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Reconsidering Copyright's Constitutionality

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Dr. Graham J. Reynolds

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Reconsidering Copyright's Constitutionality
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Abstract:

In 1996, in *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)*, Teitelbaum J. of the Federal Court (Trial Division) held both that specific provisions of the *Copyright Act* did not infringe the right to freedom of expression as protected under the Canadian *Charter of Rights and Freedoms (Charter)* and that, even if they did, these provisions could be justified under s. 1 of the *Charter*. Since *Michelin*, these conclusions have been treated by Canadian courts as settled. The purpose of this paper is to challenge these conclusions by subjecting certain core provisions of the *Copyright Act* to *Charter* scrutiny. I will do so in reliance on one case study, namely copyright term extension. I will argue that the use of copyrighted works in the context of this case study constitutes protectable expression, and that core provisions of Canada's *Copyright Act* infringe the *Charter* right to freedom of expression in purpose and effect. As well, I will argue – drawing in particular from the SCC's decision in *Saskatchewan (Human Rights Commission) v. Whatcott* – that these provisions might not be justified under s. 1. Lastly, I will address the remedies that might be granted by a court should it conclude that provisions of the *Copyright Act* unjustifiably infringe s. 2(b) of the *Charter*. Ultimately, I will demonstrate that there are serious questions to be answered with respect to whether provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. It is time for Canadian courts to move past *Michelin* and to reconsider copyright's constitutionality.

Keywords:

Canadian Charter of Rights and Freedoms, freedom of expression, copyright, Canada, Copyright Act, copyright term extension, constitutional law, intellectual property

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Reconsidering Copyright's Constitutionality

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(forthcoming in the Osgoode Hall Law Journal (issue 53.3))

1. Introduction

Do provisions of Canada's *Copyright Act* unjustifiably infringe the right to freedom of expression as protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*?¹ This question, while it has not been explicitly addressed by the Supreme Court of Canada (SCC), has been addressed by a number of lower Canadian courts.² In the leading Canadian case to have addressed the intersection of the *Charter* right to freedom of expression and copyright – *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)* – Teitelbaum J., of the Federal Court (Trial Division), held that specific provisions of the *Copyright Act* did not infringe the *Charter*-protected right to freedom of expression and, even if they did, they would be justified through the application of a s. 1 analysis. Since *Michelin*, these conclusions have been treated by Canadian courts as settled.³

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

² See, for instance, *Queen v James Lorimer & Co* [1982] FCJ No 229 FCTD, *Queen v James Lorimer & Co* [1984] 1 FC 1065, *Canadian Tire Corp v Retail Clerks Union, Local 1518* (1985), 7 CPR (3d) 415; 36 ACWS (2d) 4; [1985] FCJ No 1005; [1985] ACF no 1005 Federal Court of Canada - Trial Division, *Rôtisseries St.-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.)* [1986] 17 CPR (3d) 461, *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1996] FCJ No 1685 (QL); [1997] 2 FC 306 FCTD, *Fraser Health Authority v. Hospital Employees' Union* (2003), 2003 BCSC 807; 226 DLR (4th) 563; 25 CPR (4th) 172; 122 ACWS (3d) 544; [2003] BCJ No 1192 British Columbia Supreme Court, *Corporation Sun Média c. Syndicat canadien de la fonction publique* 2007 QCCS 2943, [2007] JQ no 6007 Cour supérieure du Québec, *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* (2008), 2008 BCSC 1609; 173 ACWS (3d) 431; [2008] BCJ No 2271, *Drolet v Stiftung Gralsbotschaft (F.C.)* (2009), 2009 FC 17; [2010] 1 FCR 492; [2010] 1 RCF 492; [2009] FCJ No 38; [2009] ACF no 38 Federal Court.

³ See, for example, *Canwest 2008* (supra, note 2) and *Drolet* (supra, note 2). This is the case despite the SCC's articulation of the purpose of copyright having evolved since *Michelin*. The evolution of the purpose of copyright in Canada is discussed in greater depth in section 2(d) of this paper. For other works that address this topic, see, for

In this paper, I argue that these conclusions ought not to be treated by courts as settled; that based on current copyright and *Charter* jurisprudence, a Canadian court could determine that provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. In so doing, this paper adds to the voices of those who have argued that Canadian courts should reconsider the relationship between copyright and the *Charter* right to freedom of expression, including David Fewer, Jane Bailey, Carys Craig, and Bitá Amani.⁴

instance, Daniel J. Gervais, 'The Purpose of Copyright Law in Canada' (2005) 2 UOLTJ 315. In a separate work, I argue that the approach adopted in *Michelin* to the intersection of the *Charter* right to freedom of expression and copyright relies on now-invalid approaches to both copyright and to the *Charter* right to freedom of expression and, as a result, that this approach is itself invalid and must be reconsidered.

⁴ David Fewer, 'Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada' (1997) 55 U Toronto Fac L Rev 175, Jane Bailey, 'Deflating the Michelin Man' in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005), Carys J Craig, 'Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright' (2006) 56 Univ of Toronto LJ 75, Bitá Amani, 'Copyright and Freedom of Expression: Fair Dealing Between Work and Play' in Rosemary J Coombe, Darren Wershler and Martin Zellinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press 2013). I also build on my previous work in this area: Graham Reynolds, 'A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression' (2006) 5 CJLT 179. For other works that address the intersection of freedom of expression and copyright in Canada, see Joe Conforti, 'Copyright and Freedom of Expression: A Privilege for New[s] Reports' (1990) 5 IPJ 130, Ysolde Gendreau, 'Canadian Copyright Law and its Charters' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press 2005), Ysolde Gendreau, 'Copyright and Freedom of Expression in Canada' in Paul Torremans (ed), *Copyright and Human Rights* (Kluwer Law International 2004), Alex Colangelo and Alana Maurushat, 'Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures' (2006) 51 McGill LJ 47, Sarah Sklar-Heyn, 'Battling Clearance Culture Shock: Comparing US Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film' (2011) 20 Cardozo J Int'l and Comp L 233, Margaret Ann Wilkinson and Charles A. Painter, 'Shifting the Balance of Copyright Control for Photographic Works in Canada' (1998-1999) 13 Intellectual Property Journal 353, Teresa Scassa, 'Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn v Office and Professional Employees' International Union, Local 378*' (2002) 39 Alta L Rev 934, Ian Kerr, Alana Maurushat and Christian Tacit, 'Technical Protection Measures: *Tilting at Copyright's Windmill*' (2003) 34 Ottawa L Rev 6, Ian Kerr and Jane Bailey, 'The Implications of Digital Rights Management for Privacy and Freedom of Expression' (2004) 2 J of Info, Comm & Ethics in Soc 87, Abraham Drassinower, 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law' (2003) 16 Can JL & Juris 3, Myra J Tawfik, 'International Copyright Law: W[h]ither User Rights?' in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005), Gregory R Hagen and Nyall Engfield, 'Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test' (2006) 3 UOLTJ 477, EAC Mohammed, 'Parody as Fair Dealing in Canada: A Guide for Lawyers and Judges' (2009) 4 JIPLP 468, Graham Reynolds, 'A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada' (2009) 6 SCRIPTed 639, Graham Reynolds, 'Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression' in Michael Geist (ed), *From "Radical Extremism" to "Balanced Copyright"* (Irwin Law 2010), Graham Reynolds, 'All the Game's a Stage: Machinima and Copyright in Canada' (2010) 13 JWIP 729, Graham Reynolds, 'Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada' (2010) 33 Man LJ 241, Graham Reynolds, 'The Impact of Canadian Copyright Laws on the Voices of Marginalised Groups: Towards a Right to Rewrite' (2010) 48 Alta L Rev 35, Teresa Scassa, 'Trademarks Worth a Thousand Words: Freedom of Expression and the Use of the Trademarks of Others' (2012) 53 Les Cahiers de droit 887, Katie Sykes, 'Towards a Public Justification of

This paper will proceed as follows. In Part 2, in reliance on copyright term extension as my case study, I will discuss the scope of the s. 2(b) right to freedom of expression in the context of copyright.⁵ I will argue that the SCC's freedom of expression jurisprudence suggests that the unauthorized act at the heart of the case study considered in this paper conveys or attempts to convey meaning and thus constitutes protectable expression under s. 2(b); that this act should not be excluded from the scope of the *Charter* right to freedom of expression due to the method or location of expression; and that key provisions of the *Copyright Act* – namely the general infringement provision (s. 27(1)) read in context with the provisions granting rights in works (ss. 3 and 5), the primary remedy provisions (ss. 34, 38.1 and 42), the provisions detailing defences and limitations to copyright infringement (ss. 29-30.9), and the provision setting out the term of copyright in works (as amended) (s. 6) – limit or restrict freedom of expression in purpose and effect, thus infringing the *Charter* guarantee.⁶

In Part 3, I will draw upon SCC jurisprudence and related commentary to discuss how the s. 1 analysis might be applied in the context of the case study considered in this paper. I will argue that the SCC's s. 1 jurisprudence suggests that the objective of the impugned provisions of the *Copyright Act* is pressing and substantial and that there is a rational connection between this objective and the impugned provisions. However, I will further argue that the impugned

Copyright' (2003) 61 UT Fac L Rev 1, Daniel Gervais, 'Making Copyright Whole' (2008) 5 UOLTJ 1, David Vaver, 'Intellectual Property: The State of the Art' (2000) 116 LQR 621, David Vaver, 'Copyright Defences as User Rights' (2013) 60 J Copyright Soc'y USA 661, Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 IPJ 1 at 18, Sunny Handa, *Copyright Law in Canada* (Butterworths 2002) at 95, David Vaver, *Copyright Law* (Irwin Law 2000) at 22, David Vaver, *Intellectual Property Law* (2nd edn, Irwin Law 2011) at 46-50. See also Graham Reynolds and others, *Canadian Intellectual Property Law* (Toronto, Emond Montgomery 2013). One section of this casebook addresses the intersection of freedom of expression and copyright (see pp 173-177). See, as well, Rebecca Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation' (2000) 42 BC L Rev 1 for a similar analysis in the US context.

⁵ Like its articulation of the purpose of copyright, the SCC's view of the correct scope of s. 2(b) has also changed over time. For a work that describes, in detail, the evolution of the SCC's articulation of the scope of s. 2(b), see Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35 OHLJ 1.

⁶ *Copyright Act*. Bailey, as well, has argued that '[a] strong argument can be made that the [Copyright] Act's prohibition against expressing certain content constitutes a *prima facie* section 2(b) violation' (supra note 4 at 144).

provisions may be considered to be overbroad, and as a result may fail the minimal impairment branch of the proportionality test. As well, a court could find that the deleterious impact of the provisions may not be outweighed by their benefits. As a result, these provisions may not be justified under a s. 1 analysis.

Part 4 will address remedies. In the event that the impugned provisions noted above are held to infringe the s. 2(b) right to freedom of expression and are not saved by s. 1, what might be the appropriate remedy? While a court could sever part of the offending provision (or provisions), my analysis of s. 1 jurisprudence suggests that a court could find that the most appropriate remedy would be for the Court to declare the *Copyright Act*, in its entirety, to be of no force or effect (albeit with a temporary suspension of invalidity). Although appearing at first glance to be a radical outcome, such an action would be consistent with both past *Charter* jurisprudence and, more generally, with the division of authority between courts and Parliament.

My purpose in writing this paper is to call into question the view that arguments challenging the constitutionality of provisions of the *Copyright Act* on *Charter* right to freedom of expression grounds are ‘bound to fail’ (as was stated in one lower court decision).⁷ Rather, as I will establish, a Canadian court could determine that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression. As such, it is important for Canadian courts to consider, and not to reject out of hand, the question of copyright’s constitutionality. As Margaret Radin writes, ‘[i]t may be that the copyright law that we have can easily meet the freedom of expression test, but that does not mean that we should not apply the test to see whether the law meets it’.⁸

⁷ *Canwest Mediaworks Publications Inc. v. Horizon Publications Inc.* 2009 BCSC 391, [2009] BCWLD 6704 at para. 37.

⁸ Margaret Jane Radin, ‘The Rule of Law in the Information Age: Reconciling Private Rights and Public Values’ (2009) [4] *JL Phil & Culture* 83 at 104.

2. Copyright and freedom of expression (s. 2(b))

a. Case study: copyright term extension

As noted by L'Heureux-Dubé J. in *Dunmore v. Ontario (Attorney General)*, “Charter litigation decisions cannot be made in a factual vacuum”.⁹ As such, in seeking to address the question of copyright’s constitutionality, it is necessary to do so in the context of a specific factual matrix. The case study that I rely on for the purposes of this paper is as follows: an action is brought against A for copyright infringement for making available works the copyright in which would have expired were it not for a legislative amendment to the *Copyright Act*, passed after the works had been created, that extended the term of copyright for both future and existing works. In this case study, it is assumed that the act complained of prima facie infringes copyright, and is not saved by any defence to copyright infringement. The defendant (A) is thus arguing that specific provisions of the *Copyright Act* (both the provision setting out the term of protection for copyrighted works as well as other core provisions) unjustifiably infringe their *Charter* right to freedom of expression.¹⁰

I have selected this case study because a recent amendment to the *Copyright Act*,¹¹ as well as possible future amendments to the *Copyright Act*,¹² suggest that in the not too distant future, a case could be brought in which the constitutionality of similar provisions of the *Copyright Act* is challenged. However, I do not mean to suggest that this is the only type of

⁹ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.

¹⁰ As a preliminary issue, it should be noted that the SCC has held, in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 SCR 110 at para. 15, that statutory provisions are not presumed to be consistent with the *Charter*. As noted by Beetz J., who delivered the judgment of the Court, ‘the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter’.

¹¹ As part of a budget implementation act that received royal assent on June 23, 2015, the Government of Canada extended the term of copyright protection in published sound recordings (both existing and not-yet-created) from, broadly speaking, 50 years after publication to 70 years after publication. See *Copyright Act*, R.S.C. 1985, c. C-42 at ss. 23(1)(b) and 23(1.1). Both existing works and works not-yet-created receive the benefit of this extension.

