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An Examination of the Framing of Canada's Copyright Exclusive Rights and Exceptions From a Human Rights Perspective

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AN EXAMINATION OF THE FRAMING OF CANADA'S COPYRIGHT EXCLUSIVE RIGHTS AND EXCEPTIONS FROM A HUMAN RIGHTS PERSPECTIVE

JUSTICE OGOROH* and ZACHARY LOMO**

Abstract

This paper examines the intersection of the framing of copyright law in Canada from the perspective of human rights. The study seeks to reconcile the rights of creators with public access to content. Asserting that copyright law is not a human right but a means to uphold the inherent human rights of both creators and the public. This study explores the legal instruments that articulate a copyright framework that aims to achieve the reconciliation of the rights of creators and the public. The discussion begins with the roots of copyright in Canada, tracing back to the Statute of Anne, and moves through its evolution to the present day. The core argument centers on the essential human rights that copyright law impacts, proposing an approach that prioritizes the public interest as well as acknowledging that creators deserve reward for their creativity. Through an analysis divided into six sections, the paper delves into the concept and progression of copyright in Canada, scrutinizes the purpose and scope of exclusive rights and exceptions, reviews copyright within the human rights context, and suggests a reconciliation of the divergent interests of creators, and the public. The conclusion synthesizes these discussions, offering insights into the framing of copyright law grounded in upholding the rights of both the creators and the public.

I. INTRODUCTION

In this paper our goal is to examine the framing of copyright law in Canada from a human rights perspective by exploring ways to reconcile the competing human rights of creators and authors with the human rights of the public to access and use creative works of the intellect of authors and creators. We argue that a human approach that recognizes human rights as the inalienable entitlements that flow from the inherent dignity of the human persons of both creators and authors and users of the creations and works of authors provides a better framework for reconciling their competing interests. We further argue that copyright is not a sui generis human rights but a means that can be used to accommodate or protect the human rights of both authors and creators on the one hand and users or the public on the other. Our approach follows an examination of relevant human rights legal instruments and the provisions of copyright law in Canada and shows how the framing of these provisions articulates the achievement balance in the copyright system.

We structure the paper in six parts. This introduction is the first part. In the second part we discuss the concept of copyright and its evolution in Canada. Here we begin with a brief discussion on the concept of copyright in Canada; then we proceed to discuss the evolution of copyright law in Canada and in doing so, we briefly discuss the historical antecedents of the first copyright law, the Statute of Anne. Then we proceed to briefly examine the subsequent development of copyright law in Canada and how these are intricately linked with the first copyright law. The third part examines the purpose of copyright in Canada as well as the scope of copyright exclusive rights and their exceptions. In this section we examine the purpose of copyright law in Canada; furthermore, we articulate the scope of copyright exclusive rights and their exceptions. The fourth part reviews the human rights dimension of copyright law and policy. We start this section with a brief overview of human rights and their origin and then move on to examine copyright from a human rights perspective. The fifth section of the papers seeks to reconcile the competing human rights of authors and creators and public interest or users. It recaps the purpose of copyright law and then proceeds to analyze human rights that copyright may impact and how to construe the framing of the content and scope of copyright exclusive rights and exceptions through the lenses of human rights. The sixth section concludes the discussions in the paper.

II. THE CONCEPT AND EVOLUTION OF COPYRIGHT LAW IN CANADA

In this section, we explain the concept of copyright in Canada as well as its evolution. We first begin with a brief discussion on the concept of copyright in Canada and then we proceed to discuss the evolution of copyright law in Canada and in doing so, we inevitably discuss the historical events that culminated in the enactment of the first copyright law (the Statute of Anne) and how subsequent Canadian copyright law is intricately linked with the first copyright law, the Statute of Anne. This leads us to address the logical question: what, then, was the purpose of copyright law, then and now? We take up this question in part three of the paper.

A. THE CONCEPT OF COPYRIGHT IN CANADA

Copyright means original work of authorship, which is fixed in a tangible means of expression. This means that the work must solely originate from or be created by the author. Additionally, the creative idea, held mentally by the creator, must be expressed in a tangible form. If a creative work is not original to the author and not expressed in a tangible form, then it cannot enjoy the benefits of legal protection under copyright law.

According to copyright law in Canada, copyright means: "…the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof…"[1]

Thus, from this definition of copyright, the copyright owner enjoys a bundle of rights:[2] (a) the sole right to produce the work; (b) the sole right to reproduce the work in any substantial part or any material form; (c) the sole right to perform the work or any substantial part of the work in public; and (d) the sole right to publish the work or any substantial part if the work is unpublished. These copyright owners' rights are collectively referred to as exclusive rights and therein lies their proprietary interest. The Copyright Act of 1985 (as amended) clearly articulates these rights and their exceptions, which we discuss in part three of this paper.

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[1] *Copyright Act*, RSC 1985, c C-42, s 3(1).
[2] *Ibid.*

At this juncture it is fitting to state that the exclusive rights enshrined in copyright law are not absolute; copyright law also provides for exceptions to these exclusive rights, which are referred to as *fair dealing* in Canadian legal parlance. The crux of fair dealing provisions is to make acts which ordinarily would amount to copyright infringement lawful. Under Canada's copyright law, permissible acts of fair dealing cover research or private study,[3] criticism or review[4] and news reporting[5] provided they conform to the stipulations necessary to trigger fair dealing. We shall return to this aspect and the underlying rationale for the fair dealing exception in part three of the paper.

Despite the fair dealing exceptions to the copyright owner's exclusive rights, the popular understanding of copyright is that the exclusive rights of the copyright owner trump the fair dealing exceptions, at least from a proprietary viewpoint.[6] A key question therefore arises— does the drafting history of copyright law in Canada, especially the Statute of Anne, support this popular understanding of copyright, namely that the copyright owner's exclusive rights override the fair dealing rights or interests of users or the public? In other words, did the framing of the first and subsequent copyright law in Canada stipulate that the exclusive rights of the copyright owner should take pre-eminence over the public interest? If yes, how should the exclusive rights of the copyright owner be reconciled with the rights of users or the public interest that subsequent international and Canadian human rights law protect? In other words, how should copyright law accommodate or reconcile the competing human rights of authors and creators and users or the public interest? The answers to these questions are the focus of this paper and are addressed in subsequent sections.

Thus, in Part B below, we discuss the first copyright law in Canada. Our goal is to provide a clearer understanding of the rationale behind the framing of copyright exclusive rights and exceptions under that law. We draw insights from the early beginnings of copyright in England

[3] *Ibid* at s 29.
[4] *Ibid* at s 29.1.
[5] *Ibid* s 29.2.
[6] The Supreme Court of Canada warned against excessive control by copyright holders 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. This is reflected in the exceptions to copyright infringement enumerated in ss 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and "ephemeral recordings" in connection with live performances (see *Théberge v Galerie d'art du Petit Champlain,* 2002 SCC 34 356 [*Théberge*]).

in the 18th century, such as the Statute of Anne, which arguably laid the foundation for the development of copyright law in other countries, including Canada.

B. OVERVIEW OF THE FIRST COPYRIGHT LAW

We shall not engage in an extensive historical analysis of the origins of the first copyright law because it is not the focus of this paper. We, however, intend to provide a brief account to give sufficient context to situate our arguments in this paper. There is a general consensus among copyright scholars[7] that contemporary copyright law as we know it today traces its roots to the Statute of Anne,[8] which is arguably the first copyright law. The Statute of Anne was enacted in 1710, over three centuries ago. The circumstances surrounding the enactment of the Statute of Anne were fraught with upheavals, conflict, intense lobbying, and political and commercial interests.[9] We argue that contemporary enactments of copyright law are similarly shrouded in conflict, intense lobby from authors and inventors, commercial interests, political interests, and the interests of free riders who, hiding under the cloak of public interest, want to harvest where they have not sown.

A discussion on the enactment of the Statute of Anne would not be complete without examining the activities of the members of the Stationers' Company.[10] The events leading up to the Statute of Anne were pivotal in determining its legislative formation and purpose. The discourse surrounding it might resemble contemporary discussions and intrigues about copyright law reform. Even with modern digital advancements changing the specifics of today's discussions, there is ongoing conflict between copyright holders wanting tighter content control[11] and users seeking unrestricted access to content. Analyzing the era before the Statute of Anne in the 16th century exposes a period filled with strategies, advocacy, and a push for book trade monopoly,

[7] *See generally* Oren Bracha, "The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant" (2010) 25:3 BTLJ 1427; Lyman Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968); Salathiel Masterson, "Copyright: History and Development" (1940) 28:5 Cal L Rev 620.

[8] *The Statute of Anne* (UK), *1710*.

[9] See generally Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in the Eighteenth-century Britain*, (Oxford: Hart Publishing, 2004); Salathiel Masterson, "Copyright: History and Development" (1940) 28:5 Cal L Rev 620; Lyman Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968); Tomás Gómez-Arostegui, "The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710" (2010) 25 Berkeley TLJ 1.

[10] The Stationers were a group of publishers who organized themselves formally into a guild of publishers to advocate for exclusive right to publish books.

[11] Lawrence Lessig, "The Creative Commons" (2004) 65:1 Mont L Rev 1 at 4-8

and the Stationers' Company was crucial in this monopolistic endeavor to oversee the book industry.

The Stationers' Company started as a book publishers guild in 1403,[12] and the guild's objective was to vest its members with exclusive rights[13] in book publication. Those publishers who were not members of the guild opposed[14] the idea of exclusive right to book publication that the Stationers' Company advocated for. As the Stationers' Company's monopoly over book publishing grew, they gained momentum, which attracted the attention and support of the British Monarchy at that time. Queen Mary in 1556[15] granted the members of the Stationers' Company a royal privilege in the form of a Charter which gave the stationers the legal authority and exclusive rights to book publication at that time. The Stationers' Company received the legal backing[16] for exclusive rights to book publication after 153 years since their establishment in 1403 (i.e., after a century and half).[17] The crucial point we emphasize here is that for an organization to exist for over 153 years, they must have had a solid foundation and structure of operation, network, and influence. Arguably, it was for these reasons and more (as we discussed subsequently) that the monarchy was interested in the activities of the guild and endorsed their venture with legal authority.

