noted that:

Criticisms relating to overbreadth are that the definition or a particular legislative provision

1. is overreaching and captures more expression than is intended or necessary;
2. has a chilling effect on public debate, religious expression and media coverage about moral conduct and social policy;
3. does not give legislative priority to freedom of expression;
4. restricts private communications;
5. should require intention
6. should require proof of actual harm
7. should provide for defences, such as a defence of truth⁹¹⁰

⁹⁰⁸ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 78.

⁹⁰⁹ *Whatcott* at para. 28.

⁹¹⁰ *Ibid* at para. 28.

In the context of the facts of *Whatcott*, it was held that the ‘key to minimizing both subjectivity and overbreadth’ is ‘[l]inking the test for hate speech to the specific legislative objectives’.⁹¹¹

Could the impugned provisions of the *Copyright Act* be held to be not minimally impairing on the basis of overbreadth? The objective of the impugned provisions of the *Copyright Act*, as discussed earlier in the chapter, is to provide a fair reward to copyright owners in order to incentivize the creation and dissemination of works of the arts and intellect. Since *Théberge*, it has been accepted that copyright is primarily an economic right.⁹¹² As articulated by Binnie J. in *Théberge*, the rewards provided by copyright are economic rewards, and the type of harm targeted – at least in the context of the non-moral rights provisions of the *Copyright Act* – is economic harm.⁹¹³ In light of the SCC’s judgment in *Cinar Corp*, the economic harm targeted can be said to be the harm that flows from acts that undermine the economic incentive for individuals to create. Given this, are the impugned provisions of the *Copyright Act* overbroad?

In applying the first criticism noted in *Whatcott* in the context of overbreadth, one must ask whether the impugned provisions are overbroad on the basis that they ‘capture[] more expression than is intended or necessary’.⁹¹⁴ As noted in *Whatcott*, ‘[p]reventative measures should only prohibit the type of expression expected to

⁹¹¹ Ibid at para. 47. For another work that discusses copyright laws in the context of hate speech and pornography, see Tushnet, ‘Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation’. Craig also suggests that ‘a comparison can be made between copyright law and other laws such as pornography and hate speech regulation that appear on their face to limit expression but ultimately function to enhance relations of communication’ (Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ at fn 113).

⁹¹² *Théberge* at para. 12.

⁹¹³ Ibid at para. 12.

⁹¹⁴ *Whatcott* at para. 28.

cause the harm targeted?'.⁹¹⁵ If the objective of copyright in Canada is to grant a fair reward to copyright owners in order to incentivize the creation of works, then – as per *Whatcott* – the only type of expression that should be prohibited is that which impacts upon this incentive function: that denies copyright owners a just or fair economic reward and in so doing negatively impacts the economic incentive that authors have to create works, or, perhaps, the economic incentive that distributors have to disseminate works.

For persons for whom the promise or possibility of economic gain acts as an incentivizing factor for the creation or dissemination of works, acts taken by individuals to deny these persons a just or fair economic reward might deter them from creating or disseminating such works in future. *Cinar Corp* provides an informative example. ‘Dreamer[s]’ like Robinson might not invest ‘years meticulously crafting an imaginary universe for an educational children’s television show’ if this show could simply be produced (and re-produced) by another party without that party being required to compensate Robinson.⁹¹⁶ Similarly, intermediaries such as production companies, and distributors such as publishing houses or movie studios, might not invest in the production and dissemination of expression if another publishing house or movie studio could simply re-produce the same work (in a manner that substitutes for the original work) without legal sanction.

It could be argued, however, that the impugned provisions of the *Copyright Act* ‘capture[] more expression than is ... necessary’ to prevent the harm targeted; that they prohibit types of expression other than expression that denies copyright owners a just or fair economic reward and in so doing negatively impacts the

⁹¹⁵ Ibid at para. 47.

⁹¹⁶ *Cinar* at para. 3.

economic incentive that authors have to create works, or the economic incentive that distributors have to disseminate works.⁹¹⁷ This is due, in large part, to the structure of the *Copyright Act*, through which the combined action of the infringement provision (s. 27) and the rights-granting provision (s. 3 and s. 5) means that any taking of a substantial part of a copyrighted work – whether or not it can be seen as impacting upon the just or fair economic reward to which copyright owners are entitled under the *Copyright Act* – constitutes a prima facie act of copyright infringement.⁹¹⁸

At this point in the copyright infringement analysis, the burden would shift to the defendant to establish a defence to copyright infringement. Once defences are factored into the analysis, is the scope of protection for the rights of copyright owners set out in the *Copyright Act* tailored to its objective in a manner sufficient to address concerns about overbreadth? As noted in a previous chapter, the broadest defence to copyright infringement in Canada is fair dealing. In recent years, two major modifications have been made to fair dealing that bring into question the claim that the impugned provisions of the *Copyright Act* are overbroad on the basis that they capture more expression than necessary. First, in June 2012, in the context of a number of amendments made to the *Copyright Act* through the vehicle of the *Copyright Modernization Act*, three new categories were added to fair dealing: parody, satire, and education.⁹¹⁹ As a result of these amendments, more expression would be considered to satisfy the first step of the fair dealing defence (the question of whether the work was created for a fair dealing purpose) than would have been the case prior to the amendments being incorporated into the *Copyright Act*.

⁹¹⁷ *Whatcott* at para. 28.

⁹¹⁸ *Copyright Act* at ss. 3, 5, 27.

⁹¹⁹ Copyright Modernization Act.

As well, in July 2012 (a mere two weeks after the *Copyright Act* had been amended), five copyright decisions were handed down by the SCC.⁹²⁰ Two of these decisions addressed fair dealing.⁹²¹ As described in Chapter 5, the SCC, in these decisions, adopted an approach to the fairness analysis in which it looked closely at the question of the extent to which the allegedly infringing work acted as a substitute for the original work; and in which the SCC declined to hold that a dealing was unfair absent evidence, brought by the plaintiff in the copyright infringement action, that the dealing resulted in economic loss. Thus, it is possible that the combined action of the 2012 legislative amendments to fair dealing plus the SCC's judicial interpretation of fair dealing could be held to limit the scope of copyright owners' rights in such a manner that – at least in the context of uses of works that can be seen as meeting the first step of the fair dealing analysis – the test for copyright infringement is linked to the objective of the *Copyright Act*.

However, despite the expansion of the first step of the fair dealing analysis through the addition of parody, satire, and education categories, and despite the broad approach adopted by the SCC to this part of the analysis, some uses of works still might not satisfy this step. Take the third case study, for instance. It is possible that an individual could use a substantial amount of existing content in the process of creating and disseminating, for commercial purposes, a new work in such a manner that would be considered neither parody nor satire (nor any of the other fair dealing categories). This work could simply be used as raw matter from which a new work is created. Provided no other defence exists to render the use non-infringing, this use would be infringing regardless of whether it impacts upon the economic incentive

⁹²⁰ *SOCAN v. Bell, Re:Sound, Rogers v. SOCAN, ESA, Alberta (Education)* .

⁹²¹ *SOCAN v. Bell; Alberta (Education)* .

that authors have to create works, or the economic incentive that distributors have to disseminate works.

As well, there are a number of categories of works for which the incentive function may not be relevant (or at least as relevant as other categories of works); where it can be argued that the presence or absence of the economic incentives provided by the grant of copyright is largely irrelevant to the question of whether the work will be created or distributed. One such category of works is those created by government departments (the second case study).⁹²² In Canada, works created by the Provincial or Federal governments are protected by Crown copyright.⁹²³ For many works created by government (such as reports, legislation, etc), the promise of economic gain from the sale or licensing of these works is irrelevant to both the work's creation and its distribution.⁹²⁴ Governments do not legislate in order to reap the economic benefit that may flow from the sale of copies of legislation.

Lastly, the hypothetical provision mentioned in the context of the first case study can also be argued to be overbroad. Increasing the term of copyright protection in works to the life of the author plus 70 years might incentivize the creation of certain works that would not have been created should the term of protection remain at the life of the author plus 50 years. However, the retroactive aspect of this provision might fall afoul of the s. 1 analysis. As written by Stevens J. in his dissenting judgment in the US Supreme Court decision in *Eldred*, '[n]either the purpose of encouraging new inventions nor the overriding interest in advancing

⁹²² See also Raustiala and Sprigman, who discuss a number of other categories of works for which the incentives arguably provided by copyright may not impact upon creativity or innovation.

⁹²³ *Copyright Act*, s. 12.