¹² On February 4, 2016, Canada signed the Trans-Pacific Partnership Agreement, one of the articles of which requires contracting parties to protect works, performances, and phonograms for the term of the natural life of the author plus 70 years after the author’s death (Article 18.63).

situation that might result in a court determining that provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression, or that my conclusions are restricted to the specific case study presented. Rather, I present this case study as an illustrative example of some of the constitutional issues raised by Canadian copyright law.¹³

b. Do the activities in question have expressive content?

As noted by Cory J. in *Libman v. Quebec (Attorney General)*, the SCC has interpreted the *Charter* right to freedom of expression broadly, in order to ‘extend the guarantee under the Canadian *Charter* to as many expressive activities as possible.’¹⁴ Aside from certain circumstances in which the method or location of an expression will result in the expression not being protected under the *Charter* right to freedom of expression (an issue that will be addressed in the next section), as noted by Cory J. in *Libman*, ‘any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of section 2(b) of the Canadian Charter’.¹⁵

In making a copyrighted work available, is A conveying or attempting to convey meaning? One question that must be addressed in considering this question is whether s. 2(b), despite protecting an ‘infinite variety of forms of expression’, only protects expression that

¹³ Furthermore, I have intentionally not included additional details in this case study, such as a specific work or individual, in order to avoid drawing attention away from the broader question of whether a Canadian court could determine that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression (the central focus of this paper, as noted above). For works the focus of which is copyright term extension, see, for instance, Marci A. Hamilton, “Copyright Duration Extension and the Dark Heart of Copyright” (1996) 14 *Cardozo Arts & Ent L J* 655, Arthur R. Miller, “Copyright Term Extension: Boon for American Creators and the American Economy” (1998) 45 *J Copyright Soc’y USA* 319, Tyler T. Ochoa, “Patent and Copyright Term Extension and the Constitution: A Historical Perspective” (2001) 49 *J Copyright Soc’y USA* 19, Dennis S Karjala, “Judicial Review of Copyright Term Extension Legislation” (2002) 36 *Loy LA L Rev* 199, Richard A Epstein, “The Dubious Constitutionality of the Copyright Term Extension Act” (2002) 36 *Loy LA L Rev* 123, Marvin Ammori, “The Uneasy Case for Copyright Extension” (2002) 16 *Harv J L & Tech* 287, Martin Kretschmer et al, ‘Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings’, (2008) 30:9 *EIPR* 341.

¹⁴ *Libman v Quebec (Attorney General)* [1997] 3 SCR 569 at 591-592.

¹⁵ *Ibid* at para. 31.

originates from the individual claiming the benefit of the s. 2(b) right?¹⁶ The question of whether a party can convey meaning, for s. 2(b) purposes, using the copyright-protected expression of another was answered, in the affirmative, in *Michelin*. In his reasons for judgment, Teitelbaum J. concluded that despite the fact that “‘Bibendum’ is not the fruits of the defendants’ own labours,’ CAW is conveying meaning (and thus engaging in expression) through the use of the modified Bibendum on its pamphlets and leaflets.¹⁷ As he noted, ‘[a]t its minimum, the meaning in this instance is that Michelin workers should band together in the union before they are stomped into submission by the corporate powers symbolized by the “Bibendum”’.¹⁸ Carys Craig echoes Teitelbaum J.’s conclusion that CAW’s use of Bibendum conveys meaning, writing that ‘the defendants’ depiction of Bibendum contributed something to the public understanding, generating new meaning by recontextualizing a powerful communicative symbol, expressing it anew and with a radically different message’.¹⁹

Some might argue, however, that rather than conveying or attempting to convey meaning, all that A is doing is engaging in a purely physical act, unconnected to expression. Some courts have interpreted acts that might otherwise be seen as expressive as purely physical.²⁰ The result of this interpretation is that the act is not considered to be protectable expression under the *Charter* right to freedom of expression. One instance in which this occurred was in *R v. Ludacka*

¹⁶ *Weisfeld v Canada (CA)* (1994), [1995] 1 FC 68 FCA at para. 26. Craig argues that ‘[t]hat the expression originates with the speaker is simply not a requirement of an attempt to convey meaning before it can fall within the freedom-of-expression guarantee...If someone writes ‘War is Terrorism!’ on a placard and hands it to me, I would be expressing myself by waving that placard. The expression may not be *mine* in the copyright sense of having originated from me as an author, but by demonstrating my support of that message, I would undoubtedly be engaged in an act of self-expression’ (supra note 4 at 83-84, emphasis in original).

¹⁷ *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1996] FCJ No 1685 (QL); [1997] 2 FC 306 FCTD at para 83. See also *Coles Book Stores Ltd v. Ontario (Attorney General)* (1991), 6 OR (3d) 673 at para. 80.

¹⁸ *Michelin* at para 85.

¹⁹ Carys J Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ (2006) 56 Univ of Toronto LJ 75 at 112.

²⁰ See, for instance, *Irwin Toy Ltd v. Quebec (Attorney General)* [1989] 1 SCR 927 at para. 41, where Dickson C.J. and Lamer and Wilson JJ write that ‘[i]t might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content’.

(*Ludacka*), a case heard by the Court of Appeal for Ontario (OCA), the judgment of which was delivered by Dubin C.J.O.²¹ *Ludacka* dealt with the question of whether a series of explicit sex acts, performed on stage, constituted expression and, thus, was prima facie protected by the *Charter*.²² Dubin C.J.O. held that the explicit sexual acts complained of were ‘purely physical activity which does not convey or attempt to convey meaning’.²³ Applying this decision in the context of A’s actions, it could be argued that the act of making available copyrighted works is ‘purely physical activity’ that does not convey or attempt to convey meaning.

The approach adopted in *Ludacka*, however, can be critiqued on several grounds. First, it is inconsistent with the expansive conception of s. 2(b) repeatedly affirmed by Canadian courts. In *Ontario Adult Entertainment Bar Assn v. Metropolitan Toronto (Municipality) (Ontario Adult Entertainment)*, a case decided by the OCA post-*Ludacka* in which it was held that explicit lap dancing is expression, it was noted that ‘courts have taken an expansive view in approaching the characterization of conduct as expression’ and that ‘competing values and interests that arise when viewing certain impugned conduct’ which might otherwise lead a court to determine that conduct does not constitute expression, are more properly assessed under a s. 1 analysis.²⁴

Second, the decision of the OCA in *Ludacka* can also be critiqued on the basis that it is inconsistent with prior SCC jurisprudence. In *Butler* (which was decided by the SCC four years before the OCA’s decision was handed down in *Ludacka*), Sopinka J. stated that ‘I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression’.²⁵ Sopinka J. distinguished ‘purely physical activity’ (that is to say physical activity in which one is

²¹ *R v Ludacka* (1996), 105 CCC (3d) 565, 28 OR (2d) 19 OCA.

²² *Ibid.*

²³ *Ibid* at paras. 24-25.

²⁴ *Ontario Adult Entertainment Bar Assn v Metropolitan Toronto (Municipality)* (1995), 35 OR (3d) 161 OCA at para. 50.

²⁵ *R v Butler* [1992] 1 SCR 452 at para. 72. As Dickson C.J. and Lamer and Wilson J.J. held in *Irwin Toy*, even the act of parking a car can have expressive content (*Irwin Toy* at para. 41).

not intending to convey a meaning, and does not convey a meaning) from the sale and rental of “hard core” videotapes and magazines as well as sexual paraphernalia’.²⁶ He held that ‘while indeed “physical”’, the sale and rental of these items ‘conveys ideas, opinions, or feelings’.²⁷ Despite involving an element of physicality, in that individuals must engage in some physical act or process in order to make a work available for others to access, *Butler* and *Ontario Adult Entertainment* suggest that the act of so doing is a physical act through which information, expression, ideas, and opinions are conveyed, and thus should be seen as an expressive act.

c. Is the activity excluded from that protection as a result of either the location or the method of expression

Notwithstanding the SCC’s characterization of the *Charter* right to freedom of expression as a broad and expansive right, some acts that convey or attempt to convey meaning are excluded from the scope of protectable expression on the basis of either the method or the location of the expression. In their majority reasons in *Montréal (City)*, McLachlin C.J. and Deschamps J., wrote that these exclusions should not be interpreted broadly. Instead, as they note, ‘expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee’, namely self-fulfillment, democratic discourse, and truth-finding.²⁸

i. Method of expression

The sole method of expression to have been excluded from protection by the SCC under s. 2(b), subsequent to *Irwin Toy*, is violent expression (or expression that takes the form of violence). In *Montréal (City)*, McLachlin C.J. and Deschamps J. noted that although it ‘may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator’,

²⁶ *Butler* at para. 2.

²⁷ *Ibid* at para. 64.

²⁸ *Montréal (City) v 2952-1366 Québec Inc* [2005] 3 SCR 141, 2005 SCC 62 at para. 72.

violent expression is excluded from protection under s. 2(b) on the basis that it ‘prevents dialogue rather than fostering it[; ...] prevents the self-fulfillment of the victim rather than enhancing it[; ...] [a]nd ... stands in the way of finding the truth rather than furthering it’.²⁹

Some might describe the unauthorized use of copyrighted works as a violent act, as an act that harms the author of the work, or as an act that is equivalent to a violent act.³⁰ The scope of the ‘violence’ exclusion from s. 2(b), however, has been confined by Canadian courts to acts of violence committed by one individual against another, or to threats of violence.³¹ While it is possible that in certain instances, individuals could engage in the unauthorized use of copyright-protected expression in a manner that threatens violence against an individual (for instance combining clips of movies and sending them to an individual as part of a threat of violence against that individual or against a group with which the individual identifies), in most circumstances, excluding uses of copyrighted works from the protection of s. 2(b) of the *Charter* on the basis that unauthorized use of copyrighted works harms the author of the work (or is equivalent to a violent act or a threat of violence) would be to adopt an interpretation of violence inconsistent with the way in which violence has been interpreted by Canadian courts in the context of this step of the s. 2(b) analysis.

Violence aside, are there any other ways in which A’s action could be considered to ‘undermine[] the values underlying s. 2(b)’ on the basis of the method of expression, and be excluded from the scope of protectable expression on this basis?³² A’s making available of works the copyright in which would have expired were it not for a retroactively-applied legislative

²⁹ Ibid at para. 72.

³⁰ For instance, in an article published in the Guardian Newspaper, Alexis Petridis describes how the singer Madonna characterized the unauthorized leak of music from her album *Rebel Heart* as ‘a form of terrorism’ and ‘artistic rape’ (Alexis Petridis, ‘Madonna: I did not say, ‘Hey, here’s my music, and it’s finished.’ It was theft’ *The Guardian* (December 21, 2014) <<http://www.theguardian.com/music/2014/dec/21/madonna-album-hack-living-state-terror>>).

³¹ See, for instance, *Irwin Toy* and *R. v. Geoghegan* 2004 ABPC 127.

³² *Montréal* at para. 72.

amendment to the *Copyright Act* extending the term of copyright in works could prevent dialogue, in that it could, for instance, lead to authors choosing not to write additional works out of concern that their works will be disseminated without their authorization. Furthermore, to the extent to which the self-fulfilment (or ‘self-actualization’³³) of the original authors in the case study described above is linked to their ability to control or manage the dissemination of their copyrighted works, their self-fulfilment may be limited by the widespread dissemination of their copyrighted works by A. Finally, the unauthorized use of copyrighted works by A may ‘stand[] in the way of finding the truth’ if it results in authors who might otherwise contribute to the truth-finding process choosing not to write, or publishers who might disseminate works that would otherwise contribute to the truth-finding process choosing not to disseminate works.³⁴

Canadian courts have held, however, that in situations where the method of expression cannot be separated from its content, the expression is entitled to protection under s. 2(b) regardless of whether the method of expression might ‘undermine[] the values underlying s. 2(b)’.³⁵ In the case study outlined above, the method through which the message is conveyed – when the content of the expression is stripped from the equation – does not conflict with the values underlying freedom of expression. The making available of copyrighted works, in and of itself, does not undermine or conflict with the values that have been said to underpin freedom of expression. Rather, the argument that this method of expression undermines the values that underpin freedom of expression ‘rests on its content’ (namely the fact that the works made available are works that are copyrighted).³⁶ As a result, this argument, as was held by McLachlin

³³ *R v. Sharpe* [2001] 1 SCR 45, 2001 SCC 2 at para. 76.

³⁴ *Montréal* at para. 72.

³⁵ *Ibid* at para. 72. See, for instance, *Canadian Broadcasting Corp v Canada (Attorney General)* 2011 SCC 2, [2011] 1 SCR 19 at para. 3, 52-53.

³⁶ *Montréal* at para. 68.

C.J. and Deschamps J. in *Montréal (City)*, ‘cannot be considered in addressing the issue of whether the method ... of the expression itself is inimical to s. 2(b)’.³⁷

The argument that in the case study introduced above the method of expression cannot be separated from its content, and thus the expression should not be excluded from the scope of protectable expression, is supported by SCC jurisprudence relating to choice of language and artistic expression. Both of these types of expression have been said by the SCC to be instances in which the method or form of expression is inseparable from its content. In *Reference re: s. 193 and 195.1(1)(C) of the Criminal Code (Reference re: s. 193)*, for instance, Lamer J. wrote that:

In my view the choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth. Language is, shortly put, both content and form.³⁸

Art is another type of expression in which form and content is linked. Lamer J., in *Reference re: s. 193*, wrote that ‘just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression’.³⁹ Lamer J. went on to state that:

Without settling the matter conclusively, I am of the view that at the very least a law that makes it an offence to convey a meaning or message, however distasteful or unpopular, through a traditional form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression, and must be justified, if possible, by s. 1 of the Charter.⁴⁰

³⁷ Ibid at para. 68.

³⁸ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 SCR 1123 at para. 77. See also *Ford v. Quebec* [1988] 2 SCR 712 at para. 40, in which the Court wrote that: ‘[l]anguage is so intimately related to the form and content of expression that there cannot be true freedom ... of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression’.

³⁹ *Reference re: 193* at para. 78.