With an endorsement and legal backing from the British Monarchy, the Stationers' Company was emboldened to carry on with its monopoly agenda in book publication. In fact, the Star Chamber Decree of 1586 recognized the licensing framework for the Stationers' Company.[18] Before the publication of any book in England at that time, it had to be submitted for licensing by the Stationers' Company and afterwards recorded in the Company's register.[19]

The exclusive right to publish books which the Stationers' Company enjoyed had negative consequences because it did significant disservice to authorship as authors could not publish on their own or with publishers who were not members of the Stationers' Company. It is important to note, however, that there was no "copyright" law, then, as we know it today. We argue that a critical examination of the Stationers' Company's exclusive right to book publication at the time

[12] Patterson, *supra* note 7 at 29.
[13] Daniel J Gervais, "A Canadian Copyright Narrative" (2009) 21:3 IPJ 269 at 274.
[14] *Ibid.*
[15] *Ibid*; Masterson, *supra* note 7 at 625;
[16] The 1556 Royal Charter of the Company of Stationers (1557).
[17] Patterson, *supra* note 7 at 29.
[18] Bracha, *supra* note 7 at 1433.
[19] *Ibid* at 1433—34.

could be seen as analogous, functionally, to copyright protection. The Stationers' Company's exclusive rights to book publication had, however, more far-reaching rights than present-day copyright protection because any member of the Stationers' Company that publishes a book and enters it into the Company's register acquires exclusive and perpetual right to publish that book.[20]

Why did the British Monarchy support the Stationers' Company's goal to possess exclusive rights to book publication? Salathiel Masterson posits that the reason the Stationers' Company received broad legal support from the Monarchy was "... to prevent the propagation of the Protestant Reformation."[21] Masterson further observes that the reason the Monarchy at the time wanted to prevent the spread of the Protestant Reformation was because certain heretical books were being printed daily and contained "great and detestable heresies against the Catholic doctrine of the Holy Mother Church."[22] Therefore, to suppress this evil, the 'ninety-seven named persons shall be incorporated as a society of art and stationer' and crucially, "no person is to practice the art of printing unless he is one of this society…"[23]

The British Monarchy had other reasons to support the Stationers' Company in addition to preventing the spread of the Protestant Reformation. Thomas Morris suggests that the Monarchy was looking for an established organization to curb the printing of heretical materials which the Catholic Church had condemned:

> Eventually, and perhaps inevitably, the government looked to the Stationers' Guild for assistance. Here was an established organization which could ferret out the source of heretical (or papistical, as the case may be) works as the Bishop or Mayor of London never could. They were printers and booksellers, they knew the locations of the presses and printers, they had developed their own machinery for the control of the trade and their register was a ready-made instrument for recording officially what works were printed. If all printers were forced to join the company, and all books were recorded on its register, and subject to its control, a centralized agency for censorship in the city of London would be established. This would mean that the limited membership of the Stationers' Guild would enjoy a monopoly over all printed works, but the government would gladly exchange such monopoly for an

[20] *Ibid* at 1434.
[21] Masterson, *supra* note 7 at 628.
[22] *Ibid*.
[23] *Ibid*.

effective system of accountability and control.[24]

Thus, the resultant convergence of the interests of the British Monarchy and the Stationers' Company guaranteed for the members of the Company exclusive rights to publish books and censor publishers that were not members of the Company. The Stationers' Company's monopoly over publishing books and censorship of those not its members from publishing, however, came under growing criticisms and opposition, especially from influential figures at that time, such as John Milton, Daniel Defoe, and John Locke. Eventually, in 1694,[25] the British Parliament refused to renew the Stationers' Company's Charter to licensing exclusive rights to publishing books.[26] We surmise two possible reasons why the British Parliament refused to renew the Stationers' Company's Charter. First, it was the growing criticism and opposition to the monopoly the Stationers' Company enjoyed, and second, the negative or adverse impact the monopoly had on the book trade and the public generally. The Stationers' Company fought hard for over fifteen years (1695 - 1710) to keep their monopoly power and privileges, submitting numerous appeals to Parliament, but failed[27] to reinstate the Licensing Act.[28] Oren Bracha suggests that the bills to reinstate the Licensing Act faced opposition because of fears related to censorship, the concentration of power, and the prioritizing of publishers' interests over those of authors, who many believe should be the rightful recipients[29] of the benefits of their ideas and creations. The British Parliament's refusal to continue the Stationers' Company's privileges paved the way for a new discourse that focused on authors' rights to their works, which became so popular that there were growing calls for legislation to recognize this right. Ronan Deazley, echoing Defoe's call for a legislation, writes: "…these things call for an Act of Parliament, and that so loud as I hope it will not be deny'd, that so Property of Copies may be secur'd to Laborious Students, to the Encouragement of Letters and all useful Studies."[30]

[24] Thomas Morris, "The Origins of the Statute of Anne" (1961-1962) 12 Copyright L Symp 222 at 238-239.
[25] The Stationers' privileges were renewable, it was not renewed in 1675; in 1685, James II renewed them but only for 7 years but not anymore (see Gervais, *supra* note 13 at 275; Masterson, *supra* note 7 at 630).
[26] Gervais, *supra* note 13 at 275.
[27] Patterson, *supra* note 7 at 138—41.
[28] The Licensing of the Press Act 1662 was an Act of the Parliament of England with the long title "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Presses" (see *Licensing of The Press Act 1662* (UK)).
[29] Bracha, *supra* note 7 at 1435.
[30] Deazley, *supra* note 9 at 32.

Thus, Defoe's position supports the recognition of the author, and it provides useful insights into framing the content and purpose of copyright law. Inherent in Defoe's position is the vesting of copyright in authors and creators, protecting the user rights of students, and promoting collaboration and advancements in creating knowledge. We shall return to these aspects in Part D below other subsequent parts of the paper.

Finally, a Bill was presented in Parliament, entitled, *"An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."*[31] After intense lobbying, debates, and scrutiny by the British Parliament, Parliament passed the Bill and it was entered into force on 9 April 1710. The Act became known as the Statute of Anne,[32] and was the first ever copyright law enacted in the United Kingdom.

C. THE STATUTE OF ANNE

We shall now examine some key provisions of the Statute of Anne. The Statute of Anne is recognized for its groundbreaking shift by granting authors a twenty-one-year copyright duration for books already in print. Additionally, it provided a fourteen-year renewable copyright period for books written but not yet printed and published.[33] This marked the genesis of exclusive rights as we know it today. Crucially, the Statute of Anne pried the monopoly right in book publication out of the members of the Stationers and vested it not just in authors, but to everyone else including the Stationers. Furthermore, the Statute of Anne[34] allowed authors to assign their copyrights held in the fourteen-year copyright duration for new books they created. This essentially meant that an author had the right to assign copyright in their work to anyone including the members of the Stationers' Company. We shall, however, return to how the members of the Stationers' Company arguably leveraged this assignment provision to their advantage. Interestingly, since the members of the Stationers' Company could not revive their exclusive monopoly rights, they got rights in book publication from authors through assignment.

[31] Simon Stern, "From Author's Right to Property Right" (2012) 62 UTLJ 29 at 46.
[32] Deazley, *supra* note 30 at 36—37.
[33] *The Statute of Anne*, *supra* note 8, s 1.
[34] Anyone who prints or reprints books without the author's written consent shall forfeit such books to the author who shall damask and make waste paper of them (*ibid*, s 1).

Two other provisions of the Statute worthy noting are the duty to: 1) fix fair prices[35] and 2) have authors deposit 9 free copies[36] of their best publications at various institutions, which were mostly libraries.[37] The Statue of Anne had a price regulation provision— the duty to fix fair prices. While this may appear overbearing, our interpretation is that this provision was relevant based on the antecedents of the members of the Stationers' Company, who mostly sought commercial gain and who, through their monopoly power, could exploit the public. The British Parliament had foresight that since authors could still assign their rights to the publishers, the publishers could still exploit the public. So, to check this, the price regulation provision was necessary at that time. The grant of copyright in the Statute of Anne represents the foundation for exclusive rights. The requirement that authors deliver copies of their best publications to public libraries and pay a fine of £5[38] for every copy not provided or deposited at the various institutions is indicative of exceptions to copyright, as well as the public interest perspective in framing of the first copyright law. We next discuss the intended purpose and the reason(s) behind the framing of the first copyright law.

D. INTENDED PURPOSE AND FRAMING OF THE STATUTE OF ANNE

As noted in the brief overview of the first copyright law in subsection 2.2, the enactment of the Statute of Anne and its purpose were shrouded in controversy because of competing interests of various groups.[39] But, beyond these interests, we posit that the Statute of Anne was framed with the overarching intention of serving the public interest while accommodating the interests of other stakeholders. In other words, the framers of the Statute of Anne sought to balance the interests of stakeholders while at the same time emphasizing the interest of the public more. Evidence in support of our position abounds in the Statute of Anne itself. Accordingly, Jane Ginsburg states that the title (discussed below) and the preamble to the Statute of Anne enunciate the policy that became the essential rationale for the both English and American copyright laws: copyright is an incentive to authors to create so that the public may have access to and be enriched by their

[35] *The Statute of Anne*, *supra* note 8, s 4.
[36] *Ibid*, s 5.
[37] The royal library, libraries of the universities of Oxford and Cambridge, the libraries of four universities in Scotland, the library of Sion College in London, and the library belonging to the faculty of advocates in Edinburgh.
[38] *The Statute of Anne*, *supra* note 8, s 5.
[39] For detailed discussions of the controversies surrounding the purpose for which the Statute of Anne was enacted see generally Bracha, *supra* note 7; Patterson, *supra* note 7; Masterson, *supra* note 7.

works.[40] The preamble to the Statute of Anne states that the Act is to discourage piracy and is "for the Encouragement of Learned Men to compose and write useful Books."[41]

First, we deduce that the crafting of the long title of the Statute of Anne articulates the purpose of the law. The long title of the Statute of Anne reads, "An Act for the Encouragement of Learning by Vesting the Copies of printed books in the Authors or Purchasers of such Copies, during the Times therein mentioned."[42] The long title contains two parts, and for the purpose of our analysis, we shall explain the long title as such.