⁹²⁴ In *Lorimer TD* at para. 38, Noël A.C.J. described the Crown as 'an unusual plaintiff and really is not greatly interested in income or revenue from this work'.

progress by adding knowledge to the public domain is served by retroactively increasing the inventor's compensation for a completed invention'.⁹²⁵

This view was supported by an amici curiae brief in support of Eldred's position written by a number of prominent economists (including Kenneth J. Arrow, Ronald Coase, Linda Cohen, and Milton Friedman).⁹²⁶ In addition to arguing that the present value of additional compensation to authors flowing from copyright term extension in new works is 'small, very likely an improvement of less than 1% compared to the pre-CTEA term', these economists argued that '[t]he term extension for *existing* works makes no significant contribution to an author's incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made'.⁹²⁷ The brief concludes that '[t]aken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs'.⁹²⁸

Applying the second criticism noted in *Whatcott* in the context of overbreadth, might the impugned provisions of the *Copyright Act* be seen as having a 'chilling effect' on debate or expression?⁹²⁹ This question – in the context of certain provisions of the *Criminal Code* relating to terrorism – was addressed in the 2012 SCC decision of *R v. Khawaja*. McLachlin C.J., who wrote the reasons for judgment for the Court, discussed the 'evidentiary basis ... required to establish that legislation

⁹²⁵ *Eldred* at 226.

⁹²⁶ *Brief of George A. Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618)

⁹²⁷ *Ibid* at 2.

⁹²⁸ *Ibid* at 3.

⁹²⁹ *Whatcott* at para. 28.

has a chilling effect on the exercise of s. 2 freedoms'.⁹³⁰ As she noted, while '[i]n some situations, a chilling effect can be inferred from known facts and experience', in other instances it is necessary 'to call evidence of a chilling effect'.⁹³¹ McLachlin C.J. held that in the case of *Khawaja*, 'it is impossible to infer, without evidence, that the motive clause will have a chilling effect on the exercise of s. 2 freedoms by people holding religious or ideological views similar to those held by some terrorists'.⁹³²

It can be argued that the broad prohibition on the use of copyrighted material set out in the *Copyright Act* creates a chilling effect on the unauthorized use of copyrighted works, or on the circulation of ideas more generally.⁹³³ Some individuals may choose not to express themselves using copyrighted works rather than risk a copyright infringement lawsuit. However, although there is a substantial body of literature in the context of copyright that addresses the issue of 'chilling effects,' the majority of this research has been done in the context of the United States, and not in Canada.⁹³⁴ Thus, there is a lack of definitive evidence establishing the existence of a chilling effect resulting from the impugned provisions of Canada's *Copyright Act*.⁹³⁵

⁹³⁰ *Khawaja* at para 78.

⁹³¹ *Ibid* at para. 79.

⁹³² *Ibid* at para. 81.

⁹³³ In *Laugh it Off CCSA* at para. 104, Sachs J. discussed 'the chilling effects that overzealously applied trademark law could have on the free circulation of ideas'.

⁹³⁴ See, for instance, Berkman Center for Internet and Society at Harvard University, 'Chilling Effects' (2014) <<http://www.chillingeffects.org>> , Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 Harv J L & Tech 171, Urban and Quilter, Derek J Schaffner, 'The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation' (2004) 14 Cornell J of Law and Public Policy 145.

⁹³⁵ A full examination of this issue is beyond the scope of this thesis to address.

This absence of evidence may lead to courts declining to find the impugned provisions invalid on the basis of overbreadth.

Applying the third criticism noted in *Whatcott* in the context of overbreadth, do the impugned provisions of the *Copyright Act* ‘give legislative priority to freedom of expression’?⁹³⁶ In some ways, they can be seen to do so. For instance, the *Copyright Act* protects neither information nor ideas. Both ideas and information can thus be used by all individuals without those individuals first needing to seek authorization from a copyright owner.⁹³⁷ Furthermore, the rights of copyright owners (with respect to works) are limited both in scope (to works as defined in s. 5 of the *Copyright Act*, to the rights as set out in s. 3, and by the defences set out in ss. 29-30.9) and in duration (see ss. 6-12 of the *Copyright Act*).⁹³⁸ Additionally, the *Copyright Act* – by providing mechanisms through which copyright owners can, through the vehicle of the state, enjoin the unauthorized use of works in which they own copyright – can be seen as giving legislative priority to the freedom of expression interests of authors under the *Copyright Act* (at least those authors that continue to own copyright in works that they create).

In other ways, however, the impugned provisions of the *Copyright Act* do not give legislative priority to freedom of expression (specifically the freedom of expression interests of non-copyright owning parties). For instance, the structure of the *Copyright Act*, rather than giving legislative priority to the freedom of expression

⁹³⁶ *Whatcott* at para. 28.

⁹³⁷ The question of what constitutes an idea, and what constitutes expression, may be one that is difficult to determine. See *Nichols v. Universal Pictures Corp* 45 F2d 119 (2d Cir 1930), cert denied, 282 US 902 (1931) at 121, in which Judge Learned Hand wrote that: ‘Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.’

⁹³⁸ *Copyright Act*.

interests of non-copyright owning parties, gives legislative priority to the property rights of copyright owners. Under the impugned provisions of the *Copyright Act*, all unauthorized use by non-copyright owning parties of a substantial part of copyrighted works is, at first instance, prohibited. The non-copyright owning party – should they wish to have their use deemed non-infringing – must establish a defence to copyright infringement. Given the cost of defending a lawsuit,⁹³⁹ it can be asked whether it is likely that individuals that might be able to benefit from the defences as set out in the *Copyright Act* will be in a position to exercise this right.

As well, there is no mention of freedom of expression in the *Copyright Act*. The absence of a provision confirming the importance of freedom of expression can be contrasted with, among other examples, the hate speech provisions set out in s. 14 of Saskatchewan's *Human Rights Code*.⁹⁴⁰ In s. 14(2) of the *Human Rights Code*, it is stated that '[n]othing in subsection (1) restricts the right of freedom of expression under the law upon any subject'.⁹⁴¹ The SCC, in *Whatcott*, cited this provision as an indication that '[t]he Saskatchewan legislature recognized the importance of freedom of expression', and noted that '[t]he legislative objective of the entire provision is to address harm from hate speech while limiting freedom of expression as little as possible' (emphasis added).⁹⁴² The absence of an equivalent provision in the context of the *Copyright Act* could be interpreted as an indication that Parliament has not recognized the importance of freedom of expression in the context of copyright.

⁹³⁹ See, for instance, Michael McKiernan, 'The Going Rate' [2014] Canadian Lawyer Magazine 33.

⁹⁴⁰ Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1 at s. 14.

⁹⁴¹ *Ibid.*

⁹⁴² *Whatcott* at para. 110.

Applying the fourth criticism noted in *Whatcott* in the context of overbreadth, the impugned provisions of the *Copyright Act* restrict private communications. For instance, if Party A sends an email to Party B that contains a copyrighted attachment, and Party B opens and downloads this attachment, this could constitute copyright infringement under the *Copyright Act*, in that Party B could be found to have infringed copyright by reproducing the work. In order for Party B's act to be found not to be infringing, Party B must establish that their act was covered by a defence to copyright infringement, such as fair dealing.

Applying the fifth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require intention for a determination of copyright infringement to be made out. In order to infringe copyright under the *Copyright Act*, parties do not have to intend to commit copyright infringement; they must merely commit a prima facie infringing act for which no defence applies. As noted by Teitelbaum J. in *Michelin*, 'the intention of the infringer, whether or not in commercial competition with the copyright holder, is irrelevant to the question of infringement'.⁹⁴³

Applying the sixth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require proof of actual harm for a finding of copyright infringement. Proof that a party has done something that the copyright owner has the right to do, and that there is no available defence, is sufficient to ground a successful action for copyright infringement. Though the party whose copyright has been infringed is entitled to an accounting of profits, they can alternatively elect to recover an award of statutory damages.⁹⁴⁴ Under the statutory damages regime, parties whose

⁹⁴³ *Michelin* at para. 50. See also *Lorimer FCA* at 1073.

⁹⁴⁴ *Copyright Act* at s. 38.1.

copyright has been infringed can receive damages without demonstrating actual harm.

