

ONE ISSUE TWO VOICES

COPYRIGHT LAW IN CANADA
AND THE UNITED STATES:

The Digital Challenge

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INTRODUCTION Drawing on expertise from both sides of the Canada-U.S. border, the *One Issue, Two Voices* series is designed to stimulate dialogue on policy issues that have a significant impact on the bilateral relationship. This eleventh issue in the series is a special expanded edition that provides an up-to-date snapshot of how copyright regimes differ between Canada and the United States. Authors Eric Schwartz of the American law firm Mitchell Silberberg & Knupp LLP and Barry Sookman of the Canadian law firm McCarthy Tétrault LLP are leading international copyright experts. Together they examine how our two countries are dealing with the current issues and debates in the field of copyright triggered by the new digital technologies.

In recent years, copyright reform has become an increasingly hot topic of discussion in cultural, academic, and legal circles in both Canada and the United States. Today,

Acronyms

DMCA	<i>Digital Millennium Copyright Act</i>	RAM	Random-access memory
IDG	International Data Group	TPM	Technical protection measures
IP	Intellectual property	TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
IPR	Intellectual property rights	UGC	User-generated content
ISP	Internet service provider	USTR	United States Trade Representative
N&TD	Notice and takedown regimes	WCT	World Copyright Treaty
NAFTA	North American Free Trade Agreement	WIPO	World Intellectual Property Organization
P2P	Peer-to-peer	WPPT	WIPO Performances and Phonograms Treaty
PVR	Personal video recorder		

copyright laws, compliance, and enforcement vary significantly between our two countries. For example, the United States, by implementing the 1996 World Intellectual Property Organization Treaties and passing the 1998 *Digital Millennium Copyright Act*, has aligned its copyright regime with international norms. Canada, in contrast, has yet to implement the digital treaties and is still working on major revisions to update its own *Copyright Act*.

Each author assesses the critical issues and debates currently in play in Canada and the United States. According to Schwartz, the key challenges that need to be tackled are the twin goals of facilitating the legal dissemination of ever more material to consumers while at the same time protecting the rights of copyright authors and owners. Sookman maintains that Canadian creative industries, due to the lack of an effective legal regime protecting digital copyright, suffer disproportionately

from online infringement. Moreover, lax laws have diminished Canada's international reputation among the G8 and other major trading partners.

Both authors agree that a rigorous system for the protection of copyright fosters economic progress and technological innovation, encourages investment, and increases competitiveness in the creative industries. The Canada Institute thanks the authors for their contribution to our understanding of a controversial topic in the ongoing bilateral dialogue. We are grateful to the Canada Institute on North American Issues for its support.

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September 2009

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COPYRIGHT REFORM FOR CANADA: WHAT SHOULD WE DO?

In July 2009 the Canadian government launched a nationwide consultation on copyright modernization. It asked Canadians five questions about the changes that should be made to the *Copyright Act* to best foster innovation, creativity, competition, and investment, and position Canada as a leader in the global, digital economy.² In this essay I will address these questions by presenting a series of principles and specific recommendations for reform.

BACKGROUND TO COPYRIGHT REFORM

To understand the need for copyright reform in Canada, some background knowledge is essential. For more than a decade, copyright reform has been studied and debated, but Canada has nothing to show for it. Meanwhile, Canadians have had to endure outdated laws that do not adequately support the digital exploitation of creative products. Canada's outdated laws have hurt all sectors of the creative industries, including the creators and artists who rely on copyright for protection. These laws have also diminished Canada's international reputation among the G8 and other trading partners.

Canada has acknowledged since 1997 that it needs to adapt its laws to address digital technologies and the Internet. That year it signed the 1996 World Intellectual Property Organization (WIPO) Treaties.³ Since then, at least 12 government, department, and committee reports have studied and made recommendations for reform to address digital issues. The two departments responsible for copyright, Industry Canada and Canadian Heritage, have consulted extensively with Canadian creators, businesses, experts, and citizens about reform.⁴ In addition to formal consultations, there were significant meetings of stakeholders in 2005 and 2008 following the first readings of Bill C-60⁵ and Bill C-61⁶—bills that were introduced into Parliament to amend the *Copyright Act* but which never proceeded past that stage.⁷

In 2004 the Standing Committee on Canadian Heritage recommended reforms to the Act.⁸ In 2007 two all-party government committees examining counterfeiting and piracy problems noted significant deficiencies in Canadian law and made important recommendations to address them.⁹ In 2008 the government's Competition Policy Review Panel urged reforms to bring Canada's laws into the Internet era.¹⁰

Successive Canadian governments have acknowledged the need to modernize the Act and signalled that reforms were forthcoming. In 2007 the government, through four Cabinet ministers, acknowledged the importance of copyright in promoting innovation and attracting investment and committed to legislative reform, including implementation of the WIPO Treaties.¹¹ In 2008 Canada committed through a multilateral declaration to modernize its laws to deal with digital issues.¹² Three throne speeches since the turn of the millennium have promised reform.¹³

In the absence of a certain and effective legal regime protecting digital copyright, Canadian creative industries suffer disproportionately from online infringement. The use of peer-to-peer (P2P) networks is extensive in Canada, and unauthorized file sharing of copyrighted material is

Canada is home to some of the world's most popular online illegitimate file-sharing Internet sites. Many sites or information sources about them claim they have moved to Canada to more easily and legally conduct business.



widely acknowledged to account for a large part of P2P activity.¹⁴ Canada is viewed as a country in which laws to address digital piracy are weak, ineffective, or non-existent. Canada is home to some of the world's most popular online illegitimate file-sharing Internet sites.¹⁵ Many sites or information sources about them claim they have moved to Canada to more easily and legally conduct business.¹⁶ These sites facilitate a staggering amount of unauthorized file sharing¹⁷ and operate for profits earned through online advertising or subscription fees.¹⁸ The only persons who profit, however, are their operators.

Piracy of software is also a major problem in Canada. The IDG (International Data Group) estimated that Canada had a piracy rate of 32 percent, 12 percent higher than the United States.¹⁹ Piracy of entertainment software is also reported to be significantly higher in Canada than in the United States.²⁰ Physical piracy is facilitated through Canada's weak border measures, which do not conform to the international standards established by the World Customs Organization.²¹

Canada's weak laws and the extent of the piracy here have been significant sources of discontent for Canada's trading partners. The European Union (EU) recently identified crucial weaknesses in Canada's intellectual property (IP) framework.²² In 2009 the U.S. Trade Representative (USTR) added Canada to the Priority Watch List in its annual Special 301 Report because of

its weak IP laws and weak enforcement system.²³ Further, Canada has been singled out by members of the United States Congress and by U.S. Vice President Joe Biden for not taking meaningful steps to update its copyright laws,²⁴ leading the U.S. Congressional International Anti-Piracy Caucus also to place Canada on its 2009 International Piracy Watch List.²⁵ Canada's world rankings in indexes that measure the state of our copyright laws are also slipping measurably.²⁶

In short, Canada's copyright reform is long overdue and much needed.

HOW CANADA SHOULD APPROACH COPYRIGHT REFORM

I will now answer the questions posed by the Canadian government with a series of principles and specific recommendations.

Eight Principles to Guide Copyright Reform

Recognize the importance and the unique characteristics of the creative sector

The cultural sector is integral to Canada's creative economy and overall economic performance.²⁷ The Conference Board of Canada estimated that the real value-added output by the Canadian cultural industries totaled \$46 billion in 2007,

A rigorous, effective system for the protection of copyright fosters progress and innovation, encourages investment, promotes growth, and increases competitiveness of the creative industries.

representing 3.8 percent of total gross domestic product (GDP). The economic footprint when including the direct, indirect, and induced effects were estimated to total \$84.6 billion, about 7.4 percent of total real GDP in 2007.²⁸

From an economic perspective, the value of cultural products lies in their content. They are protected from unlawful reproduction mainly by copyright laws.²⁹ As public goods, they can be copied at a very low cost, which makes free-riding (piracy) easy.³⁰ Consequently, a high level of legal protection for this sector is essential.

Establish specific goals for a “Digital Canada” copyright framework

Canada should follow the lead of the United Kingdom, which aims to be a global center for the creative industries as part of its “Digital Britain” initiative.³¹ After a series of probing studies, the UK government concluded that it needed “a digital framework for the creative industries and a commitment to these industries *grounded in the belief that they can be scaled and industrialised in the same way as other successful high-technology, knowledge industries.*”³²

UK government studies found that the scale of unlawful P2P file sharing in that country had resulted in considerable losses to its creative industries.³³ The government unequivocally determined that this situation was “unacceptable” and committed to addressing it with a specific goal of reducing online piracy by 70–80 percent. It proposed a series of measures to bring all stakeholders together to create an effective online marketplace for digital creative products.³⁴

Canada should be no less determined to help boost its cultural industries by establishing similar targets and policies to reduce digital piracy.

Provide effective digital copyright protection to stimulate intellectual creation and dissemination of cultural products

It is well accepted among Canada’s trading partners that effective copyright protection is crucial to the creation and dissemination of intellectual works. Copyright promotes creativity that benefits authors, producers, consumers, and the public at large. Our partners know, as should we, that a rigorous, effective system for the protection of copyright fosters progress and innovation, encourages investment, promotes growth, and increases competitiveness of the creative industries.³⁵

Provide clear, predictable, and fair rules that support creativity and innovation

The copyright system is the framework through which creative efforts are rewarded. It provides an incentive for people to create and innovate. It is the backdrop against which decisions on investment and jobs are made in the creative sector.³⁶ All nations have their own culture, but the creation of mass-market cultural products has little hope of developing without effective copyright.³⁷ Our trading partners accept that a strong rule of law is vital for the cultural industries.³⁸ No other set of institutional arrangements is sufficient to support commercial cultural industries of the scope and depth of those that historically have existed.

Reform and adapt copyright laws to reduce digital piracy and to promote investment and economic growth in creative products

Digital piracy—in particular, online file sharing over P2P networks—causes significant losses to the creative industries.³⁹ These losses are felt not only by producers of content, such as producers of records, books, software,

and motion pictures, but by everyone directly or indirectly involved in these industries.⁴⁰ These losses represent only a fraction of the total damage to the economy from digital piracy. The indirect and induced effects on an economy-wide basis are far higher.⁴¹

Opponents of copyright reform argue that the law cannot be reformed to prevent or seriously reduce online piracy. Some advocate abandoning copyright in favor of other compensation models.⁴² Others argue for weakened protections, contending that better reforms won't work or that the benefits would not exceed the perceived drawbacks.⁴³

However, studies carried out in countries that have modernized their copyright laws have demonstrated that effective copyright protection and enforcement of rights do reduce digital piracy and bring about significant direct and indirect economic benefits. Surveys conducted in the United Kingdom found that a warning notification email from an Internet service provider (ISP) would persuade 33 percent of downloaders to cease unauthorised downloading. Moreover, 70–80 percent of downloaders would permanently stop if they believed sanctions could be imposed if they did not comply.⁴⁴

Studies have also established that reforming copyright laws to deal with digital piracy has economic benefits. Based on research, the UK government calculated that if a graduated response system was established, industry annual revenues there would increase by approximately £200 million per annum and tax revenues by approximately £35 million.⁴⁵ Another recent UK study determined that the establishment of a graduated response system⁴⁶ by itself would yield the UK audio-visual sector additional industry revenues of £141.7 million.⁴⁷ Canada's trading partners are basing their copyright policies on the clear link between anti-piracy reforms and economic progress. So should Canada.

Reform and adapt copyright laws with new exceptions in accordance with international standards and treaties

Exceptions to copyright are an indispensable complement to exclusive rights. Together, they form an important balance between authors' rights and the interests of users.⁴⁸ Accordingly, along with recalibrating exclusive rights to address digital issues, there is also a need to

revisit exceptions to ensure that they remain appropriate for the 21st century.

In considering what proposed exceptions are appropriate, the government should subject each exception to the internationally accepted three-step test mandated by the Berne Convention, Trade-Related Aspects of Intellectual Property (TRIPS), and NAFTA.⁴⁹ This test permits exceptions to be made in special cases that are narrow in scope and reach, can be justified by sound policy rationale, and do not undermine a present or future market for the work or unreasonably prejudice the legitimate interests of the author.⁵⁰

Do not regard copyright reform as a "zero-sum game" or succumb to the philosophy of unrestricted "user rights"

It is often said that copyright law should promote a balance between creators and users. The idea of "balance" has been misinterpreted and misrepresented by anti-copyright advocates as suggesting that copyright reform is a zero-sum game—that stronger protection for creators makes things worse for consumers and that any "gain" by producers must result in a corresponding "loss" by users.⁵¹ This notion is not true. Copyright plays an important role in ensuring a broad array of choices for consumers by providing the proper incentives for long-term investment in creativity and innovation. They result in the availability of creative products for consumers, thereby promoting the public interest in the creation and dissemination of creative works.

These opponents attack copyright as a negative force and attempt to demonize copyright owners, copyrights, and those who support strengthening copyright law.⁵² They do so in order to convince governments either to delay reforming the law in a way they oppose or to water down such reforms to make them ineffective in achieving their purpose.⁵³ Further, although occasionally giving lip service to the term "balance,"⁵⁴ copyright antagonists often advocate reforms that focus almost exclusively on broad new exceptions and "user rights"⁵⁵ that could inhibit the creative industries' ability to develop or grow legitimate digital businesses.⁵⁶ Within the blogging community, their opinions have become popular myths and have acquired cultural momentum.⁵⁷

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Our major trading partners have rejected such views and have not succumbed to this zero-sum, user-rights philosophy to diminish their resolve in adapting their laws to foster a dynamic digital culture. The European Union, for example, has made it clear that the “objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.”⁵⁸ They recognize that enacting a high level of protection for digital properties is good for all stakeholders, including consumers. They also recognize that granting rights to creators comes with burdens, that these burdens are legitimate and required,⁵⁹ and that they are ultimately beneficial to consumers.⁶⁰

Technological advances that make it easier to infringe are not a rationale for legalizing these activities.⁶¹ The arguments to the contrary by anti-copyright advocates should not drive public policy.

Regard technology neutrality perhaps as a goal, although this principle has limitations

If one thing is certain, it is that technology will change. Accordingly, copyright should be technologically neutral so that it will encompass technological advances. However, if history has taught us anything, it is that new technologies will pose new challenges that will constantly require revisiting established principles.⁶² No generalized principle will ever be able to solve this problem.

Further, because of the diversity of technologies, there can be serious unintended and inadvertent con-

sequences in formulating a principle to apply to all present and future technologies in a neutral way.⁶³ Moreover, different policy goals and implications will often be associated with providing exclusive rights or exceptions for particular technologies.⁶⁴ It is not surprising, therefore, that the Act has long reflected the reality that certain technologies must be treated differently for policy reasons.⁶⁵

Technology neutrality is not the silver bullet that solves the need to examine the consequences of proposed amendments and to make nuanced choices to meet policy objectives.