⁴⁰ Ibid at para 81.

Like language and art, the choice to express oneself using copyrighted content can be seen, in many instances, as ‘an expression of cultural identity, and in many cases is an expression of one’s identity’.⁴¹ For instance, using a copyrighted image as part of a person’s personal web page, wearing a t-shirt with a logo of a product or company a person identifies with or supports, creating a mix tape or CD or playlist, combining two existing works into one new work, sending a link to a song to a friend, and myriad other acts, can all be seen as individuals expressing their identity through the use of copyrighted works. As well, again like language and art, the use of copyrighted content ‘colours the content and meaning of expression’.⁴² A different message is conveyed by the use of Bibendum in the pamphlets prepared by the CAW than by a description of the business practices engaged in by Michelin that the CAW finds objectionable. The use of copyrighted content, therefore, is ‘both content and form’.⁴³ As Craig writes, ‘[t]he question of whether a work as a whole is subject to copyright and, if so, what elements of the work fall within the scope of the owner’s interest cannot be divorced from an inquiry into the nature and content of the expressive work’.⁴⁴ As such, as was held in *CBC 2011*, the method of expression – namely the use of copyrighted content – ‘cannot be considered separately from the content and cannot serve as a basis for excluding the expressive activity from the protection of s. 2(b) of the Charter’.⁴⁵

Furthermore, although different from the laws at issue in *Reference re: s. 193*, in which the SCC considered the constitutionality of certain provisions relating to prostitution (including the section of the Criminal Code that prohibited communications in public for the purpose of prostitution), copyright can be conceptualized as ‘a law that makes it an offence to convey a

⁴¹ Ibid at para. 78.

⁴² *Ford v Quebec (Attorney General)* [1988] 2 SCR 712 at para. 40.

⁴³ *Reference re: 193* at para. 77.

⁴⁴ Craig, supra note 4 at 99.

⁴⁵ *CBC v. Canada* at para. 53.

meaning or message ... through a traditional form of expression like the written or spoken word or art'.⁴⁶ Instead of prohibiting specific messages, or types of communications, the provisions of the *Copyright Act* prohibit the manner in which those messages are expressed (namely through the use of copyrighted content).

Reference re: s. 193 and *CBC 2011*, taken together, suggest that the act described in the case study outlined above should not be excluded from the scope of protectable expression on the basis of the method of expression, and that – instead – the provisions of the *Copyright Act* restraining this type of use should be seen as a restriction on freedom of expression that requires justification through a s. 1 analysis.

ii. Location of expression

Telteilbaum J., in *Michelin*, took the view that expression that makes use of copyrighted works should be excluded from protection under s. 2(b) on the basis that copyright-protected expression, a species of private property, could not be used in the service of freedom of expression.⁴⁷ In reaching this conclusion, Teitelbaum J. drew parallels between the use of copyright-protected expression (considered by the SCC to be property, as described below), and expressing oneself on private property.⁴⁸

In recent years, the SCC has clarified the test for excluding messages conveyed on either private or public property from the scope of protectable expression under s. 2(b). As noted by Deschamps J. in *CBC 2011*, citing to *Montréal (City)*, 'for ... the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding'.⁴⁹

⁴⁶ *Reference re: 193* at para. 81.

⁴⁷ *Michelin* at paras. 86-108.

⁴⁸ Bailey at 143, Craig at 92.

⁴⁹ *CBC v. Canada* at para. 37.

In *Montréal (City)*, McLachlin C.J. and Deschamps J. affirmed that expression taking place on private property is generally not protected by s. 2(b). However, their judgment implies that the reason why expression taking place on private property falls outside of the protected sphere of s. 2(b) is not because property rights exist outside of the scope of the *Charter*. Rather, it is because of the way in which the *Charter* has been interpreted as applying to government action.⁵⁰ In instances in which private property rights do not involve state-imposed limits on expression, the *Charter* would not apply (as ‘state action is necessary to implicate the *Canadian Charter*’).⁵¹ However, in situations where private property is intertwined with state-imposed limits on expression, these state-imposed limits may be challenged using the *Charter* right to freedom of expression.⁵²

The SCC, on multiple occasions, has referred to copyright as a species of property.⁵³ If copyrights are to be considered property rights, however, they do not exist independently of the *Copyright Act*. Rather, they are rights created by the state through the passage of copyright legislation. As Estey J. wrote in *Compo Co. v. Blue Crest Music Inc.*:

copyright law ... is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.⁵⁴

⁵⁰ See *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 SCR 573.

⁵¹ *Montréal* at para. 62.

⁵² See, for instance, *R. v. Layton* (1986), [1986] OJ No 3069, 38 CCC (3d) 550, 3 WCB (2d) 22 Provincial Court (Criminal Division), Judicial District of York, Ontario. Jack Layton had been convicted under s. 2(1)(b) of the *Trespass to Property Act*, R.S.O. 1980, c. 511 for refusing to leave the Eaton Centre (a shopping mall) after having been directed to leave by the persons in charge of the private property. Layton had been handing out leaflets relating to a unionization campaign. Scott Prov. Ct. J. found that Layton’s s. 2(b) rights had been unjustifiably infringed.

⁵³ In *Cinar Corporation v. Robinson*, McLachlin C.J., writing for the Court, characterized the infringement of copyright as ‘a breach of ... property rights’ (*Cinar Corporation v. Robinson* 2013 SCC 73 SCC at para. 102). She also stated that ‘[c]opyright infringement is a violation of s. 6 of the [Quebec] *Charter*, which provides that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”’ (ibid at para.114). As well, in *Canadian Artists’ Representation v. National Gallery of Canada*, copyright is referred to, in a number of instances, as property (*Canadian Artists’ Representation v. National Gallery of Canada* 2014 SCC 42 at paras. 16 and 22).

⁵⁴ *Compo Co. Ltd. v. Blue Crest Music et al.* [1980] 1 SCR 357 SCC at p. 373.

Given both that copyright is a ‘creature of statute’, and that it limits the expression of some in order to advance the interests (both expression and otherwise) of others (for instance authors, publishers, and the public more generally), the property rights granted under the *Copyright Act* can be said to involve ‘state-imposed limits on expression’.⁵⁵ They are thus subject to the *Charter*, and a *Charter* analysis must be conducted in the same manner in the context of copyright as with other legislation. As Craig writes, ‘[b]ecause copyright is an interest conferred by government regulation, it follows that it can be subjected to *Charter* scrutiny and limited in the name of the rights enshrined in the *Charter*’.⁵⁶ Contrary to the conclusion reached by Teitelbaum J. in *Michelin*, the formal conception of copyright as a private property right should not result in the exclusion of expression that makes use of the copyrighted works of others from the scope of s. 2(b) of the *Charter* on the basis of the location of expression.⁵⁷

d. ‘If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?’⁵⁸

Section 27(1) is the general infringement section under the *Copyright Act*. It provides that ‘[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do’.⁵⁹ The rights of copyright owners are set out in s. 3 of the *Copyright Act*. These rights include the right

⁵⁵ *Montréal* at para. 62.

⁵⁶ Craig, *supra* note 4 at 95.

⁵⁷ Bailey, as well, writes that ‘foreclosing the protection of certain expression under section 2(b) on the basis that it conflicts with unentrenched property rights directly contradicts the concept of constitutional paramountcy – with the unenshrined property right seemingly taking precedence over the enshrined right to free expression’ (*supra* note 4 at 142).

⁵⁸ *CBC v. Canada* at para. 38.

⁵⁹ *Copyright Act* at s. 27(1).

to reproduce a work, to perform a work in public, and to communicate the work to the public by telecommunication, in whole or in substantial part.⁶⁰

Section 5 of the *Copyright Act* sets out the conditions for subsistence of copyright.

Section 5(1) notes that provided certain citizenship/residence requirements are met, ‘copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work’.⁶¹ The term of copyright is addressed in ss. 6-12 of the *Copyright Act*. The general term of copyright in Canada is the life of the author plus 50 years from the end of the calendar year in which the author dies.⁶² The hypothetical provision outlined in the case study above extends the term of copyright protection in works. This extension, in the context of the hypothetical provision, is applied both to existing and future works.

Section 34(1) of the *Copyright Act* details the remedies that are available to copyright owners. It states that ‘[w]here copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right’.⁶³ Statutory damages are provided for in s. 38.1 of the *Copyright Act*, and criminal remedies are addressed in s. 42.⁶⁴ The main defence to copyright infringement in Canada is fair dealing. This defence is set out in ss. 29-29.2 of the *Copyright Act*. Other defences are provided for in ss. 29.21-30.9 (inclusive).⁶⁵

Do these provisions, in purpose or effect, infringe s. 2(b)? First, what is the purpose of the provisions in question? Teitelbaum J., in *Michelin*, defined the objective of the *Copyright Act*

⁶⁰ Ibid at s. 3.

⁶¹ Ibid at s 5.

⁶² Ibid at s. 6.

⁶³ Ibid at s. 34(1).

⁶⁴ Ibid at ss. 38.1, 42.

⁶⁵ Ibid at ss. 29-29.2, 29.21-30.9, 38.1, and 42.

as ‘[t]he protection of authors and ensuring that they are recompensed for their creative energies and works’.⁶⁶ However, this view of the purpose of copyright – referred to by Abella J. as ‘author-centric’ – represents the ‘former framework’ for copyright.⁶⁷ In its place, the SCC – beginning with Binnie J.’s majority decision in *Théberge* - has stated that there are two objectives to copyright, namely to ensure that copyright owners receive a just or fair reward, and to advance the public interest in the encouragement and dissemination of works of the arts and intellect.⁶⁸

What is the relationship between these two objectives? This question is beyond the scope of this paper to address in detail. However, given the importance, to a *Charter* analysis, of properly characterizing the objective of impugned provisions, as will be described in more detail below, this question is one that a court faced with a challenge to copyright’s constitutionality will need to grapple.⁶⁹ One way in which this relationship could be framed positions one of the two purposes articulated by Binnie J. in *Théberge* as acting in the service of the other. Under this view of the purpose of copyright in Canada, the just rewards provided in the *Copyright Act* are the means through which the public interest in the encouragement and dissemination of works of the arts and intellect is advanced. Support for this articulation of copyright’s purpose can be found in *Cinar Corp*, in which McLachlin C.J. wrote that copyright ‘seeks to ensure that an author will reap the benefits of his efforts, *in order to* incentivize the creation of new works’.⁷⁰

⁶⁶ *Michelin* at para. 98. Similarly, in *Canadian Private Copying Collective v. Canadian Storage Media Alliance* 2004 FCA 424 at para. 33, Noël JA, who delivered the reasons for judgment of the FCA, wrote that ‘[t]he essential element of the federal legislative competence over copyright ... involves the establishment of a legal framework allowing rightsholders to be rewarded for the reproduction of recorded music by third parties’.

⁶⁷ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36 at para. 9.

⁶⁸ *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] 2 SCR 336, 2002 SCC 34.

⁶⁹ Craig, for instance, argues that ‘the failure [by Canadian courts] to satisfactorily consider copyright in the light of freedom-of-expression values can be traced back to a broader failure to appreciate the nature and the purpose of copyright’ (Craig, *supra* note 4 at 81).

⁷⁰ *Cinar* at para. 23 [emphasis added].

This conception of copyright – under which the purpose of the provisions of the *Copyright Act* described above is to incentivize the creation of expression by granting copyright owners rights in works of expression, as well as the ability, through the state, to enforce infringements of those rights – is the conception adopted by this paper for the purposes of this analysis. Under a different view of copyright’s purpose(s), however, both the s. 2(b) analysis and the s. 1 analysis might proceed differently.

In seeking to determine whether core provisions of the *Copyright Act* infringe s. 2(b) in purpose or effect, the example used in *Irwin Toy* of a rule against handing out pamphlets is informative. As noted by Dickson C.J., Lamer J. and Wilson J. (who wrote the reasons for judgment for the majority), this rule – despite ‘purport[ing] to control litter’ – ‘is “tied to content”’.⁷¹ That is to say, ‘[t]he rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning’.⁷² Like the rule at issue in *Irwin Toy*, the provisions of the *Copyright Act* noted above are also ‘tied to content’.⁷³ They ‘control access by others to a meaning being conveyed’, namely the meaning of the copyrighted work, and any meanings that are added to that work by parties that re-work it; they also ‘control the ability of [the unauthorized user of copyrighted content] to convey a meaning’.⁷⁴ In so doing, the impugned provisions of the *Copyright Act* limit, deny, and abridge expression.

In addition to arguing that the purpose of the impugned provisions of the *Copyright Act* is to limit or abridge expression, it can also be argued that the effect of the impugned provisions of the *Copyright Act* is to deny or abridge freedom of expression. As noted in *Irwin Toy* by the

⁷¹ *Irwin Toy* at para. 49.

⁷² *Ibid* at para. 49.

⁷³ Bailey, in “Deflating the Michelin Man”, refers to Canada’s copyright laws as ‘classic content-based restriction[s]’ (supra note 4 at 139).

⁷⁴ *Ibid* at para. 4.

majority, in order to demonstrate that the effect of government action is to deny or abridge freedom of expression, ‘a plaintiff must state her claim with reference to the principles and values underlying the freedom’, namely truth-seeking, participation in decision-making, and self-fulfillment and human flourishing.

In the context of the case study that is the focus of this paper, the effects of the impugned provisions are to deny or abridge freedom of expression. For A, the application of the *Copyright Act* restricts or limits their ability to disseminate expression. It also restricts the ability of the public to receive expression from A. As a result, both A as well as the public more generally are prevented from using this expression to the degree that they otherwise might, in the furtherance of truth-seeking, social and political decision-making, and self-fulfillment.

Thus far in this paper, I have argued that A’s making available of copyrighted works constitutes expression, should not be removed from the scope of protectable expression due to the method or location of expression, and that certain core provisions of the *Copyright Act* infringe the s. 2(b) guarantee of freedom of expression both in purpose and effect. Unless they can be justified under s. 1 of the *Charter*, these provisions will be declared of no force or effect.