The first part of the long title is *Encouragement of Learning*. The long title unequivocally states that the law is primarily for the encouragement of learning. Encouragement of learning is intended for the benefit of the society, and in other words, it is tailored towards the interest of the public. That is why unlike the second part of the long title, it does not expressly mention a specific person as the recipient of the benefit that flows from the encouragement of learning. Our interpretation is that it benefits the public and not just a single individual or group of individuals. The second part of the long title, "by Vesting the Copies of printed books in the Authors or Purchasers of such Copies, during the Times therein mentioned," stipulates what needs to be done to achieve the encouragement of learning. In this second part, the Statute of Anne, in order to achieve the encouragement of learning, grants copyright to authors or whoever they assign their copyright to. In the second part, we observe that a limited monopoly is granted to specific individuals (authors or their assigns).

Consequently, the order is that the first part (Encouragement of Learning) comes before the second part (by Vesting the Copies of printed books in the Authors or Purchasers of such Copies, during the Times therein mentioned). It is not just the order in which the two parts of the long title appear (for the long title can be revised so the second part comes first), but the overall meaning. Therefore, the second part, which grants copyright to authors and their assigns cannot exist independently without the first part. Hypothetically, if the long title had just the second part without the first, then this would be reminiscent of the royal privileges granted to the members of the Stationers' Company, which was devoid of benefits to the society.

[40] Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", (1990) 64 Tul L Rev 991 at 998.
[41] *Ibid.*
[42] *The Statute of Anne*, *supra* note 8.

The second and third points are provisions in the Statute of Anne that demonstrate the public interest focus of the law, as well as what can be regarded as exceptions to copyright exclusive rights. These are the requirements to deposit copies of works at the libraries[43] and the duty to fix fair prices for books.[44]The requirement to deposit copies of works at public libraries aims to grant public access to the books of copyright owners for the encouragement of learning. Public access to these books meant members of the public could read the books for free and maybe even take them on loan for a short period. Ordinarily, this may have been difficult, but an exception was made by the Statute of Anne, which could be construed as exceptions to copyright exclusive rights. Also, the provision on the duty to fix fair prices sought to make books affordable to encourage learning while at the same time recognizing that publishers and authors deserve a reward for their creative labours. These provisions were meant to protect the public interest from profit-driven publishers whose sole aim was to maximize profit at the expense of exploiting the public. The Statute of Anne came at a time when the members of the Stationers' Company (who previously had a monopoly in the book trade), had just been stripped of their monopoly by a new legislation. The insertion of these provisions shows that the British Parliament was intentional about protecting the public interest and attempted to achieve balance in the new copyright system that had just emerged.

Having discussed the origin of and purpose of the first copyright law, as well as the foundations of copyrights exclusive right and its exceptions, we shall now focus on examining the development of copyright law in Canada. This will provide the context for our analysis of Canada's copyright exclusive rights and their exceptions through the lenses of human rights.

E. OVERVIEW OF THE EARLY BEGINNINGS OF COPYRIGHT LAW IN CANADA

A detailed analysis of the legislative origins of copyright law in Canada is outside the scope of this paper. Suffice to point out here, however, that the development of copyright law in Canada is intricately connected to the influence of Britain as Canada was a former British colony. Consequently, Canada's legal system is largely inherited from the British, and its copyright legislation is not an exception. The first copyright law[45] in Canada was enacted in 1832, albeit

[43] *Statute of Anne*, *supra* note 8.
[44] *Ibid*, s 4.
[45] *An Act for the Protection of Copyrights*, SLC 1832, c 53.

subject to the British imperial copyright system.[46] Parliament passed the first domestic Copyright Act in Canada, which was not subject to British imperial copyright law, in 1921,[47] and it came into force in 1924. The 1921 Copyright Act was modeled on the British Copyright Act of 1911 to align with the provisions of the Berne Convention for the Protection of Literary and Artistic Works.[48]

Around the early 1950s, influenced largely by the advent of technological advancements, such as computers, photocopiers, and recording devices, Canada carried out numerous studies on the need to update its copyright law.[49] These studies culminated in two major copyright revision processes implemented in two phases, with one being in 1988[50] and another in 1997.[51] In 2002, Industry Canada (now Innovation, Science, and Economic Development (ISED)) issued a report that identified 40 issues that required legislative action in the short, medium, and long term.[52]

[46] Mario Bouchard, "The 2017 Parliamentary Review of Copyright Law: What Could Have Been on the Agenda But Will Not" (2017) 30:1 IPJ at 3.

[47] Since its enactment in 1921, the *Copyright Act* has been amended several times to regulate performing rights societies and to establish the Copyright Appeal Board (see Bouchard, *supra* note 46); *The Copyright Amendment Act* (Act 21-22 Geo V of 1931) c 8; *An Act to amend The Copyright Amendment Act* (Act No 25-26 Geo V of 1931, 1935) c 18; *An Act to amend The Copyright Amendment Act* (Act No I Edw VIII of 1931, 1936) c 28; *An Act to amend the Copyright Amendment Act 1931*, and *The Copyright Act 1938* (Act No 2 Geo VI) c 27.

[48] David Vaver, *Intellectual Property Law: Copyright, Patents and Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) at 55.

[49] The studies included the 1954-1960 Royal Commission on Patents, Copyright, and Industrial Design (the "Ilsley Commission"); a 1977 working paper by the Canadian Department of Consumer and Corporate Affairs, entitled *Copyright in Canada: Proposals for Revision of the Law* (the "Keyes-Brunet Report"); a 1984 federal government white paper on copyright, entitled *From Gutenberg to Telidon: A White Paper on Copyright*; and a report from the 1985 House of Commons' Standing Committee on Communications and Culture, entitled *A Charter of Rights for Creators — Report of the Subcommittee on the Revision of Copyright* (see Jay Makarenko, "Copyright Law in Canada: An Introduction to the Canadian Copyright Act" (13 March 2009), online: <https://repolitics.com/features/copyright-law-in-canada/#history>).

[50] Phase I led to important changes to the original Act, including: statutory protection for computer programs, clarification and extension of moral rights, elimination of the compulsory licence for the reproduction of musical works and the substitution of a right of negotiation, the introduction of a new procedure to licence works where the owner could not be located, new rights for visual artists to exhibit their works in public, increased criminal sanctions, and the enactment of rules under which collective organizations could form and operate under the supervision of a revamped Copyright Board (*ibid*).

[51] Phase II included: new remuneration rights to producers and performers of sound recordings when their sound recordings are broadcast or publicly performed by radio stations and in public places like bars and restaurants, compensation system for private copying, in the form of a levy on blank audio recording media, benefitting eligible composers, lyricists, performers, and producers of sound recordings for the making of recordings, provisions granting exclusive book distributors legal protection in the Canadian market, new exceptions to non-profit educational institutions, libraries, archives, museums, broadcasters, and persons with perceptual disabilities allowing them to reproduce or use copyright material in specific circumstances without paying royalties or obtaining authorization from rights holders, statutory damages and wide injunctions to enhance the enforcement of copyright (*ibid*).

[52] Bouchard, *supra* note 46 at 5, citing Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act* (Ottawa: Industry Canada, 2002).

After the report was examined and deliberated upon,[53] it culminated in tabling Bill C-60 before Parliament in June 2005,[54] which was never passed into law.

Bill C-60, Bill C-61, and Bill C-32 were all failed attempts by Canada to implement the World Intellectual Property Organization (WIPO) Internet Treaties— WIPO Copyright Treaty (WCT)[55] and WIPO Performances and Phonograms Treaty (WPPT),[56] collectively referred to as WIPO Internet Treaties (WIT). The WIT sought to set the legal framework to address the challenges and opportunities for copyright in the digital landscape. Finally, after sixteen years of a protracted copyright law reform process to implement the WIT, Bill C-11 was passed in 2012 and became the Copyright Modernization Act, which amended the 1985 Copyright Act.[57]

The 1921 Copyright Act and subsequent attempts to reform copyright law in Canada are laudable achievements, but these efforts had something crucial missing: the copyright legislation failed to articulate a clear purpose for copyrights law. We argue that the lack of a clear purpose for copyright may partly explain, to this very day, why there is a narrow understanding, framing, and interpreting of copyright exclusive rights and exceptions. We further discuss this aspect in the section that follows, i.e., Section 3.