Eight Specific Recommendations to Guide Copyright Reform—New Rights

Amend the act to enable Canada to ratify the WIPO Treaties

Canada has signed the WIPO Treaties but has resoundingly failed to implement them.⁶⁶ These treaties provide an internationally recognized norm for reducing digital piracy. All of Canada’s major trading partners, including all members of the EU, the United States, Australia, and Japan, have enacted legislation to implement these treaties.⁶⁷

Provide protection against circumvention of TPMs that are required by the WIPO Treaties and that comport with international standards

Legal protection for technological protection measures (TPMs) is a key requirement of the WIPO Treaties. TPMs act as enablers of innovative e-commerce services and new business models. They are fundamental to support versioning and consumer choice by enabling multiple options (at different prices) for accessing digital content.

Critics of legal protection for TPMs allege that they are no longer relevant or required in the digital landscape. This claim is not true. They are and will remain vital in supporting e-commerce in digital products.⁶⁸

Opponents of legal protection for TPMs have given many reasons to support their position, including purported concerns about free speech, digital lockout, and privacy. None of these concerns when analyzed raises any reason not to protect TPMs.⁶⁹ Indeed, a recent study examining the impact of legal protection for TPMs on statutory exceptions to copyright in

the United Kingdom found that the “nightmarish vision of digital lock-up” professed by opponents of anti-circumvention legislation had not materialized and that TPMs had not “impacted on many acts permitted by law.” Furthermore, the study also determined that, when beneficiaries of exceptions reported limited or no enjoyment of the exception, they were in many cases unable to provide any actual evidence in support of those claims; beneficiaries of exceptions who claimed to have been prevented from carrying out those permitted acts because of TPMs had not bothered to use the complaints mechanism set out under UK law.⁷⁰

Opponents of legal protection for TPMs also argue that there is “considerable flexibility” in how to implement the WIPO Treaties. They assert that this flexibility extends to prohibiting circumvention only for the purposes of infringement and that there is no need to prohibit the trafficking in circumvention tools and services.⁷¹ These claims exaggerate the scope for implementing the treaties.⁷² In any event, these proposed anorexic forms of implementation would do nothing to support the policy objective of fostering ecommerce in digital products.⁷³

Establish a “making-available right”

The *WIPO Copyright Treaty* requires a making-available right for works.⁷⁴ Bill C-60 had proposed that such a right be added to the Act for works and sound recordings. Unfortunately, no right was expressly proposed in Bill C-61 for works. This right is needed, yet there is uncertainty as to whether and to what extent it exists in Canada. It must be clarified in any future bill.

The Canada Border Services
Agency should have the authority
to target, detain, seize, and destroy
pirated goods on its own initiative.

Clarify the law related to secondary infringement to help address online piracy

It is probable, but uncertain, that Canadian law provides relief for acts that induce or materially contribute to copyright infringement. These secondary infringement doctrines are essential for pursuing pirate online sites and services, and the law in this area must be clarified.⁷⁵

Implement a notice and notice system backed up by a nuanced graduated response process

A “notice and notice” process is somewhat useful in dealing with infringing activity across P2P networks and other transitory network communications. It should become part of Canadian law. As previously noted, however, notice and notice is not effective in permanently stopping downloading unless the individuals receiving the notices believe that sanctions could be imposed unless they cease such activity.⁷⁶ Based on the evidence that unauthorized downloading *can* be significantly reduced through appropriate legal measures and determination to achieve this goal, countries such as France, New Zealand, the United Kingdom, South Korea, and Taiwan have enacted, or are in the process of developing, legislation to introduce a graduated response process in which rightsholders and ISPs work together to curb infringements.⁷⁷

Opponents of graduated response processes have rejected “three strikes” proposals that would “cut off Internet access based on unproven allegations of infringement.”⁷⁸ However, the proposals Canada’s trading partners are examining are intended to provide a fair and efficient process for rightsholders to deal with repeat copyright infringement in the digital environment. The United Kingdom⁷⁹ and New Zealand⁸⁰ graduated response proposals provide for actual hearings before a special tribunal before any remedy is meted out. Further, the tribunals would be accorded considerable flexibility in the remedies they could order—remedies that would not necessarily involve any termination of user access to the Internet.

The government should ensure that rightsholders and ISPs quickly reach agreement on a graduated response process. A new bill should include a power to enact necessary regulations to implement a fair and effective graduated response process.

Implement a notice and takedown system that fully respects due process considerations

Canada should adopt a formal “notice and takedown” regime (N&TD).⁸¹ N&TD is very effective in dealing with infringements on systems being stored or hosted on a system or network controlled or operated by a service provider.⁸² It is a de facto standard in the European Union and in many other countries that permits service providers to rely on hosting exceptions only if they remove or disable access to infringing content when they have knowledge of infringement.

Other countries such as Finland, Iceland, Australia, Singapore, and the United States have a more formalized process that expressly attempts to balance the needs of rightsholders to remove infringing content quickly from the Internet with the rights of users who may object to the removal. Under these regimes, infringing content can be expeditiously removed from a site on delivery of a notice of claimed infringement and be restored by a counter notice from the content poster.

To ensure due process, under legislation like the *Digital Millennium Copyright Act (DMCA)*, the notice of claimed infringement must be sworn under penalty of perjury. The claimant has a duty to consider in good faith all defenses to infringement that the poster may have, including a fair-use defense.⁸³

Opponents to N&TD claim that it deprives alleged copyright infringers of the benefit of due process. That is arguably true under the de facto model, where no formalized notice and counter-notice process is available. This model is currently in use in Canada, where ISPs that do not remove infringing content when they become aware of it may be liable for infringement.⁸⁴ Thus, a formalized N&TD regime could actually benefit content posters as well as rightsholders and ISPs by spelling out the specific rules that would apply. A study prepared for Industry Canada expressly determined that an N&TD regime would be a viable process for ISPs and could adequately balance the interests of rightsholders and users.⁸⁵ The Supreme Court also recommended that Canada enact an N&TD process as “an effective remedy” to resolve what content should be removed from websites.⁸⁶

Enable rightsholders to obtain injunctions against Internet intermediaries to prevent infringements

Canadian law does not provide copyright holders with any right to apply for injunctions against intermediaries whose services are used by a third party to infringe. This right, prescribed by the *EU Copyright Directive*,⁸⁷ has proved valuable in combating online file sharing.⁸⁸ It could also prove useful in Canada.

Implement fair and effective border measures to protect against the import of pirated goods

Canada should prohibit the importation and exportation of pirated goods. It should also establish a recordation system to assist customs officers in the seizure of pirated goods. The Canada Border Services Agency should have the authority to target, detain, seize, and destroy pirated goods on its own initiative.

Three Specific Recommendations to Guide Copyright Reform—New Exceptions from Infringement

Clarify that ISPs are not liable for infringement when they act as true intermediaries

ISPs play a crucial role in enabling the digital distribution of content. A new bill should clarify their liability when they act as truly innocent intermediaries. The ISP provisions in Bill C-61 need some technical amendments, however, as they could have inadvertently provided legal immunities to sites that knowingly and for profit purposes materially facilitated illegal online file sharing. The exceptions, as drafted, also materially deviated from the more narrowly tailored wording in similar international legislation.⁸⁹

Establish new exceptions to facilitate private uses of works where justified, and do not adopt “fair use” without studying its many potential ramifications

As part of the consultation process, calls have been made for a general fair-use exception. This exception, which is available in only a few countries worldwide, has been held up as a technologically neutral “silver bullet” that would

satisfy the plethora of specific exceptions that have been asked for.⁹⁰ But adopting fair use would simply replace one set of problems with others.

The doctrine of fair use is open-ended and vague. It introduces considerable uncertainty and leaves consumers, businesses, and copyright owners unsure of what is legal and what is not. High transaction and legal costs are associated with determining what a fair use is, and the absence of any significant case law would necessitate litigation in order to determine the scope and limits of the doctrine. By contrast, considerable flexibility and certainty can be achieved by enacting specific fair-dealing exceptions.

The fair-use model has also proved problematic in the United States. One scholar concludes: “[T]he doctrine seems ill-defined at best, and empty at worst.”⁹¹ Another wrote: “Both abstractly and concretely, however, fair use has been spectacularly unsuccessful as a substantive player in copyright theory and practice. ... Fair use has become too many things to too many people to be much specific value to anyone.”⁹²

These problems with the fair-use model were recognized by the House of Common Sub-Committee on the Revision of Copyright in its report *A Charter of Rights for Creators*. That report specifically recommended that the “fair dealing provisions should not be replaced by the substantially wider ‘fair use’ concept.”⁹³ Further, a study, recently published by Professor Giuseppina D’Agostino of Osgoode Hall Law School, also identified numerous problems with fair use and concluded that the formulation of a Canadian model would have to consider myriad factors before settling on what would make sense for Canada.⁹⁴

It would be unwise to try to solve the current challenge posed by digital technologies by adopting an exception that has proved to be problematic where it has been tried, at least without considerable study of the ramifications of taking this approach. Any proposed exceptions for personal uses under a new bill should be scrutinized for compliance with the three-step test. Their impact on other parts of the Act, such as the existing detailed exceptions and the present and future private copying regimes, also need to be carefully considered.⁹⁵

Establish new educational and library exceptions in accordance with the three-step test

Bill C-61 proposed several new exceptions for educational institutions and libraries. Exceptions that facilitate access to copyright materials for educational and library purposes that strictly comply with the three-step test may be appropriate. Some of the exceptions proposed in Bill C-61, however, need serious reconsideration.⁹⁶

CONCLUSION

In terms of copyright, Canada is at a crossroads. It can bow to the pressures of those who do not believe in it and enact weak and ineffective laws. Or it can follow the lead of its important trading partners, such as the United Kingdom, which believe that copyright can foster legitimate, vibrant markets for creative products and set specific goals, backed up by supporting laws to achieve this objective. Creating a “Digital Canada” for creative products is in the public interest. The alternative would be a mistake of long-term tragic proportions for Canada.

NOTES

1. The views expressed in this essay are my own and do not necessarily reflect those of any clients of McCarthy Tétrault. I acknowledge with gratitude the research assistance of James Gannon, an associate with McCarthy Tétrault.
2. The questions were as follows: How should existing copyright laws be modernized? How should copyright changes be made in order to withstand the test of time? What sorts of changes would best foster innovation and creativity in Canada? What sorts of copyright changes would best foster competition and investment in Canada? What kinds of changes would best position Canada as a leader in the global digital economy? The complete questions may be found at <http://copyright.econsultation.ca/topics-sujets/show-montreal/6>.
3. The WIPO Treaties comprise the 1996 WIPO Copyright Treaty and the 1996 WIPO Performances and Phonograms Treaty. Canada played an active and significant role in negotiating these treaties and thus, even before 1996, recognized the need to update its laws to deal with digital issues.
4. Canadian Electronic Commerce Strategy (1998); Discussion Paper on the Implementation of the WIPO Copyright Treaty (1998); Discussion Paper on the Implementation of the WIPO Performances and Phonograms Treaty (1998); A Framework for Copyright Reform (2001); Consultation Paper on Digital Copyright Issues (2001); Focus Paper (Digital Copyright Issues) (2002); Supporting Culture and Innovation (s. 92 Report) (2002); Government Statement on

- Proposals for Copyright Reform (2004); Status Report on Copyright Reform (2004); Technological Protection Measures (2-part Heritage Canada paper, 2004); Standing Committee on Public Safety and National Security, *Counterfeit Goods in Canada—A Threat to Public Safety* (May 2007) (“Public Safety Report”); Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy Are Theft* (June 2007) (“Industry Report”).
5. Bill C-60 (38th Canadian Parliament, 1st Session) is available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-60&parl=38&ses=1&language=E&File=24>.
 6. Bill C-61 (39th Canadian Parliament, 2nd Session) is available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3570473&Mode=1&Language=E&File=24>.
 7. The bills did not proceed to second reading because the minority governments in power at the time were dissolved.
 8. Interim Report on Copyright Reform (2004).
 9. Public Safety Report; Industry Report. These reports were the result of extensive hearings that canvassed the views of Canadian businesses, intellectual property experts, trade associations, and enforcement officers. The committees made numerous specific recommendations, including that Canada enact legislation to ratify the WIPO Treaties; strengthen civil remedies for counterfeiting and piracy infringements; and provide the Canada Border Services Agency (CBSA) and law enforcement officials with the express authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative and in accordance with due process and Canadian law.
 10. Government of Canada, Competition Policy Review Panel—Compete to Win, Final Report, June 2008. The panel noted that the importance of the Internet to all aspects of economic activity “has brought new urgency to updating IP frameworks in Canada.” It urged the government to seize the opportunity to develop a strong IP capacity and to “demonstrate to the world how competition and productivity can be furthered by a modern IP regime.” It observed that “[t]here is no reason for Canada’s patent and copyright frameworks not to be ‘state of the art’ for the Internet age.” Canadian businesses have also recognized the need for stronger and better enforcement of copyrights in Canada. Businesses have made specific recommendations for reforms. See Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*, March 2007 (“*A Road Map for Change*”); Ontario Chamber of Commerce, *Protection of Intellectual Property: A Case for Ontario*, December 2007; Canadian Chamber of Commerce and the Canadian Intellectual Property Council, *A Time for Change: Toward a New Era for Intellectual Property Rights in Canada*, February 2009.
 11. Minister of Industry Jim Prentice, Minister of International Trade David Emerson, Minister of Public Safety Stockwell Day, and Minister of Justice and Attorney General Rob Nicholson. The ministers were responding to the two federal government committees examining counterfeiting and piracy problems in Canada. They stated that the government was “committed to the importance of providing a robust framework for intellectual property rights ... to foster an environment conducive to innovation, in an effort to further attract investment and high paying jobs to this country’s growing knowledge-based economy.” They also stated that the “Government ... is working towards bringing Canada’s copyright regime into conformity with the World Intellectual Property Organization (WIPO) Internet Treaties.”
 12. The Seoul Declaration for the Future of the Internet Economy, June 18, 2008. When Canada signed the declaration it agreed to “[e]nsure respect for intellectual property rights” and committed to “[c]ombine efforts to combat digital piracy with innovative approaches which provide creators and rightsholders with incentives to create and disseminate works in a manner that is beneficial to creators, users and our economies as a whole.” See also Joint Statement by North American Leaders, August 10, 2009: “We will cooperate in the protection of intellectual property rights to facilitate the development of innovative economies.”
 13. In 2001 the government promised to “provide better copyright protection for new ideas and knowledge [to] ensure that Canadian laws and regulations remain among the most modern and progressive in the world, including those for intellectual property and competitiveness.” The Throne Speech of October 2007 made a similar pledge: “Our Government will improve the protection of cultural and intellectual property rights in Canada, including copyright reform.” The November 2008 Throne Speech stated: “Cultural creativity and innovation are vital not only to a lively Canadian cultural life, but also to Canada’s economic future.” It went on to commit the government to “proceed with legislation to modernize Canada’s copyright laws and ensure stronger protection for intellectual property.” See <http://www2.parl.gc.ca/parlinfo/Documents/ThroneSpeech/37-1-e.html>; October 16, 2007, <http://www2.parl.gc.ca/Parlinfo/Documents/ThroneSpeech/39-2-e.html>; November 18, 2008, <http://www.sft-ddt.gc.ca/eng/media.asp?id=1364>.
 14. In 2005 the OECD determined that, weighted by population, Canada had the greatest file-sharing population anywhere on the planet. Organisation for Economic Co-operation and Development, Working Party on the Information Economy, *Digital Broadband Content: Music*, December 13, 2005, 75. *International Federation of the Phonographic Industry (IFPI), Digital Music Report*, 2009, 22–23. The extensive use of P2P networks by Canadians was recently confirmed by evidence before the Canadian Radio-television and Telecommunications Commission (CRTC) in its network-shaping proceedings.
 15. For example, one of the world’s largest illegitimate BitTorrent sites, isoHunt, is operated from Canada. It sued the record industry in Canada for a declaration that it can legally carry out its P2P file-sharing services without infringement here. BTMon is another BitTorrent site operating from Canada. Illegitimate user-generated-content sites such as video.ca, illegitimate leech sites such as free-tv-video-online, and illegitimate services offering access to pirated TV, movies, and other content also operate from Canada.
 16. Slyck.com, January 5, 2009, <http://www.slyck.com/news.php?story=1817>: “In February of 2006, isoHunt and TorrentSpy were the recipients of a copyright infringement complaint from the MPAA (Motion Picture Association of America). TorrentSpy eventually shut down and was forced to accept a \$100 million settlement; however, because isoHunt is situated in Canada, it has been able to hold authorities at bay for significantly longer.” Wikipedia http://en.wikipedia.org/wiki/Btjunkie#cite_note-1: “BT Junkie is an advanced BitTorrent search engine. It uses web crawler to search for torrent files from other torrent sites and services in its database.