3. Section 1 of the *Charter*, applied in the context of copyright

a. Are the measures prescribed by law?

The first question to be addressed under a s. 1 analysis is whether the impugned provisions are ‘limits prescribed by law’ within the meaning of s. 1.⁷⁵ In *R. v. Therens*, Le Dain J. (dissenting on other grounds) stated that ‘[t]he limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements’.⁷⁶ The

⁷⁵ *Charter* at s. 1.

⁷⁶ *R. v. Therens* [1985] 1 SCR 613 SCC at para. 56.

impugned measures that are the focus of this paper are expressly provided for in the *Copyright Act*. As a result, the provisions of the *Copyright Act* are limits prescribed by law for the purposes of the s. 1 analysis.

b. Pressing and substantial objective?

The next part of the s. 1 analysis asks whether the objective of the impugned provisions is ‘sufficiently important to justify overriding a *Charter* freedom’.⁷⁷ The SCC has noted the ‘great importance’,⁷⁸ to the s. 1 analysis, of properly characterizing the objective of the impugned provisions. Deschamps J. has written that ‘all steps of the Oakes test are premised on a proper identification of the objective of the impugned measure’.⁷⁹ Of particular concern is the need to ensure that the objective is not articulated in an overbroad manner. As stated by McLachlin J., in *RJR-MacDonald Inc v. Canada (Attorney General)*, ‘[i]f the objective is stated too broadly, its importance may be exaggerated and the analysis compromised’.⁸⁰ One possible negative consequence of overstating the legislative objective is that it may be difficult to establish that the provision (the ‘means adopted to promote’ the objective) is minimally impairing.⁸¹

What are the objectives of the impugned provisions of the *Copyright Act*? As described above, for the purposes of this analysis, I adopt the view that the objective of the impugned provisions of the *Copyright Act* is to incentivize the creation of expression by granting copyright owners rights in works of expression, as well as the ability, through the state, to enforce infringements of those rights.

The objective of the impugned provisions of the *Copyright Act* is consistent with this broad objective, as outlined above. That is to say, in order to incentivize the creation and

⁷⁷ *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989 SCC at para. 112.

⁷⁸ *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21 at para. 20.

⁷⁹ *Ibid* at para. 20.

⁸⁰ *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 SCC at para. 144.

⁸¹ *Canada (Attorney General) v. JTI-Macdonald Corp.* 2007 SCC 30 at para. 38.

dissemination of works of the arts and intellect, the *Copyright Act* grants, to authors of works (s. 5), a set of time-limited (ss. 6-12) rights (s. 3) with respect to these works; permits authors to assign those rights to others (s. 13(4)); makes it an infringement of copyright to engage in any of the acts that the copyright owner has the exclusive right to do without the authorization of the copyright owner, provided no defences or limitations exist to render the act non-infringing (ss. 27, and 29-30.9); and makes available, to copyright owners, a number of remedies in the event that their rights have been infringed (ss. 34, 38.1 and 42).⁸²

Is the objective of the impugned provisions of the *Copyright Act* pressing and substantial? In *JTI*, McLachlin C.J. (who delivered the judgment for the Court), citing to Peter Hogg's *Constitutional Law of Canada*, noted that '[a]n objective will be deemed proper if it is for the realization of collective goals of fundamental importance'.⁸³ A wide range of objectives have been considered by the SCC to be pressing and substantial.⁸⁴ Although the list of objectives held to be pressing and substantial is lengthy, however, not every objective suggested by the government has been found to be pressing and substantial.⁸⁵

⁸² *Copyright Act*. Other parts or provisions of the *Copyright Act* may be held to have different objectives. For instance, Part VIII of the *Copyright Act* (ss. 79-88), which legalises the private copying of recorded music in certain circumstances in exchange for the imposition of a levy on certain types of audio recording music, may be held to have a different objective than the provisions noted above. In *CPC* at para. 32, the objective of this part was said to be to 'legalize[] private copying by a class of users while providing that rightsholders are compensated for the expropriation of their exclusive rights'. Another part of the *Copyright Act* that might have a different objective than that of the provisions noted above is the part that provides legislative protection for technological protection mechanisms (see, for instance, s. 41).

⁸³ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 37, citing to Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th edn, Carswell 2007) at p. 132.

⁸⁴ These objectives include 'to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable' (*Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 SCR 733 at para. 19), to 'reduc[e] the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity' (*Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11 SCC at para. 71), to 'providing 'a safe, welcoming public transit system' (*Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component* 2009 SCC 31, [2009] 2 SCR 295 at para. 76), among many others.

⁸⁵ Three objectives rejected by the SCC on the basis that they are not pressing and substantial are budgetary considerations (*Schachter v. Canada* (1992), [1992] 2 SCR 679, 93 DLR (4th) 1 SCC at p. 709), 'maintaining

In *Michelin*, Teitelbaum J. stated that he ‘would have had no difficulty in determining that the objective of the *Copyright Act*’ (which he defines as the protection of authors and ensuring that they are recompensed for their creative energies and works) was ‘pressing and substantial’.⁸⁶ He also noted that ‘the pressing and substantial nature of the Copyright Act’s objective is buttressed by Canada’s international obligations in treaties like the Berne Convention of 1886 as revised in Berlin in 1908 and in Rome in 1928’.⁸⁷

As noted above, the objective of the impugned provisions of the *Copyright Act* is conceptualized differently today than it was in 1996. However, for several reasons, I suggest that a Canadian court would consider the objective of the impugned provisions of the *Copyright Act*, as outlined above, to be pressing and substantial. First, as noted above, the SCC has considered a wide range of objectives to be pressing and substantial, demonstrating that the threshold for such a determination is one that is not overly onerous for governments to meet. As The Constitutional Law Group notes, ‘[t]he courts seem prepared to regard almost any purpose ... as “pressing and substantial”’.⁸⁸ Second, the granting of a just reward in order to incentivize the creation and dissemination of expression is connected to ‘the realization of collective goals of fundamental importance’.⁸⁹ One such goal is the encouragement and dissemination of works of arts and the intellect. A wide range of benefits flow to the public from the existence of works of the arts and intellect, including benefits tied to truth-seeking, democratic discourse, and self-fulfillment. Third, this objective is neither ‘trivial’ nor ‘discordant with the principles integral to a free and

conventional standards of propriety, independently of any harm in society’ (*Butler* at para. 92), and ‘the promotion of marriage’ (*Nova Scotia v Walsh* 2002 SCC 83 at para. 184).

⁸⁶ *Michelin* at para. 109.

⁸⁷ *Ibid* at para. 109. Craig writes that ‘[h]aving identified the ultimate purpose of the *Copyright Act* as the protection of authors – and not, say, the public interest in encouraging creativity and the dissemination of intellectual works – the court could hardly avoid the conclusion that enforcing the author’s monopoly is a rational and efficient means by which to achieve that purpose’ (supra note 4 at 91).

⁸⁸ The Constitutional Law Group, *Canadian Constitutional Law* (4th edn, Emond Montgomery Publications Limited 2010) at 777.

⁸⁹ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 37, citing to Hogg at p. 132.

democratic society’.⁹⁰ Rather, the objective of the impugned provisions advances principles integral to a free and democratic society such as the freedom of expression interests of authors and the public. Fourth, as noted by Teitelbaum J., the pressing and substantial nature of the objective is supported by international treaties, ratified by Canada, that protect copyright.⁹¹ Fifth, the pressing and substantial nature of the objective can also be seen to be supported by international human rights conventions ratified by Canada, including the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights.⁹² Vaver writes that ‘[w]hen the Supreme Court speaks of copyright law’s need to achieve a “proper balance between protection and access”, the language echoes the customary international law of human rights treaties such as the Universal Declaration of Human Rights of 1948’.⁹³

The arguments outlined above strongly suggest that should this issue come before a Canadian court, the objective of the impugned provisions noted above would be seen as being of pressing and substantial importance ‘sufficient to justify some limitation on freedom of expression’.⁹⁴ A separate question to be addressed, however, is whether the specific limitations set out in the *Copyright Act* can be justified. This question can be answered through the application of the proportionality branch of the s. 1 analysis.

c. Do the impugned measures satisfy the proportionality branch of the s. 1 analysis?

There are three parts to the proportionality branch of the s. 1 analysis. First, it must be asked whether the limit is rationally connected to the objective; second, whether the limit minimally impairs the right in question; and third, whether the benefits outweigh the deleterious

⁹⁰ *R v Oakes* [1986] 1 SCR 103 SCC at para. 69.

⁹¹ *Michelin* at para. 111. See also *R v Lucas* [1998] 1 SCR 439 at para. 50.

⁹² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

⁹³ David Vaver, ‘Copyright Defences as User Rights’ (2013) 60 J Copyright Soc’y USA 661 at 671.

⁹⁴ *Whatcott* at para. 23.

effects. In applying this test, it is important to recall the statement in *Whatcott* that ‘perfection is not required. Rather the legislature’s chosen approach must be accorded considerable deference. ... [w]e must ask whether Parliament has chosen one of several reasonable alternatives’.⁹⁵

i. Is the limit rationally connected to the objective?

It is not necessary for the government to conclusively establish that there is a rational connection between the objective and the means used to promote the objective (the limitation). Rather, as noted by McLachlin C.J., writing for the majority of the SCC in *Alberta v. Hutterian Brethren of Wilson Colony*, ‘[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so’.⁹⁶

In *JTI*, McLachlin C.J., writing for the Court, noted that although this step is not ‘unimportant’, ‘[f]ew cases have foundered on the requirement of rational connection’.⁹⁷ Some cases, however, have foundered on the requirement of rational connection. For instance, in *RJR Macdonald*, McLachlin C.J. held that one provision of the *Tobacco Products Control Act* failed the rational connection test on the basis that ‘there is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason’ between ‘the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products’.⁹⁸

How might the rational connection test be applied in the context of the impugned provisions of the *Copyright Act*? In *Michelin*, Teitelbaum J. held that ‘the objectives of the Copyright Act are rationally connected to an action for copyright infringement’, concluding that:

⁹⁵ Ibid at para. 78. See Bailey, *supra* note 4, however, in which Bailey relies on the SCC’s decision in *Dunmore v Ontario (Attorney General)* 2001 SCC 94 to argue that ‘courts should [not] defer to Parliament in analyzing the constitutionality of the Act’ (*supra* note 4 at 151).

⁹⁶ *Alberta v. Hutterian Brethren of Wilson Colony* 2009 SCC 37 at para. 48.

⁹⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 40.

⁹⁸ *RJR-MacDonald* at para. 159. See also *R. v. D.B.* [2008] 2 SCR 3, 2008 SCC 25 at para. 3, *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, 2007 SCC 10 at para. 54, and *M v H* [1999] 2 SCR 3 at para. 4.

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

As noted above, as a result of the SCC's re-articulation of the purpose of copyright – beginning in *Théberge* and refined through a series of cases including *Cinar Corporation* – the rational connection analysis must now be framed differently. The question that should be asked, in determining whether this part of the proportionality analysis is met, is whether there is a rational connection between the objective of granting a just reward to copyright owners in order to incentivize the creation and distribution of expression, and the means of doing so, namely through the grant of limited, assignable, exclusive statutory rights (including the 'ability to enforce those [rights] in an action for copyright infringement').¹⁰⁰

Is there 'conclusive evidence or empirical evidence of a rational connection' between this objective and the means chosen to achieve this objective?¹⁰¹ A number of commentators have challenged the idea that copyright incentivizes the creation of expression.¹⁰² Julie Cohen, for instance, writes that 'the incentives-for-authors story is wrong as a descriptive matter'.¹⁰³ Kai Raustiala and Christopher Sprigman also question whether the incentives provided for by copyright are necessary to incentivize creativity or innovation in all contexts.¹⁰⁴

However, the question of how to incentivize the creation and dissemination of expression can be considered to be a 'complex social problem[]', which would mean – following *JTI* – that Parliament's decision on how to address this problem 'should be accorded considerable

⁹⁹ *Michelin* at para. 111.

¹⁰⁰ *Ibid* at para. 111.

¹⁰¹ *Toronto Star* at para. 25.

¹⁰² See, for instance, Julie Cohen, 'Copyright as Property in the Post-Industrial Economy' (2011) 2011 Wis L Rev 141, Jessica Sibley, 'Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators' (2011) 86 Notre Dame L Rev 2091.

¹⁰³ Cohen at 143.

¹⁰⁴ Kai Raustiala and Christopher Sprigman, *The Knockoff Economy* (Oxford University Press 2012).

deference'.¹⁰⁵ Furthermore, it can be argued that through the application of 'reason and logic', a rational connection can be established.¹⁰⁶ It is not unreasonable to accept that the provision of financial incentives for the creation of works of expression may encourage at least certain individuals to create works of expression.

As well, the SCC has stated that 'widespread international practice' can be cited as a 'relevant indicator' of a rational connection.¹⁰⁷ Granting limited rights to authors in order to incentivize the creation and dissemination of works of expression can be said to be a widespread international practice.¹⁰⁸ Cohen writes that:

[t]he statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation. Court opinions and legislative histories are peppered with references to the incentives for authors rationale. Judges recite it as a matter of course when deciding cases, and legislators, lobbyists, and other interested parties invoke it in debates about proposed amendments to the copyright laws. Copyright scholars frame policy problems in terms of an 'incentives-access' tradeoff, and that framing in turn affects our analysis of what judges and legislators do.¹⁰⁹

Given the above discussion, it is suggested that a Canadian court would find the impugned provisions of the *Copyright Act* are rationally connected to the objective.¹¹⁰

ii. Minimal impairment

The second part of the proportionality test can be referred to as the minimal impairment inquiry. In *R. v. Oakes*, the SCC required courts to demonstrate, in order to satisfy this branch of the proportionality analysis, that 'the means ... should impair "as little as possible" the right or

¹⁰⁵ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 41.

¹⁰⁶ *Toronto Star* at para. 25.

¹⁰⁷ *Lavoie v Canada* 2002 SCC 23 at para. 59.