The creation of a statutory regime through which liability is imposed without a requirement that harm be demonstrated is not unique to copyright. Such an approach also exists in the context of hate speech. Rothstein J., who delivered the judgment of the Court in *Whatcott*, wrote that ‘the imposition of preventive measures that do not require proof of actual harm’ can be justified in part by ‘the difficulty of establishing a causal link between an expressive statement and the resulting hatred’.⁹⁴⁵ A similar justification has been used to justify the imposition of statutory damages regimes in the context of copyright. Samuelson and Wheatland, for instance, argue that:

[s]tatutory damages in U.S. copyright law have historically been intended to ensure that copyright owners could obtain at least some measure of compensation when it was difficult to prove how much damage they had suffered as a result of the defendants’ infringement.⁹⁴⁶

As noted in *Whatcott*, in some situations in which it is difficult to establish a causal link between the act and the harm flowing from the act, courts have accepted that a ‘reasonable apprehension of harm’ approach should be applied. Under this approach, as noted by Rothstein J., ‘a precise causal link for certain societal harms [is] not ... required. A court is entitled to use common sense and experience in recognizing that certain activities ... inflict societal harms’.⁹⁴⁷ Rothstein J. continues by noting that:

In *Thomson Newspapers Co.*, this Court recognized that a

⁹⁴⁵ *Whatcott* at para. 129.

⁹⁴⁶ Pamela Samuelson and Tara Wheatland, ‘Statutory Damages in Copyright Law: A Remedy in Need of Reform’ (2009) 51 *Wm & Mary L Rev* 439 at 446.

⁹⁴⁷ *Whatcott* at para. 132.

reasonable apprehension of harm test should be applied in cases where ‘it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society’ (para. 115). Such an approach is warranted ‘when it is difficult or impossible to establish scientifically the type of harm in question’ (para. 115).⁹⁴⁸

Should a ‘reasonable apprehension of societal harm’ test be applied in the context of the unauthorized use of copyrighted works or should ‘a precise causal link’ be required?⁹⁴⁹ Applying the test from *Thomson Newspapers Co*, does ‘the very nature of the expression in question undermine[] the position of groups or individuals as equal participants in society’?⁹⁵⁰ It could be argued that certain types or instances of unauthorized uses of copyrighted works undermine the position of authors as equal participants in society. One example where this might be the case is where someone creates a work which is then published by a different individual for a profit (denying the first individual any royalties for the work) (a *Cinar Corp*-type situation). This act of publication, by disseminating the author’s expression broadly, conveys meaning and thus prima facie constitutes expression under s. 2(b). However, it also impacts the ability of the author to act as an equal participant by denying them the financial benefits that flow from the commercialization of their creation. This could be a type of situation – as noted in *Thomson* – ‘where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap’.⁹⁵¹ As a result, in this type of situation, a Court might not ‘demand a scientific demonstration or the submission of definitive

⁹⁴⁸ Ibid at para. 133.

⁹⁴⁹ Ibid at paras. 132-133.

⁹⁵⁰ *Thomson* at para. 115.

⁹⁵¹ Ibid at para. 116.

social science evidence to establish that the line drawn by Parliament was perfectly drawn'.⁹⁵²

However, not all instances or types of copyright infringement can be seen as undermining the position of an author as an equal participant in society (viewed through an economic lens, as suggested by the SCC in *Théberge*).⁹⁵³ For instance, what is the economic impact, to the author, that results from the creation of a work such as that contemplated in the third case study – a work in which the copyrighted work is used as a building block in the creation of new expression? It could be argued that the author has lost the ability to charge licence fees for these uses of their works (and thus that their economic return is not as great as it would have been had they been able to charge licence fees). Nevertheless, can this be said to undermine the position of an author as an equal participant in society?

In this type of situation, it could be argued that a reasonable apprehension of harm test should not be applied, and the plaintiff should be required to demonstrate proof of economic harm. In one sense, this approach is similar to the approach applied by the SCC in the context of the fairness analysis. As noted in Chapter 5, the SCC, in several decisions, has criticized the plaintiff for failing to demonstrate that the dealing has resulted in economic harm, ultimately finding that the dealing with the work was fair.

The seventh criticism noted in *Whatcott* is that legislation, in order not to be found to be overbroad, 'should provide for defences, such as a defence of truth'.⁹⁵⁴ A number of defences are set out in the *Copyright Act*. As well, both the number and

⁹⁵² Ibid at para. 116. In *Bailey* at 151, *Bailey* relies on the SCC's decision in *Dunmore* to argue that 'courts should [not] defer to Parliament in analyzing the constitutionality of the Act'.

⁹⁵³ *Théberge* at para. 12.

⁹⁵⁴ *Whatcott* at para. 28.

scope of defences was expanded as part of the last round of copyright reform. Questions can be raised, however, as to whether these defences are sufficiently broad, or whether they are too vaguely worded to be useful to defendants. In the US context, Tushnet argues that fair use ‘is too vague to provide enough guidance’, stating that ‘[b]ecause the outcome of any particular case is uncertain, a potential infringer/fair user has to be willing to bear the substantial costs of litigation for a chance to escape liability. This seems quite likely to prompt self-censorship’.⁹⁵⁵ The potential applicability of fair dealing in any given circumstance, as well, can also be criticized as being uncertain, particularly given the importance placed by the SCC on the fairness factors in the fair dealing analysis.⁹⁵⁶

Based on the discussion as outlined above, although the impugned provisions fall squarely within the range of reasonably supportable alternatives that could have been selected by Parliament to address the objective of providing an incentive for the creation and dissemination of expression, it is possible – based on recent freedom of expression jurisprudence such as *Whatcott* and *Khawaja* – that the impugned provisions of the *Copyright Act* could fail to meet the minimal impairment requirement on the basis that they are overbroad. In light of this, it is useful to apply the third and final step of the proportionality analysis.

7.3.5 Do the benefits outweigh the deleterious effects

The last part of the s. 1 analysis, as described in *Whatcott*, ‘requires an assessment of whether the importance of the legislative objective of [the impugned provision...] outweighs the deleterious effects of the provision’.⁹⁵⁷ In engaging in

⁹⁵⁵ Tushnet, ‘Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation’ at 24.

⁹⁵⁶ See *SOCAN v. Bell* at para. 27.

⁹⁵⁷ *Whatcott* at para. 147.

this balancing exercise, the value of the expression must be considered. L’Heureux-Dubé, Gonthier, and Bastarache JJ, in their dissenting judgment in *R. v. Sharpe*, wrote that:

The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified ... Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an attenuated level of constitutional protection ... These forms of expression receive an attenuated level of constitutional protection not because a lower standard of justification is applied to the government, but because the low value of the expression is more easily outweighed by the objective of the infringing legislation.⁹⁵⁸

What is the importance of the impugned provisions of the *Copyright Act*?

What are their beneficial effects? In the context of the first case study, one can question what benefits flow from granting twenty years of additional protection to works already created. As noted above, in their amici curiae brief in support of the position of Eldred in *Eldred v. Ashcroft*, a number of prominent economists argue that ‘[t]he term extension for existing works makes no significant contribution to an author’s incentive to create’.⁹⁵⁹ They also argue that the present value of additional compensation to authors flowing from copyright term extension in new works is ‘small, very likely an improvement of less than 1% compared to the pre-CTEA term’.⁹⁶⁰ As note above, the brief concludes that ‘[t]aken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs’.⁹⁶¹

⁹⁵⁸ *Sharpe* at para. 181.

⁹⁵⁹ , *Brief of George A. Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618) at 2.

⁹⁶⁰ *Ibid* at 2.

⁹⁶¹ *Ibid* at 3.

In the context of the second study, the benefits of the impugned provisions are to give federal and provincial governments the ability to restrict certain unauthorized uses of works protected under Crown copyright. This preserves an income stream for government – at least in the context of works offered by government for sale. It also prevents other individuals from profiting from works created by government. A third benefit of these provisions is that they could allow governments to restrain the publication of works based on government documents that may contain inaccurate (or inaccurately summarized) information.

In the context of the third study, the benefits of the impugned provisions are – in a manner similar to the second case study – to give copyright owners the ability to restrict the extent to which individuals can create and disseminate transformative works. This preserves a potential licensing market. It also allows the copyright owner to control the integrity of the original work, and to prevent unauthorized uses of the work that present the copyrighted work in a way that the copyright owner finds inappropriate or offensive.

What are the deleterious effects of the provisions? In the context of the first case study, the deleterious effects may include restrictions being placed on the work's circulation (which could impact upon the ability of individuals to access the expression, which in turn might impact individuals' ability to use this expression in the service of self-fulfillment, truth-finding, or democratic discourse). These negative effects might be particularly severe in the context of works that are not widely available.

Similar negative effects might be felt in the second case study, where the attempt by B to distribute abridged copies of government documents would be halted by a copyright infringement claim. As in the first example, these negative effects

might be particularly severe in the context of government documents that are not being made widely available.

In the third study, the deleterious effects of a successful copyright infringement action range from the negative impacts felt by individuals who created the transformative work on the work being pulled from circulation, to the negative impact on the public who would no longer be able to access this work.