III. THE PURPOSE OF COPYRIGHT LAW IN CANADA AND COPYRIGHT EXCLUSIVE RIGHTS AND EXCEPTIONS

There was no clearly articulated and defined purpose of copyright legislation in Canada. This is puzzling since Canada's copyright legislation traces its legislative ancestry to Britain where the first copyright law (the Statute of Anne[58]) was enacted. As our preceding analysis of the intended purpose of the Statute of Anne shows, the Statute expressly laid the foundation for the rights of authors, creators, and users of creative works and creations.[59] In addition, it defined the approach

[53] *Ibid.*
[54] *Ibid.*
[55] The WCT entered into force on March 6, 2002 (see World Intellectual Property Organization, "WIPO Copyright Treaty" (20 December 1996), online: <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157>).
[56] World Intellectual Property Organization, "WIPO Performances and Phonograms Treaty" (20 December 1996), online: <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477>.
[57] *Copyright Act*, *supra* note 1.
[58] At least the long title (*An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*) of the Statute of Anne hints on the purpose of the law.
[59] *Statute of Anne*, *supra* note 8, s 1 (the grant of copyright as well as the right to assign this copyright), s 4 (duty to fix fair prices to check exploitation of users by copyright owners), s 5 (a requirement for copyright owners to deposit nine copies of their works in public libraries for user to freely access them).

to framing copyright exclusive rights and exceptions.[60] Thus, the lack of explicit purpose of Canadian copyright law is surprising, especially in the context of the first Canadian colonial copyright law— *An Act for the Protection of Copyrights*,[61] which the Parliament of the Province of Lower Canada passed in 1832. Around this time, however, the United States Constitution had already been written and ratified, and it expressly provides for the policy foundations for the purpose of copyright law. The purpose of copyright law 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.'[62] Ginsburg argues that provision in the US constitution is reminiscent of the Statute of Anne because it caters for both copyright in literary and artistic works and patents for inventions.[63] In other words, the Statute of Anne, being the first copyright law, might have influenced the policy considerations for copyright in the United States and indeed intellectual property in general.

It seems the Statute of Anne never inspired a similar provision on the purpose of copyright in Canadian copyright law. Consequently, there was no clear articulation of the rationale for the existence of copyright law in Canada. In 2005, Teresa Scassa expressed the view that, not only were the policy considerations underlying Canadian copyright law unclear, but they were also made murkier with competing and often contradictory accounts from policy makers and courts.[64] Similarly, Daniel Gervais states that an attempt to identify the purpose of copyright law in Canada from government documents would provide no clear guidance.[65]

Thus, the lack of clearly articulated policy objectives created a gap in Canadian copyright law. In fact, Gervais noted that in 1956 it was stated that to engage in the discourse on the purpose of copyright was unnecessary and unproductive.[66] In our assessment, in the absence of a clearly

[60] *Copyright Act*, *supra* note 1, s 3(1)(a)— (j) are copyright exclusive rights; s 29, 29.1, 29.2 are exceptions to copyright.
[61] *An Act for the Protection of Copyrights*, *supra* note 45.
[62] US Const art I, §8, cl 8.
[63] Ginsburg, *supra* note 40 at 999.
[64] Teresa Scassa, "Interest in the Balance" in Michael Geist, ed, *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 41.
[65] Gervais, *supra* note 13 at 285.
[66] Copyright is in effect a right to prevent the appropriation of the expressed results of the labours of an author by other persons. That an author should have this right, at least for a limited period, is generally- on the ground of justice, expediency, or both. The right is regarded by some as a "natural right" on the ground that nothing is more certainly a man's property than the fruit of his brain. It is regarded by others as not a natural right but a right which the state should confer in order to promote and encourage the labours of authors…We find it unnecessary to go on record with a conclusion of faith in either doctrine to the exclusion of the other (see Gervais, *supra* note 13 at 285, citing Canada,

articulated purpose statement for copyright in Canadian law, similar to that found in the United States Constitution, underlying copyright policy considerations in Canada may fail to capture the real essence of copyright as an essential vehicle for reconciling competing rights and spurring socio-economic development. We, however, observe that Canada and the United States approach the purpose of copyright from different perspectives. Indeed, the Information Highway Advisory Council aptly captures the differences between the principles on which Canadian and US copyright law is framed:

> It must here be recalled that the U.S. law is founded on the principle that copyright is a tool 'to promote the progress of science and useful arts.' According to that principle, the goal of the copyright in the U.S. is to be an incentive for the disclosure and publication of works. The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors.[67]

We deduce from the above statement that the perception, policy objective, and purpose of copyright law in Canada tends towards individual property ownership or rights. This suggests that the character of copyright reforms in Canada puts the interests of individual authors and creators above the public interest.[68] Additionally, the above quote embraces the moral right aspect of Canadian copyright law (due to its French and British colonial roots, Canada recognizes both moral and economic rights),[69] which is again a matter of the individual entitlement of authors. We believe this focus represents an incomplete picture of copyright policy in Canada. However, this narrow conceptualization of the purpose of copyright in Canada remained the status quo until early in the twenty-first century, when a revolutionary shift in thinking was initiated.

Royal Commission on Patents, Copyrights, Trade Marks and Industrial Designs, *Report on Copyright* (Ottawa: Ilsley Commission, 1957) at 9).

[67] Information Highway Advisory Council, *Copyright and the Information Highway: Final Report of the Copyright Sub Committee* (Ottawa: Information Highway Advisory Council, 1995) at 30; Gervais, *supra* note 13 at 286.

[68] Laura J Murray, "Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses" in Michael Geist (ed), *In the Public Interest, The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 25. Helen Chalifour Scherrer, the Heritage Minister as of 2004 said: "We are going to make sure that downloading stays illegal. We will make it a priority, so it is done as quickly as possible …she assured them that now I really know what the music industry is all about…I am going back to Ottawa with the will to do something." This comment is suggestive of a one-sided approach to copyright and is detrimental to public interest and the purpose of copyright law.

[69] Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (Toronto: University of Toronto Press, 2014) at 15.

As Tawfik[70] notes, copyright in the new millennium began to focus on the public's interest in accessing knowledge because of the growing influence of digital technology, which has in practice made accessing content considerably easier. This reorientation of the rationale for copyright protection had an enormous influence in the Canadian copyright system. The purpose of having copyright law in Canada received the attention of the judiciary, especially pronouncements by the Supreme Court of Canada that have laid the foundation for the development of a clear articulation of the purpose for enacting copyright law in Canada. As Gervais has explained, and as we shall see in more detail below, the Supreme Court of Canada, through its opinion in a copyright case, has finally articulated the rationale for enacting copyright law in Canada which had previously been lacking.[71]

Additionally, some effort was made in the enactment of the *Copyright Modernization Act* (CMA)[72] of 2012 to fill the gap (that is, the absence of a clear definition of the purpose of copyright law in Canada), capturing much of the essence of the Supreme Courts' earlier pronouncements. Part of the preamble to the Act provides:

> Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy…Whereas the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter.[73]

The text quoted above suggests that the CMA was enacted to promote creativity, innovation, and the development of a knowledge-based economy. Additionally, the CMA also provides for other purposes such as responding to the challenges and opportunities of digital technology, copyright protection based on international norms, implementing the WIT, including recognition of technological protection measures (TPMs), foster competition, investment, and promote research,

[70] Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist (ed), *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 70.
[71] Daniel J. Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 U Ottawa LTJ 315 at 317.
[72] *Copyright Modernization Act*, SC 2012, c 20, Preamble.
[73] *Ibid*.

and education through technology.[74]

The articulation of the purpose of copyright law in the CMA is commendable; it is similar to the meaning of copyright law which can be inferred from its long title, as well as the provision of the United States Constitution.[75] This attempted to fill the gap that was missing for several decades. However, it still leaves much to be desired because it is framed in a way that the right of the creator or author trumps the public interest. This is the opposite of the framing in the Statute of Anne, which while attempting to create a balance among copyright stakeholders, emphasizes the public interest as the primary purpose of the law. This is indicative of the current dynamics of contemporary copyright law in Canada which prioritizes the proprietary interest of the individual copyright holder over the public interest. Prior to the enactment of the CMA in 2012, the Supreme Court of Canada made a compelling pronouncement on the purpose of the copyright in Canada in in the case of *Théberge.*[76] In this case, a famous artist, Claude Théberge, authorized a publisher[77] to reproduce some of his artwork. An art store bought some of Claude's artworks (which were on cards, posters etc.), and then moved the picture from the poster to a canvas.[78] This made the poster blank. The question for determination was whether moving the picture to the canvas counted as copying under copyright law.[79]

Binnie J, delivering the majority decision held that:

> …the appellants did not thereby "copy" the respondent's artistic works. They purchased lawfully reproduced posters of his paintings and used a chemical process that allowed them to lift the ink layer from the paper (leaving it blank) and to display it on canvas. They were within their rights to do so as owners of the physical posters (which lawfully incorporated the copyrighted expression). At the end of the day, no new reproductions of the respondent's works were brought into existence. Nor, in my view, was there production (or reproduction) or a new artistic work "in any material form within the meaning of s.3(1) of the *Copyright Act*. What began as a poster, authorized by the respondent, remained a poster.[80]

[74] *Ibid*.
[75] US Const, *supra* note 62.
[76] *Théberge*, *supra* note 6 at paras 30—31.
[77] *Ibid* at paras 336—37.
[78] *Ibid* at para 337.
[79] *Copyright Act*, *supra* note 1, s 3(1).
[80] *Théberge*, *supra* note 6 at 344—45.

Bennie J, having held that Theberge did not infringe copyright of the creators of the artistic poster, and went on to explain the purpose of copyright law:

> 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) [...]The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to over-compensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them…Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyright 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 interest of society as a whole…[81]

This explanation by the Supreme Court in *Théberge* has become famous and instructive for its clarification of the purpose of copyright law in Canada. The key message in the apex court's explanation is that the rights of copyright owners and users should be balanced so that each party gets their due and nothing more. Furthermore, the Supreme Court emphasizes that balance and public interest objectives is not to recognize the creator's rights (exclusive rights), but it is to articulate the limited nature of these rights to give adequate room for exceptions to copyright. Put differently and simply, the purpose of copyright law is primarily for the interest of the public and this is reminiscent of the purpose of the Statute of Anne as we have already discussed. This decision provides a clear understanding of how to interpret and apply the framing of copyright exclusive rights and their exceptions.

Our preceding discussion provides sufficient foundational analysis on the origin and development of the first copyright law and specifically in Canada. We also examined the framing of copyright and its intended purpose. This foundational knowledge is necessary for the

[81] *Ibid* at paras 355—56.

understanding and interpretation of Canada's copyright exclusive rights and their exceptions. Consequently, at this point, it is fitting that we discuss the interpretation and understanding of copyright exclusive rights and their exceptions in Canada and then proceed further with the analysis from a human rights framework.