¹⁰⁸ Many countries around the world have adopted copyright legislation similar in form to Canada's legislation as a mechanism through which to encourage the creation and dissemination of works. See, for instance, *U.S. Copyright Act*, 17 U.S.C. §§ 101 - 810 and *Copyright, Designs and Patents Act 1988*, c. 48.

¹⁰⁹ Cohen at 142.

¹¹⁰ Bailey expresses doubts that certain provisions of the *Copyright Act* would satisfy the rational connection requirement (Bailey at 147).

freedom in question'.¹¹¹ Jamie Cameron notes that '[n]ot surprisingly, a consensus ... emerged that *Oakes* propounded a strict standard of justification which the Court subsequently found impossible to implement'.¹¹²

In *R v. St-Onge Lamoureux*, Deschamps J., writing for the majority, stated that:

In the minimal impairment inquiry, the court must not second-guess Parliament and try to identify the least intrusive solution. In *Downey*, this Court stated that '... the issue is "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively"'.¹¹³

In *Whatcott*, the range of alternatives from which Parliament could safely choose is referred to as the 'range of reasonably supportable alternatives'.¹¹⁴

How, then, might the minimal impairment analysis be applied in the context of the impugned provisions of the *Copyright Act*?¹¹⁵ As described above, in this paper I argue that the objective of the *Copyright Act* is to provide a fair reward for creators and copyright owners in order to incentivize the creation of works of the arts and intellect.¹¹⁶ Parliament has chosen to attempt to achieve this objective through the means of limited exclusive rights granted initially to authors, which can be then transferred from authors to other parties.

This was not the only means through which Parliament could have provided a fair reward for creators and copyright owners in order to incentivize the creation of works of the arts and

¹¹¹ *Oakes* at para. 70, citing to *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 SCC at para. 139.

¹¹² Jamie Cameron, 'The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*' 35 McGill Law Journal 253 at 264. See also Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian *Charter's* Section 1' (2006) 34 Sup Ct L Rev 501 at 502.

¹¹³ *R. v. St-Onge Lamoureux* 2012 SCC 57 at para. 39.

¹¹⁴ *Whatcott* at para. 101.

¹¹⁵ In *Michelin*, Teitelbaum J. found the impugned provisions of the *Copyright Act* to be minimally impairing of the *Charter* right to freedom of expression on the basis that "The Copyright Act does not prohibit attacks on the authors of works or their ideas. Infringers are only liable for reproducing the work or a substantial part of the same. Copyright also minimally impairs the Defendants' right of free expression by the very well-tailored structure of the *Copyright Act* with its list of exceptions in Sections 27(2) and (3)" (*Michelin* at para. 111).

¹¹⁶ As described above, this view of the purpose of copyright is given support by McLachlin C.J.'s reasons for judgment in *Cinar Corp.* (*Cinar* at para. 23).

intellect. This objective could also have been met, for instance, through government grants, tax incentives, certificates, medals, or prizes.¹¹⁷ However, it has been accepted, in many jurisdictions around the world, that the creation of limited property rights in intangible expression through the vehicle of copyright legislation is an effective way to reward authors; and, in so doing, to incentivize the creation and distribution of works of the arts and intellect. Given this, the decision to enact a *Copyright Act* through which exclusive time-limited rights are granted in expression, with access to specific remedies, and subject to certain defences, could be seen as falling squarely within the range of ‘reasonably supportable alternatives’ from which Parliament could choose in order to fulfill its objective.¹¹⁸

Despite being a reasonable alternative, however the impugned provisions (or portions of them) could still be found to be not minimally impairing on the basis that they are overbroad.¹¹⁹ In *Whatcott*, the SCC listed a number of criticisms relating to overbreadth.¹²⁰ Rothstein J., writing for the Court, noted that:

Criticisms relating to overbreadth are that the definition or a particular legislative provision

1. is overreaching and captures more expression than is intended or necessary;
2. has a chilling effect on public debate, religious expression and media coverage about moral conduct and social policy;
3. does not give legislative priority to freedom of expression;
4. restricts private communications;
5. should require intention
6. should require proof of actual harm
7. should provide for defences, such as a defence of truth¹²¹

¹¹⁷ Bruno S Frey and Susanne Neckermann, ‘Prizes and Awards’ in Luigino Bruni and Stefano Zamagni (eds), *Handbook on the Economics of Reciprocity and Social Enterprise* (Edward Elgar 2013). See also Lior Zemer, ‘Rethinking Copyright Alternatives’ (2005) 14 Int’l J of L and Info Tech 137 at 138-140 and Tushnet at 27-30.

¹¹⁸ *Whatcott* at para. 101.

¹¹⁹ See, as well, Bailey, who argues that ‘there are sound conceptual reasons to question whether the Act actually overcompensates authors for their “energies” and “works” with unnecessarily broad rights of exclusion’ (supra note 4 at 145).

¹²⁰ *Ibid* at para. 28.

¹²¹ *Ibid* at para. 28.

In the context of the facts of *Whatcott*, it was held that the ‘key to minimizing both subjectivity and overbreadth’ is ‘[l]inking the test for hate speech to the specific legislative objectives’.¹²²

Could the impugned provisions of the *Copyright Act* be held to fail the minimal impairment part of the proportionality test on the basis that they are overbroad? In applying the first criticism noted in *Whatcott* in the context of overbreadth, one must ask whether the impugned provisions are overbroad on the basis that they ‘capture[] more expression than is intended or necessary’.¹²³ As noted in *Whatcott*, ‘[p]reventative measures should only prohibit the type of expression expected to cause the harm targeted’.¹²⁴

Since *Théberge*, it has been accepted by Canadian courts that copyright in Canada is primarily an economic right.¹²⁵ As articulated by Binnie J. in *Théberge*, the rewards provided by copyright are economic rewards, and the type of harm targeted is economic harm.¹²⁶ In light of the SCC’s judgment in *Cinar Corp*, and consistent with the view of the purpose of copyright adopted in this paper, the economic harm targeted can be said to be the harm that flows from acts that undermine the economic incentive for individuals to create.

If the objective of copyright in Canada is to grant a fair reward to copyright owners in order to incentivize the creation of works, then – as per *Whatcott* – the only type of expression that should be prohibited is that which impacts upon this incentive function: that denies copyright owners a just or fair economic reward and in so doing negatively impacts the economic incentive that authors have to create works, or, perhaps, the economic incentive that distributors have to disseminate works.

¹²² Ibid at para. 47. For another work that discusses copyright laws in the context of hate speech and pornography, see Tushnet. Craig also suggests that ‘a comparison can be made between copyright law and other laws such as pornography and hate speech regulation that appear on their face to limit expression but ultimately function to enhance relations of communication’ (Craig at fn 113).

¹²³ *Whatcott* at para. 28.

¹²⁴ Ibid at para. 47.

¹²⁵ *Théberge* at para. 12.

¹²⁶ Ibid at para. 12.

For persons for whom the promise or possibility of economic gain acts as an incentivizing factor for the creation or dissemination of works, acts taken by individuals to deny these persons a just or fair economic reward might deter them from creating or disseminating such works in future. *Cinar Corp* provides an informative example. ‘Dreamer[s]’ like Robinson might not invest ‘years meticulously crafting an imaginary universe for an educational children’s television show’ if this show could simply be produced (and re-produced) by another party without that party being required to compensate Robinson.¹²⁷ Similarly, intermediaries such as production companies, and distributors such as publishing houses or movie studios, might not invest in the production and dissemination of expression if another publishing house or movie studio could simply re-produce the same work (in a manner that substitutes for the original work) without legal sanction and/or being required to provide compensation.

It could be argued, however, that the impugned provisions of the *Copyright Act* ‘capture[] more expression than is ... necessary’ to prevent the harm targeted; that they prohibit types of expression other than that which denies copyright owners a just or fair economic reward and in so doing negatively impact the economic incentive that authors have to create works, or the economic incentive that distributors have to disseminate works.¹²⁸ This is due, in large part, to the structure of the *Copyright Act*, through which the combined action of the infringement provision (s. 27) and the rights-granting provision (s. 3 and s. 5) means that any taking of a substantial part of a copyrighted work – whether or not it impacts upon the just or fair economic reward to which copyright owners are entitled under the *Copyright Act* – constitutes a prima facie act of copyright infringement.¹²⁹

¹²⁷ *Cinar* at para. 3.

¹²⁸ *Whatcott* at para. 28 See also Bailey, who argues that ‘technological developments ... increasingly call into question to what degree (if any), exclusivity is actually necessary in order to incent creation’ (supra note 4 at 147).

¹²⁹ *Copyright Act* at ss. 3, 5, 27.

More specifically, the hypothetical provision mentioned in the context of the case study outlined above could also be argued to be overbroad. Increasing the term of copyright protection in works might incentivize the creation of certain works that would not have been created should the term of protection remain at its current length of the life of the author plus 50 years. However, the retroactive aspect of this provision, in particular, might fall afoul of the s. 1 analysis. As written by Stevens J. in his dissenting judgment in the US Supreme Court decision in *Eldred v. Ashcroft*, ‘[n]either the purpose of encouraging new inventions nor the overriding interest in advancing progress by adding knowledge to the public domain is served by retroactively increasing the inventor’s compensation for a completed invention’.¹³⁰

This view was supported by an amici curiae brief in support of Eldred’s position written by a number of prominent economists (including Kenneth J. Arrow, Ronald Coase, Linda Cohen, and Milton Friedman).¹³¹ In addition to arguing that the present value of additional compensation to authors flowing from copyright term extension in new works is ‘small, very likely an improvement of less than 1% compared to the pre-CTEA term’, these economists argued that ‘[t]he term extension for *existing* works [makes no significant contribution to an author’s incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made’.¹³² The brief concludes that ‘[t]aken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs’.¹³³

¹³⁰ *Eldred v Ashcroft* 537 US 186 at 226.

¹³¹ *Brief of George A. Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2002) (No. 01-618)*

¹³² *Ibid* at 2.

¹³³ *Ibid* at 3. For other studies that engage with the question of the evidence for and against copyright term extension, see Centre for Intellectual Property and Information Law, “Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings” (University of Cambridge, 2006), IIL, *The IViR Report*, Institute for Information Law (University of Amsterdam, 2006), PwC, *The Impact of Copyright Extension for Sound*

Applying the second criticism noted in *Whatcott* in the context of overbreadth, might the impugned provisions of the *Copyright Act* be seen as having a ‘chilling effect’ on debate or expression?¹³⁴ This question – in the context of certain provisions of the *Criminal Code* relating to terrorism – was addressed in the 2012 SCC decision of *R v. Khawaja*. McLachlin C.J., who wrote the reasons for judgment for the Court, discussed the ‘evidentiary basis ... required to establish that legislation has a chilling effect on the exercise of s. 2 freedoms’.¹³⁵ As she noted, while ‘[i]n some situations, a chilling effect can be inferred from known facts and experience’, in other instances it is necessary ‘to call evidence of a chilling effect’.¹³⁶ McLachlin C.J. held that in the case of *Khawaja*, ‘it is impossible to infer, without evidence, that the motive clause will have a chilling effect on the exercise of s. 2 freedoms by people holding religious or ideological views similar to those held by some terrorists’.¹³⁷

It can be argued that the broad prohibition on the use of copyrighted material set out in the *Copyright Act* creates a chilling effect on the unauthorized use of copyrighted works, or on the circulation of ideas more generally.¹³⁸ Some individuals may choose not to express themselves using copyrighted works rather than risk a copyright infringement lawsuit. However, although there is a substantial body of literature in the context of copyright that addresses the issue of ‘chilling effects,’ the majority of this research has been done in the context of the United States, and not in Canada.¹³⁹ Thus, there is a lack of definitive evidence establishing the

Recordings in the UK: A Report for the Gowers Review of Intellectual Property prepared by PwC on Behalf of the BPI (Pricewaterhouse Coopers LLP, 2006).

¹³⁴ *Whatcott* at para. 28.

¹³⁵ *R v Khawaja* 2012 SCC 69 at para 78.

¹³⁶ *Ibid* at para. 79.

¹³⁷ *Ibid* at para. 81.

¹³⁸ In *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7, 2006 (1) SA 144, 2005 (8) BCLR 743 CCSA at para. 104, Sachs J. discussed ‘the chilling effects that overzealously applied trademark law could have on the free circulation of ideas’.

¹³⁹ See, for instance, Berkman Center for Internet and Society at Harvard University, ‘Chilling Effects’ (2014) <<http://www.chillingeffects.org>> , Wendy Seltzer, ‘Free Speech Unmoored in Copyright's Safe Harbor: Chilling

existence of a chilling effect resulting from the impugned provisions of Canada's *Copyright Act*.¹⁴⁰ This absence of evidence may lead to courts declining to find the impugned provisions invalid on the basis of overbreadth.

Applying the third criticism noted in *Whatcott* in the context of overbreadth, do the impugned provisions of the *Copyright Act* 'give legislative priority to freedom of expression'?¹⁴¹ In some ways, they can be seen to do so. For instance, the *Copyright Act* protects neither information nor ideas.¹⁴² Furthermore, the rights of copyright owners with respect to works are limited both in scope and in duration.¹⁴³ Additionally, the *Copyright Act* – by providing mechanisms through which copyright owners can enjoy the unauthorized use of works in which they own copyright – can be seen as giving legislative priority to the freedom of expression interests of authors that continue to own copyright in works that they create.

In other ways, however, the impugned provisions of the *Copyright Act* do not give legislative priority to freedom of expression (specifically the freedom of expression interests of non-copyright owning parties). For instance, the structure of the *Copyright Act*, rather than giving legislative priority to the freedom of expression interests of non-copyright owning parties, gives legislative priority to the property rights of copyright owners. Under the impugned provisions of the *Copyright Act*, all unauthorized use by non-copyright owning parties of a

Effects of the DMCA on the First Amendment' (2010) 24 Harv J L & Tech 171, Jennifer M Urban and Laura Quilter, 'Efficient Process or Chilling Effects - Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer and High Technology Journal 621, Derek J Schaffner, 'The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation' (2004) 14 Cornell J of Law and Public Policy 145.