Do the deleterious effects of these provisions outweigh their beneficial impacts? In considering this question, courts must balance a number of factors, including whether the expression in question is ‘low value’ expression. Are the uses of copyrighted works contemplated in the three case studies ‘low value’ expression similar to defamatory libel,⁹⁶² hate speech,⁹⁶³ information about tobacco products and product brands,⁹⁶⁴ and pornography?⁹⁶⁵ If they can be characterized as such, then it is possible that the benefits outlined above – however marginal they might be – might be found to outweigh the detrimental effects.

Expression that has been characterized by the SCC as ‘low value’ does not advance, to any great degree, the core values of freedom of expression (namely the search for truth, self-fulfillment, and political participation). For instance, Cory J., in *R. v. Lucas*, wrote that defamatory libel constitutes low value expression on the basis that:

[it] can cause long-lasting or permanent injuries to the victim. The victim may be forever demeaned and diminished in the eyes of her community. The victim may be forever demeaned and diminished in the eyes of her community. The conduct

⁹⁶² *Lucas*.

⁹⁶³ *Keegstra*.

⁹⁶⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.*

⁹⁶⁵ *Sharpe*.

which injures reputation by criminal libel is just as blameworthy as other conduct readily accepted as criminal, such as a deliberate assault or causing damage to property. Moreover, the offence requires an intent to defame and knowledge of the falsity of the publication.⁹⁶⁶

In *Butler*, Sopinka J. wrote that:

the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing ... lies far from the core of the guarantee of freedom of expression in that it appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.⁹⁶⁷

In *JTI-Macdonald*, McLachlin C.J., writing for the Court, determined that false promotion, in the context of tobacco sales, is of low value, describing this type of advertising as ‘the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them’.⁹⁶⁸ McLachlin C.J. also held that advertising aimed at youth, and ‘the inducement of increased consumption’ were both low value expressions.⁹⁶⁹

In *R. v. Sharpe*, child pornography was held to be low value expression.

McLachlin C.J., writing for the majority, wrote that:

[t]he law challenged in this appeal engages mainly the justification of self-fulfilment. Child pornography does not generally contribute to the search for truth or to Canadian social and political discourse. Some question whether it engages even the value of self-fulfilment, beyond the base aspect of sexual exploitation.⁹⁷⁰

However, the expressive acts in the three case studies advance the core values of freedom of expression. A’s making available works the copyright in which would

⁹⁶⁶ *Lucas* at para. 73.

⁹⁶⁷ *Butler* at para. 120.

⁹⁶⁸ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 68.

⁹⁶⁹ *Ibid* at paras. 94, 115.

⁹⁷⁰ *Sharpe* at para. 24.

have expired were it not for a legislative amendment extending the term of copyright advances the search for truth by making these works accessible to a broader range of individuals; enhances the self-fulfilment of all who read the work who would otherwise not have done so by giving them the opportunity to engage with its content; and, depending on the nature of the work made available and the actions taken by individuals after engaging with the work, may enhance participation in social and political decision making.

B's expressive acts of both abridging and then offering for sale abridged versions of works protected under Crown copyright advances the search for truth by making these works accessible in a different manner, and – arguably – to a different group of readers. B's acts may also enhance the self-fulfilment of readers of the work, will advance the communal exchange of ideas, and may also enhance participation in political decision making. The dissemination of abridged versions of government documents may be particularly relevant to this latter core freedom of expression value.

C's expressive acts may also enhance the core values of freedom of expression. In particular, the creation and dissemination, by C, of transformative works, may enhance both C's self-fulfilment and that of his/her audience, and may enhance participation in political or social decision-making by informing C's audience of issues and/or encouraging them to become involved or engaged. In *Sharpe*, McLachlin C.J. wrote that a prohibition that 'engages the value of self-fulfilment and may be difficult to link to a reasoned risk to harm ... rais[es] particular troubling constitutional concerns'.⁹⁷¹ This description could be applied to case study C.

⁹⁷¹ Ibid at para. 41.

The question of whether the expression is of low value, however, is not the only consideration in the context of this aspect of the s. 1 analysis. As noted in *Whatcott*, the freedom of expression values furthered by the expression in question must also be balanced ‘with competing *Charter* rights and other values essential to a free and democratic society’.⁹⁷² Other competing *Charter* rights that must be balanced in the context of the s. 1 analysis in the context of the three case studies in question are the freedom of expression rights of the public, and the freedom of expression rights of authors, whether or not they continue to own copyright in the works that they create.⁹⁷³ The latter right is relevant in both case studies one and three, and may be relevant in case study two, depending on the circumstances in which the document protected by Crown copyright was created. Other rights that might need to be balanced, as a result of the SCC decision in *Cinar Corp. v. Robinson*, are the property rights of copyright owners, and authors’ rights to inviolability and to dignity.⁹⁷⁴ It is unclear, however, whether infringements of these two latter rights could be found in all instances of copyright infringement, or only in situations where the author remains the copyright owner. Furthermore, it is unclear whether infringements of these two latter rights occur in all instances of copyright infringement, or only in cases analogous to *Cinar Corp.*

Canadian courts have also held that balancing, in the context of the s. 1 analysis, should ‘take into account Canada’s international obligations with respect to international law treaty commitments’.⁹⁷⁵ As stated in *Whatcott*, ‘[t]hose

⁹⁷² *Whatcott* at para. 66.

⁹⁷³ See, for instance, Paul Torremans, ‘Is Copyright a Human Right?’ [2007] *Mich St L Rev* 271 at 290.

⁹⁷⁴ *Cinar* at paras. 113-117.

⁹⁷⁵ *Whatcott* at para. 67, citing to *Taylor* at p. 916.

commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values'.⁹⁷⁶ In the context of copyright, international obligations that should be considered include international copyright and intellectual property treaties and conventions that Canada has signed and are in force, namely the *Berne Convention for the Protection of Literary and Artistic Works*, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, the *WIPO Convention*, the *WIPO Copyright Treaty*, the *WIPO Performance and Phonograms Treaty*, and *TRIPS*.⁹⁷⁷

Canada's international commitments, however, are not limited to copyright or intellectual property more broadly. Other types of treaties and international commitments that should be considered in the balancing process include human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Declaration of Human Rights, the UN Declaration on the Rights of Indigenous Peoples, and the UN Convention on the Rights of Persons with Disabilities.⁹⁷⁸

Taken together, I have demonstrated that a Canadian court could determine that the benefits of the impugned provisions – in the context of the three case studies – might not outweigh their detrimental effects. At the very least, there is a serious question to be considered.

⁹⁷⁶ *Whatcott* at para. 67.

⁹⁷⁷ Berne Convention, Rome Convention, Convention Establishing the World Intellectual Property Organization, 14 July 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3, WCT, WPPT, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1194).

⁹⁷⁸ ICCPR, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), UNDRIP, UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

7.4 Remedies

In the previous section, I argued that in the context of the three case studies discussed in this chapter, the impugned provisions of the *Copyright Act*, described above, might not be justified under a s. 1 analysis. A court could find that these provisions are not justified on the basis that they are overbroad, or that the deleterious effects of the provisions outweigh the beneficial effects. This section will take this hypothetical situation as its starting point, examining the options available to a court should it determine that the impugned provisions of the *Copyright Act* unjustifiably infringe the s. 2(b) right to freedom of expression.

Section 52(1) of the *Constitution Act, 1982* states that ‘[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’.⁹⁷⁹ Multiple remedies, including striking down, severing, and reading in, are available to a court under s. 52(1).⁹⁸⁰

As described in the above analysis, if the impugned provisions of the *Copyright Act* are to fail a s. 1 analysis, they will likely do so either on the basis that they are not minimally impairing, or that the benefits flowing from the provisions do not outweigh their detrimental effects (the second or third elements of the proportionality test). Certain remedies – namely ‘[s]triking down, severing or reading in’ – are associated with *Charter* violations that fail these steps of the s. 1 analysis.⁹⁸¹ Thus, it is possible that a court could strike down, sever, or read in elements into the

⁹⁷⁹ Constitution Act, 1982 at s. 52(1).

⁹⁸⁰ *Schachter*.

⁹⁸¹ *Ibid* at para. 50.

impugned provisions of the *Copyright Act* should they be found to fail the second or third steps of the s. 1 analysis.

Courts, however, are limited in their ability to read in or sever elements of statutory provisions. In *Schachter*, it is noted that severance and reading in are appropriate remedies only where the inconsistency or the extension ‘can be defined with some precision on the basis of the requirements of the Constitution’.⁹⁸² As

Lamer J. noted in his majority reasons in *Schachter*, in situations in which:

the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis ... it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in *Hunter v. Southam Inc.* ...:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.⁹⁸³

These principles are directly on point in the context of copyright. In the previous section, I argued that a court could conclude that the impugned provisions of the *Copyright Act* are overbroad. That is to say, as described in *JTI* and *Whatcott*, and applied in the context of copyright, a court could determine that the impugned provisions either ‘on [their] face catch[] more expression than necessary to meet the legislator’s objective’;⁹⁸⁴ or are overbroad due to vagueness.