A. COPYRIGHT EXCLUSIVE RIGHTS AND EXCEPTIONS

In Canada, the copyright exclusive rights (also referred to as bundle of rights) that a copyright owner enjoys are provided for in copyright law[82] and they can be summarized as follows:

a) The right to reproduce a work;
b) The right to convert a dramatic work into a novel;
c) The right to convert a novel to dramatic work and perform the work in public;
d) The right to make any sound recordings or cinematograph film of any literary, dramatic or musical works;
e) The right to reproduce, adapt and publicly present a literary, dramatic, musical or artistic work as a cinematographic work;
f) The right to communicate a literary, dramatic, musical or artistic work to the public by telecommunications;
g) The right to publicly exhibit an artistic work;
h) The right to rent out a computer program; and
i) The right to rent out a sound recording of a musical work.[83]

These are the exclusive rights that copyright owners enjoy, and they are protected by law such that any action that adversely affects a copyright owner's exclusive right amounts to copyright infringement[84] except when the use is permissible under fair dealing.[85] Copyright owners have wielded these rights against any acts perceived to infringe on their exclusive rights.[86] In fact, as discussed above with regards to the CMA preamble,[87] the dominant narrative on the framing of copyright exclusive rights prioritizes the interest of the copyright owners. Arguably, this is a

[82] *Copyright Act*, *supra* note 1.
[83] *Ibid*.
[84] *Ibid* at s 27.
[85] Ibid at ss 29, 29.1, 29.2.
[86] See e.g. *Nintendo of America Inc. v Jeramie Douglas King & Go Cyber Shopping,* 2017 FC 246.
[87] *Copyright Modernization Act*, *supra* note 72.

narrow interpretation of the intended purpose and framing of the bundle of rights under copyright law. The statement of the copyright exclusive rights and the permissible exceptions are apparent in Canada's copyright legislation, but their practical application gravitates more towards the proprietary interest of the copyright owners, contrary to the Statute of Anne and the decision of Canada's Supreme Court in *Théberge*.

In exceptional cases, actions which ordinarily would amount to copyright infringement are permissible if they fall within the fair dealing categories. If the use is for research purposes, private study, educational use, or parody or satire,[88] the use may be covered by fair dealing exceptions. The use of copyright-protected works for the purpose of criticism or review may be non-infringing if due attribution is given citing the source and author of the work.[89] Additionally, news reporting is allowable and does not infringe on copyright if credit is given to the source and author of the news.[90] In reality, while in some cases the line that separates fair dealing from infringement is apparent, in other cases that distinction is blurred, and the courts would have to make a determination based on their own judgment.

We emphasize that a copyright owner's exercise of their exclusive rights and the users' exercise of their fair dealing exceptions should not be contrary to the purpose of copyright law and the public interest. According to Justice Binnie in *Théberge*,[91] the framing of the purpose of copyright law is to achieve a balance in the copyright system. The Supreme Court of Canada clarified what balance in the copyright system means. It is about finding a middle ground between the public's interest in access to creative works and ensuring the author receives fair payment[92] for their work, but more importantly, the Supreme Court emphasizes that the interest of the public should be prioritized. The purpose of copyright law as expounded in *Théberge* is in agreement with the historical framing of copyright law the Statute of Anne. Undeniably, while there were a lot of interests at play in the debates leading to the enactment of the Statute of Anne, the British Parliament fittingly did its utmost to create balance; it rejected several attempts[93] made by the

[88] *Copyright Act 1985*, *supra* note 1.
[89] *Ibid* at s 29.1.
[90] *Ibid* at s 29.2.
[91] *Théberge, supra* note 6.
[92] On the issue of creators' entitlement to receive a fair reward, Canada's apex court cites *Millar v Taylor* (1769), 98 ER 201, per Willes J., at p.218. "It is wise in any state, to encourage letters, and the painful researches of men. The easiest and most equal way of doing it, is, by securing to them the property of their own works…He who engages in a laborious work, (such for instance, as Johnson's Dictionary), which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for family."
[93] Gervais, *supra* note 26 at 275; Masterson, *supra* note 18 at 630.

members of the Stationers' Company to continue their copyright monopoly. The British Parliament knew the activities of the publishers adversely impacted access to content the dissemination of works and knowledge, discouraged authorship, and sought to continually dominate the book publishing trade. This perhaps is the reason the long title of the Statute of Anne was framed in such a way that it attempts to create a balance in which the public interest is achieved by granting copyright owners limited monopolies to commercially exploit their work. The exploitative and monopolistic business model of the Stationers' Company had to be curtailed. Therefore, the exercise of copyright owners' exclusive right needs to be reasonably curtailed to avoid excesses that are inimical to the public interest. Overstretching copyright exclusive right to the detriment of fair use conflicts with the purpose of copyright law and benefit to society.

Furthermore, the Statute of Anne required that authors deliver nine free copies of their best publication[94] and fix a fair price.[95] This indicates that notwithstanding the vesting of copyright[96] in authors and copyright owners, the lawmakers envisaged the need for the public to have access to the knowledge held in these books to spur further creativity and knowledge. Books in the library belong to no single individual but to the public. The duty to deliver copies of their books to the library is akin to the fair dealing exception in Canada's modern copyright law. Free access to these books in the library can be used for any of the purposes stated under fair dealing.[97] Consequently, in the interest of creating balance in the copyright system in the 18th century, the first copyright law provided for what can be construed as fair use in contemporary copyright law.

On the purpose of the Statute of Anne, Ginsburg states that the statute sought to accomplish these goals (i.e. encouragement of learning) by granting a reproduction right on authors for fourteen years which could be renewed for another fourteen years if the author was still alive.[98]

The framing of Canada's contemporary copyright exclusive rights and exceptions, indicates that its approach builds on the foundation laid down by the Statute of Anne which arguably also influenced the policy considerations of copyright in the United States. Furthermore, the erudition of the Supreme Court of Canada in *Théberge* reiterates the proper understanding of

[94] *Statute of Anne*, *supra* note 8.
[95] *Ibid*.
[96] *Ibid.*
[97] *Ibid*; *Copyright Act*, *supra* note 85.
[98] Ginsburg, *supra* note 40 at 998.

the framing of copyright exclusive rights and exceptions according to the Statute of Anne in the 18th century.

IV. OVERVIEW OF HUMAN RIGHTS

In this section we provide a brief account of the origin of human rights and relevant international and domestic human right instruments for their promotion and protection. We shall also briefly explain whether Canada is signatory to any of the international human rights instruments and the implications of this for copyright in Canada. We shall not delve into the philosophical debates about human rights. The relationship between copyright and human rights is examined in the next sections.

We start with the imperative necessity for conceptual clarity: what are human rights and whence did they come from? There is no consensus on what human rights are, which is not surprising to us, because individuals, groups, and various societies or countries have different worldviews about everything. Different societies in the world have had some ideas about rights, but not necessarily as human rights as understood today, although contemporary concepts of human rights are steeped in European, especially western European, worldviews or philosophies, both secular and Christian philosophies. Despite a lack of consensus about what human rights are, we conceptualize human rights in our contemporary era *as a set of entitlements and ideals that every person possesses by virtue of being human and their creative genius which are deserving of protection through the moral law and legal instruments such as treaties and domestic legislation*.

The concept of human rights emerged after the Second European War in the 1940s.[99] The origin of human rights, however, is often traced to philosophical debates about the moral standards of political organization in European societies starting from Greek philosophers to the French and American revolutions.[100] We believe that attempts at presenting a continuous link between the contemporary post Second European War concept of human rights to early secular or Christian philosophical debates about rights in western countries, such as the American and French revolutions, is misleading. We argue with Moyn, that the rights asserted, for example in the French and the American revolutions, while claiming to be universal, differ radically from the

[99] See generally Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA & London, UK: Belknap Press of Harvard University Press, 2010) [Moyn, *The Last Utopia*].
[100] *Ibid* at 11—15.

notions of human rights espoused after 1945.[101] The rights that the American and French revolutionaries fought for were to be achieved and protected through the instrumentality of citizenship in a republican political organization of the state for a particular group of privileged elites despite their claim to being universal. Both the American and French revolutions did not, for example, accord black peoples the same rights of man that they claim were universal for all human beings. A critique of the darker side of these revolutions and the rights they claimed to champion is, however, beyond the scope of this paper. Suffice to point out that the rights that the human rights rhetoric of the 1940s onwards asserted, as Arendt rightly observed, did not depend on a political community or citizenship,[102] but claim international character for ordering both the state and the world.

The idea of human rights as understood today did not just happen after the end of the Second European War, fought from 1939 to 1945. Moyn traces the rise of the idea of human rights to Christian Thought, especially the Catholic Church and transatlantic Protestant groups.[103] He argues that the idea of human rights was foreshadowed and motivated by the defense of the *dignity of the human person* (our emphasis), which emerged in Christian churches and religious thought in the years just before the outbreak of the Second European War. Indeed, Moyn posits that human dignity became a central organizing principle of Christian political conversions as early as 1937, with Pope Pius XI's encyclicals and writing to Americans celebrating the 100th anniversary of the founding of the Catholic University of America containing some explicit references to human rights and dignity to human personality.[104] Moyn claims that the basic idea of universal human rights as a principle of world order was enunciated in Pope Pius XII's wartime Christmas address in 1942.[105] In that address, the Holy Father laid out 'five fundamental points for the peaceful ordering of human society.'[106] The relevant point to our discussion of the origin of the concept of human rights is the first point on the dignity of the human person and the personal rights that logically flow from that dignity:

[101] *Ibid*.
[102] *Ibid.*
[103] Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015) [Moyn, *Christian Human Rights*].
[104] Moyn, *The Last Utopia*, *supra* note 99 at 50.
[105] Moyn, *Christian Human Rights*, *supra* note 103 at 2.
[106] *Ibid*; see also Papal Encyclicals Online, "The Internal Order of States and People" (last modified 20 February, 2020), online: <https://www.papalencyclicals.net/pius12/p12ch42.htm>.