¹⁴⁰ A full examination of this issue is beyond the scope of this thesis to address.

¹⁴¹ *Whatcott* at para. 28.

¹⁴² The question of what constitutes an idea, and what constitutes expression, may be one that is difficult to determine. See *Nichols v. Universal Pictures Corp* 45 F2d 119 (2d Cir 1930), cert denied, 282 US 902 (1931) at 121, in which Judge Learned Hand wrote that: 'Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.'

¹⁴³ *Copyright Act*, ss. 3, 5, 6-12, 29-30.9.

substantial part of copyrighted works is, at first instance, prohibited. The non-copyright owning party – should they wish to have their use deemed non-infringing – must establish a defence to copyright infringement. Given the cost of defending a lawsuit in court,¹⁴⁴ it can be asked whether it is likely that individuals that might be able to benefit from the defences as set out in the *Copyright Act* will be in a position to exercise this right.

As well, there is no mention of freedom of expression in the *Copyright Act*. The absence of a provision in the *Copyright Act* confirming the importance of freedom of expression can be contrasted with, among other examples, the hate speech provisions of Saskatchewan's *Human Rights Code*.¹⁴⁵ In s. 14(2) of the *Human Rights Code*, it is stated that '[n]othing in subsection (1) restricts the right of freedom of expression under the law upon any subject'.¹⁴⁶ The SCC, in *Whatcott*, cited this provision as an indication that '[t]he Saskatchewan legislature recognized the importance of freedom of expression', and noted that '[t]he legislative objective of the entire provision is to address harm from hate speech while limiting freedom of expression as little as possible' (emphasis added).¹⁴⁷ The absence of an equivalent provision in the context of the *Copyright Act* could be interpreted as an indication that Parliament has not recognized the importance of freedom of expression in the context of copyright.

Applying the fourth criticism noted in *Whatcott* in the context of overbreadth, the impugned provisions of the *Copyright Act* restrict private communications. For instance, if Party A sends an email to Party B that contains a copyrighted attachment, and Party B opens and downloads this attachment, this could constitute copyright infringement under the *Copyright Act*, in that Party B could be found to have infringed copyright by reproducing the work. In order for

¹⁴⁴ See, for instance, Michael McKiernan, 'The Going Rate' [2014] Canadian Lawyer Magazine 33.

¹⁴⁵ Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1 at s. 14.

¹⁴⁶ Ibid.

¹⁴⁷ *Whatcott* at para. 110.

Party B's act to be found not to be infringing, Party B must establish that their act was covered by a defence to copyright infringement, such as fair dealing.

Applying the fifth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require intention for a determination of copyright infringement to be made out. In order to infringe copyright under the *Copyright Act*, parties do not have to intend to commit copyright infringement; they must merely commit a prima facie infringing act for which no defence applies. As noted by Teitelbaum J. in *Michelin*, 'the intention of the infringer, whether or not in commercial competition with the copyright holder, is irrelevant to the question of infringement'.¹⁴⁸

Applying the sixth criticism noted in *Whatcott* in the context of overbreadth, the *Copyright Act* does not require proof of actual harm for a finding of copyright infringement. Proof that a party has done something that the copyright owner has the right to do, and that there is no available defence, is sufficient to ground a successful action for copyright infringement. Though the party whose copyright has been infringed is entitled to an accounting of profits, they can alternatively elect to recover an award of statutory damages.¹⁴⁹ Under the statutory damages regime, parties whose copyright has been infringed can receive damages without demonstrating actual harm.

The creation of a statutory regime through which liability is imposed without a requirement that harm be demonstrated is not unique to copyright. Such an approach also exists in the context of hate speech. Rothstein J., who delivered the judgment of the Court in *Whatcott*, wrote that 'the imposition of preventive measures that do not require proof of actual harm' can be justified in part by 'the difficulty of establishing a causal link between an expressive

¹⁴⁸ *Michelin* at para. 50. See also *Queen v James Lorimer & Co* [1984] 1 FC 1065 at 1073.

¹⁴⁹ *Copyright Act* at s. 38.1.

statement and the resulting hatred'.¹⁵⁰ A similar justification has been used to justify the imposition of statutory damages regimes in the context of copyright.¹⁵¹

As noted in *Whatcott*, in some situations in which it is difficult to establish a causal link between the act and the harm flowing from the act, courts have accepted that a 'reasonable apprehension of harm' approach should be applied. Under this approach, as noted by Rothstein J., 'a precise causal link for certain societal harms [is] not ... required. A court is entitled to use common sense and experience in recognizing that certain activities ... inflict societal harms'.¹⁵² Rothstein J. continues by noting that:

In *Thomson Newspapers Co.*, this Court recognized that a reasonable apprehension of harm test should be applied in cases where 'it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society' (para. 115). Such an approach is warranted 'when it is difficult or impossible to establish scientifically the type of harm in question' (para. 115).¹⁵³

Should a 'reasonable apprehension of societal harm' test be applied in the context of the unauthorized use of copyrighted works or should 'a precise causal link' be required?¹⁵⁴ It could be argued that certain types or instances of unauthorized uses of copyrighted works undermine the position of authors as equal participants in society. One example where this might be the case is where someone creates a work which is then acquired and published, without authorization and without compensation, by a different individual (a *Cinar Corp*-type situation). The act of publication of this work conveys meaning and thus prima facie constitutes expression under s. 2(b). However, it also impacts the ability of the author to act as an equal participant by denying

¹⁵⁰ *Whatcott* at para. 129.

¹⁵¹ Pamela Samuelson and Tara Wheatland, 'Statutory Damages in Copyright Law: A Remedy in Need of Reform' (2009) 51 *Wm & Mary L Rev* 439 at 446.

¹⁵² *Whatcott* at para. 132.

¹⁵³ *Ibid* at para. 133.

¹⁵⁴ *Ibid* at paras. 132-133.

them all financial benefits from the commercialization of their creation. In this type of situation, a Court might not ‘demand a scientific demonstration or the submission of definitive social science evidence to establish that the line drawn by Parliament was perfectly drawn’.¹⁵⁵

However, not all instances or types of copyright infringement can be seen as undermining the position of an author as an equal participant in society. For instance, in what ways are authors impacted by the unauthorized, non-commercial use of their works by individuals for their own creative endeavours? Even if the author has lost a potential licensing fee, can this be said to undermine the position of an author as an equal participant in society? In this type of situation, it could be argued that a reasonable apprehension of harm test should not be applied, and the plaintiff should be required to demonstrate proof of economic harm.

The seventh criticism noted in *Whatcott* is that legislation, in order not to be found to be overbroad, ‘should provide for defences, such as a defence of truth’.¹⁵⁶ A number of defences are set out in the *Copyright Act*. As well, both the number and scope of defences were expanded as part of the 2012 copyright amendment process. These defences can be seen as providing space within which non-copyright owners can express themselves using copyrighted works.¹⁵⁷ Questions can be raised, however, as to whether these defences are sufficiently broad, as well as whether they are too vaguely worded to be useful to defendants.¹⁵⁸

¹⁵⁵ *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877 SCC at para. 116.

¹⁵⁶ *Whatcott* at para. 28.

¹⁵⁷ Fewer, for instance, refers to defences to copyright infringement as “legal mechanisms [that] embrac[e] [expressive] values” (supra note 4 at 202).

¹⁵⁸ In “Constitutionalizing Copyright”, Fewer critiques the way in which fair dealing was applied by a number of Canadian courts in the late 1990s, arguing that “interpretational deficienc[ies] abuse[] freedom of expression in Canada” (supra note 4 at 205-209). As well, in the US context, Rebecca Tushnet argues that fair use ‘is too vague to provide enough guidance’, stating that ‘[b]ecause the outcome of any particular case is uncertain, a potential infringer/fair user has to be willing to bear the substantial costs of litigation for a chance to escape liability. This seems quite likely to prompt self-censorship’. Tushnet at 24. Cf. see Timothy AO Endicott and Michael J Spence, ‘Vagueness in the Scope of Copyright’ (2005) 121 *Law Quarterly Review* 657.

Based on the discussion as outlined above, although the impugned provisions fall squarely within the range of reasonably supportable alternatives that could have been selected by Parliament to address the objective of providing an incentive for the creation and dissemination of expression, it is possible – based on the SCC’s decisions in *Whatcott* and *Khawaja* – that the impugned provisions of the *Copyright Act* could be held to fail to meet the minimal impairment requirement on the basis that they are overbroad. In light of this, it is useful to apply the third and final step of the proportionality analysis.

iii. Do the benefits outweigh the deleterious effects

The last part of the s. 1 analysis, as described in *Whatcott*, ‘requires an assessment of whether the importance of the legislative objective of [the impugned provision...] outweighs the deleterious effects of the provision’.¹⁵⁹ In engaging in this balancing exercise, the value of the expression must be considered. L’Heureux-Dubé, Gonthier, and Bastarache JJ, in their dissenting judgment in *R. v. Sharpe*, wrote that:

The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified ... Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an attenuated level of constitutional protection ... These forms of expression receive an attenuated level of constitutional protection not because a lower standard of justification is applied to the government, but because the low value of the expression is more easily outweighed by the objective of the infringing legislation.¹⁶⁰

What is the importance of the impugned provisions of the *Copyright Act*? In the context of the case study that is the subject of this paper, one can question what benefits flow from granting additional protection to works already created.¹⁶¹ On the other hand, the deleterious

¹⁵⁹ *Whatcott* at para. 147.

¹⁶⁰ *Sharpe* at para. 181.

¹⁶¹ See , *Brief of George A. Akerlof et al as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618), Centre for Intellectual Property and Information Law, “Review of the Economic Evidence

effects of these provisions may include restrictions being placed on the work's circulation (which could impact upon the ability of individuals to access the expression, which in turn might impact individuals' ability to use this expression in the service of self-fulfillment, truth-finding, or democratic discourse). These negative effects might be particularly severe in the context of works that are not widely available.

Do the deleterious effects of these provisions outweigh their beneficial impacts? In considering this question, courts must balance a number of factors, including whether the expression in question is 'low value' expression. Is A's use of copyrighted expression 'low value' expression similar to defamatory libel,¹⁶² hate speech,¹⁶³ information about tobacco products and product brands,¹⁶⁴ and pornography?¹⁶⁵ If it can be characterized as such, then it is possible that the benefits outlined above – however marginal they might be – might be found to outweigh the detrimental effects.

Expression that has been characterized by the SCC as 'low value' does not advance, to any great degree, the core values of freedom of expression (namely the search for truth, self-fulfillment, and political participation). For instance, Sopinka J., in *Butler*, wrote that:

the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing ... lies far from the core of the guarantee of freedom of expression in that it appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.¹⁶⁶

Relating to an Extension of the Term of Copyright in Sound Recordings" (University of Cambridge, 2006), IIL, *The IViR Report*, Institute for Information Law (University of Amsterdam, 2006), PwC, *The Impact of Copyright Extension for Sound Recordings in the UK: A Report for the Gowers Review of Intellectual Property prepared by PwC on Behalf of the BPI* (Pricewaterhouse Coopers LLP, 2006).

¹⁶² *Lucas*.

¹⁶³ *R v Keegstra* [1990] 3 SCR 697.

¹⁶⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.*

¹⁶⁵ *Sharpe*.

¹⁶⁶ *Butler* at para. 120. See also *Sharpe* at para. 24, *Lucas* at para. 73, and *Canada (Attorney General) v. JTI-Macdonald Corp.* at paras. 68, 94, and 115.

However, the expressive act in the case study considered in this paper advances the core values of freedom of expression. Specifically, A's making available works the copyright in which would have expired were it not for a legislative amendment extending the term of copyright advances the search for truth by making these works accessible to a broader range of individuals, enhances the self-fulfilment of all who read the works who would otherwise not have done so by giving them the opportunity to engage with its content, and, depending on the nature of the works made available and the actions taken by individuals after engaging with the works, may enhance participation in social and political decision making.

The question of whether the expression is of low value, however, is not the only question to be considered in this aspect of the s. 1 analysis. As noted in *Whatcott*, the freedom of expression values furthered by the expression in question must also be balanced 'with competing *Charter* rights and other values essential to a free and democratic society'.¹⁶⁷ Other competing *Charter* rights that must be balanced in the context of the s. 1 analysis in the context of the case study in question are the freedom of expression rights of the public, and the freedom of expression rights of authors, whether or not they continue to own copyright in the works that they create.¹⁶⁸

Furthermore, other rights that might need to be balanced, as a result of the SCC decision in *Cinar Corp. v. Robinson*, are the property rights of copyright owners, and authors' rights to inviolability and to dignity.¹⁶⁹ It is unclear, however, whether infringements of the authors' rights to inviolability and to dignity could be held to have occurred in all instances of copyright infringement, or only in situations where the author remains the copyright owner. As well, it is

¹⁶⁷ *Whatcott* at para. 66.

¹⁶⁸ See, for instance, Paul Torremans, 'Is Copyright a Human Right?' [2007] Mich St L Rev 271 at 290.

¹⁶⁹ *Cinar* at paras. 113-117. Fewer, as well, notes that courts considering claims for copyright infringement have, on occasion, "privilege[d] the privacy rights of individuals over the public interest in the dissemination of information" (198). Privacy is thus another right that might need to be balanced at this stage of the s. 1 analysis.

unclear whether infringements of these two rights could be held to have occurred in all instances of copyright infringement, or only in cases analogous to *Cinar Corp.*

Canadian courts have also held that balancing, in the context of the s. 1 analysis, should ‘take into account Canada's international obligations with respect to international law treaty commitments’.¹⁷⁰ As stated in *Whatcott*, ‘[t]hose commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values’.¹⁷¹ In the context of copyright, international obligations that should be considered include international copyright and intellectual property treaties and conventions that Canada has signed and are in force, namely the *Berne Convention for the Protection of Literary and Artistic Works*, the *Rome Convention for the Protection of Performs, Producers of Phonograms and Broadcasting Organizations*, the *WIPO Convention*, the *WIPO Copyright Treaty*, the *WIPO Performance and Phonograms Treaty*, and *TRIPS*.¹⁷²

Canada’s international commitments, however, are not limited to copyright or intellectual property more broadly. Other types of treaties and international commitments that should be considered in the balancing process include human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Declaration of Human Rights, the UN Declaration on the Rights of

¹⁷⁰ *Whatcott* at para. 67, citing to *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 SCC at p. 916.