In the context of the first case study, severing might be the most appropriate remedy. If the offending portion of the provision is its retroactive nature, then

⁹⁸² Ibid at para. 52.

⁹⁸³ Ibid at para. 52.

⁹⁸⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 78.

depending on how the provision is drafted, the offending portion could be severed without the court being required to ‘fill in ... details’⁹⁸⁵ or to ‘make ad hoc choices’.⁹⁸⁶ However, reading in or severing may not be appropriate in the contexts of case studies two and three, in which there are a number of ways through which the impugned provisions could be modified so as to address concerns relating to overbreadth (and the related concern of proportionality between detrimental and beneficial effects).

The situation in the context of copyright, with respect to these two case studies, is thus similar to that addressed by the SCC in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*.⁹⁸⁷ Gonthier J., in *Mackin*, noted that multiple approaches could be taken to address the constitutional issue in question. Given this, Gonthier J. stated that ‘it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers’.⁹⁸⁸ Attempts by courts to re-craft the impugned provisions of the *Copyright Act* could be criticized on the basis that they ‘amount to making ad hoc choices from a variety of options’, and that in so doing, courts are paying insufficient respect to the role of the legislature.⁹⁸⁹

This argument – that it would be inappropriate for a Canadian court to craft legislative amendments to remedy copyright’s constitutional issues in contexts where there is more than one way in which these amendments could be framed – is given

⁹⁸⁵ *Schachter* at para. 52.

⁹⁸⁶ *Ibid* at para. 56.

⁹⁸⁷ *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick* 2002 SCC 13.

⁹⁸⁸ *Ibid* at para. 77.

⁹⁸⁹ *Schachter* at paras. 37-58 and 56. See also *M v H* at para. 139.

support by *Hunter v. Southam Inc.*⁹⁹⁰ Lamer C.J., in *Schachter*, noted that in the circumstances of *Hunter*, ‘it would theoretically be possible to characterize the “extent of the inconsistency” as the absence of certain safeguards’.⁹⁹¹ However, Lamer C.J. held that it would have been inappropriate for the SCC in *Hunter* to have ‘establish[ed] ...the appropriate safeguards’, as ‘this would have required establishing a new scheme, the details of which would have been up to the Court to determine’.⁹⁹²

Consistent with the SCC’s judgment in *Hunter*, one way in which to characterize the issues identified in the context of case studies two and three is as ‘the absence of certain safeguards’.⁹⁹³ Specifically, as described in earlier sections of this chapter, the *Copyright Act* can be seen as containing insufficient safeguards for the freedom of expression interests of non-copyright owners. A court – assisted by the able arguments of counsel both for the parties and by any interveners – could conceivably craft safeguards which would address the constitutional issues in case studies two and three (relating to Crown copyright and to the fair dealing defence). However, in the same way as it would have been inappropriate for the SCC in *Hunter* to take it upon itself to ‘establish[] a new scheme’, it would be inappropriate for the SCC to add additional safeguards in the context of evaluating copyright’s constitutional deficiencies in these two contexts.⁹⁹⁴ This is a matter for Parliament, not the courts.

⁹⁹⁰ *Hunter* at p. 169.

⁹⁹¹ *Schachter* at para. 53.

⁹⁹² *Ibid* at para. 53.

⁹⁹³ *Ibid* at para. 53.

⁹⁹⁴ *Ibid* at para. 53.

Also on point is the decision of the SCC in *Rocket v. Royal College of Dental Surgeons of Ontario*.⁹⁹⁵ McLachlin J. wrote the judgment of the Court in *Rocket*, in which it was found that the impugned regulation violated s. 2(b) of the *Charter* and could not be justified under s. 1 on the basis of overbreadth. Rather than reading in additional exceptions, the SCC struck down the regulation. It did so due in large part to the structure of the regulation itself, which – as noted by McLachlin J. – ‘starts with an absolute prohibition on all advertising, [and goes]... on to set out exceptions’.⁹⁹⁶ McLachlin J., in *Rocket*, referred to this method of legislative drafting as one which is ‘almost certain to raise the spectre of *Charter* infringement’.⁹⁹⁷ As stated by McLachlin J., ‘[b]ecause the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators’.⁹⁹⁸

It could be argued that in a manner similar to *Rocket*, prohibition of use of copyright-protected expression ‘would be justifiable if additional exceptions were added’.⁹⁹⁹ For instance, it could be argued that if additional categories were incorporated into the fair dealing defence, or if additional defences themselves were created, that this could address concerns of overbreadth with respect to the third case study. However, following *Rocket*, the creation of additional exceptions would be a matter for the legislators, and not for the courts.

Given the issues noted above in the context of the second and third case studies with reading in, reading down, and severance as possible remedies, a court

⁹⁹⁵ *Rocket*.

⁹⁹⁶ *Ibid* at para. 40.

⁹⁹⁷ *Ibid* at para. 49.

⁹⁹⁸ *Ibid* at para. 47.

⁹⁹⁹ *Schachter* at para. 54, discussing *Rocket*.

could find that the most appropriate remedy, should it be determined that the impugned provisions are not justified under a s. 1 analysis, would be for the court to issue a declaration of invalidity. To what should this declaration of apply? As described earlier this chapter, the impugned provisions – those that I have argued restrict the s. 2(b) right to freedom of expression – are s. 27(1) of the *Copyright Act* (the general infringement provision), when read in context with the provisions granting rights in works (ss. 3 and 5), the primary remedy provisions (ss. 34, 38.1 and 42), and the provisions setting out defences (ss. 29-30.9) and other limitations to copyright (for instance term limits, as amended (ss. 6-12)).¹⁰⁰⁰ Considerable overlap exists between a number of these provisions. The general infringement provision (s. 27(1)), for instance, can only be understood in light of the provision articulating the rights granted to copyright owners (s. 3), the provision setting out the conditions of subsistence of copyright (s. 5), and the provision setting out the term of copyright (ss. 6-12). It would thus be difficult for a court to remedy any constitutional issue involving these provisions by invalidating a single provision.

A similar fact situation is found in *R v. Guignard (Guignard)*.¹⁰⁰¹ In *Guignard*, Lebel J., writing for the SCC, held that ‘[b]ecause of the considerable overlap between the definitions and the provision imposing the ban, the declaration of nullity must apply to both the definition and the ban itself’.¹⁰⁰² This passage from *Guignard* suggests that should one or more impugned provisions be found to be inconsistent with the *Charter*, all overlapping provisions could (and perhaps should) be struck down. Drawing from McLachlin C.J.’s judgment in *Bedford*, Parliament

¹⁰⁰⁰ *Copyright Act*.

¹⁰⁰¹ *R v Guignard* 2002 SCC 14.

¹⁰⁰² *Ibid* at para. 32.

would then be able to ‘devise a new approach, reflecting different elements of the existing regime’.¹⁰⁰³

Should this declaration extend beyond specific provisions to the *Copyright Act* as a whole? This question has been addressed by the SCC in several decisions, including *M v. H* and *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 (Alberta (Information and Privacy Commissioner))*.¹⁰⁰⁴ One question to be asked in considering this issue is whether Parliament would have enacted the legislation without the impugned provisions. If it cannot be assumed that it would have done so, then this is an indication that the statute should be struck down in its entirety. In *M v. H*, the SCC determined that the legislature would have enacted the legislation without the impugned (and constitutionally impermissible) provisions.¹⁰⁰⁵ Iacobucci J., who wrote part of the reasons for judgment, noted that:

This is not a case where the parts of the legislative scheme which do offend the Charter are so inextricably bound up with the non-offending portions of the statute that what remains cannot independently survive. As a result, it would be safe to assume that the legislature would have passed the constitutionally sound parts of the statute without the unsound parts.¹⁰⁰⁶

In the context of the first case study, it might be assumed that Parliament would have enacted the copyright term extension without making it retroactive. However, there is no guarantee that Parliament would have enacted the *Copyright Act* absent the impugned provisions relevant in the contexts of case studies two (the

¹⁰⁰³ *Bedford* at 165.

¹⁰⁰⁴ *M v H; Alberta (IPC)* .

¹⁰⁰⁵ *M v H* at para. 144.

¹⁰⁰⁶ *Ibid* at para. 144.