It has over 2,180,000 active torrents and about 4,200 torrents added daily (compared to runner-up Torrent Portal with 1,500), making it the largest torrent site indexer on the web. BT Junkie has moved to Canada for legal reasons.” TorrentPortal, a BitTorrent index site, <http://www.torrentportal.com/>, is registered to a person in Vancouver and states: “Unless you live in Canada, downloading copyrighted material via P2P may put you at risk for a lawsuit. Canadian users are currently shielded from P2P lawsuits. Canada signed the 1997 World Intellectual Property Organization Internet Treaties, but has not yet ratified them by enacting their provisions into domestic law.” An explanation of torrents in Net for Beginners on About.com, http://netforbeginners.about.com/od/peersharing/a/torrent_search.htm, states: “Warning for new users: while P2P file sharing technology is completely legal, many of the files traded through P2P are copyrighted. *Unless you live in Canada where users are shielded from P2P lawsuits, then downloading P2P files may put you at risk for a civil lawsuit in any other country*” (emphasis in original). About.com, “<http://netforbeginners.about.com/b/2004/04/13/now-legal-in-canada-downloading-mp3-music-files.htm>”, also explains: “Even though Napster 1.0 has been shut down by American law, it is now legal to download free music if you are in Canada. Millions of people upload and download billions of songs each week, without paying a cent, and as of March 2004, Canadians cannot be prosecuted for this file trading.” and Iwannadownload.com, <http://www.iwannadownload.com/learnmore.html>, declares: “Canadian Server Location—Completely Legal.” The hosting provider Moxie communications refused to stop providing services to the pirate BitTorrent site BTMon on the assertion that such sites are legal in Canada. See <http://torrentfreak.com/cria-launches-assault-on-major-bittorrent-trackers-080527/>: “We will not be following the request and will be fighting for the rights of our clients[,] as to date laws in Canada protect them.”

17. For example, on July 8, 2009, there were 85.25 million files with a combined size of 2719.62 terabytes being shared by 23.82 million peers on isoHunt.
18. For instance, see Gillian Shaw, “Court ruling on isoHunt could have huge ramifications, says founder,” *Vancouver Sun*, May 1, 2009, where isoHunt founder Gary Fung admits he profits from advertising on the site: “Right now I have to say it is a business. We have to make money to sustain our business, and to sustain the lawsuits that are costing quite a bit.”
19. According to the IDC, the monetary value of unlicensed software grew to \$53 billion in 2008. *Sixth Annual BSA-IDC Global Software 2008 Piracy Study*, May 2009.
20. According to the Entertainment Software Association of Canada, piracy in this industry is estimated to cost the U.S. and Canadian entertainment software industries more than \$3.5 billion annually, excluding Internet piracy. Industry investigations found that an alarming 20–30 percent of retail specialty stores visited in Toronto and Vancouver sell pirated products. In Canada, approximately 34 percent of gamers have acquired pirated games, compared to 17 percent in the United States. On average, 22 percent of pirates’ video-game collections are illegal. Approximately 22 percent of gamers have modified their consoles or handhelds to play pirated games. Entertainment Software Association of Canada website: Piracy, available at <http://www.theesa.ca/piracy.html>.
21. World Customs Organization, Model Legislation. Unlike customs authorities in other major industrialized nations, the Canada Border Services Agency officers are not empowered to seize or destroy counterfeit or pirated goods. Instead, customs officers will detain (for a limited period of time) counterfeit or pirated goods only if the IP holder has obtained a court order or if the RCMP or local police officers agree to seize the goods.
22. *Assessing the Costs and Benefits of a Closer EU-Canada Partnership: A Joint Study by the European Union and the Government of Canada (“Joint Study”)*, October 2008, 87–88.
23. USTR, 2009 Special 301 Report, 17: “The United States continues to have serious concerns with Canada’s failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997. We urge Canada to enact legislation in the near term to strengthen its copyright laws and implement these treaties. The United States also continues to urge Canada to improve its IP enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the volume of infringing products transshipped and transiting through Canada. Canada’s weak border measures continue to be a serious concern for IP owners.”
24. Statement of Chairman Howard L. Berman at hearing, “Sinking the Copyright Pirates: Global Protection of Intellectual Property,” United States Congressional Hearings of the Foreign Affairs Committee on Global Intellectual Property Theft, April 6, 2009; http://news.cnet.com/8301-13578_3-10224689-38.html.
25. Congressional International Anti-Piracy Caucus, “2009 Country Watch List,” May 2009: “Canada has regrettably become known as a ‘safe haven’ for Internet pirates. There is an urgent need for amendments to the Copyright Act in order to comply with the World Intellectual Property Organization (WIPO) Internet Treaties. This includes provisions that prohibit circumvention of technological copyright protection measures and trafficking in circumvention devices, and proposals to ensure that copyright owners can effectively combat online piracy by enacting an effective legal framework governing Internet Service Provider (ISP) liability and responsibility. Canada’s enforcement record also falls short of what should be expected of our neighbor and largest trading partner, primarily due to the following: ineffective border controls, inadequate enforcement resources and policies, and a seeming unwillingness to impose deterrent penalties on copyright pirates. Canadian parliamentary leaders and government officials, at the highest levels, have acknowledged many of these deficiencies, but have done little to address them.”
26. See Taylor Wessing, *Global Intellectual Property Index 2009*, May 2009: “Canada has suffered the greatest fall in GIPI 2, both in rank and rating. It has attracted numerous adverse comments, such as having ‘ineffective border controls,’ ‘insufficient enforcement resources,’ ‘inadequate enforcement policies’ and an ‘unwillingness to impose deterrent penalties on pirates.’ In a pending case, an ISP has considered the regime sufficiently benign to sue a rights-holder in the Canadian court for a decision on whether search engines should be held accountable for copyright infringement (isoHunt Web Technologies Inc. v. Canadian Recording Industry Association).” *World Economic Forum Global Competitiveness Report 2008–2009*: Canada’s ranking in the Intellectual Property Protection category fell from 15 to 19, and is marked as a “competitive disadvantage.”

27. Conference Board of Canada, *Valuing Culture: Measuring and Understanding Canada's Creative Economy* (August 2008), 8. According to the board, the cultural sector includes written media, the film industry, broadcasting, sound recording and music publishing, performing arts, visual arts, crafts, architecture, photography, and design but not software or most elements of interactive media (which are generally considered part of the information and communications technology [ICT] sector).
28. The Conference Board estimates that for every \$1 of real value-added GDP produced by Canada's cultural industries, roughly \$1.84 is added to overall real GDP.
29. Statistics Canada, <http://www.ic.gc.ca/cis-sic/cis-sic.nsf/IDE/cis-51defe.html>.
30. In a hypothetical extreme situation where everyone free rides, investors would not be able to appropriate any returns, and investment in creative contents would cease. United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing*, July 2008, 47; Paul Chwelos, "Assessing the Economic Impacts of Copyright Reform on Internet Service Providers," Report Prepared for Industry Canada, November 2003, 20–21.
31. See United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain—Final Report*, June 2009.
32. Emphasis added.
33. United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain—Final Report*, June 2009, para. 17.
34. *Ibid.*, para. 18: "The Government considers online piracy to be a serious offence. Unlawful downloading or uploading, whether via peer-to-peer sites or other means, is effectively a civil form of theft. This is not something that we can condone, or to which we can fail to respond. We are therefore setting out in this report a clear path to addressing this problem which we believe needs to result in a reduction of the order of 70–80 percent in the incidence of unlawful filesharing."
35. Commission of the European Communities, *Copyright in the Knowledge Economy*, Green Paper, 2008, 4; U.K. Government Response to the European Commission's Green Paper—*Copyright in the Knowledge Economy*, December 2008.
36. U.K. Government Response to the European Commission's Green Paper—*Copyright in the Knowledge Economy*, December 2008; Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (World Intellectual Property Organization, 231); *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Recitals 4, 5, 9, 10, 11; *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights*, Recital 3.
37. Copyright decentralizes control over decisions about producing and paying for creative works. Exclusive rights and the consequent ability to license authorized uses, and to preclude unlicensed uses, foster economic independence, greater economic and creative opportunities, and experimentation among business models. It provides businesses with the resources they need to make investments and obtain financing. Copyright allows organizations such as film studios, video game developers, book publishers, and record labels to invest time and resources to identify and develop new talent. A framework that provides a high level of legal protection for copyrights has the potential to unleash the initiative and creativity of individuals. Mark Schultz and Alec van Gelder, "Creative Development: Helping Poor Countries by Building Creative Industries," 79–119; United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing*, July 2008, s. 7.4; Anne Chandima Dedigama et al., *International Property Rights Index (IPRI) 2009 Report* (Property Rights Alliance), 12. In addition to the economic value of these industries to the Canadian economy, consumers of music, film, theater, books, and other cultural properties also gain considerable cultural value and enjoyment from these creative works.
38. United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain—Final Report*, June 2009, para. 17.
39. These losses are not countered by the "network effects" or "sampling effects." United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing*, July 2008, 13; Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy*, March 2009, s. 2.2.1; Stan J. Liebowitz, "File Sharing: Creative Destruction or Just Plain Destruction?" *Journal of Law and Economics* 49 (1) (2006): 24; Stan J. Liebowitz, "Testing File-Sharing's Impact by Examining Record Sales in Cities," April 2006; Paul Chwelos, "Assessing the Economic Impacts of Copyright Reform on Internet Service Providers," Report Prepared for Industry Canada, November 2003, 1, 23.
40. Darrell Panethiere, "The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development" (UNESCO Global Alliance for Cultural Diversity, 2005), UNESCO Document CLT/ACE/CEC-05/09, 13–14.
41. Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy*, March 2009.
42. See Barry B. Sookman, "The SAC Proposal for the Monetization of the File Sharing of Music in Canada: Does It Comply with Canada's International Treaty Obligations related to Copyright?" *Osgoode Hall Review of Law and Policy* 1 (2008): 102, reviewing the Songwriters of Canada proposal.
43. See note 52.
44. Wiggin LLP—2008 Digital Entertainment Survey and empirical experience of THUS, quoted with approval by the United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing*, June 16, 2009; Nate Andersen, "Stern Letters from ISPs Not Enough to Stop P2P Use After All," *Ars Technica*, June 10, 2009. Other sources are as follows. BBC News, "Piracy Law Cuts Internet Traffic," April 2, 2009: Internet traffic in Sweden dropped by 33 percent when the country's new anti-piracy laws came into effect. CET, "Swedish Anti-piracy Law Keeps Downloaders on the Defensive," August 4, 2009, www.thelocal.se/21092/20090804: "Sweden's legislation, based on the European Union's Intellectual Property Rights Enforcement Directive (IPRED), is credited with a 30 percent fall in the country's total web traffic the day after it came into effect. Experts say that the drop in Swedish web usage is explained by the fact that illegal downloading represents between