¹⁷¹ *Whatcott* at para. 67.

¹⁷² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, [1992] ATS 29, 496 UNTS 43., Convention Establishing the World Intellectual Property Organization, 14 July 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3, WIPO Copyright Treaty, Dec 20, 1996, 2186 UNTS 121, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997), WIPO Performances and Phonograms Treaty, Dec 20, 1996, 2186 UNTS 2013, S Treaty Doc No 105-17 (1997); 36 ILM 76 (1997), Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1194).

Indigenous Peoples, and the UN Convention on the Rights of Persons with Disabilities.¹⁷³

Ultimately, a Canadian court could determine that the benefits of the impugned provisions – in the context of the case study considered in this paper, or in other contexts as discussed in the conclusion – might not outweigh their detrimental effects.

4. Remedies

In the previous section, I argued that in the context of the case study discussed in this paper (as well as in several other contexts), the impugned provisions of the *Copyright Act*, described above, might not be justified through the application of a s. 1 analysis. A court could find that these provisions are not justified on the basis that they are overbroad, or that the deleterious effects of the provisions outweigh their beneficial effects. This section will examine the options available to a court should it determine that the impugned provisions of the *Copyright Act* unjustifiably infringe the s. 2(b) right to freedom of expression.

Section 52(1) of the *Constitution Act, 1982* states that ‘[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’.¹⁷⁴ Multiple remedies, including striking down, severing, and reading in, are available to a court under s. 52(1).¹⁷⁵ As described in the above analysis, if the impugned provisions of the *Copyright Act* are to fail a s. 1 analysis, they will likely do so either on the basis that they are not minimally impairing, or that the benefits flowing from the provisions do not outweigh their detrimental effects (the second or

¹⁷³ ICCPR, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), UNDRIP, UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106. Bailey, in “Deflating the Michelin Man”, has written in detail on the ways in which the SCC’s interpretation of the s. 2(b) right to freedom of expression is consistent with its international human rights obligations (supra note 4 at 134).

¹⁷⁴ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 at s. 52(1).

¹⁷⁵ *Schachter*.

third elements of the proportionality test). Certain remedies – namely ‘[s]triking down, severing or reading in’ – are associated with *Charter* violations that fail these steps of the s. 1 analysis.¹⁷⁶

Canadian courts are limited in their ability to read in or sever elements of statutory provisions. In *Schachter*, it is noted that severance and reading in are appropriate remedies only where the inconsistency or the extension ‘can be defined with some precision on the basis of the requirements of the Constitution’.¹⁷⁷ As Lamer J. noted in his majority reasons in *Schachter*, in situations in which ‘the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis ... it is the legislature's role to fill in the gaps, not the court's’.¹⁷⁸

This principle is directly on point in the context of copyright. In the previous section, I argued that a court could conclude that the impugned provisions of the *Copyright Act* are overbroad. That is to say, as described in *JTI* and *Whatcott*, and applied in the context of copyright, a court could determine that the impugned provisions either ‘on [their] face catch[] more expression than necessary to meet the legislator’s objective’,¹⁷⁹ or are overbroad due to vagueness.

Depending on how the offending provisions are drafted, severing might be the most appropriate remedy. This would only be the case, however, if the offending portion could be severed without the court being required to ‘fill in ... details’¹⁸⁰ or to ‘make ad hoc choices’.¹⁸¹ If it is held that there are a number of ways through which the impugned provisions could be modified so as to address concerns relating to overbreadth (for instance by expanding defences to

¹⁷⁶ Ibid at para. 50.

¹⁷⁷ Ibid at para. 52.

¹⁷⁸ Ibid at para. 52.

¹⁷⁹ *Canada (Attorney General) v. JTI-Macdonald Corp.* at para. 78.

¹⁸⁰ *Schachter* at para. 52.

¹⁸¹ Ibid at para. 56.

copyright infringement, or by adopting new interpretive principles), then severance and reading in would be inappropriate.

Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick was a decision in which Gonthier J. noted that multiple approaches could be taken to remedy the *Charter* breach in question.¹⁸² Given this, Gonthier J. stated that ‘it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers’.¹⁸³ Attempts by courts to re-craft the impugned provisions of the *Copyright Act* could be criticized on the basis that they ‘amount to making ad hoc choices from a variety of options’, and that in so doing, courts are paying insufficient respect to the role of the legislature.¹⁸⁴

This argument – that it would be inappropriate for a Canadian court to craft legislative amendments to remedy copyright’s constitutional issues in contexts where there is more than one way in which these amendments could be framed – is given support by the SCC’s decision in *Rocket v. Royal College of Dental Surgeons of Ontario*.¹⁸⁵ McLachlin J. wrote the judgment of the Court in *Rocket*, in which it was found that the impugned regulation violated s. 2(b) of the *Charter* and could not be justified under s. 1 on the basis of overbreadth.

In *Rocket*, rather than reading in additional exceptions, the SCC struck down the regulation. It did so due in large part to the structure of the regulation itself, which – as noted by McLachlin J. – ‘starts with an absolute prohibition on all advertising, [and goes]... on to set out exceptions’.¹⁸⁶ McLachlin J., in *Rocket*, referred to this method of legislative drafting as one

¹⁸² *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick* 2002 SCC 13.

¹⁸³ *Ibid* at para. 77.

¹⁸⁴ *Schachter* at paras. 37-58 and 56. See also *M v H* at para. 139.

¹⁸⁵ *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232. See also *Hunter v Southam Inc* [1984] 2 SCR 145 SCC at p. 169, cited in *Schachter* at para. 53.

¹⁸⁶ *Rocket* at para. 40.

which is ‘almost certain to raise the spectre of *Charter* infringement’.¹⁸⁷ As stated by McLachlin J., ‘[b]ecause the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators’.¹⁸⁸

It could be argued that in a manner similar to *Rocket*, the prohibition of use of copyright-protected expression ‘would be justifiable if additional exceptions were added’.¹⁸⁹ For instance, it could be argued that if additional categories were incorporated into the fair dealing defence, or if additional defences themselves were created, that this could address concerns of overbreadth (both in the context of the case study considered in this paper or more broadly). However, following *Rocket*, the creation of additional exceptions would be a matter for the legislators, and not for the courts.

Given the limitations noted above with respect to reading in and severance as possible remedies, a court could find that the most appropriate remedy, should it be determined that one or more of the impugned provisions of the *Copyright Act* are not justified through the application of a s. 1 analysis, would be for the court to issue a declaration of invalidity. To what should this declaration of apply? As described earlier this paper, the impugned provisions – those that I have argued restrict the s. 2(b) right to freedom of expression – are s. 27(1) of the *Copyright Act* (the general infringement provision), when read in context with the provisions granting rights in works (ss. 3 and 5), the primary remedy provisions (ss. 34, 38.1 and 42), and the provisions setting out defences (ss. 29-30.9) and other limitations to copyright (for instance term limits, as amended (ss. 6-12)).¹⁹⁰ Considerable overlap exists between a number of these provisions. The general infringement provision (s. 27(1)), for instance, can only be understood in light of the

¹⁸⁷ Ibid at para. 49.

¹⁸⁸ Ibid at para. 47.

¹⁸⁹ *Schachter* at para. 54, discussing *Rocket*.

¹⁹⁰ *Copyright Act*.

provision articulating the rights granted to copyright owners (s. 3), the provision setting out the conditions of subsistence of copyright (s. 5), and the provision setting out the term of copyright (ss. 6-12). It would thus be difficult for a court to remedy any constitutional issue involving these provisions by invalidating a single provision.

A similar fact situation is found in *R v. Guignard (Guignard)*.¹⁹¹ In *Guignard*, Lebel J., writing for the SCC, held that ‘[b]ecause of the considerable overlap between the definitions and the provision imposing the ban, the declaration of nullity must apply to both the definition and the ban itself’.¹⁹² This passage from *Guignard* suggests that should one or more impugned provisions be found to be inconsistent with the *Charter*, all overlapping provisions could (and perhaps should) be struck down. Drawing from McLachlin C.J.’s judgment in *Bedford*, Parliament would then be able to ‘devise a new approach, reflecting different elements of the existing regime’.¹⁹³

Should this declaration extend beyond specific provisions to the legislation as a whole? This question has been addressed by the SCC in several decisions, including *M v. H* and *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 (Alberta (Information and Privacy Commissioner))*.¹⁹⁴ One question to be asked in considering this issue is whether Parliament would have enacted the legislation without the impugned provisions. If it cannot be assumed that it would have done so, then this is an indication that the statute should be struck down in its entirety.

¹⁹¹ *R v Guignard* 2002 SCC 14.

¹⁹² *Ibid* at para. 32.

¹⁹³ *Canada (Attorney General) v Bedford* 2013 SCC 72 at 165.

¹⁹⁴ *M v H; Alberta (IPC)* .

In *M v. H*, the SCC determined that the legislature would have enacted the legislation without the impugned (and constitutionally impermissible) provisions.¹⁹⁵ In the context of the case study canvassed in this paper, it might be assumed that Parliament would have enacted the copyright term extension without making it retroactive. However, in other contexts in which the constitutionality of copyright is challenged, this assumption might not be valid.

One decision in which the SCC determined that it could not conclude that the legislature would have enacted the legislation without the impugned (and constitutionally impermissible) provisions was *Alberta (Information and Privacy Commissioner)*.¹⁹⁶ This decision dealt with the constitutionality of specific provisions of Alberta's *Personal Information Protection Act (PIPA)*.¹⁹⁷ Abella and Cromwell JJ, writing for the Court, stated that '[g]iven the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant'.¹⁹⁸ As a result, the SCC struck down *PIPA* in its entirety.

Similar to *PIPA*, the *Copyright Act* possesses an integrated structure. The primary infringement provision (s. 27), for instance, must be read together with the rights-granting provision (s. 3 for works), which itself must be read alongside the provision detailing the conditions for subsistence of copyright (s. 5) and the provisions setting out the term of copyright in works (ss. 6-12). Given the integrated structure of the *Copyright Act*, and following *Alberta (Information and Privacy Commissioner)*, it can be argued that should it be found that one or more provisions of the *Copyright Act* unjustifiably infringe the *Charter*-protected right to

¹⁹⁵ *M v H* at para. 144.

¹⁹⁶ *Alberta (IPC)* .

¹⁹⁷ Personal Information Protection Act, S.A. 2003, c. P-6.5.

¹⁹⁸ *Alberta (IPC)* at para. 40.

freedom of expression, that it may be more appropriate to strike down the *Copyright Act* in its entirety than to invalidate a specific provision or a number of provisions.

In suggesting that a declaration of invalidity might be the most appropriate remedy in certain contexts, the next question that must be asked is whether the declaration of invalidity should apply immediately, or whether it would be appropriate for the Court to grant a temporary suspension of this declaration. Canadian courts have indicated their discomfort in granting a suspended declaration of invalidity. In *Canada (Attorney General) v. Hislop*, for instance, LeBel and Rothstein JJ, writing for the majority, stated that the effect of granting a suspended declaration of invalidity is to ‘[extend] the life of an unconstitutional law’.¹⁹⁹ As noted by Deschamps J. in her dissenting reasons in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, ‘[g]enerally, the Court should be wary of allowing or appearing to condone a continued state of affairs that violates *Charter* rights’.²⁰⁰

Guidance was given by the SCC in *Schachter* as to the types of situations in which temporary suspensions of invalidity could be issued. Lamer C.J., who delivered the reasons for judgment for the majority, wrote that a suspension of invalidity is ‘clearly appropriate where the striking down of a provision poses a potential danger to the public ... or otherwise threatens the rule of law’.²⁰¹ Lamer C.J. also suggested that suspensions of invalidity ‘may also be appropriate in cases of underinclusiveness as opposed to overbreadth’.²⁰² In these types of cases, were an underinclusive law to be struck down, deserving persons might be deprived of benefits ‘without providing them to the applicant’.²⁰³ Since *Schachter*, other justifications for granting a temporary

¹⁹⁹ *Canada (Attorney General) v Hislop* at para. 91.

²⁰⁰ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4 at para 244.

²⁰¹ *Schachter* at para. 79.

²⁰² *Ibid* at para. 79.

²⁰³ *Ibid* at para. 79.

suspension of invalidity have been articulated by the SCC in cases such as *Bedford* and *Kingstreet Investments Ltd v. New Brunswick (Finance)*.²⁰⁴

The possibility that a court might grant a declaration of invalidity should impugned provisions of the *Copyright Act* (or the *Copyright Act* in its entirety) be found to be invalid is supported by the reasoning from the three cases noted above (*Schachter*, *Bedford*, and *Kingstreet*). First, although striking down the *Copyright Act* would pose no risk to public safety, it would deprive deserving people of benefits (for instance authors who are copyright owners whose works could be used by anyone in any context (including a commercially competitive context) without the possibility of recourse). Second, drawing from *Bedford*, it can be suggested that given the increasing prominence of copyright in Canadian public discourse, ‘moving abruptly from a situation where [intangible expression] is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians’.²⁰⁵ Third, given economic data on the importance of copyright to Canada’s economy, it is likely that – as was the case in *Kingstreet* – evidence would be led ‘establishing a real concern about fiscal chaos’ should the *Copyright Act* be struck down.²⁰⁶

If a temporary suspension is granted, for how long might it be granted? The SCC has suspended declarations of invalidity under the *Charter* in 21 decisions.²⁰⁷ In all but one case, the

²⁰⁴ *Bedford* at para. 167, *Kingstreet Investments Ltd v New Brunswick (Finance)* 2007 SCC 1 at para. 25.