Crown copyright provision) and three (fair dealing, read together with the rights-granting provision, the infringement provision, and other provisions).

One recent decision in which the SCC determined that it could not conclude that the legislature would have enacted the legislation without the impugned (and constitutionally impermissible) provisions was *Alberta (Information and Privacy Commissioner)*.¹⁰⁰⁷ This decision dealt with the constitutionality of specific provisions of Alberta's *Personal Information Protection Act (PIPA)*.¹⁰⁰⁸ Abella and Cromwell JJ, writing for the Court, stated that '[g]iven the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant'.¹⁰⁰⁹ As a result, the SCC struck down *PIPA* in its entirety.

Similar to *PIPA*, the *Copyright Act* possesses an integrated structure. The primary infringement provision (s. 27), for instance, must be read together with the rights-granting provision (s. 3 for works), which itself must be read alongside the provision detailing the conditions for subsistence of copyright (s. 5) and the provisions setting out the term of copyright in works (ss. 6-12).

Given the integrated structure of the *Copyright Act*, and following *Alberta (Information and Privacy Commissioner)*, it can be argued that should it be found that one or more provisions of the *Copyright Act* unjustifiably infringe the *Charter*-protected right to freedom of expression, that it may be more appropriate to strike down the *Copyright Act* in its entirety than to invalidate a specific provision or a number of provisions.

¹⁰⁰⁷ *Alberta (IPC)* .

¹⁰⁰⁸ Personal Information Protection Act, S.A. 2003, c. P-6.5.

¹⁰⁰⁹ *Alberta (IPC)* at para. 40.

In suggesting that a declaration of invalidity might be the most appropriate remedy with respect to case studies two and three, the next question that must be asked is whether the declaration of invalidity should apply immediately, or whether it would be appropriate for the Court to grant a temporary suspension of this declaration. Canadian courts have indicated their discomfort in granting a suspended declaration of invalidity. In *Canada (Attorney General) v. Hislop*, for instance, LeBel and Rothstein JJ, writing for the majority, stated that the effect of granting a suspended declaration of invalidity is to ‘[extend] the life of an unconstitutional law’.¹⁰¹⁰ As noted by Deschamps J. in her dissenting reasons in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, ‘[g]enerally, the Court should be wary of allowing or appearing to condone a continued state of affairs that violates *Charter* rights’.¹⁰¹¹

Guidance was given by the SCC in *Schachter* as to the types of situations in which temporary suspensions of invalidity could be issued. Lamer C.J., who delivered the reasons for judgment for the majority, wrote that a suspension of invalidity is ‘clearly appropriate where the striking down of a provision poses a potential danger to the public ... or otherwise threatens the rule of law’.¹⁰¹² Lamer C.J. also suggested that suspensions of invalidity ‘may also be appropriate in cases of underinclusiveness as opposed to overbreadth’.¹⁰¹³ In these types of cases, were an underinclusive law to be struck down, deserving persons might be deprived of

¹⁰¹⁰ *Canada (Attorney General) v Hislop* at para. 91.

¹⁰¹¹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4 at para 244.

¹⁰¹² *Schachter* at para. 79.

¹⁰¹³ *Ibid* at para. 79.

benefits ‘without providing them to the applicant’.¹⁰¹⁴ Since *Schachter*, other (arguably related) justifications for granting a temporary suspension of invalidity have been articulated by the SCC. For instance, in *Bedford*, a suspension of invalidity was granted in part on the basis that ‘moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians’.¹⁰¹⁵ As well, in *Kingstreet Investments Ltd v. New Brunswick (Finance)*, Bastarache J. stated that ‘[w]here the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend the declaration of invalidity to enable government to address the issue’.¹⁰¹⁶

The possibility that a court might grant a declaration of invalidity should impugned provisions of the *Copyright Act* (or the *Copyright Act* in its entirety) be found to be invalid is supported by the reasoning noted above in *Schachter*, *Bedford*, and *Kingstreet*. First, although striking down the *Copyright Act* would pose no risk to public safety, it would deprive deserving people of benefits (for instance authors who are copyright owners whose works could be used by anyone in any context (including a commercially competitive context) without the possibility of recourse). Contrary to the example cited in *Schachter*, in this situation striking down an overbroad statute (as opposed to an underinclusive one) would deprive deserving persons of benefits. Second, to quote the reasons for judgment in *Bedford* (modified to fit the copyright context), it can be suggested that given the increasing prominence of copyright in Canadian public discourse, ‘moving abruptly from a situation where

¹⁰¹⁴ Ibid at para. 79.

¹⁰¹⁵ *Bedford* at para. 167.

¹⁰¹⁶ *Kingstreet Investments Ltd v New Brunswick (Finance)* 2007 SCC 1 at para. 25.

[intangible expression] is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians'.¹⁰¹⁷ Third, given economic data on the importance of copyright to Canada's economy, it is likely that – as was the case in *Kingstreet* – evidence would be led 'establishing a real concern about fiscal chaos' should the *Copyright Act* be struck down.¹⁰¹⁸

If a temporary suspension is granted, for how long might it be granted? The SCC has suspended declarations of invalidity under the *Charter* in 21 decisions. In all but one case, the SCC granted suspensions of either six, 12, or 18 months.¹⁰¹⁹ In total, in two out of 21 cases (10%) in which suspensions of invalidity were granted, the SCC suspended the declaration for a period of 18 months;¹⁰²⁰ in 11 out of 21 cases (52%), the SCC suspended the declaration for a period of 12 months;¹⁰²¹ and in

¹⁰¹⁷ *Bedford* at para. 167. In 2009, Canada's federal government launched a public consultation on copyright in conjunction with the introduction of Bill C-61 (Government of Canada, 'Copyright Consultations' (*Government of Canada*) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/home>> accessed 16 February 2015). Geist writes that '[t]here were ultimately more than 8,300 submissions - more than any government consultation in recent memory': Michael Geist, 'The Final Copyright Consultation Numbers: No Repeat of Bill C-61' (*Michael Geist*, April 9, 2010) <<http://www.michaelgeist.ca/2010/04/copycon-final-numbers/>> accessed 16 February 2015.

¹⁰¹⁸ *Kingstreet Investments Ltd v New Brunswick (Finance)* at para. 25. See, for instance, CONNECTUS Consulting, *The Economic Impact of Canadian Copyright Industries - Sectoral Analysis* (2006), Conference Board of Canada, *Valuing Culture* (2008).

¹⁰¹⁹ The one exception is *Reference re Manitoba Language Rights (Man.)* [1985] 1 SCR 721, a decision in which the SCC 'declare[d] all the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect' (para 72). In this case, the SCC held that a special hearing should be set to determine the period of temporary validity (para 116).

¹⁰²⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1999), 173 DLR (4th) 1 SCC, *Dunmore*.

¹⁰²¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R v. Campbell; R v Ekmecic; R v Wickman; Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)* (1997), 150 DLR (4th) 577 SCC, *Trociuk v British Columbia (Attorney General)* 2003 SCC 34, *R v Demers* 2004 SCC 46, *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 2007 SCC 9, *Confédération des syndicats nationaux v Canada (Attorney General)* 2008 SCC 68, *Nguyen v Quebec (Education, Recreation and Sports)* 2009 SCC 47, *R v Tse* 2012 SCC 16, *Alberta (IPC)*, *Bedford*, *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, *Carter*.

seven out of 21 cases (33%), the SCC suspended the declaration for a period of six months.¹⁰²²

However, the last case in which the SCC suspended a declaration of invalidity for a period of other than 12 months was the 2003 decision of *Nova Scotia (Worker' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*.¹⁰²³ Since this date, the SCC has granted suspended declarations of invalidity in nine cases, all of which for a period of 12 months.¹⁰²⁴ Statistically, it appears most likely that if a court decides to suspend a declaration of invalidity, that it would do so for a period of 12 months.

This statistical analysis is supported by remarks, made by the SCC, as to the appropriate length of time for which to suspend the effect of a declaration of invalidity. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the effect of the declaration of invalidity was suspended for 18 months.¹⁰²⁵ L'Heureux-Dubé J. referred to the length of this suspension, in her dissenting reasons, as 'longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected'.¹⁰²⁶ A suspension of 12 months, on the other hand, was referred to by Lamer C.J. in his dissenting reasons in *Rodriguez v. British Columbia*

¹⁰²² *R v Bain* (1992), 87 DLR (4th) 449 SCC, *Eurig Estate (Re)* (1998), 165 DLR (4th) 1 SCC, *M v H, United Food and Commercial Workers, Local 1518 (UFCW) v Kmart Canada Ltd* (1999), 176 DLR (4th) 607 SCC, *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick, Guignard, Nova Scotia (Worker' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* 2003 SCC 54.