- 50 and 75 percent of Internet traffic worldwide ... Some popular Swedish artists have seen their downloading on websites like The Pirate Bay go down by up to 80 percent ... While unauthorized downloads are on the slide at a time when global record sales are booming, the amount of music bought from legal download sites ha[s] shot up by 57 percent compared to last year ... No one could predict such a dramatic decrease in illegal traffic and not only that there's also been a huge increase in the legal services." CET, "Spotify earns us more than iTunes': Sony BMG," August 11, 2009, <http://www.thelocal.se/21246/20090811/>; "The convictions of four people behind The Pirate Bay on charges of being accessories to copyright infringement in April [2009], as well as the passing of tough new anti-piracy legislation, have led to a dramatic fall in internet traffic, attributed to a decline in illegal file-sharing."
45. United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing*, June 16, 2009, 46–47.
 46. A graduated response system is a system of warnings delivered to a user by an ISP, followed by a series of measures applied by the ISP which would prevent continued unauthorized activity.
 47. Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy*, March 2009, s. 3.3. The study determined that reforming UK laws to provide a better anti-piracy legal framework would provide direct gross revenue benefits to the audio-visual sector of £268 million as well as benefits spread throughout the entire UK economy via multiplier effects, creating a total of £614 million in revenues to all industries, £310 million in GDP, 7,900 jobs, and £155 million in taxes to government. As noted above, it also determined that the establishment of a graduated system would yield additional industry revenues of £141.7 million.
 48. *Théberge v. Galerie d'Art du Petit Champlain inc.* (2002), 17 CPR (4th) 161 (SCC).
 49. For examples of the application of these norms to proposals for copyright reform in Canada, see Wanda Noel et al., "Free v. Fee," *Canadian Intellectual Property Review* 23 (1) (2006); Sookman, "The SAC Proposal for the Monetization of the File Sharing of Music in Canada," 102. Numerous submissions have been made to the government for new exceptions. Many of these requests focus solely on the claimed advantages of the exception without subjecting the request to any framework that balances the claimed benefits against the economic consequences to rightsholders.
 50. Under this test, each of the following conditions must be met: the exception is limited to "certain special cases"—it must be "clearly defined," narrow in scope and reach, and justified on a sound policy rationale; the act does not conflict with a normal exploitation of the work—all forms of exploiting a work that have, or are likely to acquire, considerable economic or practical importance cannot be an exception; and the exception "does not unreasonably prejudice the legitimate interests of the author"—this condition is not met if an exception unreasonably deprives the copyright owner of the right to enjoy and exercise the exclusive right as fully as possible, or where it causes or could cause an unreasonable loss of income to the copyright owner. *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2003), CT-10.2; *United States—Section 110(5) of the U.S. Copyright Act*, WTO Report of the Panel, WT/DS160/R, June 15, 2000, paras. 6.177–83, 6.220–29.
 51. See, for example, the sites operated by Professor Michael Geist, <http://www.michaelgeist.ca> and <http://speakoutoncopyright.ca>; and by Howard Knopf, <http://excesscopyright.blogspot.com>. See also www.ccer.ca, "Canadian Coalition for Electronic Rights." This coalition's members include sellers of circumvention devices such as "mod chips" for video game consoles and unlocking software and services for iPhones. Not surprisingly, it advocates for no laws against circumvention of technological protection measures (TPMs) and expanding the backup exception to cover all digital products.
 52. See Brian Isaac, "Geist's Unfounded Allegation of Copyright Policy 'Recycling,'" *Hill Times*, July 6, 2009, responding to allegations that the Canadian Anti-Counterfeiting Network (CACN) recommendations for copyright reform were tainted because other Canadian business organizations had made similar recommendations.
 53. An example is the recommendation by Professor Geist and others that legal protection for TPMs be confined to prohibiting circumvention for the purposes of infringement. His recommendations for reforms are set out in note 56 below.
 54. On the lack of balance and objectivity in Professor Geist's copyright positions, see Barry B. Sookman, "TPMs: A Perfect Storm for Consumers: Replies to Professor Geist," *Canadian Journal of Law and Technology* 4 (1) (2005): 23; Barry Sookman, "Facebook Fair Copyright of Canada: Replies to Professor Geist," *Osgoode Hall Review of Law and Policy* 1 (2008): 198; Sookman, "Copyright Reform: Let the Light Shine In"; *Hill Times*, Opinion Piece, October 23, 2006; Claudette Fortier, letter to the editor, *Toronto Star*, December 6, 2004.
 55. In Canada, acts that do not infringe are sometimes metaphorically called "user rights," after being referred to as such by the Supreme Court in a leading fair-dealing copyright case: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13. This reference to users' rights was intended to emphasize that the fair-dealing defense to copyright infringement was not to be interpreted restrictively. The court's decision is otherwise clear that "fair dealing" is a defense to infringement, one that the defendant has the procedural onus of proving. It is conceptually wrong to suggest that copyright law confers on users affirmative rights to access and use works or to exercise "rights" such as a right of fair dealing. Copyright is a negative right that confers on copyright holders the power to authorize the exercise of specific rights conferred by statute. Acts that are fair dealings with works or that fall within another exception to infringement simply do not infringe an exclusive right. There is a great deal of difference between the absence of right that prevents the use or access of a work by an owner of a work and a positive right of an owner of a work to perform an act that is not within the scope of an exclusive right of a copyright owner. Users do not have positive legal rights that they can assert against others, including copyright owners, to restrain them from interfering with, or to compel them to permit, acts, uses, or means of exploiting works not covered by exclusive rights.
 56. For example, on his site <http://speakoutoncopyright.ca>, Professor Geist starts his recommendation by stating that "balance and the dangers of excessive control should stand as a starting principle for reform." He then goes on to make a series of recommendations that would neutralize the efficacy of key reforms in favor of rightsholders and focuses almost exclusively on broad new exceptions or "user rights." Here are some examples from his site and his "61 Reforms

to C-61,” <http://speakoutoncopyright.ca/61-reforms-to-c-61>. First, protect technological measures (TPMs) from circumvention only for the purpose of infringement and provide no protection for circumvention tools or services. This proposal would not comply with the requirements of the WIPO Treaties and would provide almost no protection against circumvention activities (see below). Second, permit copying of all “digital data” for back-up purposes, presumably even where the form of media used is not vulnerable to deterioration. Third, expand the format-shifting exception to apply to digital as well as analog videos and permit circumvention of TPMs, including broadcast flags to accomplish this expansion. Fourth, allow time shifting of all Internet programming streams with no time or copy limits on the time-shifting exception; for example, permit the creation of permanent libraries of content. Fifth, permit ISPs to introduce network personal video recorders (PVRs). Sixth, permit circumvention of TPMs on music for time-shifting purposes and permit making copies from CDs that are not owned by the individual. Seventh, enact a broad fair-use exception. Eighth, do not enact a notice and takedown regime. Ninth, do not implement any graduated response system.

57. On this phenomenon generally, see Idris, *Intellectual Property*, 9.
58. *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Recital 22.
59. On this issue, see Robert P. Merges, “IP Rights and ‘Creative Professionals,’” *The Media Institute*, March 25, 2009.
60. The UK government explicitly acknowledged that the high levels of digital protection for works it proposed would be beneficial to consumers. In promoting its policy of implementing a graduated response system, the government stated the following:

Implementation of the proposed policy will allow right holders to better appropriate the returns on their investment, subsequently fostering further investment in content and ensuring the long term sustainability of the industry. This will ensure that high quality and diverse content is available to consumers ...

But this is not just about taking action against consumers. Most consumers, except the minority of the anarchic or those who believe in ‘freedom to’ without its counterbalancing ‘freedom from’, who believe in unsupported rights without countervailing duties, would prefer to behave lawfully if they can do so practically and with a sense of equity. A recent study in Scandinavia has shown that the biggest users of unlawful peer-to-peer material are also the biggest paid-for consumers of music. Where there are easy, affordable and lawful routes[,] consumers will take them.

United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing*, June 16, 2009, 49, 109–10.

There is good reason to believe that Canadian practices would be the same. A survey published in *Enviroinics* in June 2008 that examined Canadians’ attitudes toward intellectual property found that the vast majority of Canadians believe that intellectual property deserves the same respect and protection as other, more tangible goods. When asked to agree or disagree that “[m]usic, videos, computer software and books are all forms of intellectual property which deserve the

same degree of protection from copyright theft as physical goods do from physical theft,” more than eight in 10 Canadians (83 percent) agreed. It found that Canadians also overwhelmingly agree that “strong patent, copyright and trademark laws are required to protect those who create intellectual property for a period of time so that they can sell or commercialize their ideas before competitors are allowed to copy their creations.” Fully nine in 10 Canadians (90 percent) supported the idea that products of the mind should be protected by such laws. In addition to creating—and enforcing—laws that protect intellectual property, a substantial majority of Canadians believe that government needs to play an active role in instilling a sense of respect for intellectual property among citizens, particularly online. Eight in 10 Canadians (82 percent) agree that “government has a responsibility to educate Canadians about the need to respect copyright laws on the Internet.”

61. A.A. Keyes et al., *Copyright in Canada: Proposals for a Revision of the Law*, Consumer and Corporate Affairs, April 1997, 146: “The sheer impact of technology is another major factor accounting for demands for further exceptions. However, technological advances that make it easier to infringe copyright should not be a rationale for legalizing or permitting what is prohibited. There is no logic, for example, in exempting payment from the use of protected works because a photocopying machine is used.”
62. See Jane C. Ginsburg, “From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law,” Columbia Law School, Public Law and Legal Theory Working Paper Group Paper Number 8, 8. Ginsburg makes the case for the right to control access to works as follows: “Even if an ‘access’ right does not precisely correspond to either of the traditional copyright rights of reproduction or public performance, it does respond to what is becoming the dominant way in which works are in fact exploited in the digital online environment. After all, there should be nothing sacred about the eighteenth- or nineteenth-century *classifications* of rights under copyright in a technological world that would have been utterly inconceivable to eighteenth-century minds. By contrast, the *justifications* offered by the Enlightenment-era framers of copyright policy should still guide us. While Madison could not have foreseen the Internet, he clearly believed that the private rights of authors furthered the general public interest in the advancement of learning, and he believed that at a time when printing presses were ‘growing much faster even than the population’ [see note 92]. As a matter of economic incentive to creativity, as well as the author’s right to the fruits of her intellectual labor, copyright should cover the actual exploitation of works of authorship. On that account, one should welcome the access right, new arrival though it might be.”
63. The proposed exceptions for Internet intermediaries that were in Bill C-61 provide a good example of this problem. The exceptions were drafted in expansive “technologically neutral” language. As a result, they might well have provided safe harbors to pirate Internet sites and services such as pirate BitTorrent sites. The “network services exception” applied to any entity providing services related to the operation of the Internet or another digital network which provided any means for the telecommunication or the reproduction of a work through the Internet or a digital network. The exception could have been relied on by any illicit P2P file-sharing service. The “information location tool exception” applied to any service provider “that

makes it possible to locate information that is available through the Internet or another digital network.” Because the exception was drafted in such broad “technologically neutral” terms, it could have been relied on by file-sharing services. In fact, isoHunt, one of Canada’s most notorious BitTorrent file-sharing services, alleged in a lawsuit brought against Canadian record companies that its services are indistinguishable from Google’s search-engine business. See also TorrentPortal, <http://www.torrentportal.com/>: “TorrentPortal is like Google™, in that it links only to .torrent metafiles and takes a cache of such files. None of the data transferred by or stored on TorrentPortal servers is content linked to by .torrent files.”

64. For example, there may be different policy objectives and implications for an exception permitting copying for format shifting of analog versus digital content; or copying TV programs on home PVRs versus network PVRs; or permitting back-up copies to be made of computer software versus other digital content such as movies, video games, or music that are licensed under a subscription-based service model that is supported by a TPM.
65. For example, the Private Copying Regime in Part VIII of the Act applies to audio-recording media, not to digital audio devices such as iPods. *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 (CA); and, under section 31 of the Act, the retransmission exception applies to cable and similar retransmitters but not new media retransmitters.
66. In naming Canada to its Special 301 Priority Watch List, the United States Trade Representative stated: “The United States continues to have serious concerns with Canada’s failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997. We urge Canada to enact legislation in the near term to strengthen its copyright laws and implement these treaties.” U.S. TR Special 301 Watch List Report (2009), 17.
67. Some countries have not yet ratified the WIPO Treaties. However, ratification should not be confused with having enacted laws necessary to ratify the treaties. For instance, while all EU member nations have enacted legislation implementing the WIPO Treaties, most have yet to officially ratify the treaties.
68. While certain distributors of music have elected to release music that is TPM free, most content distributors have not. TPMs remain a key means of protecting digital content such as music, books, movies, TV programs, and business and entertainment software. Downloading and streaming films, renting them on-line, or buying a DVD with a bonus digital copy are services made possible because of TPMs. TPMs are currently in wide use by the cultural industries, some only outside Canada. For example, music download services: Zune Marketplace, RealNetworks (Helix & Harmony, Windows Media DRM, Wal-Mart Music Downloads, Sony Online “Connect”); music download subscription services (with a monthly fee for unlimited download): Napster, Rhapsody; video streaming websites that aim to prevent making copies so they can earn ad revenues: YouTube, CinemaNow, Hulu, Netflix Watch Instantly, TV.com, U.S. TV broadcaster websites (NBC, ABC, CBS, FOX, CNN, Comedy Central, etc.) (most use a form of TPM enabled by Adobe Flash); video download or rental sites: Blockbuster Online, Amazon Video on Demand, Filmkey (for Quicktime movies); DVD copy protection: CSS; Blu-Ray copy protection: Advanced Access Content System (AACS); ringtones: Open Mobile Alliance; software copy protection: SecureROM, SafeDisc, GameShield, CD Keys/Serials, online product activation (e.g., Microsoft Genuine Advantage, often used to allow updates and patches); online gaming: subscription fees tied to a single CD Key (used in online MMORPGs such as World of Warcraft), Star craft, and Diablo; online PC gaming services: new services such as Valve Corp.’s “Steam” or Stardock’s “Impulse,” which tether downloads to an online account rather than to a particular computer or device, enabling a consumer to access games at convenient times and locations (such as when traveling); gaming consoles: all major gaming consoles (Playstation, Wii, Xbox) use some form of TPM (e.g., ROM-Mark for Playstation 3); text document copy protection: Adobe Acrobat (PDFs), Amazon Kindle, Microsoft Reader.
69. Sookman, “*TPMs: A Perfect Storm for Consumers?*” Sookman, “Facebook Fair Copyright of Canada,” 198.
70. Dr. Patricia Akester, *Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment* (University of Cambridge Faculty of Law, May 2009), 101–2. See also June Besek, “Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts,” *Columbia Journal of Law and the Arts* 27 (2004): 385, where, after a rigorous survey of the impact of anti-circumvention legislation in the United States, Professor Besek concludes that (a) “technological protections are not yet as pervasive or as intrusive as critics have feared. A host of legal, technological, and market factors work together to counter digital lockup and provide a safety valve to accommodate legitimate uses”; (b) “existing evidence does not support new statutory exemptions”; and (c) “we should allow the new types of digital deliveries that are promoted by [*Digital Millennium Copyright Act*] § 1201 the opportunity to continue to flourish.”
71. See Michael Geist, <http://speakoutoncopyright.ca>.
72. Sookman, “Facebook Fair Copyright of Canada,” 198; Heather A. Sapp, “North American Anti-circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada,” *Computer Law Review and Technology Journal* 10 (1) (2005): 9, 34–35, concludes that “the dominant view internationally is that legislation that prohibits only the circumvention of TPMs for the purpose of infringement would not be adequate and effective” and that any anti-circumvention legislation that “merely prohibits circumventing ‘copy controls’ rather than prohibiting the circumvention of ‘access controls’ and the trafficking in circumvention devices ... fails to meet the obligation under Article 11 of the WCT and Article 18 of the WPPT to provide adequate legal protection and effective legal remedies.” She also expresses the opinion that the TPM provisions in Bill C-60 would not have complied with the requirements of the WIPO Treaties. See also Mihaly Ficsor, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002), 549–50; WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO, English No. 891(E), 2004), para. CT-11.16; Michael Schlesinger, “Implementation of the WIPO Treaties beyond the U.S. and the EU,” Eleventh Annual Conference on International Intellectual Property Law and Policy, April 23, 2003, Fordham University School of Law, 12–13. Some also contend that there is international precedent among our trading partners for this form of implementation and point to Denmark. Again, this