²⁰⁵ *Bedford* at para. 167. In 2009, Canada’s federal government launched a public consultation on copyright in conjunction with the introduction of Bill C-61 (Government of Canada, ‘Copyright Consultations’ (*Government of Canada*) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/home>> accessed January 8, 2015). Geist writes that ‘[t]here were ultimately more than 8,300 submissions - more than any government consultation in recent memory’: Michael Geist, ‘The Final Copyright Consultation Numbers: No Repeat of Bill C-61’ (*Michael Geist*, April 9, 2010) <<http://www.michaelgeist.ca/2010/04/copycon-final-numbers/>> accessed January 8, 2015.

²⁰⁶ *Kingstreet Investments Ltd v New Brunswick (Finance)* at para. 25. See, for instance, CONNECTUS Consulting, *The Economic Impact of Canadian Copyright Industries - Sectoral Analysis* (2006), Conference Board of Canada, *Valuing Culture* (2008).

²⁰⁷ This paper is current as of 12 March 2016.

SCC granted suspensions of either six, 12, or 18 months.²⁰⁸ In total, in two out of 21 cases (10%) in which suspensions of invalidity were granted, the SCC suspended the declaration for a period of 18 months;²⁰⁹ in 11 out of 21 cases (52%), the SCC suspended the declaration for a period of 12 months;²¹⁰ and in seven out of 21 cases (33%), the SCC suspended the declaration for a period of six months.²¹¹

However, the last case in which the SCC suspended a declaration of invalidity for a period of other than 12 months was the 2003 decision of *Nova Scotia (Worker' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*.²¹² Since this date, the SCC has granted suspended declarations of invalidity in nine cases, all of which for a period of 12 months.²¹³ Statistically, it appears most likely that if a court decides to suspend a declaration of invalidity, that it would do so for a period of 12 months.

This statistical analysis is supported by remarks, made by the SCC, as to the appropriate length of time for which to suspend the effect of a declaration of invalidity. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the effect of the declaration of invalidity was

²⁰⁸ The one exception is *Reference re Manitoba Language Rights (Man.)* [1985] 1 SCR 721, a decision in which the SCC 'declare[d] all the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect' (para 72). In this case, the SCC held that a special hearing should be set to determine the period of temporary validity (para 116).

²⁰⁹ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1999), 173 DLR (4th) 1 SCC, *Dunmore*.

²¹⁰ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*; *R v. Campbell*; *R v. Ekmecic*; *R v. Wickman*; *Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)* (1997), 150 DLR (4th) 577 SCC, *Trociuk v British Columbia (Attorney General)* 2003 SCC 34, *R v Demers* 2004 SCC 46, *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 2007 SCC 9, *Confédération des syndicats nationaux v Canada (Attorney General)* 2008 SCC 68, *Nguyen v Quebec (Education, Recreation and Sports)* 2009 SCC 47, *R v Tse* 2012 SCC 16, *Alberta (IPC)*, *Bedford, Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, *Carter v. Canada* 2015 SCC 5. In *Carter*, the SCC, in January 2016, granted a four-month extension of the suspension of the declaration of invalidity (2016 SCC 4).

²¹¹ *R v Bain* (1992), 87 DLR (4th) 449 SCC, *Eurig Estate (Re)* (1998), 165 DLR (4th) 1 SCC, *M v H, United Food and Commercial Workers, Local 1518 (UFCW) v Kmart Canada Ltd* (1999), 176 DLR (4th) 607 SCC, *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick, Guignard, Nova Scotia (Worker' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur* 2003 SCC 54.

²¹² *Nova Scotia (Worker' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*.

²¹³ *R v Demers*, *Charkaoui*, *Confédération des syndicats nationaux v Canada (Attorney General)*, *Nguyen v Quebec (Education, Recreation and Sports)*, *R v Tse*, *Alberta (IPC)*, *Bedford, Sask. Fed of Labour*, *Carter*.

suspended for 18 months.²¹⁴ L’Heureux-Dubé J. referred to the length of this suspension, in her dissenting reasons, as ‘longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected’.²¹⁵ A suspension of 12 months, on the other hand, was referred to by Lamer C.J. in his dissenting reasons in *Rodriguez v. British Columbia (Attorney General)* as ‘giv[ing] Parliament adequate time to decide what, if any, legislation should replace [the impugned provision]’.²¹⁶

5. Conclusion

In this paper I have explored, in the context of a case study relating to copyright term extension, both whether specific provisions of Canada’s *Copyright Act* infringe the *Charter* right to freedom of expression, and, if so, whether they can be justified through the application of a s. 1 analysis. These questions were considered by Teitelbaum J. in *Michelin*. As noted above, Teitelbaum J. held that specific provisions of the *Copyright Act* did not infringe the *Charter*-protected right to freedom of expression and, even if they did, they would be saved by a s. 1 analysis. Since *Michelin*, these conclusions have been treated by Canadian courts as settled. A number of commentators, however, including David Fewer, Jane Bailey, Carys Craig, and Bita Amani, have argued that these conclusions ought not to be seen as settled, and that elements of Canada’s *Copyright Act*, as written or as applied, are inconsistent with the s. 2(b) right to freedom of expression.²¹⁷ This paper, in which I resituate the analysis of copyright’s

²¹⁴ *Corbiere*.

²¹⁵ *Ibid* at para. 118.

²¹⁶ *Rodriguez v. British Columbia (Attorney General)* [1993] 3 SCR 519 SCC at para. 100.

²¹⁷ David Fewer, ‘Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada’ (1997) 55 U Toronto Fac L Rev 175, Jane Bailey, ‘Deflating the Michelin Man’ in Michael Geist (ed), *In the Public Interest* (Irwin Law 2005), Carys J Craig, ‘Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright’ (2006) 56 Univ of Toronto LJ 75, Bita Amani, ‘Copyright and Freedom of Expression: Fair Dealing Between Work and Play’ in Rosemary J Coombe, Darren Wershler and Martin Zellinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press 2013).

constitutionality in light of recent SCC jurisprudence in the areas of both copyright and freedom of expression, adds to and builds on these works.

Specifically, I have argued that A's making available of copyrighted works (the unauthorized act at the heart of the case study considered in this paper) constitutes protectable expression, and that core provisions of Canada's *Copyright Act* infringe the *Charter* right to freedom of expression in purpose and effect. As well, I have argued that these provisions might not be justified through the application of a s. 1 analysis. Drawing in particular from the SCC's decision in *Whatcott*, I have argued that although the impugned provisions should be seen as rationally connected to this objective, they may be found to be overbroad, and thus not minimally impairing. As well, it could be found that the beneficial effects of the provisions are not proportionate to their detrimental effects.

If the determination is made that the impugned provisions of the *Copyright Act* infringe s. 2(b), and that this infringement cannot be justified under s. 1, the question turns to remedies. In the context of the case study considered in this paper, I suggested that the constitutionality of the impugned provision could be addressed by severing part of the provision. Depending on how the provision is drafted, however, my analysis of relevant SCC case law suggests that – perhaps surprisingly – in order to avoid usurping the role of Parliament, a court considering the constitutionality of specific provisions of Canada's *Copyright Act* should strike down either part of the *Copyright Act*, or the *Copyright Act* in its entirety, rather than trying to re-shape the *Copyright Act* (for instance through the addition of exceptions or defences to copyright infringement). I have argued that if a court takes this approach, it is likely that any declaration of invalidity would be suspended for a period of 12 months. Such a remedy would give Parliament

Bailey, for instance, suggests that the '[*Copyright*] Act as currently structured cannot be assumed to be consistent with freedom of expression, and that the justifiability of the violation is by no means a foregone conclusion – particularly in the digital networked context' (Bailey, *supra* note 4 at 156).

the opportunity to remake Canada's *Copyright Act* in ways that are consistent with what the *Charter* requires.

The purpose of this paper has been to demonstrate that the *Copyright Act* is not immune from freedom of expression scrutiny; that certain provisions of the *Copyright Act*, depending on the context in which they are engaged, may unjustifiably infringe the *Charter* right to freedom of expression; and that, as a result, Canadian courts should reconsider the relationship between the *Charter* right to freedom of expression and copyright.

A number of possible consequences could flow from Canadian courts choosing to reconsider the intersection of the *Charter* right to freedom of expression and copyright. First, reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide Canadian courts with opportunities for further engagement with a number of legal issues that merit attention. For instance, reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide additional opportunities for Canadian courts to engage with the question of the purpose or objective of copyright. As described above, the purpose of copyright is an integral aspect of both the s. 2(b) and s. 1 analyses under the *Charter*.

In *Cinar Corp* – the decision in which McLachlin C.J. wrote that copyright ‘seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works’²¹⁸ – she also demonstrated an openness to considering additional justifications of copyright through her characterization of the acts of copyright infringement in *Cinar* as having violated Robinson’s ‘personal rights to inviolability and to dignity’.²¹⁹ Reconsidering the intersection of the *Charter* right to freedom of expression and copyright would provide Canadian

²¹⁸ *Cinar* at para. 23.

²¹⁹ *Cinar* at para. 114.

courts with additional opportunities to consider the extent to which values such as dignity and autonomy – among others – either are or should be embedded within Canadian copyright law.

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright could also result in further modifications being made to the s. 2(b) and s. 1 analyses themselves, as well as creating additional opportunities for courts and commentators to engage in further consideration of the intersection of copyright and other *Charter*-protected rights, or of the intersection of intellectual property rights other than copyright and the *Charter*.

Second, in addition to providing opportunities for further consideration of a number of legal issues that merit attention, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could lead to more individuals choosing to engage – in different ways, and from different perspectives – with respect to this intersection. For instance, consideration by the SCC of the intersection of the *Charter* right to freedom of expression and copyright might lead to a spike in empirical research on copyright law topics. As noted above, evidence plays an important role in the s. 1 analysis. It can be used both by government to ‘justify the law’s impact in terms of society as a whole’, or by other parties (including interveners) to argue that the law is neither rationally connected to the objective nor minimally impairing.²²⁰ Choudhry writes that ‘the central debate in many section 1 cases is the quality of the evidentiary record’.²²¹

Reconsideration of the intersection of the *Charter* right to freedom of expression and copyright by Canadian courts could also result in Canadian constitutional and freedom of expression scholars choosing to engage with the intersection of the *Charter* right to freedom of expression and copyright to a greater degree than has previously been the case. In three of the

²²⁰ *Bedford* at para. 126.

²²¹ Choudhry at 504.

most prominent constitutional law casebooks and textbooks used in Canadian law schools, no reference is made to copyright in the context of freedom of expression.²²² Engagement with this intersection by constitutional scholars would bring a perspective that is thus far lacking in Canadian commentary in this area.

Third, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could also lead courts in other jurisdictions to reconsider the way in which they approach this intersection. Anne-Marie Slaughter has described the SCC as ‘highly influential, apparently more so than the US Supreme Court and other older and more established constitutional courts’.²²³ The way in which the SCC articulates the relationship between freedom of expression and copyright may thus influence the articulation of this relationship in other jurisdictions.

Fourth, as argued above, reconsideration of the intersection of the *Charter* right to freedom of expression and copyright, by Canadian courts, could result in certain provisions of the *Copyright Act* being declared of no force or effect, which would necessitate reform of Canada’s *Copyright Act*. In this paper, the case study relied on focused on copyright term extension. However, as noted above, I am not suggesting that my conclusions are restricted to this specific case study. Other case studies that could have been considered include those in which fair dealing’s limits are challenged (for instance if an individual creates a ‘transformative work’ that, although fair, falls outside of the fair dealing categories²²⁴); those in which an individual is sued for copyright infringement for making an unauthorized, personal copy of a

²²² See Hogg, Group, Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution* (1st edn, Lexis Nexis 2013). The absence of discussion of copyright in the context of these works can be contrasted with Eric Barendt’s textbook *Freedom of Speech* (Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press, 2007)), which contains an entire chapter on ‘copyright and other property rights’ (pp. 247-267).

²²³ Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) at 74.

²²⁴ See, for instance, Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”* (Irwin Law 2010). See also Fewer, *supra* note 4 at 199.

work; those that challenge Canada's moral rights regime (for instance due to the absence of free-standing defences to moral rights infringement); or those that challenge the provisions in Canada's *Copyright Act* that make it an offence, in certain circumstances, to circumvent technological protection measures.

In any of the contexts outlined above, a declaration that all or part of the *Copyright Act* is of no force or effect would create an opportunity for governments, non-governmental organisations, corporations, artists, and scholars (among other groups and interested parties) to suggest ways through which to re-make copyright in ways that would be consistent with the *Charter*; for '[c]ourts, and writers on freedom of speech as well as on copyright' – as Eric Barendt argues – to 'confront th[e] clash of speech and property rights openly, and develop principles under which an appropriate accommodation of the two rights can be reached in concrete cases'.²²⁵ This could also result in opportunities for a broader reconsideration of the aims of copyright, and the way in which copyright achieves these aims – not simply the way in which copyright impacts upon expression.

These are only a few of the consequences, among others, that could flow from Canadian courts choosing to reconsider their approaches to the intersection of the *Charter* right to freedom of expression and copyright. It is unclear, however, whether such reconsideration will take place. Lower Canadian courts have shown no sign that they wish to revisit the intersection of the *Charter* right to freedom of expression and copyright. Similarly, the SCC has not signalled an interest in explicitly engaging with this intersection.²²⁶

²²⁵ Eric Barendt, 'Copyright and Free Speech Theory' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press 2005) at 12.

²²⁶ For a work that discusses the SCC's approach to the intersection of the *Charter* right to freedom of expression and copyright, see Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 *Queen's LJ* [].

What is clear, however, on the basis of the analysis set out in this paper, is that the view that arguments challenging the constitutionality of provisions of the *Copyright Act* on *Charter* right to freedom of expression grounds are ‘bound to fail’ is not correct;²²⁷ rather, a Canadian court could determine that core provisions of Canada’s *Copyright Act* unjustifiably infringe s. 2(b) of the *Charter*. Given this, I argue that it is time for the reinvigoration of judicial consideration of this area; for Canadian courts to explicitly reconsider the constitutionality of copyright.

²²⁷ *Canwest Mediaworks Publications Inc. v. Horizon Publications Inc.* 2009 BCSC 391, [2009] BCWLD 6704 at para. 37.