¹⁰²³ *Nova Scotia (Worker' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*.

¹⁰²⁴ *R v Demers, Charkaoui, Confédération des syndicats nationaux v Canada (Attorney General)*, *Nguyen v Quebec (Education, Recreation and Sports)*, *R v Tse, Alberta (IPC)*, *Bedford, Sask. Fed of Labour, Carter*.

¹⁰²⁵ *Corbiere*.

¹⁰²⁶ *Ibid* at para. 118.

(*Attorney General*) as ‘giv[ing] Parliament adequate time to decide what, if any, legislation should replace [the impugned provision]’.¹⁰²⁷

7.5 Conclusion

In this chapter I have explored, through the lens of three case studies, the question of whether specific provisions of Canada’s *Copyright Act* infringe the *Charter* right to freedom of expression, and, if so, whether they can be justified under s. 1 of the *Charter*. These questions were considered by Teitelbaum J. in *Michelin*. As noted in Chapter 2, Teitelbaum J. held that specific provisions of the *Copyright Act* did not infringe the *Charter*-protected right to freedom of expression and, even if they did, they would be saved by a s. 1 analysis. As described in Chapter 2, since *Michelin*, these conclusions have been treated as settled.

In this chapter, I have demonstrated that these conclusions ought not to be seen as settled. I have argued that the uses of copyrighted works described in the three case studies constitute protectable expression, and that core provisions of Canada’s *Copyright Act* infringe the *Charter* right to freedom of expression in purpose and effect. As well, I have argued that these provisions might not be justified through the application of a s. 1 analysis. Drawing in particular from *Whatcott*, I have argued that although the impugned provisions would be seen as rationally connected to this objective, they may be found to be overbroad, and thus not minimally impairing. As well, it could be found that the beneficial effects of the provisions are not proportionate to their detrimental effects.

If the determination is made that the impugned provisions of the *Copyright Act* infringe s. 2(b), and that this infringement cannot be justified under s. 1, the question turns to remedies. In the context of the first case study, I suggested that the

¹⁰²⁷ *Rodriguez v. British Columbia (Attorney General)* [1993] 3 SCR 519 SCC at para. 100.

constitutionality of the impugned provision could be addressed by severing part of the provision. In the context of the second and third case studies, however, my analysis of relevant SCC case law suggests that – perhaps surprisingly – in order to avoid usurping the role of Parliament, a court should strike down either part of the *Copyright Act*, or the *Copyright Act* in its entirety. I have argued that if a court takes this approach, it is likely that any declaration of invalidity would be suspended for a period of 12 months. Such a remedy would give Parliament the opportunity to remake Canada’s *Copyright Act* in ways that are consistent with what the *Charter* requires.

The purpose of this chapter, however, has not been to demonstrate that the *Copyright Act* unjustifiably infringes the *Charter* right to freedom of expression. Rather, it has been to demonstrate that the *Copyright Act* is not immune from freedom of expression scrutiny, and that certain provisions of the *Copyright Act*, depending on the context in which they are engaged, may unjustifiably infringe the *Charter* right to freedom of expression. In so doing, this chapter has offered a fourth argument – one based on the SCC’s own copyright and *Charter* jurisprudence – in support of my position that it is time for Canadian courts to move beyond *Michelin* and to reconsider the relationship between the *Charter* right to freedom of expression and copyright.

8. CONCLUSION

This thesis has focused on the relationship between the *Charter* right to freedom of expression and copyright, as articulated both by lower Canadian courts and by the SCC. Lower Canadian courts have adopted several approaches to this intersection. Under the governing approach, any possibility of conflict between the *Charter* right to freedom of expression and copyright is disclaimed; both rights exist in separate spheres, and do not conflict. The first alternative approach, on the other hand, takes the view that any tension that might exist between copyright and the *Charter* right to freedom of expression is resolved by mechanisms internal to copyright, at least to the point that would satisfy a s. 1 analysis. The second alternative approach presents copyright as enhancing, rather than limiting, the *Charter* right to freedom of expression. One common feature shared by all three approaches is the rejection of the possibility that provisions of the *Copyright Act* might unjustifiably infringe the *Charter* right to freedom of expression.

The SCC, on the other hand, through the course of its post-2002 copyright jurisprudence, has significantly expanded the degree of protection for the expression interests of non-copyright owning parties, at the expense of copyright owners' rights. It has done so, however, without explicitly engaging with the *Charter* right to freedom of expression. Rather, the primary vehicle through which the SCC has balanced the expression interests of non-copyright owning parties with the rights of copyright owners has been the process of statutory interpretation.

In my thesis, I have argued – on the basis of a doctrinal analysis of Canadian copyright and freedom of expression jurisprudence – that the approaches adopted by both lower Canadian courts and the SCC, to the intersection of the *Charter* right to

freedom of expression and copyright, merit reconsideration. I have offered four arguments in support of this position.

In Chapter 4, I argued that the approaches to the intersection of the *Charter* right to freedom of expression and copyright adopted by lower Canadian courts (as identified in Chapter 3) have been shaped by approaches to copyright, and to freedom of expression, that are no longer valid (namely the author-centric approach to copyright and the definitional conception of freedom of expression); and that, as a result, the approaches to the intersection of these rights – at least to the extent that they rely on the now-invalidated approaches to copyright and to the *Charter* right to freedom of expression – are themselves invalid, and should be reconsidered by Canadian courts.

In Chapter 5, I argued that the way in which the SCC has engaged with the intersection of the *Charter* right to freedom of expression and copyright, to the extent that it assumes that the *Charter* right to freedom of expression can be adequately protected through statutory interpretation alone, also merits reconsideration. Despite the beneficial impacts of the SCC's post-2002 copyright jurisprudence for the expression interests of non-copyright owning parties, there are limits to the extent to which the *Charter* right to freedom of expression can be protected through the process of statutory interpretation. This is particularly the case given the SCC's conclusion that statutory provisions should be interpreted in accordance with *Charter* values only in limited circumstances.

In Chapter 6, I offered a third argument in support of my position that it is time for Canadian courts to reconsider the relationship between the *Charter* right to freedom of expression and copyright. In this chapter, I described how leading courts in the US, UK, and SA – three jurisdictions the decisions of which have been cited

by the SCC in the context of its copyright and/or freedom of expression jurisprudence – have explicitly engaged with the intersection of freedom of expression and copyright. The engagement by these courts with the intersection of freedom of expression and copyright highlights the lack of explicit engagement by the SCC with respect to this issue, and suggests that ‘[t]he time has arrived ... for [the SCC] to follow suit’ and itself engage explicitly with the intersection of the *Charter* right to freedom of expression and copyright.¹⁰²⁸

I also explored, in this chapter, the extent to which the approaches taken by US, UK, and SA courts to the intersection of freedom of expression and copyright might be of assistance to Canadian courts reconsidering this issue. I concluded that while certain elements of the SA approach might prove useful for Canadian courts to consider, significant differences between Canada and the other jurisdictions canvassed in this chapter limit the extent to which Canadian courts can rely on approaches to this intersection developed in these other jurisdictions. Rather, what is ultimately required is for Canadian courts to develop a ‘made-in-Canada’ approach to this intersection, one that is rooted in the Canadian constitutional, jurisprudential, and legislative context.

In Chapter 7, I offered a fourth argument in support of my position that it is time for Canadian courts to reconsider the relationship between the *Charter* right to freedom of expression and copyright. I did so by demonstrating – in reliance on three case studies – that certain core provisions of the *Copyright Act* may unjustifiably infringe s. 2(b) of the *Charter*. I also demonstrated that while in the first case study the most appropriate remedy may be to sever part of the impugned provision, the most appropriate remedy for the second and third case studies – should it be held that

¹⁰²⁸ *Grant* at para. 40.

the impugned provisions unjustifiably infringe the *Charter* right to freedom of expression, and taking into consideration both the principle of respect for the *Charter* and the principle of respect for the role of the legislature¹⁰²⁹ – might be for the *Copyright Act* to be declared, in its entirety, to be of no force and effect (albeit with a 12 month suspension of invalidity).

These arguments, taken together, establish that there are serious questions to be considered with respect to the approaches adopted by Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright; that lower Canadian courts should no longer dismiss freedom of expression defences to copyright infringement on the basis that this issue has been resolved in *Michelin* or in other lower court decisions; and that the SCC should engage explicitly with the intersection of the *Charter* right to freedom of expression and copyright.