- assertion is not accurate. Denmark protects against the circumvention of TPMs without any requirement that the purpose be to infringe copyright. See Denmark, *Consolidated Act on Copyright 2003*—Consolidated Act No. 164 of March 12, 2003.
73. Such an implementation would provide no protection against technologies such as “mod chips” that would enable pirated copies of DVDs or games to play on consoles and other digital players. It would also not protect the myriad different digital streaming, rental, and subscription-based models that depend on controlling access to meet paid-for plans.
 74. The making-available right has been used extensively in countries that have implemented the WIPO Treaties as a means of shutting down BitTorrent sites such as Pirate Bay and Finreactor. It makes proof of infringement much easier without requiring rightsholders to collect information about file-sharing activities from individuals who download infringing files.
 75. These theories have been successfully used around the world in combating illicit online file-sharing sites and services. See *MGM Studios v. Grokster* (Distributor of P2P software); *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (P2P file share service); In *Re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) (P2P file share service); *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* (with Corrigendum dated September 22, 2005) [2005] FCA 1242 (September 5, 2005), Australia (Distributor of Kazaa P2P software); *Brein v. KPN* (*dutch-torrent.org*) (Court of The Hague, January 5, 2007) Netherlands (BitTorrent site); *Brein v. Leaseweb* (Dist. Ct. Amsterdam, June 21, 2007) Netherlands (ISP that hosts BitTorrent site www.everlasting.nu); *Prosecuting Authority v. A* (the “DirectConnect” case) (Oslo Trial Court, May 27, 2005; Toslo 2004-94328) (DirectConnect file-sharing network); *TONO et al. v. Bruvik* (January 27, 2005, case no. HR-2005-00133-A), Norwegian Supreme Court, Norwegian (Napster [P2P] site); *IFPI Danmark et al. v. DMT2 A/S* (Court of Frederiksberg, Denmark, January 29, 2008, file no. FS 14324/2007), (PirateBay BitTorrent site).
 76. See note 75.
 77. Other countries are moving toward graduated response regimes through agreements between rightsholders and ISPs. In Ireland, the country’s largest ISP, Eircomm, agreed to implement graduated response as part of a settlement agreement ending an infringement suit brought by copyright owners. Japan’s four major Internet organizations, which represent about one thousand large and small domestic providers, agreed to a “graduated response” system to cut off Internet access for users who repeatedly copy music illegally online. The scheme is a voluntary agreement between the ISPs and copyright holders, with copyright holders using monitoring software to identify people who repeatedly make copies illegally and then notify the appropriate ISPs. The ISPs send warning emails to the users in question; if the illegal copying doesn’t stop after that, the providers will either temporarily disconnect these users’ Internet access or cancel their contracts altogether. The agreement was signed in March 2008. In December 2008 the U.S. recording industry announced that it was working with the attorney general of New York State and leading ISPs on a series of voluntary online anti-piracy initiatives. In a separate and parallel move, the Recording Industry Association of America (RIAA) and several leading ISPs agreed on principles under which ISPs will take responsibility to send notices and institute a program of escalating sanctions for subscribers who are repeat copyright infringers. ISPs in the United States have an incentive for a graduated response mechanism because they do not qualify for safe harbors under the *Digital Millennium Copyright Act (DMCA)* unless they have a policy to curb infringement by their subscribers and have reasonably implemented it. Singapore is also considering a graduated response system. See http://www.pcworld.com/article/170484/report_singapore_considers_three_strikes_antipiracy_law.html.
 78. Professor Geist states: “Do not establish a three-strikes and you’re out system that removes Internet access based on unproven allegations of infringement.” See <http://speakoutoncopyright.ca/my-short-answer>.
 79. United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing*, June 16, 2009; United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain—Final Report*, June 2009.
 80. New Zealand Ministry of Economic Development, “Section 92A Review Policy Proposal Document,” July 14, 2009.
 81. “Notice and notice” and “notice and takedown” are complementary methods of dealing with online file sharing. They have often been portrayed as mutually exclusive processes. They are not. Notice and notice may be somewhat useful in dealing with P2P file sharing; notice and takedown is necessary to deal with files that are hosted by the ISP.
 82. Mihaly Ficsor, *Effective Enforcements of Intellectual Property Rights*, WIPO document WIPO/IP/TIP/03/10b, describing an IIPA survey charting the system from January 1, 2001, to June 30, 2002.
 83. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (ND Cal. 2008).
 84. *Public Performance of Musical Works 1996, 1997, 1998, 2004 SCC 13* (*Tariff 22*), paras. 110, 127.
 85. Paul Chwelos, “Assessing the Economic Impacts of Copyright Reform on Internet Service Providers,” Report Prepared for Industry Canada, November 2003, 30–31: “One of the objections to the Notice and Takedown approach is that it is a ‘shoot first and ask questions later’ or ‘guilty until proven innocent’ approach that deprives alleged copyright infringers the benefit of due process and judicial oversight. The force of this argument will depend critically on the implementation of the Notice and Takedown system. For example, the US system allows an alleged infringer to file a counter-notification in order to have content reinstated after a 10-day waiting period. The waiting period allows time for the complainant to obtain a court order prior to the content being reinstated. The administrative mechanisms of notice, counter-notice, and waiting periods before takedown (if any) and reinstatement, as well as any accelerated judicial process for obtaining court orders[,] provide for many tools with which legislation can attempt to balance the rights of ISP clients and copyright holders.” “In terms of the international competitiveness of Canadian ISPs, the Notice and Takedown approach will likely put Canadian ISPs on nearly identical competitive footing to US and EU ISPs in terms of copyright liability.”
 86. *Tariff 22*, paras. 125, 127: “Under the European *E-Commerce Directive*, access to cached information must be expeditiously curtailed when the Internet Service Provider becomes aware of infringing content. At that time, the information must be removed or

- access disabled at the original site (art. 13(1)(e)). Under the U.S. *Digital Millennium Copyright Act*, those who cache information are not liable where they act expeditiously to remove or disable access to material once notice is received that it infringes copyright (s. 512(b)(2)(E)). If the content provider disputes that the work is covered by copyright, the U.S. Act lays out a procedure for the resolution of that issue.” “The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did ‘(g)ive approval to; sanction, permit; favour, encourage’ (*CCH*, para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by ‘taking it down,’ may in some circumstances lead to a finding of ‘authorization.’ However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of ‘authorization’ would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory ‘notice and takedown’ procedure as has been done in the European Community and the United States.”
87. EU Copyright Directive, Art. 8(3). In France, for example, the law on digital economy created a special injunctive relief procedure against access or hosting services (Art. 6.8). It allows a judge to take any measures to put an end to the damage caused by the content of a service. In France, rightsholders have obtained many orders from the courts requiring ISPs to terminate the accounts of infringing users.
 88. *IFPI Denmark v. DMT2* (February 5, 2008, Denmark)—Danish ISP ordered to block access to the world’s most active BitTorrent site, thepiratebay.org; *IFPI Denmark v. DMT2* (October 25, 2006, Denmark)—Danish ISP ordered to block access to the controversial Russian music downloading site AllofMP3.com; *Brein v. KPN* (Court of The Hague, January 5, 2007) Netherlands—ISP KPN ordered to cease providing connectivity services to the dutchtorrent.org site; *Brein v. Leaseweb* (Dist. Ct. Amsterdam, June 21, 2007) Netherlands—ISP ordered to cease providing connectivity to www.everlasting.nu BitTorrent website; *SABAM v. Tiscali (Scarlet)* Dist. Ct. Brussels (June 28, 2007, Belgium); also further ruling October 22, 2008, Tribunal de Première Instance de Bruxelles—Belgium ISP Scarlet compelled to install filtering software on its routers to block P2P file sharing over its networks.
 89. They also were not conditioned on ISPs having or reasonably implementing any policy to deal with repeat infringers.
 90. For example, Professor Geist says: “A more flexible fair dealing provision would address many of the current concerns associated with Canadian copyright law. By opening up fair dealing, Canadian law could ensure that user rights extend to parody and satire as well as to format shifting, time shifting (recording television shows), and device shifting. It could cover transformative works to ensure that remix creativity is adequately protected and it could ensure that the law is technologically-neutral.” See <http://speakoutoncopyright.ca/my-short-answer>.
 91. Darren Hudson Hick “Mystery and Misdirection: Some Problems of Fair Use and Users’ Rights,” Copyright Society of the U.S.A., *Journal* 56 (2009): 500.
 92. Michael J. Madison, “Rewriting Fair Use and the Future of Copyright Reform,” *Cardozo Arts and Entertainment* 23 (2005): 391.
 93. *A Charter of Rights for Creators*, October 1985, 63–66: “... fair dealing has worked well ... The Sub-Committee is of the view that [fair dealing] should be retained. It settles many potential lawsuits at an early stage. The wider approach in the United States has given rise to much litigation there, and has caused the issue to be raised as a matter of course in all copyright actions. It has created rather than curtailed the uncertainty surrounding the concept.” This recommendation was endorsed by government in the *Government Response to the Report of the Sub-Committee on the Revision of Copyright*, February 1986, paras. 82–86.
 94. Professor Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use,” *Comparative Research in Law and Political Economy* 3 (4) (2007). For example, its potential impact on the existing and future private copying regimes and on other exceptions in the Act would need to be studied.
 95. Bill C-61 would have introduced three new format and time-shifting exceptions for private uses of works: format shifting of music to permit copying of legitimately acquired music onto digital audio devices such as iPods; format shifting of books or video cassettes onto another digital medium or device; and time shifting to permit copying of TV programming and simulcasts for later listening or viewing.
 96. For example, the exception for “works available through the Internet” might have legalized copying all online works not protected by TPMs, unless the copyright owner complied with certain marking formalities. It also had no limitations on the fairness or extent of the copying. The inter-library loan exception might also have seriously undermined publishers’ electronic distribution models.



Eric J. Schwartz

A SNAPSHOT OF U.S. COPYRIGHT LAW

The dawn of the digital era—approximately 20 years ago—caused significant upheaval in the copyright regimes in every country, including the United States. The specific story of copyright revision in the United States, as in other countries, is, however, unique. This essay summarizes those changes, providing a glimpse of some of the specific features of current law as well as the challenges and shortcomings in the existing legal regime that need further review and, in some instances, revision.

In the 1970s and 1980s, well before the Internet's popular emergence, the United States engaged in a major transformation of its copyright regime in order to "harmonize" its system with international norms. This process continued with U.S. implementation of the 1996 international "digital treaties"¹ in the *Digital Millennium Copyright Act* (DMCA) of 1998²—the last major, but not the final, piece in this transformational process. While Canada today is still working its way through major revisions, including implementation of the digital treaties, the United States continues to wrestle with new issues and the application of the law to developing technologies. The goal is to foster creativity, to sustain the economic viability of our (respective) artistic, creative, and innovative communities, and to encourage and support advancements and investments in technology. In copyright law, that translates into facilitating the legal dissemination of digital material to consumers in new formats and platforms while simultaneously using efficient and effective measures to protect the rights of authors, publishers, performers, and producers.

In addition to the individual efforts under way in each country, the United States and Canada share a unique and historical bilateral relationship in the field of copyright. One such example stems from the Berne Convention, which bestows "national treatment"—the benefits of Berne rights and protections—on works first or simultaneously (within 30 days) published in a Berne country. Canada has been a member of Berne since 1928, but the United States joined only in 1989.

So, for 70 years, American authors and publishers relied on Canadian law for enhanced "international" copyright protection. Drawing on the convenience of geography, American authors and publishers routinely first or simultaneously published in Canada in order to enjoy the "back-door" benefits of Berne membership.

The bilateral copyright relationship has historically not always been smooth. Before the enactment by the U.S. Congress of the *Chace Act* in 1891, foreign (including Canadian) authors and publishers were denied protection for their published works in the United States. Similarly, U.S. authors were denied rights in Canada. Mark Twain, for example, complained of the absence of effective international protection and remedies when a Toronto publisher issued *Tom Sawyer* before the American edition was published. To combat this problem, Twain spent several weeks in Montreal in 1881 to meet a Canadian copyright residency requirement that would secure protection for *The Prince and the Pauper* and, again in 1883, to protect *Life on the Mississippi*.³

Today, the governments of Canada and the United States are embroiled in a debate about the balance and appropriate levels of protection and enforcement for hard copy and especially digital works in their respective countries, as a part of their bilateral trade policy debates.⁴ This essay briefly examines some of the key protection and enforcement mechanisms in the United States and serves also to bookmark some of the critical issues and debates currently in play, both in the United States and in Canada.

A PRIMER OF U.S. COPYRIGHT LAW

The U.S. Constitution sets out the basic parameters and the purpose for U.S. copyright law, giving an exclusive grant of rights to "authors" (not, notably, users), but only to the extent such a grant "promote[s] the progress of science."⁵ The details of U.S. copyright law are provided in statutory law (title 17 of the U.S. Code) and case law,

So long as the economic (and moral) rights of copyright creators and owners are properly calibrated with those of users, and safeguards exist to slow or prevent unauthorized dissemination of material, copyright law is fulfilling its purpose of retaining wide-scale distribution of material and enhancing the economic vitality of the creators while at the same time meeting consumer and societal needs.

as well as some additional regulatory provisions (mostly pertaining to the Copyright Office and certain rate-making proceedings). The federal law is complemented by other intellectual property laws, including federal and state trademark protections, patent law, rights of publicity and privacy, and a few state law “remnants” (i.e., not pre-empted by federal law), such as the subsisting common-law protection for sound recordings first fixed before February 15, 1972.

The laws and regulations set out the legal purpose and substance of copyright. In addition to the legal rationale, there are significant commercial contributions of the “copyright industries” to the U.S. economy.⁶ These include an impressive set of metrics on the number of jobs and the value to the economy in general, originating from the core (i.e., creating, producing, and distributing) copyright industries.⁷

But, the value of the system is also evident in myriad immeasurable ways to the culture, history, and aesthetic life of America in addition to the important contributions made to the commercial vitality of the United States (and to technological innovation).

The contribution of authors, artists, performers, producers, and publishers to the vibrancy of the U.S. cultural and entertainment environment, and of scientific and medical book and software publishers to technological advances, is as important as the economic statistics, even if it cannot be quantified. For instance, more American films and more music—whether major releases or independent material—are legally available today than at any other time in the history of recorded sound and motion

pictures. This is because of, not in spite of, copyright law, including effective and efficient licensing and enforcement schemes, which continue to develop and improve as we move past the adolescent years of the “new” digital era. For example, as rightholders understand how protections and technological measures (whether access/copy protections or now more commonly, digital rights management and watermarking) can help them develop new markets and new pricing mechanisms, they are more willing to take the financial risks necessary to get material that consumers want to the public.