> Dignity of the Human Person. He who would have the Star of Peace shine out and stand over society should cooperate, for his part, in giving back to the human person the dignity given to it by God from the very beginning; should oppose the excessive herding of men, as if they were a mass without a soul ….He should uphold respect for and the practical realization of the following fundamental personal rights; the right to maintain and develop one's corporal, intellectual and moral life and especially the right to religious formation and education; the right to worship God in private and public and to carry on religious works of charity; the right to marry and to achieve the aim of married life….[107]

Thus, the war and its aftermath greatly influenced the language, content, and scope of human rights and the pope's appeal to human dignity and human rights as a necessary precondition for peace in his Christmas address in 1942. This typifies the increasing importance of the role of human rights in the search for a new world order premised on a new state of principles that transcends the nation state. While not everyone will agree with our observation, we argue with Moyn that the idea of human dignity and human rights the human person was entitled to beyond the national borders became prominent in conversations and discussions about what the postwar world order should look like and eventually found expression in some of the important instruments negotiated after the war ended in 1945.

The Universal Declaration of Human Rights (UDHR) of 10 December 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966, provide the international framework for promoting and protecting human rights. They find their normative basis in the Charter of the United Nations, albeit the Charter mentions human rights only in its preamble. The UDHR is the foundation upon which the ICCPR and ICESCR further develop and elaborate the rights enumerated in it. Several other instruments have been adopted since 1948 to address specific issues, such as the problem of racism, child abuse, the oppression of women. These special human rights instruments include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965, the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, and the Convention on the

[107] *Ibid*.

Rights of the Child (CRC), 1989. For our discussion of copyright and human rights, the UDHR and the ICESCR are the most relevant. We shall return to these two instruments when we look at copyright from a human rights perspective.

In addition to the international human rights instruments adopted under the aegis of the United Nations, several human rights instruments have also been adopted under regional blocks or arrangements, such as the African Union (AU), the Council of Europe (CoE), and the Organization of American States (OAS).

Canada has ratified seven of the principal United Nations human rights conventions and covenants.[108] She, for example, acceded to the ICERD in 1970, the ICCPR in 1976, and the ICESCR in 1976. In addition, Canada is party to several multilateral human rights treaties. Canada supports the principles outlined in the UDHR and submits reports on how it implements the seven United Nations treaties it has ratified.[109] Canada's support for the principles of the UDHR and ratification of the ICESCR implies that it has undertaken to promote and respect all the rights, including the right to property and protection of authors' creations in these instruments.

A. COPYRIGHT FROM A HUMAN RIGHTS PERSPECTIVE

We now turn to examine copyright in the light of human rights. How should copyright be understood from a human rights perspective, as a human right or as a means to protect a specific genre of human rights? The issue of the relationship between copyright and human rights has been discussed in the literature, but the question of whether copyright is a human right has only received recent attention and has not been fully settled. Torremans, for example, attempted to address that issue when he examined whether copyright is a human right.[110] He concluded from Article 27 of the UDHR and Article 15 of the ICESCR that these provisions recognize copyright as a human right.[111] In essence, he claims that copyright is a human right. Dessemontet similarly argues that copyright is a human right.[112] Other scholars see copyright and human rights as two

[108] See e.g. Government of Canada, "Canada and the United Nations Human Rights System: Human Rights Treaties" (12 October 2023), online: <https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>.
[109] *Ibid*.
[110] Paul L C Torremans, "Is Copyright a Human Rights?" (2007), 2007:1 Mich St L 271.
[111] *Ibid* at 275—276, 279.
[112] Francois Dessemontet, "Copyright and Human Rights", online: <https://www.unil.ch/cedidac/files/live/sites/cedidac/files/Articles/Copyright%20%26%20Human%20Rights.pdf>.

separate and distinct areas of law, albeit they intersect at various points.[113] In general, two dominant views about copyright and human rights emerged. One school of thought opines that copyright and human rights are in conflict, which is what Torremans describes as the conflict model.[114] The second school of thought sees some compatibility between copyright and human rights. It seeks to define the locus of points along a continuum that would provide the right balance between incentives for creators and access to the public to the creators or authors' work.

Our focus in this section is modest: to provide a brief account of how to properly view copyright from a human rights perspective and therefore we shall not review the competing models of explaining the relationship between copyright and human rights. We posit that copyright is not a human right in itself. Rather copyright, seen from a human rights perspective, is a policy and legal means to protect the human rights of authors and creators to their ideas. Specifically, copyright is a means to protect the right of authors to the property in their creations. Property can be physical or intangible. The right to own the creation is distinct from the means to protect that right. We base our claim and conclusion on our reading of the international human rights instruments that protect the right to property and other moral and material interests of authors.

We draw insights from Articles 17 and 27 of the UDHR and Article 15 of the ICESCR to buttress our assertion that copyright is a means to protect a genre of human rights falling under the aegis of property rights and not a *sui generis* right on a continuum of rights under human rights law. We start with an analysis of Article 17 and 27 of the UDHR. Article 17 stipulates that: (1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property. Thus, Article 17 of the UDHR enshrines the right to own property, plain and simple. The context for this article is the aftermath of the bloody Second European War when the Nazis stripped the Jews and other unwanted ethnic groups of their possessions, including billions of dollars, houses, businesses, and artworks. What constitutes property in the sense of Article 17 of the UDHR? If we give the term "property" in its plain meaning,[115] we are dealing with the protection of a right to own "a thing or things belonging to

[113] See e.g. Manoj K Sinha & Vandana Mahalwar (eds), 'Copyright and Human Rights: The Quest for a Fair Balance' (2017) in Manoj K Sinha & Vandana Mahalwar, *Copyright Law in the Digital World* (Singapore: Springer, 2017).
[114] Torremans, *supra* note 110, at 272.
[115] See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31(1) (entered into force on 27 January 1980), providing that the plain meaning be given terms in a treaty. Although the UDHR is not a treaty, we

someone or possessions collectively."[116] A thing could be a house, a car, a piece of land, an invention, a piece of literary or artistic work, designs, or symbols. An author who creates a literary work owns the ideas developed and expressed in the work that gives it its distinctive character. A film director who makes major decisions about the creative direction in creating the films owns the property in the film. In the final analysis, the expression of ideas is property. We conclude that Article 17 is a general normative basis for protecting property rights, both tangible and intangible property.

In contrast, Article 27 of the UDHR protects intangible property rights of creators and the rights of the public to access these creations. It stipulates that:

1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the *right to the protection of the moral and material interests* from any scientific, literary or artistic production of which he is the author (our emphasis).[117]

Our reading of paragraph 1 of Article 27 is that it protects the right of everyone or the public (we surmise everyone in the plural sense constitutes the public) to access works of art and scientific advancement and its benefits. It lays a normative basis for a claim for a right to access and enjoy works of art and scientific advancement as a means to participate in the cultural life of the community. Paragraph 2 of Article 27, by contrast, protects an author's *moral and material interests* in works of science, literature, or art that the author has produced. The key question is, what are these *moral and material interests* of the author in the works he has produced? If A produces a film, what are A's moral and material interests in the film that he or she has created? We believe that the import of paragraph 2 of Article 27 of the UDHR is to confer entitlement or ownership of their creations, and ownership implies that the author's creation is some property. Therefore, Paragraph 2 of Article 27 of the UDHR protects the intangible property rights of the authors or creators of scientific, literary, or artistic works. We conclude that Article 27 of the

surmise because it is an international declaration, rules of treaty interpretation may be applied to analyzing the meaning of its terms.

[116] Oxford Advanced Learner's Dictionary, "Property", online: <https://www.oxfordlearnersdictionaries.com/us/definition/english/property?q=Property>.

[117] *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

UDHR protects two competing rights: the right of authors or creators of creative works to the property in their creation and the right of the public to access and use these works or creations.

Article 15 of the ICESCR concretized the property and access rights provided in Article 27 of the UDHR. In other words, Article 15 recasts the provisions of Article 27 of the UDHR in terms of an obligation on Contracting States to recognize the right to property and right to access property and to take steps necessary for achieving this right in binding treaty form. Thus, Article 15(1) of the ICESCR enjoins States Parties to the ICESCR to recognize the rights of everyone to (a) participate in the cultural life[118]; (b) enjoy the benefits of scientific progress and its application[119]; and (c) benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[120] Paragraph 2 of Article 15 instructs States Parties to the ICESCR to take steps to "achieve the full realization of this right," and amongst the steps that States must take to achieve this right must include "those necessary for the conservation, the development and diffusion of science and culture." And paragraph 3 of Article 15 of the ICESCR further instructs States Parties to "undertake to respect the freedoms indispensable for scientific research and creative activity."

We conclude that both the UDHR and ICESCR protect owner's rights to property, both tangible and intangible, and the right of the public to access and use these properties. Thus, if we conclude that the real import of Articles 17 and 27 of the UDHR and Article 15 of the ICESCR is protecting property rights, both tangible and intangible, and the rights of the public to access them, how, then, must States Parties ensure that the creators' and authors' rights and the right of the public to access and enjoy these creations are protected? We surmise paragraph 2 of Article 15 of the ICESCR provides some answer. As already noted in the preceding paragraph, it enjoins States Parties to *take certain steps* to achieve full realization of this right, including steps that are necessary for "conservation, the development, and the diffusion of science and culture" (our emphasis). What might these steps be or look like? We suggest that copyright law is one of the steps that States Parties can take to ensure the property rights of the authors and the rights of the public to access and enjoy the benefits of the authors creation.