A number of possible consequences could flow from Canadian courts choosing to reconsider the relationship between these two areas. First, reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide Canadian courts with additional opportunities to consider a number of legal issues that merit attention: from the significance of copyright's proprietary nature, to the purpose of copyright, to the scope of both s. 2(b) and s. 1, to the intersection of copyright and other *Charter* rights (among other issues). Second, reconsidering this intersection might result in a broader range of individuals engaging with this topic, adding perspectives, views, and evidence currently absent or underrepresented from both the case law and literature in this area. Third, reconsideration of this intersection, by Canadian courts, might result in courts in other jurisdictions choosing to reconsider the way in which they approach the relationship between

¹⁰²⁹ See *Schachter* at paras. 37-42.

freedom of expression and copyright. Fourth, reconsidering this intersection – should it be held that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression – could spur a broader reconsideration of the nature of copyright or the structure of the *Copyright Act* in Canada.

First, reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide Canadian courts with opportunities for further engagement with a number of legal issues that merit attention. For instance, one issue that merits attention is the question of what consequences flow (and should flow) from copyright’s characterization as property. As described in Chapter 4, the characterization of copyright as a specific type of property, in *Michelin* and other lower court decisions, in conjunction with the adoption of a definitional conception of freedom of expression, played an important role in shaping the governing approach to the intersection of the *Charter* right to freedom of expression and copyright. Any reconsideration of the intersection of the *Charter* right to freedom of expression and copyright will thus need to consider what it means to refer to copyright as property;¹⁰³⁰ how the characterization of copyright as property clashes with the nature of copyrighted works as expression (if at all); and whether the nature of copyright as a property right warrants removal of copyright from the scope of protectable expression under s. 2(b) of the *Charter*.

Similarly, reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide additional opportunities for Canadian courts to engage with the question of the purpose or objective of copyright. As described in Chapters 2 and 7, the purpose of copyright is an integral aspect of both the s. 2(b) and s. 1 analyses under the *Charter*. Thus, reconsidering the intersection of the

¹⁰³⁰ The SCC has recently referred to copyright as property in both *Cinar* and *Canadian Artists’ Representation*.

Charter right to freedom of expression and copyright would require Canadian courts to engage with the question of the purpose or objective of copyright.

In *Cinar Corp* – the decision in which the SCC affirmed, to a degree not present in previous decisions, the governing approach to copyright in Canada as economic-functional – the SCC demonstrated an openness to considering additional justifications of copyright through its characterization of the acts of copyright infringement in *Cinar* as having violated Robinson’s ‘personal rights to inviolability and to dignity’.¹⁰³¹ Reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide Canadian courts with additional opportunities to consider the extent to which values such as dignity and autonomy – among others – either are or should be embedded within Canadian copyright law.¹⁰³²

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright could also result in further modifications being made to the s. 2(b) and s. 1 analyses themselves. It could be the case that consideration of these tests, in the context of copyright, leads courts to refine or re-articulate them in ways that impact upon decisions in a range of areas other than copyright.

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts could also spur courts and commentators to engage in further consideration of the intersection of copyright and other *Charter*-protected rights; or further consideration of the intersection of intellectual property rights other than copyright and the *Charter*.

¹⁰³¹ *Cinar* at para. 114.

¹⁰³² The project that I will engage in following this doctoral thesis – the project for which this thesis has served, in my view, as an indispensable first step – will consider the extent to which values such as dignity, autonomy, and equality, among others, either are or ought to be embedded within copyright law.

Second, in addition to providing opportunities for further consideration of a number of legal issues that merit attention, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could lead to more individuals choosing to engage – in different ways, and from different perspectives – with respect to this intersection. For instance, consideration by the SCC of the intersection of the *Charter* right to freedom of expression and copyright would likely lead to a spike in scholarly writing in this area.¹⁰³³ Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts might also encourage individuals to engage in further empirical research on the impact of a number of existing provisions of the *Copyright Act* (or potential amendments to these provisions) on expression, including the potential amendment discussed in the first case study (namely the extension of the term of copyright protection in works to the life of the author plus 70 years). As noted in Chapters 2 and 7, evidence plays an important role in the s. 1 analysis. It can be used both by government to ‘justify the law’s impact in terms of society as a whole’, or by other parties (including interveners) to argue that the law is neither rationally connected to the objective nor minimally impairing.¹⁰³⁴ Choudhry writes that ‘the central debate in many section 1 cases is the quality of the evidentiary record’.¹⁰³⁵

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts could also result in Canadian constitutional and freedom of expression scholars choosing to engage with the intersection of the *Charter* right to freedom of expression and copyright to a greater

¹⁰³³ See, for instance, the number of papers published following the EWCA’s decision in *Ashdown*, or US Supreme Court’s decisions in *Eldred* and *Golan*.

¹⁰³⁴ *Bedford* at para. 126.

¹⁰³⁵ Choudhry at 504.

degree than has previously been the case. Out of the papers described in Chapter 2 that engage with the intersection of the *Charter* right to freedom of expression and copyright in Canada, none were written by scholars whose primary focus is on constitutional law. Similarly, in three of the most prominent constitutional law casebooks and textbooks used in Canadian law schools, no reference is made to copyright in the context of freedom of expression.¹⁰³⁶ Engagement with this intersection by constitutional scholars would bring a perspective that is thus far lacking in Canadian commentary in this area.

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts could also lead to interveners representing human rights perspectives participating in copyright cases to a greater degree than is currently the case.¹⁰³⁷

Third, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could also lead courts in other jurisdictions to reconsider the way in which they approach this intersection. Anne-Marie Slaughter has described the SCC as ‘highly influential, apparently more so than the US Supreme Court and other older and more established constitutional courts’.¹⁰³⁸ The way in which the SCC articulates the relationship between freedom of expression and copyright may thus influence the articulation of this relationship in other jurisdictions.

¹⁰³⁶ See Hogg, Group, Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution* (1st edn, Lexis Nexis 2013). The absence of discussion of copyright in the context of these works can be contrasted with Eric Barendt’s textbook *Freedom of Speech* (Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press, 2007)), which contains an entire chapter on ‘copyright and other property rights’ (pp. 247-267).

¹⁰³⁷ As noted above, one project on which I am currently working involves an examination of the impact of interveners on the development of Canadian intellectual property law.

¹⁰³⁸ Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) at 74.

Fourth, as demonstrated in Chapter 7, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could result in certain provisions of the *Copyright Act* being declared of no force or effect, which would necessitate reform of Canada's *Copyright Act*. This would create an opportunity for governments, non-governmental organisations, and scholars alike to suggest ways through which to re-make or re-construct copyright in ways that would be consistent with the *Charter*; for '[c]ourts, and writers on freedom of speech as well as on copyright' – as Eric Barendt argues – to 'confront th[e] clash of speech and property rights openly, and develop principles under which an appropriate accommodation of the two rights can be reached in concrete cases'.¹⁰³⁹ This could also result in opportunities for a broader reconsideration of the aims of copyright, and the way in which copyright achieves these aims – not simply the way in which copyright impacts upon expression.¹⁰⁴⁰

These are only a few of the consequences, among others, that could flow from Canadian courts – both lower courts and the SCC – deciding to reconsider their approaches to the intersection of the *Charter* right to freedom of expression and copyright. It is unclear, however, whether such reconsideration will take place. Lower Canadian courts have shown no sign that they wish to revisit the approaches to the intersection of the *Charter* right to freedom of expression developed in *Lorimer TD*, *Lorimer FCA*, *Canadian Tire, St-Hubert, Corporation Sun Média*, and *Michelin*, among other cases. Similarly, the SCC has shown no sign that it wishes to

¹⁰³⁹ Barendt, 'Copyright and Free Speech Theory' at 12.

¹⁰⁴⁰ In order for these opportunities to be realized, care would have to be taken, as Dev Gangjee and Robert Burrell note in the context of their analysis of the intersection of freedom of expression and trademarks law, not to allow analysis of the intersection of freedom of expression and intellectual property rights to 'distract[] from a more fundamental reconsideration of the scope of [intellectual property] protection': Dev Gangjee and Robert Burrell, 'Trade Marks and Freedom of Expression: A Call for Caution' (2010) 41 IIC - Int'l Rev of Intell Prop and Comp L 544 at 545.

explicitly engage with the intersection of the *Charter* right to freedom of expression and copyright.

What is clear, however, on the basis of the analysis set out in this thesis, is that there are serious questions to be considered with respect to the intersection of the *Charter* right to freedom of expression and copyright in Canada. Given this, I argue that it is time for the reinvigoration of judicial consideration of this area; for Canadian courts to explicitly engage (or re-engage, in the case of lower Canadian courts) with the intersection of the *Charter* right to freedom of expression and copyright. This intersection is ripe for reconsideration.

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