Similarly, as aggregators and disseminators of legal materials understand the nature and scope of their liability and their responsibilities, they too are increasingly willing to make more products available to consumers at whatever prices the market will bear—including for “free.” There has also been an explosion of consumer use of materials, especially in the “remix culture” with “user-generated content” (UGC) material. So long as the economic (and moral) rights of copyright creators and owners are properly calibrated with those of users, and safeguards exist to slow or prevent unauthorized dissemination of material, copyright law is fulfilling its purpose of retaining wide-scale distribution of material and enhancing the economic vitality of the creators while at the same time meeting consumer and societal needs. Additionally, Congress and the U.S. Copyright Office understand that there is a vast untapped world of “orphan works” that needs to be made available to the public while simultaneously protecting the rights of any (future surfacing) authors.⁸

U.S. COPYRIGHT LAW—HIGHLIGHTS

Even after the transformation and after major movement toward harmonizing U.S. copyright law with other (especially) civil law Berne-based systems, many features of the law are unique to the U.S. legal regime. They include the highlights set out below.⁹

Termination of grants Set timetables—different for pre-1978 works or post-1977 grants—permit authors to recapture U.S. copyrights even for grants made “in perpetuity” or where contracts otherwise bar recapture. This provision, perhaps one of the strongest “pro-author” provisions in the world, gives authors of all works a “second bite at the apple” for grants they made early in their career or for a previously unappreciated and now valued work.

Exceptions to the exclusive rights of authors Explicit statutory exceptions (sections 108 to 122) run the gamut from detailed educational exemptions to special library and archive exemptions to promote preservation, security, and access for certain materials. All such exemptions are meant to be consistent with the Berne Convention’s “three-part” test.¹⁰

In addition to those exceptions, section 107 (“fair use”), enacted in the 1976 *Copyright Act*, attempted for the first time to codify 150 years of case (common) law by adopting four enumerated, but not exclusive, factors—the “purpose and character of the use”; “the nature of the copyrighted work”; “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and “the effect of the use on the potential market for or value of the copyrighted work.” Fair use is determined on a case-by-case basis, weighing those four factors without any mathematical formula. However, two of them—the transformative nature of the use¹¹ and the possible harm) have become the determining factors in a majority of cases. Fair use has not been and is not equated with personal use in the courts or in the statute, even as untested theories question whether particular uses or personal copies may or may not be fair.

Work-for-hire provisions For regular salaried employees creating works within the scope of their employment, as well as certain independent contractors, these provisions grant initial authorship and ownership in individuals (other than the creative authors), or more frequently in juridical entities such as film studios. The termination provisions noted above are not applicable to works made for hire.

The treatment of sound recordings The U.S. treatment is unique in the world because sound recordings are protected as copyrightable subject matter (since 1972), not, as in most countries, under a neighboring rights regime. However, at least for the present, rightsholders of sound recordings are not granted a full public performance right. In lieu, Congress opted to provide more limited rights relative to transmitting recordings of musical works using digital technologies.¹² Legislation is moving in the current Congress that would provide a full public performance right (at least for certain “broadcasts” of recordings). Until that legislation is enacted, the current law provides only a choice of either a statutory license (for webcasting) or an exclusive right (for interactive services), depending on the nature of the transmission.¹³ In 1998 further amendments were added to broaden and clarify these latter rights and licenses.¹⁴

Chapter 12 protections As a part of U.S. implementation of the WIPO digital treaties, Congress enacted a set of non-copyright rights and exceptions for protecting technological measures meant to prevent the unauthorized access or copying of works, as well as measures to protect copyright management information.

Rights to damages and fees Escalating statutory damages and reasonable attorney’s fees are available for qualified works and parties (which, in the case of attorney’s fees, also include defendants). These rights are tied to timely registrations with the U.S. Copyright Office—for American and foreign authors.

Indirect liability A system of indirect or third-party liability has been crafted judicially—employing vicarious, contributory, and inducement theories for those who enable, contribute to, or induce the direct infringement by others.

To facilitate widespread digital access and dissemination (the goal of the 1998 amendments), efficient and effective enforcement mechanisms have been and must be allowed to continue to develop.

Limited remedies A special statutory section adopted as part of the *DMCA* (s. 512) is devoted to limiting remedies to non-monetary damages against certain third-party infringers, such as qualified Internet Service Providers (ISPs), if they fall within one of four safe harbors.¹⁵ This section was added as a layer on top of, and without interfering with, existing third-party liability doctrines. It includes a system for notice, takedown, and put-back procedures.

CURRENT CHALLENGES AND ISSUES

During the past 20 years, the United States has generally kept pace with advancements and revisions meant to improve and “harmonize” rights and remedies internationally.¹⁶ The last major revision to U.S. law, as noted, was in 1998 with substantial amendments for WIPO digital treaty accession. Since then, the convergence of technological advancements has improved both the access and the delivery of copyright material while simultaneously challenging enforcement.

Without question, the major dilemma for rights-holders during the past decade has been twofold: first, enforcement against digital (and hard-copy) piracy, especially organized criminal syndicates, as well as curbing peer-to-peer (P2P) illegal file sharing; and, second, the launch of multiple new legal digital delivery systems and market ideas for streaming, tethering, and/or downloading material.

There are several other significant challenges in the immediate future.

Enumeration of Rights

The eroding, conflating, or confusing enumeration of rights has been driven by a series of court cases that have defined (or redefined) exclusive rights. The licensing of works is dependent on a clear delineation of rights, since licenses and

licensing participants—such as performing rights societies—are limited to one or another exclusive right (often by court order or other legal authority, or for the economic viability of the license). The same is true for the enforcement of rights. Recent cases have questioned the scope and viability of the reproduction right, especially as it pertains to temporary and buffer copies; the public performance right; the making-available right; the adaptation right (in the context of the far reaches of fair use and transformative uses and purposes); and the public display right.

Right of Communication to the Public

Unlike other countries that have an explicit “right of communication” or “making available” to members of the public, the United States’ “bundle of rights” has melded the distribution right with the public performance and display rights, providing all the component rights under the “umbrella” of a communication and making-available right.¹⁷ The U.S. Congress made this decision as part of the implementation of the WIPO digital treaties—that is, not to change this formulation. However, U.S. case law remains unclear as to whether and how the enumerated rights can be construed to that effect.

Copyright owners enjoy the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹⁸ This distribution right allows an author to control the “publication” of copies and, in some cases, the offering of copies to the public.¹⁹ However, U.S. courts have struggled to apply this right to making digital copies available online to the public,²⁰ or more accurately, have struggled to find the requisite level of proof when a digital copy of a work has been made available, such as on a peer-to-peer network, but has not clearly been or proven to have been accessed (referred to as a “deemed” or implied distribution).²¹

Public Performance Right

The *Copyright Act* defines to “perform” and to perform “publicly,” whether by direct or indirect performance, including in the latter instance by transmitting or otherwise communicating a performance to distant recipients (in time and place).²² One court badly misconstrued the definitions to find that the “transmission” clause did not necessarily apply to a service whose technology remotely makes and stores copies of televised works for each of its subscribers and then plays the copies back via cable on each subscriber’s demand, effectively redisseminating the works to thousands of viewers in their homes.²³ The case, albeit in only one appellate circuit, could potentially jeopardize the development of pay-per-view and other on-demand delivery systems of material.

Reproduction Right and Temporary Copies

The definition of “copies” and “phonorecords” requires that a reproduction—one of the enumerated rights—results in embodiments fixed “for a period of more than transitory duration.”²⁴ Many cases over the years have noted that copies fixed in RAM are sufficiently permanent to meet this test.²⁵ In 2008 one influential court found that a 1.2-second buffer copy was not fixed for “more than transitory duration,” even though the entire work could be viewed by cable subscribers from that buffer copy.²⁶ This holding has been criticized for incorrectly applying the criterion of “more than transitory duration” to the buffer copy rather than to the work itself.²⁷ Supporters of the holding argue hyperbolically that to find otherwise could result in a cause of action for infringement for every buffer copy. Lost in that argument, and the similar arguments that consider other temporary and buffer copies, is the notion that many such copies, while technically “reproductions” by definition, will not result in any additional payments or liability, either because existing licensing schemes cover them—in the payments for the economically viable permanent copies, or for the transmissions that result without permanent copies—or because certain specific copies are either impliedly licensed or “fair” uses.

Display Right

The display right complements and partially overlaps the related performance right, but it differs in that “the owner

of a particular copy lawfully made ... is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.”²⁸

Some courts have struggled with the application of the display right in Internet contexts. One court, for example, created a “server test” to apply to the display right, requiring that, to find infringement of the display right, a service had to host the copy on its server; conversely, it also found that a service whose computers do not “store” the work “cannot communicate a copy” of it.²⁹ This test suggests that, unless an unauthorized copy of the work is first made on the server (i.e., a reproduction), the display right cannot be invoked, raising the question of how in the digital context the display right can ever stand on its own independent of the reproduction right.

Adoption of Efficient and Effective Enforcement Mechanisms

To facilitate widespread digital access and dissemination (the goal of the 1998 amendments), efficient and effective enforcement mechanisms have been and must be allowed to continue to develop. This issue has been at the fore of rightsholders’ requests for hard-copy and digital enforcement, both with the expansion of copyright “internationally” in the 1980s in hard copy and for the digital era since the 1990s. Discussions of ISP liability have been joined with discussions of ISP (and rightsholders’) responsibilities and cooperative agreements. Much is being done—some out of the spotlight of public policy debate—to develop and enhance meaningful cooperation. However, some of the cases and some of the disseminators and ISPs have resisted undertaking steps to ensure basic copyright protections and instead insist that the burden be placed solely on rightsholders, rather than shared. This resistance is unfortunate, since cooperation among creators, publishers, producers, and distributors will best facilitate the delivery of materials to the demanding public. Some countries are moving toward government-mandated “graduated responses” by ISPs (and others) against recidivist infringers. Because the United States moved more quickly than many others—in 1998—to adopt a system of digital responsibility and enforcement, it has resisted changing

Cooperation among creators, publishers, producers, and distributors will best facilitate the delivery of materials to the demanding public.

the existing public law enforcement regime (the existing *DMCA* requirements and exceptions). Instead, the U.S. government—spanning several administrations—and Congress have encouraged the development of private rather than publicly mandated responses to new technological advances and enforcement challenges while at the same time supporting and enhancing the resources available for civil and criminal action.³⁰

The *DMCA*: Summary

The *DMCA* was the result of complex multi-year negotiations between (and among) rightsholder groups, libraries and archives, and disseminators of material, including the ISPs. The Act added provisions (in a new Chapter 12) to U.S. copyright law which impose liability on parties implicated in circumventing or otherwise interfering with two distinct types of measures intended to help protect or exploit copyright: technological measures to control access to or the copying of works, and technical measures for copyright-management information.³¹

The provisions include specific rights and seven exceptions, with respect to the act of circumventing a technological measure that effectively controls “access” to a work. Separately, the rights and five of the exceptions apply to those who “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof” that effectively controls access to a work.³² Finally, the rights and two

exceptions apply to those who “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof” that effectively protects a right of a copyright owner, such as a copy-control device.³³

DMCA Safe Harbors and Notice and Takedown

In addition to the existing case law on direct and third-party liability, which was left intact, Congress created four “safe harbors” to limit copyright remedies against online-service providers in specific instances.³⁴ These safe harbors, with one exception (for educational institutions),³⁵ provide immunity from damages or other monetary relief for copyright infringement for qualified service providers. These provisions are designed to impose shared responsibility and to encourage cooperation among copyright owners and service providers, notably by the use of “notice and takedown” procedures, as well as to protect users, with generous counter-notification and “put-back” provisions for purportedly wrongly undertaken takedowns.

The four types of activities/situations that are eligible for the safe harbors are (1) the passive-carrier conduits where a service provider is merely providing a conduit for the transmission or routing of infringing material, including copies automatically made in the course of the transmission; (2) system caching, whereby the service provider automatically makes and retains copies of the material—for example, of frequently visited remote websites, purely to improve network performance and reduce congestion for users, and it generally respects the technological and access parameters set by the site operator; (3) user postings, where, without receiving a direct financial benefit, the service provider gives access to infringing material posted on its system by a user—for example, by storing the material on its site at the direction of a user without knowledge of the material’s infringing nature;³⁶ and (4) information location tools, where the service provider furnishes these tools, such as a hyperlink, directory, or pointer, which facilitate access to infringing material, without knowledge of the material’s infringing nature,³⁷ even if it is posted outside its system.

For the second, third, and fourth safe harbors, the limitation on liability is subject to the service provider implementing on notification an appropriate response



mechanism to take down or cut off access to the infringing material. A service provider must also meet two threshold conditions in order to benefit from the limitations on remedies in all four situations: it must have a policy in place and made known to subscribers to terminate subscribers, notably “repeat infringers,” in appropriate circumstances; and it must accommodate and not interfere with “standard technical measures.”³⁸

Under any of the four situations above, a qualified service provider is not liable for monetary relief but can be subject to limited injunctive or other equitable relief. In short, the notice and takedown provisions have developed as a “self-help” remedy for copyright owners to have materials taken down or to stop access to them. The provisions have their limits and are certainly not without problems, but they have been successful against certain types of unauthorized online activity.

Third-Party Liability

The courts have developed a set of criteria for attributing liability—“third-party liability”—to parties who are only indirectly implicated in acts of copyright infringement. There are essentially three forms of third-party liability, which are not mutually exclusive: vicarious liability; con-

tributory liability; and inducement (considered by some commentators as technically a subcategory of contributory liability).

Vicarious liability has two elements: that a defendant exercises a certain degree of control over the direct infringer; and that he derives a direct financial benefit from the direct infringement. There is no required knowledge of the risk of infringement.³⁹ Contributory liability entails the defendant’s contribution of machinery, devices, or goods used to infringe, along with knowledge of infringement.⁴⁰ Inducement, like (or as part of) contributory infringement, adds to the liability mix the defendant’s explicit activities that induce illegal conduct by the direct infringers.⁴¹

The key question for digital dissemination is how, if at all, a particular product or service provider actively or knowingly facilitates or induces infringement. Since the Supreme Court case in *Grokster*, lower courts have clarified the criteria for imputing indirect liability.⁴² In short, perhaps the best summation of the current test may be the “simple-measures” formulation set out in the *Perfect 10* case—which would mean that, as technologies develop and it is easier and less expensive to do so, the liability, and thus the burden on ISPs, may properly intensify to stop or slow infringing activity.⁴³

CONCLUSION

In sum, in the United States, the challenges of meeting the twin goals of facilitating the legal dissemination of more material to consumers while at the same time protecting the rights of copyright authors and owners have three requirements. First, correctly re-calibrating and enumerating the rights, and thereby facilitating licenses (and enforcement), which will in a cost-effective way allow for the delivery of legal material to consumers while allowing authors and owners to be fairly compensated. Second, encouraging the proper mix of cooperation, legal responsibility, and active participation by and between disseminators—including ISPs—and rightsholders of copyright material. Third, providing the proper resources—including, as needed, government resources, educational efforts, and participation—to meet these laudable goals.