[118] *International Covenant on Economic, Social and Cultural* Rights, UNGA, UN Doc A/6316 (1966) GA Res 2200A (XXI), art 15 (1)(a).
[119] *Ibid*, art 15 (1)(b).
[120] *Ibid*, art 15 (1)(c).

Therefore, copyright seen from a human rights perspective is linked to the protection of a person's creativity, which we concluded earlier is a form of property, and the protection of the right of the public to access creative works. We conclude that copyright is not a human right but a means for protecting the human rights of creators and other rights-holders to property and the rights of the public to access the created protected works. Similarly, the International Publishers Association (IPA) concluded in 2015 that 'copyright protection is not per se a human right, but it is a tool which protects the human rights of authors and publishers.'[121] We, however, do not fully ascribe to the IPA's position that views copyright as a tool for protecting only the "human rights of authors and publishers." As already stated, we conclude that international human rights instruments protect the rights of both authors and users and therefore when framing copyright law, this fact must not be lost on the policy makers and legislators. We submit that copyright law could be used to reconcile competing human rights of authors and users if framed objectively with the clear understanding that at stake are the interests of both creators and users, but that it is not just to try to balance the human rights of creators with the human rights of users of the creation. A balance suggests a condition in which different elements are equal or in the correct proportion, but how can that be achieved?

V. ANALYSIS OF HUMAN RIGHTS THAT COPYRIGHT IMPACT

We have argued, in the preceding section, that copyright is not a *sui generis* right on a continuum of rights. Rather, copyright is a means to an end, not an end itself. It is an instrument or mechanism for protecting and reconciling two competing rights: the rights of creators and other rights holders and the rights of the public to access and enjoy or use the benefits of the creator's work. If copyright is a means to an end or a tool to protect the human rights of authors, publishers, other creators, and the public, how do we frame its content and scope so that it adequately protects competing rights of creators and users? To answer this question, we first explain a genre of human rights that copyright law may impact and then consider how copyright law may be framed in ways that reconcile the competing human rights of both authors or creators and users of the works or creations of authors or creators.

[121] International Publishers Association (IPA), "Copyright and Human Rights: An IPA Special Report" (8 July 2015), online (pdf): <https://www.internationalpublishers.org/images/Copyright.pdf>.

We identify three genres of human rights that copyright law may impact for examination. We shall start with the right to enjoy the benefits of scientific progress and its applications. Article 15(1)(b) of the ICESCR protects this right, which finds its normative basis in Article 27(1) of the UDHR. Some studies subsume this right under a broader right, which is the right to science and culture,[122] or simply the right to science.[123] We, however, prefer the formulation in Article 15 of the ICESCR which treats the right to participate in the cultural life (Article 15(1)(a)) as distinct from the right to enjoy the benefits of scientific progress and its applications (Article 15(1)(b)). We recognize that there is some level of interconnections between the strands of rights articulated under Article 15(1) of the ICESCR. For example, certain aspects of scientific progress can enhance the right to take part in cultural life and, similarly, certain aspects of the cultural life may influence discoveries or innovations and progress in science and its applications. Nonetheless, for the purpose of this paper, we would rather treat each as independent in their own right.

The content and scope of this right to enjoy the benefits of scientific progress and its applications has received scant attention in human rights discourses and leading works and is therefore not fully developed.[124] We, however, believe that the content and scope of this right might be inferred from the formulation of Article 15 of the ICESCR, Article 27 of the UDHR, and other human right instruments to include the following three aspects or elements: accessing all the benefits of scientific and technological advancements and their applications, especially in relation to the right to health, the right to education, the right to food, and the right to freedom of expression; opportunities to contribute to scientific innovations; and the freedoms indispensable for scientific research. An additional element is the obligation of States Parties to the ICESCR to foster an enabling environment that promotes the development, conservation, and diffusion of science and technology.[125] Crucially, the COVID-19 pandemic exposed the critical relationship between the right to health and the right to enjoy the benefits of scientific progress and its applications.

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[122] See e.g. Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights: Copyright and the right to Science and Culture*, UNGA, 28th Sess, UN Doc A/HRC/28/57 (2014).
[123] See e.g. Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, UNGA, 20th Sess, UN Doc A/HRC/20/26 (2012).
[124] See e.g. Yvonne Donders, "The Right to Enjoy the Benefits of Scientific Progress and its Applications: In Search of State Obligations in Relation to Health" (2011) 14:4 Medicine, Health Care and Philosophy 371; Amrei Muller, "Remarks on the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Article 15(1)(b) ICESCR)" (2010) 10:4 Human Rights L Rev 765.
[125] On these aspects, see *Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, *supra* note 123.

Next, we examine the right to take part in cultural life. Article 15(1)(a) of the ICESCR protects this right, which finds its normative basis in Article 27(1) of the UDHR. This right is also articulated using various formulations in other international and regional human rights instruments. Some examples include: Article 27 of the ICCPR on the rights of ethnic or religious minorities, in community with the other members of their group to enjoy their own culture; Article 5(e)(vi) of the CERD on the obligation of States Parties to prohibit and eliminate all forms of racial discrimination and guarantee, among other rights, the right to economic, social, and cultural rights, and especially the right to equal participation in cultural activities; and Article 30(1) of the Convention on the Rights of Persons with Disabilities, guaranteeing the right of persons with disabilities to take part on equal basis with others in cultural life and for States Parties to take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats.

The content and scope of the right to take part in cultural life depend on certain conditions, such as the availability of cultural goods and services, access to physical and financial resources to enjoy cultural life, compatibility of State Parties policies and legislation and other measures adopted to promote enjoyment of right to cultural life with other social group's cultural values. Furthermore, the scope is also determined by the recognition of diversity in cultures and the need for flexibility and relevance in formulating policies and strategies for promoting this right.[126] Some of the cultural goods necessary for the enjoyment of the right to cultural life may be the creations of authors, such as certain technologies created through scientific research. Technologies such as computers, cars, and telecommunication equipment, including mobile phones, are increasingly playing a role in everyone's right to take part in the cultural life of the community.

The third genre of human right we analyze is the right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the author guaranteed under Article 15(1)(c) of the ICESCR. There are divergent views about what the content and scope of this right should be. In the first place, we agree with the Committee on Economic, Social, and Cultural Rights (CESCR) that the expression, "any scientific, literary, or

[126] For detailed discussion of the elements of the content and scope of the right to take part in cultural life, see e.g. *General Comment No. 21: Right of everyone to take part in cultural life*, CESCR, 43rd Sess, UN Doc E/C12/GC/21 (2009).

artistic production" within the meaning of paragraph 1(c) of Article 15 of the ICESCR means the "creations of the human mind,"[127] and we argue that creations of the human mind are the creator's intellectual property. We do not, however, share the CESCR's attempt to deny intellectual property rights, which are creations of the human mind, albeit corporations may own some of these creations, from the protection guaranteed to creators under Article 15 (1)(c) of the ICESCR and Article 27 of the UDHR. A critical review of the Committee's position on this aspect is beyond the scope of this paper.

The moral and material interests of creators and authors as the creation of the human mind are the intellectual property of the creators, and they are human rights or the entitlements of the creators and authors. What, then, are the core elements of this human right to benefit from the protection of their intellectual property or creations of the human mind? First is the element of ownership. A person who creates or discovers something must naturally own it, take credit for it, or be recognized for discovering it, unless certain exceptions apply. This, we have already argued, implies that the human rights in Article 15(1)(c) are closely linked with Article 17 of the UDHR on the right to own property. The second element is the freedom to deal with the creation or discovery in the way the creator or author chooses. Thus, the author or creator, for example, must be free to dispose of their creation any time they choose to do so, subject to any other interests attaching to it. The third element is protection from arbitrary deprivation or unauthorized use of the creation. This implies the availability of adequate protection for the ownership of the creation through legislation and regulations, an effective administrative system, and effective judicial remedies to vindicate any abuse of the creator or author's human rights.

Thus, the right to enjoy the benefits of scientific progress and its application, the right to take part in cultural life, and the right to benefit from one's scientific or artistic creations intersect at several levels. Steps taken to protect each right has implications for other strands of rights. Since copyright is the pre-eminent mechanism for protecting the right to benefit from the protection of one's scientific or artistic creations, crafting or framing its content and scope must integrate the protection of the other rights as well. Let us consider, for example, the case of an author who invented an artificial intelligence (AI) technology that can revolutionize healthcare provisions or educational advancements for persons with learning disabilities that are more cost-effective than

[127] *General Comment No. 17 (2005) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author*, CESCR, 35th Sess, UN Doc E/C12/GC1712 (2006).

other available options. How can copyright framing provide protection for the author of the technology and, at the same time, ensure that the right to enjoy the benefits of scientific progress and its applications is protected?

The greatest challenge to framing copyright in a way that benefits both creators and users of scientific or artistic creations is, as Ginsburg argues, greed of both the authors and users.[128] Authors and creators have succeeded in achieving great protection for their creations using international law. Users or the public are increasingly fighting to have a free ride on the authors' and creators' creations or artworks.

A. TOWARDS A BALANCED APPROACH

In our preceding discourse, we have examined copyright from the perspective of human rights. Unlike others[129] who argue that copyright is human rights, we postulate that there is a relationship between copyright and human rights. Specifically, we argue that copyright is not a human right but a means to protect the human rights of creators in their creative works as well as the human rights of the public to access cultural works. The controversial question, therefore, is how to reconcile the competing rights of creators and the public. As Ginsburg noted, a solution to this question is elusive because of the greed of both creators and the public. In other words, the import of Ginsburg's statement, in our view, is that both the creators and the public gravitate towards an extreme approach to both ends of the spectrum. That is, creators desire to maximize the exploitation of their cultural goods as much as possible without any access to the public if a fee is not paid. On the other hand, the public desires unlimited access and free riding to creators' content. Both extremes have been condemned by Lawrence Lessig in his advocacy for free culture;[130] Lessig states that free culture does not mean that artists do not get paid for their creations. He further stresses that not paying artists for their creations amounts to anarchy, and he advocates for a balance between anarchy and control.