NOTES

1. The World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—in force in 2002.
2. Pub. L. No. 105-304.
3. R. Kent Rasmussen, *Mark Twain A–Z: The Essential Reference to His Life and Writings* (New York: Oxford University Press, 1996), 54.
4. See Office of the U.S. Trade Representative (USTR) Press Release, April 30, 2009: “Canada is being elevated to the Priority Watch List for the first time, reflecting increasing concern about the continuing need for copyright reform, as well as continuing concern about weak border enforcement.” See also USTR’s Special 301 Report, issued April 30, 2009, at www.ustr.gov: “The United States continues to have serious concerns with Canada’s failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997. We urge Canada to enact legislation in the near term to strengthen its copyright laws and implement these treaties. The United States also continues to urge Canada to improve its IPR [intellectual property rights] enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the volume of infringing products transshipped and transiting through Canada. Canada’s weak border measures continue to be a serious concern for IP owners. The United States hopes that Canada will implement legislative changes to provide a stronger border enforcement system by giving its customs officers the authority to seize products suspected of being pirated or counterfeit without the need for a court order. The provision of additional resources and training to customs officers and domestic law enforcement personnel would enhance IPR enforcement.” The Canadian government did not issue a public rebuttal statement.
5. U.S. Const., art. I, § 8, cl. 8. The reference to “science” is for *scientia*—from the Latin, meaning “knowledge.”
6. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2003–2007 Report* (released July 20, 2009), prepared for the International Intellectual Property Alliance (IIPA). The methodology employed in this report has been adopted by the WIPO Secretariat for the preparation of studies in other countries to show the value of the (local) copyright industries to local economies.
7. The statistics in the report prepared by Siwek, *Copyright Industries in the U.S. Economy*, are based on U.S. Department of Commerce and Department of Labor information. The report shows that the core copyright industries employed nearly 5.6 million workers in 2007 (the last year of available Commerce raw data)—4.05 percent of the U.S. workforce. That year, 11.7 million people were employed by the total copyright industries, or 8.51 percent of the U.S. workforce. The annual 2007 compensation paid to core copyright workers exceeded the average annual compensation paid to all U.S. workers by 30 percent. In 2004 through 2007, the real annual growth rates achieved by both the core and the total copyright industries were more than twice the real growth rates achieved by the U.S. economy as a whole. In 2007 the value added by the core copyright industries was \$889.1 billion, approximately 6.44 percent of U.S. gross domestic product (GDP). In addition, sales of U.S. copyright products continue to expand in overseas markets, exceeding foreign sales of other U.S. industries, including aircraft, automobiles, agricultural products, food, and pharmaceuticals.
8. See U.S. Copyright Office, *Report on Orphan Works* (2006). Orphan-works legislation has, so far, stalled in Congress. Separately, a legal dispute among authors, publishers, and Google over the Google Book Search Project was settled in October 2008. That project entails Google’s unauthorized scanning (digitization) of the content of several major research libraries, including in-print, out-of-print, and orphan-works material, and the possible dissemination of that material to the public. Google and the parties announced a settlement to the dispute in 2008 and are awaiting judicial approval for the terms of that settlement. A “fairness hearing” in federal court to review and possibly approve the settlement is set for October 7, 2009. See Google Book Settlement, <http://www.googlebooksettlement.com/agreement.html>.
9. The most significant overhaul of U.S. law, the adoption of the 1976 Act, was an effort that took 21 years for Congress to complete. Before that Act went into force on January 1, 1978, copyright in the United States consisted of a bifurcated federal (published) and state (unpublished) system. The pre-1978 law included a step-over-the-transom feature from unpublished to published (referred to as “copyrighted”) works, dependent on first publication with proper copyright notice as well as timely registrations and renewals. Beginning in 1978, and with the removal of a few lingering formalities as of March 1, 1989—the date of U.S. ratification of the Berne Convention—the United States joined the rest of the world with a formality-free system that grants authors and owners rights at the moment of fixation (i.e., creation in a tangible form) of their works. The U.S. enforcement regime includes a panoply of civil, equitable, and criminal remedies. The transition from the “old” to the “new” system also meant that the United States abandoned its unique (pre-1978) copyright terms of 28 years, with renewable 28-year

- terms (later, 47- and then 67-year terms). The United States did not adopt the 1948 Berne-minima life plus 50-year term until the 1976 Act, and then was slow to extend that term to the current life plus 70-year term now in place in more than 70 countries. U.S. term extension was adopted in 1998 only after, and in large measure as a response to, other trading partners, such as the European Union. The United States was, however, one of the first countries to implement (in 1998, with the *DMCA*) and ratify (in 1999) the WIPO digital treaties—which came into force in 2002—once 30 countries had ratified them.
10. Under the three-part test, limitations and exceptions to author's rights are confined to "certain special cases," provided that any such use "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (Paris Text 1971, as amended September 28, 1979), 828 UNTS 221, art. 9(2); see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), April 1, 1994, 33 ILM 81, art. 13; WIPO Copyright Treaty (WCT), December 20, 1996, 36 ILM 65, art. 10; WIPO Performances and Phonograms Treaty (WPPT), December 20, 1996, 36 ILM 76, art. 16.
 11. Copyright owners have the exclusive right "to prepare derivative works based on the copyrighted work"; 17 USC § 106(2). Thus, the first fair-use factor has raised questions about the appropriate boundaries between a user's transformative rights and the copyright author's adaptation right.
 12. See *Digital Performance Right in Sound Recordings Act* of 1995, Pub. L. No. 104-39, § 6, 109 Stat. 336. That Act also amended the compulsory "mechanical" license for digital downloads ("digital phonorecord deliveries"), which is used to license downloads on services such as iTunes and similar web-based sources.
 13. 17 USC §§ 106(6) and 114.
 14. Pub. L. No. 105-304, tit. IV, 112 Stat. 2860, 2887-2904.
 15. See the sections on the *DMCA* below.
 16. The brief history of U.S. copyright reform is as follows: two major reforms in the last century—the *Copyright Act* of 1909 and the *Copyright Act* of 1976—the latter referred to as the "current" law, which became effective on January 1, 1978. See Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541. The *Berne Convention Implementation Act* of 1988 (in force, March 1, 1989), Pub. L. No. 100-568, 102 Stat. 2853, which modified the 1976 Act in several aspects to harmonize the law with the requirements of the Berne Convention. The *North American Free Trade Agreement Implementation Act* of 1993, Pub. L. No. 103-182, 107 Stat. 2057 (1993), and the *Uruguay Round Agreements Act* of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994), implementing the copyright provisions of NAFTA and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), respectively. The *Digital Millennium Copyright Act* of 1998, Pub. L. No. 105-304, 112 Stat. 2860, which implemented the WCT and WPPT, as well as introducing significant additional provisions pertaining to online-service provider liability and other Internet issues that were not treaty obligations.
 17. The U.S. Register of Copyrights explained in testimony to Congress that under U.S. law, "making [a work] available for other users of [a] peer to peer network to download ... constitutes an infringement of the exclusive distribution right." Letter from Marybeth Peters to Rep. Howard L. Berman (September 25, 2002), reprinted in *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 114–15 (2002). See also Statement of Marybeth Peters, Register of Copyrights, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 & H.R. 2180 before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 43 (1997) (assuring Congress before the ratification of the WIPO digital treaties that there was "no need to alter the nature and scope of the copyrights and exceptions, or change the substantive balance of rights embodied in the Copyright Act" in order to provide a making-available right); see also World Intellectual Property Organization, *Guide to the Copyright and Related Rights Treaties Administered by WIPO 209* (2003), guidebook author Dr. Mihaly Ficsor, former assistant director general of WIPO, explaining the "umbrella solution" adopted in the digital treaties conference to encompass the different approaches to treaty compliance under common law (the distribution right) and civil law (the right of communication to the public).
 18. 17 USC § 106(3).
 19. See 17 USC § 101 (definition of "publication"). In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203–5 (4th Cir. 1997), the court found that "a library distributes a published work, within the meaning of the Copyright Act [cite omitted] when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public."
 20. In *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1014 (9th Cir. 2001), the court found that "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." In *Elektra Entmt' Group. v. Barker*, 551 F. Supp. 2d 234, 243–46 (SDNY 2008), the court refused to apply a "contourless 'make available' right" in itself, absent an offer "to distribute ... to a group of persons for purposes of further distribution, public performance, or public display." In *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981–85 (D. Ariz. 2008), citing other similar decisions, the court said it would require an "actual dissemination" to find a violation of the distribution right.
 21. It has been suggested that the evidentiary treatment of the right of distribution and "making available" needs to catch up to the reproduction right, which accepts circumstantial proof. See Robert Kasunic, "Making Circumstantial Proof of Distribution Available," *Fordham Intellectual Property Media & Entertainment Law Journal* 18 (2008): 1145.
 22. 17 USC § 101 (definitions).
 23. In *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 137 (2d Cir. 2008), *cert. denied*, No. 08-448, 2009 U.S. LEXIS 4828 (June 29, 2009), the court said that the "transmit" clause requires an examination of "the potential audience of a given transmission ... to determine whether that transmission is 'to the public.'"
 24. 17 USC § 101.
 25. See, for example, *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (finding an infringing act of reproduction by the loading of a program into a computer's central processing unit).

26. In *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129–30 (2d Cir. 2008), *cert. denied*, No. 08-448, 2009 U.S. LEXIS 4828 (June 29, 2009).
27. See Jane C. Ginsburg, “Recent Developments in U.S. Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?” *Revue Internationale du Droit d’Auteur* (2009), noting that the Second Circuit’s reading “is dubious both grammatically and as a matter of common sense.”
28. 17 USC § 109(c).
29. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159–60 (9th Cir. 2007).
30. *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, Pub. L. 110-403.
31. 17 USC §§ 1201 (anti-circumvention), 1202 (copyright-management information).
32. 17 USC § 1201(a)(2).
33. 17 USC § 1201(b)(1).
34. 17 USC § 512.
35. 17 U.S.C. § 512(e).
36. In *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. CV 07-7544, 2008 U.S. Dist. LEXIS 104980, at *18-32 (CD Cal. December 29, 2008), the court interpreted the language “by reason of the storage at the direction of a user” to cover and therefore shield four software functions created by an online video service for its users, where the service’s software automatically converted the format of video files, created copies of these files, allowed users to access these files by streaming, and allowed users to download the files.
37. A service provider cannot have actual or constructive knowledge of infringement. The legislative history to the *DMCA* refers to constructive knowledge as “red-flag” knowledge. One court set a high threshold for what constitutes a red flag: in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114–15 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 709 (2007), the court said there is no burden on a service provider to determine “whether photographs are actually illegal” or whether websites with names such as “illegal.net” make infringement apparent because such websites could be “a hoax, or out of date.”
38. 17 USC § 512(i).
39. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 709 (2007).
40. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
41. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2780 (2005): “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”
42. In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172–74, *reh’g en banc denied*, No. 06-55405 (9th Cir. December 10, 2007), the court said a defendant could be held contributorily liable for a search engine “if it had knowledge that infringing ... images were available using its search engine, could take simple measures to prevent further damage ... and failed to take such steps.” The court, however, found no vicarious liability because the defendant had no ability or obligation to police the Internet for infringing images—said additionally, it “lacks the practical ability to police third-party websites” absent “image-recognition technology.” In *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 797, *reh’g and reh’g en banc denied*, No. 05-15170 (9th Cir. October 7, 2007), *cert. denied*, 128 S. Ct. 2871 (2008), the court found that credit card companies servicing illegal website purchases were neither contributorily nor vicariously liable because there is “an additional step in the causal chain” that is absent for search engines as in *Amazon.com*.
43. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172–74, *reh’g en banc denied*, No. 06-55405 (9th Cir. December 10, 2007).

BARRY SOOKMAN'S RESPONSE TO ERIC SCHWARTZ

Eric Schwartz's opinion essay, "A Snapshot of U.S. Copyright Law," shows how digital technological changes in the United States are posing challenges to U.S. copyright laws. Although Canadian copyright law has not been amended to deal with digital issues, Canadian courts and tribunals have also had to face the challenges of copyright issues arising from the Internet and the digitization of copyrighted material.

A PRIMER OF CANADIAN COPYRIGHT LAW: SOME COMPARATIVE DIFFERENCES

The Canadian Constitution grants the federal government jurisdiction with respect to copyright matters.¹ However, unlike the U.S. Constitution, there is nothing in the Canadian Constitution that sets out the objectives of copyright. In particular, there is no general principle stating that its purpose is to promote the progress of science and the useful arts, as there is in the U.S. Constitution.

Canadian courts have, over time, fashioned their own guiding principles for copyright law. For more than a century, copyright was intended to reward authors and protect them against the unfair appropriation of their labors.² More recently, the Supreme Court of Canada has stressed that copyright law had two aims: first, to achieve a balance between protecting authors and ensuring that they are rewarded for their original creations; and, second, to promote the dissemination of culture.³ However, there is nothing to suggest which of the two principles prevails in the event of a conflict, as there is in some U.S. jurisprudence.⁴

Canada's copyright law is also different from U.S. law in a number of important respects. For example, there is no generally applicable exception for "fair use." Rather, the Canadian tradition has been to enact specific exceptions following the model of the three-step test mandated by the Berne Convention, TRIPS, NAFTA, and other inter-

national conventions. In this regard, Canada's approach to exceptions is similar to almost all of Canada's major trading partners other than the United States, including Australia, New Zealand, and member states of the European Union. However, Canada has not yet enacted legislation to implement the WIPO Treaties. Nor has it implemented legislation to exempt Internet intermediaries such as ISPs, as the United States has done in the *Digital Millennium Copyright Act (DMCA)*.

As Schwartz points out, the United States has a judicially crafted set of secondary liability principles that can impose liability on third parties based on vicarious liability, contributory liability, and inducement theories. Canada has a very weak set of secondary liability principles related to copyright. The Commonwealth has authorities that impose liability for inducing infringement, or where parties act together pursuant to a common design to infringe copyright, but it is not clear whether these principles apply to copyright in Canada.⁵ Canada has no developed copyright law related to contributory infringement. Secondary principles of liability are essential to enable rightsholders to pursue entities that materially induce and contribute to widespread infringement on the Internet. The absence of any developed secondary liability theories in Canada is a significant gap in Canadian copyright law.

CURRENT CHALLENGES AND ISSUES

Schwartz's conclusion that "the major dilemma for rightsholders during the past decade has been ... enforcement against digital (and hardcopy) piracy ... as well as curbing peer-to-peer (P2P) illegal file sharing" is equally applicable in Canada, where there is also considerable digital piracy and illegal peer-to-peer file sharing. This activity undermines legitimate markets for digital products and is a major challenge for the creative industries in Canada.

ENUMERATION OF RIGHTS

Distribution Right

The Canadian *Copyright Act* does not contain a distribution right such as exists in the U.S. *Copyright Act*. A distribution right will have to be enacted if Canada seeks to ratify the WIPO Treaties. Bill C-61 did include a proposed distribution right, but it was limited to distribution of “a tangible object.” As such, it is unlikely that this right would have provided any protection for the distribution of intangible copies over the Internet (such as MP3 files). The proposed new right was not drafted in a technologically neutral manner so as to provide rightsholders with protection in both on-line and off-line activities.

As a Canadian looking at the U.S. jurisprudence interpreting the distribution right, I cannot help but wonder how some U.S. courts decided that the distribution right is satisfied only where there is evidence of a transmission of copies. The United States chose to implement the WIPO Treaties through the distribution and public performance rights. In Canada, courts strive to interpret copyright legislation so as to ensure that Canadian copyright laws are construed to be consistent with Canada’s treaty obligations.⁶ It is therefore surprising that a U.S. court would refuse to interpret the distribution right in a way that would enable the United States to meet its treaty obligations with respect to the making-available right under the WIPO Treaties.⁷ It might well be argued that, under this ruling, the United States is not compliant with the WIPO Treaties, which expressly require a “making-available right.”

Right of Communication to the Public

Schwartz points out that, in the United States, there have been difficulties in the enumeration of rights in the digital environment. Canada has had the same challenges. Recently, the Canadian Federal Court of Appeal held that the right to communicate a work to the public included both the communication of performances of a work (a stream) as well as the transmission of reproductions of a work. The decision held that the transmission of a ringtone by a mobile carrier to individuals constituted a communication to the public.⁸ As any such transmission

Although Canadian copyright law has not been amended to deal with digital issues, Canadian courts and tribunals have also had to face the challenges of copyright issues arising from the Internet and the digitization of copyrighted material.

would also be a reproduction, the court, in effect, created a set of overlapping rights that applies on the Internet.

In the same case, the Federal Court of Appeal also held that, when a mobile carrier transmits ringtones to members of the public in response to individual orders, such transmissions constituted communications that are “to the public.”⁹ This finding may well be inconsistent with the decision of the Second Circuit in the Cablevision case, which, as Schwartz points out, held that the on-demand services of cable companies operating remote personal video recorders (PVRs) did not constitute a public performance.¹⁰

Reproduction Right and Temporary Copies

Schwartz states that, in the Cablevision case, the Second Circuit Court of Appeal held that a 1.2-second buffer copy was not sufficient to result in a reproduction. In a recent tariff proceeding concerning Satellite Radio, the Canadian Copyright Board came to precisely the same conclusion. It considered whether buffer copies made in the receipt of a satellite transmission constituted a reproduction under the *Copyright Act*. The board determined that these transitory copies were not infringements.¹¹

Display Right

Canada has no express right of public display. Displays of works originating from the Internet would be assessed under the communication-to-the-public right.

SUMMARY

In summary, recent advances in technology have posed challenges to copyright. These challenges are evident in issues that U.S. courts have confronted. These same issues have also been confronted in Canada. Interestingly, there are both similarities and divergences in the way U.S. and Canadian courts have approached these issues. It is certain, however, that the rapid changes in technology and globalization will pose future common challenges that both countries will have to address.

NOTES

1. *The Constitution Act, 1867*, s. 91(23).
2. *Bishop v. Stevens*, [1990] 2 SCR 467, 478: “[T]he Copyright Act ... was passed with a single object, namely, the benefit of authors of all kinds”; *Vigneux v. Canadian Performing Rights Society*, [1943] SCR 348, reversed [1945] AC 108 (Canada PC), 353–54: Justice Duff stated that the purpose of copyright is to prevent persons from “unfairly availing themselves of the work of others” and that the “protection of authors ... is the object to be attained by all patent and copyright laws.”
3. *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, 2002 SCC 34, para. 30; repeated in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13, para. 10: “The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”
4. See *Eldred v. Ashcroft*, 123 S.Ct 769 (U.S. Sup. Ct. 2003), per Ginsberg J, FN18: “JUSTICE STEVENS’ characterization of reward to the author as ‘a secondary consideration’ of copyright law ... understates the relationship between such rewards and the ‘Progress of Science.’ As we have explained, ‘[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.’ ... Accordingly, copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. ... The profit motive is the engine that ensures the progress of science. ... Rewarding authors for their creative labor and ‘promot[ing] ... Progress’ are thus complementary ... Justice BREYER’s assertion that ‘copyright statutes must serve public, not private, ends’ ... similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.”
5. *CBS Songs Ltd. v. Amstrad Plc*, [1988] 2 All ER 484 at 495 (HL).
6. See *SOCAN v. Canadian Association of Internet Providers*, 2004 SCC 45, paras. 54–78, 149–50; *Composers, Authors and Publishers Assoc. of Canada Limited v. CTV Television Network Limited et al.*, [1968] SCR 676.
7. *Capitol Records Inc. v. Thomas*, 579 F.Supp.2d 1210 (D. Minn., 2008), 1226: “The Court acknowledges that past Presidents, Congresses, and the Register of Copyrights have indicated their belief that the Copyright Act implements WIPO’s make-available right. The Court also acknowledges that, given multiple reasonable constructions of U.S. law, the Charming Betsy doctrine directs the Court to adopt the reasonable construction that is consistent with the United States’ international obligations. However, after reviewing the Copyright Act itself, legislative history, binding Supreme Court and Eighth Circuit precedent, and an extensive body of case law examining the Copyright Act, the Court concludes that Plaintiffs’ interpretation of the distribution right is simply not reasonable.”
8. *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 FCR 539, para. 19: “The wireless transmission of a musical ringtone to a cellphone is a communication, whether the owner of the cellphone accesses it immediately in order to hear the music, or at some later time. The fact that the technology used for the transmission does not permit the cellphone owner to listen to the music during the transmission does not mean that there is no communication. In my view, in the context of a wireless transmission, it is the receipt of the transmission that completes the communication.”
9. *Ibid.*, 43: “In my view, the conclusion of the Copyright Board that the transmissions in issue in this case are within the scope of paragraph 3(1)(f) of the Copyright Act is consistent with the language of that provision and its context. It also accords with common sense. If a wireless carrier were to transmit a particular ringtone simultaneously to all customers who have requested it, that transmission would be a communication to the public. It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times.”
10. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2nd Cir. 2008).
11. *Satellite Radio Services, SOCAN (2005–2009), NRCC (2007–2010), CSI (2006–2009)*, Copyright Board decision of April 8, 2009, paras. 97, 98: “The rolling 4 to 6 seconds of a musical work is not an aggregate of an entire work. At no time does a subscriber possess a series of 4 to 6 second clips which when taken together would constitute a substantial part of the work. It matters not that over time the totality of all works transmitted are reproduced. We are dealing with a rolling buffer and at no time can we line up all of the fragmented copies amounting to one complete copy of a musical work. At no point in time can one extract from the RAM of the receiver more than 4 to 6 seconds of a song (or more accurately of a signal). More importantly, at no time is there a choice as to what goes in there or when it comes out. In our opinion, the 4 to 6 second buffer fails to satisfy the substantiality requirement. It is not a substantial part of the protected work.”

ERIC J. SCHWARTZ'S RESPONSE TO BARRY SOOKMAN

In his essay on the current Canadian copyright regime, Barry Sookman proposes “a series of principles and specific recommendations” for intellectual property rights (IPR) reform in Canada which, if enacted—consistent with the international trends—would benefit the consuming public as well as the creators and producers of copyright material. I concur with his principles and recommendations: improved copyright regimes will provide a full range of benefits to local economies and societies. In addition, I will offer some additional comments here on copyright reform in Canada and the United States.

Given that the Canadian government has, since 1997, recognized the need for major reform and that Canada has pledged—in bilateral and multilateral fora¹—to modernize its law, including the necessity to accede to and fully implement the 1996 WIPO digital treaties, it seems that Canada is overdue for such reform. Further, as noted by Sookman, peer-to-peer (P2P) and other forms of digital piracy in Canada are a major problem that can be addressed only by improved protections and enforcement.² Piracy rates there exceed those of other developed countries—the rate for computer software, for example, is 12 percent higher than in the United States, while that for entertainment (videogame) software is double the U.S. average. There are also particular problems in Canada, such as the high rates of Internet piracy, which are causing severe harm to the burgeoning legal markets for the motion picture, recording, music publishing, business and entertainment software, and book-publishing industries. One unique example in Canada is the prevalence of “mod chips” created and distributed by organized crime syndicates which, in the absence of the technological protection measures required by the WIPO digital treaties, particularly hurt Canadian and other markets for entertainment software.³ Effective technological protection measures and deterrent criminal penalties are essential to address this problem.

All in all, the Canadian experience—like the American over a decade ago—is an acknowledgement of the need to accede to and implement the WIPO digital treaties, yet it is stalled on the details and debate over how to implement those treaties fully. However, there is more urgency in Canada because of growing Internet piracy and the related serious problems detailed by Sookman which have resulted from the delay and ongoing technological advancements. The implementation of the digital treaties, as in other developed and developing countries (more than 70 countries are now member states), will encourage investment and economic growth as well as facilitate the creation and dissemination of copyrighted works for all the stated societal benefits—in the sciences and the arts, and for general entertainment purposes. In addition, as Mr. Sookman notes, the development of effective and comprehensive copyright regimes is not a “zero-sum” game, such that every benefit granted to an author or producer somehow results in a net loss for consumers or the advancement of technology. In fact, the opposite is true: well-developed copyright regimes provide mutual benefits for consumers, educational institutions, and researchers and advance technology, as well as benefiting authors, performers, producers, and publishers.

A few particular issues in Sookman's essay highlight the similarities in structure and the harmonization of “needs” in the United States and Canada, as seen in the context of the growing international “norms” for copyright protection and enforcement:

- 1) Notice and takedown tools have proved to be effective and, if properly implemented, efficient against some forms of Internet piracy, especially when combined with policies to impose deterrent penalties on repeat infringers. Sookman cites the recent UK study which found that warning notification emails alone could persuade as many as 33 percent

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of downloaders to cease their activity, and that sanctions could stop as many as 70–80 percent of such activities.⁴

- 2) Effective technological protection measures (TPMs) are important (and treaty-required) enforcement tools to manage access to works and to prevent the unauthorized copying or other exploitation of works. More recently, TPMs and digital rights management (including watermarking) have proven to be critical components for the licensing of copyright materials on the Internet and in new digital markets, allowing more works to be made available to the public and at prices the market will bear (including, in some instances, “free” access). Canada has yet to implement the digital treaties, as the United States did in 1998, to cover the activities not only of individuals seeking access (or unauthorized copying) but also those engaged in the trafficking in devices or services that would enable others to circumvent TPMs. Sookman notes that Canada is thereby denying itself investment and economic growth in new digital markets.
- 3) It is essential to create strong, effective, and efficient incentives for Internet Service Providers (ISPs) to cooperate with copyright rightsholders to deal with online piracy problems. As ISPs and rightsholders develop closer economic ties and business dealings, this collective sense of purpose has become even more important.
- 4) Clear rules of liability must be provided for parties who are not direct copyright infringers but who secondarily (and knowingly) contribute to, facilitate, and/or encourage infringement. The United States has developed rules for such liability under vicarious, contributory, and inducement theories, although many questions remain on the full scope and the particulars of such liability. Canada has yet to develop these rules.
- 5) Rights must be clarified for copyright authors and owners. The rights of reproduction, including those of temporary copies, display, and public performance, as well as the “making-available” right, are a problem both in Canada (for some, but not all, of these rights) and, especially, in the United States (for all the rights noted). Clear enumeration of rights will facilitate efficient and more cost-effective licenses, thereby making more material legally available to an ever more demanding public.
- 6) Limited exceptions should be examined carefully. While the treaties, dating back to the 20th century, allow for limitations on the exclusive rights of authors and owners, more problematic issues have recently surfaced with technological advances, especially pertaining to so-called private copying and uses. In the current technological environment, with moves toward high-quality home and personal-use devices, broad personal-use exceptions and/or too-broad

educational exemptions (for non-profit entities) might allow the exceptions, in effect, to swallow the exclusive rights of authors and owners, to the detriment of the system for providing incentives to create and to disseminate copyrighted material.

- 7) Effective remedies must be instituted: criminal penalties for those who either profit from or cause great harm to the works of others; and appropriate civil penalties and remedies, including injunctive relief and proper border measures. Such remedies are already requirements of the WTO/TRIPS Agreement. In this regard—beginning in 1996 with the World Trade Organization TRIPS Agreement—the signatory countries to the treaties understood that copyright protection cannot end merely with “good laws” but must also have a variety of effective means, including civil, criminal, administrative, and customs enforcement measures, to deter infringers, and that those measures must actually be used.

In sum, there is much work to be done, in the United State and in Canada, to address the present and future notions of effective, efficient, and fair copyright regimes for both hard copy and the growing demand for digital works. These measures are essential for the benefit not only of authors, performers, producers, and publishers but also the consuming public.

NOTES

1. See, for example, “The Seoul Declaration for the Future of the Internet Economy,” June 18, 2008, cited in Sookman’s essay in note 12.
2. As noted in Sookman’s essay in note 14: “In 2005 the OECD determined that, weighted by population, Canada had the greatest file-sharing population anywhere on the planet.” Organisation for Economic Co-operation and Development, Working Party on the Information Economy, *Digital Broadband Content: Music*, December 13, 2005, 75. The extensive use of P2P application by Canadians was recently confirmed by evidence given before the Canadian Radio-television Telecommunications Commission (CRTC) in its network-shaping proceedings. Also, as Sookman notes, “one of the world’s largest illegitimate BitTorrent sites, IsoHunt, is operated from Canada” (note 15).
3. See Sookman’s essay at note 72. See also Special 301 Report on Canada of the U.S. Trade Representative, April 30, 2009, “The United States continues to have serious concerns with Canada’s failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997,” at <http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-special-301-report>; see also Country Report on Canada of the International Intellectual Property Alliance (IIPA), “Canada now finds itself one of the world’s epicenters for the distribution and export of several categories of tools aimed at circumventing TPMs—so-called ‘modification chips’ ... [being sold by] ... [h]ighly organized international criminal groups,” p. 15 at <http://www.iipa.com/rbc/2009/2009SPEC301CANADA.pdf>.
4. Sookman essay, note 44, citing Wiggin LLP – 2008 Digital Entertainment Survey.



About the Authors

1 **BARRY SOOKMAN** is a partner with McCarthy Tétrault LLP and the co-chair of its Technology Law Group. He is one of Canada's foremost authorities in the area of information technology and intellectual property law. He is the author of the leading five-volume treatise, *Computer, Internet and E-Commerce Law* (Toronto: Carswell, 1999–2009), and *Computer, Internet and E-Commerce Terms: Judicial, Legislative and Technical Definitions* (Carswell, 2001–8), and co-author (with Steven Mason) of *Copyright: Cases and Commentary on the Canadian and International Law* (Carswell, 2009). Sookman is also an adjunct professor of copyright and intellectual property at Osgoode Hall Law School in Toronto.

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