Lessig's use of the word "balance" in his book published in 2004 in the United States reinforces the position of the Supreme Court of Canada in *Theberge*,[131] where the apex court opines

[128] Jane C Ginsburg, "How Copyright Got a Bad Name for Itself" (2002) 26:1 Colum J L & Arts 61.
[129] Torremans, *supra* note 110; Dessemontet, *supra* note 112.
[130] Lawrence Lessig, *Free Culture, How big Media uses Technology and the Law to lock down Culture and Control Creativity* (New York: Penguin Press, 2004) at XVI.
[131] *Théberge*, *supra* note 6.

that the purpose of copyright is to achieve a balance of rights of creators on the one hand, and those of the public on the other hand. Advocating for balance is laudable, but it presents an inherent challenge. The concept of balance creates an image of meting out entitlements in equal proportion. This, we argue, is not practical in relation to legal concepts as well as equal apportionment of the rights of creators and the public access to content. In order to make our arguments more practical and relatable, we prefer to use the word "reconcile" instead of balance, and we believe that copyright scholars who use the word "balance" actually mean finding a way to reconcile the interests of creators and the public. Therefore, the quest for a balanced approach is in effect an attempt to reconcile the competing rights of creators to exploit their works and the right of the public to access content for the encouragement of learning.

B. RECONCILING THE RIGHTS OF CREATORS AND THE PUBLIC INTEREST

In the copyright system, reconciling the rights of copyright owners to monetize their works and the right of the public to access creative works for encouragement of knowledge has been a source of controversy. In this section, we shall attempt to recommend how this can be achieved. Our recommendation is that reconciling the rights of copyright owners and the rights of the public is chiefly the responsibility of two key institutions of government— the legislature and the judiciary. Admittedly, in Canada, and indeed in other jurisdictions, the various copyright stakeholders attempt to influence the direction of copyright to favour their interest, but the extent of their influence is determined by the legislative and judicial arm of government whom we regard as the primary gatekeepers of the copyright system because they moderate the excesses of copyright stakeholders. This will directly impact on the degree of success achieved in reconciling the rights of copyright owners and those of the public.

In the historical account of the first copyright law, the members of the Stationers Company unflinchingly sought to revive their perpetual and exclusive right[132] to book publication. But this was met with strong opposition by critics,[133] and the British Parliament at that time exercised the primary responsibility to reject the excesses of the members of the Stationers' Company because their motive was inimical to the public interest and the encouragement of learning. However, after much scrutiny, the British Parliament in 1710 agreed to pass the Statute of Anne, which according

[132] Patterson, *supra* note 7.
[133] Such critics were Daniel Defoe, John Milton and John Locke.

to our analysis in this paper, represents the reconciliation of the rights of copyright owners to earn financial reward and rights of the public to access content for the encouragement of learning. Similarly, in contemporary copyright, in our present dispensation, the Parliament of Canada, like the 18th century British Parliament, has the responsibility to objectively scrutinize and pass copyright legislation to ensure it serves its purpose while at the same time reconciling the mostly competing rights of copyright owners and users. The objectivity of copyright legislation reflects the objectivity of the law makers. The legislature as an institution of government has the responsibility to provide clarity on the purpose of copyright law in relation to the rights of the copyright owner and the rights of the public.

Where there is ambiguity or doubt as to the meaning of the copyright legislation, the judiciary has the responsibility to interpret the law to give clarity. The interpretative role of the judiciary is demonstrated in 18th century Britain. Instructive here are two cases, *Millar v. Taylor*[134] and *Donaldson v. Beckett*.[135] After the enactment of the Statute of Anne in 1710, there was still the argument that notwithstanding the existence of the new copyright law, copyright still existed in common law, that is, the perpetual right which the members of the Stationers' Company enjoyed. These two cases provided the opportunity for the judiciary to consider the unsettled matter. In *Millar v. Taylor,* Millar sued Taylor for publishing the poem *The Seasons* without his permission even if the copyright in the work granted by the Statute of Anne had expired.[136] Taylor argued that the work was already in the public domain since the copyright term in the work had expired.[137] While it may seem obvious that a piece of legislation should reasonably cover the subject matter of its focus, it may not reasonably foresee every matter. This is the case with the Statute of Anne.

It is pertinent to mention that the Statute of Anne itself was silent on whether its enactment ended the common law of copyright or not, and this created a vacuum. Four judges considered the matter, and judgment was given in favour of Millar for the existence of common law copyright despite the existence of the Statute of Anne. The judges reasoned that in considering the matter, they considered the 1710 Act (the first copyright law) and found nothing contrary to the author's

[134] *Millar v Taylor*, [1769] 98 ER 201.
[135] Morris, *supra* note 24 at 227, citing *Donaldson v Becket* [1775] 98 ER 257.
[136] Millar had purchased rights in *The Seasons* from the original author – James Thompson.
[137] Stern, *supra* note 31 at 72.

right at common law.[138] In our view, this ruling created an absurdity that seemed to undermine the authority and efficacy of the Statute of Anne. *Millar v. Taylor* was decided in 1769 and it was not until six years later that the court had the opportunity to reconsider the issue again. In *Donaldson v. Beckett*, the issue also centered around the same creative work, *The Seasons*. Beckett purchased rights to the work from Millar's estate, but Donaldson was still selling cheaper editions of the same work.[139] The matter was litigated all the way to the House of Lords, and the issue for consideration was whether the common law right existed even after the enactment of the Statute of Anne. The House of Lords decided against the existence of the common law copyright and quashed the decision in *Millar v. Taylor*. According to Lord Campden, the House of Lords' rejection of the claim for common copyright was because it was based on the by-laws of the Stationers' Company, which were regarded as gross tyranny and usurpation and the least place to find common law.[140] The decision in *Donaldson v. Beckett* was an important decision because the court corrected the absurdity that was created in *Millar v. Taylor*. This underscores the importance of the role of the judiciary as a gatekeeper in reconciling the rights of copyright holders and the public interest, even if it means reevaluating its own decision.

The Supreme Court of Canada, in the case of *Théberge*,[141] exercised its gate-keeping responsibility when it weighed in on reconciling the rights of copyright owners and those of the public interest. The apex court emphasized that excessive control by copyright owners unduly limits the flourishing of the public domain in the interest of society.[142] In other words, while copyright owners have the right to exploit their works for financial reward, the exercise of this right must not jeopardize the right of the public to access and disseminate works of art and the intellect for the encouragement of learning.[143]

The reconciliation of the rights of the copyright owner to exploit their works and the rights of the public to access content for the encouragement of learning is the responsibility of the legislature and the judiciary. As we have seen in the discussion above, neither the judiciary nor the

[138] Ronan Deazley, "Commentary on *Millar v. Taylor* (1769)" (2008) in Lionel Bentley & Martin Krestschmer, "Primary Sources on Copyright (1450 – 1900)" (2008), online:<http://www.copyrighthistory.org/cam/commentary/uk_1769/uk_1769_com_972007181852.html > at 5.
[139] See Morris, *supra* note 24.
[140] Wikipedia, *Donaldson v. Becket*, at online: < https://en.wikipedia.org/wiki/Donaldson_v_Beckett > Accessed November 27, 2023, at 2.
[141] *Théberge*, *supra* note 6.
[142] *Ibid.*
[143] *Ibid.*

legislature is perfect in its gate-keeping responsibility. Therefore, these two arms of government must work together by complementing each other; the legislature must as much as possible provide clarity on copyright. Where the legislation is unclear, the judiciary should step in and through its interpretative role, provide clarity. While it may seem obvious that it is the responsibility of the legislature to enact clear copyright laws, it is not always the case. Instructive here is Canada's copyright legislation which did not have a clearly defined purpose until 2012; but the judiciary filled that gap in 2002 in the case of *Théberge*.

VI. CONCLUSION

In this paper, we delved into the intricate interplay between copyright law and human rights in Canada, exploring the framing of copyright from a historical and human rights perspective. Our analysis recognizes that copyright law, rooted in the Statute of Anne, serves to balance the proprietary interests of creators with the public's right to access content for the encouragement of learning. Canadian copyright law, influenced by British legal traditions and refined through its own legislative and judicial processes, presents a complex picture of exclusive rights complemented by fair dealing exceptions.

Additionally, we argue that copyright law, while not a human right itself, is a critical tool for protecting the proprietary interest of creators and ensuring public access to their works. We emphasize that the purpose of copyright law is not to grant an unfettered monopoly but to incentivize creativity while facilitating public enrichment from creative works. This objective aligns with the human rights framework, particularly the rights to participate in cultural life, to benefit from scientific progress, and to protection of authors' moral and material interests as enshrined in international human rights instruments such as the UDHR and ICESCR.

Furthermore, we also discuss the challenge of balancing the rights of copyright owners with the public interest in accessing creative content. We stress the importance of legislative clarity and judicial interpretation in maintaining this balance and argue for a reconciliation approach rather than an equal apportionment of rights. We posit that this approach requires a nuanced understanding of the varying interests and rights at stake and a commitment to ensuring that copyright law serves as a conduit for both rewarding creativity and enriching the public domain.

In discussing the evolution of Canada's copyright law, we underscore the critical role of the legislature and judiciary in shaping a copyright system that respects and protects both creators' rights and public access. It posits that the reconciliation of these interests is essential to fostering a society that values both the contributions of creators and the cultural and educational advancement of the public.

We advocate for a copyright framework that is grounded in human rights, acknowledging the inherent dignity of both creators and the public. It concludes that the ultimate aim of copyright law should be to promote a copyright ecosystem where creators are fairly compensated and the public can freely engage with creative works, thereby advancing the broader societal interest in cultural, educational, and technological progress.